

Blake A. Hawthorne  
Clerk of the Court  
The Supreme Court of Texas  
Supreme Court Building  
201 W. 14th, Room 104  
Austin, Texas 78701

RE: Amicus Curiae Letter: Cause No. 21-0547, *Rahul K. Nath, M.D., v. Texas Children's Hospital and Baylor College of Medicine*, and Cause No. 22-0785, *Rahul K. Nath, M.D., and Usha Nath v. Texas Children's Hospital and Baylor College of Medicine*.

To Mr. Hawthorne and the Honorable Justices of the Texas Supreme Court:

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, I file this amicus letter in the above referenced cause in support of Dr. Nath's Motion for Rehearing and Dr. and Mrs. Nath's Petition for Review.

**Statement of Interest:**

I am a licensed attorney in the state of Texas and an individual who has been personally affected by the recent decisions of this Court pertaining to the right to a civil jury trial. Specifically, I am the adult child of the Petitioners in Cause No. 22-0387, *Thomas Andrew Morrell and Cabrina Morrell v. Martha J. Morrell*, which is currently pending before this Court on motion for rehearing. I have not been paid by any party involved with this case and only submit this brief to highlight the importance of the issues presented in this case and the Nath cases that deserve this Court's review.

### **Position**

My entire legal education has gone hand in hand with the *Morrell v. Morrell* litigation. As I was learning civil procedure in law school, I learned about the importance of a party's right to jury trial and how, despite my previous beliefs and the guarantees of the Texas Constitution, it is not always preserved and protected by trial courts. When the trial court denied my parents a jury trial my concerns regarding the reality of the litigation began to blossom.

After graduating from law school and working as an associate for a small civil litigation firm in east Texas, I gained experience in the importance of having a jury, rather than a judge, determine important questions of fact and damages. I know what to expect going into most courtrooms in Texas and the inherent nature of civil practice. I know from experience that a jury's deliberation and determination of a case is more validating than the determination of a trial court, and particularly from the perception of non-lawyer clients and the public at large. Texas citizens are repeatedly told, including in their childhood education, that if they are involved in litigation they are constitutionally entitled to have their conduct adjudged by a jury of their "peers." I have personally seen through my parents' case that to have those well-founded expectations of a jury trial dashed, as they were for my parents and presumably for Dr. and Mrs. Nath, is deeply distressing. What's more, they have caused my parents—and I expect other non-lawyer clients in a similar situation—to wonder, as 60 Minutes first asked in 1987, "Is Justice for Sale in Texas?" *See 60*

*Minutes: Is Justice for Sale?* (CBS television broadcast 1987), [https://www.youtube.com/watch?v=ob3\\_-Ilf6Vw](https://www.youtube.com/watch?v=ob3_-Ilf6Vw); see also *Justice for Sale*, Interview by PBS Frontline with John Hill, <https://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/hill.html> (“[T]here’s a very widespread perception that there’s an element of favoritism, there’s an element of partisanship, that it matters who your lawyer is, that’s out there. . . . [I]f it’s out there to the extent that people are concerned about coming to Texas or having their legal affairs dealt with in Texas then we ought to take that very, very seriously . . .”).

What I have not come across in my practice is the inherently disturbing behavior demonstrated in the trial courts in *Morrell* and the *Nath* cases. These cases have little in common other than that the trial courts chose to act as the sole triers of fact in each case. When a trial court selects itself to be the sole trier of fact, such an action punishes the party for its counsel’s alleged actions in cases where issues of facts exist.<sup>1</sup> If there is a factual determination to be decided and a jury trial has been requested, even where a party does not timely pay the jury fee, courts have held that a trial court should accord the right to jury trial if it can be done without interfering with the court’s docket, delaying the trial, or injuring the opposing party. *GMC v.*

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<sup>1</sup> The wrongful denial of a jury trial is harmful and requires reversal when the case contains material fact questions. *Halsell v. Dehoyos*, 810 S.W.2d 371, 372 (Tex. 1991)

*Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (citing *Dawson v. Jarvis*, 627 S.W.2d 444, 446-47 (Tex. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Childs v. Reunion Bank*, 587 S.W.2d 466, 471 (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.); *Aronoff v. Texas Turnpike Auth.*, 299 S.W.2d 342, 344 (Tex. Civ. App.--Dallas 1957, no writ); *Erback v. Donald*, 170 S.W.2d 289, 294 (Tex. Civ. App.--Fort Worth 1943, writ ref'd w.o.m.)); *see also Allen v. Plummer*, 71 Tex. 546, 9 S.W. 672, 673 (Tex. 1888). After the trial court chose in the instant cases to deny a jury, each trial court's award was in *complete* favor of the party objecting to a jury. When circumstances such as these are presented to this Court for review, review is necessary to keep fundamental rights from becoming elusive privileges and undermining public confidence in the legal system.

