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IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

Dr. Lalitha Madhav Janaki

Appellant

v.

C.H. Wilkinson Physician Network d/b/a Christus Physician Group, Christus Spohn Hospital – Corpus Christi and Christus Spohn Hospital Corpus Christi – Shoreline, and Christus Spohn Cancer Center – Calallen and Christus Spohn Cancer Center – Shoreline

Appellees

Appeal from the 319th Judicial District Court
Of Nueces County, Texas
Cause No. 2017-DCV-4930-G

Appellant's Brief

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ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Dr. Lalitha Madhav Janaki believes oral argument will be helpful to resolve the issues on appeal.

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STATEMENT OF THE ISSUE

Issue: Whether the trial court erred in not extending the single integrated enterprise liability theory to Section 161.134 of the Texas Health and Safety Code.

STATEMENT OF THE CASE

This appeal arises out Plaintiff/Appellant Dr. Lalitha Madhav Janaki's ("Dr. Janaki") report of suspected Medicare fraud to her former employer, a physician's group along with the Hospitals and the Cancer Centers, and her retaliatory termination thereafter. CR.43. Dr. Janaki filed a claim under Section 161.134 of the Texas Health and Safety Code which prohibits an employer from the retaliatory discharge of an employee after reporting illegal activity. *Id.* Each of the three defendants/appellees filed separate motions for summary judgment. CR.30, 56, 81. Appellant responded to each one. CR.106, 121, 174. Appellees replied. CR.155, 136, 189.

The trial court held a hearing on the motions on September 12, 2019 and a telephonic continuation of the hearing on September 26, 2019. RR2, RR3. At the second hearing, the trial court requested additional briefing on whether Appellant's assertion that the single integrated enterprise

theory applied to hospitals in Texas. RR3.23-24. Dr. Janaki and Appellees submitted additional briefing on October 10, 2019. CR.208, 242. The trial court granted each motion on February 4, 2020. CR.287, 289, 291. This appeal followed. CR.293.

STATEMENT OF THE FACTS

Janaki Complains of Medicare Fraud to her Employer. Dr. Janaki was a Radiation Oncologist who treated patients at the Hospitals and Cancer Centers. CR.107. CPG is a physician's network that employs physicians like Dr. Janaki and supplies physicians to work in the Hospitals and Cancer Centers. RR3.10-11. Her employment contract with CPG began on June 27, 2014. CR.118. The Hospitals and Cancer Centers granted her privileges and Dr. Janaki physically worked at those locations for the length of her employment. RR3.11. From December 2016 until the date of her termination, Janaki raised concerns and had several meetings at various points in time with different authorities at both CPG and the Hospitals. CR.45-48. Her purpose was to report discrepancies in the Hospitals' use of Medicare physician numbers for billing and services, peculiarly from doctors who were no longer employed or performing the work at the hospital, which she believed constituted Medicare fraud. *Id.*

Janaki is Terminated by CPG and the Hospital. Dr. Janaki was summoned to a meeting on August 18, 2017 after she had arrived to work and was terminated on the spot. CR.70, 116. A representative from CPG along with a Human Resource official from the Hospital were present during this meeting where they announced her termination and immediate departure. CR.48. Her employers told her that she was being terminated because of her "behavior and quality of patient care." *Id.* Believing the reason her employers gave for her termination was pretext, Dr. Janaki through her counsel at the time, requested a written explanation for her termination; on August 30, 2017 she received a letter from CPG's Regional Counsel. CR.116. The letter explained in the most relevant part that "**[t]he hospital** informed CPG that it no longer wanted Dr. Janaki to provide services under the CPG contract." *Id.* (Emphasis Added).

Janaki provides termination explanation letter as summary judgment evidence. Dr. Janaki, in her response to Appellees' motions for summary judgment, provided the trial court with this letter showing that it was the hospital that made the ultimate decision to terminate her

and to also show CPG's integrated involvement with the Christus hospitals and cancer centers' personnel decisions:

> I am counsel for CHRISTUS Physician Group ("CPG"). Your letter dated August 24th has been forwarded to me for response. Please confine all CHRISTUS communications regarding this matter to me.
>
> I will not address all the issues raised in your letter due to the large number of inaccuracies. However, I will rectify the primary errors. **The hospital informed CPG that it no longer wanted Dr. Janaki to provide services under the CPG contract.** CPG generously offered Dr. Janaki the option to resign or to be terminated without cause. Dr. Janaki did not indicate whether she wanted to resign, so she was terminated without case. She will be paid for the 90 day notice period, she is eligible for any quality bonus she earned during her employment, and CPG will continue to pay for her insurance.
>
> The standard notice to patients was mailed, as is required by law, and Dr. Janaki still has access to the EHR system to complete her records. Dr. Watts (who was hired to replace Dr. Stewart) is taking over Dr. Janaki's patients and providing all their necessary care. All work performed by Dr. Janaki before her separation will be billed under her number and she will receive appropriate credit for those wRVUs. Any work performed by a different physician will not be billed under Dr. Janaki's number.
>
> Dr. Janaki has requested to reduce her hospital privileges to consulting only. Once she obtains malpractice insurance, she will be able to exercise those privileges.
>
> Sincerely,
>
> Leah Domstead
> Vice-President and
> Regional Counsel

CR.116. (Emphasis added). At the hearing, Appellant's counsel argued that this piece of evidence, at the very least created a material issue of fact as to the control of the hospital as it related to the termination of Dr. Janaki's employment contract and whether or not the hospital was also her employer. RR3.28.

