# Court of Appeals

## Thirteenth District of Texas

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October 6, 2005

TO ALL ATTORNEYS OF RECORD:

Re: Cause No. 13-04-00174-CV
Tr.Ct.No. 00-4057-A
DEBORAH SUE MCSHANE AND
JAMES PATRICK MCSHANE
V.
BAY AREA HEALTHCARE GROUP,
LTD., INDIVIDUALLY AND D/B/A
THE CORPUS CHRISTI MEDICAL
CENTER - BAY AREA, ET AL.

Dear Attorneys:

The judgment of the trial court in the above cause was this day REVERSED AND REMANDED by this Court. Copies of the opinion, dissenting opinion, and judgment are enclosed.

Very truly yours,

Cathy Wilborn

Cathy Wilborn, Clerk

CW:ng
Enc.
cc: Hon. Kathleen P. McCaftan
Hon. Mark R. Mueller
Hon. Max Freeman
Hon. Vincent L. Marable, III
Hon. John A. Scully
Hon. Rick Rogers
Hon. Leslie C. Weeks
Hon. Russell H. McMains
Hon. Stephen J. Rodolf
Hon. R. Brent Cooper
Hon. A. Scott Johnson
Hon. Diana L. Faust
28th District Court
Hon. Patsy Perez, District Clerk
Hon. Darrell Hester, Administrative Judge

COURT OF APPEALS

Thirteenth District

Corpus Christi - Edinburg, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth District of Texas, at Corpus Christi - Edinburg, as of the 6th day of October, 2005. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-04-00174-CV (Tr.Ct.No. 00-4057-A)

DEBORAH SUE MCSHANE AND
JAMES PATRICK MCSHANE, Appellants,

v.

BAY AREA HEALTHCARE GROUP, LTD.,
INDIVIDUALLY AND D/B/A THE CORPUS
CHRISTI MEDICAL CENTER - BAY AREA, ET AL., Appellees.

On appeal to this Court from Nueces County, Texas.

* * * * * * *

# JUDGMENT

On appeal from the 28th District Court of Nueces County, Texas, from a judgment signed January 8, 2004. Opinion by Justice Dori Contreras Garza. Dissenting Opinion by Justice Errlinda Castillo.

THIS CAUSE was submitted to the Court on August 31, 2005, on the record and briefs. These having been examined and fully considered, it is the opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED AND REMANDED to the trial court for a new trial.

Costs of the appeal are adjudged against appellees, BAY AREA HEALTHCARE GROUP, LTD., INDIVIDUALLY AND D/B/A THE CORPUS CHRISTI MEDICAL CENTER - BAY AREA, ET AL. It is further ordered that this decision be certified below for observance.

* * * * * *

CATHY WILBORN, CLERK

NUMBER 13-04-174-CV

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI - EDINBURG

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DEBORAH SUE MCSHANE AND
JAMES PATRICK MCSHANE, **Appellants,**

v.

BAY AREA HEALTHCARE GROUP, LTD.,
INDIVIDUALLY AND D/B/A THE
CORPUS CHRISTI MEDICAL CENTER -
BAY AREA, ET AL., **Appellees.**

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**On appeal from the 28th District Court of Nueces County, Texas.**

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# O P I N I O N

**Before Justices Yañez, Castillo, and Garza**
**Opinion by Justice Garza**

Appellants, Deborah Sue McShane and James Patrick McShane, individually and as next friends of Maggie Yvonne McShane, a minor, sued appellees, Bay Area Healthcare Group, Ltd., individually and d/b/a Corpus Christi Medical Center – Bay Area; and

Columbia Hospital Corporation of Bay Area, individually and as a partner of Bay Area Healthcare Group, Ltd. Appellants sought to recover for injuries sustained during Deborah McShane's labor and delivery of her daughter, Maggie, who is severely brain damaged and suffers from cerebral palsy, developmental disability, and mental retardation. Appellants alleged that the negligence of appellees, either directly or vicariously through the negligence of their nursing staff, caused Maggie's injuries. The case was tried to a jury, which returned a 10-2 verdict against appellants. The trial court entered a take-nothing judgment against appellants and denied their motion for new trial. Appellants now raise seven issues on appeal. We conclude that the trial court erred by admitting evidence of appellants' superseded pleadings, which show that, at one time, appellants had sued not only appellees but also two physicians involved in Maggie's delivery. Having reviewed the entire record, we further conclude that the error probably led to the rendition of an improper verdict. We therefore reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

**I. Attorney Misconduct**

In their first issue, appellants contend that the trial court erred by failing to order a new trial because of the misconduct of appellees' counsel during trial. Appellants complain that counsel for appellees "engaged in misrepresentation and mischaracterization," produced a "constant barrage of improper objections meant to interrupt the flow of the examination [of witnesses] and to coach the witnesses," engaged in "sidebars meant to prejudice the jury," and made an "improper reference to attorney's fees." With the exception of counsel's reference to attorney's fees, which will be addressed below, appellants have provided this Court with no authority, other than the Texas Lawyer's Creed

and the preamble to the state bar rules, to establish that counsel's behavior amounted to attorney misconduct. *See* TEX. R. APP. P. 38.1(h). Appellants have also failed to provide this Court with any case law regarding attorney misconduct as a basis for new trial. *See id.* Although we agree with appellants that an attorney must "not knowingly misrepresent, mischaracterize, misquote, or miscite facts to gain an advantage," we must acknowledge that the trial court has broad discretion in deciding whether to grant a new trial. *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding) (per curiam). We are also fully aware of the trial court's discretion to grant a new trial "in the interest of justice," as well as the court's decision not to do so in this case. *See id.*

To successfully challenge the trial court's denial of a motion for new trial, appellants must demonstrate that the trial court acted unreasonably, arbitrarily, or without reference to guiding rules and principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *GJR Mgmt. Holdings, L.P. v. Raus*, 126 S.W.3d 257, 260 (Tex. App.—San Antonio 2003, pet. denied). In reviewing a trial court's order denying a motion for new trial, we make every reasonable presumption in favor of the trial court's ruling. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809–10 (Tex. 1983); *Raus*, 126 S.W.3d at 260. Without appropriate citations to any controlling authorities regarding attorney misconduct as a basis for new trial, we cannot conclude that appellants have carried the burden of showing an abuse of discretion. *See* TEX. R. APP. P. 38.1(h). It would be injudicious and patently unfair for this Court to conclude, without the benefit of any relevant law, that the "trial court acted unreasonably, arbitrarily, or without reference to guiding rules and principles."

In overruling appellants' issue for failure to present authority to establish an abuse

of discretion, we also find it significant that appellants' counsel failed to request a mistrial based on any of the alleged instances of attorney misconduct until after the jury's verdict was returned. For instance, at one point in the trial, appellants' counsel objected "to the continual sidebar remarks" from opposing counsel. The objection was sustained by the trial court, which instructed counsel "not to do that again" or "there will be fines assessed." *See* TEX. R. CIV. P. 269(f) (directing the trial court to rigidly suppress any sidebar remarks). Appellants contend that counsel's remarks tainted the entire trial, but counsel for appellants did not ask the trial court to declare a mistrial at the time of the objection or at any time before the jury's verdict was returned.

As mentioned above, appellants also complain that opposing counsel made an improper reference to attorney's fees during his cross-examination of appellants' expert on damages. As with the improper sidebar remarks, appellants' counsel lodged a timely objection, which was sustained by the trial court. The jury was instructed to disregard the reference to attorney's fees, and counsel for appellants seemed content with this remedial action. Counsel did not request a mistrial. On appeal, appellants complain that the remark probably caused the rendition of an improper judgment, but they have failed to show how the instruction to disregard counsel's reference to attorney's fees was inadequate to cure the harm created by the reference. Therefore, we cannot conclude that the trial court abused its discretion by denying appellants' motion for new trial on this basis.

Appellants' first issue is overruled.

**II. Exclusion of Expert Testimony**

In their second issue, appellants contend that the trial court erred by excluding the testimony of Arthur Shaw, their proposed expert on the hospital's standard of care. There

is a clear mandate in Texas that medical decisions are to be made by attending physicians. *Boney v. Mother Frances Hosp.*, 880 S.W.2d 140, 144 (Tex. App.—Tyler 1994, writ denied). A hospital cannot practice medicine and therefore cannot be held directly liable for any acts or omissions that constitute medical functions. *Spinks v. Brown*, 103 S.W.3d 452, 456 n.4 (Tex. App.—San Antonio 2002, pet. denied). Nevertheless, a hospital may be directly liable for injuries arising from its negligent performance of a duty that it owes directly to a patient. *Denton Reg'l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 950 (Tex. App.—Fort Worth 1997, pet. denied). One such duty is the duty to use reasonable care in formulating the policies and procedures that govern the hospital's medical staff and non-physician personnel. *Reed v. Granbury Hosp. Corp.*, 117 S.W.3d 404, 409 (Tex. App.—Fort Worth 2003, no pet.). In this case, appellants argued that appellees breached this duty by failing to use reasonable care in formulating the policies and procedures regarding the availability of personnel to perform emergency neonatal resuscitation during the delivery of a baby.

The test used to determine the standard of care a hospital is required to use in formulating its policies and procedures is what a hospital of ordinary prudence would have done under the same or similar circumstances. *LaCroix*, 947 S.W.2d at 950 (citing *Hilzendager v. Methodist Hosp.*, 596 S.W.2d 284, 286 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ)). The standard of non-medical, administrative, ministerial or routine care at a hospital need not be established by expert testimony if the jury would be competent from its own experience to determine and apply such a reasonable-care standard. *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343, 349 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Of course, if the alleged negligence is of such a nature as to be outside

the experience of a layperson, expert testimony is necessary to establish the standard of care. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 246–47 (citing *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982)).

In this case, the parties agree that expert testimony was necessary to establish the standard of care in the formulation of policies and procedures regarding the availability of personnel to perform emergency neonatal resuscitation during the delivery of a baby. The parties disagree as to what type of expert would be qualified to testify to the standard of care. Appellees argued at trial that Shaw, the appellants' expert, was unqualified to offer expert testimony because he had no training, education, or experience as a physician or nurse. According to appellees, only a healthcare provider such a physician or nurse would be qualified to testify as to the standard of care for a hospital. Appellees further contended that, even if Shaw were qualified to give expert testimony, the questionable (i.e., purely subjective) methodology supporting his expert opinion would render his testimony inadmissible. Appellants argued that Shaw's knowledge, skill, experience, training, and education as a healthcare administrator qualified him to testify as to appellees' failure to use reasonable care in formulating policies and procedures. The trial court granted appellees' motion to strike, ruling that Shaw "lacks the qualifications to testify under Texas law."

The trial court has broad discretion to determine the admissibility of evidence. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). For an expert's opinion testimony to be admissible, the expert must be qualified, the expert's opinion must be relevant to the issues in the case, and the expert's opinion must be based upon a reliable foundation. *Id.* at 628–29 (citing TEX. R. EVID. 702; *Gammill v. Jack Williams Chevrolet,*

*Inc.*, 972 S.W.2d 713, 720 (Tex. 1998); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995)). It is well settled in Texas that a trial court's ruling on the admissibility of evidence will not amount to reversible error unless the error probably led to the rendition of an improper judgment. TEX. R. APP. P. 41.1(a); *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992).

Appellants contend that the trial court's ruling probably led to the rendition of an improper judgment because it excluded their only expert as to the standard of care applicable to appellees. Notwithstanding appellees' representations to the contrary, it appears that Shaw was, in fact, the only witness who would have testified in this regard for appellants. Nevertheless, for the following reasons, we are unable to conclude that the trial court's error, if any, in determining that Shaw was not qualified as an expert probably led to the rendition of an improper judgment.

As explained above, an expert's opinion testimony is admissible only if the expert is qualified, the expert's opinion is relevant to the issues in the case, and the expert's opinion is based upon a reliable foundation. *Zwahr*, 88 S.W.3d at 628–29. In this case, the trial court ruled on only the first of these considerations. The trial court excluded Shaw's testimony after it concluded that Shaw was not qualified as an expert, but appellees had also argued at great length that Shaw's testimony was inadmissible because his opinions were not based on a reliable foundation. As a reviewing court, we would be unable to conclude that the trial court's ruling on the first consideration amounted to reversible error without also concluding that the testimony would have been admissible given the second and third considerations enumerated above. That is, in order to determine whether the case turned on the particular evidence excluded, we must first

determine whether the evidence should have been admitted. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753–54 (Tex. 1995). At trial, it was appellants' burden to establish that the testimony was admissible because the expert is qualified, the expert's opinion is relevant to the issues in the case, and the expert's opinion is based upon a reliable foundation. *Zwahr*, 88 S.W.3d at 628–29. On appeal, appellants have neglected to discuss whether Shaw's opinions were based upon a reliable foundation, an issue which was hotly contested before the trial court. The brief filed by appellees maintains that the trial court's ruling should be affirmed on this ground, an argument which is unacknowledged in either of appellants' briefs. Appellants have failed to make a key argument to support their issue on appeal, and this Court will not endeavor to make it for them. *See* TEX. R. APP. P. 38.1(h). Accordingly, appellants' second issue is overruled.

**III. Improper Cross-Examination of Expert Witness**

Appellants' third and fourth issues are closely related. In their third issue, appellants complain that the trial court abused its discretion by allowing counsel for appellees to cross-examine one of their expert witnesses, Dr. Cardwell, regarding his prior treatment of a patient. In their fourth issue, appellants complain that the trial court abused its discretion by admitting the same patient's medical records for the purpose of impeaching Dr. Cardwell. Although counsel for appellees stated in open court, on the record, and before the jury, that he had in his possession the medical records of Dr. Cardwell's former patient, those records were never offered or admitted into evidence. Nevertheless, it is apparent from the record that counsel used the records to cross-examine Dr. Cardwell. Therefore, the real issue presented by appellants' third and fourth issues is whether the trial court abused its discretion by allowing counsel for appellees to impeach the credibility

of Dr. Cardwell by questioning him about his treatment of a former patient. We address appellants' third and fourth issues together as a single issue.

As a preliminary matter, appellees contend that the error, if any, in this matter was waived by appellants' failure to ask the trial court (1) to strike the evidence from the record, (2) to instruct the jury to disregard the evidence, and (3) to declare a mistrial. We agree with this conclusion, but our reasoning differs from the argument made in appellees' brief.

As this Court has explained previously, to preserve error regarding inadmissible testimony, a party is required to object to the complained-of evidence, move for an instruction to disregard, and then move for a mistrial. *Ortiz v. Ford Motor Credit Co.*, 859 S.W.2d 73, 77 (Tex. App.—Corpus Christi 1993, writ denied). This process must continue only until the party receives an adverse ruling from the court. *Id.* A party should object every time inadmissible evidence is offered. *Duperier v. Tex. State Bank*, 28 S.W.3d 740, 755 (Tex. App.—Corpus Christi 2000, pet. dism'd) (citing TEX. R. APP. P. 33.1). If a party objects to certain evidence, but later does not object when the same evidence is introduced, the party waives its objection. *Id.* (citing *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984)); *see also Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004). A party can preserve error to repeated offers of the same evidence by asking the court for a running objection. *Ramirez*, 159 S.W.3d at 907; *Duperier*, 28 S.W.3d at 755 (citing *State v. Baker*, 574 S.W.2d 63, 65 (Tex. 1978)).

