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NO. 20-0923

IN THE SUPREME COURT OF TEXAS

JESUS VIRLAR, M.D. AND GMG HEALTH SYSTEMS ASSOCIATES, P.A., A/KA/ AND D/B/A GONZABA MEDICAL GROUP,
Petitioners,

v.

JO ANN PUENTE,
Respondent.

On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas
Case No. 04-18-00118-CV

PETITIONERS' BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

In accordance with rule 55.3(a) of the Texas Rules of Appellate Procedure, the following is a list of names and addresses of all parties and their counsel:

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioners, Jesus Virlar, M.D. ("Dr. Virlar") and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group ("Gonzaba") (collectively "Petitioners"), seek reversal of the Court of Appeals' judgment in favor of Respondent Jo Ann Puente. In support of their Petition for Review, Petitioners respectfully show:

STATEMENT OF THE CASE

Nature of the Case	This is a medical malpractice action. Plaintiff asserted injuries resulting from a failure to provide thiamine to the patient following bariatric surgery, allegedly resulting in a permanent debilitating condition known as Wernicke's encephalopathy. *See* 8RR131-35[1]. Primary issues in this Court are: (1) whether the settlement credit provisions in Chapter 33 of the Texas Civil Practice & Remedies Code are unconstitutional as applied to Puente, as the court of appeals ruled in denying a $3.3 million settlement credit and instead remanding for a benefits hearing; (2) whether the judgment should be reversed and remanded because the trial court awarded more than $13 million in future medical expenses in lump sum, refusing to order periodic payment under the Texas Medical Liability Act (TMLA), Chapter 74 of the Texas Civil Practice and Remedies Code, Subchapter K; and (3) whether the trial court committed reversible error by making erroneous evidentiary rulings.
Parties in the Trial Court	Although a number of parties were originally sued by Jo Ann Puente ("Puente" or "Respondent") and Maria Esther Carr, Individually and as Guardian of C.P., Puente's minor daughter ("Carr"), *see* 1CR28, most were dismissed or settled before trial. The remaining defendants at the time of trial were Dr. Virlar ("Dr. Virlar") and Dr. Manuel Martinez ("Dr. Martinez"), both employed by the third remaining defendant, GMG Health Systems Associates, P.A. a/k/a

[1] The clerk's record is cited as [vol. #]CR [page #], the supplemental clerk's record as SCR[page 3], the reporter's record as [vol. #]RR[page #], and the supplemental reporter's record as SRR[page #]. The reporter's record volumes containing the parties' exhibits are not paginated, so they are cited as [vol. #]RR[exhibit #].

	and d/b/a Gonzaba Medical Group ("Gonzaba").
Trial Court	This case was tried to a jury. A judgment on the verdict was signed by Hon. Norma Gonzales, 131st District Court, Bexar County, Texas. 3CR5192-205 (App. Tab B).
Trial Court Disposition	The jury found against Dr. Virlar and assessed 60% of the total responsibility against him. 3CR4912 (App. Tab C). The jury assessed the remaining 40% against a settling defendant, Dr. Nilesh Patel ("Dr. Patel"), the bariatric surgeon. *Id*. Another settling party was Methodist Healthcare System of San Antonio, Ltd. d/b/a Metropolitan Methodist Hospital ("Methodist"). Its liability was not submitted to the jury. *Id.* Methodist settled with C.P. 1CR1447. The order approving the settlement recited that Methodist was released from all claims by Plaintiffs, including Puente. 1CR1528. C.P. and Carr non-suited all their other claims and thus were no longer parties at trial. 1CR1527. Judge Gonzales signed a judgment on the verdict, awarding Puente $14,109,349.02 against Gonzaba and Dr. Virlar, jointly and severally. 3CR5192-205.
Parties in the Court of Appeals	Petitioners, Gonzaba and Dr. Virlar, were the appellants. Respondent Puente was the appellee. During the appeal, Puente died.
Court of Appeals and Disposition	In the Fourth Court of Appeals, the original panel was comprised of Chief Justice Sandee Bryan Marion, Justice Patricia O. Alvarez, and Justice Lisa A. Rodriguez. After argument, the court of appeals submitted the case en banc sua sponte. No opinion was ever issued by the panel. The en banc court issued three opinions, all authored by Justice Lisa A. Rodriguez. In all three opinions, Chief Justice Marion and Justice Alvarez dissented on the settlement credit issue. In all three opinions, the court

	denied a new trial requested on the basis of evidentiary rulings. The third and final majority opinion largely affirmed the judgment, with a voluntary remittitur of a small portion of the lost wages award that is not at issue before this Court. The opinion is *Virlar v. Puente*, No. 04-18-0118-CV, 613 S.W.3d 652 (Tex. App.—San Antonio 2020, pet. filed) (App. Tab A) ("*Virlar III*"). More specifically, the court held that Petitioners (1) had not presented sufficient evidence to entitle them to periodic payments under the TMLA and (2) were not entitled to a $3.3 million settlement credit for the settlement between Methodist and C.P. under Chapter 33 of the Texas Civil Practice & Remedies Code because the settlement credit provisions violate the Open Courts Provision of the Texas Constitution. The court concluded that Petitioners raised a presumption they may be entitled to a settlement credit under the common law. *Virlar III*, at 697-98. The court remanded the case for a hearing to determine whether and to what extent Puente had benefited from her daughter's settlement with Methodist, which would entitle Petitioners to a credit in the amount of that benefit. *Id.* at 698. Further, the court denied the request for a new trial based on asserted evidentiary errors. *Id.* at 671, 680, 682. In the first opinion, the court made the same ruling on the settlement credit issue that it ultimately did in is third opinion, as set forth above, but it also remanded for a determination on the request for periodic payments because the trial court abused her discretion in deciding not to award any periodic payments. A new trial based on evidentiary errors was denied. *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 557735 (Tex. App.—San Antonio Feb. 5, 2020) (App. Tab. G) ("*Virlar I*"). In the second opinion, the court merely denied a

	voluntary remittitur by Puente of part of the settlement with Methodist, namely, $434,000. *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 2139313 (Tex. App.—San Antonio May 6, 2020) (App. Tab H) ("*Virlar II*").

STATEMENT OF JURISDICTION

This Court has jurisdiction under the Texas Government Code because the appeal presents at least two questions of law that are important to the jurisprudence of the state. TEX. GOV'T CODE § 22.001(a).

The first important question is whether the statutory provisions requiring application of a settlement credit to Puente's recovery found in Chapter 33[2] of the Texas Civil Practice and Remedies Code, violate the Open Courts Provision of the Texas Constitution as applied here. The opinion below is the only appellate decision that addresses this issue, as this and other courts have always treated the provisions as valid. The Legislature, not to mention the bench and bar, needs to know if the lower court has uncovered a constitutional defect that other courts and litigants have missed.

The second important question concerns unresolved issues regarding the periodic payments provisions of Subchapter K of Chapter 74 of the Texas Civil Practice & Remedies Code (§§74.501-.507). Even after this Court's opinion in *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020), the

[2] Unless specified otherwise, all references to Chapter 33 and Chapter 74 herein refer to Chapter 33 (and its various sections) and Chapter 74 (and its various sections), respectively, of the Texas Civil Practice and Remedies Code.

findings and proof necessary to establish the right to such payments remain uncertain, and an opinion by this Court would bring needed clarity to the State's jurisprudence.

ISSUES PRESENTED

Issue One

Chapter 33 Settlement Credits and Open Courts

Texas law requires the trial court to reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of all settlements to the claimant—the dollar-for-dollar settlement credit. And the law provides that a single "claimant" in a personal injury case includes all those who bring derivative claims for their own damages due to the personal injury to another.

The Court of Appeals held that applying Chapter 33's dollar-for-dollar settlement credit based on the hospital's settlement with the Plaintiff's child would unconstitutionally restrict the Plaintiff's well-established common-law right to recovery in her medical malpractice claim. Did the court of appeals err in holding that applying of Chapter 33's settlement credit provisions on these facts would violate the Open Courts Provision of the Texas Constitution?

Issue Two

Chapter 74 Periodic Payments

Texas law requires that, at the request of a defendant physician or health care provider, the trial court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by lump sum.

Did the Court of Appeals err in holding that Petitioners failed to meet their post-trial burden to provide sufficient information for the trial court to fashion a judgment awarding periodic payments of future medical, health care, or custodial services?

Issue Three

Exclusion of Evidence Relevant to Percentages of Responsibility of Responsible Third Parties

Did the Court of Appeals commit reversible error in affirming the trial court's harmful exclusion of expert testimony from the claimant's neurologist concerning the responsibility of various responsible third parties for Puente's injuries?

Issue Four

Admission of Irrelevant and Prejudicial Evidence

Did the Court of Appeals commit reversible error in affirming the trial court's harmful admission of evidence about Dr. Virlar's loss of privileges at Memorial Methodist Hospital and alleged bad acts in treating other patients?

STATEMENT OF FACTS

A. Puente's Injury

In late 2011, Dr. Patel, who is not affiliated with Gonzaba, performed gastric bypass surgery on Puente at Southwest General Hospital. 25RR131. A month later, to address surgical complications, Puente underwent an outpatient procedure with Dr. Patel at Methodist. 7RR110-11. A few days later, following other doctor visits, Puente returned to Methodist, where she was admitted to the ICU by Dr. Martinez, a hospitalist and the first physician employed by Gonzaba to see Puente. 7RR126; 11RR7; 19-20, 108. Two days later, Dr. Virlar, another hospitalist with Gonzaba, replaced Dr. Martinez as attending. 11RR9-10; 12RR1220.

Throughout her complicated and lengthy hospitalization, Puente was treated by Dr. Patel and many other physicians and providers unaffiliated with Gonzaba, as well as by Dr. Virlar. *See* 10RR15-20; DX29-31. Dr. Patel settled before trial and testified that he relied on other doctors for Puente's nutritional care, although he admitted that he managed the oral nutrition of his surgical patients. 5RR143; 18RR158.

At discharge, Puente was quadriplegic, although by trial she had limited movement of her lower extremities. 8RR145-46. Further, Puente had debilitating and persistent memory impairment. 8RR146.

Although the cause of and responsibility for Puente's outcome was hotly disputed, the jury agreed with Puente's position: she was unable post-operatively to take nourishment by mouth; her intravenous nutrition did not include thiamine; as a result, she developed severe thiamine deficiency, unnoticed by her doctors; that led to Wernicke's encephalopathy; and the continued failure to add thiamine allowed progression to a permanent neurological condition known as Korsakoff's syndrome. *See* 7RR95, 180-81; 8RR132-35, 145; *see* 10RR174; *see generally* 19RR19-36.

B. The Lawsuit

Puente and her mother, Maria Ester Carr, individually and as guardian for Puente's minor daughter, C.P., sued Dr. Virlar, Gonzaba, Dr. Patel, James Houston, P.A., Angela Garcia, R.D., NITYA Surgical Associates, PLLC d/b/a Texas Bariatric Specialists, LLC, Dr. Martinez, Methodist, and "JKD" (an unknown registered dietician identified only by initials on medical records). 1CR28. Plaintiffs alleged that several defendants' actions, including Dr. Virlar's, resulted in Puente's permanent neurological injuries. 1CR37-38, 90-91, 105-06; 2CR2452-53; 13RR31-35, 79-90. As a result, Puente would, they claimed, require around-the-clock care for the remainder of her life. 8RR134-36, 154-55, 202-03; 9RR143-28, 177-78; 10RR26; 13RR70.

C. Pre-Trial Settlements

Before trial, Carr settled C.P.'s claims against Methodist for $3.3 million, and Puente simultaneously dismissed her claims with prejudice against Methodist and its associated defendants. *See* 1CR1447, 1527-28, 1533-35; 2RR21-22; *see also* 2CR2446-56. C.P. and Carr non-suited all other claims, so they were no longer parties to the suit. 1CR1527. Puente settled with Dr. Patel and his associated Defendants for $200,000. 3CR5144; 21RR11. By trial, only Dr. Virlar, Gonzaba, and Dr. Martinez remained as defendants. *See* 3CR4911.

D. Jury's Verdict

The jury found both Drs. Virlar and Patel liable, assessing 60% responsibility to Dr. Virlar, 40% to Dr. Patel, and 0% to Dr. Martinez. 3CR5195-5205. The jury awarded Puente $133,202.00 for loss of past and $888,429.00 for loss of future earning capacity, as well as $13,263,874.86 for future medical care expenses. 3CR5202.

Post-trial, Petitioners requested that dollar-for-dollar credits for both settlements be offset and that future damages be awarded in periodic payments. 3CR4046-5121, 3CR5137-43.

E. Trial Court's Judgment

The trial court granted a full $200,000 credit for Patel's settlement but denied any credit for Methodist's $3.3 million settlement and ordered that all damages be paid in lump sum.[3] 3CR5192-94.

F. Court of Appeals' Opinions

Petitioners appealed to the Fourth Court of Appeals, which issued three sets of opinions as set forth in the Statement of the Case. Puente died during the appeal's pendency, but the parties are proceeding as if she were alive. TEX. R. APP. P. 7.1(a). The Court of Appeals held that the evidence did not support the jury's full award of loss of future earning capacity, accepted a remittitur, and modified the judgment on that damages issue. It remanded for the trial court to conduct a benefits analysis pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002), to apply an appropriate settlement credit, if any, and it affirmed the trial court's judgment in all other respects. *Virlar III*, at 704.

SUMMARY OF THE ARGUMENT

The court of appeals erred in holding that Chapter 33's settlement credit provisions, as applied to the facts of this case, violate the Open Courts Provision of the Texas Constitution. Chapter 33 requires that all those who seek recovery for a

[3] Although Petitioners requested findings of fact and conclusions of law regarding the trial court's rulings on the settlement credit and the order for lump-sum payment of all damages, the trial court declined to do so. 3CR5232-5240.

person's injury, whether they are injured themselves or merely suing derivatively, constitute the "claimant" for purposes of applying settlement credits against the final judgment. This provision, first passed in 1987, does not withdraw a well-recognized common law remedy. The issue has been within the Legislature's exclusive purview for more than a century, and even before that was not governed by a well-settled common law rule. In these circumstances, the Constitution is simply not implicated. Beyond that, defining 'claimant' to eliminate settlement manipulations is not an arbitrary or capricious legislative action.

The Court of Appeals also erred in failing to reverse the trial court's failure to order periodic payments as mandated by Subchapter K of Chapter 74. Unlike in *Detrick*, the record here was more than sufficient to permit the court to determine both that Petitioners had demonstrated financial responsibility and that Petitioners had demonstrated that some ascertainable amount of future medical expenses should be awarded in periodic payments. If this Court concludes that *Detrick* mandates that more be shown, then this cause should be remanded in the interest of justice so that the legislative requirement may be satisfied.

Finally, a new trial is required because evidence was excluded that prevented the submission of other health-care providers as responsible third parties and inflammatory and irrelevant evidence was admitted about Dr. Virlar's

unrelated loss of hospital privileges and his equally unrelated treatment of another patient.

ARGUMENT AND AUTHORITIES

I. Petitioners are entitled to a settlement credit for C.P.'s settlement.

Under Chapter 33 of the Texas Civil Practice and Remedies Code, Petitioners are entitled to a dollar-for-dollar settlement credit to be applied against the damages awarded to Puente. TEX. CIV. PRAC. & REM. CODE § 33.012. Before trial, Puente's daughter C.P. settled for $3.3 million with the hospital. Following the settlement, Puente, Carr, and C.P. non-suited their claims against the hospital. Chapter 33's settlement credit provision treats Puente and C.P. as a unitary claimant, and thus requires that Puente's damages award against the non-settling defendants, Petitioners here, be reduced by the settlement amount.

While the court of appeals acknowledged that Chapter 33 on its face entitles Petitioners to a credit for C.P.'s settlement with the hospital, the court refused to follow that provision and apply that credit. Instead, relying largely on this Court's inapposite decision in *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), the court of appeals concluded that, as applied, the settlement credit provision violated the Open Courts Provision of the Texas Constitution. TEX. CONST. art. I, § 13; 613 S.W.3d at 693. The court of appeals erred by analogizing the settlement credit provision with a damages cap, causing it to conclude that the settlement credit

constituted a restriction on a common law right, It also erred by ignoring, or at the very least minimizing, the legislative basis for the settlement credit provision.

The court's decision was wrong. Far from restricting a well-recognized common law right, Chapter 33's settlement credit provision is merely an appropriate legislative codification of the common law's one-satisfaction rule. In treating litigants situated as Puente and C.P. as a unitary claimant, the Legislature recognized that some plaintiffs had manipulated settlements to avoid the application of Chapter 33's settlement credit provision —a concern recognized in this Court's opinion in *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). Because the Legislature sought to assure that the common law's one-satisfaction rule was uniformly applied without collusion, the provision does not improperly restrict a common law right, nor is it arbitrary and unreasonable. This Court should reverse the court of appeals' holding on the Open Courts challenge and either reform the judgment or remand to the trial court with instructions to apply a credit for the full amount of C.P.'s settlement.

A. Pursuant to the unambiguous terms of Chapter 33, Petitioners are entitled to a settlement credit for C.P.'s settlement with Methodist Hospital.

Section 33.012(c) provides that "if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect

to a cause of action by an amount equal to one of the following, as elected by the defendant: (1) the sum of the dollar amounts of all settlements; or (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact." TEX. CIV. PRAC. & REM.CODE § 33.012(c). The statute further defines "claimant" as:

> a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, 'claimant' includes:
>
> > (A) the person who was injured, was harmed, or died or whose property was damaged; and
> >
> > (B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.

Id., § 33.011.

As Puente is "the person who was injured" and C.P. is a "person who [sought] recovery of damages for the injury [and] harm" to Puente, together they are a unitary claimant by the terms of § 33.011. The court of appeals recognized that Petitioners had proved the amount of the hospital's settlement with C.P. *Virlar III*, 613 S.W.3d at 687. Therefore, given Petitioners' election of a credit for "the sum of all the dollar amounts of all settlements," the provision entitles Petitioners to a reduction of damages in the dollar amount of C.P.'s settlement with Methodist Hospital, under § 33.012.

B. The Court of Appeals erred in concluding that § 33.012, as applied here, violates the Open Courts Provision of the Texas Constitution.

In declining to reform the trial court's judgment by applying the credit, the court of appeals held that this Court's decision in *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), required it to strike down § 33.012 as applied to these facts. *Lucas* does not control here. In that case, the Court struck down an inflation-adjusted cap on non-economic damages in medical malpractice actions. The Court of Appeals read *Lucas* as supporting the broad proposition that "pursuant to the Open Courts Provision of the Texas Constitution, the Legislature may not restrict the recovery of economic damages in a common law medical malpractice action." *Virlar III*, at 691. But, *Lucas,* whether rightly or wrongly decided (its holding has since been superseded by the adoption of Section 66 of Article III of the Texas Constitution on September 13, 2003), does not sweep so broadly.

The Open Courts provision of the Constitution of Texas provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art I, § 13. This Court has applied that language to encompass three constitutional guarantees:

> 1) courts must actually be operating and available; 2) the Legislature cannot impede access to the courts through unreasonable financial

> barriers, and 3) meaningful remedies must be afforded, so that the Legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.

Trinity River Auth. v. URS Consultants, Inc.-Texas, 889 S.W.2d 259, 261 (Tex. 1994) (quotation omitted).

The court of appeals concluded that Chapter 33's settlement credit provision violates the third guarantee. This Court has articulated the standard for the third guarantee as "[L]egislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's lands, goods, person or reputation is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare." *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955). To establish such a violation, a litigant who challenges a statute "must satisfy two criteria: 'First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.'" *Trinity River*, 889 S.W.2d at 261 (quoting *Sax*, 648 S.W.2d at 665). Puente cannot show either prong.

1. *Applying a settlement credit does not withdraw a cognizable common law cause of action.*

As to the first prong, applying a settlement credit for the amount of C.P.'s settlement to Puente's damages award does not restrict a well-established common law right. The court of appeals concluded that Puente established the first prong without analysis. *Virlar III*, at 692. The court's holding failed to examine either the nature of Puente's common law right or how Chapter 33's application would actually restrict that right. The court of appeals simply held that because a medical malpractice cause of action "is a common law cause of action," Puente established the first prong. *Id.* That simplistic approach is incorrect.

First, the court of appeals failed to acknowledge that the common law right to recover in negligence actions has historically been limited by some iteration of a "one satisfaction" rule, which was manifested by various contribution and proportionate responsibility schemes. Section 33.012's settlement credit provision is merely the latest in a series of legislative codifications about the application of those principles. Second, even if the provision somehow changed the common law, it would not be a restriction because it only limits recovery by the amount of the *recovery already obtained.* Thus, the settlement itself is an "alternative remed[y]" for the reduction in the plaintiff's damages. *Lucas*, 757 S.W.2d at 691. In no way is this provision an "effective abrogation" of a plaintiff's remedy, as

required to establish a violation. *Sax v. Voteller*, 648 S.W.2d 661, 667 (Tex. 1983).

At common law, the one satisfaction-rule provided that "a plaintiff is entitled to only one recovery for any damages suffered." *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 106 (Tex. 2018); *Utts v. Short*, 81 S.W.3d 822, 831 (Tex. 2002). But the precise nature by which the common-law right to one recovery operated when some but not all parties to the same side of a dispute settle while others go to trial, as happened here, was never settled under the common law. The confusion over what constituted the common-law principle and how it was to be applied merely underscores that no "well-established" common law restriction existed to be legislatively impinged. Gus M. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947).

Indeed, this Court has described the operation of how the one-satisfaction rule applied under the common law and various prior statutes as "chaos." *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 768 (Tex. 1964). Various courts, including this one, had sought to implement common-law settlement schemes that honored the one-satisfaction rule, balanced the competing interests of the settling and non-settling parties, and encouraged and honored settlements. *Id.* at 767-68. Different approaches in applying a settlement credit emerged, including (1) denying a non-settling defendant the right to contribution or a settlement credit

while allowing the plaintiff a full recovery, (2) allowing the plaintiff to recover the full amount of damages minus the amount of the previous settlement, and (3) "allowing the plaintiff to recover only one-half of the damages found by the jury," regardless of whether the earlier settlement was more or less than half the size of the verdict. *Id.* at 767.

To rectify the common law's confusion, the Legislature has adopted a series of several contribution statutes. The first, in 1917, provided for pro-rata contribution among joint tortfeasor-defendants when the settling defendant was not submitted to the jury, but did not provide for contribution when one tortfeasor settled and was no longer a defendant. Acts approved Mar. 30, 1917, 35th Leg., R.S., ch. 152, § 1, 1917 Tex. Gen. Laws 360, 360. Thus, in *Bradshaw v. Baylor University*, 84 S.W.2d 703 (Tex. 1935), the Court construed the common-law one-satisfaction rule and concluded that a non-party's settlement payment must be credited against the plaintiff's recovery. Then, in 1973, the Legislature enacted article 2212a, which eliminated the common law defense of contributory negligence and instead required that damages be awarded in proportion to the fault of the parties. TEX. REV. CIV. STAT. ANN. art. 2212a. In 1985, the Legislature adopted Chapter 33 to govern proportionate responsibility. Among its provisions were specifics about when and how settlement credits would be warranted. Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. In 1987, Chapter 33 was updated

to provide that if a "claimant" settles "with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by credit equal to . . . the sum of the dollar amount of *all* settlements . . . ." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.08, sec. 33.012, Tex. Gen. Laws 42. Simultaneously, the Legislature adopted the definition of "claimant" under Chapter 33 to include not only a "party" seeking damages for injury, but any other party "who seeks recovery of damages for injury to another person." *Id.*, § 2.07, sec. 33.011(1), 1987 Tex. Gen. Laws 37, 41 (amended 2003).

In 2003, through tort reform legislation (House Bill 4), the Legislature further amended the definition of "claimant" to change "party" to "person," and added subparts (A) and (B) of the current definition—to include all derivative claimants whether the claimant is "seeking, has sought, or could seek" damages for the injury or death giving rise to the litigation in question. Act of June 2, 2003, 78th Leg., R.S., ch. 204, §4.05, 2003 Tex. Gen. Laws 847, 857 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(1)).

Courts and commentators have recognized that the reform expanded the meaning of "claimant" to include those like C.P. "The effect of the H.B. 4 amendments was thus to expand 'claimant' to encompass not only derivative plaintiffs who are actually asserting claims, but any person who could potentially assert such a claim." *Smith v. East*, 411 S.W.3d 519, 527 n.10 (Tex. App.—Austin

2013, pet. denied) (emphasis added). "The new definition of claimant . . . includes everyone who is in a position to make an actual or potential derivative claim. As a result, payments made in settlement of a derivative claim will be credited against the recovery of another derivative claimant." Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Two*, 36 Tex. Tech L. Rev. 51, 104-05 (2005) (emphasis added) (explaining that prior ambiguity of "claimant" illustrated in *Utts* was resolved by expanding definition of "claimant" in Chapter 33). Chapter 33 is thus but the latest in a series of legislative codifications of a long-recognized but never precisely articulated or well-settled common law principle. *See generally*, Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEX. TECH L. REV. 1125 (2004); Russell H. McMains, *Contribution and Indemnity Problems in Texas Multi-Party Litigation*, 17 ST. MARY'S L.J. 653 (1986).

The court of appeals acknowledged that Chapter 33 is based on the one-satisfaction rule, 613 S.W.3d at 685, but it failed to recognize that a statute cannot "abrogate[] a well-established common law cause of action" where the common law right to recovery was similarly restricted. *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 262 (Tex. 1994). This is a far cry from the situation in *Lucas*, in which the damages cap was enacted not to codify or regularize a common-law principle, but to respond to a policy issue—the

restriction of health-care services availability caused by the rapid increase in medical malpractice insurance rates. *See Lucas*, 757 S.W.2d at 693 (Gonzalez, J., dissenting). That Chapter 33 restricts Puente's ability to recover the full amount awarded by the jury for her medical malpractice claim does not establish the first prong of an Open Courts violation. *Virlar III*, 613 S.W.3d at 692.

By broadly defining which individuals constituted the "claimant," the Legislature sought to ensure that the one-satisfaction rule was fully and uniformly implemented, without the opportunity for a family of plaintiffs colluding to obtain more than a full recovery. *See infra* § I.B.2. And, as in this Court's opinion in *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504 (Tex. 1995), application of the statute, per its terms—here, treating Puente and C.P. as a unitary claimant—reduces Puente's recovery less than other common-law and statutory implementations of the one-satisfaction rule. *Id.* at 520 (upholding new workers' compensation statute that provided for "more limited but more certain recovery," than that provided at common law). For instance, allowing Puente to recover only half of the damages found by the jury, as was done under the common law in *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1008 (Tex. Comm. App. 1932, holding approved), would have reduced her damage award by significantly more than the Legislature's definition of claimant does here.

Thus, the application of C.P.'s settlement credit to calculate Puente's damages is a far cry from an absolute bar to Puente's right to bring suit or to recover a remedy.

To equate the settlement credit with a damages cap is wrong. They are distinguishable not just in degree, but in kind.

Lucas stands as the lone precedent in which this Court has held that a statute that only partially restricts a common law right to recovery violates the Open Courts provision. It has never been cited by this Court to hold that another statute is unconstitutional. Instead, this Court has distinguished *Lucas*, describing its holding as "very limited." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000); *see also Rose v. Doctors Hosp*., 801 S.W.2d 841, 842 (Tex. 1990).

To the extent that *Lucas* remains good law after the constitutional amendment found at Art. 3, Section 66 of the Texas Constitution, it nonetheless is qualitatively different from the situation here. While the damages cap found to be an unconstitutional restriction in *Lucas* reduced the plaintiff's damages to a fixed amount, it reduced the damages recoverable without consideration of the magnitude of the injury and without any alternative way to obtain relief. As the Court there recognized, the damages cap would most significantly affect the damages award for the most severely injured plaintiffs. *Lucas*, 757 S.W.2d at 692.

Here, in contrast, the recoverable damages are limited only by the amount that Puente's daughter had already received, and a settlement credit does not present a disproportionate reduction on the recoverable damages only to a certain set of plaintiffs. For these reasons, Puente cannot establish the first prong of her Open Courts challenge.

2. *Applying a settlement credit is not an unreasonable or arbitrary restriction.*

Even if applying a settlement credit against Puente's recovery pursuant to the terms of § 33.012 were deemed to restrict a common law right, doing so would not violate the Open Courts provision because the settlement credit provision is neither unreasonable nor arbitrary. *See Sax*, 648 S.W.2d at664-65 (holding "that the right to bring a well-established common law cause of action cannot be effectively abrogated by the Legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress. In applying this test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected"). In considering the purposes underlying Chapter 33, and whether those purposes provided the settlement credit with a reasonable basis, the Court of Appeals improperly looked only to *Lucas* to hold that the settlement credit provision was functionally equivalent to a damages cap.