Janaki provides affidavit as evidence to describe the interrelated operations of CPG, the Hospitals, and the Cancer Centers. Dr. Janaki's affidavit stated:

> 1. "My name is **DR. LALITHA JANAKI**. I am over the age of eighteen and have never been convicted of a felony or of a misdemeanor involving moral turpitude. The facts stated below are based on my personal knowledge and are true and correct.
>
> 2. I was employed as a radiation oncologist through a contract with C.H. Wilkinson Physician Network, DBA Christus Physician's Group ("CPG"). I physically worked in cancer treatment centers owned and operated by the following hospitals: Christus Spohn Health Corpus Christi and Christus Spohn Health Corpus Christi Shoreline ("Spohn").
>
> 3. My employment began on June 27, 2014 and I was terminated on August 18, 2017. On August 30, 2017, I received a letter explaining that "the hospital informed CPG that it no longer wanted [me] to provide services under the CPG contract." *See* Exhibit A.
>
> 4. According to this letter from CPG's Regional General Counsel on August 30, 2017, and my understanding of the relationship between CPG and Spohn, Spohn not only directed the firing of employees, such as in my

case, but also controlled and directed the wages relative to RVU's and quality assurance bonuses. *See* Exhibit A.

5. During my time of employment with Plaintiffs, the Hospitals and CPG were an integrated employer because they had common management, interrelation between operations, centralized control of labor relations, and common ownership or financial control. For example, a Human Resources official from Spohn was present during my termination meeting with CPG. And while my salary was determined by the contract with CPG, Spohn dictated wages based on performance relative to RVU's and quality assurance bonuses.

6. CPG employs physicians through employment contracts, such as myself, who treat patients at Spohn hospital facilities. Other hospital employees are employed by Spohn. These two entities are so integrated to where patient care would not be possible without the other. For example, a patient's flow through receiving treatment is as follows: Spohn directs and manages patient referrals and the scheduling of patients that need cancer treatment at the facilities. A Spohn employee receives the patient on the day of consultation. A nurse employed by Spohn will then visit with the patient, but a CPG physician, like myself, must see and evaluate the patient. At this patient evaluation conducted by a CPG physician, a patient signs a consent for treatment, which is generally witnessed by a Spohn employee. After the physician evaluation, a simulation for treatment is performed by Spohn, but a CPG physician prescribes the dose where the Spohn employee calculates the dose. The dose calculations are then verified by a physicist employed by Spohn. And after verification, the calculations and planning are approved by a CPG physician. While Spohn employees deliver the treatment and do quality assurance checks, CPG physicians must evaluate and sign off on treatment plans. Additionally, Spohn hospitals can only collect money and process billing under a CPG physician Medicare and NPI number who provides services to the patients. Spohn cannot operate without CPG physicians, and CPG physicians would not have patients and

> a place to treat them if not for Spohn. The two entities have operations that are so interrelated that they would not be able to function without the other.
>
> 7. I have read the foregoing affidavit, and hereby swear that it is true and accurate based upon my personal knowledge."

CR. 133-134.

At the second hearing, in support of the single integrated enterprise theory showing joint employer status of all appellees, Dr. Janaki's counsel summarized the details of the affidavit to show a genuine issue of a fact concerning the interrelation between CPG and the Hospitals:

> Your honor . . . the patient treatment . . . is provided by both non-employees and CPG physicians, and the argument is clearly made that such an integration of patient care would not be possible without the co-dependency of each other. We provided an example of how the patient care flows through the hands of both CPG and Spohn [hospital and cancer centers]. We pointed out that Spohn directs and manages patient referrals and the scheduling for patients who need cancer treatment. The Spohn employees receive patients on the day of consultation. The Spohn nurses are visiting with the patients while the CPG physicians see and evaluate the patient.

RR3.16-17.

Appellees moved to strike Janaki's summary judgment evidence; the trial court never granted the motion to strike. Appellees argued that the post-termination letter was not properly authenticated and constituted inadmissible hearsay and together with

Dr. Janaki's affidavit were irrelevant to the question of whether she was an employee of the Hospitals and the Cancer Centers. CR.144, 167, 199. Dr. Janaki responded to Appellee's motion:

> Defendants dedicate nearly ten pages in its reply in an attempt to strike Defendant's summary judgment evidence because the evidence without doubt raises a genuine issue of fact. Defendants' argument that the letter from CPG is hearsay is without merit; the letter is a statement by a party opponent, and is not hearsay. Tex. R. Evid. 801(d)(e)(2). Defendants' argument that the letter is irrelevant is also without merit, it goes to the heart of the fact issue of whether the hospital had joint control over Plaintiff as her employer. Defendants' argument that the letter is not properly authenticated is also without merit, Plaintiff in her affidavit identified the letter and testified that she received it from CPG. Tex. R. Evid. 901(b)(1). Additionally, Plaintiff's affidavit is admissible because it was based on her personal knowledge.

CR.244. The trial court did not rule on Appellees' motion to strike Dr. Janaki's summary judgment evidence but instead asked for additional briefing on whether "there is any case law that . . . talks about the single integrated enterprise theory in relationship to hospitals in Texas . . ." RR3.23-24. The trial court subsequently granted each of Appellee's motions for summary judgment.

SUMMARY OF THE ARGUMENT

This appeal turns on how an employer-employee relationship can be defined in the context of Section 161.134. As in the interpretation of

other employment retaliation or discrimination statutes, there is nothing novel to applying the single integrated enterprise theory to establish coverage under the particular statute in issue. Appellees collectively are not entitled to summary judgment with respect to Dr. Janaki's claim of retaliation under Section 161.134 of the Texas Health & Safety Code ("THSC") because Appellant presented competent evidence to the trial court creating genuine issues of material fact showing that CPG, the Hospitals, and Cancer Centers acted in concert jointly as Dr. Janaki's employer with liability under the law. There was evidence before that court that the three defendants jointly were responsible for the termination of Dr. Janaki's employment confirming centralized or joint control of labor operations.

Each Appellee in this case attempted to skirt liability for terminating Dr. Janaki's employment contract after she raised concerns of Medicare fraud occurring in the cancer treatment facilities operated by the hospitals where she worked. CPG's sole argument was that it is not a "hospital" or "treatment facility" under THSC while the Hospitals and Cancer Centers argued that they were not her "employer" under the same statute.