When applied to the facts of this case, as stated below, these precepts indicate that appellants failed to preserve their complaints for appellate review. During an initial bench conference held at the time of the witness's cross-examination, counsel for appellants made very specific objections to the questions regarding the witness's treatment of a

former patient. These objections were overruled by the trial court. When the jury was brought back into the courtroom, appellees' counsel resumed the objectionable questioning of the witness. Counsel for appellants made no further objections to this questioning, even though no running objection had been requested or granted at that point. The witness eventually refused to answer any questions regarding his treatment of the patient, arguing that he could not do so without violating federal law because the patient had not executed a written release of confidentiality.

On its own accord, the trial court excused the jury and held a second bench conference. During this second conference, appellants requested a running objection "as to getting into anything with respect to another case and another patient other than a prior inconsistent statement." The trial court granted this running objection and stated that it was sustaining the objection. The court explained to both sides, "[W]e're not going to try a second lawsuit in this lawsuit." Then, it specifically stated that counsel for appellees would be allowed to question the witness as to prior inconsistent statements by following the procedure outlined in rule 613(a). TEX. R. EVID. 613(a). Counsel for both sides stated on the record that they understood the court's ruling. Nevertheless, immediately after the jury was brought back into the courtroom, counsel for appellees resumed his objectionable cross-examination of the witness, questioning him about his prior treatment of the patient rather than a prior inconsistent statement. No further objections were made by appellants' counsel. Counsel did not request that the objectionable testimony be struck from the record or that the jury be given an instruction to disregard the testimony. No request for a mistrial was made.

Appellants now complain of the cross-examination testimony. For the following

reasons, we conclude that counsel's actions at trial were insufficient to preserve error for appellate review. First, as to the questioning that took place after the first bench conference but before the second bench conference, no objections were made. The error, if any, was therefore waived. *See Ortiz*, 859 S.W.2d at 77. Second, as to the questioning that took place after the second bench conference, counsel failed to seek an adverse ruling by requesting the trial court (1) to strike the evidence from the record, (2) to instruct the jury to disregard the testimony, or (3) to declare a mistrial. Although the trial court had already sustained counsel's objections to this testimony during the second bench conference, it was nevertheless incumbent on counsel to pursue the matter until he received an adverse ruling from the trial court when the evidence was offered again in violation of the court's ruling. *See id.* Accordingly, the error, if any, regarding this testimony was waived. *See id.*; *One Call Sys. v. Houston Lighting & Power*, 936 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist] 1996, writ denied) (holding plaintiff waived its objection to inadmissible testimony by failing to request further relief after trial court sustained its objection). Finally, we are left with the cross-examination testimony that was given before either of the bench conferences were held. Appellants complain of the following exchange, which, when reviewed, shows that only the witness made objections:

**Counsel:** And this was a patient of yours up in Ohio, right?

**Witness:** Yes, but I don't see the relevance here. If you want - -

**Counsel:** I'll see if I can get to it, okay?

**Witness:** Well, try to get to it because I see no relevance. And I think it's not only confusing me, I think its confusing the jury.

**Counsel:** Do you?

**Witness:** Yes.

**Counsel:** Well, let's - -

**Witness:** Because we're not talking about that patient here.

**Counsel:** Wait a minute.

**Witness:** We're talking about Ms. McShane, totally different set of circumstances.

**Counsel:** We're talking about a patient who was under your care who was carrying a major risk factor which was exacerbated by the fact that in addition to that risk factor of diabetes she was noncompliant, didn't show up for her appointments, all of which increased dramatically the likelihood that she was going to give birth to a macrosomic baby. You're here criticizing these doctors for not predicting the possibility of shoulder dystocia, right? Aren't you?

**Witness:** My real criticism is not necessarily failure to predict the size of the baby. My criticism is that Dr. Eubank and the nurses should not have used a vacuum to deliver the baby.

Although appellants now take issue with this exchange, counsel made no timely objection to it. To be "timely," an objection must be made prior to the witness responding to the question if it is reasonably obvious that the question calls for inadmissible evidence. *Beall v. Ditmore*, 867 S.W.2d 791, 794 (Tex. App.—El Paso 1983, writ denied). Otherwise, counsel must object as soon as practicable after the inadmissible answer is given. *Id.* In this case, the record shows that the cross-examination continued and was uninterrupted by any objections for a significant period of time following the exchange documented above. We therefore have no choice but to conclude that counsel failed to "object as soon practicable after the inadmissible answer is given." *Id.* Accordingly, any complaint as to this testimony was waived.

For the foregoing reasons, appellants' third and fourth issues are overruled.

## IV. Superseded Pleadings

In their fifth issue, appellants argue that the trial court erroneously admitted testimony regarding superseded pleadings showing that Dr. Rothschild and Dr. Eubank were previously named in the lawsuit as having committed acts of negligence that proximately caused the damages, injuries, or harm claimed. As a preliminary matter, appellees contend that the complained-of evidence was merely cumulative of other un-objected-to evidence and the error, if any, is therefore harmless. *See Reina v. Gen. Accident Fire & Life Assurance Corp.*, 611 S.W.2d 415, 417 (Tex. 1981) (stating there is no reversible error if admissibility ruling involves cumulative evidence). Appellees argue that Dr. Cardwell testified that he wrote his expert report knowing that the doctors were not parties to the suit and that he nevertheless included numerous opinions concerning his criticisms of the physicians (for not predicting shoulder dystocia). The testimony relied upon by appellees is the following cross-examination of Dr. Cardwell by appellees' counsel:

**Counsel:** Can you answer my question?

**Witness:** Please state it.

**Counsel:** Yes, sir. You knew as you wrote that expert report that this was going to form the basis in part for the accusations against nurses and doctors in this lawsuit. You knew that right?

**Witness:** I knew that. And sir, let me explain. When I wrote this report on August 21st, I knew at the time that I wrote that report that the doctors were not a party to the lawsuit. But I tried to be fair and put all my opinions concerning the criticism of all of the healthcare providers. I am critical of the doctors for not predicting shoulder dystocia, but that's also a joint responsibility with the nurses.

**Counsel:** Are you through?

**Witness:** Yes.

In addition, appellees claim that the complained-of evidence was also cumulative of testimony given by Dr. Rothschild and Dr. Eubank. In relevant part, Dr. Rothschild testified as follows:

| | |
|---|---|
| **Appellees' Counsel:** | Now, Doctor, do you recall that [counsel for appellants] said he was not fussing at you? At one time in this case he was fussing at you, was he not? Weren't you sued, originally? |
| **Appellants' Counsel:** | May it please the Court, we would like to object for the record to going into this line of questioning. And we would like to, if we have permission rather than restating all of the objections, adopt specifically and incorporate by reference, all of the ones previously made with respect to this line of questioning? |
| **The Court:** | All right. Your objection is overruled and your objection is continued. And all arguments are on the record, they are preserved on the record. |
| **Appellants' Counsel:** | So it is continued and preserved - - I'm sorry, Your Honor, I apologize. It's my fault, I can't hear. |
| **The Court:** | Yes. |
| **Appellants' Counsel:** | Thank you. |
| **Appellees' Counsel:** | Tell the ladies and gentleman of the jury about the claims or the fussing at you that was going on in this case, please. |
| **Witness:** | Well, yes. I was sued for $50 million in this case. And my involvement is what you heard it was. I was in my office and I was asked to render emergency aid and I ran to help and did the best I could. It didn't work out. I'm sorry for them. But if you are in a car and see a wreck and you stop to help, you do the best you can and get sued for $50 million. |
| **Appellees' Counsel:** | Was there a claim made that you - - your care was beneath the standard of care in this case? |

**Witness:** Yes. $50 million worth.

**Appellees' Counsel:** By the McShanes?

**Witness:** Yes.

**Appellees' Counsel:** And they said, I think [counsel for appellants] said he wasn't fussing at Dr. Eubank. Was Dr. Eubank also at one time a party in this case?

**Witness:** Yes.

**Appellees' Counsel:** A claim made that his care was beneath the standard of care and caused the injuries in this case?

**Witness:** Yes.

As the foregoing excerpt from the reporter's record demonstrates, the trial court granted appellants' counsel a running objection to the line of questions regarding the doctors' prior status as defendants in the lawsuit. Subsequently, Dr. Eubank testified in response to a similar line of questions:

**Counsel:** Doctor, you were sued in this case, weren't you?

**Witness:** Yes, I was.

**Counsel:** Do you know why you are not sued now?

**Witness:** Not really.

**Counsel:** And do you know why the hospital is the only Defendant in this case and these nurses are accused of causing this injury?

**Witness:** I have no idea.

Having reviewed the testimony that appellees contend is cumulative of the complained-of evidence, we make the following observations: (1) Dr. Cardwell did not testify that any of the doctors had ever been sued; (2) appellants properly objected to Dr.

Rothschild's testimony; and (3) appellants properly objected to Dr. Eubank's testimony by the running objection granted by the trial court. *See Ramirez*, 159 S.W.3d at 907 (holding that recognition of running objection for more than one witness is appropriate if it clearly identifies the source and specific subject matter of the expected objectionable evidence).

Based on these considerations, we conclude that appellees' cumulative-evidence argument is incorrect for at least two reasons: First, Dr. Cardwell never testified that the doctors had ever been sued. His testimony could not be cumulative of the complained-of evidence. Second, the testimony of Dr. Rothschild and Dr. Eubank *is* the complained-of evidence, and it was properly objected to. We will not hold that the error, if any, is harmless because the complained-of evidence was cumulative of itself. We therefore proceed to decide whether the trial court erred by admitting evidence that Dr. Rothschild and Dr. Eubank had been previously sued by appellants.

The issue before us is whether the trial court erred by allowing testimony regarding statements made in superseded pleadings. It is well settled that a party who judicially admits a fact in a live pleading cannot later challenge that fact. *Houston First American Savings v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983). Thus, any fact that is judicially admitted is conclusively established in the case. *Id.* If a fact is judicially admitted, the pleadings need not be admitted nor other evidence presented to prove the judicial admission. *Id.*

If a pleading is abandoned, superseded, or amended, it ceases to be a judicial pleading and statements in such a pleading cease to be judicial admissions. *Drake Ins. Co. v. King*, 606 S.W.2d 812, 817 (Tex. 1980). Evidence of statements in such pleadings may be admissible but only as ordinary admissions. *See Kirk v. Head*, 152 S.W.2d 726,

729 (Tex. 1941); *Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied); *Huff v. Harrell*, 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ denied).

Admissions are statements made or acts done by an opposing party, or on his behalf, which amount to a prior acknowledgment by such party that one of the facts relevant to the issues is not as he now claims. *Harrell*, 941 S.W.2d at 239. An admission against interest in an abandoned pleading may be used as evidence against the pleader, but it is not conclusive. *Id.* Like any other utterance or statement, if the abandoned pleading is inconsistent with the party's present position at trial, then the statement in the abandoned pleading is admissible and receivable into evidence as an admission, and this rule is recognized even though the superseded pleading is not verified and bears no file mark. *Id.* In order for a petition to qualify as an admission, it must contain some statement relevant to a material issue in the case and be inconsistent with the position taken by the party against whom it is introduced. *Id.*

A bench conference was held before Dr. Rothschild and Dr. Eubank gave their testimony. At that time, counsel for appellants argued that testimony regarding the plaintiffs' superseded pleadings could not be admitted because (1) they contained no prior inconsistent position or statement; (2) they were irrelevant to the case; and (3) their probative value, if any, was greatly outweighed by their unfairly prejudicial effect. Counsel for appellees argued, "That is an unbroken, allegedly, unbroken chain of negligence involving the physicians and the nurses for which all were sued; that was plaintiffs' claim from the outset. The fact they are now attempting to run away from that is inconsistent with their originally stated position." The trial court ruled, "The prior pleadings will come in

at the appropriate time." The doctors subsequently testified, and as documented above, counsel for appellants secured a running objection to the testimony arising from the entire line of questioning.

This Court has reviewed the five superseded pleadings filed by appellants, as well as appellants' live pleading, their sixth amended petition. We have identified no statement or position in the superseded pleadings that is inconsistent with appellants' live petition. All of appellants' pleadings are consistent with appellants' theory at trial, which was that appellees' negligence, either directly or indirectly (through the actions of its nursing staff), was a proximate cause of the injuries and damages suffered by appellants. At trial, appellees made much of the fact that appellants dropped their claims against the doctors, but all parties agree that the claims were dismissed without prejudice, meaning they theoretically could be re-asserted in a new lawsuit. In short, none of the pleadings ever took the position, much less stated, that either Dr. Rothschild or Dr. Eubank was free of culpability. Likewise, none of the pleadings ever alleged that an "unbroken chain of negligence" involving the doctors, nurses, and appellees was the only cause of the injuries alleged.

To the contrary, the first three petitions filed by appellants alleged that the negligence of Dr. Rothschild and Dr. Eubank "taken separately or collectively, constitute a proximate cause of the injuries and damages claimed herein." These same petitions also alleged that "during the hospitalization in question, the defendant hospital was directly negligent in one or more particulars and such acts and/or omissions, taken separately or collectively, constituted a proximate cause of the injuries and damages claimed herein." The petitions further alleged that "during the hospitalization in question the agents,

servants, and/or employees of the defendant hospital involved in the care or treatment [with the exception of defendants Eubank and Rothschild] . . . were negligent in one or more particulars and such acts and or omissions, taken separately or collectively, constitute a proximate cause of the injuries and damages claimed herein."

Appellants' third amended petition (the fourth petition filed) did not include any allegations of negligence against Dr. Rothschild or Dr. Eubank. Instead, appellants pursued claims solely against appellees. Even in the third amended petition, however, appellants alleged that the negligence of appellees was "a proximate cause" of the injuries and damages claimed. Appellants never alleged that the negligence of appellees was "the sole proximate cause" of the injuries and damages claimed.

Appellants subsequently filed a fourth, fifth, and sixth amended petition. Each of these petitions named only appellees as defendants. As with the third amended petition, these petitions each alleged that the negligence of appellees was "a proximate cause" and not "the sole proximate cause" of the injuries and damages claimed.

We have reviewed the record and find nothing inconsistent in appellants' superseded pleadings, live pleading, or position at trial. It is well settled in Texas that there may be more than one proximate cause for purposes of negligence. *See, e.g., First Assembly of God, Inc. v. State Utils. Elec. Co.*, 52 S.W.3d 482, 493 (Tex. App.—Dallas 2001, no pet.). Thus, the claim in appellants' live petition that the negligence of appellees was "a proximate cause" of their injuries and damages does not mean that appellees' negligence was "the sole proximate cause" of the injuries and damages. *See id.* (contrasting the concepts of "a proximate cause" with "a sole proximate cause"). It also does not follow that the negligence of Dr. Rothschild or Dr. Eubank was not "a proximate

cause" of the injuries. The live petition simply indicates that Dr. Rothschild and Dr. Eubank were not ultimately sued. Thus, the only difference between appellants' superseded and live pleadings is that Dr. Rothschild and Dr. Eubank were once included in the lawsuit and then dropped.