The court should have looked closer at *Lucas*'s approach to an Open Courts analysis. After holding that a cognizable common-law remedy had been withdrawn, the Court then balanced the restriction there—a damages cap—against the Legislative purposes that motivated the statute. The Court held that the purposes did not justify the restriction for three reasons. First, the Court concluded that the fact that the damages cap applied without "any adequate substitute to obtain redress" for the plaintiff's injuries. *Lucas*, 757 S.W.2d at 690. Second, the Court decided that there was not adequate legislative justification for the cap because the stated purpose to "'assure that awards are rationally related to actual damages' . . . is a power properly attached to the judicial and not the legislative branch of government." *Id.* at 691. Finally, the Court concluded the damages cap was unreasonable because it applied to "all claimants no matter how seriously injured," and would have the greatest impact on the most severely injured plaintiffs. *Id.* at 691-92.

The Court of Appeals read *Lucas* as an outright ban on any limitation on a damages award in a medical malpractice action. *Virlar III*, at 692. But *Lucas* did not sweep so broadly—there the Court found that the damages cap provision was arbitrary and unreasonable only when balanced against the purposes of the statute. *Lucas*, 757 S.W.2d at 690-93. The Court concluded that because no evidence existed of "any correlation between a damage cap and the stated legislative

purpose of improved health care," *id.* at 691, there was no reasonable basis for the statute. Here, by contrast, the court utterly failed to consider the purposes behind Chapter 33's settlement credit provision.

As discussed above, even an outright ban on a plaintiff's exercise of a common law cause of action might be constitutional if it is justified by the purposes underlying the restriction. For example, in *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283 (Tex. 2010), the Court considered a statute of repose[4] that resulted in an absolute bar to suit for claims even if they could not have been discovered within the repose period and upheld the statute. The Court recognized the "absolute nature" of the statute of repose would result in taking away the right of the plaintiff altogether, "through no fault of" their own. *Id.* at 288. Despite such an admittedly harsh result, the Court explained that the purpose of a repose statute is "to eliminate uncertainties under the related statute of limitations" and to assure that "professionals, contractors, and other actors would [not] face never-ending uncertainty as to liability for their work," provided a reasonable basis for the statute. *Id.* at 286. The Court rejected the plaintiff's argument that the statute was unreasonable "because it cut off her

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[4] TEX. CIV. PRAC. & REM. CODE § 74.251(b), provides:

> A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

right to sue before she had an opportunity to discover her injury," and instead balanced the plaintiff's lost right against "the broader societal concerns that spurred the Legislature to act." *Id.* at 287.

Here too, the Legislature's legitimate concerns that prompted the settlement credit provision outweigh any potential infringement on plaintiff's right of recovery. However, the Court of Appeals simply assumed that the reasons behind Chapter 33's settlement credit were identical to those that supported the invalidation of the damages cap in *Lucas's*. *Virlar III*, at 692. The court ignored the additional and distinct reasons that support the settlement credit. As noted above, Chapter 33's proportionate responsibility scheme, including the settlement credit provision, was adopted to reduce the distortions caused by collusive settlement practices. *See supra* § 1.B.2. Chapter 33 was amended in 2003 to define "claimant" to include "any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of" another person. TEX. CIV. PRAC. & REM. CODE § 33.012. The definition of claimant was expanded in following the Court's decision in *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002), in which a majority of the Court could not agree whether the term "claimant" included a person who, like C.P., settled and was no longer a party to the lawsuit. The Legislature elected to broaden the definition of claimant "to protect defendants from plaintiffs who would manipulate settlements among those 'seek[ing] recovery

of damages for injury to another person.'" *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 97 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

In *Utts*, for example, various family members brought suit against a hospital and two doctors. 81 S.W.3d at 825. After all the family members non-suited their claims against one doctor, one family member-plaintiff, Walker, settled her claim with the defendant-hospital and non-suited the remainder of her claims against the other remaining defendant, so that Walker was no longer a party. Walker thereafter distributed substantial portions of the settlement proceeds to other family members, each of whom then settled with the hospital for $10 apiece but maintained their claims against the other doctor, Dr. Utts. *Id.* Under the then-effective version of Chapter 33, it was not clear whether Dr. Utts was entitled to claim a settlement credit for the Walker settlement, despite the apparent collusion among the plaintiffs to avoid a settlement credit. Thus, the Legislature clarified the definition of "claimant" to prevent apparent or actual collusive settlements. Yet, even though *Utts* was the impetus for the re-definition of "claimant" as it applies here, the Court of Appeals did not even mention the case in analyzing the statute's reasonableness.

In addition to preventing collusive settlements, Chapter 33's settlement credit provision incentivizes defendants to settle. By implementing the common law one-satisfaction rule through a settlement credit, the Legislature made

settlement more appealing to defendants by eliminating the possibility that the non-settling defendant might later seek contribution against the settling defendant. TEX. CIV. PRAC. & REM. CODE § 33.015(d). And, more generally, by dictating the specific way a settlement will affect a plaintiff's recovery at judgment, the statute provides the plaintiff with certainty and predictability when entering into a settlement. This Court has found the encouragement of settlements and the prompt resolution of claims is a valuable and legitimate Legislative objective. *See Carreras v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011).

Thus, the Court of Appeals erred in analogizing the settlement credit provision to the damages cap and concluding that *Lucas* required the invalidation of the statute here. The Legislature's rationale for Chapter 33 as it applies in this case is both reasonable and non-arbitrary. The Court of Appeals' judgment should be reversed, and this Court should reform the judgment to apply the dollar-for-dollar settlement credit to include the $3.3 million settlement amounts paid by Methodist Hospital.

One final note: The Court of Appeals declared the settlement credit provision unconstitutional as applied. *Virlar III*, at 694. The court did not explain why it was not addressing and sustaining a facial challenge. Perhaps the holding would not affect some applications of the settlement credit provision, such as when only one person is suing, that is, when there is no derivative "claimant." What the

court of appeals did, however, was to invalidate the definition of claimant, or at least one aspect thereof, which seems to be more akin to sustaining a facial challenge. *See Garcia*, 893 S.W.2d at 518 (explaining that under a facial challenge, the challenging party contends that the statute, by its terms, always operates unconstitutionally). Regardless of how the holding is characterized, it is wrong for the reasons discussed.

This Court should grant review, reverse the Court of Appeals' judgment, and apply the $3.3 million settlement credit to Puente's recovery.

II. Petitioners are entitled to periodic payments for future medical expenses.

The Court of Appeals also erroneously failed to reform the trial court's judgment awarding lump-sum payment of all damages. Under Chapter 74, Petitioners are entitled to an order that at least a portion of the future medical damages award be paid in periodic payments. The Court of Appeals purportedly relied on this Court's discussion and holding in *Regent Care of San Antonio, L.P. v. Detrick*,[5] issued shortly before the Court of Appeals granted rehearing in this case.

In *Detrick*, the Court announced that "[t]he party requesting an order for periodic payments has the burden to identify for the trial court evidence regarding

[5] 610 S.W.3d 830 (Tex. 2020).

each of the findings required by section 74.503[(c) and (d)], and the findings must be supported by sufficient evidence." 610 S.W.3d at 837. Following the jury verdict, if the trial record does "not contain all of the evidence necessary to make the required findings," the trial court may "receive additional evidence for that purpose," as long as it does not "contradict the jury's findings on any issues." *Id.* at 837-38.

The Court concluded that defendant was not entitled to an order that all future damages be paid periodically because it did not identify evidence of any specific dollar amount of medical expenses that would be incurred periodically. *Id.* at 838.

But the Court of Appeals too narrowly applied *Detrick* here. The record contained the necessary evidence under *Detrick* for the trial court to fashion a periodic payments judgment consistent with the jury's verdict. Even if it did not, Petitioners should have been granted an opportunity to meet their new burden.

A. Chapter 74's periodic payments scheme under *Detrick*

Subchapter K of Chapter 74 of the Texas Civil Practice and Remedies Code provides for periodic payments when the award of future damages equals or exceeds a present value of $100,000. *See* TEX. CIV. PRAC. & REM. CODE § 74.502. In enacting Subchapter K, the Legislature considered that future medical expenses should be funded as the plaintiff needs medical care, for the remainder of her life

expectancy. Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 Tex. Tech Law Rev. 169, 259-60 (2005). This ensures that the lump sum payment of future damages is preserved over the life expectancy of the injured patient, such that future medical care will be attainable when needed. *See Id*. at 253, 259-60. When a claimant does not reach her life expectancy, the obligation to continue to fund them terminates, while the patient's estate will receive the remainder of any unfunded future loss of earnings. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.506(a), (b), (c).

Subchapter K provides, in relevant part:

> At the request of a defendant physician or health care provider or claimant, the court ***shall*** order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

TEX. CIV. PRAC. & REM. CODE § 74.503(a) (emphasis added). The statute makes it *mandatory*, at the request of a heath care provider, to order some or all future medical expenses as periodic payments. *Detrick*, 610 S.W.3d at 836; *Virlar III*, at 698 (citing *Gunn v. McCoy*, 554 S.W.3d 645, 579 (Tex. 2018)).

In ordering periodic payments, the trial court must "make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages," TEX. CIV. PRAC. & REM. CODE § 74.503(c), and "specify in its judgment ordering the payment of future damages by periodic payments the: (1) recipient of the payments; (2) dollar amount of the payments; (3) interval between

payments; and (4) number of payments or the period of time over which payments must be made," *Id.* § 74.503(d).

In *Detrick*, this Court considered application of Subchapter K in the context of a challenge to an award of some of the future medical expenses in periodic payments as unsupported by the record. *Detrick*, 610 S.W.3d at 836. This Court interpreted the statute's requirements, explaining that the trial court may order that an award of future medical expenses be paid periodically either in whole or in part, but the "dollar amount" of the "periodic payments" it orders must be the amount that evidence shows will "compensate the claimant for the future damages." *Id*. at 837 (citing TEX. CIV. PRAC. & REM. CODE § 74.503(c)). Any division between lump-sum payments and periodic payments of damages that will be "incurred after the date of judgment" must be founded in the record. *Id*. (citing section 74.501(1)).

This Court concluded that the party requesting an order for periodic payments has the burden to identify for the trial court evidence regarding each of the findings required by section 74.503, and the findings must be supported by sufficient evidence. *Id.* The trial court has discretion to receive additional evidence for that purpose if the record does not contain the necessary evidence. *Id.* Subchapter K contemplates that attorney's fees will be considered in awarding periodic payments. *Id.* at 838 (citing TEX. CIV. PRAC. & REM. CODE § 74.507).

This Court further concluded that Regent Care was not entitled to reversal—even though the amount awarded to be paid in periodic payments was not supported by the record. *Id.* Regent Care did not point to any evidence supporting its request that all future damages be paid periodically and did not point to evidence of any specific dollar amount of medical expenses that would be incurred periodically. *Id.* The parties presented damages evidence at trial in present value without detailing how the damages were discounted, and the jury's award was in present value dollars. *Id.* The court did not make a finding regarding the amount that would fairly and reasonably compensate Detrick for future medical damages if paid periodically. *Id.* Simply ordering the jury's present-value damages award to be paid in periodic installments (whether in whole or in part) would effectively "double discount" the award, undercompensating the claimant for expenses he would incur in the future. *Id.* at 838-39 (citing section 74.503(c)).

B. The Court of Appeals erroneously determined that Petitioners failed to meet *Detrick* burdens.

After this Court decided *Detrick*, Puente filed a second motion for rehearing. The Court of Appeals held that Petitioners failed to carry their burden under *Detrick* to identify or provide evidence necessary for the trial court to make the section 74.503(c)-(d) findings, so the trial court did not err in declining to order periodic payments. *Virlar III* at 703-04.

The Court of Appeals explained that the evidence was submitted to the jury in present value, the jury's damages were awarded in present value, and the jury was not asked to determine the amount of money that would compensate Puente if paid periodically. *Id*.

The Court of Appeals erred. Unlike in *Detrick*, the trial evidence included the information the trial court needed to award periodic payments. Not only did the record show evidence of financial responsibility for entitlement to periodic payments, but the record also contained the necessary evidence contemplated under *Detrick* for the trial court to exercise its discretion in fashioning a periodic payments judgment consistent with the jury's verdict.

1. *Record evidence supports an award in periodic payments.*

a. The Parties relied on Dr. Fairchild's supplemental report (PX-23) as the evidence the trial court needed to award any periodic payments.

Following the verdict, Petitioners requested that any judgment awarding future medical damages be ordered paid in periodic payments, and therein acknowledged Puente's undisputed life expectancy of 31 years. 3CR5140. In renewed objections to the motion for judgment, Petitioners urged that the trial court should rely on the evidence heard by the jury in awarding future damages to make the determinations required under Subchapter K. 3CR5178.

At the initial post-verdict hearing, Puente's counsel advised the trial court how to determine the future value of the jury's award of future medical expenses damages, based on that trial evidence the jury had before it in awarding damages: PX-23, supplemental report of Keith Wm. Fairchild, Ph.D. ("Dr. Fairchild"). 47RR[PX-23]136-200 (App. Tab E).[6] Puente pointed to the "undiscounted projected future costs" listed in PX-23 for each sub-element of expense included in the life care plan and its component rate of inflation. 21RR19-20; 47RR[PX-23]136-200. Puente explained that using Dr. Fairchild's undiscounted projected future costs contained in PX-23, the actual future value of the $14 million verdict is $23 million. 21RR20.

During trial, Dr. Fairchild explained to the jury that PX-23 takes the life care plan prepared by Puente's expert, Dr. David Altman, and calculates what each item of care costs with inflation—"what the future costs will be." 10RR197-98. He examined each component of the life care plan historically to determine how the cost of each behaves relative to general inflation. 10RR195-96. He used the then-current interest rate on treasury notes (2.03%) to calculate present value. 10RR219-20. The interest rate is used to determine what amount if invested today will cover the future projected costs. 10RR199-20. Dr. Fairchild's computation of

[6] PX-23 is not paginated but is contained in Volume 47 of the Reporter's Record. Petitioners will cite to PX-23 by referencing the pages in Volume 47 where the information is located in PX-23.

present value for the entire life care plan was $16,054,975, and his computation of future value for the entire life care plan was $23,397,367. 47RR[PX-23], (Total of Projected Costs) at 145, 151, 157, 161, 169, 177, 186.

Puente's counsel urged, for various reasons, that Petitioners were not entitled to periodic payments for future medical expenses. First, they argued that Petitioners failed to provide evidence of financial responsibility required under section 74.507 as a condition precedent to an award of periodic payments for an underinsured defendant, that Gonzaba was required to establish financial responsibility in an amount of future damages valued by Dr. Fairchild's report,[7] and in addition, Dr. Virlar must establish financial responsibility[8] because he was underinsured. 21RR17, 20-21. Counsel further contended that Petitioners waived

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[7] The Court of Appeals properly concluded that Petitioners met their burden to provide evidence of financial responsibility. Petitioner Gonzaba, who is jointly and severally liable for the entire amount of the judgment based on the jury's liability finding and assessment of 60% responsibility as to Dr. Virlar, provided evidence of financial responsibility sufficient under Section 74.505 through its balance sheet as confirmed through testimony of Gonzaba's controller. *Virlar III*, at 700-01.

[8] The Court of Appeals also correctly interpreted Section 74.505(a), such that only one jointly and severally liable defendant is required to provide evidence of financial responsibility under this provision. The court explained:

> Assuming the facts of this case—that is, assuming Gonzaba provided evidence of financial responsibility, but its employee, Dr. Virlar, did not—under Puente's interpretation of subsection (a), Gonzaba could be granted its requested relief of making periodic payments but, in practicality, be denied that relief because Puente could seek to collect the entire amount of the joint and several judgment from Gonzaba when Dr. Virlar did not pay the lump sum in full. We conclude the Legislature could not have intended such a result.

Virlar III, at 700-01.

entitlement to periodic payments because they should have pleaded pretrial the application of periodic payments[9] and should have requested jury findings "on future periodic payments and had the jury find how much and with what intervals the damages would have compensated Ms. Puente." 21RR20-22. Puente also urged that Petitioners could not undermine the jury's verdict by reopening the evidence. 21RR18.

Regarding Subchapter K's application, Puente's counsel argued that because the damages finding was in present value dollars, no future value could be computed, and that it would be improper to take the present value award and divide it into 31 payments representing life expectancy. 21RR17-18. Instead, Counsel explained, the only evidence was Dr. Fairchild's report summaries of his evaluation of the present value contained in PX-23 (which he provided to the trial court in a notebook). Counsel demonstrated how to use PX-23 to determine the information required by Subchapter K:

> At the top of the first one, it says: Annual totals of routine outpatient physician services. If you look, there are two columns there. The first column is the undiscounted projected future costs. That's 133,122. The discounted present value same costs is 94,532.
>
> And you will see that on the immediately prior page, Dr. Fairchild tells you what component rate of inflation he uses, 0.96 percent.

[9] The Court of Appeals also properly concluded that no pretrial pleading invoking Subchapter K was required; a request for periodic payments is not an affirmative defense or matter in avoidance. *Virlar III*, at 699-700.

> So what I have done for the Court behind Tab No. 9 is to show you if this statute applies – which I don't believe it does -- and if the Court could mathematically do this, which I don't think the Court can, what the defendant's really asking is that you take what amounts to a 14-million-dollar verdict and turn it into a 23-million-dollar judgment, because that's what it would be.
>
> In order to undiscount the jury's verdict for present value, the ultimate total of the future payments that would have to be made, based on the uncontroverted evidence that exists in the trial records from Dr. Fairchild, is $23,397,000.

21RR19-20.

Petitioners responded, arguing that before an award of periodic payments could be made, the parties needed a determination regarding the amount of settlement credit to be applied to the jury's verdict so the remainder of future medical damages subject to periodic payments could be known. 21RR38. Petitioners provided evidence of Gonzaba's financial responsibility; Petitioners suggested that a lump sum award of attorney's fees be ordered before the court consider periodic payments. 21RR38-39. Petitioners further suggested that one way to order the payments would be to take the remainder future medical divided into 31 payments for Puente's life expectancy, or, based on the trial evidence and the verdict, to award larger amounts in the years toward the end of Puente's life expectancy. 21RR39-41. Petitioners explained that the award must be reasonable based on the evidence presented to the jury and the jury's verdict. 21RR41.

Puente's counsel responded that awarding the present value amount would be improper based on the statute's requirements to determine the amount of money required to compensate Puente in the future. 21RR46. Counsel again urged that the trial court could comply with the requirements of the statute by taking one element from Dr. Fairchild's report—routine outpatient physician services—in the amount of $133,122, then going to Dr. Fairchild's summary sheet showing "the difference between undiscounted and present value, and just say, okay, as to that $94,000 the jury found in present value, I will structure that into $133,000 in yearly payments *because I have the evidence to do that*." 21RR47 (emphasis added).

Puente's counsel continued:

> It is clear under the statute that you need not award all of it. In fact, the statute says that you have got to give us at least half of it in present value upfront to pay the attorneys' fees. The statute says that.
>
> It says you have to first determine that it's 22 or $23 million in the future. You then have to discount it back to present value in order to calculate the attorneys' fees. And it's a clear indication of legislative incident [sic] to have at least half the money paid upfront.

21RR48-49.

Petitioners' counsel also pointed to the evidence before the jury, including that: (1) Puente's undisputed life expectancy was 31 years[10]; (2) Puente's medical

[10] 3CR5140; *see* 9RR161.

needs are greater during the last decade of life[11]; (3) no immediate surgical needs existed to award lump sum[12]; (4) a need for ongoing care was established, so the entire award could be paid out over Puente's life expectancy.[13] Petitioners again urged that Puente's attorney's fees could be paid periodically or lump sum, but that lump sum would be a better practical application of the statute.[14]

b. The Parties again addressed the propriety of periodic payments at the Final Judgment hearing.

In their renewed objections to the motion for judgment, Petitioners urged that the trial court should rely on the evidence that the jury heard in fashioning periodic payments. 3CR5178. At the Final Judgment hearing, Petitioners clarified their proposal regarding the double discounting issue:

> Subtract the portion that the plaintiffs believe is necessary to pay for attorneys' fees and costs. And then whatever they believe needs to be set in reserve for an immediate surgery -- counsel at the last hearing, I think, had indicated that there may be a surgery in her immediate future. Whatever they think they need, take that out. And then order us to buy an annuity with the remaining amount so that the full amount of the judgment will be paid by the defendants, either to an annuity company to provide for payments and then they would get whatever the annuity company agrees should be paid over 31 years with that amount of money upfront rather than ordering the amount of money per year we would take the portion of the judgment the Court

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11 21RR40-41; *see* 9RR179-80, 183-84.

12 21RR41, 56.

13 21RR40-42; *see* 9RR177-78, 179-82.

14 21RR39.

> orders. That way there would not be a double discounting issue. The full amount that the jury awarded would be utilized for the benefit of the plaintiff.

Puente's counsel also tendered an alternative proposed Final Judgment that structured the $94,000 present value for routine outpatient physician services as contained in Dr. Fairchild's report, PX-23, to be paid in periodic payments over Puente's life expectancy. Puente's counsel explained:

> I do have a form of final judgment that includes periodic payments along the lines that we discussed at the last hearing, which is to say taking one of the sub-elements of the economist's testimony and spreading it out over the lifespan of the plaintiff and deducting the present value of that, which is $94,000, from the net judgment.

22RR24-25.

And, within their motion to modify the Final Judgment, Petitioners urged that the trial court should use the evidence the jury heard from Dr. Altman regarding Puente's life expectancy and life care needs, as valued by Dr. Fairchild's projections, to support the findings required in Subchapter K. 3CR5297. Again Petitioners urged that the trial court should order (1) the amounts for any surgery Puente immediately required to be paid in lump sum, (2) more to be paid toward the end of the 31-year period based on Dr. Altman's life care plan, (3) attorney's fees be paid in lump sum, and (4) the full amount of the remainder be ordered to be paid to fund an instrument to pay the future damages. 3CR5297-98.

* * *

Thus, Petitioners and Puente directed the trial court to the evidence the jury heard—Puente's life care plan prepared by Dr. Altman, as valued by Dr. Fairchild's testimony and supplemental report, PX-23—to provide the necessary evidence for all elements required to be addressed in Subchapter K, including:

- the different discount rates for each element of Puente's life care plan;
- the computation of present value for the entire life care plan as $16,054,975;
- the computation of future value for the entire life care plan as $23,397,367; and
- information to extrapolate the discount rates to order an appropriate dollar amount of periodic payments for future medical care during Puente's life expectancy.

With evidence of the amount, interval, and number of periodic payments, 47RR[PX-23], the trial court could have fashioned periodic payments in myriad ways consistent with the verdict. *See Detrick*, 610 S.W.3d at 837-38. Taken together this evidence would have permitted the trial court to comply with Section 74.503 by finding the dollar amount of periodic payments that would compensate Puente for the future damages. *See id*. at 837.

c. There was legally sufficient evidence of the dollar amount of payments.

The record contained sufficient and credible evidence from which the court could have extrapolated from the jury's present-value award the appropriate dollar amount of any periodic payments, as required for findings under sections 74.503(c)

and 74.503(d)(2). Dr. Fairchild, Puente's damages expert, testified to the different discount rates applicable to the various elements of Puente's life care plan. The court could have extrapolated from those discount rates to order the appropriate dollar amount of periodic payments for future medical care.

Dr. Fairchild was the sole economics expert Puente presented to testify to the present value of the future medical expenses identified in the report of the life care experts she retained. *See* 47RR[PX-23]. While the jury awarded approximately $3 million less than Dr. Fairchild's calculations (*i.e.*, about 82% of his total), it credited most of his testimony regarding the present value of the total care Puente would require for her 31-year life expectancy. *Compare* 3CR4913 (verdict awarding $13,263,874.86) with 10RR200 (Dr. Fairchild's testimony of $16,054,975 present value of total future medical); 47RR[PX-23] at 140 (Dr. Fairchild's report explaining $16,054,975 present value of total future medical care costs). Dr. Fairchild used 2.03% as a conservative interest rate to show what sum if paid today would yield the projected costs that he calculated for each element of Puente's life care plan, using inflation rates that varied with each element. *See* 10RR198; 47RR[PX-23] at 145, 151, 157, 161, 169, 177, 186.

d. There was legally sufficient evidence of the amount, interval, and number of periodic payments.

The record also supported numerous ways the trial court could have exercised its discretion to determine periodic payments, such that a reasonable

dollar amount is provided in each interval for a certain number of payments. TEX. CIV. PRAC. & REM. CODE §74.503(c)-(d). The point is not that the court was required to choose one proposed alternative over another but that it had enough evidence to order some portion of future medical expenses be paid in periodic payments.

One alternative would be to add all the projected expenses for a year—such as 2018, the first future year. Those expenses are shown by year in each of the "Annual Totals" in Dr. Fairchild's report for each of the seven categories of health care costs (*i.e.*, supported care, physician services, therapeutic services, medication, diagnostic services, equipment & supplies, and acute care). 47RR[PX-23] at 145, 151, 157, 161, 169, 177, 186.[15] The total in round numbers for 2018 is $385,000. The trial court could reduce that amount in accord with the jury's award of 82.6% of Dr. Fairchild's total, which would be approximately $315,000, and require that amount to be paid in 2018. That same methodology could be applied successively each year. And when the total amount of payments equals the $13 million award net of legal fees and settlement credits and upfront expenses Puente immediately required, then the interest earned on the declining balance during those years at Dr. Fairchild's 2.03% interest rate could be paid in a final lump sum.

[15] The report has no page numbers. Appendix Tab F excerpts the Annual Totals, found at Volume 47, pages 145, 151, 157, 161, 169, 177, 186.

Other alternatives existed.[16] The court could have awarded the proportion of damages the jury awarded out of the full amount that Dr. Fairchild testified would have been incurred (the jury awarded $13,263,874.86, and Dr. Fairchild's testimony supported a damages award of $16,054,975, so the jury awarded approximately 82.6% of Dr. Fairchild's total) to each element of Puente's life care plan. For example, if Dr. Fairchild opined that in 2030, Puente would incur $1 million (present value) in expenses, the court could have ordered that $826,000 (present value) be paid during that year. Either of these would be consistent with the statutory mandate, the jury's verdict, and Dr. Fairchild's computations.

Petitioners also made various suggestions for fashioning an award in periodic payments, including: (1) that attorney's fees and costs could also be deducted lump sum from the jury award, (2) that immediate medical care needs be deducted lump sum from the jury award, and (3) that because of evidence Puente would need more care in the last few years of her life, the periodic payments could

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[16] *See* Brief of Amici Curiae Texas Association of Defense Counsel, Texas Alliance for Patient Access, The Texas Medical Association, and the Texas Hospital Association, pp. 16-18 (discussing example assuming (a) no settlement credit applies to future damages; (b) trial court arrived at $5 million lump-sum payment to pay attorney's fees, litigation expenses and health care costs to be incurred soon after trial; and (c) after reduction of lump-sum amounts from the jury's award, the amount subject to periodic payments is $8,253,874.86).

Notably, should the Court hold that Petitioners are entitled to the entire dollar-for-dollar settlement credit for the Methodist Settlement, the total settlement credits of $3.5 million would extinguish past damages, prejudgment interest on past damages, and several million dollars of future damages subject to periodic payments. *See* 3CR4913 (jury findings totaling $133,202 past damages).

be enhanced after the first twenty years of her life expectancy. These suggestions were entirely supported by Subchapter K, as well as the evidence: Dr. Fairchild's report valuing Dr. Altman's life care plan. *See* 47RR[PX-23] at 191-93 (supported life care and inpatient/other acute care services).

Thus, the trial court had before it evidence of the amount, interval, and number of periodic payments. *See* TEX. CIV. PRAC. & REM. CODE § 74.503(c)-(d).

e. There was legally sufficient evidence of the recipient of payments.

Because the periodic payments were only for Puente's future medical care expenses, there is no dispute that Puente would receive the payments. TEX. CIV. PRAC. & REM. CODE §74.503(d)(1).

***

Because the record contains sufficient evidence from which the trial court could have made each finding required under section 74.503, the trial court was required under the statute and *Detrick* to order an award of periodic payments. There was no basis for the trial court's absolute refusal to do so, and the Court of Appeals' rationale for affirming that refusal placed an impossible burden on Petitioners.

2. *The Court of Appeals too narrowly applied Detrick.*

Even though Dr. Fairchild's report valuing Dr. Altman's life care plan was supplied to the trial court as evidence of both present value and future value for

each element of expense, the Court of Appeals concluded that because Dr. Fairchild's evidence assumed different inflation rates for each expense in the life care plan, it was impossible for the trial court to order payments consistent with the jury's award of $3 million less than his total present value computation. *Virlar III*, at 703-04.

First, Dr. Fairchild's report states that he took each category of cost and increased each category of costs by a 2.29% change in the Consumer Price Index and inflation factors to arrive at the "projected future medical care costs." 47RR[PX-23] at 139. Dr. Fairchild then reduced projected costs to present value, such that the differing inflation factors are subsumed present value numbers which can then be adjusted to future value.

But, the failure of the jury to award the exact amount Dr. Fairchild computed does not render the evidence insufficient to allow the trial court to fashion periodic payments. If that were so, the periodic payments provisions would be a nullity unless the jury accepted every scrap of the damages expert's assertions. While the record admittedly does not establish *on its face* how periodic payments should be ordered—the jury's finding was, after all, in terms of present value—*Detrick* merely requires a party to identify evidence that enables the court to make reasonable findings that are not "inconsistent with the jury's verdict." *Id.* at 837-38. Petitioners met that burden.