However, Dr. Janaki's summary judgment evidence showed that CPG, the Hospitals, and the Cancer Centers operated as a single integrated enterprise or "single employer" and thus can be recognized under Section 161.134 as a hospital and/or treatment center who employed her. Appellant, at the very least showed there were genuine issues of material fact to survive Appellees' motions for summary judgment.

Appellees attempted to divert the court's attention away from the issues of fact presented to the court by arguing that the single integrated enterprise/single employer factors under the Fifth Circuit's *Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983)* to determine single integrated employer status were inapplicable to Section 161.134 -- simply because the *Trevino* factors have not been previously applied to the statute. At the trial court's request, Dr. Janaki provided examples of when the *Trevino* factors applied to hospitals in Texas in the context of anti-discrimination laws and showed how the theory would consequently be applicable to Section 161.134. The trial court erred in granting the motions for summary judgment and disposing of Dr. Janaki's sole claim. This Court should reverse and remand.

STANDARD OF REVIEW

Texas courts of appeal review the trial court's grant of summary judgment *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A traditional motion for summary judgment requires the moving party to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life*, 128 S.W.3d at 215–16. If the movant carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

In reviewing the grant of summary judgment, the court must credit evidence favoring the non-movant, indulging every reasonable inference and resolving all doubts in his or her favor. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). When the trial court does not specify the grounds for its grant of summary judgment, as is the case here, courts of appeal affirm the summary judgment if any of the theories presented to the court and preserved for appeal are meritorious. *See Provident Life*, 128 S.W.3d at 216.

Courts have held that even if a party objects to an opponent's summary judgment evidence, the evidence "remains part of the summary judgment proof unless an order sustaining the objection is reduced to writing, signed, and entered of record." *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.— Dallas 2003, no pet.); *see also Dolcefino v. Randolph*, 19 S.W.3d 906, 927 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (assuming that error was not preserved so that statements were part of the summary judgment evidence on appeal).

ARGUMENT

I.

The district court erred when it granted CPG's motion for summary judgment because a genuine issue of fact exists as to whether CPG, the Hospitals, and the Cancer Centers are a single employer.

In reviewing the trial court's grant of CPG's summary judgment motion ("motion"), this Court will find that there is credible evidence favoring Dr. Janaki. When indulging every reasonable inference and resolving all doubts in her favor, the trial court erred when it determined that Dr. Janaki did not meet her burden to raise genuine issues of fact to survive summary judgment. The single theory CPG presented to the

court and preserved for appeal, that it is not a hospital or a treatment facility, is not meritorious.

Section 161.134 of the Texas Health and Safety Code prohibits retaliation against employees of hospitals, mental-health facilities, and treatment facilities who report "a violation of law, including a violation of this chapter, a rule adopted under this chapter, or a rule adopted by the Texas Board of Mental Health and Mental Retardation, the Texas Board of Health, or the Texas Commission on Alcohol and Drug Abuse." Tex. Health & Safety Code Ann. § 161.134. The elements of a cause of action under section 161.134 are (1) an employee of a hospital, mental-health facility, or treatment facility, (2) reported a violation of law, (3) to a supervisor, administrator, state regulatory agency, or a law enforcement agency, (4) in good faith, and (5) as a result, the employee was suspended, terminated, disciplined, or otherwise discriminated against. *See Barron v. Cook Children's Health Care Sys.,* 218 S.W.3d 806, 810 (Tex.App.—Fort Worth 2007, no pet.); *see also Word v. Wilson N. Jones Reg'l Health Sys.,* 2007 WL 2421500 *9 (Tex.App.—Dallas Aug. 28, 2007, no pet.) (mem.op.). Appellees did not address the other elements of

Dr. Janaki's retaliation claim in their motions and thus this appeal only addresses the employer-employee relationship issue. CR.34.

CPG's sole argument presented to the trial court in support of its motion was that CPG is a physician's network and Section 161.134 only applies to claims against hospitals, mental health facilities, or treatment facilities, thus the statute is inapplicable to CPG. However, this argument fails because Dr. Janaki's evidence showed that while CPG was the entity who held Dr. Janaki's employment contract, the Hospitals and the Cancer Centers acted as her employer as well. The Hospitals and Cancer Centers determined which physicians they wanted to be employed in their facilities, directing CPG on who to hire and who to fire as seen in the post-termination letter submitted as evidence to the trial court. CR.116. Dr. Janaki was dependent on the Hospitals and Cancer Centers to grant her privileges at those facilities so she could perform her medical practice and receive a paycheck from CPG. RR3. 11. For the purpose of Section 161.134, although Dr. Janaki's employment contract was with CPG, she was also an employee of the Hospitals and Cancer Centers, making her claim against the collective entities appropriate under Section 161.134.

A. The Fifth Circuit's four-part test to determine whether separate entities are a single employer apply to this case.

As a preliminary issue, Dr. Janaki asserts that the Fifth Circuit's four-part test that has emerged -- that superficially distinct entities may be exposed to liability upon a finding that they represent a single, integrated enterprise: "a single employer" -- applies here. *Trevino v. Celanese Corp.*, 701 F.2d 397, 403–04 (5th Cir. 1983). The term "employer" as used in Title VII of the Civil Rights Act was meant to be liberally construed. *Id.* The Fifth Circuit recognized that numerous courts have drawn upon theories and rules developed in the related area of labor relations in determining when separate business entities are sufficiently interrelated for an employee whose Title VII rights have been violated to file a charge against both entities. *Id.*

The test includes considering the following factors in determining whether distinct entities constitute an integrated enterprise, or in other words a single employer: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Id.*

The parties have both acknowledged that the single integrated enterprise or single employer theory has not been applied to Section

161.134. However, courts routinely look to analogous federal law in addition to Texas case precedent to interpret the Texas discrimination laws like the Texas Commission of Human Rights Act ("TCHRA"). *Prairie View A&M University v. Chata*, 381 S.W.3d 500 (Tex. 2012). Courts do so because the Texas statutes were enacted to address the specific evil of discrimination and retaliation in the workplace. *Id.*

This court should similarly look toward federal precedent to interpret the Texas Health & Safety Code when there is no Texas case precedent. Appellee would have this court believe that simply because the four-factor test has not been applied to Section 161.134, that it is inappropriate to do so now. However, this case warrants looking toward federal guidance because like TCHRA, this provision of the Texas Health and Safety Code was meant to protect employees from discrimination and retaliation in the workplace, not to give an employer an "easy out."