The issue before us is whether this difference alone is a sufficient basis to conclude that the statements in the superceded pleadings amounted to admissions. The parties each rely on the same case to prove the correctness of their respective positions: *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 240 (Tex. App.—Eastland 1975, writ ref'd n.r.e.). In *Pursley*, a defendant offered into evidence the plaintiff's original petition, in which the plaintiff had alleged actions for negligence against four different defendants. *Id.* The plaintiff ultimately went to trial on his first amended original petition, which alleged actions for negligence against only two defendants. *Id.* The trial court refused to admit the superseded pleading. *Id.* On appeal, the reviewing court noted that "it is well settled that the doctrine invoked applies only as between inconsistent remedies or demands; and to make them inconsistent one action must allege what the other denies, or the allegations in one action must necessarily repudiate or be repugnant to the other." *Id.* (citing *Alexander v. Harris*, 254 S.W. 146, 149 (Tex. Civ. App—Fort Worth 1923, writ ref'd). The reviewing court then upheld the trial court's ruling, holding that the original petition was not inconsistent with the trial pleadings simply because two defendants were dropped. *Id.*

Appellees argue that the court's holding in *Pursley* supports their position because the two defendants who were dropped in that case actually settled with the plaintiffs, whereas the doctors in this case did not. *See id.* We are unpersuaded by this argument. The *Pursely* court did not attach any significance to the fact that the dropped defendants

had settled with the plaintiff. This observation was made in passing, after the court had concluded that the pleadings were not inconsistent. *See id.* The fact that the defendants had been dropped because they settled was not, as appellees suggest, a consideration used to determine whether there was an inconsistency that would make the superseded pleading relevant. *See id.* This is evident from the fact that the court first concluded there was no inconsistency in the pleadings and then mentioned that the dropped defendants had settled with the plaintiff. *See id.*

Appellants' pleadings did not request inconsistent remedies or make inconsistent demands. *See id.* None alleged what the others denied. *See id.* We therefore conclude that the statements in the superceded pleadings were not admissions and were therefore inadmissible. *See Harrell*, 941 S.W.2d at 239. The trial court abused its discretion by allowing witnesses to testify regarding statements made in the superceded pleadings.

We must now determine whether the trial court's error amounts to reversible error. To do this, we must determine whether the error was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. *See* TEX. R. APP. P. 41.1(a); *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983); *Nix v. H.R. Mgmt. Co.*, 733 S.W.2d 573, 576 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.). The supreme court has found it impossible to prescribe a specific test for this determination, and it has therefore become a judgment call entrusted to the sound discretion and good sense of the reviewing court from an evaluation of the whole case. *Nix*, 733 S.W.2d at 576 (citing *Lorusso v. Members Mutual Ins. Co.*, 603 S.W.2d 818, 821 (Tex. 1980)); *see also Ponder v. Texarkana Memorial Hosp., Inc.*, 840 S.W.2d 476, 479 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Some courts have held that when evidence is sharply

conflicting and the case is hotly contested, any error of law by the trial court will be reversible error. *Stergiou v. Gen. Metal Fabricating Corp.*, 123 S.W.3d 1, 6 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Hill v. Heritage Resources*, 964 S.W.2d 89, 136 (Tex. App.—El Paso 1997, no pet.); *Nix*, 733 S.W.2d at 576.

Having reviewed the entire record, we conclude that the evidence was "sharply conflicting" and that the case was indeed "hotly contested." As discussed above, the exclusion of Shaw's testimony rendered appellants' theory of direct corporate liability unworkable, as Shaw was appellants' only expert witness to testify to appellees' standard of care. Nevertheless, appellants had two theories of liability against appellees. The other theory was based on vicarious liability for the negligence of appellees' agents, servants, and employees (other than the doctors). Both sides produced "sharply conflicting" evidence on this theory. Thus, although one of appellants' theories of recovery failed because of the trial court's ruling on Shaw's testimony, the case was still "hotly contested" because appellants' second theory remained viable. Of course, as the reviewer of a cold record, this Court is no way positioned to evaluate or declare the precise effect that the inadmissible evidence had on the jury's deliberations. *See Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004) ("[W]hether erroneous admission is harmful is more a matter of judgment than precise measurement."). At best, we can note that the case was hard fought by both sides. It is difficult, if not impossible, for this Court to determine whether the jury's verdict hinged on the inadmissible evidence.

Nevertheless, we can discern a distinct pattern in counsel's use of the inadmissible evidence to relieve appellees of liability simply because the doctors had been dropped from the suit. The pattern began during the jury selection process, when counsel for appellees

stated before the panel of prospective jurors, "[A]t least three of these doctors [are] . . . probably going to testify in this case and they have been sued at one time by the Plaintiffs."[1] Then, at trial, counsel tried to establish that, if anyone was responsible for the injuries, it was the doctors. Counsel asked Dr. Cardwell how it was that the nurses could be negligent when the doctors had failed to predict the birth complications giving rise to the baby's injuries. Counsel then emphasized repeatedly that the doctors had actually been sued at one point but were no longer being sued. Dr. Rothschild testified that he had been sued for $50 million. Dr. Eubank testified that he too had been sued and that, for some unknown reason, he had been dropped from the suit. Counsel asked Dr. Eubank why appellees were the only ones being sued, but Dr. Eubank did not know why. During closing argument, counsel brought this up again, asking the jury: "Why is it that the doctor isn't here and this big hospital is? There is a pretty good common sense answer to that, and I'll leave it up to you to answer the question for yourselves."

From the foregoing facts, it is apparent that counsel asked the jury to relieve appellees of liability simply because appellants had previously sued the doctors, who were allegedly much more culpable than appellees, and then dropped their claims for no apparent reason, allowing for the inference that even the claims against the doctors had been frivolous. If the claims against the doctors were frivolous, then surely the claims against the hospital (i.e., appellees) were also frivolous. Although we see nothing preventing counsel from defending appellees by proving that the actions of one or both of the doctors was "the sole proximate cause" of the injuries, we think it is highly improper to do so by relying on superseded pleadings which show that the doctors had been sued at

[1] Counsel for appellants objected to this statement, requested the court to instruct the jury panel to disregard the statement, and asked for a mistrial, but his requests were overruled.

one point and then dropped from the lawsuit. In this case, such evidence was unfairly prejudicial because it allowed the jury to infer that the claims against appellees were frivolous solely because substantial claims against the doctors had been filed and then dropped without explanation.

We recognize that this was a hard-fought case. With all due candor, we also recognize that we have no way of knowing why the jury reached the verdict it reached. Nevertheless, we think it would be disingenuous to brush aside as harmless an error that pervaded all stages of trial, from jury selection, expert witness testimony, to closing argument. As demonstrated above, the error was reasonably calculated to cause the rendition of an improper judgment. Because this case was so close, we conclude that the error probably led to the rendition of an improper judgment. Accordingly, appellants' fifth issue is sustained.

## V. Conclusion

Having sustained appellants' fifth issue, we reverse the judgment of the trial court and remand for a new trial. We do not reach appellants' sixth or seventh issues. *See* TEX. R. APP. P. 47.1.

DORI CONTRERAS GARZA,
Justice

Dissenting Opinion by
Justice Errlinda Castillo.

Opinion delivered and filed
this the 6th day of October, 2005.

NUMBER 13-04-174-CV

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI - EDINBURG

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DEBORAH SUE McSHANE AND
JAMES PATRICK McSHANE, **Appellants,**

**v.**

BAY AREA HEALTHCARE GROUP, LTD.,
INDIVIDUALLY AND D/B/A THE
CORPUS CHRISTI MEDICAL CENTER -
BAY AREA, ET AL., **Appellees.**

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**On appeal from the 28th District Court of Nueces County, Texas.**

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## DISSENTING OPINION

Before Justices Yañez, Castillo and Garza
Dissenting Opinion by Justice Castillo

Appellants assert that the trial court reversibly erred by allowing testimony of superseded pleadings to inform the jury that the testifying doctors were once defendants

in the case. The majority concludes that the evidence was not an admission, was inadmissible, and that the trial court's error was reasonably calculated to and probably led to the rendition of an improper judgment. Respectfully, I disagree that appellants have shown reversible error.

We ordinarily do not find reversible error for erroneous rulings on admissibility of evidence where the evidence in question is (1) cumulative, and (2) not controlling on a material issue dispositive of the case. *See Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989) (citing *Whitener v. Traders and Gen. Ins. Co.*, 289 S.W.2d 233, 236 (Tex.1956)). Even assuming that the trial court abused its discretion in allowing the testimony and further assuming that appellants preserved error, respectfully, I would hold that: (1) the complained-of evidence was cumulative of evidence that the testifying physicians were not parties to the lawsuit, *see Gee*, 765 S.W.2d at 396; and (2) appellants, with the burden to show prejudicial error, have not shown the error "turns on" the particular evidence admitted, *see Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753-54 (Tex. 1995); *Whitener*, 289 S.W.2d at 236.

Accordingly, I respectfully dissent.[1]

ERRLINDA CASTILLO
Justice

Dissenting Opinion delivered and filed
this 6th day of July, 2005.

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[1] I need not address the majority's decision on the first through fourth issues presented because the fifth issue is dispositive. *See* TEX. R. APP. P. 47.1. Similarly, I need not address appellants' sixth and seventh issues presented regarding juror misconduct, because the majority does not reach them. *Id.*

No. 13-04-00174-CV

IN THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI, TEXAS

DEBORAH SUE MCSHANE AND JAMES PATRICK MCSHANE
INDIVIDUALLY AND AS NEXT FRIENDS OF
MAGGIE YVONNE MCSHANE, A MINOR

Appellants,

v.

BAY AREA HEALTHCARE GROUP, LTD., INDIVIDUALLY AND D/B/A THE
CORPUS CHRISTI MEDICAL CENTER - BAY AREA, ET AL.

Appellees.

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**ORAL ARGUMENT REQUESTED**

## IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), the following is a complete list of all parties to the trial court's judgment and the names and addresses of all trial and appellate counsel:

**Parties to the Trial Court's Final Judgment**

| | |
|---|---|
| Deborah Sue McShane and James Patrick McShane, Individually and as Next Friends of Maggie Yvonne McShane, a Minor | Plaintiffs/Appellants |
| Bay Area Healthcare Group, Ltd., Individually and d/b/a the Corpus Christi Medical Center - Bay Area; | Defendants/Appellees |
| Columbia Hospital Corporation of Bay Area, Individually and as a Partner of Bay Area Healthcare Group, Ltd.; and | |
| South Texas Surgicare, Inc., Individually and as a Partner of Bay Area Healthcare Group, Ltd. | |

**Trial and Appellate Counsel**

| | |
|---|---|
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| | |
|---|---|
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**CONSTITUTION**

## STATEMENT OF THE CASE

This is a medical malpractice case. Appellants Deborah Sue McShane and James Patrick McShane, Individually and as Natural Guardians and Next Friends of Maggie Yvonne McShane, a minor, sued Bay Area Healthcare Group, Ltd., Individually and d/b/a Corpus Christi Medical Center -- Bay Area; Columbia Hospital Corporation of Bay Area, Individually and as a Partner of Bay Area Healthcare Group, Ltd.; South Texas Surgicare, Inc., Individually and as a Partner of Bay Area Healthcare Group, Ltd.; Sandra F. Hudson, R.N.C.; Susan Lynn Peterson, R.N.; Sandra Sotelo, R.N.; Gary Dean Zarr, C.R.N.A.; Raymond C. Lewandowski, M.D. Individually and d/b/a Center for Genetic Services; Raymond C. Lewandowski, M.D., P.A. Individually and d/b/a Center for Genetic Services; Elizabeth Hanna, R.T.; Coastal Bend Women's Center; Charles Dale Eubank, Jr., M.D. Individually and as a Partner of Bay Area Healthcare Group, Ltd.; Bernhardt F. Rothschild, M.D.; and Bernhardt F. Rothschild, M.D., P.A. for injuries sustained by their daughter during labor and delivery and the subsequent resuscitation. (I CR 3-19) Maggie McShane is severely brain damaged and suffers from cerebral palsy, developmental disability and mental retardation. (17 RR 10-11)(9 RR 125). Appellants sought recovery of actual damages and exemplary damages based on the negligent and grossly negligent acts and/or omissions of the named healthcare providers. (I SCR 17-18)(I SCR 101-115).

During the course of the proceedings the appellants non-suited all defendants except Bay Area Healthcare Group, Ltd., Individually and d/b/a Corpus Christi Medical Center -- Bay Area; and Columbia Hospital Corporation of Bay Area, Individually and as

a Partner of Bay Area Healthcare Group, Ltd. (I CR 3-5)(I CR 6-7)(I CR 8-10)(I CR 11-12). The case was tried to a jury over a 26 day period with the Honorable Nanette Hassette, 28th Judicial District Judge of Nueces County, presiding. (I SCR 2 ). The issues at trial were closely contested with opinions from experts on both sides disputing liability and causation. The jury returned 10-2 verdict in favor of Appellees Bay Area Healthcare Group, Ltd., Individually and d/b/a Corpus Christi Medical Center -- Bay Area; and Columbia Hospital Corporation of Bay Area, Individually and as a Partner of Bay Area Healthcare Group, Ltd. (I CR 83; 23 RR 3-5). The trial court rendered a take nothing judgment in favor of the appellees and overruled appellants' motion for new trial. (I CR 84-88)(II CR 309). Appellants timely perfected this appeal. (II CR 310).

## ISSUES PRESENTED FOR REVIEW

Pursuant to Tex. R. App. P. 38.1(e), this appeal presents the following issues:

1. Did the trial court commit reversible error by denying appellants' motion for new trial based upon attorney misconduct and the deliberate injection of attorney fees into the trial?

2. Did the trial court err and abuse its discretion in excluding the testimony of Arthur Shorr, appellants' only expert on the hospital's standard of care?

3. Did the trial court err and abuse its discretion admitting prejudicial testimony related to a pending medical malpractice claim against appellants' expert, Dr. Michael Cardwell?

4. Did the trial court err and abuse its discretion by allowing the introduction of medical records from an expert's pending lawsuit for improper impeachment and because the medical records were not relevant and, even if relevant, their probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury?

5. Did the trial court err in allowing the admission of appellants' superseded pleadings which were used by the appellees to interject the existence of claims against two physicians who had been dismissed from the suit and who testified on behalf of the hospital at trial?

6. Did the trial court err and abuse its discretion by improperly overruling plaintiffs' motion for new trial based upon the misconduct of a juror, Mr. Chad Clanton, who visited his newborn granddaughter at Defendant Bay Area Hospital during the course of the trial and by refusing to allow the plaintiffs to create an evidentiary record about the misconduct of Mr. Chad Clanton during the hearing on the motion for new trial?

7. Did the trial court err in denying appellants' motion for new trial based upon juror disqualification because the testimony of Mr. Arnoldo Moreno at the hearing on the motion for new trial was conflicting, not credible and patently false.

To The Honorable Thirteenth Court of Appeals:

Appellants file this, their Brief of Appellants. Appellants will be referred to as appellants or the McShane's. Appellees will be referred to as appellees or the hospital.