Apparently, the Court of Appeals interpreted *Detrick* to require that Petitioners identify or present evidence in such detail and obtain jury findings of such granularity that the trial court would have virtually no discretion in the award it fashions. But, by their very nature, future damages awards are speculative and uncertain.[17] And medical malpractice cases with claims for payment of long-term care plans are particularly so. The highly complex evidence involves many variables and numerous assumptions.[18] Such damages evidence lends itself to a wide range of reasonable awards, all based on mere educated predictions about what damages a plaintiff may someday incur.

To require a jury to make an award with such detail that the court can fashion from it the precise amount of periodic payments is wholly impracticable. Applied here, such a requirement would have mandated that the jury answer over 31 future medical expenses damages questions (one question per year of undisputed life expectancy), with each question containing multiple subparts

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[17] An award of future damages in a personal injury case is always speculative because issues such as life expectancy, medical advances, and the future costs of products and services are, by their very nature, uncertain. *Pipgras v. Hart*, 832 S.W.2d 360, 365 (Tex. App.—Fort Worth 1992, writ denied). *See also Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 863 (Tex. App.—Fort Worth 2003, pet. denied) (proving life expectancy in medical malpractice suit to reasonable medical probability would be impossible because "life expectancy, by its very nature, is uncertain").

[18] The accepted practice, as Puente did here, is to have a medical damages expert opine about the plaintiff's anticipated care needs for her life expectancy. An economics or finance expert then values those anticipated needs (both in future and present value) and assists the jury in determining the proper award. Puente's economist issued PX-23, his lengthy supplemental report detailing his opinions. 47RR[PX-23]136-200.

addressing each element of Dr. Altman's life care plan in present and future value. In essence, the Court of Appeals eviscerated *Detrick*'s purpose by requiring such impractical precision, *Virlar III*, at 703-04 ("no party requested the jury to determine the amount of money that would compensate Puente if paid periodically").

This interpretation also deprives the trial court of the discretion this Court recognized exists when making the section 74.503(c) and (d) findings. *Detrick*, at 837. Discretion allows a trial court to examine the evidence when the jury's award differs from the expert's opinion or when the expert uses differing inflation rates, such as Dr. Fairchild used in PX-23. So long as the 74.503(c) and (d) findings do not conflict with the jury's findings and are supported by the relevant trial or post-trial evidence, *Detrick* has been satisfied. *See Detrick*, 610 S.W.3d at 837-38.

The Court of Appeals did not address whether the double-discounting under-compensation issue would be cured if the amount ordered to be paid in periodic payments was paid in lump sum to fund an annuity or other instrument that would make the periodic payments over time, as Petitioners proposed. 3CR5297-98; 22RR25-27. Petitioners requested a determination of how the trial court would fashion periodic payments under its discretion, so that additional evidence could then be provided to address an annuity and its structure to accommodate the order for damages to be paid periodically. 21RR60. For example, if the court ordered a

total of $5 million in present value be paid in periodic payments, that $5 million would have been paid in lump-sum to fund an annuity or similar instrument that would have paid out the future value (if not more) of the periodic payments ordered. Having paid the remainder present value future damages to fund periodic payments, no double discounting could result.

The Court of Appeals erroneously applied *Detrick* to affirm the trial court's denial of periodic payments. This Court should grant review, and should reverse and remand for additional proceedings requiring future medical expenses to be awarded in periodic payments.

C. Alternatively, Petitioners are entitled to cure the record based on newly-announced *Detrick* standard.

If *Detrick* does require more evidence than the record below contains, the issue should be equitably remanded for Petitioners to adduce further proof. *See Torrington Co. v. Stutzman*¸ 46 S.W.3d 829, 841 (Tex. 2000) ("Because neither this Court nor any other appellate court had written about the proper submission of an undertaking claim at the time this case was tried, it is appropriate to remand in the interest of justice.").

At the hearing on periodic payments, Petitioners accurately advised the trial court that neither this Court nor any other appellate court had written about

Subchapter K workings. *See* 21RR37-38.[19] *Detrick* clarified how to submit a request for periodic payments under Subchapter K to allow the trial court to exercise its discretion in making the findings required in Section 74.503(c) and (d), after a jury award of present value future damages equal to or exceeding $100,000. If more is needed than what is shown here and contained in the record, an equitable remand is appropriate to ensure that the purpose of Subchapter K is met here. *See id.*; *Crosstex N. Tex. Pipeline v. Gardiner*, 505 S.W.3d 580, 618 (Tex. 2016). *See also Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655, 670 (Tex. 2017); *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 484 (Tex. 2018).

Indeed, three circumstances make remand especially appropriate. First, Petitioners asked the trial court to explain how it would exercise its discretion in fashioning periodic payments, so they could adduce additional evidence to address how an annuity could be structured to accommodate the order for periodic payments and to avoid double discounting problems. 21RR38, 42, 54, 57-60; 22RR23, 26-27. The trial court denied this request and further denied Petitioners' request for findings of fact and conclusions of law on this issue. 3CR5432-39.

Second, the Legislature enacted the periodic payments requirement precisely for circumstances such as those present here. Under section 74.506(b), "[p]eriodic

[19] The trial court expressed willingness to allow for additional evidence and arguments if the court of appeals ordered periodic payments. *See* 22RR27.

payments, other than future loss of earnings, terminate on the death of the recipient." TEX. CIV. PRAC. & REM. CODE § 74.506(b). Puente died on March 30, 2020, at which time periodic payments would have terminated. Under the Court of Appeals' judgment, however, Petitioners must pay many millions of dollars for Puente's future medical expenses that will never occur—the paradigmatic example of the type of windfall the Legislature sought to ameliorate.[20]

Finally, remand is appropriate because until the settlement credit for the Hospital's settlement is determined, the remaining future medical damages that are subject to periodic payments remains unknown and Petitioners' Subchapter K burdens are substantively affected by that determination.

III. Petitioners are entitled to a new trial.

The trial judge made three critical errors that denied Dr. Virlar and Gonzaba a fair trial. The trial judge (1) excluded testimony from an expert designated by Puente that would have entitled Petitioners to submit the conduct of other health care professionals; and (2) the trial court admitted irrelevant and highly prejudicial evidence against Dr. Virlar about (a) his loss of privileges in another hospital and (b) his alleged bad acts in treating other patients. The Court of Appeals erred in affirming the trial court's errors.

[20] Petitioners pointed out this problem within their motion to modify the Final Judgment. 3CR5298.

A. The Court of Appeals erred in affirming the trial court's harmful error in the exclusion of Dr. Kuncl's testimony.

Puente designated Dr. Ralph Kuncl as an expert. 1CR402. As shown by portions of his deposition testimony that Petitioners designated, Dr. Kuncl is a board certified neurologist qualified to testify about the medical treatment in this case because he is familiar with Wernicke's encephalopathy, its cause by thiamine deficiency, and the standards of care for its treatment. *See* Kuncl Deposition (Court Exhibit 1) 25ARR11, 39-40, 44-45, 152, 157, 159-60. *See Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996); *Blan v. Ali*, 7 S.W.3d 741, 746-47 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Dr. Kuncl testified: "I'm critical of the care of every physician, every nurse, every dietician, every member of the team that cared for Ms. Puente." 25ARR60-61. "[E]very one of them had the chance that they missed to recognize the risk [of developing Wernicke's encephalopathy from thiamine deficiency] and the curative benefit of thiamine and the zero risk of administering thiamine. *Id.* at 62. According to Dr. Kuncl, those health care professionals "fell below the standard of care and were negligent by failing to recognize the risk and replete thiamine, and that such failures were "a cause, in fact, of [Puente's] neurological deficits and current condition." *Id.* at 60-61. Contrary to the Court of Appeals' conclusion, this testimony was sufficient to submit to the jury the negligence of the other participants in Puente's health care because Dr. Kuncl provided the basis for his

opinion: the same standard of care regarding recognizing the risk and failing to replete thiamine applied to everyone involved on the team providing care to Puente. *See Bustamante v. Ponte*, 529 S.W.3d 447, 455–56, 462 (Tex. 2017).

Once the trial court sustained Puente's objections to this key testimony, *see* 17RR177-81, 188, there was no reason for Petitioners to offer the rest of Dr. Kuncl's testimony, so Petitioners submitted their entire designations from his deposition as an offer of proof, as Court Exhibit 1.[21] 17RR190. Because this evidence was excluded, Petitioners were unable to submit the negligence of other members of Puente's health care team as responsible third parties, leaving only Drs. Virlar, Martinez, and Patel and markedly increasing the likelihood of a finding that Dr. Virlar was more than 51% responsible for Puente's outcome, making him (and Gonzaba) liable for 100% of the damages. *See* TEX. CIV. PRAC. & REM CODE § 33.004(l) (requiring evidence to submit a responsible third party); *Id.* § 33.013(b)(1) (imposing joint and several liability when a defendant is found more than 50% responsible for the harm).

Contrary to waiver arguments below, the issue was preserved because the trial court ruled on Puente's objections to Petitioners' designations from Dr. Kuncl's deposition, and Petitioners made an offer of proof. *See* 17RR177-81; CE-1. *Garden Ridge, L.P. v. Clear Lake Ctr., L.P.*, 504 S.W.3d 428, 439 (Tex. App.—

[21] *Virlar III*, at 670, n.15.

Houston [14th Dist.] 2016, no pet.) (discussing an offer of proof as a means for preserving appellate review); *Virlar III*, at 670, n.15. Nor was Dr. Kuncl's testimony cumulative; no other expert provided specific testimony about the breach of the standard of care by others who cared for Puente.

Because the Court of Appeals erroneously affirmed the trial court's harmful errors in evidentiary rulings, this Court should grant review, reverse the Court of Appeals' judgment and remand for a new trial.

B. The Court of Appeals erred in affirming the trial court's harmful error in the admission of evidence about Dr. Virlar's loss of privileges at another hospital and his conduct in treating other patients.

Over Petitioners' objection under Texas Rule of Evidence 403, the trial court allowed Puente's counsel to ask Dr. Virlar whether he had lost his privileges at Methodist Hospital two years *after* the events at issue here. 12RR61-70, 75, 80. Because of the hospital's peer review privilege, Petitioners could not correct the misimpression created by this evidence that the loss of privileges was related to Puente's treatment. *See* TEX. OCC. CODE § 160.007. The harm from this evidence is confirmed by how it was emphasized by Puente's counsel in rebuttal jury argument:

> You can believe it when he says he lost his privileges at every hospital in San Antonio and cannot practice in any hospital in this city. You can believe him when he said he got fired from IPC. You can believe him when he says that I don't work at Gonzaba anymore. This is a guy we want taking care of our families?

19RR99. *See Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004) (explaining that in determining whether the erroneous admission of evidence is harmful, the court may consider efforts made by counsel to emphasize the evidence).

Additional irrelevant and prejudicial evidence was admitted over Petitioners' objection when Puente's counsel was allowed to ask Dr. Virlar whether he had a history of not reading a patient's charting or examining the patient before administering treatment and referring to such practice with a prior patient, Charlotte Watson, implying that Ms. Watson had a bad outcome. 12RR47-52. 12RR5-9, 47-52. There was no evidence Watson was being treated for similar conditions or in a similar manner as Puente. Contrary to waiver arguments below, Petitioners made timely, specific objections to this examination and obtained rulings from the court, preserving the complaint for review. *See* 12RR61-70, 75, 80; TEX. R. APP. P. 33.1(a).

Such evidence of other unconnected events and conduct is inadmissible to prove character in order to show "action in conformity therewith." *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011) (citing TEX. R. EVID. 404). Further, such evidence is irrelevant and unduly prejudicial to a physician in a medical malpractice claim arising out of alleged negligence in the care and treatment of an

unrelated patient. *See Neeble v. Sepulveda*, No. 01-96-001253-CV, 1999 WL 11710, *6 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

Because the Court of Appeals erroneously affirmed the trial court's harmful errors in these additional evidentiary rulings, this Court should grant review, reverse the Court of Appeals' judgment and remand for a new trial.

PRAYER

THEREFORE, Petitioners Jesus Virlar, M.D. and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group pray that this Court grant review, reverse the judgment of the Court of Appeals, and remand for a new trial because of the trial court's harmful errors in evidentiary rulings, or, in the alternative, reform the judgment to award a settlement credit for the entire sum of C.P.'s settlement with Methodist Hospital, and/or remand the cause to the trial court for additional proceedings to consider and resolve the proper amount of periodic payments or make other appropriate calculations. Finally, Petitioners request all other relief to which the Court may determine them entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petitioners' Brief of the Merits was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, as amended) is 12,380 words.

/s/Diana L. Faust
DIANA L. FAUST

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this Petitioners' Brief on the Merits upon on all counsel of record, via efile, on November 4, 2021 at the following address:

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NO. 20-0923

IN THE SUPREME COURT OF TEXAS

JESUS VIRLAR, M.D. AND GMG HEALTH SYSTEMS ASSOCIATES, P.A., A/KA/ AND D/B/A GONZABA MEDICAL GROUP,
Petitioners,

v.

JO ANN PUENTE,
Respondent.

On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas
Case No. 04-18-00118-CV

APPENDIX TO PETITIONERS' BRIEF ON THE MERITS

In compliance with rule 53.2(k) of the Texas Rules of Appellate Procedure, Petitioners Jesus Virlar, M.D. and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group, submit the Appendix to their Petition for Review containing the following items:

Tab A: Judgment and Opinion on Rehearing, *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 6049652 (Tex. App.—San Antonio, Oct. 14, 2020, pet. filed) (cited as *Virlar III*)

Tab B: November 28, 2017 Final Judgment (3CR5192-205)

Tab C: September 28, 2017 Charge of the Court (3CR4906-915)

Tab D: February 9, 2018 Orders Denying Defendants Jesus Virlar, M.D.'s and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group's Post-Judgment Motions (3CR5338-44)

Tab E: Supplemental Assessment of the Future Life Care Plan Costs of Jo Ann Puente (47RRPX-23).

Tab F: Annual Totals from Supplemental Assessment PX-23

Tab G: Opinion, *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 557735 (Tex. App.—San Antonio Feb. 5, 2020) (cited as *Virlar I*)

Tab H: Opinion on Rehearing and Remittitur, *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 2139313 (Tex. App.—San Antonio May 6, 2020) (cited as *Virlar II*)

Tab I: TEX. CIV. PRAC. & REM. CODE §§ 33.004, 33.011, 33.012, 33.013

Tab J: TEX. CIV. PRAC. & REM. CODE §§ 74.500-.507

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APPENDIX TAB “A”

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

OPINION ON MOTION FOR REHEARING

Opinion by: Liza A. Rodriguez, Justice
Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice
Concurring and Dissenting Opinion by: Patricia O. Alvarez, Justice

Sitting:[1] Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: October 14, 2020

AFFIRMED IN PART AS MODIFIED, REVERSED AND REMANDED IN PART; MOTION FOR REHEARING GRANTED

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

This appeal arises from a medical malpractice action filed by Jo Ann Puente against Dr. Jesus Virlar and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group ("Gonzaba"). A jury found Dr. Virlar liable for Puente's injuries, and judgment was rendered in favor of Puente and against Dr. Virlar and his employer, Gonzaba. On appeal, Dr. Virlar and Gonzaba bring five issues:

(1) whether the trial court erred in excluding the expert testimony of Dr. Ralph W. Kuncl;

(2) whether the trial court erred in admitting evidence of Dr. Virlar's loss of privileges and alleged extraneous bad acts in treating other patients in violation of Texas Rule of Evidence 403;

(3) whether the evidence is legally and factually sufficient to support the jury's award of $888,429.00 in future loss of earning capacity;

(4) whether the trial court erred in refusing to apply a settlement credit in the amount of the hospital's settlement with Puente's minor daughter; and

(5) whether the trial court erred in failing to order that future damages should be paid in whole or in part in periodic payments rather than by lump sum pursuant to section 74.503 of the Texas Civil Practice and Remedies Code.

In our opinion of February 5, 2020, we found no error on the part of the trial court with respect to the first and second issues. *See Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 557735, at *8, *12, *15, *17 (Tex. App.—San Antonio Feb. 5, 2020, no pet. h.) ("*Virlar I*"). With respect to the third issue, we held that the evidence was legally and factually sufficient to support loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00), and therefore suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00. *See id*. at *20, *33 (citing TEX. R. APP. P. 46.3). Regarding the fourth issue, we remanded the cause for the trial court to conduct a benefits analysis pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). *See Virlar I*, 2020 WL 557735, at *29. Finally, with regard to the fifth

issue, we found no abuse of discretion by the trial court in failing to award periodic payments for future loss of earning capacity under section 74.503(b) of the Texas Civil Practice and Remedies Code; however, we did find the trial court abused its discretion under section 74.503(a) because it did not order any part of the amount awarded for future medical care expenses to be paid in periodic payments. *See Virlar I*, 2020 WL 557735, at *32.

Puente then filed two remittiturs with the clerk of this court. *See Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 2139313, at *1 (Tex. App.—San Antonio May 6, 2020, no pet. h.) ("*Virlar II*"). The first was a remittitur in the amount of $8,000.00 as suggested in our original opinion in *Virlar I*. The second was a voluntary remittitur in the amount of $434,000.00 pursuant to Texas Rule of Appellate Procedure 46.5, which Puente argued would cure any reversible error committed by the trial court with respect to Issue 4 (the settlement credit issue). Puente also filed a motion for rehearing, requesting that this court reconsider its holdings with respect to Issue 4 (the settlement credit issue) and Issue 5 (the periodic payments of future medical expenses issue). We accepted Puente's first remittitur of $8,000.00. *See Virlar II*, 2020 WL 2139313, at *1. However, we rejected Puente's second remittitur of $434,000.00 and denied her motion for rehearing. *See id*.

Two days after we issued our opinion on remittitur, the supreme court issued its opinion in *Regent Care of San Antonio, L.P. v. Detrick*, No. 19-0117, 2020 WL 2311943, at *4-*6 (Tex. May 8, 2020), which discussed the issue of periodic payments of future medical expenses. On May 20, 2020, Puente filed a second motion for rehearing based on the *Regent Care* decision. We reviewed the motion and requested a response from Dr. Virlar and Gonzaba. After considering the motion and responses filed, we grant Puente's second motion for rehearing. We withdraw our opinions and judgments of February 5, 2020 and May 6, 2020. *See Virlar I*, 2020 WL 557735, at *33; *Virlar*

II, 2020 WL 2139313, at *1 (opinion on remittitur). We substitute this opinion and judgment in their place.

BACKGROUND

On November 28, 2011, Appellee Jo Ann Puente underwent "Roux-en-Y" gastric bypass surgery, which was performed by Dr. Nilesh Patel. On December 24, 2011, she began having complications from her surgery, including nausea and vomiting. She reported to Dr. Patel that when she attempted to eat solids, she vomited but was able to keep liquids down. On January 11, 2012, Dr. Patel performed an outpatient dilation procedure for a suspected stricture related to the bypass surgery. On January 13, 2012, Puente went to Dr. Patel's clinic in Del Rio, Texas, and was treated for dehydration. The next day, January 14, 2012, Puente went to the emergency room at Metropolitan Methodist Hospital in San Antonio, Texas, where her main complaint was vomiting. She reported she had just had a dilation outpatient procedure and was not better. In the six weeks since her bariatric surgery, Puente had lost 100 pounds. While she was at the emergency room, the results of a CAT scan raised concerns she was suffering from an esophageal rupture. She was admitted to the intensive care unit on the orders of Dr. Manuel Martinez, a hospitalist and employee of Gonzaba, and placed under his care. Dr. Martinez diagnosed Puente with pancreatitis and dehydration. Puente's medical records reflect that she was awake, alert, and able to follow commands. She did not have any "deficit of movement" to her upper or lower extremities.

Because of the possible esophageal rupture, Dr. Martinez ordered Puente to take nothing by mouth and ordered all the medications Puente had been taking since her surgery, including vitamins, to be stopped during her hospitalization. A nutritional assessment was performed by the

hospital's nutritional dietician, who noted that Puente was at nutritional risk; the dietician recommended that "alternate support with TPN needs to be considered."[2]

On January 16, 2012, Appellant Dr. Jesus Virlar, also a hospitalist and Gonzaba employee, assumed Puente's care and treated her until she was discharged on January 26, 2012. On January 16th, medical records indicate Puente was having trouble walking, even with help of the nurses. The nurses noted that Puente complained of dizziness, "tingles" in her fingers, and tight muscles in her shoulder. She was still vomiting. The nurses further noted that Puente had lost control of her bowels; after being helped to the bathroom, Puente did not respond to questions, and her gaze became "fixed." The nurses also noted that Puente needed "additional fall risk elements," including a "tether device," because of an "unsteady gait."

Dr. Virlar noted in Puente's medical records that Puente had "refused" to ambulate and wrote "MAT evaluate for depression?" According to Dr. Virlar, he wrote "MAT," or Mental Assessment TEAM, because he was considering getting a consultation for Puente's mental state. Dr. Virlar testified he thought she might have "a psychological issue" and that she "need[ed] to try harder to walk." Dr. Virlar testified, "Based at the time, under those circumstances, to me, she was depressed and possibly something else [was] going on. I just couldn't put it together." When asked why he did not find significant the nurses' notes that Puente had fixed gaze and was not responding to questions, Dr. Virlar responded, "It was not reported to me." Dr. Virlar admitted that he did not read the nurses' notes. He was asked at trial whether it was true that he never read any of the nurses' notes during the time of Puente's hospitalizations. Dr. Virlar replied, "Not every single one. Maybe I read one or two. I don't recall a specific number, but the majority of the nurses' notes, no, I did not read, sir." Later during his testimony, Dr. Virlar clarified that he "did not look

[2] TPN, or total parenteral nutrition, is a method of giving nutrients intravenously to a person. TPN may or may not include thiamine based on the physician's orders.

at the nurses' notes." He was then asked if he wished now that he had reviewed them; Dr. Virlar replied, "No, because that's–it's their subjective interpretation. Somebody's weakness of level of 4, to me may be a level of 3, part of that assessment."

On January 20, 2012, a second nutritional assessment was performed. Since her admission, Puente had been without food and had had nothing by the mouth; the only fluid Puente had received intravenously was saline. Puente was also still vomiting, a condition which started before she was hospitalized. The dietician again recommended TPN. That same day, Puente was put on a trial of clear fluids, but was not able to tolerate the fluids by mouth. Dr. Virlar returned her status to nothing by mouth.

On January 21, 2012, Puente's surgeon, Dr. Patel, wrote in her medical records to "start TPN"; however, Puente was not started on TPN that day. Dr. Patel testified he relied on the hospitalist, Dr. Virlar, to write the appropriate orders. That same day, the physical therapist's progress note stated that Puente was feeling nauseated and vomited "clear spital" in the trash. The physical therapist wrote in the medical records that Puente was demonstrating "Trendelenburg gait," which is a gait seen with people who have weakness in the pelvic muscles. On January 23, 2012, nurses' notes reflected that Puente was still complaining of dizziness and that she was exhibiting right eye nystagmus. On January 24, 2012, Puente said she was having nausea when she opened her eyes.

On January 26, 2012, Puente was discharged with orders for administration of TPN through home health care. Dr. Virlar's discharge diagnosis was (1) "intractable nausea and vomiting"; (2) "obesity"; and (3) "obstructive sleep apnea." Puente never received intravenous vitamins, including any supplemental thiamine, while she was admitted in the hospital. Further, the TPN order written by Dr. Virlar was a custom TPN order, which did not provide for the supplementation

of thiamine.[3] The TPN ordered by Dr. Virlar contained nutrients, including glucose. At trial, Dr. Virlar admitted that if a patient is given glucose before thiamine, the patient's thiamine levels will diminish more rapidly because the thiamine will be "used for the metabolism." According to Dr. Virlar, he learned this fact after he was served with this lawsuit. He admitted that at time of Puente's hospitalizations, he did not know giving glucose to a patient without knowing the patient's thiamine level could be devastating to the patient. Dr. Virlar also admitted at trial that he did not know Wernicke's syndrome[4] was a risk in a post-bariatric patient suffering from "intractable vomiting."

On January 27, 2012, the day after she was discharged, Puente had blood drawn based on orders from Dr. Patel's office; the results showed she had an "abnormal, very abnormally low" level of vitamin B-1 thiamine.[5] Dr. Patel, Puente's surgeon, testified the results were not sent to his office, and he did not see them. On January 31, 2012, Puente went to the emergency room at Val Verde Regional Hospital but was not admitted. On February 2, 2012, she returned to Val Verde Regional Hospital and was admitted. On February 3, 2012, she was transferred to Metropolitan Methodist Hospital in San Antonio and admitted on Dr. Virlar's orders.

Puente's medical records reflect that upon being admitted the second time to Metropolitan Methodist Hospital, she was not responding to stimuli. She became progressively more confused

[3] The "premix" TPN, which was not ordered by Dr. Virlar, did contain thiamine. At trial, Dr. Altman testified that giving supplemental thiamine is "very safe" and "very cheap." It should be given to any patient who might be at risk for thiamine deficiency because "the consequences can be devastating and permanent." Puente's treating neurologist, Dr. David Wenzell, also confirmed that there is no downside to giving thiamine because a patient who receives more than they need excretes the surplus in her urine. When asked why he did not give Puente thiamine, especially considering there was "no downside," Dr. Virlar responded that there "was no indication at the time based on my clinical judgment."

[4] Wernicke's syndrome, or Wernicke's encephalopathy, is brain dysfunction associated with thiamine deficiency and is "usually associated with chronic alcoholism or other causes of severe malnutrition." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 761, 2495 (Donald Venes ed., 21st ed. 2009).

[5] According to Dr. Altman, "the reference range–every lab has its own reference range, or normal range," and "in this case, the normal range for their thiamine level would be anywhere from 87 on the low end to 280 on the high end, nanomoles per liter–that's a concentration. And, in this case, Jo Ann [Puente]'s results were 30 nanomoles. So, in other words, less–well less than half of the low end of that reference range."

and her mental status declined. She ultimately needed respiratory support and was put on a ventilator to help her breathe. She experienced weakness in all four extremities and continued to have eye movement abnormalities. On February 11, 2012, a neurosurgeon's diagnostic impression was "encephalopathy[6] of unknown etiology . . . with normal MRI and CT scan of the brain . . . and in the face of [Puente's] history of a prior bariatric surgery, the suspicion is malnutrition related encephalopathy, such as Wernicke encephalopathy[7] as a consideration." On February 13, 2012, Puente's medical records show that thiamine was finally added to her TPN orders.

Puente was discharged on March 9, 2012 and began receiving care at long-term care facilities. She suffered permanent brain damage. Dr. David Wenzell, her treating neurologist, testified Puente was later diagnosed as suffering from Wernicke's syndrome, which progressed to Korsakoff's syndrome. According to Dr. Wenzell, "Wernicke's syndrome is the acute presentation of the illness, and if it persists, it's called Korsakoff's syndrome." "When patients initially experience acute thiamine deficiency, they have Wernicke's syndrome. And if the problem is not dealt with, if it's not treated appropriately, then it progresses into Korsakoff's syndrome." Wernicke's syndrome can be reversed if the patient receives timely thiamine supplements intravenously.

[6] One of the experts at trial described encephalopathy as inflammation or irritation of the brain. Encephalopathy is defined as "[g]eneralized brain dysfunction marked by varying degrees of impairment of speech, cognition, orientation, and arousal." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 761 (Donald Venes ed., 21st ed. 2009). "In mild instances, brain dysfunction may be evident only during specialized neuropsychiatric testing; in severe instances (e.g., the last stages of hepatic encephalopathy), the patient may be unresponsive even to unpleasant stimuli." *Id.*

[7] Wernicke encephalopathy is caused by thiamine deficiency. At trial, Dr. David Joseph Altman, a board certified neurologist, testified symptoms of Wernicke's encephalopathy include "ataxia, or problems with coordination; confusion, which is also called encephalopathy; and eye movement abnormalities, things like nystagmus where the eyes move rapidly or problems where the eyes are not moving together." Dr. Altman testified thiamine deficiency caused Puente to develop "changes in her mental state, causing confusion [and] behavioral changes." "It caused problems with her coordination . . . as well as strength issues in her upper and lower extremities. And it also affected her eye movements, such that they were not moving together. She was experiencing jittery movements, called nystagmus of her eyes. All of those are classic for Wernicke's encephalopathy."

On March 26, 2014, Puente[8] and her mother[9] sued Dr. Virlar, Gonzaba, and numerous other healthcare providers involved in Puente's care.[10] With regard to Dr. Virlar and his employer, Gonzaba, Puente and Carr sued them for negligence in diagnosing, monitoring, and treating nutritional deficiencies of Puente during her hospitalization at Metropolitan Methodist Hospital in January 2012. Puente sought damages for physical pain and mental anguish; she also alleged that she incurred loss of earnings in the past, loss of earning capacity in the future, and medical expenses in the past and future. Puente's minor daughter alleged that as a result of her mother's injuries, she had suffered damages in the past, and will incur damages in the future, for "loss of parental consortium, emotional trauma, and loss of care, maintenance, labor services, kindness, affection, protection, emotional support, attention, services, companionship, care, advice, and counsel." Puente's mother, Carr, alleged that she had suffered loss of services as a result of her daughter's injuries.