As a concerned citizen and licensed attorney in this great state, I am pleading with this Court to grant Dr. Nath's Motion for Rehearing and Dr. and Mrs. Nath's Petition for Review.

### **Arguments for Rehearing**

This Court has two Motions for Rehearing and a Petition for Review in which to consider whether the denial of a jury trial was wrong. While the substantive issues are different, the constitutional issue is the same: were the Petitioners wrongfully deprived of their constitutional right to a jury? The procedural history of *Nath* is disturbing when viewed as a bystander: the trial court was ordered to reconsider the award of attorney's fees multiple times—under different standards—yet somehow

came up with the exact same \$1.4 million award every time. While this may be a possible valid outcome under certain circumstances, it still warrants a review and explanation by this Court. Absent this Court’s review, the non-lawyer client will most likely be punished for technical and procedural maneuvers made in litigation, and another citizen stands to lose faith in the Texas legal system as a neutral arbiter of parties’ disputes.

**This Court Must Protect the Civil Jury Trial.**

**I. “The Many” is Better than “The Individual.”**

**A. Ancestral Beginnings of the Modern Day Jury**

Currently, the right to jury trial in civil cases seems to be a “hot topic” in this Court, judging from the number of recent cases involving this issue, and that fact only strengthens the argument that this Court should take notice and evaluate the presented issues. The public perception that public officials may be prone to corruption, and that juries, insulated from political or governmental pressure, are less susceptible to such corruption, is not new. Hon. David E. Keltner, *Right to Trial By Jury After Poe: Here For Evermore?* Texas State Bar, Texas Bar CLE 17<sup>th</sup> Annual Fiduciary Litigation, (2022).

This sentiment was first analyzed in Ancient Greece by the likes of Aristotle and has been consistently reinforced for thousands of years. The central idea is that the many may turn out to be better than the virtuous few when they come together,

even though the many may be inferior when considered individually. Miller, Fred, "Aristotle's Political Theory", *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.), <https://plato.stanford.edu/archives/fall2022/entries/aristotle-politics/>.

England further honed and embellished upon the right to jury trial. Sir William Blackstone described that the jury was important to prevent partiality, stating that although judges have integrity, they are derived from a specific set of people and “will have frequently an involuntary bias towards those of their own rank and dignity.”<sup>1</sup> William Blackstone, *Commentaries of the Laws of England* 400 (1768). Almost invariably, when juries did not decide damages, the circumstances are nearly always controversial. Sir William Blackstone cautiously pointed out that countries that had *gradually* not used juries to decide facts became aristocracies. *Id.* Sir Blackstone advised against having questions of facts be determined by a single person:

“But in settling and adjusting a question of fact, when [e]ntrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.” *Id.*

Without quick attention by this Court, Texas runs the risk of forgetting its history and taking steps towards establishing an aristocracy, the most oppressive of absolute governments. *See id.*

The English viewed the jury as a protector against the judiciary, the executive, and the legislature. Although the English jury is largely our historical model, England had a very different system of government that enshrined the jury as compared to the United States.

One of the strongest objections originally taken *against* the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. *Parsons v. Bedford*, 28 U.S. (3 Peters) 433, 446 (1830) (emphasis added). Ultimately, the U.S. Constitution was enacted based on a promise of a Bill of Rights with additional jury protections. Suja A. Thomas, *Blackstones' Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 Wm. & Mary L. Rev. 1196, 1199 (2014). As soon as the Constitution was adopted, the right was secured by the Seventh Amendment of the Constitution proposed by Congress and ratified by the States. *Id.*

The United States has further created a process where juries are selected through an intricate and organized voir dire procedure that provides parties with the opportunity to have a potential juror struck based on bias and prejudices. Yet, the jury trial has begun to fade away, leaving the potential to create a hotbed for the birth of an aristocracy.