## STATEMENT OF FACTS

### A. Negligence of the Nurses

On November 15, 1999, Deborah Sue McShane was admitted to The Corpus Christi Medical Center -- Bay Area for induction of labor. (12 RR 43). Mrs. McShane's first child, Kayla, was 8 pounds and 12 ounces when she was born and had a fractured clavicle. (12 RR 34). Sue Peterson, the primary nurse caring for Mrs. McShane, was aware that she had a problem with a prior pregnancy in which the baby got stuck and had a broken clavicle. (11 RR 119). This information was recorded in Mrs. McShane's prenatal records and on the obstetric admission history and assessment and was available to and known by the nurses taking care of Mrs. McShane. (8 RR 122-123)(8 RR 115; 130)(JX 1). Dr. Michael Cardwell, appellants' expert, testified that in a patient who has delivered a baby in which there was a broken clavicle and some evidence of shoulder dystocia, the doctor and the nurses have to be very careful in managing a subsequent labor because shoulder dystocia can recur. (17 RR 38-39). The chart available to the nurses also contained information that there had been a suspected macrosomia or "big size" of the baby. (8 RR 115)(JX 1). Dr. Eubank, Deborah McShane's obstetrician, testified that the reason for the elective induction on November 15th was "to prevent macrosomia." (10 RR 220). Nurse Hudson had previously testified in her deposition that

a relative contraindication for an attempted vacuum delivery is suspected macrosomia. (8 RR 24).

During Mrs. McShane's labor, Dr. Eubank went into Mrs. McShane's hospital room to assess her. (10 RR 223). At this point, she had been pushing for about an hour or an hour and a half. *Id.* There was no indication that the baby had decreased fetal reserves and the fetal heart rate strip looked reassuring. (17 RR 51-52). In fact, Dr. Cardwell testified that, to a reasonable degree of medical probability, if Maggie had been delivered before her head got stuck, she would be normal today. (17 RR 56). Dr. Eubank gave Deborah McShane the "option" to continue to push or have a vacuum extractor used. (10 RR 223). A vacuum extractor was used. Dr. Cardwell testified that, in a patient who has a history of shoulder dystocia, the use of a vacuum is contraindicated because it may allow delivery of the head, but if the baby is large, will cause another shoulder dystocia. (17 RR 39). He also testified that labor and delivery nurses should also be aware of risk factors in their management of a patient, including risk of shoulder dystocia. (17 RR 40-41).

Dr. Cardwell testified that under the standard of care for nurses facing these circumstances, they should have known the vacuum would have been absolutely contraindicated under the circumstances and tried to persuade the doctor that this was not an appropriate mode of action. (17 RR 62-63). If the doctor persisted, the nurses have an independent duty to exercise the chain of command. (17 RR 63). Appellees' nursing expert, Bonnie Flood Chez, disagreed, saying that it is not appropriate for a nurse to be second guessing a physician under these circumstances. (19 RR 112). The hospital's

obstetric expert, Christopher Seeker, M.D., testified that the use of a vacuum was not contraindicated. (19 RR 192). He also opined that if a nurse in such a situation had attempted to exercise the chain of command, "I think it would be her last day." (19 RR 198).

Nurse Sandra Hudson testified in her deposition that she was asked by Dr. Eubank to come into the delivery "in anticipation of a potential shoulder dystocia problem." (8 RR 136). She testified directly contrary to this at trial. (8 RR 135). Nurse Sandra Sotelo also testified in her deposition that she was asked to come into the room for a delivery to assist with possible shoulder dystocia. (7 RR 152). She, too, changed her testimony regarding this when testifying at trial. (7 149-150). Dr. Rothschild, the physician who came in to assist in the delivery of Maggie McShane, defined shoulder dystocia as "a situation where the baby's shoulder becomes impacted against the pubic bone, the bone in the pelvis and it is difficult to deliver." (10 RR 61). He also explained that with a shoulder dystocia, when a baby is stuck, an increase of pressure, i.e., fundal pressure, makes the dystocia worse and can increase the impaction. (10 RR 109-110). He agreed that if there's pressure on the mother's chest or on her diaphragm that, too, can compromise the oxygen supply to the baby. (10 RR 113). Dr. Cardwell, appellants' obstetrical expert, testified that fundal pressure should not be used and that one consequence of its use could be injury to the baby, i.e., if a baby has a shoulder dystocia, fundal pressure makes it worse. (17 RR 35). It can also cause compression or clamping down of the baby's umbilical cord, thus cutting off the blood supply. (17 RR 35). Nurse Sotelo also testified that it would be wrong for a nurse to apply fundal pressure for

delivery. (8 RR 71). Bonnie Flood Chez, appellees' nursing expert, testified that she had been involved in cases where a nurse has done fundal pressure and it made the shoulder dystocia worse. (19 RR 125).

Nurse Sandra Sotelo testified at trial that she saw Nurse Hudson on top of the bed on top of Mrs. McShane. (7 RR 130). Sandra Hudson herself had testified in her deposition that she straddled Deborah McShane lower half and that she straddled her abdomen with her knees on the bed. (8 RR 184). Mrs. McShane testified at trial that "I had a butt on my face, I had feet on the side of my head, and I felt pressure." (12 RR 124). Mr. McShane, who was present during the delivery of his daughter, testified that there was a nurse on top of the bed pushing down on his wife's stomach. (15 RR 221).

At trial, Nurse Hudson testified that while on top of Mrs. McShane she did suprapubic pressure rather than fundal pressure. (8 RR 155-156). While watching a demonstration of the application of suprapubic pressure based upon Nurse Hudson's testimony, Dr. Cardwell testified that he had never seen a nurse try to apply suprapubic pressure in that position and that he thought is would be impossible to do it in that position. (17 RR 57-59). When asked what would be the effect on the mother and on the baby if the nurse was, as testified to, sitting on the abdomen, Dr. Cardwell replied that the effect would be to apply pressure to the abdomen of the mother, fundal pressure. (17 RR 59). And, he testified, that in itself is dangerous and is the same as intentionally applying fundal pressure. (17 RR 59). Dr. Cardwell testified that, to a degree of reasonable probability, this type of straddling on top maneuver would make the shoulder dystocia worse, decrease blood flow to the baby and make the baby more depressed after birth. (17

RR 61-62). The obstetrician called by the appellees as an expert on the standard of care, Dr. Christopher Seeker, testified that he did not see any evidence in the record that suggested that fundal pressure was applied. (19 RR 192). He offered the opinion that if, indeed, fundal pressure were applied, they would be unable to deliver the baby and Maggie would not have survived. (19 RR 192). Dr. Seeker testified, based on reasonable medical probability, that the nurses were not negligent. (19 RR 205).

According to Dr. Rothschild, when he was called to assist in Maggie McShane's delivery there "was a real shoulder dystocia." (10 RR 115-116). When Dr. Rothschild entered the room, the head had been delivered and Dr. Eubank was "attempting to deliver the rest of the body." (7 RR 166). Dr. Eubank told Dr. Rothschild that he was exhausted because he had already unsuccessfully attempted the rare Zavanelli maneuver in which the physician tries to push the stuck baby back up with his hand. (10 RR 116-118). Mr. McShane recalled that he saw that Dr. Eubanks "had cupped his hands and was trying to push her in, push her head back in." (15 RR 223). After the failed Zavanelli maneuver, Dr. Rothschild tried another maneuver in an attempt to delivery the baby. It was unsuccessful. (7 RR 170)(10 RR 119-120). Finally, Dr. Eubank was successful in pulling the baby out. (7 RR 171). Maggie had an Apgar score of 0 at one minute. (17 RR 14). She weighed 11 pounds and 3 ounces. (JX 1). There was no neonatologist present at the delivery nor was there a neonatal nurse practitioner at the delivery. (7 RR 176). Dr. Eubank turned to the resuscitation of Maggie because, in his own words, "I was the one that was present and no one else." (10 RR 182). Dr. Joseph Pasternak testified that Maggie McShane sustained permanent damage to her brain from an hypoxic ischemic

insult with the vast majority of the damage to her thalamus and basal ganglia. (17 RR 10-11). This essentially only occurs in an acute near total asphyxia, a profound insult of 15 to 30 minutes duration. (17 RR 11).

Dr. Michael Cardwell was asked if he had an opinion, based on reasonable medical probability, as to whether or not the labor and delivery nurses involved in the care of Maggie McShane were negligent. (17 RR 79). He testified that, in his opinion, the nurses were negligent in (1) allowing the physician to use the vacuum extractor to deliver the baby; (2) in applying fundal pressure once the shoulder dystocia was encountered; and (3) in not having someone at the delivery who was qualified and competent to resuscitate the baby. (17 RR 81). Bonnie Flood Chez, the hospital's expert, held a contrary opinion, i.e., that the nursing care in this case met the appropriate standards to a reasonable degree of medical probability and that the hospital care provided to Mrs. McShane and her baby Maggie McShane were within appropriate standards. (19 RR 119-120).

**B. Negligence of the Hospital**

The appellants alleged that the hospital was negligent in failing to properly designate skilled, trained, and competent persons to be responsible for full neonatal resuscitation in a timely manner. (I CR 40-41). Dr. Joseph Pasternak, a pediatric neurologist retained as an expert by the appellants, testified that an Apgar score is a quick assessment used by attending healthcare providers to determine how much resuscitation a baby needs. (17 RR 14). There is, he testified, wide clinical experience of babies born with Apgar scores of 0 who are successfully resuscitated and are normal. (17 RR 15).

Stuart Danoff, M.D. is a neonatologist and was asked by the appellants to form opinions on the quality of Maggie's resuscitation and the competency of the people involved. (12 RR 131). He testified that the ultimate responsibility to make sure that the staff is trained and competent rests with the hospital. (13 RR 9-10). There was no neonatologist present at the delivery nor was there a neonatal nurse practitioner at the delivery. (7 RR 176). Nurse Maurice Curran was called into the delivery room on a stat basis and proceeded to set up some of the equipment needed for resuscitation (11 RR 5; 10). He was not certified to intubate a newborn or to give medication through the endotracheal tube without physician supervision. (11 RR 11). Neither Nurse Sandra Sotelo nor Nurse Hudson nor Nurse Peterson were certified to intubate or to place an umbilical line. (8 RR 153). Dr. Eubank tried the first attempt at intubation and instead got the tube, he presumed, into the esophagus because after delivery he was "physically exhausted." (10 RR 181). Gary Zarr, the certified registered nurse anesthetist, was called into the delivery room to provide anesthesia for a possible Cesarean section. (11 RR 83). He intubated Maggie at four minutes of life. (11 RR 86).

Dr. Danoff testified that nobody in the delivery room "could resuscitate this baby, period." (13 RR 16). In his opinion, the only one qualified to perform a full-blown resuscitation was Dr. Serrao, a neonatologist, who was paged a minute before the baby's body came out. (13 RR 14). Dr. Serrao was on call that day and across town. (18 RR 16). He was called at 1550 and arrived at the hospital at 1606 or 1607 -- some 16 or 17 minutes after he was called (13 RR 14).

Dr. Danoff testified that, to a reasonable degree of medical probability, the hospital and the people involved in resuscitating Maggie McShane were negligent and that the negligence was a proximate cause of the damages and injuries to Maggie McShane. (13 RR 22-29). The appellees' expert on neonatal resuscitation, Dr. Donald Nelms, did not agree with Dr. Danoff's assessment and testified that, to a reasonable degree of medical probability, nothing the those persons involved in the resuscitation caused to contributed to the injuries to Maggie McShane. (18 RR 180). He also testified that, to a reasonable degree of medical probability, the hospital conformed to the appropriate standards of care with respect to the resuscitation, that the nurses involved in the resuscitation were properly trained and that they conformed to the appropriate standards of care for neonatal resuscitation. (18 RR 204).

## SUMMARY OF THE ARGUMENT

Appellants are entitled to a new trial. The entire trial was permeated by attorney misconduct so pervasive and egregious that no action by the trial court could have mitigated its impact on the jury and the prejudice to the appellants. The misconduct by counsel for the defense permeated these judicial proceedings and ultimately culminated in a calculated and deliberate reference to attorneys fees that constituted material injury and harmful error and warrant a new trial for the McShane family.

The court admitted evidence that was calculated to and did lead to the rendition of an improper verdict. The court erroneously allowed the hospital to cross examine the appellants' obstetric expert, Dr. Michael Cardwell, about a pending medical malpractice

lawsuit against him which created enormous prejudice and impaired the plaintiffs' right to a fair trial. The court excluded the testimony of appellants' expert on hospital administration, Mr. Arthur Shorr, whose testimony was crucial to the plaintiffs' direct liability claim against the hospital. This exclusion was a "death penalty" sanction because Arthur Shorr was the appellants' sole expert on hospital standard of care and expert testimony was required to establish direct corporate negligence against Bay Area Hospital. The trial court also erred in allowing the admission of appellant' superseded pleadings which were used by the hospital to interject the existence of claims against two physicians who had been dismissed from the suit and who testified on its behalf at trial.

The trial was further marred and justice thwarted by the fraudulent jury service by Mr. Arnoldo Alberto Moreno, Juror Number 10, who appeared for jury service for financial gain, in the place of his son, who had been legally summoned for jury service. This unqualified juror ultimately served on the jury and was one of ten jurors who rendered a verdict for the hospital. There was jury misconduct on the part of another juror, Mr. Chad Clanton, who visited Bay Area Hospital during the course of the trial to see his newborn granddaughter in the exact surroundings that gave rise to the lawsuit on trial. This is tantamount to a juror going to a defendant's house for dinner during trial. Mr. Clanton went even further. He drew a sketch of the floor plan of the hospital relevant to key issues at trial and shared it with other jurors. The court erred, also, by refusing to allow the appellants to create an evidentiary record about the misconduct of Mr. Chad Clanton during the hearing on the motion for new trial. This Court should reverse the trial court's judgment and remand the case for a new trial.

## ARGUMENT

**Issue 1: Did the trial court commit reversible error by denying appellants' motion for new trial based upon attorney misconduct and the deliberate injection of attorney fees into the trial?**

According to the Texas Lawyer's Creed, it is the duty of attorneys who practice law in Texas to respect the court, to recognize that the Judge is the symbol of the both the judicial system and administration of justice and refrain from all conduct that degrades that symbol. An attorney "will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage." *Texas Lawyer's Creed--A Mandate For Professionalism* § IV(1)(adopted November 7, 1989).

Throughout the trial, counsel for the hospital engaged in misrepresentation and mischaracterization which, viewed in the context of the trial as a whole, caused harmful error and warrants a new trial. Appellants incorporate in this section the allegations of misconduct discussed in various sections of this appellants' brief outlining misrepresentations to the trial court on key issues related to crucial rulings. During the direct examination of Nurse Sotelo, appellants' counsel was met with a constant barrage of improper objections meant to interrupt the flow of the examination and to coach the witnesses and sidebars meant to prejudice the jury. For example, one issue that was key to the question of the hospital's liability by and through its nurses was whether or not Nurse Sandra Hudson used fundal pressure. On direct examination, Nurse Sandra Sotelo was asked by appellants' counsel if she knew that Sandy Hudson was sitting on top of Mrs. McShane straddling her. Hospital's counsel objected, claiming to be looking "at the

deposition now. I'm calling you on it. That's an unfair characterization of her deposition testimony. I'm looking at exactly what she said." (7 RR 135). In fact, this sidebar notwithstanding, the testimony from the deposition transcript read at trial actually reveals that Sandra Hudson had testified that she was straddling Mrs. McShane and sitting on her abdomen:

Q. Were you sitting on her abdomen?
A. I was. I was on my knees. I straddled her.
Q. You had your knees beside her abdomen?
A. On either side of her.
Q. How could you do that without **sitting** on her?
A. "I may have been."

(7 RR 138).