Before trial, Carr, individually and as guardian of Puente's minor child, settled with or non-suited all defendants, including nonsuiting the claims against Dr. Virlar, Dr. Martinez, and Gonzaba. Puente settled with or non-suited her claims with all defendants except Dr. Virlar, Dr. Martinez, and Gonzaba. Thus, at the time of trial, the remaining claims were Puente's claims against Dr. Virlar, Dr. Martinez, and Gonzaba.

At trial, Puente's experts testified the failure of Dr. Virlar, Dr. Martinez, and Dr. Patel to recognize the risks or symptoms of Wernicke's encephalopathy and to replenish thiamine proximately caused Puente's permanent brain injury and neurological deficits for which Puente

[8] During the proceeding, the trial court appointed guardians ad litem for Puente and her minor daughter, respectively.
[9] Maria Ester Carr brought suit individually and as guardian of Puente's minor daughter.
[10] These healthcare providers were Dr. Nilesh Patel; James Houston, P.A.; Angela Garcia, R.D.; NITYA Surgical Associates, PLLC d/b/a Texas Bariatric Specialists, LLC; Manuel Martinez, M.D.; Methodist Healthcare System of San Antonio, Ltd. d/b/a Metropolitan Methodist Hospital; and "JKD" (an unknown registered dietician identified only by initials on medical records).

will require twenty-four-hour care for the rest of her life. According to Puente's experts, her thiamine deficiency was reversible from the time of her admission on January 14, 2012 until her discharge on January 26, 2012. However, after January 26th, her injuries were permanent.

Dr. Virlar and Gonzaba's defense at trial was that Puente had never suffered from Wernicke's encephalopathy but was suffering some other condition that no health care provider could have foreseen or prevented.[11] They emphasized that over two dozen healthcare providers had seen or treated Puente since her surgery, but none diagnosed her with Wernicke's until after January 26, 2012. Dr. Virlar testified that he took no responsibility for Puente's injuries, stating that he did his "best with the team" and they did what they "could under the circumstances." Dr. Virlar testified, "And I still agree that it is not Wernicke's encephalopathy–that she suffered a stroke."

The jury returned a verdict in favor of Puente; it found that Dr. Patel was 40% responsible; Dr. Virlar was 60% responsible; and Dr. Martinez was 0% responsible.[12] The jury awarded Puente $133,202.00 for past loss of earning capacity; $888,429.00 for future loss of earning capacity; and $13,263,874.86 for future medical expenses. Dr. Virlar and Gonzaba then filed a motion for settlement credit, arguing that the settlement paid to Puente's minor daughter by the hospital

[11] Defense expert, Dr. Darryl S. Camp, a neurologist, testified that after reviewing Puente's medical records, he believed she was suffering from Guillain-Barre syndrome. Puente's experts, on the other hand, testified she could not have been suffering from Guillain-Barre syndrome. According to Dr. Wenzell, the "typical presentation for Guillain-Barre syndrome is gradual evolution over several days to two weeks of ascending–meaning starting at the bottom and moving up–symptoms of numbness and weakness in the extremities, sometimes people can have eye movement abnormalities as well, and the diagnosis is confirmed by the presence of elevated protein [in] the spinal fluid and by certain electrical abnormalities where the nerves are tested." Dr. Wenzell testified Puente had no elevated spinal fluid protein and no "abnormality of nerve conduction studies." According to Dr. Wenzell, there was no support in Puente's medical records for a diagnosis of Guillain-Barre syndrome. Similarly, Dr. Altman testified that Puente was not suffering from Guillain-Barre syndrome because "Guillain-Barre doesn't cause mental confusion"; "by definition" it "affects only the peripheral nerves" and "has no effect on the central nervous system, the brain." Thus, it does not "cause confusion, behavioral changes, things of that nature." "Also, it's not going to be associated with spasticity," which was one of Puente's problems–"she's spastic in her arms and legs."

[12] During Puente's January 2012 hospitalization, Dr. Martinez saw Puente for only the first two days of the two-week window in which her condition could have been reversed.

should be applied as a credit against the judgment. Dr. Virlar and Gonzaba also filed a motion for order of periodic payments. After a hearing, the trial court denied both motions. The trial court then signed a judgment against Dr. Virlar and Gonzaba, awarding Puente $14,109,349.02 in damages.[13]

Dr. Virlar and Gonzaba then filed post-judgment motions, including a motion for new trial, motion for remittitur, motion for judgment notwithstanding the verdict, and motion to modify the judgment. The trial court denied all their motions. They then appealed.

EXCLUSION OF EXPERT TESTIMONY

In their first issue, Dr. Virlar and Gonzaba argue the trial court erred in excluding deposition testimony from Dr. Ralph W. Kuncl, who would have testified about the liability of responsible third parties. "We review a trial court's exclusion of an expert witness's testimony for an abuse of discretion." *Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018). "A trial court abuses its discretion by failing to follow guiding rules and principles." *Id.* "To reverse a trial court's judgment based on the exclusion of evidence, we must find that the trial court did in fact commit error, and that the error was harmful." *Id.*

Here, Dr. Virlar and Gonzaba argue that Dr. Kuncl's testimony was relevant to responsible third parties in this case. Section 33.004 of the Texas Civil Practice and Remedies Code permits a defendant to seek to designate a person as a responsible third party by filing a motion for leave to designate that person on or before the 60th day before the trial date. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a). Section 33.003(a) requires a jury to determine, as to each cause of action asserted, "the percentage of responsibility, stated in whole numbers," for each claimant, each

[13] The jury awarded $14,285,505.86 in compensatory damages, of which $133,202.00 was for damages incurred in the past. The trial court awarded prejudgment interest, but also reduced the award by a $200,000.00 settlement credit relating to Puente's settlement with Dr. Patel. The net judgment was for $14,109,349.02. The judgment also awarded Puente court costs and post-judgment interest at the annual rate of 5% compounded annually.

defendant, each settling person, and "each responsible third party who has been designated under [s]ection 33.004." *Id.* § 33.003(a). Section 33.003(b), however, "does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission." *Id.* § 33.003(b).

Dr. Virlar and Gonzaba pled the alleged responsibility of twenty-six different health-care providers. Pursuant to section 33.003(b), they were not entitled to a jury submission on the conduct of these twenty-six alleged responsible third parties unless at trial there was "sufficient evidence to support the submission." *Id*. Dr. Virlar and Gonzaba argue on appeal they were denied that opportunity because the trial court excluded their evidence in the form of Dr. Kuncl's deposition testimony.

A. Standards for Expert Testimony in Medical Malpractice Cases

"Recovery in a medical malpractice case requires proof to a reasonable medical probability that the injuries complained of were proximately caused by the negligence of a defendant." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 860 (Tex. 2009). "Proximate cause includes two components: cause-in-fact and foreseeability." *Id*. "Proof that negligence was a cause-in-fact of injury requires proof that (1) the negligence was a substantial factor in causing the injury, and (2) without the act or omission, the harm would not have occurred." *Id*. "Thus, to satisfy a legal sufficiency review in such cases, plaintiffs must adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence." *Gunn*, 554 S.W.3d at 658 (quoting *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017)). "In medical-malpractice cases, the general rule is that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors." *Id.* (citations omitted).

A person is qualified to give opinion testimony concerning the causal relationship between the alleged injury and the alleged departure from the applicable standard of care only if the person meets the requirements of section 74.402 of the Texas Civil Practice and Remedies Code and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402; *Diagnostic Res. Group v. Vora*, 473 S.W.3d 861, 868 (Tex. App.—San Antonio 2015, no pet.). To be so qualified under Texas Rule of Evidence 702, an expert must have "knowledge, skill, experience, training, or education," regarding the specific issue. TEX. R. EVID. 702; *see Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). Further, the expert's testimony must be reliable. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 555 (Tex. 1995) ("To constitute 'scientific knowledge,' the proffered testimony must be reliable."). In determining whether expert testimony is reliable, courts may consider the nonexclusive factors set out in *Robinson* regarding scientific theories and techniques,[14] as well as the expert's experience. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). When the *Robinson* factors do not readily lend themselves to a review of the expert's opinion, expert testimony is unreliable if there is simply too great an "analytical gap" between the foundational data and the opinion proffered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726-27 (Tex. 1998).

Finally, an expert's testimony cannot be conclusory. "An expert's testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation." *Bustamante*, 529 S.W.3d at 462. "If no basis for the opinion is offered, or the basis offered provides

[14] *Robinson*'s list of nonexclusive factors include (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection." *Id.* "It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury." *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). "The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury." *Id*. "Stated differently, an expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of the statements to link the conclusions to the facts." *Bustamante*, 529 S.W.3d at 462.

B. Did the offer of proof presented by Dr. Virlar and Gonzaba meet these standards?

Dr. Kuncl, a neurologist, was an expert designated and retained by Puente, and not by Dr. Virlar or Gonzaba. Even though Dr. Kuncl was not their retained witness, Dr. Virlar and Gonzaba argued at trial that Dr. Kuncl's deposition testimony was relevant to the breach of standard of care (1) in failing to recognize the signs and symptoms of thiamine deficiency, and (2) in failing to order thiamine replenishment. Puente objected, arguing that Dr. Kuncl, as a neurologist, was not qualified to testify about the standard of care required of the twenty-six different healthcare providers, including nurses and emergency room physicians, who did not practice in the area of neurology. Further, Puente argued Dr. Kuncl's deposition testimony was too general and not sufficiently specific because his testimony did not address the standard of care and breach for each responsible third party. The trial court sustained Puente's objections. Dr. Virlar and Gonzaba then made an offer of proof.[15] The offer of proof included an Amended Designation of Deposition and

[15] Puente contends Dr. Virlar and Gonzaba have failed to preserve error on this issue because they withdrew Dr. Kuncl as a witness. In reviewing the record, we conclude that counsel for Dr. Virlar and Gonzaba did not withdraw Dr. Kuncl as a witness. Instead, counsel was merely recognizing that the trial court had already sustained two objections made by Puente to Dr. Kuncl being qualified to testify about the liability of other physicians, i.e. the responsible third parties. Defense counsel was recognizing that based on the trial court's rulings, it did not make sense to continue line by line through Dr. Kuncl's deposition testimony. Thus, he "withdrew" the remaining deposition excerpts and made an offer of proof of what Dr. Kuncl would have testified about. We find no waiver by Dr. Virlar and Gonzaba.

Video Testimony of Ralph W. Kuncl, Ph.D., M.D., and the actual excerpts from Dr. Kuncl's deposition testimony.

On appeal, Dr. Virlar and Gonzaba point to excerpts of Dr. Kuncl's deposition testimony in support of their argument that the trial court erred in excluding his testimony. They refer to where Dr. Kuncl testified he was "critical of every physician, every nurse, every dietician, every member of the team that cared for Ms. Puente." However, Dr. Kuncl could not explain those criticisms. When asked about a specific physician, Dr. Kuncl admitted that he had not reviewed the records related to that physician, so he could not comment on that physician's care. Nevertheless, when asked whether he would be "critical" of that physician for failing to recognize the risk of thiamine deficiency and to order replacement thiamine if that physician had seen Puente during her hospital admissions on January 14 and February 3, 2012, Dr. Kuncl replied, "Yes." According to Dr. Kuncl, he would have the same criticisms of emergency room physicians who saw Puente "[i]f they knew that she had altered anatomy and nausea and vomiting." Dr. Kuncl testified that his "criticisms extend to, virtually, everyone who was involved as a team caring for her and all who saw her, because every one of them had the chance that they missed to recognize the risk and the curative benefit of thiamine and the zero risk of administering thiamine." The attorney questioning Dr. Kuncl during the deposition pointed out that Dr. Kuncl's statements constituted a "general response":

> Q: *And I appreciate your general response*, *but I want to go through each physician.* So, you are critical and believe Dr. Lindsey, the emergency room physician or the physician at Val Verde Regional Medical Hospital, was negligent and below the standard of care?
>
> A: Yes, *if you'd allow me a caveat*. *Obviously, some physicians and therapists had vanishing little time to spend with her*, so I can't tell you how long that Dr. Lindsey spent with Jo Ann Puente. But every person who had a moment or a hand on her had a chance to reverse an otherwise fatal disease. *I'm*

> *guessing that there are going to be levels of liability dependent on the nature of the continuing care provided and how integral a part of the team, the bariatric surgical team*, they were. So, you'll list a lot of names and I'm going to say they're all responsible in a way because they all had a chance to give her repletion doses of thiamine.

(emphasis added). Dr. Kuncl later testified again he was "critical" of every physician who saw Puente during her admissions in January and February 2012 "*with the caveat that her stays at Val Verde were very short*." (emphasis added).

The above testimony by Dr. Kuncl is general in nature and does not explain how and why a specific physician breached the applicable standard of care and proximately caused Puente's injuries. *See Bustamante*, 529 S.W.3d at 462. Dr. Kuncl admitted this general response cannot apply to all the healthcare providers. Although Dr. Kuncl testified that all the physicians were liable for Puente's injuries because they were part of a "team," he then admitted that some physicians had "vanishing little time to spend with her" and he was "guessing that there are going to be levels of liability dependent on the nature of the continuing care provided and *how integral a part of the* team, the bariatric surgical team, they were." (emphasis added). Thus, Dr. Kuncl gave general statements of every member of the "team" being held responsible, while also admitting that some members of the team would have different "levels of liability" based on the circumstances presented. Dr. Kuncl, however, does not go through these circumstances and specifically explain the standard of care applicable to each alleged responsible third party and how that alleged responsible third party breached the standard and proximately caused Puente's injuries. Thus, the above testimony by Dr. Kuncl is general and conclusory; it is therefore not considered "probative evidence, regardless of whether there is no objection." *Bustamante*, 529 S.W.3d at 462.

Dr. Virlar and Gonzaba also point to where Dr. Kuncl was asked whether he believed "all the physicians should have been aware of . . . the high risk for thiamine deficiency" to Puente. Dr. Kuncl, replied, "Yes, *because the literature and common medical knowledge* in the era of post-bariatric surgery always lists such patients, especially those with malabsorption surgery like Roux-en-Y procedure, as those being listed to be at high risk for thiamine depletion." (emphasis added). Thus, Dr. Kuncl testified that *all physicians* should be *aware* of the high risk posed to Puente, but did not specifically detail how the alleged responsible third parties in question failed to appreciate that risk. Dr. Kuncl admitted that the amount of time spent with Puente would be a "caveat" to his answer. Again, Dr. Kuncl's testimony is general and conclusory. *See Bustamante*, 529 S.W.3d at 462.

Dr. Virlar and Gonzaba also point to where Dr. Kuncl in a conclusory fashion agreed to the following statements:

- And you're critical of all of those physicians and their failure to replete the thiamine?
- And do you believe that their failure to do was a cause, in fact, of Mrs. Puente's neurological deficits and current condition?
- If Dr. Silva was at the bedside on January 18th, would you be critical of him for not diagnosing Wernicke's encephalopathy?
- Are you critical of the ophthalmologist who saw her as an outpatient specifically evaluating this presentation to include ocular disorders?

In response to all these statements, Dr. Kuncl simply replied, "Yes." His agreement with these conclusory statements cannot be considered probative evidence. *See Bustamante*, 529 S.W.3d at 462.

With respect to hospital staff, nurses, or dieticians, Dr. Kuncl testified that he did not expect the nurses or dieticians to make the diagnosis of Wernicke's encephalopathy; he did expect them "to be aware of the risk factors and the need to prophylax to prevent it." Thus his "criticism" was they did not recognize the risk factors or "make a recommendation to replete." Once again, Dr.

Kuncl's testimony is general and conclusory, and does not constitute probative evidence. *See Bustamante*, 529 S.W.3d at 462.

Given that the excerpts from Dr. Kuncl's deposition testimony presented in the offer of proof do not constitute probative evidence, Dr. Virlar and Gonzaba have failed to show the trial court erred in excluding Dr. Kuncl's deposition testimony.

TEXAS RULES OF EVIDENCE 403 AND 404

In their second issue, Dr. Virlar and Gonzaba argue the trial court abused its discretion by allowing questions and admitting evidence regarding (1) Dr. Virlar's loss of privileges in violation of Texas Rule of Evidence 403; and (2) prior acts in treating other patients in violation of Texas Rule of Evidence 404.

A. Rule 403: Loss of Privileges

According to Dr. Virlar and Gonzaba, Puente was allowed to ask Dr. Virlar repeatedly whether he had lost his privileges at Methodist Hospital, which they contend was "clearly intended to mislead the jury into believing Dr. Virlar had lost his privileges as a result of Puente's care."

1. Did Dr. Virlar and Gonzaba preserve error for appeal?

Puente argues that Dr. Virlar and Gonzaba did not preserve this issue for appeal. In response, Dr. Virlar and Gonzaba contend they did preserve error and point to the portion of the reporter's record where the trial court ruled on motions in limine. A ruling on a motion in limine, however, does not preserve error for appeal. It "is designed solely to require an offering party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury." *Castaneda v. Tex. Dep't of Protective & Regulatory Servs*., 148 S.W.3d 509, 520 (Tex. App.—El Paso 2004, pet. denied). Accordingly, a ruling on a motion in limine "has no bearing on the ultimate admissibility of the evidence," *id.*, and "preserves nothing for review", *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 873 (Tex. App.—Corpus Christi–

Edinburg 2006, pet. denied). Dr. Virlar and Gonzaba's argument that portions of the reporter's record relating to the motion in limine show they preserved error is without merit. *See id*.

Once trial began, the record reflects that during Dr. Virlar's testimony, Puente's attorney informed the trial court outside the presence of the jury that he was "going to get into [Dr. Virlar's] loss of privileges." Puente's attorney noted that defense counsel had been allowed to ask his expert witnesses, who were physicians, whether they had privileges at hospitals. Defense counsel objected and argued the question was unfair to Dr. Virlar because he was barred by peer privilege from explaining why his privileges had been revoked. Defense counsel argued the question, "Do you have privileges now at Methodist?" was "[p]robably an appropriate question," because it "does not get into the peer review process." However, the question, "Were your privileges revoked?" did get into "an action by a peer review committee." Defense counsel then made an objection pursuant to rule 403:

> And, Judge, in addition to privilege, let me add something else. Under the rule–and I'm– I believe, in this case, prejudicial effect of this line of inquiry far exceeds any probative value it may have in this case. If he asks the question: "Did you lose privileges?", and I do not respond with a question like, "Did it have anything to do with this case?"–which it–manifestly did not. It was two years later–if I don't ask that question, the jury is going to speculate about why he lost his privileges, and certainly going to speculate that it had something to do with his care of Ms. Puente. So you have a huge prejudicial effect out of a simple small question there. If he answers then, "No, it had nothing to do with this case," arguably, I'm opening the door for [Puente's attorney] to come back and say, "Well, what did it have to do with?", and then we're back to the race going into things that the doctor is not permitted to talk about.

Puente's counsel then informed the trial court that he was "looking at Dr. Virlar's board of medical examiner site," and the information online showed Dr. Virlar "entered into an agreed order publicly reprimanding himself and requiring him to go back and complete 24 hours of continuing medical education, 8 hours in risk management, 8 hours in ethics, 8 hours in professional

communications, and pay an administrative fee." According to Puente's counsel, all the information was public record. The trial court then stated to defense counsel, "I hear your argument, but if it's something we can look up, how can we say that's privileged information and can no longer be discussed?" The trial court overruled defense counsel's objection.

Puente's counsel then stated that he was "not going to ask [Dr. Virlar] what it arose out of." He was "just going to ask [Dr. Virlar] . . . [whether he has] any privileges at any hospitals now?" Defense counsel replied that Dr. Virlar presently had privileges at two hospitals.

> COURT: Well, then, if the doctor has regained his privileges, then he regained his privileges. He can talk about that. But I don't want the trial–I don't want to try that case. And the actual intricate workings of the peer review of how the physician is not going to be–well, we don't know any of that information. We're not going to talk about that. We're not going to try that. I mean, we've got to keep it clean. You know, it's just have you–did you subsequently lose– and then they are going to come back and say, since then, you have gained it at some other hospitals. I'm going to give him some room to explain, if he feels like he wants to, you know, explain his–
>
> PLAINTIFF: Okay. But I just want to make everyone aware, if you open the door and try to explain it away, I'm going to get into the fact that he agreed to be disciplined.
>
> DEFENSE: And, again, it's not admissible. The facts in there are not admissible.

In the presence of the jury, Puente's attorney began questioning Dr. Virlar about privileges:

> Q: Okay. Doctor, what are privileges? When a hospital grants you privileges, what does that mean?
> A: It is a courtesy by the hospital that allows you to go into a hospital setting to evaluate patients.
> Q: Do you have to apply for those?
> A: Yes, sir.
> Q: Have you ever lost your privileges?
> A: Yes, sir.
> Q: How many times have you lost your privileges from hospitals?
> A: Once.

Q: And that was in 2014?
A: December of 2013.

Until this point in Dr. Virlar's testimony, any error has been preserved for appeal. Dr. Virlar's testimony was within the ruling of the trial court about what was admissible–that is, what Puente would be allowed to question Dr. Virlar about. *See* TEX. R. EVID. 103(b) ("When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal."); *see also Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235-36 (Tex. 2007) (explaining that at a bench conference, the trial court ruled it would allow questions "about the prior patient's treatment to the extent that his statements concerning that treatment were inconsistent with his trial testimony," but that the cross-examination "went well beyond that limitation," thus requiring the attorney to object again to preserve the issue for appeal).

Puente's attorney then asked the question that is the basis of Dr. Virlar and Gonzaba's complaints on appeal:

Q: December of 2013. *So right after you took care of Jo Ann*?

DEFENSE: Objection, Your Honor. Can we approach?

PLAINTIFF: **I'll withdraw that, Your Honor.**

(emphasis added). Puente's attorney then continued his questioning about another subject without further comment by the defense. Thus, there was no evidence admitted here, and the trial court never ruled on the objection. If Dr. Virlar and Gonzaba believed the mere asking of the question was prejudicial, to preserve error, they needed to obtain a ruling on their objection, and if that objection was sustained, move for the trial court to instruct the jury to disregard the question. *See* TEX. R. APP. P. 33.1. They needed to request relief from the trial court at a point in the proceedings when the trial court could have cured any alleged error. *See* O'CONNOR'S TEXAS RULES–CIVIL

TRIALS, ch. 8, § 5, at 839 (2019) (explaining that (1) "[g]enerally, an improper question that is not answered by the witness does not constitute reversible error," (2) "[i]n most cases, the error in asking a prejudicial question can be cured by an instruction to the jury to disregard the question"; and (3) when the trial court sustains an objection, "to preserve error, the party should pursue an adverse ruling"). Thus, whether this question was unduly prejudicial is not preserved on appeal.

Finally, Dr. Virlar and Gonzaba point to where Puente's attorney again questioned Dr. Virlar about privileges:

Q: Which hospital did you lose your privileges at?
A: Methodist.
Q: The one where you had taken care of–the one where Ms. Puente was?
A: The Methodist Healthcare System.
Q: Do you have those back?
A: No, sir.

This evidence is within the ruling by the trial court and thus the rule 403 objection was preserved here. *See McShane*, 239 S.W.3d at 235-36.

In summation, the complained of testimony that has been preserved on appeal consists of testimony that Dr. Virlar lost his privileges, once, in December 2013, at Methodist Hospital and does not have those privileges back.

2. *Did the trial court abuse its discretion in ruling this testimony did not violate Rule 403?*

Texas Rule of Evidence 403 permits a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. Thus, "testimony is not inadmissible on the sole ground that it is 'prejudicial' because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent." *Diamond Offshore Servs. Ltd v. Williams*, 542 S.W.3d 539, 549 (Tex. 2018) (quoting

McShane, 239 S.W.3d at 234). "Rather, *unfair* prejudice is the proper inquiry." *Id.* (emphasis in original). "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (citations omitted). "When determining the admissibility of evidence under rule 403, trial judges must balance the probative value of the evidence against relevant countervailing factors." *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018).

We review a trial court's admission of evidence for abuse of discretion. *See Williams*, 542 S.W.3d at 542; *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). A trial court abuses its discretion when it acts without regard for any guiding rules. *Caffe*, 487 S.W.3d at 142.

In arguing this testimony was unduly prejudicial under rule 403, Dr. Virlar and Gonzaba contend "[e]vidence of credentialing or the loss of privileges of a defendant physician to practice at a hospital are matters irrelevant and unduly prejudicial to that physician in a medical malpractice claim arising out of alleged negligence in the care and treatment of an unrelated patient." For support, they point to an unpublished opinion: *Neeble v. Sepulveda*, No. 01-96-01253-CV, 1999 WL 11710, at *6 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). In *Neeble*, the appellant argued the trial court erred because (1) it ordered a separate trial on the negligent credentialing and failure to monitor claims against the hospital from the negligence claims against the doctors; and (2) it ordered the appellant not to inform the jury of the claims against the hospital and of previous medical malpractice lawsuits against the appellee doctor. *Id.*

The court of appeals explained that "[t]he admission of evidence of previous claims and lawsuits is governed in part by Texas Rule of Evidence 404(b)," which precludes "a party from using evidence of other acts to prove a person acted in conformity with that past conduct." *Id.* The court concluded that "[t]he evidence of previous medical malpractice lawsuits against [appellee doctor] was, therefore, inadmissible in the current negligence action against him." *Id.* However,

the evidence was "admissible to prove the negligent credentialing and failure to monitor claims against" the hospital. *Id.* According to the court of appeals, "[b]ecause trying both claims simultaneously would have unduly prejudiced" appellee doctor, the trial court did not abuse its discretion in ordering separate trials and in ordering appellant to not inform the jury of the claims against the hospital and of previous medical malpractice lawsuits against appellee doctor. *Id.*

The facts presented in this appeal are distinguishable from those in *Neeble*. Here, there was no evidence of previous medical malpractice claims and lawsuits—the trial court explicitly limited the scope of the questions to just whether Dr. Virlar had lost his privileges and whether he had them now.

Further, Puente points out that Dr. Virlar testified as an expert witness on his own behalf. And, she emphasizes that the "qualifications of a medical expert include the nature and extent of his or her practice, including the existence or lack of hospital privileges." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.401 (requiring expert witness testifying about accepted standards of medical care to be "qualified on the basis of training or experience," which includes whether the witness "has other substantial training or experience in an area of medical practice relevant to the claim" and "is actively practicing medicine in rendering medical care services relevant to the claim"); *Tenet Health Ltd. v. Zamora*, 13 S.W.3d 464, 472 (Tex. App.—Corpus Christi–Edinburg 2000, pet. dism'd w.o.j.) (explaining that "bestowment of hospital privileges does not mean a physician has an unlimited right to practice medicine in a particular hospital, but rather whether he is *qualified* to practice there according to the scope of the privileges") (emphasis in original). Indeed, as noted by Puente, defense counsel at trial acknowledged that he had asked all his experts about whether they have privileges. In reviewing the record, we hold that the trial court did not abuse its discretion in ruling Dr. Virlar's testimony that he had lost his privileges, once, in December 2013,

at Methodist Hospital and did not have those privileges back was not unduly prejudicial under rule 403.

B. Rule 404: Prior Acts

In their second issue, Dr. Virlar and Gonzaba also complain that the trial court allowed Puente's attorney to question Dr. Virlar about "whether he had a history of not reading a patient's charting or examining the patient before administering treatment" in violation of rule 404. Puente again argues this issue is not preserved for appeal.

To preserve error for appellate review, the complaining party must (1) make a timely objection to the trial court that "state[s] the grounds for the ruling that the complaining party s[eeks] from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context," and (2) obtain an adverse ruling. *See* TEX. R. APP. P. 33.1.

In support of their argument that they did preserve error for appeal, Dr. Virlar and Gonzaba point to objections they made during a motion in limine:

> DEFENSE: Briefly, Your Honor, we would like to make an oral motion in limine relating to the testimony of Dr. Virlar. We would ask that the Court instruct counsel not to go into two issues. One is Dr. Virlar's prior lawsuit. . . . And the second thing is Dr. Virlar, in December of 2013, lost his privileges at Methodist Hospital. . . .
>
> [discussion about loss of privileges]
>
> COURT: What about the prior lawsuit?
>
> PLAINTIFF: The prior lawsuit, I intend to question him about a bunch of answers he gave in that deposition. I was not going to say "This is a case where you got sued and I was the lawyer for the plaintiff" or whatever. I was going to say, "Is it true you have given prior testimony regarding other patients? For example, in this other patient, you did X, Y, and Z, which is pretty much the same that [you] did here." And so, you know, that's what I'm going to do with it. I'm going to be asking about specific answers he gave in his deposition back then.