The Fifth Circuit's four factor test in *Trevino* has been used and applied in the context of hospitals to determine whether hospital entities and the physician networks that operate together are in fact a single employer for liability purposes in anti-discrimination cases. That four-factor test should be applied here. The trial court asked whether the

theory had ever been applied in the context of hospitals, irrespective to the applicability of Section 161.134, and it has.

For example, in *Johnson v. El Paso Pathology Group, P.A.*, the defendant sued a pathology group and a hospital system in a Title VII action, and the court held that the hospital was a single employer or what the *Johnson* court called "joint employer" under the four *Trevino* factors. *Johnson v. El Paso Pathology Group, P.A.*, 868 F. Supp. 852 (W.D. Tex. 1994), citing *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). The pathology group employed pathologists under contract and supplied them to the hospital system. The court analyzed all four factors, (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control and determined that the hospital system made the final decisions or at least reserved for itself the ultimate decisions regarding the physician employment matters for the pathology group. *Id.* The court concluded that the hospital and the group were a single employer because of those joint decisions, thus could be held liable in the Title VII action. *Id.* at 860. The *Johnson* Court also noted that the plaintiff could not seek work from other hospital systems to earn a living because like the hospital system

in that case, other hospitals dealt exclusively with their own groups of pathologists. *Id.* at 861. The same analysis should be applied here.

Similar to *Johnson*, CPG as a physician's network contracted Janaki's employment and supplied her to work in the Cancer Centers operated and owned by the Hospitals. The hospital system made the ultimate decision to terminate Janaki's employment contract with CPG. Thus, CPG along with the Hospitals and Cancer Centers should be considered a single employer like in *Johnson*. Appellees collectively argue that Dr. Janaki is solely CPG's employee and because CPG is not a hospital or treatment facility, it cannot be liable for the retaliatory termination under Section 161.134. However, CPG's seamless integration and joint decision making with the hospitals and treatment facilities concerning which physicians are to be employed in those facilities dictate that is an integrated enterprise with the Hospitals and the Cancer Centers covered under Section 161.134.

In addition to *Johnson*, other federal courts have analyzed whether the *Trevino* factors apply to hospitals in the context of anti-discrimination laws. In *Williams v. MMO Behavioral Health Systems, LLC*, a behavioral health system and hospital were sued for alleged

discriminatory employment practices under the Age Discrimination in Employment Act "ADEA." 2018 WL5886523*1 (E.D. La Nov. 9, 2018). Under the ADEA an entity cannot be held liable for discriminatory employment actions unless it qualifies as an "employer" under the statute. The Court applied the *Trevino* factors and held that the hospital and the behavioral health system were a single-enterprise because the hospital was involved in the ultimate decision to terminate the employee. *Id.*at *7. The court held that granting the motion for summary judgment the behavioral health system filed would be inappropriate given that the employee cited specific evidence to create a genuine issue of fact as to the behavioral health system's involvement with the hospital's personnel decision, including what extent each entity was involved as the final decision maker regarding the employee's employment with the hospital. *Id.*

Like *Williams*, Dr. Janaki has supplied specific evidence to create a genuine issue of fact as to CPG's involvement with the Hospitals and the Cancer Centers' personnel decisions. Dr. Janaki's Affidavit confirms that representatives from both CPG and the Hospitals were present to terminate her. CR.118. Additionally, while the post-termination letter

was written by CPG's Regional Counsel, it states that the hospital directed CPG to terminate Dr. Janaki's employment contract. CR.116. The trial court did not rule on Appellee's motion to strike Dr. Janaki's summary judgment evidence making these two pieces of evidence part of the record for review.

There is no case precedent that prevents this court from applying the *Trevino* factors to Section 161.134.

B. Application of *Trevino* factors to this case creates an issue of fact that all entities are a single employer.

To prevail on a retaliatory discharge claim under Section 161.134, Janaki must first show that she was employed by a hospital, mental health facility, or treatment facility. Tex. Health & Safety Code Ann. § 161.134. Under the *Trevino* four-part test: Dr. Janaki has provided evidence that creates a genuine issue of fact that the Cancer Centers, the Hospitals, and CPG cannot operate without the other and are thus a single employer. That analysis is below.

1. Interrelation of operations

CPG employs physicians like Dr. Janaki and supplies them to the hospital facilities to treat patients at the Cancer Centers. The

interrelation of operations is illustrated by how employees employed by the Hospital together with physicians employed by CPG provide cancer treatment to patients at the Cancer Centers. CR.118. The entities are so integrated that patient care would not be possible without the others. *Id.*

For example, a patient's flow through receiving treatment at a cancer center is as follows: The Hospital directs and manages patient referrals and the scheduling of patients that need cancer treatment at the facilities. *Id.* A Hospital/Cancer Center employee receives the patient on the day of consultation. *Id.* A nurse employed by the Hospital/Cancer Center will then visit with the patient, but a CPG physician sees and evaluates the patient. *Id.* At this patient evaluation conducted by a CPG physician, a patient signs a consent for treatment, which is generally witnessed by a Hospital/Cancer Center employee. *Id.*