## **B. The Fall of the Jury in Civil Trials: Texas Edition**

In Texas, as well as many other states, state judges are public figures voted in. Judges are human beings, and despite the oaths they take, are inherently controlled by certain biases. Such bias has been warned of since the beginning of democracy, “for a few are more easily corrupted by gain and by influence than the many”. Aristotle, *Politics*. 3.5 1286a31-40. The framers of the Texas Constitution recognized that this bias exists, holding the right to jury trial so sacred that it is twice guaranteed in the Texas Constitution. *Matter of Troy S. Poe Tr.*, 646 S.W.3d 771, 778 (Tex. 2022); *see also id.* at 783; Tex. Const. art. I, § 15; art. V, § 10. Texans have the right to trial by jury of all causes if requested and the jury fee paid. *Id.* Even if the jury fee is not “timely” paid, this Court has still stressed the right to a jury trial absent proof of delay, interference, or unfairness. *See Gayle*, 951 S.W.2d at 476.

Yet, civil litigants are finding it harder and harder to preserve this right and to present issues to a jury of their peers, whether by a procedural mechanism used by the trial court to dismiss a case prior to trial or by a technicality enacted by the Legislature, such as the issue presented in the *Nath* and *Morrell* cases.<sup>2</sup> These extra steps devalue the purpose of the system created by the Ancient Greeks, honed by enlightenment philosophers, and implemented by the Founding Fathers of the U.S.

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<sup>2</sup> Other issues which have frequently presented themselves before this Court concerning a civil litigant’s right to jury trial are jury waiver and arbitration provisions. *In re Frank Kent Motor Co.*, 361 S.W.3d 628 (Tex. 2012); *In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex. 2009).



and Texas Constitutions. This Court must actively engage in issues such as the ones presented which concern the right to a jury, or else risk the gradual dismantling of that fundamental right.

Many Justices on this Court recognize that “every new case seems to obscure further the original meaning of the jury-trial guarantees.” *In re Troy S. Poe Tr.*, 646 S.W.3d 771, 782 (Tex. 2022) (Busby, J., concurring, joined by Devine, Young, JJ.). This Court should take the opportunity it has now with the *Nath* cases and *Morrell* to continue correcting the course of our jury-trial jurisprudence, guided by the plain meaning of the constitutional text as it was understood by those who ratified it. *Id.* (citing *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021)).

Protections are already in place to preserve a jury’s *verdict*. For example, trial courts have significant discretion in granting new trials, but such discretion does not permit a trial judge to substitute his or her own views for that of the jury without a valid basis. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 212 (Tex. 2009). The reasoning of this protection is to assure that the court does not simply substitute its judgment for that of the jury, thus depriving the litigants of their right to trial by jury. *Id.* (citing *Scott v. Monsanto Co.*, 868 F.2d 786, 791 (5th Cir. 1989)).

But these protections are only available to those who can jump through the procedural hoops to get their issues before a jury trial in the first place. Whether it is through Rule 216, Rule 11 agreements, or ambiguous statutes, litigants must depend

on their lawyers to constantly navigate around traps set for the unwary to have their disputes heard before a jury. The three cases now before this Court provide a unique opportunity for this Court to revive the ever-dying jury trial in Texas.

## **II. Review by this Court is Warranted.**

With the origins of the jury trial and Sir William Blackstone's warnings in mind, this Court has every reason to grant review in the *Nath* cases. For example, in Dr. Nath's Motion for Rehearing in No. 21-0547, Dr. Nath requested a jury to determine the reasonable and necessary attorney's fees in this case, but each time the jury was denied, despite this Court's multiple grants of review to provide guidance in the proper way of calculating the attorney's fees. The trial court held an evidentiary hearing and considered the proof of attorneys' fees required under *Rohrmoos* to determine the amount necessary for sanctions. This Court has previously held that reasonableness and necessity of an opposing party's attorney fees are fact questions that must be determined, if so requested, by a jury. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019).

According to *Rohrmoos*, the *fact finder* must first determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate. *Id.* The *fact finder* must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee. *Id.* at 501.

In *Nath I*, this Court was careful in not allowing a defendant to “arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for sanctions. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 372 (Tex. 2014). In *Nath II*, this Court required the lower courts to follow the legal and evidentiary requirements of *Rohrmoos* to establish the reasonableness of the fees sought to be shifted. *Nath v. Tex. Children's Hosp.*, 576 S.W.3d 707, 709 (Tex. 2019) Yet, this Court has not explained whether the “legal” requirement of *Rohrmoos* includes the *legal right to a jury trial*, creating another “barnacle” to encrust the hull of the “due process” ship. *Troy S. Poe. Tr.*, 646 S.W.3d at 781 (Busby, J., concurring).