> DEFENSE: Judge, this is going into a completely different character trait. If he is asking specific questions about the care of a patient during a prior lawsuit, then we're going to end up retrying the entire lawsuit, I mean, because then all that was done in that has to be re-justified, giving me another half a day that I've got to go into it. If he gives an answer to a question about this case that is contradicted by his answer on previous sworn testimony, that would certainly be permissible.
>
> COURT: Well, obviously, we're not going to try the other lawsuit. You can talk about it. But I think – I mean, it's sworn testimony. It's got to be relevant in some sense to this one.
>
> PLAINTIFF: It will be, Judge.
>
> COURT: And so why don't you, I guess, on both of these issues – Mr. Anderson, do you have any case law about this that the defense would not be able to go into the loss of privileges at a hospital?
>
> DEFENSE: Nothing directly on it. There is nothing. I can promise the Court I have looked. It's just general that all peer review is protected and privileged; and, therefore, we can't get to the records. We can't find out what was done or why, whether he did it voluntarily, or whether they were lost due to a problem totally unrelated to anything relevant to this case.
>
> COURT: But your client can testify as to his understanding. I mean, if he lost his privileges or if he voluntarily, you know, decided not to practice at the hospital anymore. *And then on the prior lawsuit, Mr. Rhodes [Puente's counsel], why don't we approach at that point when you get to the point?*

(emphasis added). As noted previously, a ruling by the trial court on a motion in limine "does not preserve error on evidentiary rulings at trial because it does not seek a ruling on admissibility; rather, the purpose of such a motion 'is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury' without seeking the trial court's permission." *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 n.3 (Tex. 2015) (quoting *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963)). Thus, the above portions of the reporter's record do not show Dr. Virlar and Gonzaba preserved any complaint for appeal.

The parties continued their argument to the trial court:

> PLAINTIFF: Let me give you an example: "Isn't it true that you have a history of prescribing to patients without seeing them or looking at the records?" That's one of the questions.
>
> DEFENSE: Judge, it's totally irrelevant. There is no allegation that he did anything improper in prescribing to this patient. Th[ese are] other bad acts that are irrelevant to this case, and that kind of evidence is simply not permissible.
>
> PLAINTIFF: He never read the records in this case. It's totally relevant. He has a history of it. He didn't read the records.
>
> DEFENSE: Okay.
>
> PLAINTIFF: So how is that not relevant?
>
> DEFENSE: What are you contending he prescribed that hurt her?
>
> PLAINTIFF: The prescription – he treated the patient in a way that injured the patient without looking at the patient or looking at the records.
>
> DEFENSE: That's a prior bad act, Judge. It's one. There is no showing that it's a substantially similar circumstance. That kind of evidence should not be permitted.
>
> COURT: *When you get to that point, Mr. Rhodes [Puente's counsel], please approach*.

(emphasis added). The trial court thus again made a ruling on a motion in limine; no error was preserved for appeal. *See Kaufman*, 197 S.W.3d at 873.

Dr. Virlar and Gonzaba also point to the following portions of Dr. Virlar's testimony at trial to show they preserved error for appeal:

> PLAINTIFF: Can we approach, Your Honor?
>
> COURT: Yes.

PLAINTIFF: I'm going to – this is where I want to ask him about his history of not looking at records and not examining patients before he prescribes treatment or renders treatment.

DEFENSE: And, again, Judge, it's past acts.[16] He has got one. There is no evidence of a history. It's just trying to get into some dirt that has no relevance to this case whatsoever -- one prior act that may be simple -- he hasn't established that he didn't examine the patient before he treated. So right now, it's not even relevant.

COURT: I mean, I'm going to allow you to try to lay a proper predicate.[17]

PLAINTIFF: Thank you.

Q. (By Plaintiff): Doctor, do you have a history in the past of–

DEFENSE: Excuse me, Your Honor. Can we approach? I'm sorry. I'm sorry. He is going to go to the history part of it going into a prior act. I thought what the Court said was that he could lay a predicate by establishing its relevancy in the presence. He can't do that by referring to the history. The question is, in this case, did he do what he is now saying he did in the past; and he hasn't established that yet. There is no predicate for that line of questioning.

PLAINTIFF: Your Honor, we have already laid the predicate, the fact that I asked him the question about the standard of care requiring him to look at the test and to look at the chart.

DEFENSE: He has not established that he didn't yet. That question and answer has not yet been had.

PLAINTIFF: Well, it's one of the two.

COURT: I need you to rephrase the question, a history of, you know.[18]

[16] Defense counsel appears to be objecting under Texas Rule of Evidence 404.
[17] This statement by the trial court is not a ruling on the admissibility of the evidence. The trial court was merely allowing Puente's counsel to lay a predicate.
[18] Similarly, this statement by the trial court is not an adverse ruling on the admissibility of the evidence. The trial court was merely asking Puente's counsel to rephrase the question for purposes of laying a predicate.

PLAINTIFF: Yes, Your Honor. I will rephrase it.

DEFENSE: Thank you.

Q. (By Plaintiff): Doctor, given your possibilities on the nutritional assessment that you either ignored it or you didn't look at it, do you sometimes, in other patients, not read the chart or examine the patient before you render treatment?

A. No, sir, usually we go through all the tabs to get the information that we need that's available at the time.

Q. Do you remember Charlotte Watson?

A. Yes, I do, sir.

Q. Isn't it true that you rendered treatment to her – that you rendered treatment to her without ever seeing her or without ever looking at her chart? That was a patient that was in the hospital for a knee surgery.

DEFENSE: Excuse me. Doctor, at this point, without going back into the old case, could you simply answer the question, please?[19]

WITNESS: Okay.

A. Can you repeat the question, please?

Q. (By Plaintiff) Did you render treatment to her, over the telephone from your couch, without looking at her or looking at her chart?[20]

A. Based on the information that the nurse provided to me over the phone regarding her clinical state and the clinical information that she had available at her disposal, yes, I did.

PLAINTIFF: Objection, nonresponsive, Your Honor.[21]

COURT: Sustained.

[19] Defense counsel did not object to the question; instead, he instructed his client to answer the question.
[20] Defense counsel did not object.
[21] Defense counsel did not object. The objection sustained was made by Puente's counsel.

Thus, defense counsel did not object to the question about whether Dr. Virlar treated Charlotte Watson "over the phone, without looking at her or looking at her chart." And, any error based on Dr. Virlar's answer is not preserved for appellate review.

The questioning continued:

Q. (By Mr. Plaintiff): Did you render treatment to her from your couch at home without seeing the patient or looking at her chart, "yes" or "no"?

A. Yes.

Q. Thank you. Do you do that a lot?

DEFENSE: Your Honor, objection, this goes –

COURT: I didn't hear the comment.

PLAINTIFF: The question was: Does he do it a lot?

DEFENSE: Your Honor, we're now opening up the entire practice.[22]

COURT: Overruled.

Q. (By Plaintiff) Do you do that a lot?

A. No, sir.

Thus, defense counsel obtained an adverse ruling to the question regarding whether Dr. Virlar treats patients "a lot" without looking at their chart or seeing them. However, Dr. Virlar responded that he did not practice that way. As Dr. Virlar did not agree with the question, any error from the asking of the question is harmless.

Puente's counsel continued his questioning of Dr. Virlar:

Q. Because that's not the way you're supposed to practice medicine, is it? Is it?

[22] Defense counsel did not specifically object under rule 404. From the context, we can assume counsel meant rule 404.

A. Is that a question?

Q. Yes. That's not the way you're supposed to practice medicine, is it?

A. Which way?

Q. Where you render treatment to a patient without seeing the patient or looking at the chart.[23]

A. We render care of the patient based on the evaluation of the patient, and sometimes that may be via many means. Now, with social media, there is electronic means, over the phone. There is PubHelp. We may not have the chart at our disposal at the time.

Q. But you didn't have any of that with regard to Charlotte Watson, did you, none? You just rendered treatment over the phone without seeing her chart and without seeing the patient.

A. Yes, sir.[24]

Q. And you know what that resulted in, don't you?

DEFENSE: Your Honor, we're going well outside –

COURT: Sustained.

Thus, defense counsel obtained a ruling by the trial court to the question "And you know what that resulted in, don't you?" However, defense counsel did not obtain an adverse ruling. After the trial court sustained the objection made by defense counsel, Puente's counsel moved on to another topic. To preserve error, defense counsel would have needed to move to instruct the jury to disregard, and if the trial court complied, he would have then needed to move for a mistrial. *See* TEX. R. APP. P. 33.1.

[23] No objection was made by defense counsel.
[24] No objection was made by defense counsel. Further, Dr. Virlar had already testified without objection about Charlotte Watson.

Dr. Virlar and Gonzaba point to no other portions of the record. Therefore, we find no abuse of discretion by the trial court.

C. Harmless Error

Even if we were to assume that the trial court erred in admitting the above evidence, any error was harmless. "Erroneous admission of evidence requires reversal only if the error probably (though not necessarily) resulted in an improper judgment." *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004); *see* TEX. R. APP. P. 44.1(a). "We review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted." *Nissan*, 145 S.W.3d at 144.

"Clearly, erroneous admission is harmless if it is merely cumulative." *Id.* "But beyond that, whether erroneous admission is harmful is more a matter of judgment than precise measurement." *Id.* "In making that judgment, we have sometimes looked to the efforts made by counsel to emphasize the erroneous evidence and whether there was contrary evidence that the improperly admitted evidence was calculated to overcome." *Id.*

In arguing the evidence about the loss of hospital privileges was harmful, Dr. Virlar and Gonzaba point to statements made by Puente's counsel during closing argument.[25] While Puente's counsel did refer to Dr. Virlar's loss of privileges, the focus of his closing argument was on the facts of this particular case and the symptoms exhibited by Puente during her hospitalizations. Further, in considering the entire record, we conclude this case did not turn on whether Dr. Virlar lost his privileges once and whether he had those privileges back at Methodist Hospital. This case

[25] Puente's counsel stated during closing argument, without objection, that the jury could "believe it when [Dr. Virlar] says he lost his privileges at every hospital in San Antonio and cannot practice in any hospital in this city." Dr. Virlar testified he was currently employed at Doctors Hospital of Laredo as a full-time hospitalist and also "as a local at Fort Duncan in Eagle Pass." He testified he also worked at a clinic in San Antonio. Thus, Dr. Virlar testified that he had "admitting privileges at Doctors Hospital in Laredo and Fort Duncan in Eagle Pass." When he is in San Antonio, he is "in the clinic and at the nursing facilities."

turned on whether Dr. Virlar breached the standard of care by failing to treat Puente for a thiamine deficiency.

Similarly, with regard to the evidence that Dr. Virlar rendered treatment to another patient over the phone without reviewing her chart, this case did not turn on that evidence, but instead turned on whether Dr. Virlar *in Puente's case* had failed to realize she was exhibiting signs of thiamine deficiency because he admittedly did not review nurses' notes or notes from the dietician and physical therapist.

At trial, Puente's counsel presented evidence from witnesses and Puente's medical records proving that during her hospitalizations, Puente exhibited classic signs of thiamine deficiency. Although nurses and the physical therapist wrote notes in her medical records documenting those symptoms and although a dietician recommended twice in her medical records to supplement her nutrition, Dr. Virlar admitted at trial he did not read those notes at the time and was thus unaware of Puente's many symptoms. He testified the symptoms were "not reported" to him. For example, Dr. Virlar admitted he had not read the nurses' notes regarding Puente not responding to questioning, having a "fixed gaze," and exhibiting abnormal eyeball movement. Dr. Virlar testified that when he was on the hospital floor, "it was never reported to [him]" and that if *he* had observed any nystagmus in her eyes during *his* exam, he would have documented it. Thus, while Dr. Virlar emphasized a "team approach"[26] to the medical professionals treating Puente, he admitted to not reading notes written by nurses, her physical therapist, and the dietician. For example, Dr. Virlar admitted he never looked at the progress note by the physical therapist reporting that Puente had exhibited a Trendelenburg gait. Dr. Virlar testified if the gait had been reported to him, he would

[26] When asked who was the "captain" of the team, Dr. Virlar testified that he was the "admitting attending physician," but then claimed "there is no real captain." "We work as a team. Basically, there is no like, hey, man, I'm the captain, you do what I say. It doesn't work that way." When pressed who was the physician of record, Dr. Virlar stated, "I was."

have looked into the symptom. Later during his testimony, Dr. Virlar admitted that at the time of Puente's hospitalization, he had not known what a Trendelenburg gait was and only recently learned about it.

Further, while Dr. Virlar claimed he would have documented a significant observation like nystagmus, he also claimed to have had a "general conversation" with Dr. Patel that he did not document in Puente's records. According to Dr. Virlar, he brought up putting Puente on TPN with Dr. Patel, but Dr. Patel wanted to keep advancing her oral diet: "I would discuss my concerns regarding the nutrition with Dr. Patel, who then advised me, based on his expertise, to basically give him more time to work on her diet." When asked why this conversation was not documented in Puente's medical records, Dr. Virlar testified that "[s]imply because it is not documented doesn't mean it was not discussed or considered." Puente's counsel responded, "What are you taught in medical school? If it ain't documented, it wasn't done, correct?" Dr. Virlar replied, "Yes and no. We cannot document every concern in the chart on every patient. The documentation is *for billing purposes*." (emphasis added). Puente's counsel attempted to clarify Dr. Virlar's testimony: "Your understanding is the notes you are recording in your progress notes are just for billing?" Dr. Virlar responded,

> No. The progress note serves two purposes. It is a diary of my actions, for me to document what I consider important and relevant, plus whatever other purpose my entry may serve for me. In addition, it also serves the purpose as a billing record to basically ensure to payers that I did see the patient at that time and that it is appropriate for me to bill for that visit.

Puente's counsel then asked, "Is one of the purposes of charting patient's care the continuity of care?" Dr. Virlar admitted that "[i]t helps with the continuity of care."

Not only had Dr. Virlar not documented this conversation with Dr. Patel regarding Puente's nutrition in her medical records, but Dr. Virlar also failed to mention it during his deposition. He

was asked during his deposition whether he recalled "[u]p until the time of discharge" "any specific conversations" he had with Dr. Patel about Puente. At the deposition, Dr. Virlar responded, "No." At trial, he claimed that after reviewing Puente's chart in preparation for his testimony, he had remembered the conversation with Dr. Patel. Puente's counsel then asked him whether he had reviewed Puente's chart before his deposition. Dr. Virlar testified he had not, but then admitted he could not recall. Dr. Virlar then clarified, "But I do remember the conversation with Dr. Patel."

Dr. Virlar's inconsistent testimony was so significant that defense counsel addressed the matter during closing argument:

> I need to do something now, and this is pretty painful for me. Dr. Virlar testified to conversations that he now remembers that he did not remember at the time of his deposition. One of two things is true. Either, as he said, that as he went through these records over and over again in the three weeks leading up to trial, he remembered some things that he had not remembered at the time of his deposition. The other thing that you could conclude and that I suspect [Puente's counsel] will suggest when he does the rebuttal portion is that Dr. Virlar made up some of those conversations. I can't read your minds. I don't know which way you're thinking about this. I will tell you if you believe he made up those conversations, that was wrong, and you have every right to be angry about that, because you're not supposed to do that under oath. And I can't endorse that, and I can't even try and defend that, and I won't. But recall your oath. What did you swear to do? Render a true verdict. The court is asking you, did the negligence, if any, of those doctors proximately cause the injury? Your concern with the evidence is five years ago, not what happened here last week. Five years ago. What you are entitled to do, and the court has told you this, you are the sole judges of the credibility of a witness. If you believe that Dr. Virlar was not reliable in his testimony, it is your right and indeed your duty to give no weight to anything that he said on that witness stand, no weight. That is your—that is the ability you have. What you cannot do consistent with your oath is to decide this case on the fact that you believe he did not tell you the truth.

Finally, Dr. Virlar testified without objection that he no longer works for his previous employer: "I was given two options: one to basically be terminated or one to resign. I took the termination letter so that they wouldn't be able to enforce the non-compete. If I had taken a resignation letter, I wouldn't have been able to practice in the hospitals in San Antonio."

Given this entire appellate record, we cannot conclude that any error in the admission of evidence complained of by Dr. Virlar and Gonzaba "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a). Thus, even if the trial court had erred in allowing the evidence, any error was harmless.

LOSS OF FUTURE EARNING CAPACITY

In their third issue, Dr. Virlar and Gonzaba argue the judgment for loss of future earning capacity was supported by legally and factually insufficient evidence. "Lost earning capacity is an assessment of what the plaintiff's capacity to earn a livelihood actually was and the extent to which that capacity was impaired by the injury." *Hospadales v. McCoy*, 513 S.W.3d 724, 742 (Tex. App.—Houston [1st Dist.] 2017, no pet.). "Loss of past earning capacity is a plaintiff's diminished ability to work during the period between the injury and the date of trial." *Id.* "Loss of future earning capacity is the plaintiff's diminished capacity to earn a living after trial." *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 491 (Tex. App.—Amarillo 2006, no pet.); *see Tagle v. Galvan*, 155 S.W.3d 510, 519 (Tex. App.—San Antonio 2004, no pet.). "In order to support such a claim, the plaintiff must introduce evidence from which a jury may reasonably measure in monetary terms [her] earning capacity prior to injury." *Bituminous*, 223 S.W.3d at 491. "If the plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of [her] loss can best be shown by comparing [her] actual earnings before and after [her] injury." *Id*. "Because the amount of money a plaintiff might earn in the future is always uncertain, the jury has considerable discretion in determining this amount." *Id*.; *see Tagle*, 155 S.W.3d at 519 (same).

To support an award of damages for loss of future earning capacity, the plaintiff can introduce evidence of (1) past earnings; (2) the plaintiff's stamina, efficiency, and ability to work with pain; (3) the weakness and degenerative changes that will naturally result from the plaintiff's injury; and (4) the plaintiff's work-life expectancy. *Perez v. Arredondo*, 452 S.W.3d 847, 862

(Tex. App.—San Antonio 2014, no pet.); *Tagle*, 155 S.W.3d at 519. "There must be some evidence that the plaintiff had the capacity to work prior to the injury, and that [her] capacity was impaired as a result of the injury." *Tagle*, 155 S.W.3d at 520.

In considering whether the evidence is legally sufficient to support the jury's finding of loss of future earning capacity, we examine the record for evidence and inferences that support the jury's finding and disregard all contrary evidence and inferences. *See id.* at 517. If there is more than a scintilla of evidence to support the jury's finding, the evidence is legally sufficient to support the jury's finding. *See id.* at 518.

With regard to whether the evidence is factually sufficient to support the jury's finding of loss of future earning capacity, we consider all the evidence in the record, both for and against the jury's finding. *See id*. The evidence is factually insufficient if the jury's finding "is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* As the trier of fact, the jury "determines the credibility of the witnesses and the weight to be given their testimony, decides whether to believe or disbelieve all or any part of the testimony, and resolves any inconsistencies in the testimony." *Id.* Thus, when there is conflicting evidence, we defer to the jury as the trier of fact. *Id*.

Dr. Virlar and Gonzaba argue the evidence is legally and factually insufficient to support the jury's award of damages for loss of future earning capacity because the only evidence to support such an award was the testimony of Dr. Keith Fairchild, Puente's economist. Dr. Fairchild valued Puente's past and future loss of earning capacity, including her loss of employee benefits, at $1,013,631.00. The jury, however, awarded Puente $1,021,631.00, which is $8,000.00 more than Dr. Fairchild's valuation.

Dr. Fairchild testified that in making his calculations of Puente's loss of earning capacity, he assumed an average life expectancy based on vital statistics tables published by the Centers for

Disease Control and Prevention. He projected Puente to live until February 23, 2062. According to Dr. Fairchild, Puente could live longer than this average life span or she could live less than this average life span. Dr. Fairchild also assumed an inflation rate of 2.29 percent per year and a discount rate based on a seven-year U.S. Treasury bond, which he testified was a "middle of the road" investment model. He also projected the remaining work-life expectancy to be May 21, 2038, at which time Puente will be sixty-two years of age. According to Dr. Fairchild, he based Puente's work-life expectancy on average statistics reported by the government, including the Bureau of Labor Statistics, which take into account gender and educational level. He projected Puente's loss of future earning capacity to be $880,429.00. He testified his opinions were based on a reasonable degree of economic and financial probability. The jury awarded Puente $888,429.00 for loss of future earning capacity, which exceeds the range of Dr. Fairchild's testimony by $8,000.00.

In response, Puente argues that Dr. Virlar and Gonzaba incorrectly assert Dr. Fairchild's testimony was the only evidence of her loss of future earning capacity. She states that Dr. Altman, Dr. Gavi, and "appellants' own damage witness testified to various aspects of Jo Ann Puente's impairment, its duration, her life expectancy, and the composite of factors that may affect a person's capacity to earn, such as pain, weakness, and diminished functional ability." Puente, however, does not cite to the record where these witnesses gave testimony. *See* TEX. R. APP. P. 38.1(i). Nor does Puente explain how the testimony from these witnesses would affect Dr. Fairchild's calculations. It is undisputed that Puente was employed as an administrative assistant with the San Felipe Consolidated School District earning approximately $26,000 per year at the time of her injuries. It is also undisputed that due to her permanent injuries, she is wholly incapable

of working.[27] Thus, the extent of her impairment is really not at issue on appeal. *See Bituminous*, 223 S.W.3d at 491 (explaining that if a plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of her loss is relevant). Further, the testimony in this case was Puente will have a longer life expectancy than her work-life expectancy. *See Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 38 (Tex. App.—Tyler 2003, pet. denied) (noting that work-life expectancy is a retirement age of 65 less the plaintiff's age). Therefore, whether Puente has a shorter or longer life expectancy does not affect the calculations regarding her *work-life* expectancy.

The jury's award of $888,429.00 exceeded the range of loss described by Dr. Fairchild, the expert witness, by $8,000. There is no other evidence in the record to support an award for this $8,000. A jury's award may not be based on conjecture and "must be based upon such facts as are available in the particular case" and "'proved with that degree of certainty of which the case is susceptible.'" *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App.—Amarillo 2002, pet. denied) (quoting *McIver v. Gloria*, 140 Tex. 566, 169 S.W.2d 710, 712 (1943)). Thus, "where the plaintiff seeks special damages for loss of his earning capacity in a particular business or profession, the amount of his earnings or the value of his services in that business must be shown with reasonable certainty." *Id*. at 52 (quoting *McIver*, 169 S.W.2d at 712). Here, by awarding damages in excess of the range of evidence, the jury abused its discretion. *See id*.

[27] We note that Puente also makes an invited error argument in her brief. She points to Dr. Fairchild's testimony about the discount rate he used and Dr. Fairchild's acknowledgment that some economists use discount rates lower than the one he used in making his calculations. Puente then points to defense counsel's statements during closing argument where he stated to the jury: "With regards to the investment part and using T-bills, again use your common sense." Puente argues that defense counsel "invited the jury to use its own 'common sense' in choosing between putative investments and discount rates." According to Puente, the testimony "from over a dozen witnesses about [Puente]'s physical limitations and life expectancy, there was sufficient evidence to support the jury's judgment and any alleged error was invited and waived." We, however, find no invited error by defense counsel through the statement made during closing argument. Further, any statement made by defense counsel is not evidence.

We therefore hold there was sufficient evidence of loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00). In *Virlar I*, 2020 WL 557735, at *33, we suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00. Puente then filed a remittitur in the amount of $8,000.00. As we did in *Virlar II*, 2020 WL 2139313, at *1, we accept this remittitur and modify the trial court's judgment to reflect that Puente recover damages against appellants for loss of future earning capacity in the amount of $880,429.00. *See* TEX. R. APP. P. 46.3, 46.5. We do not disturb any other damages awarded by the jury.

SETTLEMENT CREDIT

Under a confidential settlement, Puente's minor daughter, C.P., received a sum of money from the hospital.[28] Puente, C.P., and Carr (Puente's mother) then dismissed all their claims against the hospital. On appeal, Dr. Virlar and Gonzaba argue that the dollar amount of the settlement paid to C.P. should be deducted from the amount awarded to Puente pursuant to chapter 33 of the Texas Civil Practice and Remedies Code. In response, Puente argues that Dr. Virlar and Gonzaba did not meet their burden of proving they were entitled to the settlement credit because they did not introduce evidence of the settlement amount. Puente further argues that even if they did show the settlement amount, the amount of her daughter's settlement for her daughter's independent damages should not reduce her award for injuries she suffered as a result of Dr. Virlar and Gonzaba's negligence.

A. Chapter 33's Settlement Credit Provisions

Section 33.012(c) of the Texas Civil Practice and Remedies Code provides that if a claimant in a health care liability claim has settled with one or more persons, the amount recovered

[28] Because the settlement amount is part of a confidential settlement, we do not refer to the exact amount in this opinion.

by the claimant should be reduced "by an amount equal to one of the following, as elected by the defendant: (1) the sum of the dollar amounts of all settlements; or (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact." TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(c). "Claimant" is defined as

> a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of *damages for injury to another person*, damage to the property of another person, the death of another person, or other harm to another person, "claimant" includes:
>
> (A) the person who was injured, was harmed, or died or whose property was damaged; and
>
> (B) *any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person* or for the damage to the property of that person.

Id. § 33.011(1) (emphasis added). A "settling person" is "a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death or other harm for which recovery of damages is sought." *Id.* § 33.011(5).

B. Same Burden Under Chapter 33 and One-Satisfaction Rule

Chapter 33 is based on the one-satisfaction rule, a common-law doctrine, but it is more narrowly applied. *See In re Xerox Corp.*, 555 S.W.3d 518, 523 (Tex. 2018) (orig. proceeding) (explaining that "chapter 33's proportionate-responsibility scheme . . . incorporates the one-satisfaction rule"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a) (applying only to a "cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought" or an action brought under the DTPA "in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought"). The one-satisfaction rule is a common law rule providing that "a plaintiff is entitled to only one recovery for any damages

suffered." *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 106 (Tex. 2018). This is true even though "more than one wrongdoer contributed to bring about his injuries." *Id.* at 107 (citations omitted). The "fundamental consideration in applying the one-satisfaction rule is *whether the plaintiff has suffered a single, indivisible injury*—not the causes of action the plaintiff asserts." *Id.* (emphasis added). Thus, the one-satisfaction rule "applies both when the defendants commit the same act as well as when defendants commit technically differing acts which result in a single injury." *Id.* (citations omitted). This rule applies to settlement credits for nonsettling defendants because the "plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settlement defendant has already partially contributed." *Id.* (citations omitted). "The plaintiff would otherwise be recovering an amount greater than the trier of fact determined would fully compensate for the injury." *Id.* (citations omitted).

Because chapter 33 is silent about which party has the burden to prove the settlement amount, the supreme court has looked to the common law's one-satisfaction rule. *See Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998). Under the common law's one-satisfaction rule, "a defendant seeking a settlement credit has the burden of proving its right to such a credit." *Ellender*, 968 S.W.2d at 927. This burden "includes proving the settlement credit amount." *Id*. In applying this common-law burden to chapter 33, the supreme court has held that a defendant meets this burden if "the record show[s], in the settlement agreement or otherwise, the settlement credit amount." *Utts*, 81 S.W.3d at 828.

"Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation." *Sky View*, 555 S.W.3d at 107 (citing *Utts*, 81 S.W.3d at 828). "The plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits

by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award *would not provide for the plaintiff's double recovery*." *Id.* at 107-08 (citations omitted) (emphasis added). "A written settlement agreement that specifically allocates damages to each cause of action will satisfy this burden." *Id.* at 108.

The supreme court has explained that a "nonsettling party should not be penalized for events over which it has no control." *Id.* (quoting *Utts*, 81 S.W.3d at 829). "Thus, this burden-shifting framework, based on the presumption that the nonsettling defendant is entitled to a settlement credit after it introduces evidence of the plaintiff's settlement, is appropriate because the plaintiff is 'in the best position' to demonstrate why rendering judgment based on the jury's damages award would not amount to the plaintiff's double recovery." *Id.* "If the plaintiff fails to satisfy this burden, then the defendant is entitled to a credit equal to the entire settlement amount." *Id.*

C. Did Dr. Virlar and Gonzaba meet their burden of showing the amount of the settlement credit?

Puente argues Dr. Virlar and Gonzaba did not meet their burden to show entitlement to the settlement credit, because the settlement amount is not in the record, was not offered in evidence, and was not stipulated to by the parties. In response, Dr. Virlar and Gonzaba point to the supreme court's opinion in *Ellender*, 968 S.W.2d at 927, where the court recognized chapter 33 did not require proof of a settlement "by a judicial admission, a stipulation, judicial notice, or properly admitted documents or testimony." *Id.* According to the court, "neither chapter 33 nor existing case law demand[ed] such proof." *Id*. For the defendant to meet its burden, the record need only "show, in the settlement agreement *or otherwise*, the settlement credit amount." *Id.* (emphasis

added). In reviewing its appellate record, the supreme court concluded the defendant had met its burden of showing a settlement amount:

> The record here shows that [the defendant] first informed the trial court of the $500,000 settlement amount when the [plaintiffs'] attorneys announced the settlement in open court during trial. Later, [the defendant's] written opposition to the [plaintiffs'] motion for judgment included the settlement amount. The [plaintiffs] did not contest the $500,000 settlement amount. Thus, we conclude that by placing the uncontested settlement amount in the record, [the defendant] met its burden of proof on the settlement amount.

Id.