After the physician evaluation, a simulation for treatment is performed by a Hospital/Cancer Center employee, but a CPG physician prescribes the dose where the hospital or cancer center employee calculates the dose. *Id.* The dose calculations are then verified by a physicist employed by the Hospital/Cancer Center. *Id.* And after verification, the calculations and planning are approved by a CPG

physician. *Id.* While the Hospital/Cancer Center employees deliver the treatment and does quality assurance checks, CPG physicians must evaluate and sign off on treatment plans. *Id.*

2. Centralized control of labor relations

Courts applying this four-part test in Title VII and related cases have found centralized control of labor relations to mean, "What entity made the final decisions regarding employment matters related to the person claiming discrimination?" *Vance v. Union Planters Corp.,* 279 F.3d 295, 297 (5th Cir. 2002), *citing Trevino v. Celanese Corp.* 701 F.2d 397, 403 (5th Cir. 1983). Here, the letter from CPG's Regional Counsel on August 30, 2017 shows that the Hospital made the final decision to terminate Dr. Janaki's contract with CPG at the Cancer Center. CR.116. The letter serves as a simple admission from a party opponent.

3. Common Management

Janaki has pled in her petition that she held meetings with management of both CPG and the Hospitals in reporting the conduct she thought was Medicare fraud while working at the Cancer Centers. CR.43-51. Also, representatives from CPG and the Hospitals were present during her termination meeting. CR.118.

4. Common Ownership or Financial Control

Additionally, the Hospitals can only collect money and process billing under a CPG physician Medicare and NPI number who provides services to the patients. *Id.* The Hospitals and Cancer Centers cannot operate without CPG physicians, and CPG physicians would not have patients and a place to treat them if not for the Hospitals and Cancer Centers. The entities have operations that are so interrelated that they would not be able to function without the others.

For these reasons, the trial court erred when it granted CPG's motion for summary judgment.

II.

The trial court erred when it granted the Hospitals' motion for summary judgment because it is also Dr. Janaki's employer.

The Hospitals' sole argument in its motion was that the hospital entities were not Dr. Janaki's employer and thus not liable under Section 161.134 which requires an employer-employee relationship. CR.59-62. It is undisputed in the record that all parties agree that CPG employed Dr. Janaki within the confines of being the entity named on her employment contract, paid her wages, withheld her taxes, and provided her with a post-termination letter. CR.100. However, the Hospitals controlled and

directed the physician's wages relative to RVU's (Relative Value Unit is the term used for a reimbursement formula in the Medicare system) and quality assurance bonuses. CR.118. Dr. Janaki relied upon the Hospitals to grant her privileges so that she could practice medicine at the Cancer Centers since she was not allowed to practice outside of her employment contract. RR3.11.

While the Hospitals argue that they are prohibited by law from employing physicians and directing the work of physicians under the corporate practice of medicine doctrine CR.61, RR3.21-22, the evidence Dr. Janaki provided shows at the very least a genuine issue of fact that the Hospitals do control aspects of her employment. As discussed above within the four-factor *Trevino* analysis, the Hospitals direct and control much of the CPG physicians' day to day patient care flow at the Cancer Centers. Most importantly, in determining whether separate entities are liable under anti-discrimination statues as a single employer, courts place the "highest importance" on what entity made the final decisions regarding employment matters related to the person claiming discrimination. *Turner v. Baylor Richardson Medical Center*, 476 F.3d. 337, 344 (5th Cir. 2007). Here, it was the Hospital.

Appellees characterize the application of the single employer theory to THSC Section 161.134 as a wild expansion of law that would wholly undermine statutory construction. CR.190-191, RR3.11. However, not applying the theory would otherwise render the statute meaningless if physicians could never sue the hospitals that clearly act as employers and ultimately not be able to hold them accountable for retaliatory actions.

Appellees suggested that under a plain reading of THSC Section 161.135(a), it would be the more appropriate section for Dr. Janaki to bring her claim under as "a person who is not an employee [of a hospital, mental health facility, or treatment facility] for reporting a violation of law . . ." CR.143, 196. However, the facts of this case do not lend to a binary interpretation of the word employee. Based on the facts in the record, Dr. Janaki is an employee of the Hospitals and Cancer Centers for the purposes of liability. The totality of the circumstances surrounding Dr. Janaki's employment contract with a physician's network who supplies her to work in the Cancer Centers that are owned and operated by the Hospitals, reasonably dictate that she is an employee of all three: CPG, the Hospitals, and the Cancer Centers. Under the Fifth

Circuit test, all entities here are considered a single employer under the law, as courts have interpreted in other anti-discrimination statutes. Contrary to Appellees' statutory construction argument, there is nothing in the construction of Section 161.134 that prohibits the application of the Fifth Circuit's single employer theory.

Discrimination claims under the Americans with Disabilities Act ("ADA") for example, similarly require an employer-employee relationship. 42 U.S.C. § 12112(a). In *Burton v. Freescale Semiconductor, Inc.*, a manufacturer of microchips employed workers through a temporary staffing agency. 798 F.3d 222 (5th Cir. 2015). The manufacturer made the ultimate decision to terminate the employee and after both the manufacturer and the staffing agency held a conference call to discuss the termination, the staffing agency executed it. *Id. at 227.* The Plaintiff filed a claim under the ADA. The manufacturer filed a motion for summary judgment arguing that it was not the plaintiff's employer because it did "not have the authority to hire, fire, supervise, or directly administer disciplinary procedures" to her and additionally "it does not handle payroll, withhold taxes, provided [sic] benefits, worker compensation, or set the terms and conditions of employment for [the

staffing agency's] temps." *Id.* The trial court granted the motion but the Fifth Circuit reversed, holding that a "genuine issue of material fact existed as to whether [the] manufacturer was [an] employer." *Id.* at 222. The court held so because it found the evidence supported the fact that the manufacturer had the right to demand the plaintiff's termination from assignment, that the manufacturer supervised the plaintiff, complaints about the plaintiff were made by the manufacturer's personnel, and most importantly, it was the manufacturer that decided and insisted the plaintiff be fired, thus offering adequate evidence of an employment relationship. *Id.* at 227.