The question was not an unfair characterization; Ms. Hudson said she was sitting on Mrs. McShane's abdomen. *Id.* The remarks by appellees' attorney, though ultimately disproven, effectively delayed and hindered the direct examination of a key witness.

At another point in her testimony, Nurse Sotelo was asked if she had seen written policies and procedures that a vacuum delivery was contraindicated in a suspected shoulder dystocia. (7 RR 155). Hospital counsel objected by testifying that "there is no policy saying that you don't use a vacuum extractor for shoulder dystocias." (7 RR 155-156). Her deposition testimony, read at trial, showed that indeed Sandy Sotelo had testified to seeing a written guideline regarding just such a policy, i.e., "I have seen it written." (7 RR 156). Once again, this obstructive tactic served to coach the witness at a critical juncture as well as interrupt counsel's direct examination and confuse the jury.

Nurse Sotelo was asked if it would be negligence if a nurse put pressure on the

mother's abdomen with her forearms or her hands. (8 RR 58). When the McShane's counsel explained, in response to a query by Nurse Sotelo, that negligence meant below the standard of care, hospital counsel objected that he was instructing the witness on the law. (8 RR 58-59). Appellants' counsel pointed out that Ms. Sotelo had been designated to talk about the standard of care. (8 RR 59). Immediately appellees' counsel said in the jury's presence: **"No, she's not. *That's untrue as well.*"** (8 RR 59). Counsel for the McShane's objected "to the continual side bar remarks" and asked for an instruction that Mr. Rodolf be required to make proper objections. (8 RR 59). Before the court could respond, hospital counsel protested that he had to object to "misstatements." (8 RR 59). After the jury was excused, appellees' counsel was admonished by the Court to "not to do that again" or "there will be fines assessed." (8 RR 60). At the bench conference, the McShane's produced the hospital's designation in which Sandra Sotelo was designated as an expert witness on nursing care. (8 RR 66).

At times, prejudicial statements were uttered by appellees' counsel without even the pretense of a valid legal objection. During the cross-examination of Dr. Ken McCoin, appellants' expert economist, hospital counsel engaged in such an egregious sidebar comment, while literally pointing at the McShane's attorneys, that even he belatedly retracted after the jury had heard it:

> **Q. I keep thinking, we've put all these millions and millions and millions of dollars up here. And I keep thinking about my passport account. I keep wondering who all these millions and millions of dollars are really for.**
> **A. I couldn't hear you.**
> **Q. Who are all these millions and millions of dollars really for? I mean, if you get a little bit of money in the bank, you can make a little bit of money.**

(15 RR 191). Appellants' objections to this obvious reference to attorney's fees were sustained by the court and the jury ordered to disregard. (15 RR 192). Such inflammatory remarks in the presence of the jury are wholly improper. *See, Texas Emp. Ins. Ass'n v. Hatton*, 255 S.W.2d 848, 849 (Tex. 1953)(holding that an improper discussion of contingent attorney's fees before the jury is material misconduct and will justify reversal).

The improper reference to attorney's fees is no different than improper attempts to inject wealth into a case - a tactic repeatedly disapproved of by the Supreme Court. *See, Southwestern Elec. v. Burlington Northern*, 966 S.W.2d 467, 471 (Tex. 1998) ("This Court has long recognized the potential for undue prejudice in allowing the jury to consider a litigant's financial status . . . Because this evidence is often irrelevant and highly prejudicial, Texas Courts historically have been extremely cautious in admitting evidence of a party's wealth.").

Throughout the trial, the hospital's counsel made statements unsupported and/or contrary to facts developed in discovery so that in many instances the proceedings became a "trial by ambush." *See, Johnson v. Berg*, 848 S.W.2d 345, 349 (Tex. App.--Amarillo 1993, no writ)(trial should be based upon the merits of the parties' claims and defenses, rather than on an advantage obtained by one side through a surprise attack). It is one thing for attorneys to prepare witnesses. It is another thing for attorneys to so carefully orchestrate the testimony of witnesses that a "yes" in deposition can be a "no" at trial. The extent to which hospital's counsel coached its key witnesses is exemplified by the recurrent use of the word "hindsight" to explain changed testimony by witness after

witness. At trial, Sandra Sotelo's testimony was, in her own words, "a little" different from her deposition testimony, Dr. Eubank ***had not*** called her in to assist with a shoulder dystocia. (7 RR 151). The reason for the directly contradictory testimony?

> **A. No. That's what I said at the time. And like I said, *hindsight was a big factor.* I knew that there was a possibility, as with any patient. That's the way I practice. I know that with any delivery we could have a shoulder dystocia. So when you asked me the question, along with the nervousness and all that put into factor, I knew that there was a shoulder dystocia. So I did answer it that way.**

(7 RR 152-153).

After this statement, Nurse Sotelo reiterated that though she had 30 or 60 days to review her deposition testimony she did not make this change. (7 RR 153).

> **Q. The only thing he told you was to come into the room for a potential shoulder dystocia?**
> **A. Into the room to help with the delivery, yes.**
> **Q. Well, to help with the delivery part is different now than what you said then, correct?**
> **A. Like I said, *hindsight was a big factor.***
> **Q. Okay. But, again, you didn't correct it?**
> **A. There are things still to this day that are in and out of my memory.**

(7 RR 153-154). Like Sandra Sotelo, Nurse Hudson testified in her deposition that "Yes," Dr. Eubank had called her into the delivery in anticipation of a potential shoulder dystocia problem. (8 RR 136-137). Like Sandra Sotelo, when asked that same question on direct examination at trial, her answer was an unequivocal "No." (8 RR 135). Nurse Hudson insisted in her deposition testimony about shoulder dystocia significant enough to call in two experienced nurses to help with the delivery was "Hindsight, hindsight and foresight." (8 RR 144). The willingness of hospital counsel to coach witnesses to this

extent is the kind of harmful and prejudicial conduct that cannot be tolerated in a court of law where cases are to be decided upon facts, not orchestrated sound-bites meant to excuse material changes in testimony.

In *Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988), the court convened en banc for the purpose of establishing a standard of litigation conduct to be observed in civil actions in its district. The court wrote that "we observe patterns of behavior that forebode ill for our system of justice" and noted that they were not alone in that observation. *Id.* at 286. Among the standards of practice adopted by the court was:

> (K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

*Id.* at 288.

Hospital counsel's behavior toward the witnesses and appellants' trial counsel, some of which was noted above, was contrary to the conduct expected in a Texas courtroom. One other example will suffice. On cross-examination of Dr. Cardwell, hospital counsel asked him if, in his opinion, the Journal of Fetal Medicine was a reliable publication and if he was familiar with an article entitled "Shoulder Dystocia and Operative Vaginal Delivery." (17 RR 156). Dr. Cardwell replied that the journal was generally reliable and that he was not sure of his familiarity with the article and asked to see the article. *Id.* Hospital counsel told Dr. Cardwell that the article was in the packet

of materials Dr. Cardwell had brought with him into the courtroom and that "[i]t came with the stuff you brought to the witness stand." *Id.* The following exchange took place:

> **A. Well, apparently you looked through my packet. So I guess you know.**
> **Q. Well, I'm asking you.**
> **A. I mean, I -- like I said, I guess you looked through my package.**
> **Q. I did. It's up there on the witness stand, right?**
> **A. I didn't give you permission, but I guess you can.**

(17 RR 157). By his own admission, appellees' counsel rifled through papers of Dr. Cardwell's left unattended on the witness stand without Dr. Cardwell's permission or his knowledge. As Dr. Cardwell pointed out, these were his personal effects and there may have been things in them he did not want counsel to see. (17 RR 160). This astonishing invasion of a witness's right to privacy by an officer of the court demeans the legal profession and is the kind of conduct that "offends the dignity and decorum" of the legal proceedings. *The Texas Lawyer's Creed A Mandate for Professionalism* § IV, (5) (1989). So did hospital counsel's parting question to Dr. Cardwell:

> Q. I forgot to ask you one other thing, Doctor. I'm sorry. Was it Rockford, Illinois where you were on staff at the hospital?
> A. Yes.
> Q. Why did you leave?
> A. Personal reasons.
> Q. Do you want to tell the jury what they were?
> A. No.

(17 RR 192-193). Once more, there was no need to answer the question. Counsel for the appellees had accomplished his goal, i.e., leaving the jury with an unmistakable, incurable and prejudicial inference that Dr. Cardwell had left the hospital in Rockford under a cloud.

These actions, plus the cumulative effect of these actions, denied Maggie McShane her day in court. The whole trial was tainted by hospital counsel's belligerent and "win at any cost" tactics. These tactics should not be tolerated in a Texas courtroom because they demean the judicial process and impair the plaintiffs' right to a fair and impartial trial. A lawyer is an officer of the legal system and a public citizen having special responsibility for the quality of justice. Supreme Court of Texas, Texas State Bar Rules, art. 10, § 9, Preamble (1). The Texas Lawyer's Creed reminds those attorneys privileged to practice law in the state of Texas to be mindful of their duty to the judicial system. The creed serves to remind lawyers that zealous advocacy does not excuse injudicious behavior. Cook, et al, *A Guide to the Texas Lawyer's Creed: A Mandate for Professionalism*, 10 Rev. Litig. 673, 678 (1991).

**Issue 2: Did the trial court err and abuse its discretion in excluding the testimony of Arthur Shorr, appellants' only expert on the hospital's standard of care?**

**a. There were key issues at trial regarding the hospital's failure to use ordinary care in formulating policies and procedures which required expert testimony.**

The exclusion of evidence is a matter committed to the trial court's discretion. *See, e.g., City of Brownsville v. Alvarado,* 897 S.W.2d 750, 753 (Tex. 1995). Reversal of a judgment based upon erroneous exclusion of evidence requires the appellants to show that the trial court committed error and that the error probably caused the rendition of an improper judgment. *Id.; see also Gee v. Liberty Mut. Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989); Tex. R. App. P. 44.1 (a). In making this determination, the reviewing court must consider the entire record. *See Alvarado,* 897 S.W.2d at 754. The trial court erred

in excluding the testimony of appellants' expert, Arthur Shorr, because the record shows that he was qualified to offer an opinion on the hospital's direct negligence and, without his testimony, the McShane's were deprived of testimony critical to their case against the hospital.

Appellants filed suit against the hospital in this case based upon two theories: (1) vicarious liability arising out of the nurses' negligence during the time Maggie McShane and her mother were in their care; and (2) direct corporate liability of the hospital for the breach of duties it owed directly to the plaintiffs. (I CR 35-50). Appellants offer of proof at trial established that Mr. Shorr would have testified that:

> the hospital violated the standard of care with respect to acting as a reasonable and prudent hospital would have acted under the same or similar circumstances from an administrative point, in particular with respect to not having appropriate policies and procedures in place in order to account for the labor and delivery policies, in order to have appropriate policies with respect to resuscitation, appropriate policies with respect to personnel for a resuscitation, appropriate policies with respect to having competent and trained personnel in the room for a given resuscitation. And . . . based on a reasonable administrative probability that the hospital was negligent for those and other administrative failures.

(16 RR 160-161).

At a pre-trial hearing on October 9, 2003, the court granted the hospital's motion to strike Arthur Shorr because "he lacks the qualifications to testify under Texas law." (4 RR 39). The court erred in granting the hospital's motion to strike because Arthur Shorr was qualified to testify as to the standard of administrative care and his exclusion left the appellants with no other controlling evidence on the standard of care for the hospital

which is the threshold issue upon which direct corporate hospital liability must be predicated.

One of the key issues litigated at this trial was whether or not Bay Area Hospital failed to use reasonable care in formulating policies and procedures that would have provided Maggie McShane optimal care by trained and skilled nurses during the entire labor and delivery process and assured her parents that, in the event of a life-threatening emergency requiring resuscitation, there would be medical personnel immediately available to perform full and complete and skilled neonatal resuscitation. The nurses' testimony regarding pertinent policies was conflicting at best. (7 RR 156-157) (8 RR 155) 9 RR 178-179). The testimony at trial accentuates the critical need for expert opinion on exactly what policies and procedures an ordinarily prudent hospital would have in place to deal with the emergencies posed by the delivery of Maggie McShane. Arthur Shorr's opinions addressed these and other questions and the excluded testimony was critical to material issues about which the jury should have been informed in order to render a decision on the direct corporate liability of Bay Area Hospital.

**b. Bay Area Hospital misled the court as to the subject of Arthur Shorr's anticipated testimony and, therefore, his qualifications to testify at trial on standards of administrative care for a hospital of ordinary prudence.**

Appellants designated Arthur Shorr, an expert on administrative standards of hospitals, to assist the jury in determining the standard of care for Bay Area Hospital and thus define the duty it owed to the McShane's. (III SCR 657-658). Appellees moved to exclude his testimony with an argument carefully tailored to mislead the court, i.e., that Arthur Shorr was going to give opinions on nursing and medical care. (4 RR 10). In its

attempt to disqualify Mr. Shorr, the hospital focused its attack on an area that the appellants conceded Mr. Shorr would *not* be addressing: standards of nursing and medical care.

Hospital counsel deliberately ignored definitive statements on the part of Mr. Shorr in his deposition that he did not have any clinical qualifications nor did he claim any clinical capability to do anything "nor will I be opining on anything clinical in that context." (III SCR 32). This position was reiterated by appellants' counsel in the court's presence at the hearing -- "[a]nd to the extent our designation is overbroad, I will make it clear. ***He is not going to testify about the clinical nursing care in this case***". (4 RR 18). Nevertheless, hospital counsel persisted, time and again, in representing to the court that Mr. Shorr would be addressing *clinical* standards:

> If you're going to come in and criticize nurses, or a hospital for that matter, based on alleged violations of standard of care, and that's what he does, as this Judge said, you ought to at least be a nurse to do that. And if not a nurse, you ought to at least have *some clinical expertise and experience* that would enable you to make these kinds of critical pronouncements.

(4 RR 14). In another instance, hospital counsel demanded that Arthur Shorr have clinical expertise in neonatal resuscitation suggesting that Mr. Shorr could speak to the hospital's independent duty to ensure that its nurses know how to appropriately respond to an emergency neonatal resuscitation only if he has "at least the clinical expertise and background to know what constitutes an appropriate neonatal resuscitation." (4 RR 15). In yet another assertion that clinical training is a *sine qua non* of one's ability to testify as to a hospital's negligence on the basis of direct corporate liability, appellees once again focused its claims on Mr. Shorr's lack of clinical, medical experience:

> **He doesn't provide nursing care. He doesn't provide medical care. He makes no clinical decisions, exercises no clinical or medical judgment. He doesn't tell the obstetrician how to deliver the baby. He doesn't tell the nurse how to start an IV. He doesn't tell the neonatologist how to perform an intubation. He is utterly irrelevant to the clinical setting.**

(4 RR 16). These declarations epitomize counsel's misunderstanding and/or conscious misrepresentation of (1) the qualifications necessary to testify as to the direct corporate liability of the hospital and (2) Texas law on the basis of opinion testimony by experts.