Similarly, here, at the November 2, 2017 hearing, defense counsel informed the trial court that the hospital had settled with C.P. for a specified amount,[29] and "[a]ll the people suing [the hospital had] dismissed [their claims] with prejudice." Puente's counsel objected to defense counsel revealing the confidential amount in open court but did not dispute the amount was accurate. Because the amount placed in the record was uncontested by Puente, we conclude Dr. Virlar and Gonzaba met their burden of showing the settlement amount of C.P.'s settlement with the hospital. We thus must consider whether Puente's award should be reduced by the amount of C.P.'s settlement.

D. Post-Verdict Motion for Settlement Credit and Puente's Response

On October 20, 2017, Dr. Virlar and Gonzaba filed a post-verdict motion for settlement credit, arguing the amount of C.P.'s settlement with the hospital should be credited against Puente's award. On October 31, 2017, Puente filed a written response to the motion, arguing the amount of C.P.'s settlement should not be credited against her award for the following reasons: (1) because C.P.'s cause of action was separate and independent of Puente's common law medical malpractice action, section 33.012(c) did not apply; and (2) even if section 33.012(c) did apply,

[29] The record reflects that defense counsel informed the trial court of the exact amount of the settlement.

"any attempt to reduce one person's claim or cause of action by the amount received by another person on a separate and independent cause of action violates not only relevant statutes and common law, but also [Puente]'s rights under the Texas and U.S. Constitutions, including their respective due process, due course of law, equal protection, equal rights, jury trial, and open courts provisions." After hearing all the arguments of counsel, the trial court denied Dr. Virlar and Gonzaba's motion for settlement credit without stating its reasoning.

On appeal, Dr. Virlar and Gonzaba argued in their appellants' brief that section 33.012(c) applied to the facts of this case and that the constitutional objections raised by Puente in the trial court were meritless because section 33.012(c) "was a valid exercise of the Legislature's police power." We conclude, however, that as applied to the facts raised in this appeal, application of section 33.012(c) violates the open courts provision of the Texas Constitution.

***1. The Texas Supreme Court first holds a statutory damages cap violates the Open Courts Provision in* Lucas.**

The Open Courts Provision of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. In *Lucas v. United States*, 757 S.W.2d 687, 687 (Tex. 1988), the Texas Supreme Court first recognized that a statute may violate the Open Courts Provision by restricting a plaintiff's recovery of damages in a medical malpractice action. In *Lucas*, a fourteen-month-old infant was paralyzed as the result of a federal army medical center improperly giving him a shot of antibiotics. *Id*. at 688. The child's parents brought a lawsuit in their individual capacities and as next friend of their son. *Lucas v. United States*, 811 F.2d 270, 271 (5th Cir. 1987). After a trial, the federal district court awarded the parents economic damages for medical expenses they had incurred and would incur until their son reached eighteen years of age. *Id*. The district court also awarded the son the following economic damages: "$350,000 as the

present value of future medical expenses he will incur after his eighteenth birthday, and $600,000 as the present value of the impairment of his future earning capacity." *Id*. As for noneconomic damages, the district court awarded the son "$1.5 million for pain and suffering." *Id*. With respect to the parents' individual claims, the district court "made no findings concerning the parents' claims for their own mental anguish and loss of companionship." *Id*. Then, the "district court reduced the total award of damages against the United States by the $400,000 paid by Wyeth Laboratories to the Lucases in settlement of the state court suit." *Id*. On appeal, the Fifth Circuit certified the following question to the Texas Supreme Court: whether under these facts, application of former article 4590i's damages cap provision would be consistent with the Texas Constitution. *Lucas*, 757 S.W.2d at 688.

The supreme court explained that "there is no provision in the federal [C]onstitution corresponding to [the Texas] [C]onstitution's 'open courts' guarantee." *Id*. at 690. According to the court, the "open courts" "guarantee is embodied in Magna Carta and has been a part of our constitutional law since our republic." *Id*. The supreme court noted that in previously construing the Open Courts Provision, it had required a litigant to first show that he had "a cognizable common law cause of action that is being restricted." *Id*. (quoting *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983)). "Second, a litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Id*. (quoting *Sax*, 648 S.W.2d at 666).

With regard to the first prong, the supreme court explained that "Texas courts have long recognized that victims of medical negligence have a well-defined common law cause of action to sue for injuries negligently inflicted upon them." *Id*. Thus, according to the court, "the remaining inquiry [was] whether the restriction on Lucas' right of recovery 'is unreasonable *or* arbitrary when balanced against the purpose and basis of the statute.'" *Id*. (quoting *Sax*, 648 S.W.2d at 666) (emphasis in original).

In reviewing the statute's language, the supreme court expressed its "first concern" was "that the legislature has failed to provide Lucas any adequate substitute to obtain redress for his injuries." *Id*. The court "reject[ed] any argument that the statute may be supported by alleged benefits to society generally." *Id.* While some may argue there was "a societal *quid pro quo* in that loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care,'" the court emphasized "[t]his *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act." *Id*. (citation omitted). And, in looking to other jurisdictions where statutes restricting the recovery of damages were upheld, the supreme court found "significant" that in those jurisdictions, "alternative remedies were provided," a fact which "weighed heavily in the decisions." *Id*. at 691. The supreme court noted that former article 4590i had been "based on recommendations of the Texas Medical Professional Liability Study Commission, sometimes referred to as the Keeton Report." *Id*. "Dean Keeton, in a separate statement, recommended a victim's compensation fund as a statutory substitute for limitations upon recovery." *Id*. The supreme court stressed that "[t]he legislature [had] chose[n] not to follow this recommendation." *Id*.

The supreme court then considered "whether the restrictions in sections 11.02 and 11.03 [of former article 4590i were] reasonable when balanced against the purposes and bases of the statute." *Id*. The court reasoned that "[t]he legislature, in enacting [former] article 4590i, apparently did not intend to strike at frivolous malpractice suits for it found in section 1.02(a)(2) that 'the filing of *legitimate* health care liability claims in Texas is a contributing factor affecting medical professional liability rates.'" *Id*. (quoting former article 4590i, § 1.02(a)(2)) (emphasis in original). The court noted "[t]he legislature did find that a 'medical malpractice insurance crisis'

had been created and that 'satisfactory insurance coverage . . . [was] often not available at any price,' but it then stated that 'adoption of certain modifications in the medical, insurance, and legal systems . . . *may or may not have an effect* on the rates charged by insurers for medical professional liability coverage.'" *Id*. (quoting former article 4590i, § 1.02(a)(5), (10), (12)) (alterations in original). The supreme court concluded,

> In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high. As to the legislature's stated purpose to "assure that awards are rationally related to actual damages," section 1.02(b)(2), we simply note that this is a power properly attached to the judicial and not the legislative branch of government. TEX. CONST. art. II, § 1.

Lucas, 757 S.W.2d at 691 (emphasis in original). The supreme court thus held that it was "unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded." *Id*.

In support of its holding, the supreme court pointed to language found in an opinion by the Supreme Court of Florida:

> Access to the court is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.

Lucas, 757 S.W.2d at 692 (quoting *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987)). While the supreme court in *Lucas* understood "the legislature's concern in attempting to solve the health care problems it perceived during the middle of the 1970s," the court nevertheless concluded it was "simply unfair and unreasonable to impose the burden of supporting the medical care

industry solely upon those persons who are the most severely injured and therefore most in need of compensation." *Id*. (quoting *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 837 (1980)). Accordingly, the supreme court held that "the restriction [was] unreasonable *and* arbitrary and that [former] article 4590i, sections 11.02 and 11.03, unconstitutionally limit[ed] Lucas' right of access to the courts for a 'remedy by due course of law.'" *Id*. at 690 (quoting TEX. CONST. art. I, § 13) (emphasis in original). Therefore, the supreme court's answer to the Fifth Circuit's certified question was "that the limitation on medical malpractice damages in TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02 and 11.03, is inconsistent with and violative of article I, section 13, of the Texas Constitution." *Lucas*, 757 S.W.2d at 692.

2. The Texas Supreme Court does not extend its holding in* Lucas *to statutory claims.

Two years after its holding in *Lucas*, the supreme court "again consider[ed] the constitutionality of the damages provisions of the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02 and 11.03 . . ., this time in the context of a wrongful death action." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 842 (Tex. 1990). The court explained that in *Lucas*, it had held "statutory damages limitations are unconstitutional when applied to damages in common law medical malpractice actions." *Id*. (citing *Lucas*, 757 S.W.2d at 692). However, according to the court, its holding in *Lucas* "did not extend to wrongful death actions." *Id*. The court emphasized its "traditional distinction between common law personal injury and statutory wrongful death claims." *Id*. at 845. The court explained that it had "recognized this distinction in *Lucas*, restating the traditional rule that the [O]pen [C]ourts [P]rovision of our constitution applies only to common law claims." *Rose*, 801 S.W.2d at 845. According to the court, had it "faced a wrongful death claim in *Lucas*, [it] could not have reached the same conclusion, for the [O]pen [C]ourts [P]rovision does not apply to statutory claims." *Rose*, 801 S.W.2d at 845.

In applying the required two prong-analysis, the supreme court first considered whether the plaintiffs' remedy was "based upon a cognizable common law cause of action." The court explained that "[l]ike all actions based upon theories of negligence, the [wrongful death plaintiffs'] cause of action was a common law claim [that] would have died with [the decedent] had it not been preserved by the legislature in the wrongful death statute." *Id*. The plaintiffs' "remedy, therefore, was conferred by statute, not by the common law." *Id*. According to the court, because the plaintiffs did "not seek a common law remedy, the [O]pen [C]ourts [P]rovision [did] not apply to their wrongful death claim." *Id*.

Similarly, in *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex. 2000), the supreme court held the damages cap provision under former article 4590i did not violate the Open Courts Provision because the plaintiff had brought a claim under the survival statute. The supreme court explained that "all negligence actions are common-law claims" and that at common law, "no personal injury cause of action survived a victim's death." *Id*. The court concluded that "[b]ecause wrongful-death and survival actions would not exist absent legislative enactment, they are derived not from the common law but from a statute." *Id*. Thus, wrongful-death and survival claimants "cannot establish an open-courts violation because they 'have no common law right to bring either.'" *Id*. (quoting *Bala v. Maxwell*, 909 S.W.2d 889, 893 (Tex. 1995)).

3. An amendment to the Texas Constitution permits limitation of noneconomic damages in suits against healthcare providers.

In June 2003, the legislature enacted the Medical Malpractice and Tort Reform Act of 2003, otherwise known as House Bill 4, which provided for a statutory limitation on noneconomic[30] damages in medical malpractice lawsuits. *See* Act of June 2, 2003, 78th Leg., R.S.,

[30] Economic damages are damages intended to compensate the claimant for actual economic or pecuniary loss. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(4). They do not include exemplary or noneconomic damages. Noneconomic damages are damages awarded to compensate the claimant for physical pain and suffering, mental or emotional pain

ch. 204, 2003 Tex. Gen. Laws 847; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (limiting noneconomic damages as provided for by House Bill 4). Later that year, the Texas Constitution was amended to permit the Texas Legislature to cap noneconomic damages in civil lawsuits against healthcare providers. *See* TEX. CONST. art III, § 66. However, the amendment expressly did not apply to economic damages, which were defined as "compensatory damages for any pecuniary loss or damage" but did "not include any loss or damage, however characterized, for past, present, and future pain and suffering, mental anguish and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment." *Id*. § 66(a). Thus, *Lucas* and its progeny remain good law with respect to the recovery of *economic damages*; that is, pursuant to the Open Courts Provision of the Texas Constitution, the legislature may not restrict the recovery of economic damages in a common law medical malpractice action. *See Lucas*, 757 S.W.3d at 690-93 (explaining why limitation on recovery of damages in common-law medical malpractice action violates the open courts provision of Texas Constitution); *see also Horizon/CMS*, 34 S.W.3d at 903 (Tex. 2000) (explaining causes of action created by statute do not implicate open courts provision of constitution).

4. Open Courts Analysis to Puente's Common-Law Medical Malpractice Action

In applying the two-prong open courts analysis, we first note that Puente brought a medical malpractice cause of action against Dr. Virlar and Gonzaba, which is a common law cause of action that "Texas courts have long recognized." *Lucas*, 757 S.W.2d at 688. Thus, she has met the first prong. *See Horizon/CMS*, 34 S.W.3d at 902; *Weiner v. Wasson*, 900 S.W.2d 316, 317 (Tex. 1995); *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. With regard to the second prong, Dr. Virlar

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or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses other than exemplary damages. *Id.* § 41.001(12).

and Gonzaba point to the fact that chapter 33's settlement credit provisions were enacted as part of House Bill 4's tort reform efforts to reduce costs to the health care industry. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. However, in *Lucas* and its progeny, the supreme court has clearly stated that restricting *economic* damages awarded to victims of medical malpractice for the general goal of attempting to reduce overall costs to the healthcare industry violates the Open Courts Provision of the Texas Constitution. *See Horizon/CMS*, 34 S.W.3d at 902; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 692; *see also* TEX. CONST. art III, § 66 (permitting *restriction of noneconomic damages* in common-law medical malpractice actions). In doing so, the supreme court emphasized that the legislature had not provided a plaintiff who suffered injuries in excess of the damages cap "any adequate substitute to obtain redress for his injuries." *Lucas*, 757 S.W.2d at 690. According to the supreme court, "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation." *Lucas*, 757 S.W.2d at 692 (quoting *Carson*, 424 A.2d at 837). Today, there is still no adequate substitute for a plaintiff who has suffered economic injuries in excess of a legislative restriction. *See id*.

Further, we note that chapter 33 is titled "Proportionate Responsibility" and provides "a proportionate responsibility framework for apportioning percentages of responsibility in the calculation of damages." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 499 (Tex. 2010); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.017. Chapter 33 requires the trier of fact to determine "the percentage of responsibility, stated in whole numbers, for" "each claimant," "each defendant," "each settling person," and "each responsible third party who has been designated." TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a). It reduces the damages awarded by the trier of fact "by a percentage equal to the claimant's percentage of responsibility." *Id*. §§ 33.001, 33.012(a). Further, it provides for settlement credits to be applied to a claimant's recovery in a

health care liability claim. *See id*. § 33.012(c). Thus, "chapter 33 embodies the fundamental tort-law principle that liability generally arises only from one's own injury-causing conduct and, as a result, liability for damages is commensurate with fault." *In re Xerox*, 555 S.W.3d at 523. "Chapter 33's proportionate responsibility scheme also incorporates the one-satisfaction rule—a tort concept that limits a plaintiff to only one recovery for any damages suffered because of an injury." *Id*. (emphasis added). "The one-satisfaction rule's purpose is to make the plaintiff whole, but not more than whole, for [her] injuries." *Home Ins. Co. v. McClain*, No. 05-97-01479-CV, 2000 WL 144115, at * 7 (Tex. App.—Dallas 2000, no pet.). This purpose of making the plaintiff whole, but not more than whole, is not consistent with restricting a plaintiff from recovering less than the full amount of her economic damages. Thus, we conclude that application of a settlement credit under chapter 33 that has the effect of preventing Puente from recovering the full amount of her economic damages violates the Open Courts Provision of the Texas Constitution.

Here, all the damages awarded by the jury to Puente are economic damages.[31] Thus, applying chapter 33's settlement credit provisions and reducing Puente's award in an amount equal to C.P.'s settlement results in Puente recovering less than the full amount of her economic damages. The supreme court has clearly held the legislature may not restrict the recovery of the full amount of economic damages in a common-law medical malpractice action like the one brought by Puente in this case. *See Horizon/CMS*, 34 S.W.3d at 902; *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. We recognize that *Lucas* and its progeny involved statutes that "capped" damages while chapter 33 relates to the application of settlement credits to a jury's award; however, whether the statute involves a damages cap or whether it

[31] The jury found that Puente was entitled to the following: (1) $133,202 in loss of earning capacity sustained in the past; (2) $888,429 in loss of earning capacity that in reasonable probability Puente will sustain in the future; and (3) $13,263,874.86 in medical care expenses that in reasonable probability Puente will incur in the future.

involves a settlement credit, the result is the same as applied to the facts of this case—application of the statute would prevent a plaintiff in a common-law medical malpractice action from recovering the full amount of her economic damages. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.011(1), 33.012(c), *with Horizon/CMS*, 34 S.W.3d at 902; *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. Under either scenario, the statute impermissibly restricts a cognizable common law action by preventing a plaintiff in a common-law medical malpractice action from recovering the full amount of her economic damages.[32]

We note that Dr. Virlar and Gonzaba argue that Puente and her daughter C.P. are one "claimant" under chapter 33 and thus have not received less than the full amount of their economic damages. However, the legislature cannot circumvent the Open Courts Provision by simply statutorily changing the definition of "claimant" and thereby *restricting a common law cause of action protected by the Open Courts Provision*. As noted previously, the Texas Supreme Court has held that a medical malpractice cause of action like Puente's is a cognizable common law cause of action that "Texas courts have long recognized." *Lucas*, 757 S.W.2d at 688. And, in such a

[32] As noted previously, the supreme court in *Lucas* answered the certified question posed by the Fifth Circuit by explaining why the Texas statute capping damages impermissibly restricted the common-law medical malpractice cause of action. 757 S.W.2d at 691-92. We recognize that in the background section of its opinion, the supreme court mentioned that the federal district court had applied a settlement credit to the amount awarded to the plaintiffs. *See id*. at 688. However, the supreme court did not analyze whether application of this settlement credit would violate the Open Courts Provision as no such question was posed to it. *See id*. at 688-92. We note that in considering the facts presented in *Lucas* under current caselaw interpreting the Open Courts Provision, application of the settlement credit in *Lucas* would not have resulted in the child recovering less than the full amount of his economic damages. The child's parents in *Lucas*, 811 F.2d at 271, brought a lawsuit in their individual capacities and as next friend of their son. *Id*. After a trial, the federal district court awarded the parents economic damages for medical expenses they had incurred and would incur until their son reached eighteen years of age. *Id*. However, with respect to their individual claims, the district court "made no findings concerning the parents' claims for their own mental anguish and loss of companionship." *Id*. The district court also awarded the son the following economic damages: "$350,000 as the present value of future medical expenses he will incur after his eighteenth birthday, and $600,000 as the present value of the impairment of his future earning capacity." *Id*. As for noneconomic damages, the district court awarded the son "$1.5 million for pain and suffering." *Id*. The district court then "reduced the total award of damages against the United States by the $400,000 paid by Wyeth Laboratories to the Lucases in settlement of the state court suit." *Id*. Because the son was awarded $1.5 million in noneconomic damages, an amount that far exceeded the amount of the $400,000 settlement credit, he necessarily received the full amount of his economic damages even after application of the settlement credit. Thus, reducing his award by the amount of the settlement credit did not violate his rights under the Open Courts Provision.

common-law cause of action, the legislature may not statutorily restrict a plaintiff's right to recover the full amount of her economic damages. *See Horizon/CMS*, 34 S.W.3d at 902; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 692; *see also* TEX. CONST. art III, § 66 (permitting restriction of noneconomic damages in common-law medical malpractice actions). The supreme court also recognized that under the common law, a child's claim for loss of consortium, like the one brought by C.P. in this case, is a "*separate and independent claim[] distinct from the underlying action*." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009) (emphasis added). The supreme court has also rejected the argument that allowing a party to recover damages for loss of consortium while also allowing the injured party to recover damages would result in a "double recovery." *See Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978). According to the supreme court, "there is no duplication of recovery" and no violation of the one-satisfaction rule. *Id*. For example, in the context of (1) an injured spouse and (2) a spouse seeking recovery for loss of consortium, the supreme court has explained that "[e]ach spouse recovers for losses *peculiar to the injury sustained by each of them*." *Id*. (emphasis added). "On the one hand, the impaired spouse recovers for those distinct damages arising out of the direct physical injuries." *Id*. "On the other hand, the recovery for the loss of consortium by the deprived spouse is predicated on separate and equally distinct damages to the emotional interests involved." *Id*.

Applying this reasoning by the supreme court to the facts presented here, under the common law, any damages suffered by C.P. for loss of consortium are her own; such damages would not constitute a double recovery and would not violate the one-satisfaction rule. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d at 646; *Whittlesey*, 572 S.W.2d at 669. Because any damages suffered by C.P. for loss of consortium are her own, any credit applied pursuant to chapter 33 against Puente's award in an amount equal to C.P.'s damages would necessarily result in Puente failing to recover the full amount of her economic damages. Thus, application of chapter 33's

settlement credit provision under the facts of this case is an impermissible statutory restriction of Puente's right to recover 100% of her economic damages under her common-law claim.

Finally, we note that Dr. Virlar and Gonzaba argue on appeal that Puente failed to meet her burden in the trial court of raising an open courts challenge, arguing that "Puente provided no analysis of how applying a settlement credit for C.P.'s settlement to Puente's recovery violates the state and federal Constitutions." Dr. Virlar and Gonzaba, however, cite no authority that an open courts challenge must be "analyzed" in response to a post-verdict motion for settlement credits. It appears that no court has addressed the burden of a party asserting an open courts challenge in the context of responding to a post-verdict motion for settlement credits under chapter 33. In other contexts, courts have held that the party relying on the open courts provision has the burden to plead and prove the violation. *See Boyd v. Kallam*, 152 S.W.3d 670, 676 (Tex. App.—Fort Worth 2004, pet. denied). Here, by focusing on Puente's lack of "analysis," Dr. Virlar and Gonzaba do not argue that she failed to meet any evidentiary burden. Indeed, the facts on which Puente relied for her open courts challenge are undisputed, obviating any need to present evidence to prove the relevant facts. We therefore must determine whether Puente adequately pled an open courts challenge in her response to Dr. Virlar and Gonzaba's post-verdict motion for settlement credits.

Dr. Virlar and Gonzaba have not provided any authority as to the appropriate pleading standard for an open courts challenge. Generally, the purpose of a pleading is to "give fair notice of the nature and basic issues so the opposing party can prepare a defense." *Bos v. Smith*, 556 S.W.3d 293, 305-06 (Tex. 2018). There is no apparent reason why a heightened pleading standard should apply to open courts challenges. "When, as here, no special exception is made, we liberally construe the pleadings in the pleader's favor." *Id.* at 306. "Even so, a liberal construction does not require a court to read into a petition what is plainly not there." *Id.* (citation omitted). Here, Puente

stated in her response to Dr. Virlar and Gonzaba's post-verdict motion for settlement credits the following:

> In the alternative, Plaintiff would show that any attempt to reduce one person's claim or cause of action by the amount received by another person on a separate and independent cause of action violates not only relevant statutes and common law, but also Plaintiff's rights under the Texas and U.S. Constitutions, including their respective due process, due course of law, equal protection, equal rights, jury trial, and open courts provisions.

Although there is no lengthy legal argument in Puente's response, an open courts challenge is plainly there. *See Bos*, 556 S.W.3d at 306. Her response refers to the Open Courts Provision and provides the factual basis upon which her constitutional challenge is based. Her constitutional challenge stated the nature of the basic issue she was raising. Thus, we conclude Dr. Virlar and Gonzaba had fair notice of her open courts challenge as a bar to application of the settlement credit as argued by Dr. Virlar and Gonzaba in their post-verdict motion for settlement credits.

***5. Remand for Hearing Pursuant to* Utts**

While we have concluded that applying a dollar-for-dollar credit in the amount of C.P.'s settlement against Puente's award pursuant to chapter 33 would violate the Open Courts Provision of the Texas Constitution, we note that at the trial court and on appeal, Dr. Virlar and Gonzaba have argued that C.P.'s settlement was a "sham settlement," pointing to testimony by the guardian ad litem from the prove-up hearing for C.P.'s settlement. In *Utts v. Short*, 81 S.W.3d 822, 824 (Tex. 2002), the supreme court considered whether a pretrial settlement by a family member in a medical malpractice action should be applied to amounts awarded by the jury to the nonsettling family members. The supreme court explained that a defendant seeking a settlement credit has the burden of proving his right to such a credit. *Id*. at 828. According to the court, "the common law requires only that the record show, in the settlement agreement or otherwise, the settlement credit amount." *Id*. (citing *First Title Co. v. Garrett*, 860 S.W.2d 74, 78-79 (Tex. 1993), which explained

that under the common law, a defendant is entitled to seek a settlement credit under the one-satisfaction rule). "Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation." *Utts*, 81 S.W.3d at 828.

In *Utts*, the defendant contended the pretrial settlement by one family member was a "sham" transaction to avoid application of chapter 33's settlement-credit scheme to the other nonsettling family members. *Utts*, 81 S.W.3d at 829. In discussing the burden a defendant has to raise the issue of a "sham" settlement, the supreme court noted that "when a case involves facts suggesting that a nonsettling plaintiff may have benefited from the proceeds of another plaintiff's settlement, the nonsettling defendant must raise this allegation to the trial court–not the jury–and present evidence of the benefit as part of its burden in electing for a dollar-for-dollar credit." *Id*. The court noted that a defendant did not have to present evidence before the case was presented to the jury but could "urge its settlement-credit motion and introduce evidence" in a post-verdict motion. *Id*. "If the evidence shows such a benefit, then the trial court should apply the settlement credit reflecting that benefit unless the nonsettling plaintiff presents evidence that he or she did not benefit from the settlement." *Id*. "In other words, once the nonsettling defendant presents evidence of the nonsettling plaintiff's benefit from a settlement, the trial court shall presume the settlement credit applies unless the nonsettling plaintiff presents evidence to overcome this presumption." *Id*.

In applying this law to the facts presented in *Utts*, the supreme court explained that the nonsettling defendant had placed the amount of the settlement with the settling family member (who was no longer a party at the time of trial) in the record. *Id.* at 830. The nonsettling defendant further offered evidence that the nonsettling family members (who were plaintiffs at the time of trial) benefitted from the settling family member's settlement. *Id*. The supreme court concluded the record evidence raised a presumption that the nonsettling defendant may be entitled to a

settlement credit but that the record did not establish the amount. *Id*. The supreme court thus remanded the cause to the trial court to allow each family member an opportunity to present evidence to show that he or she did not receive any benefit from the settling family member's settlement. *See id*. (explaining that to avoid the settlement credit, each nonsettling family member on remand must "present evidence showing why the settlement credit should not apply").

Similarly, here, Dr. Virlar and Gonzaba argued in their post-verdict motion that Puente benefited from C.P.'s settlement with the hospital. As evidence, they submitted the reporter's record from the prove-up hearing for C.P.'s settlement and pointed to testimony from C.P.'s guardian ad litem. They also stressed that after C.P. settled with the hospital, Puente and her mother (Carr) dismissed all their claims against the hospital with prejudice. We conclude Dr. Virlar and Gonzaba presented evidence raising a presumption that they may be entitled to a settlement credit under the common law. *See Utts*, 81 S.W.3d at 829; *First Title Co*., 860 S.W.2d at 79 (application of settlement credit under common law's one-satisfaction rule). In response to the motion, Puente filed an affidavit by her counsel disputing that Puente received a benefit from C.P.'s settlement with the hospital. The trial court then denied Dr. Virlar and Gonzaba's motion for settlement credit but did not have an opportunity to make an evidentiary finding as to any benefit Puente received from C.P.'s settlement. Thus, as in *Utts*, we remand the case to the trial court so that it may conduct an evidentiary hearing.

We note that in her second motion for rehearing, Puente again argues, as she did in *Virlar II*, that her second remittitur in the amount of $434,000.00 would cure any reversible error committed by the trial court with respect to Issue 4 (the settlement credit issue). *See Virlar II*, 2020 WL 2139313, at *1. We again reject her second remittitur of $434,000.00. As we explained in *Virlar II*, Texas Rule of Appellate Procedure 46.5 provides that if a court of appeals reversed a "trial court's judgment because of a legal error that affects only part of the damages awarded by

the judgment, the affected party may . . . voluntarily remit the amount that the affected party believes will cure the reversible error." TEX. R. APP. P. 46.5. If "the court of appeals determines that the voluntary remittitur cures the reversible error, then the court must accept the remittitur and reform and affirm the trial court judgment in accordance with the remittitur." *Id*. "If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, *but that remittitur is appropriate*, the court must suggest a remittitur in accordance with Rule 46.3." *Id*. (emphasis added). As explained above, the trial court in this case denied Dr. Virlar and Gonzaba's motion for settlement credit but did not have an opportunity to make an evidentiary finding as to any benefit Puente received from C.P.'s settlement. Thus, we do not believe that remittitur is appropriate on the settlement credit issue. Nor can we conclude, based on the record before us, whether $434,000.00 would cure the error. We therefore reject Puente's second remittitur in the amount of $434,000.00. *See* TEX. R. APP. P. 46.5; *M & A Tech., Inc. v. iValue Grp., Inc.*, 295 S.W.3d 356, 372 (Tex. App.—El Paso 2009, pet. denied) (op. on reh'g) (rejecting voluntary remittitur because remittitur inappropriate under appellate record presented).

PERIODIC PAYMENTS

In their final issue, Dr. Virlar and Gonzaba argue the trial court erred in failing to award future damages payable in periodic payments. Chapter 74 of the Texas Civil Practice and Remedies Code permits periodic payments when the award of future damages exceeds a present value of $100,000.00. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.502.[33] Section 74.503 provides,

> (a) At the request of a defendant physician or health care provider or claimant, the court *shall* order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

[33] Section 74.502 provides that "[t]his subchapter applies only to an action on a health care liability claim against a physician or heath care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds $100,000." TEX. CIV. PRAC. & REM. CODE ANN. § 74.502.