The Hospitals advance similar arguments to escape liability under Section 161.134 here. They also argue that they do not employ Dr. Janaki, that they did not control or direct CPG's physicians with respect to salaries, wages, or other personnel issues, including Dr. Janaki's termination. CR.61. However, like *Burton*, the evidence shows that the Hospitals and CPG together held a meeting to terminate Dr. Janaki, and while the termination was executed through CPG, and assuming that the alleged complaints on her behavior and quality of patient care came from

hospital or cancer center personnel, the ultimate decision to fire Dr. Janaki came from the Hospitals. CR.118, 116, 48.

Here, Dr. Janaki has provided the explanation letter from the physician's network that indicates that the hospital directed her termination. Along with Dr. Janaki's Affidavit that describes the interrelation of operations between the defendant entities, there is specific evidence that is cited that create a genuine issue of material fact as to whether these entities are a single employer. Thus, the trial court erred when it granted the Hospitals' motion for summary judgment.

III.

The trial court erred when it granted the Cancer Centers' motion for summary judgment because it is also Dr. Janaki's employer.

The Cancer Centers' only argument in its motion was that Dr. Janaki is not an employee of the Cancer Centers, thus liability under Section 161.134 is inapplicable to them. As discussed in length above, in reviewing the trial court's grant of the Cancer Centers' motion, this Court will find that there is credible evidence favoring Dr. Janaki, the non-movant, and when indulging every reasonable inference and resolving all doubts in her favor, the trial court erred when it determined that Dr. Janaki did not meet her burden to raise genuine issues of fact to preclude

summary judgment. The single theory the Cancer Center presented to the court and preserved for appeal, that it is not Dr. Janaki's employer, is not meritorious.

The affidavit the Cancer Center provided to the lower court to support it argument, similar to the argument advanced in *Burton*, that it did not employ Dr. Janaki, that the Cancer Centers did not control or direct CPG's physicians with respect to salaries, wages, or other personnel issues along with her termination, is without merit. CR.86, 105. *See Burton*, 798 F.3d 222 (5th Cir. 2015). The Fifth Circuit did not allow the manufacturer in *Burton* to escape liability by placing responsibility for the employee's termination on the staffing agency in an attempt to wash away the stain of liability. *See Burton*, 798 F.3d 222 (5th Cir. 2015). The Fifth Circuit held that the evidence the plaintiff provided to show that the manufacturer made the ultimate decision to terminate the employee was sufficient to create an issue of fact of whether the manufacturer was the plaintiff's employer; the trial court's grant of summary judgment was reversed. *Id.* Here, Dr. Janaki has provided evidence that she worked in the Cancer Centers which are owned and operated by the Hospitals. CR.118. For the purposes of determining who

Dr. Janaki's employer is, the *Trevino* factors show the seamless integration of all entities to provide the requisite patient care to fulfill her employment contract with CPG for the Hospitals and Cancer Centers. Her termination was directed by the Hospital entities which operate the Cancer Centers, executed by CPG, making each entity integrated and liable under Section 161.134 Dr. Janaki's a single employer.

The Cancer Centers, in an attempt to divert the trial court's attention away from Dr. Janaki's competent summary judgment evidence, argued that because the single employer theory has never been applied to Section 161.134 before that it would be inappropriate to now. CR.197. However, this court has the discretion to look toward federal case law, as other courts have done for analogous anti-discrimination statutes, to combat the wrongful treatment of employees who are doing the right thing by reporting illegal activity.

There is no reason this court should not apply the single employer theory to the entities here to afford Dr. Janaki recourse against her employers for collectively terminating her after she reported what she believed was Medicare fraud.

CONCLUSION

Because there is nothing novel to using the Single Integrated Enterprise theory of liability in the context of Section 161.134, this court should reverse and remand the trial court's decision to grant all three motions for summary judgment.

SUBMITTED BY:

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CERTIFICATE OF SERVICE

I certify that on **August 7, 2020**, the foregoing document was served, via email to:

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/s/ Gregg M. Rosenberg
Gregg M. Rosenberg

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief is computer generated, has been prepared in conventional typeface no smaller than 14-point font for text and 12-point font for footnotes, contains 6261 words according to the word count function of the computer program used to prepare this Brief, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1), and otherwise complies with Texas Rules of Appellate Procedure 9.4.

/s/ Gregg M. Rosenberg
Gregg M. Rosenberg

NO. 13-20-00125-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

Dr. Lalitha Madhav Janaki

Appellant

v.

C.H. Wilkinson Physician Network d/b/a Christus Physician Group, Christus Spohn Hospital – Corpus Christi and Christus Spohn Hospital Corpus Christi – Shoreline, and Christus Spohn Cancer Center – Calallen and Christus Spohn Cancer Center – Shoreline

Appellees

Appeal from the 319th Judicial District Court
Of Nueces County, Texas
Cause No. 2017-DCV-4930-G

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CHRISTUS Spohn Hospital Corpus Christi Shoreline……..C

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NO. 13-20-00125-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

Dr. Lalitha Madhav Janaki

Appellant

v.