Arthur Shorr possessed the requisite qualifications to testify as to the standard of care and the breach of the standard of administrative care by a hospital of ordinary prudence. He was qualified by knowledge, skill, experience, training and education to offer opinions on the Bay Area Hospital's failure to use reasonable care in formulating policies and procedures. *See*, Tex. R. Evid. 702. Arthur Shorr is board certified in Healthcare Administration and a Fellow of the American College of Healthcare Executives. (II CR 212) (ShorrX 2). He received an M.B.A. in Health Care Administration from The George Washington University, Washington, D.C. in 1970. (II CR 212). Arthur Shorr served as the Administrator & Chief Operating Officer of Mount Sinai Medical Center in Milwaukee, Wisconsin from May of 1976 until April of 1980. (II CR 217) (ShorrX 2). During his time at Mount Sinai he was responsible for all day-to-day operational activities of the hospital including in excess of 1600 employees and an operating budget of over 90 million dollars. (II CR 217). Following his tenure at Mount Sinai, Arthur Shorr became Chief Operating Officer, Senior Vice President for Administration at Cedars-Sinai Medical Center in Los Angeles. He was responsible for all operating activities including a staff of 5500 employees. (II CR 217) (ShorrX 2).

Arthur Shorr is an Associate Clinical Professor at the University of Southern California, School of Policy, Planning and Development, Graduate Program in Health Care Administration, a member of the Residency Advisory Committee and a published author in the field of health care management. (II CR 212-217) (ShorrX 2). He presently serves on the editorial advisory board of the Medical Practice Compliance Alert. (II CR 212). (ShorrX 2). Arthur Shorr is well-qualified to testify as to the standard of hospital care by knowledge, skill, experience, training and education. Tex. R. Evid. 702.

**c. Arthur Shorr's testimony was necessary to establish the hospital's standard of care and its breach of the standard of care separate and apart from the nurses' negligence.**

Under Texas law, a hospital may be liable for injuries arising from the negligent performance of a duty that the hospital owes directly to a patient. *Denton Reg'l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 950 (Tex. App.--Fort Worth 1997, pet. denied)(case turned on whether standard of care required the hospital to have CRNA supervised by anesthesiologist). A hospital may be liable for not using reasonable care in formulating policies and procedures governing its medical staff and non-physician personnel. *McCombs v. Children's Med. Ctr. of Dallas*, 1 S.W.3d 256, 259 (Tex. App.--Texarkana 1999, pet. denied). Courts have recognized a duty to use due care in enforcing such policies and procedures and in ensuring they are not violated. *Mills v. Angel*, 995 S.W. 2d 262, 269 (Tex. App.--Texarkana 1999) *citing Penn Tanker Co. v. United States*, 310 F. Supp. 613, 617-18 (S.D. Tex. 1970). The test for determining whether or not a hospital has a duty of care and has breached that duty of care is what an ordinary hospital would have done under the same or similar circumstances. *Id.* at 950-951 *citing*

*Hilzendager v. Methodist Hosp.*, 596 S.W. 2d 284, 286 (Tex. Civ. App. Houston [1st Dist.] 1980, no writ); *see also*, 2 GRIFFITH, TEXAS HOSPITAL LAW § 3.011 at 49. Expert testimony is generally required to determine the standard of care and whether the standard has been breached. *Id.*

The hospital argues that expert testimony on the hospital's negligence is not required because there is expert testimony relating to the negligence of the nurses and, therefore, Arthur Shorr "brings nothing to this discussion." (4 RR 16). This argument was the same argument made by the plaintiffs in *Mills v. Angel*, 995 S.W.2d at 267. In that case, the key issue on appeal from an instructed verdict on their direct corporate liability suit against the hospital was the appropriate standard of care a hospital owes to its patients in its administrative role of overseeing the practice of physicians who have staff privileges at the hospital. *Id.* at 265.

The plaintiffs in *Mills* contended that expert testimony on the hospital's negligence was not necessary because the jury "had already heard expert testimony that Dr. Wells and Dr. Angel were negligent." *Id.* at 267. In this case, Bay Area Hospital similarly argued that the plaintiffs "have nurses who are going to come in and criticize our nursing care" and "physicians who will criticize the nursing care." (4 RR 13). The appeals court rejected this proposition in *Mills* holding that a "physicians negligence does not automatically mean that the hospital is liable or vice versa." *Id.* at 274. A similar analysis applies to a nurse's negligence. Hospital's counsel is simply wrong about Texas law when he says that:

> **The jurors can and will draw their own conclusions about the hospital's corporate responsibilities for the acts of its agents... If they decide that the nurses were negligent, they will have no trouble linking that negligence to the hospital.**

(4 RR 30). Counsel ignores or fails to distinguish between the allegations of direct corporate liability on the part of Bay Area Hospital and its vicarious liability for the negligence of its nursing staff.

Mr. Shorr's anticipated testimony, as set out in the appellants' offer of proof, was crucial to their case and without it, the McShane's were deprived of the opportunity to present critical evidence to the jury. As the court in *Mills v. Angel* concluded:

> **The Hospital's negligence turned on the proper standard of care for a hospital in its credentialing activities and in its supervision of the doctors' performance of medical procedures. Here, expert testimony was required to shed light on the role the Hospital played in David's care. Therefore, the Millses' argument that expert administrative testimony was not required in the instant case because the Hospital's negligence was within the common knowledge of laymen is without merit.**

*Id.* at 278. *See also, FFE Transportation Service, Inc. v. Fulgham* ___ S.W.3d ___, (18 Tex. Sup. Ct.) 267, 271-72. (December 31, 2004)(holding that expert testimony was required on negligent cause of action because alleged negligence was not within experience of laymen.). Because expert testimony was required to shed light on the role Bay Area Hospital played in Maggie McShane's care and because Arthur Shorr was the only expert designated by the appellants to testify solely to direct corporate liability, the exclusion of his testimony at trial was equivalent to a "death penalty" sanction. The McShane's were deprived of a meaningful trial on the merits on the issue of direct corporate liability of the hospital for the breach of duties it owed directly to the

appellants. This case required expert testimony on the hospital's standard of care. *Mills v. Angel*, 994 S.W.2d at 268. As the court in *Revco, D.S., Inc. v. Cooper* observed:

> In some situations, exclusion of experts may well be only an inconvenience, impairing presentation of a party's case but not precluding trial on the merits. Many cases, indeed, do not require expert testimony at all. Others, however, (medical negligence cases for example) require expert testimony and cannot be tried without it. In those cases, exclusion of experts may well have a death penalty effect.

873 S.W.2d 391, 396 (Tex. App.-El Paso,1994, orig. proceeding).

**Issue 3: Did the trial court err and abuse its discretion by admitting prejudicial evidence related to a pending medical malpractice claim against appellants' expert, Dr. Michael Cardwell?**

At trial, appellants called Dr. Michael Cardwell, a practicing physician board-certified in both obstetrics/gynecology and in maternal fetal medicine, to testify as to the standard of care for obstetrical nurses and to offer his opinion as to the breach of the standard by the nurses involved in the care and treatment of Deborah and Maggie McShane. (17 RR 29-34). Dr. Cardwell was appellants' sole expert to testify as to the standard of care for the nurses and to their breach of that standard.

At a pre-trial conference on September 29, 2003, one of the matters subject to the appellees' motion in limine was the propriety of using depositions, for impeachment purposes, from other lawsuits involving the nurses, the parties and/or the experts. (2 RR 41-42). Counsel for the hospital stated: "We don't want them to come in and say. . . Bay Area has been sued before and Doctors' Regional has been sued before and that kind of stuff." (2 RR 41). The parties agreed that using a deposition for impeachment purposes could be done "without bringing cases against experts, cases against parties, cases against

the hospital, cases against nurses into that." (2 RR 42). The court announced "agreed" on the record. (2 RR 42).

However, when Dr. Cardwell was called to testify, hospital's counsel ignored the agreement. Hospital counsel had in his possession a deposition from a pending medical malpractice suit filed against Dr. Cardwell in Ohio, as well as the medical records from that case, and no longer had any compunction about what his co-counsel said was the substance of the agreement made in open court, i.e., questioning Dr. Cardwell in a way that the jury would certainly infer he was a defendant in a lawsuit. Mr. Rodolf said as much, "It is quite possible that the jury may infer that." (13 RR 140). Texas law does not permit such unduly prejudicial inferences. *See Stam v. Mack*, 984 S.W.2d 747, 751 (Tex. App.-Texarkana,1999). In *Stam,* the plaintiff sought to impeach the defendant's expert because of a past professional relationship in which the defendant's attorney represented the expert in a medical malpractice action. *Id.*

> The trial court, *sua sponte,* interrupted Stam's cross-examination of Dr. Clifford and asked the attorneys to approach the bench. After a short bench conference, the trial court ruled that Stam could not specifically ask Dr. Clifford about the past lawsuit because of the "amount of prejudice that might come from *inferences* from that would far outweigh any admissible aspects of it."

*Id. See also,* Annot., George L. Blum, Propriety of Questioning Expert Witness Regarding Specific Incidents or Allegations of Experts Unprofessional Conduct or Professional Negligence, 11 A.L.R. 5th 1, § 3(b) (2004)(noting majority of jurisdictions hold it improper to permit an expert witness to be cross-examined on his personal involvement as a party defendant in a professional malpractice case.)

Hospital counsel represented to the court that "[t]he court has already ruled that I can get into his previously held opinions." (13 RR 143). The court had not made such a ruling. The court, instead, had specifically ruled that the appellees "can get into prior inconsistent statements." (13 RR 140). At a bench conference on this subject, appellants' counsel suggested that questions stemming from Dr. Cardwell's deposition be asked in a hypothetical and thus not identify the Ohio plaintiff as a patient of Dr. Cardwell because then the jury would know that he is a defendant in the case. Mr. Rodolf responded:

> Mr. Rodolf: But why do I have to do that? I mean, why do I have to do that?
> Mr. Mueller: Because what you are doing otherwise -- I know you want to do this, but what you are doing otherwise is you are absolutely telling the jury about his other case and that he was sued in another case.

(13 RR 154-155). Obviously, the hospital was not so much interested in impeaching Dr. Cardwell with a prior inconsistent statement from the deposition or a statement in the undisclosed medical records from his patient, as it was determined, at any cost, to tell the jury that Dr. Cardwell had been sued in a medical malpractice claim and thus prejudice the jury by that fact alone. The Hospital succeeded. One example: Dr. Cardwell testified that one of the nurses involved in Mrs. McShane's care had "made a mistake in this case." (17 RR 183). Hospital counsel immediately responded:

**Q. Like you in the Gutierrez case?**
**A. I did not make a mistake.**
**Q. Is that what Ms. Gutierrez thinks?**
**A. You'll have to ask her that.**

(17 RR 183). There is no room for inference here. The hospital's attempt to use the fact that Dr. Cardwell stood *accused* of negligence to show that he was negligent was so

prejudicial that its exclusion was mandated under Texas Rule of Evidence 403. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice; (2) confusion of the issues or misleading the jury; or (3) by considerations of undue delay or needless presentation of cumulative evidence. Tex. R. Evid. 403. Appellees intended to and did taint the jury with irrelevant and inflammatory information about Dr. Cardwell. *See Stam v. Mack*, 984 S.W.2d at 751(evidence that a defense expert was represented by defense counsel in a past malpractice lawsuit is inadmissible for impeachment purposes); *see also*, *Watson v. Isern* 782 S.W.2d 546, 549 (Tex. App.-Beaumont 1989, writ denied)(whether a person was negligent is not usually provable or susceptible of proof by other alleged acts of negligence at other times under other circumstances).

The court ruled that the hospital could get into prior inconsistent statements. (13 RR 140). The record shows, however, and hospital counsel admitted that he was not questioning Dr. Cardwell about prior inconsistent statements. (17 RR 114). He represented to the court at the bench conference that although he not reached Dr. Cardwell's deposition yet "it is sure coming up" and that he fully intended to impeach Dr. Cardwell and that he was "getting close" to doing so. (17 RR 112-113; 128). Instead, counsel for the appellees relied upon the medical records of Dr. Cardwell's patient to question Dr. Cardwell. Appellants' counsel properly objected. (17 RR 118-119). The McShane's counsel requested that the jury be instructed to disregard the questioning about Dr. Cardwell's patient and that hospital counsel follow the proper procedure for

impeachment with a prior inconsistent statement. (17 RR 131-132). The court agreed, "That's the procedure." (17 RR 132).

Hospital counsel did not follow the prescribed procedure and instead continually mischaracterized the facts in Dr. Cardwell's case in order to have the jury believe that his case and the McShane's case involved the same issues. For example: he represented to the court in a bench conference that Dr. Cardwell *walked off and left his patient* with a first year resident. (13 RR 139) The facts are that Dr. Cardwell was called away to another hospital on another emergency and that the patient went from non-active labor to the second stage of labor to delivery in eight minutes with a doctor in attendance to deliver the infant who had Apgar scores of 8 and 9 with no brain damage. (17 RR 187-188). There was no prior shoulder dystocia, ultrasounds were done on the last prenatal visits and delivery was accomplished without the use of a vacuum extractor. (17 RR 186-188).

At first, hospital counsel had readily agreed that if a witnesses' deposition testimony from unrelated litigation was to be used for impeachment by prior inconsistent statement, the fact that the witness was a defendant in that case would not be revealed. (2 RR 50). It is apparent that the trial court believed counsel when he represented that he would impeach Dr. Cardwell with a prior inconsistent statement:

> **The Court: I think Mr. Rodolf is right in going into the inconsistent statements when he does go into them. And I'm not sure how much further he has before he gets into them.**

(17 RR 127-128). The court relied upon hospital counsel's statement that he fully intended to impeach Dr. Cardwell unless instructed otherwise. (17 RR 113). The court relied also upon counsel's representation that:

> I can't be sitting at that counsel table holding ***this deposition*** where he gives testimony and opinions under oath that are completely, and I mean completely, contrary to what he testified to in his deposition in this case and just say, gee, I can't use it.

(13 RR 135). Co-counsel for the appellees reiterated this stance:

> Mr. Johnson: Your honor, under the rules of evidence, this is impeaching a prior inconsistent under oath statement, plain and simple. You ruled, Your Honor, on the motions in limine that we were not to mention specifically where someone had been sued. And this was discussed in great detail, that we wouldn't do that, but that we could use prior inconsistent testimony to impeach witnesses with.
>
> The Court: So it is prior recorded testimony?
>
> Mr. Johnson: ***It's in a deposition.***

(13 RR 136). The records shows that hospital counsel did not once -- even once -- use this deposition to impeach Dr. Cardwell with a prior inconsistent statement as he promised the court he would. And although appellees' counsel told the court that he was "close" to getting to the inconsistent statement, he never got there. By making these misrepresentations to the trial court, hospital counsel did accomplish what he set out to do--prejudice Dr. Cardwell and cause the rendition of an unjust and improper judgment by improperly injecting the fact that Dr. Cardwell had been sued in another, unrelated case.

**Issue 4: Did the trial court err and abuse its discretion by allowing the introduction of medical records from an expert's pending lawsuit for improper impeachment and because the medical records were not relevant and, even if relevant, their probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury.**

The introduction of facts from medical records of Dr. Cardwell's patient was a purposeful, calculated decision by hospital counsel to irreparably prejudice the testimony of this expert witness, *not* by the proper use of an inconsistent statements as sanctioned by Texas law, but by the improper and unethical use of private medical records unsanctioned by any code. The Texas Rules of Evidence provide that a prior inconsistent statement is not hearsay. Tex. R. Evid. 801(e)(1)(A). However, before a witness can be examined concerning a prior inconsistent statement, "the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement." Tex. R. Evid. 613(a)(b); *see Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 506, 512 (Tex. App.--Corpus Christi 1993, writ denied) *citing Garcia v. Sky Climber, Inc.*, 470 S.W.2d 261, 266 (*Tex. Civ. App.*--Houston [1st Dist.] 1971 writ ref'd n.r.e.). If, at cross-examination, the witness admits unequivocally having made the statement, the impeachment is complete and the prior statement is not admissible. *Id. citing* Tex. R. Civ. Evid. 613(a).