> (b) At the request of a defendant physician or health care provider or claimant, the court *may* order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.
>
> (c) The court *shall* make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.
>
> (d) The court *shall* specify in its judgment ordering the payment of future damages by periodic payments the:
> (1) recipient of the payments;
> (2) dollar amount of the payments;
> (3) interval between payments; and
> (4) number of payments or the period of time over which payments must be made.

Id. § 74.503 (emphasis added). Thus, section 74.503 has both discretionary and mandatory language.

With regard to future damages other than medical, health care, or custodial services, the trial court has discretion to order periodic payments. *See id.* § 74.503(b) (stating the trial court "may" order periodic payments). However, with regard to future medical, health care, or custodial services awarded, upon the request "by a defendant physician or health care provider, a trial court *must* order that medical, health care, or custodial services awarded" "be paid *in whole or in part in periodic payments*." *Gunn v. McCoy*, 554 S.W.3d 645, 679 (Tex. 2018) (discussing subsection (a)) (emphasis added). "When periodic payments are ordered, the court must make specific findings as to the amount of periodic payments, and the court's judgment must specify the amount, the timing of payments, and the number of payments or time period over which payments are to be made." *Id.* (discussing subsections (c) and (d)).

In a post-trial motion, Dr. Virlar and Gonzaba filed a Motion for Order on Periodic Payments, requesting that the full amount of Puente's award for future medical expenses in the

amount of $13,263,874.86 and future loss of earning capacity in the amount of $888,429.00 (minus any applicable settlement credits) be payable in periodic payments instead of a lump sum payment. According to Dr. Virlar and Gonzaba, because Dr. Altman testified Puente's reasonable life expectancy was thirty-one years, the trial court should divide the amount of the awards for future damages by thirty-one.[34] After a hearing, the trial court denied the motion for periodic payments.

To the extent our determination of this issue involves statutory construction, statutory construction is a "legal question we review de novo." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). "In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Id.*

A. Waiver?

According to Puente, Dr. Virlar and Gonzaba waived any right they had to periodic payments under section 74.503 because they "never pleaded this matter of defense and avoidance," and "did not object to the court submitting the damages question to the jury in the usual form of 'what sum if paid now in cash.'" Instead, they filed a post-trial motion. Section 74.503, however, makes no mention of when a defendant must make the request for periodic payments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503. And, we agree with Dr. Virlar and Gonzaba that requesting periodic payments is not a matter "in avoidance" or an affirmative defense. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015); *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 136 (Tex. 2014). That is, section 74.503 is not a bar to recovery but merely a method of how recovery will be paid.

[34] Below and on appeal, Puente argued that such a calculation would constitute a "double discount." That is, the jury awarded, as instructed by the court, the value of future damages reduced to the present value of money. This was the first discount. Puente contends that Dr. Virlar and Gonzaba's formula of dividing this present value award for future damages by Puente's life expectancy of thirty-one years would constitute yet another discount of the value of money —hence, a "double discount." At oral argument, defense counsel acknowledged that such a formulation would be a discount of the jury's award.

Further, section 74.503 provides that the trial court, not a jury, shall make the specific finding of the *dollar* amount of periodic payments that will compensate the claimant for the future damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(c). It further requires the trial court, not the jury, to specify the interval between the payments, and "the number of payments or the period of time over which payments must be made." *Id.* § 74.503(d). Finally, section 74.503 does not become applicable until a jury awards future damages, and the court determines that the present value of that award equals or exceeds $100,000.00. *See id.* § 74.502 ("This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of future damages, *as determined by the court*, equals or exceeds $100,000") (emphasis added). Given that the trial court, and not the jury, is making the appropriate findings, there is no reason why it cannot do so at a post-trial hearing.[35] We therefore find no waiver by Dr. Virlar and Gonzaba in filing their request for periodic payments post-trial but before judgment was signed by the trial court.

B. Evidence of Financial Responsibility

Pursuant to section 74.505, before the trial court may authorize periodic payments of future damages, it must require "a defendant who is not adequately insured *to provide evidence* of financial responsibility in an amount adequate to assure full payment of damages awarded by the

[35] We note that Puente also argues that if section 74.503 allows for a request for periodic payments to be made post-trial, then her rights to due process and due course of law under the Texas Constitution, along with the separation of powers doctrine, would be violated. Puente's argument is based on the assumption that no additional evidence can be brought to the trial court at the hearing on the motion for periodic payments. Puente argues that the trial court will have to engage in "speculation" to make the appropriate findings. However, given that chapter 74 presents a post-trial proceeding and the trial court is required to make fact findings, we find nothing in chapter 74 that would prevent the trial court from hearing additional evidence on matters like discount rates and the plaintiff's near and future financial expenses. Thus, we do not believe Puente has shown any constitutional violation. *See Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (explaining that courts presume a statute is constitutional and the "party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements").

judgment." TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a) (emphasis added). The judgment must then provide for payments to be funded by

> (1) an annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;
> (2) an obligation of the United States;
> (3) applicable and collectible liability insurance from one or more qualified insurers; or
> (4) any other satisfactory form of funding approved by the court.

Id. § 74.505(b).

Puente argues that the trial court did not err in not ordering periodic payments because Dr. Virlar and Gonzaba never showed evidence of financial responsibility under section 74.505(a). Subsection (a) requires *a* defendant *to provide* evidence of financial responsibility in an amount adequate to assure full payment of damages awarded. *Id.* § 74.505(a). As noted, when construing a term in a statute, we ascertain and give effect to the Legislature's intent as expressed by the language used in the statute. *City of Rockwall*, 246 S.W.3d at 625. When the statute does not define a particular term, we construe the term according to its "plain and common meaning," "unless a contrary intention is apparent from the context" or "unless such a construction leads to absurd results." *Id*. Chapter 74 does not define "provide"; thus, we look to its plain and common meaning. *See id*.; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) ("Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law."). The plain meaning of "provide" is "to supply" or "to furnish." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1827 (1981).

At the post-trial hearings on Dr. Virlar and Gonzaba's motion for periodic payments, they provided evidence of Gonzaba's financial responsibility in the form of a balance sheet and

testimony from Melissa Keller, Gonzaba's controller.[36] In reviewing the balance sheet and testimony, we hold Gonzaba provided evidence of financial responsibility in an amount adequate to assure full payment of damages awarded. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a).

Even if Gonzaba provided evidence of financial responsibility, Puente emphasizes that Dr. Virlar did not. According to Puente, both Dr. Virlar and Gonzaba are required to provide evidence of financial responsibility under subsection (a). Subsection (a), by its plain language, requires "a defendant . . . to provide evidence of financial responsibility." *Id.* We disagree with Puente.

When, as here, both defendants are jointly and severally liable for the full amount of the judgment, the practical ramifications of Puente's interpretation would frustrate the intent of the Legislature. "A party who is jointly and severally liable for the judgment is liable not only for its own share of the judgment but also, as between itself and the plaintiff, for the shares of the judgment attributable to other defendants." 5 TEX. PRAC. GUIDE: PERSONAL INJURY 2d § 16:49 (2019). "If one or more defendants are insolvent, the jointly and severally liable defendant can be made to pay the portion of the judgment attributable to those defendants." *Id.* "Further, the plaintiff can collect the entire amount of a joint and several judgment against any defendant jointly and severally responsible, and leave it to that defendant to collect contribution for any overpayments from the other defendants." *Id.* Assuming the facts of this case—that is, assuming Gonzaba provided evidence of financial responsibility but its employee, Dr. Virlar, did not—under Puente's interpretation of subsection (a), Gonzaba could be granted its requested relief of making periodic payments but, in practicality, be denied that relief because Puente could seek to collect the entire amount of the joint and several judgment from Gonzaba when Dr. Virlar did not pay the lump sum

[36] Puente argues in her brief that she objected to Keller's testimony "because [Keller] had never been designated as an expert witness or even a person with knowledge of relevant facts." Puente's argument refers to pretrial discovery. As we have previously explained, Dr. Virlar and Gonzaba properly moved for periodic payments in a post-trial proceeding.

in full. We conclude the Legislature could not have intended such a result. Therefore, under the facts of this case, we hold that only one jointly and severally liable defendant was required to provide evidence of financial responsibility under subsection (a).

C. Subsection (b)'s Periodic Payments at Discretion of Court

Dr. Virlar and Gonzaba first argue that the trial court erred in failing to order periodic payments in accordance with section 74.503(b). Subsection (b) allows the trial court at its discretion to order "future damages other than medical, health care, or custodial services awarded in a health care liability claim" to "be paid in whole or in part in periodic payments rather than by a lump sum payment." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(b) (providing that at the request of the defendant, the court "may" order "future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment").

Here, Puente was awarded $888,429.00 in damages for loss of future earning capacity.[37] Unlike future medical expenses, a trial court's decision whether to order periodic payments to compensate for future loss of earning capacity is completely discretionary. *See id*. Dr. Virlar and Gonzaba's briefing in this appeal focuses on subsection (a)'s mandatory language and the fact that the trial court failed to order *any* amount to be paid in periodic payments. Dr. Virlar and Gonzaba, however, in their briefs do not adequately argue why the trial court erred under subsection (b). *See* TEX. R. APP. P. 38.1(i). Given that the trial court "may" order periodic payments under subsection (b), Dr. Virlar and Gonzaba were required to bring forth an argument explaining why the trial court abused this discretion. *See id*. We therefore hold they waived any error relating to subsection (b).

[37] As noted previously, we have determined there is legally and factually sufficient evidence of $880,429.00 and have thus suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00.

Further, in reviewing the record, we find no abuse of discretion by the trial court in failing to award periodic payments for future loss of earning capacity.

D. Subsection (a)'s Periodic Payments Mandatory

Unlike subsection (b), subsection (a) requires a trial court, at the request of a defendant health care provider, defendant physician, or claimant, to order "medical, health care, or custodial services awarded in a health care liability claim [to] be paid in whole or in part in periodic payments rather than by a lump-sum payment." TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (providing that trial court "shall" order periodic payments in whole or in part). "When a trial court orders periodic payments, it 'shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages' and shall specify the amount, number, timing, and recipient of those payments in its judgment." *Regent Care of San Antonio, L.P. v. Detrick*, No. 19-0117, 2020 WL 2311943, at *5 (Tex. May 8, 2020) (quoting TEX. CIV. PRAC. & REM. CODE § 74.503(c)-(d)).

"The party requesting an order for periodic payments has the burden to identify for the trial court evidence regarding each of the findings required by section 74.503, and the findings must be supported by sufficient evidence." *Id*. "The trial court record may not contain all of the evidence necessary to make the required findings, and the trial court has discretion to receive additional evidence for that purpose." *Id*. "Such evidence may not be used to contradict the jury's findings on any issues submitted to it, however." *Id*. "Subchapter K gives the trial court no discretion to craft its own award of damages inconsistent with the jury's verdict." *Id*.

In *Regent Care*, the nursing facility argued the trial court abused its discretion by ordering that $256,358 in future medical damages be paid periodically because that figure was not supported by the evidence and did not conform to the verdict. *Id*. at *4. The jury had "found that $3 million, 'if paid now in cash,' would compensate [the plaintiff] for his future medical expenses." *Id*. After

trial, the nursing facility requested that the trial court order "payment of the jury's entire award periodically over five to eight years." *Id*. The trial court ordered the nursing facility to pay $256,358 periodically in twenty-four monthly installments. *Id*. In reviewing the trial court's decision, the supreme court agreed with the nursing facility "that the specific amount the trial court ordered to be paid periodically—$256,358—[was] not supported by sufficient evidence." *Id*. at *5. The supreme court explained that while there was sufficient evidence to support an award of $3 million in damages for future medical care, "no evidence indicated that only $256,358 of these medical expenses would be incurred periodically." *Id*. at *5-*6.

However, even though no evidence supported the trial court's finding regarding periodic payments, the supreme court explained that the nursing facility was not entitled to reversal:

> Nevertheless, Regent Care is not entitled to reversal unless this error harmed it—that is, unless the trial court had discretion to order that a larger amount of Detrick's damages be paid periodically. We conclude such an order would be an abuse of discretion on this record because Regent Care did not point the court to any evidence supporting its request that the entire $3 million award be paid periodically, nor to evidence of *any* specific dollar amount of medical expenses that would be incurred periodically. At trial, the parties presented their evidence regarding damages *solely in present values without detailing how those damages were discounted*, and the jury found the amount that would fairly and reasonably compensate Detrick for future medical care expenses "if paid now in cash." No party requested that the jury find the amount that would compensate Detrick if paid periodically—unsurprisingly, as Subchapter K had not yet been invoked. Nor did Regent Care offer evidence post-trial from which the trial court could make such a finding. We agree with Detrick that simply ordering the jury's present-value damages award to be paid in periodic installments—whether in whole or in part—would be an abuse of discretion here because it would effectively "double discount" the award, undercompensating him for the expenses he would incur in each future period. *See* TEX. CIV. PRAC. & REM. CODE § 74.503(c) (requiring trial court to find dollar amount of periodic payments that will "compensate the claimant for the future damages.").

Regent Care, 2020 WL 2311943, at * 6 (emphasis added). According to the supreme court, "[b]ecause no other order was possible given the evidence before" the trial court, "the trial court did not abuse its discretion by declining to order that more of the damages Regent Care owed Detrick to be paid periodically." *Id*.

Like in *Regent Care*, the parties in this case presented their evidence regarding damages solely in present value terms, without detailing how those damages were discounted. *See id*. Like the jury in *Regent Care*, the jury in this case was asked what sum of money, "if paid now in cash," would fairly and reasonably compensate Puente for future medical care expenses. *See id*. The jury answered $13,263,874.86. As in *Regent Care*, no party requested the jury to determine the amount of money that would compensate Puente if paid periodically. *See id*. Like the nursing facility in *Regent Care*, Dr. Virlar and Gonzaba did not offer any evidence post-trial from which the trial court could make such a finding. *See id*. The only argument made by Dr. Virlar and Gonzaba post-trial was that the trial court should divide the jury's award of future medical expenses into thirty-one equal annual payments because there was evidence that Puente was expected to live another thirty-one years. As the supreme court explained in *Regent Care*, "simply ordering the jury's present-value damages award to be paid in periodic installments—whether in whole or in part—would be an abuse of discretion" because "it would effectively 'double discount' the award, undercompensating" the plaintiff for expenses she would incur in each future period. *Id*.

Dr. Virlar and Gonzaba admit there was no evidence presented from which the trial court could have made a finding on periodic payments of future medical expenses, but argue that "issues existed impacting the award of future damages in this case that should have been, but were not, decided by the trial court before any determination or presentation of evidence, if necessary, regarding the specific amounts of periodic payments [they]

sought." According to Dr. Virlar and Gonzaba, those issues included (1) "the amount of the settlement credit to which [they] were entitled based on the hospital's settlement, and its impact on the award of future damages"; and (2) whether Dr. Virlar and Gonzaba had met their burden to present evidence of financial responsibility pursuant to section 74.505(a).[38] Dr. Virlar and Gonzaba argue that because the trial court denied their motions without giving findings of fact or conclusions of law, they "had no way to know that specific amount of future damages awarded would be subject to periodic payments."

However, as pointed out by Puente, Dr. Virlar and Gonzaba "had a full and fair opportunity to provide the trial court with evidence to support an order of periodic payments *after the trial court informed them it had denied their request for any credit* for Puente's daughter's settlement with the hospital." (emphasis in original). We agree with Puente that the record reflects "Virlar and Gonzaba knew at the time that the trial court heard their periodic payment evidence that the [trial] court had already disallowed any credit beyond the $200,000 credit for the settlement with Dr. Patel." Thus, after the trial court's ruling on the settlement credits, Virlar and Gonzaba had an opportunity to present evidence in support of their request for periodic payments of future medical expenses.

The supreme court in *Regent Care* recognized that in ordering periodic payments, a trial court may receive additional evidence to make the required findings under Subchapter K, but "[s]uch evidence may not be used to contradict the jury's findings on any issues submitted to it." *Regent Care*, 2020 WL 2311943, at *5. The supreme court stressed that "Subchapter K gives the trial court no discretion to craft its own award of damages *inconsistent with the jury's verdict*." *Id*. (emphasis added). As noted, there was

[38] As explained previously in this opinion, we have held that they did.

no evidence introduced post-verdict that would support an amount of periodic payments of future medical expenses. The evidence at trial supporting future medical expenses was presented in present-value terms. Puente's expert, Dr. Fairchild, presented evidence totaling almost $3 million more than the jury awarded. Further, his opinion with respect to future medical expenses consisted of different discount rates depending on the specific expense because Dr. Fairchild assumed different inflation rates for each. Thus, with this record, it was impossible for the trial court to order periodic payments that was *consistent with the jury's award*. As in *Regent Care*, "[b]ecause no other order was possible given the evidence before" the trial court, we hold the trial court did not err in declining to order periodic payments of future medical expenses. *Id*. at *6.

CONCLUSION

We hold the trial court did not err in excluding the expert testimony of Dr. Kuncl or in admitting evidence of Dr. Virlar's loss of privileges and alleged extraneous bad acts. We further hold the evidence was legally and factually sufficient to support the jury's award of loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00). We accept the remittitur filed by Puente in the amount of $8,000.00 and modify the judgment to reflect that Puente recover damages against Dr. Virlar and Gonzaba for loss of future earning capacity in the amount of $880,429.00. *See* TEX. R. APP. P. 46.3, 46.5. We do not disturb any other damages awarded by the jury. Additionally, we find no reversible error by the trial court in failing to award periodic payments for future loss of earning capacity under section 74.503(b) or for future medical care expenses under section 74.503(a). Finally, with respect to any applicable settlement credit from C.P.'s settlement with the hospital pursuant to the common law's one-satisfaction rule, we conclude a benefits analysis should be conducted pursuant to *Utts v.*

Short, 81 S.W.3d 822 (Tex. 2002). Therefore, we reverse the judgment in part and remand the cause for the trial court (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts* and apply an appropriate settlement credit, if any, and (2) to sign a new judgment in conformity with this opinion.

Liza A. Rodriguez, Justice

Fourth Court of Appeals
San Antonio, Texas

CONCURRING AND DISSENTING OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice
Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice
Concurring and Dissenting Opinion by: Patricia O. Alvarez, Justice

Sitting:[1] Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: October 14, 2020

I concur in the majority's opinion and judgment on Puente's second motion for rehearing in all respects except as to the issue of the settlement credit. Because I believe appellants are entitled to a dollar-for-dollar credit for the full amount of the confidential settlement and such a credit would not result in an open courts violation, I would reverse and remand for the trial court

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

to reduce the judgment by the full amount of the settlement. Accordingly, I respectfully dissent in part.

Puente, Puente's mother, and Puente's daughter C.P. asserted a health care liability claim against appellants and the hospital for negligently injuring Puente. C.P. sought loss of consortium damages. The hospital and C.P. entered into a confidential settlement agreement, and C.P., Puente, and Puente's mother subsequently nonsuited their claims against the hospital. Puente proceeded to trial against appellants and obtained a jury verdict in her favor. Appellants sought a settlement credit for the full amount of the confidential settlement with C.P., which the trial court denied. On appeal, Puente argues appellants are not entitled to any settlement credit because C.P.'s loss of consortium claim is "a separate and independent claim distinct from" Puente's claim and that application of the settlement credit would result in an open courts violation. I disagree with both arguments.

The crux of the dispute is whether C.P. is a "claimant" for whose claim appellants are entitled to a settlement credit under Civil Practice and Remedies Code sections 33.011 and 33.012. When interpreting a statute, we must "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). "If the statutory text is unambiguous, [we] must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results." *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

Section 33.012 provides: "[I]f the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant . . . by an amount equal to the sum of the dollar amounts of all settlements . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(c). Section 33.011 defines

"claimant" to include ***both*** the injured person ***and*** "any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of" the injured person. *Id*. § 33.011(1). The statute's plain and unambiguous language does not distinguish between the injured person and a plaintiff seeking damages for that person's injury. Further, the statute does not carve out of the definition of "claimant" a plaintiff seeking damages the injured person could not recover herself, such as damages for loss of consortium.

Here, C.P. and Puente each pleaded the same claim—a health care liability claim. Although C.P. and Puente each sought different damages, both C.P.'s and Puente's damages arose from Puente's injury. And while the supreme court has characterized claims for loss of consortium as "separate and independent claims distinct from the underlying action," it nevertheless recognized they are "derivative" in the sense that a lost consortium plaintiff such as C.P. must establish a third party's "underlying injury in order to recover damages." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009); *see also Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990) ("[C]hildren may recover for loss of consortium when a third party causes serious, permanent, and disabling *injuries to their parent*." (emphasis added)). In other words, regardless of whether C.P.'s claim for loss of consortium is separate and independent from Puente's claims, both C.P. and Puente sought damages for the injury to Puente. Therefore, both C.P. and Puente are the "claimant" under section 33.011's plain language.

The supreme court's decision in *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999), interpreting substantially similar language in the prior version of the statute, is consistent. In *Drilex*, the supreme court construed "claimant" to include every party seeking recovery for injury to the same person. *Id.* at 122. The court did not distinguish between a wholly derivative claim for damages versus a separate and independent claim for damages, such as for loss of consortium.

Rather, the court held that what unifies parties as one "claimant" is the fact that they are seeking damages arising from injury to the same person. Although the supreme court has criticized its holding in *Drilex*, it has not overruled it, nor has it held the *Drilex* analysis is inapplicable to loss of consortium claims. Therefore, in light of the plain language of sections 33.011 and 33.012 and *Drilex*, I would conclude that because C.P. is a "claimant" who "has settled with one or more persons," appellants are entitled to a dollar-for-dollar credit for the amount of C.P.'s confidential settlement.

I also disagree with the majority's conclusion that application of section 33.012 in this case results in an open courts violation. In *Lucas*, the supreme court held an arbitrary damages cap unconstitutionally restricted a health care liability claimant's right to redress for a common law claim. *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988). Section 33.012, in contrast, does not restrict a health care liability claimant's recovery; rather, it requires every member of the claimant class to share in a single, but unrestricted, recovery for the underlying injury. Even if application of section 33.012 restricts an individual plaintiff's recovery, *Lucas* took issue with a statute that capped the damages recoverable for a common law claim. Here, as noted, Puente and C.P. are asserting the same health care liability claim, and section 33.012 neither caps nor otherwise restricts the damages recoverable for that claim.

For these reasons, I would sustain appellants' fourth issue and remand to the trial court with instructions to apply a credit in the full amount of the confidential settlement in accordance with section 33.012.

Sandee Bryan Marion, Chief Justice

Fourth Court of Appeals
San Antonio, Texas

CONCURRING AND DISSENTING OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A.,
a/k/a and d/b/a Gonzaba Medical Group,
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From the 131st Judicial District Court, Bexar County, Texas
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Sitting:[1] Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: October 14, 2020

I agree with the majority's opinion and judgment except for the settlement credit issue. On that issue, I join Chief Justice Marion's dissent. I write separately because I am concerned with the effect that section 33.012 has on parties when separate settlements involve derivative claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012.

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

In this case, the statute's plain language requires the trial court to reduce Puente's damages for her physical injury by the amount C.P. received for her separate loss of consortium. The statute penalizes Puente dollar-for-dollar for C.P.'s settlement for her separate damage. The facts of this case reveal a punitive aspect to the statute. For this reason, I invite the Texas Legislature to revisit the statute's construction to avoid punitive consequences in tragic circumstances like the one this case raises.

Patricia O. Alvarez, Justice

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

BEFORE THE EN BANC COURT[1]

In accordance with this court's opinion of this date, the portion of the trial court's judgment awarding damages for future loss of earning capacity is MODIFIED to reflect that Appellee Jo Ann Puente recover damages from appellants in the amount of $880,429.00. As modified, the portion of the trial court's judgment awarding damages for future loss of earning capacity is AFFIRMED. We do not disturb any other damages awarded by the jury. Further, the judgment of the trial court is REVERSED IN PART and this cause is REMANDED for the trial court (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002), and apply any appropriate settlement credit, if any, and (2) to sign a new judgment in conformity with this court's opinion. Costs of appeal are taxed against the party incurring same.

Appellee Jo Ann Puente's second motion for rehearing is GRANTED.

SIGNED October 14, 2020.

Liza A. Rodriguez

Liza A. Rodriguez, Justice

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

2020 WL 6049652
Only the Westlaw citation is currently available.

Court of Appeals of Texas, San Antonio.

Jesus VIRLAR, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group, Appellants

v.

Jo Ann PUENTE, Appellee

No. 04-18-00118-CV
|
Delivered and Filed: October 14, 2020

Synopsis

Background: Patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency brought medical malpractice action against her physician and his medical group. After the jury found for patient, the 37th District Court, Bexar County, Norma Gonzales, J., signed the judgment awarding her more than $14 million in damages, and denied physicians' post-trial motions. Defendants appealed.

Holdings: On rehearing, the Court of Appeals, Rodriguez, J., held that:

[1] expert witness testimony that he was "critical" of health care providers that cared for patient was general and conclusory and did not constitute probative evidence;

[2] any error in trial court's evidentiary rulings was harmless given record as a whole;

[3] evidence was insufficient to support jury's award of $888,429 damages for loss of future earning capacity;

[4] application of statutory settlement credit provisions to reduce award of economic damages by amount of settlement between patient's daughter and hospital for daughter's claim for loss of consortium violated open courts provision of state constitution;

[5] physicians were entitled to hearing on whether they were entitled to settlement credit for amount of alleged "sham" settlement between hospital and patient's daughter;

[6] physicians' post-trial request for periodic payments did not violate patient's right to due process and due course of law under state constitution; and

[7] trial court did not abuse its discretion by not awarding any amount of future medical care expenses to be paid in periodic payments.

Affirmed in part as modified, reversed in part, and remanded.

Marion, C.J., filed opinion concurring in part and dissenting in part.

Alverez., J., filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for New Trial; Motion for Remittitur; Motion for Judgment Notwithstanding the Verdict (JNOV); Motion to Modify, Correct or Reform the Judgment.

West Headnotes (77)

[1] **Appeal and Error** Expert Evidence and Witnesses

The Court of Appeals reviews a trial court's exclusion of an expert witness's testimony for an abuse of discretion.

[2] **Appeal and Error** Abuse of discretion

A trial court abuses its discretion by failing to follow guiding rules and principles.

[3] **Appeal and Error** Admission or exclusion of evidence in general

Appeal and Error Exclusion of Evidence

To reverse a trial court's judgment based on the exclusion of evidence, the Court of Appeals must find that the trial court did in fact commit error, and that the error was harmful.

[4] **Health** Proximate cause

Recovery in a medical malpractice case requires proof to a reasonable medical probability that the injuries complained of were proximately caused by the negligence of a defendant.

[5] **Health** Proximate Cause

Proof that medical negligence was a cause-in-fact of injury, which is one component of proximate cause, requires proof that: (1) the negligence was a substantial factor in causing the injury, and (2) without the act or omission, the harm would not have occurred.

[6] **Health** Proximate cause

To satisfy a legal sufficiency review in medical-malpractice cases, plaintiffs must adduce evidence of a reasonable medical probability or reasonable probability that their injuries were caused by the negligence of one or more defendants, meaning simply that it is more likely than not that the ultimate harm or condition resulted from such negligence.

[7] **Health** Proximate cause

In medical-malpractice cases, the general rule is that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors.

[8] **Evidence** Necessity and sufficiency

In determining whether expert testimony is reliable and admissible, a court may consider the expert's experience, as well as six other nonexclusive factors: (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the non-judicial uses which have been made of the theory or technique. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[9] **Evidence** Necessity and sufficiency

When factors regarding scientific theories and techniques do not readily lend themselves to a review of the expert's opinion, expert testimony is unreliable if there is simply too great an analytical gap between the foundational data and the opinion proffered. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[10] **Evidence** Necessity and sufficiency

An expert's testimony cannot be "conclusory"; expert testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[11] **Evidence** Necessity and sufficiency

Evidence Testimony of Experts

If no basis for the expert opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[12] **Evidence** Certainty of testimony; probability, or possibility

Evidence Medical testimony

It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury; the expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[13] **Evidence** Necessity and sufficiency

An expert's simple ipse dixit is insufficient to establish a matter; rather, the expert must explain the basis of the statements to link the conclusions to the facts. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[14] **Evidence** Medical testimony

Testimony by expert witness that he was "critical" of health care providers that cared for patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency was general and conclusory and did not constitute probative evidence in medical malpractice action, although expert testified he believed physicians, nurses, and dieticians should have recognized risk of thiamine deficiency; expert failed to explain how and why each physician breached the applicable standard of care and proximately caused patient's injuries, admitted that some physicians

spent very little time with patient, and speculated that there were varying levels of liability. Tex. Civ. Prac. & Rem. Code Ann. § 74.402; Tex. R. Evid. 702.