C.H. Wilkinson Physician Network d/b/a Christus Physician Group, Christus Spohn Hospital – Corpus Christi and Christus Spohn Hospital Corpus Christi – Shoreline, and Christus Spohn Cancer Center – Calallen and Christus Spohn Cancer Center – Shoreline

Appellees

Appeal from the 319th Judicial District Court
Of Nueces County, Texas
Cause No. 2017-DCV-4930-G

TAB A

Filed
9/24/2019 3:51 PM
Anne Lorentzen
District Clerk
Nueces County, Texas

CAUSE NO. 2017-DCV-4930-G

DR. LALITHA MADHAV JANAKI,	§	IN THE STATE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
	§	
	§	
v.	§	OF NUECES COUNTY, TEXAS
	§	
C.H. WILKINSON PHYSICIAN NETWORK, D/B/A CHRISTUS PHYSICIAN GROUP, CHRISTUS SPOHN HOSPITAL – CORPUS CHRISTI, CHRISTUS SPOHN HOSPITAL CORPUS CHRISTI – SHORELINE, CHRISTUS SPOHN CANCER CENTER – CALALLEN, AND CHRISTUS SPOHN CANCER CENTER – SHORELINE,	§	
	§	
Defendants.	§	319TH DISTRICT COURT

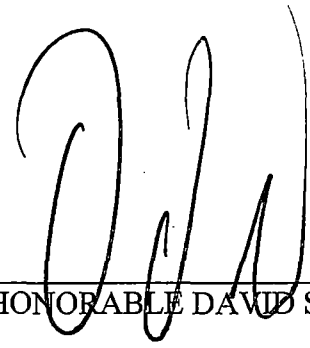
ORDER GRANTING SUMMARY JUDGMENT

ON THIS DAY, the Court considered Defendants CHRISTUS Spohn Cancer Center - Calallen and CHRISTUS Spohn Cancer Center – Shoreline's Motion for Summary Judgment, the pleadings, evidence in support, and any response thereto. The Court is of the opinion that the Motion should be GRANTED. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants CHRISTUS Spohn Cancer Center - Calallen and CHRISTUS Spohn Cancer Center – Shoreline's Motion for Summary Judgment is in all things GRANTED;

IT IS FURTHER ORDERED that Plaintiff TAKE NOTHING against Defendants CHRISTUS Spohn Cancer Center – Calallen and CHRISTUS Spohn Cancer Center – Shoreline as a result of the claims made in the above-captioned lawsuit.

SO ORDERED this 4 day of ~~SEPTEMBER~~ February 2020, 2019.



THE HONORABLE DAVID STITH

AGREED AS TO FORM:

GREGG M. ROSENBERG
Counsel for Plaintiff

DAPHNE ANDRITSOS CALDERON
Counsel for Defendants CHRISTUS Spohn Cancer Center – Calallen and CHRISTUS Spohn Cancer Center – Shoreline

NO. 13-20-00125-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

Dr. Lalitha Madhav Janaki

Appellant

v.

C.H. Wilkinson Physician Network d/b/a Christus Physician Group, Christus Spohn Hospital – Corpus Christi and Christus Spohn Hospital Corpus Christi – Shoreline, and Christus Spohn Cancer Center – Calallen and Christus Spohn Cancer Center – Shoreline

Appellees

Appeal from the 319th Judicial District Court
Of Nueces County, Texas
Cause No. 2017-DCV-4930-G

TAB B

Filed
9/24/2019 3:47 PM
Anne Lorentzen
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Nueces County, Texas

CAUSE NO. 2017-DCV-4930-G

DR. LALITHA MADHAV JANAKI,	§	IN THE STATE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
	§	
	§	
v.	§	OF NUECES COUNTY, TEXAS
	§	
C.H. WILKINSON PHYSICIAN NETWORK, D/B/A CHRISTUS PHYSICIAN GROUP, CHRISTUS SPOHN HOSPITAL – CORPUS CHRISTI, CHRISTUS SPOHN HOSPITAL CORPUS CHRISTI – SHORELINE, CHRISTUS SPOHN CANCER CENTER – CALALLEN, AND CHRISTUS SPOHN CANCER CENTER – SHORELINE,	§	
	§	
Defendants.	§	319TH DISTRICT COURT

ORDER GRANTING SUMMARY JUDGMENT

ON THIS DAY, the Court considered Defendant C.H. Wilkinson Physician Network's Motion for Summary Judgment, the pleadings, evidence in support, Plaintiff's response thereto, and C.H. Wilkinson Physician Network's reply thereto. The Court is of the opinion that the Motion should be GRANTED. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant C.H. Wilkinson Physician Network's Motion for Summary Judgment is in all things GRANTED;

IT IS FURTHER ORDERED that Plaintiff TAKE NOTHING against Defendant C.H. Wilkinson Physician Network as a result of the claims made in the above-captioned lawsuit.

SO ORDERED this FEB - 4 2020 ~~day of SEPTEMBER,~~ 2019.

THE HONORABLE DAVID STITH

AGREED AS TO FORM:

_____
GREGG M. ROSENBERG
Counsel for Plaintiff

_____
DAPHNE ANDRITSOS CALDERON
Counsel for Defendant C.H. Wilkinson Physician Network

NO. 13-20-00125-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

Dr. Lalitha Madhav Janaki

Appellant

v.

C.H. Wilkinson Physician Network d/b/a Christus Physician Group, Christus Spohn Hospital – Corpus Christi and Christus Spohn Hospital Corpus Christi – Shoreline, and Christus Spohn Cancer Center – Calallen and Christus Spohn Cancer Center – Shoreline

Appellees

Appeal from the 319th Judicial District Court
Of Nueces County, Texas
Cause No. 2017-DCV-4930-G

TAB C

Filed
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Anne Lorentzen
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Nueces County, Texas

CAUSE NO. 2017-DCV-4930-G

DR. LALITHA MADHAV JANAKI,	§	IN THE STATE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
	§	
	§	
v.	§	OF NUECES COUNTY, TEXAS
	§	
C.H. WILKINSON PHYSICIAN NETWORK, D/B/A CHRISTUS PHYSICIAN GROUP, CHRISTUS SPOHN HOSPITAL – CORPUS CHRISTI, CHRISTUS SPOHN HOSPITAL CORPUS CHRISTI – SHORELINE, CHRISTUS SPOHN CANCER CENTER – CALALLEN, AND CHRISTUS SPOHN CANCER CENTER – SHORELINE,	§	
	§	
Defendants.	§	319TH DISTRICT COURT