Soon into his continued cross-examination of Dr. Cardwell following the bench conference, it became apparent that hospital counsel was not "getting close" to conducting proper impeachment and that, undoubtedly, he intended to pursue Dr. Cardwell, not with (1) his deposition, which was never used to impeach him, or (2) with a

prior inconsistent statement as promised, but with unrelenting references to Dr. Cardwell's patient. Here is the flavor of that focus:

- I would think that if you estimate a baby to be eight pounds by ultrasound, as you claim to have done in the Gutierrez case, that it's unlikely that the baby would have gained two and a half pounds three days later. (17 RR 138).
- Just like in Mrs. Gutierrez's case you didn't do any fundal heights, did you? (17 RR 141-142).
- Is it your testimony that you did fundal heights on Mrs. Gutierrez? (17 RR 142).
- He also recorded fundal heights, and then later, just as you did in Mrs. Gutierrez's case, switched to ultrasound, right? (17 RR 142).
- Clearly you're saying that the doctors knew or should have known that Maggie was macrosomic? ... Just as you would have known in Ms. Gutierrez's case? (17 RR 144).
- Dr. Cardwell, you made a statement to the jury about not disclosing information regarding this patient, Ms. Gutierrez. (17 RR 151).
- You have before you a document signed by Ms. Gutierrez. (17 RR 152).
- And they should have suspected it [macrosomia], just as you should have suspected it in Mrs. Gutierrez's case, correct? (17 RR 153).
- Mr. Mueller asked you if you were involved in the Gutierrez delivery. Of course you weren't, were you? (17 RR 191).
- Ms. Gutierrez was -- she was admitted for induction of a large baby, right? (17 RR 191).
- You left this woman to deliver her baby in the hands of a first-year resident, a woman who was a known diabetic and delivered a 10 pounds 2 ounce baby, right? (17 RR 192).

The record unequivocally establishes that the medical records of Nicole Gutierrez, a patient of Dr. Cardwell with a pending medical malpractice case against him, were not used in accordance with the dictates of Texas Rule of Evidence 613, i.e., Dr. Cardwell was not confronted with inconsistent statements. Nevertheless, in further cross examination, hospital counsel interjected information from the medical chart of Nicole

Gutierrez and persisted in framing questions with calculated commentary about this patient of Dr. Cardwell's:

> We're talking about a patient who was under your care who was carrying a major risk factor which was exacerbated by the fact that in addition to that risk factor of diabetes she was noncompliant, didn't show up for her appointments, all of which increased dramatically the likelihood that she was going to give birth to a macrosomic baby. You're here criticizing these doctors and nurses for not predicting the possibility of shoulder dystocia, right? Aren't you?

(17 RR 107). Appellants were substantially and irreparably prejudiced by the court's failure to exclude the hospital's improper impeachment of an expert witness by the use of the unauthenticated medical records of Ms. Gutierrez. The promised impeachment of Dr. Cardwell by prior inconsistent statements from his deposition was a mere subterfuge to get irrelevant and prejudicial information about appellants' sole expert on the standard of care for the nurses in front of the jury. This constitutes reversible error and was reasonably calculated to and did cause the rendition of an improper judgment. *Purvis v. Johnson*, 430 S.W. 2d 226, 229-231 (Tex. App. --San Antonio 1968, no writ)(allowing defendant's counsel to cross-examine plaintiff's medical expert by reading excerpts from letter attacking his professional ability and integrity constituted reversible error.)

**Issue 5: Did the trial court err in allowing the admission of appellants' superseded pleadings which were used by the hospital to interject the existence of claims against two physicians who had been dismissed from the suit and who testified on behalf of the defendants at trial?**

Courts have long recognized that "the use of trial pleadings as admissions has been a thorny issue in the law of evidence." *Garman v. Griffin*, 666 F.2d 1156, 1157 (8th Cir. 1981). If the plaintiffs have made a factual admission in a live pleading, those

admissions are generally admitted. For example, in *Huff v. Harrell*, the Huff's claimed that a statement in a summary judgment pleading by Harrell, that he assumed the liabilities of Harrell Petroleum, was a judicial admission and that, therefore, the trial court erred in entering a take-nothing judgment against them. The court of appeals recognized this statement as judicial admission. *Huff v. Harrell*, 941 S.W.2d 230, 235-236 (Tex. App.--Corpus Christi 1997, writ denied).

On the other hand, if superseded or abandoned pleadings are to be used for the purpose of interjecting the existence of claims against parties dismissed from the suit and no longer part of the trial pleadings, it is not a judicial admission and is not admissible. This scenario is far different from factual statements and involves the introduction of superseded pleadings that have no relevance to the issues asserted in the live pleading, i.e., the negligence of those defendants who are submitted to the jury. The trial court erred in allowing the admission of superseded pleadings to inform the jury that the doctors who testified at trial on behalf of the hospital had once been defendants in the case.

Appellants' trial pleading, their Seventh Amended Petition, differed from Plaintiffs' Original, First Amended, and Second Amended Petitions in that there were no allegations of negligence as to individual healthcare providers, including Dr. Dale Eubank, Jr. and Dr. Bernhardt Rothschild. (I CR 35-50)(I SCR 3-74). Appellants filed their motion in limine prior to the commencement of voir dire asking that the court instruct counsel for the hospital and any and all witnesses to refrain from introducing superseded pleadings. (II SCR 7-8). Hospital counsel argued that statements seriously

made in a superseded pleading can be introduced into evidence as ordinary admissions. (3 RR 93-94).

> **So that if they claim that they want $40 million from Doctors A, B, and C because A, B, and C did this, and now they're claiming no, we want $40 million from Hospital A because they did it, the doctors didn't do it, that can be construed as an admission from the prior pleading, though it's not a live pleading.**

(3 RR 93-94).

The hospital's example proves appellants' position and succinctly illustrates the difference between what the McShane's allege in their superseded pleadings and what they allege in their live pleading. Some of appellants' superseded pleadings included claims against the hospital *and* individual healthcare providers. (I SCR 3-43, 65-74). There was never a time, however, that the hospital was not a defendant. (I CR 35-50); (I SCR 3-43, 65-74; 101-115; 192-206; 323-338). Nor did the appellants *ever* assert that they first considered the doctors negligent and then decided that the hospital was negligent, not the doctors. The trial court granted appellants' motion in limine on this matter (3 RR 95). Despite this, hospital counsel, while questioning Potential Juror No. 21 during voir dire, asked her if she knew Dr. Rothschild, Dr. Eubank, Dr. Lewandowski or Mr. Zarr, CRNA. She knew the doctors. (6 RR 244). He then, without approaching the bench, said the following in front of the whole jury panel:

> Q.: Okay. Knowing that you know at least three of these doctors and they're probably going to testify in this case *and they have been sued at one time by the Plaintiffs* --

(6 RR 244). Appellants' counsel immediately objected. Appellees' counsel replied, "It's a fact." *Id.* The court excused the jury at which time the appellants objected again to the

interjection of superseded pleadings and moved for a mistrial asserting that the mention of doctors previously dismissed from the suit was prejudicial and irrelevant. (6 RR 249-250; 254-255). The court denied the motion for mistrial as well as the appellants' motion for an instruction to disregard. (6 RR 255).

As voir dire continued, hospital counsel questioned Prospective Juror No. 19:

> Mr. Rodolf: Given . . . the complete difference in the nature of this lawsuit versus what you went through, do you think you could set aside what you went through and be fair to the McShane's, just as you would want a juror in your position to be fair to you?
>
> Prospective Juror No. 19: My understanding ***from the information that you-all have given*** is that the McShane's ***have had suits against their physicians***, and there are persons -- I'm understanding nurses; I don't know them -- that have had suits brought to them for doing their job. So yes, I would have a hard time with that.

(6 RR 342). Counsel for the McShane's, once again, asked for a mistrial because this prospective juror based her feelings about the lawsuit on what she was told by Mr. Johnson. (6 RR 343). Plaintiffs' motion for mistrial was overruled once again. (6 RR 343).

Prior to the testimony of Dr. Rothschild, a physician who had been dismissed by the appellees, the subject of prior pleadings was again addressed at a bench conference. (10 RR 39). The court did not recall having made a ruling on the prior pleadings and Mr. Rodolf assured her that "You have not, Your Honor." (10 RR 40). The court had made such a ruling. (3 RR 95). However, following this discussion, the court subsequently ruled that the "prior pleadings will come in at the appropriate time." (10 RR 52).

The court erred in admitting appellants' superseded pleadings because there was no inconsistency in those pleadings and their probative value was substantially outweighed by the danger of unfair prejudice as exhibited in the testimony of two physicians who had been non-suited. Had the appellants asserted that the doctors were the sole proximate cause of the plaintiffs' injuries in one pleading and then, in an amended pleading, asserted that the hospital was the sole proximate cause of the injuries there would be an inconsistency. However, contrary to hospital counsel's statement, the appellants did not allege that the "doctors didn't do it." What the appellants did, as was their right under Texas law, was to proceed to trial against the hospital as "a proximate cause" of the appellants' injuries irrespective of the responsibility on the part of the doctors. There is no inconsistency which would allow the introduction of the superseded pleadings. The trial court erred in admitting the prior pleadings.

Texas Rule of Civil Procedure 40 allows for the permissive joinder of parties, specifically providing that "[a]ll persons may be joined in one action as defendants" with respect to a right to relief arising out of the same occurrence. Tex. R. Civ. P. 40. The Texas rules also provide that at any time before the plaintiff has introduced all his evidence (other than rebuttal evidence), he may dismiss a case. Tex. R. Civ. P. 162. The dismissal of a defendant may not be used as evidence against the plaintiff by the remaining defendants. *Texaco v. Pursle*y, 527 S.W.2d 236 (Tex. Civ. App.--Eastland, 1975, writ ref'd n.r.e.).

In *Texaco v. Pursley*, Pursley alleged specific acts of negligence against four defendants in his original petition. *Id.* at 240. Texaco offered the abandoned original

petition of Pursley in which he alleged acts of negligence against four defendants. *Id.* "This pleading was offered on the theory it was inconsistent with Pursley's position at the time of trial." *Id.* Following the non-suit of two of the four defendants, the plaintiff proceeded to trial against the two remaining defendants with his first amended petition as the live pleading. *Id.* The trial court refused to admit the abandoned pleading. *Id.* On appeal the court held that the trial court properly excluded from the jury the fact that two defendants had been dismissed and that the original petition was not inconsistent with Pursley's trial pleadings. 527 S.W. 2d at 240.

There is support for this position in legal treatises and case law from other jurisdictions, to wit:

> **a plea against the dismissed defendant may not be used in evidence against plaintiff by another defendant. . . a plaintiff has the right to try his case on the issues made against a remaining defendant without regard to the charges previously made against voluntarily dismissed defendants.**

32 C.J.S. *Evidence* § 401 *citing Manahan v. Watson*, 655 S.W.2d 807 (Mo. App. 1983)(a pleading on one issue may not be used as an admission upon another issue in the case in order to impeach or discredit).

The testimony at this trial leaves little doubt that admission of evidence that Dr. Rothschild and Dr. Eubank had been named in a superseded pleading was prejudicial. *See*, Tex. R. Evid. 403 (evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). There is no mistaking the allegiance of these two physicians. Dr. Rothschild met with the appellees' attorneys on more than one occasion so that he knew "to a great degree" what questions he would be asked by

hospital counsel. (10 RR 169). Dr. Eubank talked with the lawyers for the other side and viewed a CD at their request. (10 RR 219). When asked if he clearly viewed himself as being adverse to the appellants, he responded, "Well, you were the one that sued me." (10 RR 276). That comment and the following excerpt from Dr. Rothschild's cross-examination illustrates why courts have ruled that a superseded pleading against one defendant may not be used in evidence against the plaintiff by another defendant:

> Q. (Mr. Rodolf): Now, Doctor, do you recall that Mr. Freeman said he was not fussing at you? At one time in this case he was fussing at you, was he not? Weren't you sued, originally?
> . . .
> A. (Dr. Rothschild): Well, yes. I was sued for $50 million in this case. And my involvement is what you heard it was. I was in my office and I was asked to render emergency aid and I ran to help and did the best I could. It didn't work out. I'm sorry for them. But if you are in a car and see a wreck and you stop to help, you do the best you can and then you get sued for $50 million.
> Q. Was there a claim made that you -- your care was beneath the standard of care in this case?
> A. Yes. $50 million worth.

(10 RR 138-139).

When Dr. Eubank was asked about his involvement in this suit as a defendant the following exchange took place:

> Q. (Mr. Rodolf): Doctor, you were sued in this case, weren't you?
> A. Yes, I was.
> Q. Do you know why you are not sued now?
> A. Not really.
> Q. And do you know why the hospital is the only Defendant in this case and these nurses are accused of causing this injury?
> A. I have no idea.

(10 RR 275-276). Dr. Rothschild's testimony about his presence in the lawsuit and his outrageous statement that he had been sued for $50 million was irrelevant to any issue in

the case. Likewise, evidence that Dr. Eubank was once a defendant and is now not a defendant--leaving only the hospital as a defendant--was inherently prejudicial and probative of no material fact in the case. So, too, is Dr. Eubank's statement that he delivered babies "until about a year ago." (10 RR 235). The admission of this testimony served only to prejudice the McShane's by bringing to the courtroom the specter of tort reform, frivolous lawsuits and a myriad of issues detrimental to appellants' right to a fair trial by a fair and impartial jury. The admission of this highly prejudicial evidence was error.

**Issue 6: Did the trial court err and abuse its discretion by improperly overruling appellants' motion for new trial based upon the misconduct of a juror, Mr. Chad Clanton, who visited his newborn granddaughter at Appellee Bay Area Hospital during the course of the trial and by refusing to allow the appellants to create an evidentiary record about the misconduct of Mr. Chad Clanton during the hearing on the motion for new trial?**

The court erred in overruling appellants' motion for new trial based upon the misconduct of a sitting juror, Mr. Chad Clanton, which was material and based on the whole record, resulted in injury to the appellants. *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 375 (Tex. 2000). Rule 327 provides that a new trial may be granted on grounds of jury misconduct when it is shown that such misconduct occurred, that it was material, and that it reasonably appears from the entire record that injury probably resulted to the complaining party. *Kastanos v. Ramos*, 581 S.W.2d 740, 741 (Tex. App.--Beaumont 1979, writ ref'd n.r.e.) *citing* Tex. R. Civ. P. 327. The act of overt misconduct in itself may, in some situations, be the most compelling factor in establishing prejudice. *Texas Employers' Insurance Association v. McCaslin*, 317

S.W.2d 916, 919 (1958). So it is in this compelling case. During the course of the trial and prior to jury deliberations, Mr. Clanton's daughter delivered a baby girl at Bay Area Hospital. (II CR 189-190). Mr. Clanton did not reveal this fact to the court nor did he disclose that he actually went to Bay Area Hospital to see his new granddaughter while serving as a juror in a case against the hospital. (II CR 190).