There is no precedent to guide the current issue presented in Dr. Nath’s Motion for Rehearing: whether attorney’s fees awarded under Chapter 10 of the Civil Practice and Remedies Code are subject to the constitutional definition of the word “cause” in Article V § 10 of the Texas Constitution. Courts have identified, on a case-by-case basis, some proceedings that do not qualify as a “cause” under Article V. Section 10:

- *Middleton v. Tex. Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 561-62 (1916) (held that trial by jury cannot be claimed in inquiry that is nonjudicial in character or with respect to proceedings before an administrative board).
- *Hammond v. Ashe*, 103 Tex. 503, 131 S.W. 539, 539 (1910) (orig. proceeding) (held that contested elections are proceedings specially created and controlled by statute, and not "causes" in which the right of trial is secured).

- *Burckhalter v. Conyer*, 9 S.W.2d 1029, 1029-30 (Tex. Comm'n App. 1928, judgm't affirmed) (held that, where the custody and possession of a child is sought by invoking the writ of habeas corpus, neither party is entitled to a jury trial).
- *Tex. Liquor Control Bd. v. Jones*, 112 S.W.2d 227, 229-30 (Tex. Civ. App.-Texarkana 1937, no writ) (held that administrative proceeding to cancel permit to sell liquor is not a civil suit or cause of action and party is not entitled to a jury trial).
- *Cocke v. Southland Life Ins. Co.*, 75 S.W.2d 194, 198 (Tex. Civ. App.-El Paso 1934, writ ref'd) (held that party not entitled to jury trial on incidental matter of objections to receiver's final account filed after final judgment in foreclosure action). *Kruse v. Henderson Tex. Bancshares, Inc.*, 586 S.W.3d 118, 124-25 (Tex. App.—Tyler 2019, no pet.).

In each of these cases, there is some special reason a jury is unsuitable, and none of them involve the determination of the reasonable attorney's fees under Tex. Civ. Prac. & Rem. Code §10. Therefore, a jury should be presumed unless there is some specific reason a jury would be unsuitable. No specific reason exists as to why a jury would be unsuitable in this case.

In *Kruse v. Henderson Tex. Bancshares, Inc.*, the Twelfth Court of Appeals determine that Tex. Const. art. V., § 10 did not support the appellants' request for a jury trial in their suit to determine the value of their dissenters' shares of stock in the business, because the proceeding for determining the fair value of a dissenting shareholder's ownership interest was not a "cause" within the meaning of the provision. *Id.* The court's reasoning was that because the Texas Business

Organizations Code was silent about the right to decide the fair value of the dissenting owner's interest, the court had to determine the Legislature's intent and whether the Texas Constitution required a jury trial in that instance. *Id.* at 122.

Texas Civil Practice & Remedies Code has no statutory guidance to assist with the interpretation of whether § 10.002(c) falls under Tex. Const. Art. V. §10 nor is there any other controlling precedent from this Court. In order to protect a sacred right, this Court should give input as to extent of the reach of Art. V. §10's "all causes" language.

A jury is so fundamental and sacred to the citizen, whether guaranteed by the Constitution, statute, or agreement between parties (as was the case in my parents' lawsuit), that it should be zealously guarded by this Court. Considering the historical lineage of the jury and the current trend of that right becoming less available, this Court has the opportunity to put its foot in the door to keep the jury civil trial door open in Texas.

By not addressing the issues in the *Nath* cases, this Court is allowing the right to a jury in civil disputes to be erroneously applied per the whim of each trial court. This case is exactly the type of case that Justice Busby seeks to open "a robust dialogue about the meaning and implementation of our vital constitutional guarantees of trial by jury." *In re Troy S. Poe Tr.*, 646 S.W.3d 771, 790 (Tex. 2022).

These current cases provide this Court the perfect opportunity to have that dialogue and prevent the further erosion of the civil jury in Texas.

**PRAYER**

For these reasons, I urge that the Court grant Dr. Nath's Motion for Rehearing, reinstate this case on the Court's docket and grant the Petition for Review in No. 21-0547. I further urge that the Court grant Dr. and Mrs. Nath's Petition for Review in No. 22-0785.

Respectfully submitted by,



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/s/ Caitlin A. Morrell

Caitlin A. Morrell

Dated: December 14, 2022

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Caitlin A. Morrell

Dated: December 14, 2022



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