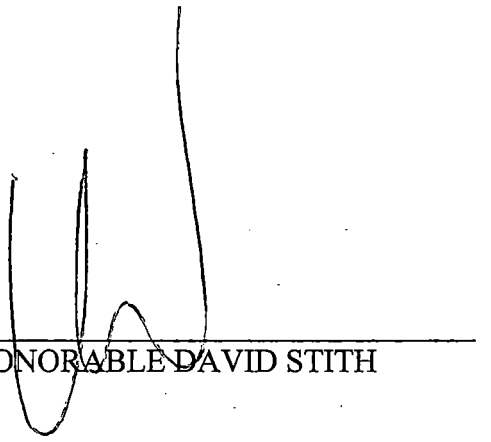
ORDER GRANTING SUMMARY JUDGMENT

ON THIS DAY, the Court considered Defendants CHRISTUS Spohn Hospital Corpus Christi and CHRISTUS Spohn Hospital Corpus Christi – Shoreline's Motion for Summary Judgment, the pleadings, evidence in support, Plaintiff's response thereto, and Defendants' reply thereto. The Court is of the opinion that the Motion should be GRANTED. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants CHRISTUS Spohn Hospital Corpus Christi and CHRISTUS Spohn Hospital Corpus Christi – Shoreline's Motion for Summary Judgment is in all things GRANTED;

IT IS FURTHER ORDERED that Plaintiff TAKE NOTHING against Defendants CHRISTUS Spohn Hospital Corpus Christi and CHRISTUS Spohn Hospital Corpus Christi – Shoreline as a result of the claims made in the above-captioned lawsuit.

SO ORDERED this FEB - 4 2020 day of ~~SEPTEMBER, 2019~~.



THE HONORABLE DAVID STITH

AGREED AS TO FORM:

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Counsel for Plaintiff

DAPHNE ANDRITSOS CALDERON
Counsel for Defendants CHRISTUS Spohn Hospital Corpus Christi and CHRISTUS Spohn Hospital Corpus Christi – Shoreline

NO. 13-20-00125-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

Dr. Lalitha Madhav Janaki

Appellant

v.

C.H. Wilkinson Physician Network d/b/a Christus Physician Group, Christus Spohn Hospital – Corpus Christi and Christus Spohn Hospital Corpus Christi – Shoreline, and Christus Spohn Cancer Center – Calallen and Christus Spohn Cancer Center – Shoreline

Appellees

Appeal from the 319th Judicial District Court
Of Nueces County, Texas
Cause No. 2017-DCV-4930-G

TAB D

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Limited on Preemption Grounds by Castillo v. Brownsville-Valley Regional Medical Center, Inc., Tex.App.-Corpus Christi, Dec. 19, 2013

Vernon's Texas Statutes and Codes Annotated
Health and Safety Code (Refs & Annos)
Title 2. Health
Subtitle H. Public Health Provisions
Chapter 161. Public Health Provisions (Refs & Annos)
Subchapter L. Abuse, Neglect, and Unprofessional or Unethical Conduct in Health Care Facilities (Refs & Annos)

V.T.C.A., Health & Safety Code § 161.134

§ 161.134. Retaliation Against Employees Prohibited

Effective: April 2, 2015
Currentness

(a) A hospital, mental health facility, or treatment facility may not suspend or terminate the employment of or discipline or otherwise discriminate against an employee for reporting to the employee's supervisor, an administrator of the facility, a state regulatory agency, or a law enforcement agency a violation of law, including a violation of this chapter, a rule adopted under this chapter, or a rule of another agency.

(b) A hospital, mental health facility, or treatment facility that violates Subsection (a) is liable to the person discriminated against. A person who has been discriminated against in violation of Subsection (a) may sue for injunctive relief, damages, or both.

(c) A plaintiff who prevails in a suit under this section may recover actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown.

(d) In addition to an award under Subsection (c), a plaintiff who prevails in a suit under this section may recover exemplary damages and reasonable attorney fees.

(e) In addition to amounts recovered under Subsections (c) and (d), a plaintiff is entitled to, if applicable:

(1) reinstatement in the plaintiff's former position;

(2) compensation for lost wages; and

(3) reinstatement of lost fringe benefits or seniority rights.

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(f) A plaintiff suing under this section has the burden of proof, except that it is a rebuttable presumption that the plaintiff's employment was suspended or terminated, or that the employee was disciplined or discriminated against, for making a report related to a violation if the suspension, termination, discipline, or discrimination occurs before the 60th day after the date on which the plaintiff made a report in good faith.

(g) A suit under this section may be brought in the district court of the county in which:

(1) the plaintiff was employed by the defendant; or

(2) the defendant conducts business.

(h) A person who alleges a violation of Subsection (a) must sue under this section before the 180th day after the date the alleged violation occurred or was discovered by the employee through the use of reasonable diligence.

(i) This section does not abrogate any other right to sue or interfere with any other cause of action.

(j) Each hospital, mental health facility, and treatment facility shall prominently and conspicuously post for display in a public area of the facility that is readily available to patients, residents, employees, and visitors a statement that employees and staff are protected from discrimination or retaliation for reporting a violation of law. The statement must be in English and in a second language.

Credits
Added by Acts 1993, 73rd Leg., ch. 573, § 1.01, eff. Sept. 1, 1993. Amended by Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 3.0476, eff. April 2, 2015.

V. T. C. A., Health & Safety Code § 161.134, TX HEALTH & S § 161.134
Current through the end of the 2019 Regular Session of the 86th Legislature

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Kris MBlanco		kris@rosenberglaw.com	8/7/2020 1:04:44 PM	SENT
Renee Nguyen		renee@rosenberglaw.com	8/7/2020 1:04:44 PM	SENT

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