At trial, the court gave instructions to the jury which included the admonition that the jurors were not to mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or *interested in this case*, except for casual greetings. (7 RR 65-66). *See* Tex. R. Civ. P. 226a. The jurors were further instructed to not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. (7 RR 67). The jurors were called upon to decide whether or not Bay Area Hospital and its nurses were negligent. A number of hospital employees, some of whom were still employed by Bay Area Hospital and actively involved in labor and delivery, were called as witnesses at trial, i.e., Sandra Sotelo, (7 RR 121); Sandra Hudson (8 RR 106); Debra Campbell (9 RR 241); Maurice Curran (11 RR 4); Gary Zarr (11 RR 79) and Sue Peterson. (11 RR 117). Counsel for the appellees informed the entire jury panel in voir dire that all kinds of people at Bay Area Hospital were intensely interested in the outcome of this case:

> Bay Area Hospital is made up of people just like you and me. That's Sandy Sotelo from the hospital. There's the executive staff. There's the employees and the other nurses. And all of those people that comprise collectively Bay Area Hospital are vitally ***interested in this case.*** They have feelings. They have concerns. And they're very much ***interested in this case.***

(6 RR 183).

The affidavit of a juror, Mary Aleman, shows that a juror, Mr. Chad Clanton, had improper contacts with individuals outside the jury who had an interest in the outcome of this case *prior to jury deliberations*. (II CR 189-90). Mr. Clanton visited Bay Area Hospital's labor and delivery unit during the trial because of the birth of a grandchild during the trial. (II CR 189-90). Subsequently, during jury deliberations he sketched the floor plan of certain areas of the hospital, i.e., the birthing rooms and the nursery, that were central to crucial issues of timing in the resuscitation of Maggie McShane. (II CR 189-90). Juror Mary Aleman's affidavit is proper proof of the misconduct at issue. A juror "may testify about jury misconduct provided it does not require delving into deliberations." *Golden Eagle Archery*, 24 S.W.3d at 370 *citing* Tex. R. Civ. P. 327(b). The Texas Supreme Court gives an example, applicable here, of a proper subject of testimony by a juror, i.e., "**a juror could testify that another juror improperly viewed the scene of the events giving rise to the litigation.**" *Id.* at 370. It is also proper for a juror to testify about improper contacts with individuals outside the jury. *Id.* The affidavit of Mrs. Mary Aleman establishes both improper contacts and the fact that Mr. Clanton viewed the scene giving rise to the litigation prior to jury deliberations. (II CR 189-90). Mr. Chad Clanton went to Bay Area Hospital during the trial because his daughter had given birth to a child, his grandchild on November 5, 2003. The very fact of his daughter's presence in the labor and delivery unit of the hospital defendant means that she was attended by hospital personnel who were, by the very fact of their employment and as a matter of law "connected with or interested in the case." The fact

that Mr. Clanton was in the hospital in the very labor and delivery unit with nurses employed by Bay Area and that his grandchild was delivered safely creates a situation where harm must be presumed to have occurred in the process of jury deliberations. The hospital and its nurses' conduct were on trial. His grandchild was delivered alive and well and he could attribute that to care given to his family by the hospital and its nurses. His contacts with the hospital in this setting and in these circumstances are so highly prejudicial to the plaintiffs that the act itself is proof of unfairness and demands a new trial. *See Texas Employers' Insurance Association v. McCaslin*, 317 S.W.2d at 921.

Mr. Clanton's visit or visits to Bay Area Hospital during the trial constitutes jury misconduct on its face and is in and of itself the most compelling factor in establishing that Mr. Clanton was subjected to an outside influence by his visit to the hospital. Not only were the appellants denied a fair and impartial jury, they were denied their right to an evidentiary hearing on the issue of jury misconduct raised in their motion for new trial. The only time a trial court is required to hold an evidentiary hearing on motion for new trial is when the grounds for new trial involve jury misconduct. *Jefa Co., Inc. v. Mustang Tractor and Equip. Co.*, 868 S.W.2d 905, 909 (Tex. App.--Houston [14th Dist.] 1994, writ denied) *citing* Tex. R. Civ. P. 327; *Parham v. Wilbon,* 746 S.W.2d 347, 351 (Tex. App.--Fort Worth 1988, no writ). Juror Chad Clanton and Juror Mary Aleman were subpoenaed to appear and did appear at the courthouse for the hearing on appellants' motion for new trial to give testimony related to appellants' allegations of juror misconduct. (24 RR 5). The appellees objected to proceeding with an evidentiary hearing on jury misconduct involving Mr. Clanton and incorrectly alleged that the affidavit of

Juror Mary Aleman says "that all of this, the drawing of the diagram of the room and everything else, occurred *during the deliberations*." (24 RR 4). The trial court erred in sustaining this objection and preventing the appellants from having an evidentiary on this issue because Mr. Clanton's visit to Bay Area Hospital was an overt act of misconduct that did not occur during jury deliberations. *See Golden Eagle Archery*, 24 S.W.3d at 367 ("juror *testimony* or affidavits were admissible to show only overt acts of misconduct, not merely the mental processes or motives of the jurors")(cites omitted). In *Golden Eagle Archery*, the Texas Supreme Court expressly said that Rule 327(b) does not preclude a juror from testifying about juror misconduct "about improper contacts with individuals outside the jury." *Id.* at 370. This is precisely what Mr. Clanton and Mrs. Aleman would have testified to and, as set out in the offer of proof, this testimony would have established juror misconduct as a matter of law.

> If allowed to testify, Mr. Chad Clanton would indeed state that he was a juror in the McShane case; that during the trial his daughter delivered a granddaughter at Corpus Christi Medical Center Bay Area, the defendant hospital in this case; that his daughter's name is Danielle Canales from Ingleside; that the date of delivery was November 5, 2003; that on one or more occasions he visited his daughter and his new granddaughter in the hospital . . . that he was actually in the labor and delivery and/or newborn care units; that the nurses were coming in and out; that he may well have interacted with the very nurses that were witnesses in this case . . . that the conversation that he had with respect to telling the other jurors about the birth of his granddaughter occurred during casual conversations on breaks and not as part of the jury deliberations. Ms. Aleman, Ms. Mary Aleman who was also a juror, would testify that indeed she was a juror; that she was present on these breaks; that indeed he told her that his granddaughter had been born. (24 RR 9-10).

To be absolutely entitled to an evidentiary hearing on a motion for new trial, the motion must (1) raise matters that cannot be determined from the record and (2) be

supported by one or more sufficient affidavits. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994); *Reyes v. State,* 849 S.W.2d 812, 816 (Tex.Crim.App.1993). A party need only assert a properly supported, reasonable ground for relief which is not determinable from the record in order to be entitled to a hearing. *Id. citing Jordan,* 883 S.W.2d at 665. Appellants' motion for new trial and, specifically, their issue on jury misconduct involving Mr. Chad Clanton was properly supported by affidavit and raised issues that could not be determined from the record. The safe delivery of a juror's granddaughter, during trial and at the appellees' hospital, was an outside influence and under Texas Rule of Civil Evidence 606(b) the subpoenaed jurors should have been allowed to testify "whether any outside influence was improperly brought to bear upon any juror." Tex. R. Evid. 606(b). It was error to exclude the testimony of Chad Clanton and Mary Aleman at the appellants' motion for new trial.

**Issue 7: Did the trial court err in denying appellants' motion for new trial based upon juror disqualification because the testimony of Mr. Arnoldo Moreno at the hearing on the motion for new trial was conflicting, not credible and patently false?**

Based upon investigative materials provided by the trial court, appellants alleged in their motion for new trial that Mr. Arnoldo Alberto Moreno had fraudulently served on the jury in the place of his son. (I CR 93-104)(II CR 168-178). The voter registration list for Nueces County has individual voter registrations for (1) Arnoldo A. Moreno and for (2) Arnoldo Albeto Moreno both at a 921 Cunningham address. (24 RR 63)(PNTX 8; 9). Arnoldo Alberto Moreno served on the jury in the McShane trial. (PNTX 3). The jury summons responded to by the father was sent to his son, Arnoldo Alberto Moreno, Jr. as

Arnoldo Albeto Moreno. (PNTX 6; 7). (24 RR 53) Mr. Arnoldo Alberto Moreno is an employee of the Corpus Christi Army Depot ("CCAD"). (24 RR 68). He was paid by his employer during the time he served as a juror in the McShane trial. (24 RR 68).

At a hearing on the appellants' motion for new trial, appellants called Howard Michael Beers to testify. (24 RR 16). He is an employee of the Corpus Christi Army Depot and is a co-employee of the father, Mr. Arnoldo Alberto Moreno, Juror No. 10. (24 RR 16-17). In October of 2003, Mr. Beers served on a jury in Nueces County and had occasion to see Mr. Moreno outside at lunchtime and at breaks. (24 RR 17). Mr. Moreno told him that he had been selected for jury duty. (24 RR 18). A few weeks later, Mr. Beers ran into Mr. Moreno at work and was told by Mr. Moreno that he just got back from jury duty and that:

> his trial ran for about a month. And during that time there was a holiday that the government employees were given the day off, and he had to come out here on jury duty and wondered if he could get paid overtime for that particular day. . . [h]e told me that he was sitting in on the jury for his son because his son couldn't get off from work.

(24 RR 18-19). Mr. Beers went back to his office after Mr. Moreno made that statement and told Rick Felix what Mr. Moreno had just told him about having sat on a jury for his son. (24 RR 25). Rick Felix's wife works in the financial department and takes care of matters such as jury pay and is knowledgeable about overtime pay. (24 RR 25). Mr. Beers testified that he had told Arnoldo, "that, hey, I could ask Rick and he could ask his wife if you should get overtime for being there." (24 RR 25). According to Mr. Beers, when Arnoldo Moreno told him that he had sat in for his son, "it didn't sink in." (24 RR 25-26). He then testified, "I thought, well, you know, it doesn't sound right but -- but

then later on, you know, I realized that this may be a problem here." (24 RR 26). At another point he testified, "I didn't think it was right, but I didn't think it was illegal either." (24 RR 31). An investigation, conducted by Mr. Edward Preusse, a criminal investigator at the Corpus Christ Army Depot, followed. (24 RR 92).

Mr. Preusse testified that he contacted a couple of employees who had knowledge of Mr. Moreno allegedly sitting in on a jury panel for his son. (24 RR 110). Mr. Beers and Mr. Moreno submitted sworn statements and these statements, as well as Mr. Preusse's memorandum, were forwarded to Human Resources at CCAD. (24 RR 113). Mr. Preusse then went to the voter registration office, looked up Mr. Moreno's voter registration numbers and that of his son. They were both different. (24 RR 112). Following Mr. Preusse's receipt of a letter from Judge Hassette, he sent her, through the court's administrator, a copy of his investigative file. (24 RR 93). The investigation concerning Mr. Moreno is now with Human Resources at CCAD. (24 RR 115).

The McShane's counsel asked Mr. Beers if he knew whether or not his recollection of the conversation was different than Mr. Moreno's recollection:

> Q. And if his recollection is slightly different, would you dispute what he has to say?
> A. Well, I think I remember what he told me.
> Q. Okay.
> A. If he remembers it differently, then I think I would have to dispute it.

(24 RR 32).

Mr. Moreno did remember it differently. At first he testified that he did not tell Mr. Beers that he had sat in on a jury for his son because his son did not get paid for it and he would get paid for it. (24 RR 65). He then testified that "I told him about the jury.

I told him I *may have sat in there for my son.*" (24 RR 65). Mr. Moreno was aware that the Corpus Christi Army Depot was involved in an investigation regarding his sitting on a jury. (24 RR 68). He testified at the hearing that he did not discover that he had served for his son until after the trial was over. (24 RR 64). That discovery took place "probably the weekend" after trial when Mr. Moreno was cleaning out his son's room some 11 or 12 months after he had moved to San Antonio. (24 RR 86).

Arnoldo Alberto Moreno, the father, was one of the ten jurors who returned a verdict in favor of the defendants. The general qualifications for jury service are found in Texas Government Code § 62.102. That statute provides that a person is disqualified to serve as a petit juror unless he is of sound mind and good moral character. Tex. Gov't Code § 62.102(6). The testimony of Mr. Howard Beers and the investigations by the Corpus Christi Army Depot, at the very least, cast doubt on Mr. Moreno's truth and veracity. Mr. Moreno's testimony at the hearing on appellants' motion for new trial raises further conflicts *vis a vis* his conversations with fellow employee, Howard Beers. Mr. Moreno's testimony that he did not discover that his son was the one summoned for jury service until after the trial when he was cleaning out his son's room some 11 to 12 months after the moved out of the house. As the Supreme Court of Missouri observed in a similar case involving practiced deception by a juror: "A man who uses dishonest means to get on a jury, does not usually do so for the purposes of honestly deciding the case on the law and the evidence." *Lee v. Baltimore Hotel Co.*, 136 S.W.2d 695, 697-698 (Mo. 1939). Mr. Moreno was deliberately deceiving his employer (the United States Army) and the Nueces County judicial system for monetary gain on behalf of his son. He is

statutorily disqualified under section 62.002(4) of the Texas Government Code which provides that a person is disqualified to serve as a juror unless he is of "good moral character." The plaintiffs were prejudiced and materially harmed by the presence of Mr. Arnoldo Alberto Moreno on the jury because they were deprived of the right to choose twelve qualified jurors as mandated by the Texas constitution. Texas. Const. art. 1, § 15. Denial of the right to trial by jury, guaranteed by both the federal and state constitutions, constitutes reversible error. *See Heflin v. Wilson,* 297 S.W.2d 864, 866 (Tex. Civ. App.--Beaumont 1956, writ ref'd)(approval of judgment in case involving error in selection of jury panel is tantamount to denying constitutional right of a trial by jury). A disqualified juror, Arnoldo Alberto Moreno, was one of 10 jurors who supported the verdict in this case. The appellants have been materially harmed as a matter of law. A new trial should be granted.

## PRAYER

Appellants ask the court to reverse the trial court judgment and remand the McShane's claims for new trial.

Respectfully submitted,

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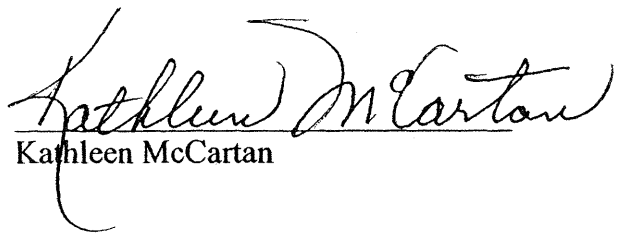
## CERTIFICATE OF SERVICE

This is to certify that on 14th day of January, 2005, a true and correct copy of this Appellants' Brief was served by certified mail, return receipt requested and by first class mail on all counsel shown below:



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No. 13-04-00174-CV

IN THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI, TEXAS

DEBORAH SUE MCSHANE AND JAMES PATRICK MCSHANE
INDIVIDUALLY AND AS NEXT FRIENDS OF
MAGGIE YVONNE MCSHANE, A MINOR

Appellants,

v.

BAY AREA HEALTHCARE GROUP, LTD., INDIVIDUALLY AND D/B/A THE
CORPUS CHRISTI MEDICAL CENTER - BAY AREA, ET AL.

Appellees.

# APPELLANTS' APPENDIX

## LIST OF DOCUMENTS