[15] **Appeal and Error** Exclusion of evidence

Pretrial Procedure Motions in limine; preclusion of evidence, argument, or reference

A ruling on a motion in limine does not preserve error for appeal; it is designed solely to require an offering party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury, and accordingly has no bearing on the ultimate admissibility of the evidence and preserves nothing for review.

[16] **Appeal and Error** Rulings on evidence in general

Physicians failed to preserve issue whether allowing patient's counsel to ask physician whether he had lost his hospital privileges immediately after he had cared for patient was prejudicial error, in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; physicians' trial counsel had objected to question, patient's counsel withdrew the question, trial court never ruled on the objection, and physicians never requested relief from trial court. Tex. R. Evid. 103(b), 403.

[17] **Appeal and Error** Evidence and Witnesses

Appeal and Error Rulings on evidence in general

Physicians preserved issue of whether admitting testimony that physician lost his privileges at hospital after patient was treated there, and had not regained them, was prejudicial error, in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; physicians' trial counsel objected to proposed testimony outside presence of jury and trial court ruled that the evidence was admissible. Tex. R. Evid. 403.

[18] **Evidence** Tendency to mislead or confuse

Testimony is not inadmissible on the sole ground that it is prejudicial, because in the adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent; rather, unfair prejudice is the proper inquiry. Tex. R. Evid. 403.

[19] **Evidence** Tendency to mislead or confuse

"Unfair prejudice," within the context of procedure rule allowing court to exclude relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Tex. R. Evid. 403.

[20] **Evidence** Tendency to mislead or confuse

When determining the admissibility of evidence under procedure rule allowing court to exclude relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, trial judges must balance the probative value of the evidence against relevant countervailing factors. Tex. R. Evid. 403.

[21] **Appeal and Error** Admission or exclusion of evidence in general

The Court of Appeals reviews a trial court's admission of evidence for abuse of discretion.

[22] **Appeal and Error** Exclusion of evidence

Physicians failed to preserve for appeal issue of whether trial court erred when it allowed patient's attorney to question physician about whether he had history of not reading a patient's charting or examining the patient before administering treatment, in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; trial court's rulings on motions in limine failed to preserve the issue, and physicians' trial counsel did not object to question when posed at trial. Tex. R. App. P. 33.1; Tex. R. Evid. 404.

[23] **Appeal and Error** Objections to evidence and witnesses

Appeal and Error Instructions

Physicians failed to preserve for appeal their argument that trial court in medical malpractice action erred when it allowed patient's attorney to ask physician about the results of his diagnosing a patient over the phone without seeing her or her chart, where defense counsel objected to the question, trial court sustained the objection, patient's counsel moved on to another topic, and defense counsel failed to move to instruct the jury to disregard. Tex. R. App. P. 33.1; Tex. R. Evid. 404.

[24] **Appeal and Error** Relation Between Error and Final Outcome or Result

Erroneous admission of evidence requires reversal only if the error probably, though not necessarily, resulted in an improper judgment. Tex. R. App. P. 44.1(a).

[25] **Appeal and Error** Entire record

Appeal and Error Relation Between Error and Final Outcome or Result

Appeal and Error Rulings as to evidence

In determining whether erroneous admission of evidence resulted in an improper judgment, such that reversal is required, Court of Appeals reviews the entire record, and requires complaining party to demonstrate that judgment turned on the particular evidence admitted.

[26] **Appeal and Error** Same or Similar Evidence Otherwise Admitted; Cumulative Evidence

Erroneous admission of evidence is harmless if it is merely cumulative.

[27] **Appeal and Error** Admission of Evidence

Whether erroneous admission of evidence is harmful is more a matter of judgment than precise measurement; in making that judgment, the Court of Appeals may look to efforts made by counsel to emphasize the erroneous evidence and whether there is contrary evidence that the improperly admitted evidence is calculated to overcome.

[28] **Appeal and Error** Negligence and torts in general

Trial court's error, if any, in admitting evidence that physician had lost his privileges at hospital after treating patient there, and had treated another patient over the phone without reviewing her chart, was harmless given record as a whole in medical malpractice action; case did not turn on whether physician had lost privileges or how he had treated another patient, but whether he breached standard of care by failing to treat plaintiff patient for thiamine deficiency, and evidence at trial established that physician failed to review patient's medical records which documented classic symptoms of thiamine deficiency, failed to document conversation about patient's nutrition, offered trial testimony inconsistent with his deposition, and testified without objection that he was terminated from his previous employer.

[29] **Damages** Impairment of earning capacity

"Lost earning capacity" is an assessment of what the plaintiff's capacity to earn a livelihood actually was and the extent to which that capacity was impaired by the injury.

[30] **Damages** Loss of earnings or services

"Loss of past earning capacity" is a plaintiff's diminished ability to work during the period between the injury and the date of trial.

[31] **Damages** Impairment of earning capacity

"Loss of future earning capacity" is the plaintiff's diminished capacity to earn a living after trial.

[32] **Damages** Impairment of earning capacity

In order to support a claim for lost earning capacity, the plaintiff must introduce evidence from which a jury may reasonably measure in monetary terms her earning capacity prior to injury.

[33] **Damages** Impairment of earning capacity

If the plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of her loss can best be shown by comparing her actual earnings before and after her injury.

[34] **Damages** Impairment of earning capacity

Because the amount of money a plaintiff might earn in the future is always uncertain, the jury has considerable discretion in determining the amount of lost earning capacity.

[35] **Damages** Impairment of earning capacity

To support an award of damages for loss of future earning capacity, the plaintiff can introduce evidence of (1) past earnings, (2) the plaintiff's stamina, efficiency, and ability to work with pain, (3) the weakness and degenerative changes that will naturally result from the plaintiff's injury, and (4) the plaintiff's work-life expectancy.

[36] **Damages** Impairment of earning capacity

To support an award of damages for loss of future earning capacity, there must be some evidence that the plaintiff had the capacity to work prior to the injury, and that her capacity was impaired as a result of the injury.

[37] **Appeal and Error** Lost wages

In considering whether the evidence is legally sufficient to support the jury's finding of loss of future earning capacity, the Court of Appeals examines the record for evidence and inferences that support the jury's finding and disregards all contrary evidence and inferences.

[38] **Appeal and Error** Lost wages

If there is more than a scintilla of evidence to support the jury's finding of lost earning capacity, the evidence is legally sufficient to support the jury's finding.

[39] **Appeal and Error** Lost wages

With regard to whether the evidence is factually sufficient to support the jury's finding of loss of future earning capacity, the Court of Appeals considers all the evidence in the record, both for and against the jury's finding.

[40] **Appeal and Error** Lost wages

The evidence is factually insufficient to support the jury's finding of loss of future earning capacity if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

[41] **Trial** Weight of evidence

Trial Credibility of Witnesses

As the trier of fact, the jury determines the credibility of the witnesses and the weight to be given their testimony, decides whether to believe or disbelieve all or any part of the testimony, and resolves any inconsistencies in the testimony.

[42] **Appeal and Error** Jury as factfinder below

When there is conflicting evidence, the Court of Appeals defers to the jury as the trier of fact.

[43] **Evidence** Damages

Health Amount

Evidence was insufficient to support jury's award of $888,429 damages for loss of future earning capacity, in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; the only evidence to support award was testimony from plaintiff's expert economic witness, which valued plaintiff's loss at $880,429, $8,000 less than jury's award.

[44] **Damages** Certainty as to amount or extent of damage

Damages Weight and Sufficiency

A jury's award of damages may not be based on conjecture and must be based upon such facts as are available in the particular case and proved with that degree of certainty of which the case is susceptible.

[45] **Damages** Impairment of earning capacity

Where the plaintiff seeks special damages for loss of his earning capacity in a particular business or profession, the amount of his earnings or the value of his services in that business must be shown with reasonable certainty.

[46] **Damages** Nature and theory of compensation

The "one-satisfaction rule" is a common law rule providing that a plaintiff is entitled to only one recovery for any damages suffered; this is true even though more than one wrongdoer contributed to bring about his injuries.

[47] **Damages** Nature and theory of compensation

The fundamental consideration in applying the one-satisfaction rule is whether the plaintiff has suffered a single, indivisible injury, not the causes of action the plaintiff asserts; thus, the one-satisfaction rule applies both when the defendants commit the same act as well as when defendants commit technically differing acts which result in a single injury.

[48] **Damages** Nature and theory of compensation

Damages Reparation by wrongdoer

The one-satisfaction rule applies to settlement credits for nonsettling defendants because the plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settling defendant has already partially contributed; the plaintiff is otherwise recovering an amount greater than the trier of fact determines will fully compensate for the injury.

[49] **Damages** Mitigation of damages and reduction of loss

A defendant seeking a settlement credit has the burden of proving its right to such a credit; this burden includes proving the settlement credit amount.

[50] **Damages** Mitigation of damages and reduction of loss

Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation.

[51] **Damages** Mitigation of damages and reduction of loss

The plaintiff can rebut the presumption that a nonsettling defendant is entitled to settlement credits by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award would not provide for the plaintiff's double recovery; a written settlement agreement that specifically allocates damages to each cause of action will satisfy this burden.

[52] **Damages** Mitigation of damages and reduction of loss

A nonsettling party should not be penalized for events over which it has no control, and thus, the burden-shifting framework, based on the presumption that the nonsettling defendant is entitled to a settlement credit after it introduces evidence of the plaintiff's settlement, is appropriate because the plaintiff is in the best position to demonstrate why rendering judgment based on the jury's damages award would not amount to the plaintiff's double recovery; if the plaintiff fails to satisfy this burden, then the defendant is entitled to a credit equal to the entire settlement amount.

[53] **Damages** Mitigation of damages and reduction of loss

Nonsettling physicians met their burden of showing amount of settlement between patient's daughter and hospital in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; although physicians did not present judicial admission, stipulation, judicial notice, or properly admitted documents or testimony to establish amount, physicians informed trial court of settlement amount at hearing, and patient did not contest settlement amount. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.002(a), 33.012(c).

[54] **Constitutional Law** Conditions, Limitations, and Other Restrictions on Access and Remedies

Pursuant to the Open Courts Provision of the Texas Constitution, the legislature may not restrict the recovery of economic damages in a common law medical malpractice action. Tex. Const. art. 1, § 13.

[55] **Torts** Comparative fault; apportionment

Torts Persons Liable

Liability generally arises only from one's own injury-causing conduct and, as a result, liability for damages is commensurate with fault under the proportionate responsibility statute. Tex. Civ. Prac. & Rem. Code Ann. § 33.001 et seq.

[56] **Damages** Nature and theory of compensation

The one-satisfaction rule's purpose is to make the plaintiff whole, but not more than whole, for her injuries.

[57] **Constitutional Law** Conditions, Limitations, and Other Restrictions on Access and Remedies

Application of statutory settlement credit provisions to a jury award of economic damages in a common-law medical malpractice action is an impermissible statutory restriction of a plaintiff's right of recovery under the open courts provision of state constitution, if the settlement credits prevent the plaintiff from recovering the full amount of her economic damages. Tex. Const. art. 1, § 13; Tex. Const. art. 3, § 66.

[58] **Parent and Child** Loss of parent's services, society, or consortium

Under the common law, a child's claim for loss of consortium is a separate and independent claim distinct from the underlying action.

[59] **Constitutional Law** Conditions, Limitations, and Other Restrictions on Access and Remedies

Damages Reparation by wrongdoer

Application of statutory settlement credit provisions in common-law medical malpractice action to reduce patient's award of economic damages by amount of settlement between patient's daughter and hospital for daughter's claim for loss of consortium violated open courts provision of state constitution; any damages suffered by daughter for loss of consortium were her own and did not constitute double-recovery for patient, and settlement credit would thus impermissibly restrict patient's right to recover entire amount of her economic damages. Tex. Const. art. 1, § 13; Tex. Const. art. 3, § 66.

[60] **Constitutional Law** Conditions, Limitations, and Other Restrictions on Access and Remedies

Damages Reparation by wrongdoer

Patient adequately pled an open courts challenge in response to physicians' post-verdict motion for settlement credits in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency, where patient stated in her response to physician's motion that the attempt to reduce her recovery by the amount received by her daughter in settlement with hospital violated state constitution's open courts provision, and provided factual basis for her constitutional challenge. Tex. Const. art. 1, § 13.

[61] **Pleading** Statement of cause of action in general

Generally, the purpose of a pleading is to give fair notice of the nature and basic issues so the opposing party can prepare a defense.

[62] **Pleading** Construction in General

When no special exception is made, court liberally construes the pleadings in the pleader's favor; even so, a liberal construction does not require a court to read into a petition what is plainly not there.

[63] **Damages** Reparation by wrongdoer

When a case involves facts suggesting that a non-settling plaintiff may have benefited from the proceeds of another plaintiff's settlement, the non-settling defendant must raise this allegation to the trial court, not the jury, and present evidence of the benefit as part of its burden in electing for a dollar-for-dollar credit.

[64] **Damages** Computation of amount

A non-settling defendant does not have to present evidence that a non-settling plaintiff may have benefited from the proceeds of another plaintiff's settlement before the case was presented to the jury, but may urge its settlement-credit motion and introduce evidence in a post-verdict motion.

[65] **Damages** Reparation by wrongdoer

If the evidence shows that a non-settling plaintiff may have benefited from the proceeds of another plaintiff's settlement, then the trial court should apply the settlement credit reflecting that benefit unless the nonsettling plaintiff presents evidence that he or she did not benefit from the settlement; in other words, once the nonsettling defendant presents evidence of the nonsettling plaintiff's benefit from a settlement, the trial court shall presume the settlement credit applies unless the nonsettling plaintiff presents evidence to overcome this presumption.

[66] **Damages** Reparation by wrongdoer

Non-settling physicians were entitled to hearing on whether they were entitled to settlement credit for amount of allegedly "sham" settlement between hospital and patient's daughter in medical malpractice action; patient and her mother had dismissed all their claims against hospital with prejudice after hospital settled with daughter, and trial court did not have opportunity to make evidentiary finding as to any benefit patient received from daughter's settlement.

[67] **Appeal and Error** Reducing amount of recovery; remittitur

Appellee's proposed voluntary remittitur in amount of $434,000.00, which appellee argued would cure any reversible error committed by trial court with respect to settlement credit issue, would not be appropriate, nor could Court of Appeals conclude that $434,000.00 would cure the error; trial court did not make evidentiary finding as to any benefit appellee received from settlement. Tex. R. App. P. 46.5.

[68] **Judgment** Application for judgment

Physicians did not waive their right to request periodic payments of damages by failing to object to trial court submitting damages question to jury in usual form of immediate sum of cash, in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; issue was one for trial court, not jury, and physicians' post-trial motion allowed trial court to make appropriate findings of dollar amount, number, and interval between payments. Tex. Civ. Prac. & Rem. Code Ann. §§ 74.502, 74.503, 74.503(c), 74.503(d).

[69] **Judgment** Application for judgment

Physicians' post-trial request for periodic payments in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency did not violate patient's right to due process and due course of law under state constitution by forcing trial court to engage in speculation to make required findings, where trial court was able to hear additional evidence in post-trial proceeding. Tex. Const. art 1, § 19; Tex. Civ. Prac. & Rem. Code Ann. § 74.503.

[70] **Statutes** Undefined terms

Statutes Context

Statutes Relation to plain, literal, or clear meaning; ambiguity

When a statute does not define a particular term, the Court of Appeals construes the term according to its plain and common meaning, unless a contrary intention is apparent from the context or unless such a construction leads to absurd results.

[71] **Judgment** Application for judgment

Testimony of controller and balance sheet for medical group was sufficient evidence of financial responsibility to support physician's and medical group's request for periodic payments of damages awarded in medical malpractice action to patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; medical group and physician were jointly and severally liable for full amount of judgment, and thus only one of them was required to provide evidence of financial responsibility. Tex. Civ. Prac. & Rem. Code Ann. §§ 74.503, 74.505(a).

[72] **Appeal and Error** Damages or other relief

Defendants in medical malpractice action waived any error relating to trial court's failure to order periodic payments of damages for loss of future earning capacity awarded to patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; trial court had discretion whether or not to so order, and defendants failed to explain how trial court abused its discretion. Tex. Civ. Prac. & Rem. Code Ann. § 74.503(b).

[73] **Judgment** Application for judgment

While it is mandatory that the trial court order some of the medical, health care, or custodial services awarded to a plaintiff in a medical malpractice action to be paid in periodic payments following the request of a defendant health care provider, the determination of the amount to be paid periodically is within the trial court's discretion. Tex. Civ. Prac. & Rem. Code Ann. § 74.503(a).

[74] **Judgment** Application for judgment

The party requesting an order for periodic payments of future medical expenses, instead of a lump sum, has the burden to identify for the trial court evidence regarding each of the findings required by the statute, and the findings must be supported by sufficient evidence. Tex. Civ. Prac. & Rem. Code Ann. § 74.503.

[75] **Judgment** Application for judgment

The trial record may not contain all of the evidence necessary to make the required findings to award periodic payments for future medical expenses, and the trial court has discretion to receive additional evidence for that purpose; such evidence may not be used to contradict the jury's findings on any issues submitted to it, however. Tex. Civ. Prac. & Rem. Code Ann. § 74.503.

[76] **Judgment** Application for judgment

Statutes allowing the trial court to order that an award of future medical expenses be paid periodically, rather than by lump sum, gives the trial court no discretion to craft its own award of damages inconsistent with the jury's verdict. Tex. Civ. Prac. & Rem. Code Ann. § 74.501 et seq.

[77] **Judgment** Application for judgment

Trial court in medical malpractice action did not abuse its discretion by not awarding any amount of future medical care expenses to be paid in periodic payments following request from defendant health care providers, in medical malpractice action brought by patient who suffered permanent neurological injuries following undiagnosed thiamine deficiency; there was no evidence introduced post-verdict that supported an amount of periodic payments of future medical expenses because the evidence at trial supporting future medical expenses was presented in present-value terms. Tex. Civ. Prac. & Rem. Code Ann. §§ 74.503(a), 74.503(c).

West Codenotes

Unconstitutional as Applied

Tex. Civ. Prac. & Rem. Code Ann. § 33.012(c)

From the 131st Judicial District Court, Bexar County, Texas, Trial Court No. 2014-CI-04936, Honorable Norma Gonzales, Judge Presiding

Attorneys and Law Firms

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Sitting: [1] Sandee Bryan Marion, Chief Justice, Patricia O. Alvarez, Justice, Luz Elena D. Chapa, Justice, Irene Rios, Justice, Beth Watkins, Justice, Liza A. Rodriguez, Justice

OPINION ON MOTION FOR REHEARING

Opinion by: Liza A. Rodriguez, Justice

***1** This appeal arises from a medical malpractice action filed by Jo Ann Puente against Dr. Jesus Virlar and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group ("Gonzaba"). A jury found Dr. Virlar liable for Puente's injuries, and judgment was rendered in favor of Puente and against Dr. Virlar and his employer, Gonzaba. On appeal, Dr. Virlar and Gonzaba bring five issues:

(1) whether the trial court erred in excluding the expert testimony of Dr. Ralph W. Kuncl;

(2) whether the trial court erred in admitting evidence of Dr. Virlar's loss of privileges and alleged extraneous bad acts in treating other patients in violation of Texas Rule of Evidence 403;

(3) whether the evidence is legally and factually sufficient to support the jury's award of $888,429.00 in future loss of earning capacity;

(4) whether the trial court erred in refusing to apply a settlement credit in the amount of the hospital's settlement with Puente's minor daughter; and

(5) whether the trial court erred in failing to order that future damages should be paid in whole or in part in periodic payments rather than by lump sum pursuant to section 74.503 of the Texas Civil Practice and Remedies Code.

In our opinion of February 5, 2020, we found no error on the part of the trial court with respect to the first and second issues. *See* *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 557735, at *8, *12, *15, *17 (Tex. App.—San Antonio Feb. 5, 2020, no pet. h.) ("*Virlar I*"). With respect to the third issue, we held that the evidence was legally and factually sufficient to support loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00), and therefore suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00. *See* *id.* at *20, *33 (citing TEX. R. APP. P. 46.3). Regarding the fourth issue, we remanded the cause for the trial court to conduct a benefits analysis pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). *See* *Virlar I*, 2020 WL 557735, at *29. Finally, with regard to the fifth issue, we found no abuse of discretion by the trial court in failing to award periodic payments for future loss of earning capacity under

section 74.503(b) of the Texas Civil Practice and Remedies Code; however, we did find the trial court abused its discretion under section 74.503(a) because it did not order any part of the amount awarded for future medical care expenses to be paid in periodic payments. *See* *Virlar I*, 2020 WL 557735, at *32.

Puente then filed two remittiturs with the clerk of this court. *See* *Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 2139313, at *1 (Tex. App.—San Antonio May 6, 2020, no pet. h.) ("*Virlar II*"). The first was a remittitur in the amount of $8,000.00 as suggested in our original opinion in *Virlar I*. The second was a voluntary remittitur in the amount of $434,000.00 pursuant to Texas Rule of Appellate Procedure 46.5, which Puente argued would cure any reversible error committed by the trial court with respect to Issue 4 (the settlement credit issue). Puente also filed a motion for rehearing, requesting that this court reconsider its holdings with respect to Issue 4 (the settlement credit issue) and Issue 5 (the periodic payments of future medical expenses issue). We accepted Puente's first remittitur of $8,000.00. *See* *Virlar II*, 2020 WL 2139313, at *1. However, we rejected Puente's second remittitur of $434,000.00 and denied her motion for rehearing. *See* *id.*

***2** Two days after we issued our opinion on remittitur, the supreme court issued its opinion in *Regent Care of San Antonio, L.P. v. Detrick*, No. 19-0117, —— S.W.3d ——, —— – ——, 2020 WL 2311943, at *4-*6 (Tex. May 8, 2020), which discussed the issue of periodic payments of future medical expenses. On May 20, 2020, Puente filed a second motion for rehearing based on the *Regent Care* decision. We reviewed the motion and requested a response from Dr. Virlar and Gonzaba. After considering the motion and responses filed, we grant Puente's second motion for rehearing. We withdraw our opinions and judgments of February 5, 2020 and May 6, 2020. *See* *Virlar I*, 2020 WL 557735, at *33; *Virlar II*, 2020 WL 2139313, at *1 (opinion on remittitur). We substitute this opinion and judgment in their place.

BACKGROUND

On November 28, 2011, Appellee Jo Ann Puente underwent "Roux-en-Y" gastric bypass surgery, which was performed by Dr. Nilesh Patel. On December 24, 2011, she began having complications from her surgery, including nausea and vomiting. She reported to Dr. Patel that when she attempted to eat solids, she vomited but was able to keep liquids down. On January 11, 2012, Dr. Patel performed an outpatient dilation procedure for a suspected stricture related to the bypass surgery. On January 13, 2012, Puente went to Dr. Patel's clinic in Del Rio, Texas, and was treated for dehydration. The next day, January 14, 2012, Puente went to the emergency room at Metropolitan Methodist Hospital in San Antonio, Texas, where her main complaint was vomiting. She reported she had just had a dilation outpatient procedure and was not better. In the six weeks since her bariatric surgery, Puente had lost 100 pounds. While she was at the emergency room, the results of a CAT scan raised concerns she was suffering from an esophageal rupture. She was admitted to the intensive care unit on the orders of Dr. Manuel Martinez, a hospitalist and employee of Gonzaba, and placed under his care. Dr. Martinez diagnosed Puente with pancreatitis and dehydration. Puente's medical records reflect that she was awake, alert, and able to follow commands. She did not have any "deficit of movement" to her upper or lower extremities.

Because of the possible esophageal rupture, Dr. Martinez ordered Puente to take nothing by mouth and ordered all the medications Puente had been taking since her surgery, including vitamins, to be stopped during her hospitalization. A nutritional assessment was performed by the hospital's nutritional dietician, who noted that Puente was at nutritional risk; the dietician recommended that "alternate support with TPN needs to be considered." [2]

On January 16, 2012, Appellant Dr. Jesus Virlar, also a hospitalist and Gonzaba employee, assumed Puente's care and treated her until she was discharged on January 26, 2012. On January 16th, medical records indicate Puente was having trouble walking, even with help of the nurses. The nurses noted that Puente complained of dizziness, "tingles" in her fingers, and tight muscles in her shoulder. She was still vomiting. The nurses further noted that Puente had lost control of her bowels; after being helped

to the bathroom, Puente did not respond to questions, and her gaze became "fixed." The nurses also noted that Puente needed "additional fall risk elements," including a "tether device," because of an "unsteady gait."

Dr. Virlar noted in Puente's medical records that Puente had "refused" to ambulate and wrote "MAT evaluate for depression?" According to Dr. Virlar, he wrote "MAT," or Mental Assessment TEAM, because he was considering getting a consultation for Puente's mental state. Dr. Virlar testified he thought she might have "a psychological issue" and that she "need[ed] to try harder to walk." Dr. Virlar testified, "Based at the time, under those circumstances, to me, she was depressed and possibly something else [was] going on. I just couldn't put it together." When asked why he did not find significant the nurses' notes that Puente had fixed gaze and was not responding to questions, Dr. Virlar responded, "It was not reported to me." Dr. Virlar admitted that he did not read the nurses' notes. He was asked at trial whether it was true that he never read any of the nurses' notes during the time of Puente's hospitalizations. Dr. Virlar replied, "Not every single one. Maybe I read one or two. I don't recall a specific number, but the majority of the nurses' notes, no, I did not read, sir." Later during his testimony, Dr. Virlar clarified that he "did not look at the nurses' notes." He was then asked if he wished now that he had reviewed them; Dr. Virlar replied, "No, because that's–it's their subjective interpretation. Somebody's weakness of level of 4, to me may be a level of 3, part of that assessment."

***3** On January 20, 2012, a second nutritional assessment was performed. Since her admission, Puente had been without food and had had nothing by the mouth; the only fluid Puente had received intravenously was saline. Puente was also still vomiting, a condition which started before she was hospitalized. The dietician again recommended TPN. That same day, Puente was put on a trial of clear fluids, but was not able to tolerate the fluids by mouth. Dr. Virlar returned her status to nothing by mouth.

On January 21, 2012, Puente's surgeon, Dr. Patel, wrote in her medical records to "start TPN"; however, Puente was not started on TPN that day. Dr. Patel testified he relied on the hospitalist, Dr. Virlar, to write the appropriate orders. That same day, the physical therapist's progress note stated that Puente was feeling nauseated and vomited "clear spital" in the trash. The physical therapist wrote in the medical records that Puente was demonstrating "Trendelenburg gait," which is a gait seen with people who have weakness in the pelvic muscles. On January 23, 2012, nurses' notes reflected that Puente was still complaining of dizziness and that she was exhibiting right eye nystagmus. On January 24, 2012, Puente said she was having nausea when she opened her eyes.

On January 26, 2012, Puente was discharged with orders for administration of TPN through home health care. Dr. Virlar's discharge diagnosis was (1) "intractable nausea and vomiting"; (2) "obesity"; and (3) "obstructive sleep apnea." Puente never received intravenous vitamins, including any supplemental thiamine, while she was admitted in the hospital. Further, the TPN order written by Dr. Virlar was a custom TPN order, which did not provide for the supplementation of thiamine.[3] The TPN ordered by Dr. Virlar contained nutrients, including glucose. At trial, Dr. Virlar admitted that if a patient is given glucose before thiamine, the patient's thiamine levels will diminish more rapidly because the thiamine will be "used for the metabolism." According to Dr. Virlar, he learned this fact after he was served with this lawsuit. He admitted that at time of Puente's hospitalizations, he did not know giving glucose to a patient without knowing the patient's thiamine level could be devastating to the patient. Dr. Virlar also admitted at trial that he did not know Wernicke's syndrome[4] was a risk in a post-bariatric patient suffering from "intractable vomiting."

On January 27, 2012, the day after she was discharged, Puente had blood drawn based on orders from Dr. Patel's office; the results showed she had an "abnormal, very abnormally low" level of vitamin B-1 thiamine.[5] Dr. Patel, Puente's surgeon, testified the results were not sent to his office, and he did not see them. On January 31, 2012, Puente went to the emergency room at Val Verde Regional Hospital but was not admitted. On February 2, 2012, she returned to Val Verde Regional Hospital and was admitted. On February 3, 2012, she was transferred to Metropolitan Methodist Hospital in San Antonio and admitted on Dr. Virlar's orders.

***4** Puente's medical records reflect that upon being admitted the second time to Metropolitan Methodist Hospital, she was not responding to stimuli. She became progressively more confused and her mental status declined. She ultimately needed respiratory support and was put on a ventilator to help her breathe. She experienced weakness in all four extremities

and continued to have eye movement abnormalities. On February 11, 2012, a neurosurgeon's diagnostic impression was "encephalopathy [6] of unknown etiology ... with normal MRI and CT scan of the brain ... and in the face of [Puente's] history of a prior bariatric surgery, the suspicion is malnutrition related encephalopathy, such as Wernicke encephalopathy [7] as a consideration." On February 13, 2012, Puente's medical records show that thiamine was finally added to her TPN orders.

Puente was discharged on March 9, 2012 and began receiving care at long-term care facilities. She suffered permanent brain damage. Dr. David Wenzell, her treating neurologist, testified Puente was later diagnosed as suffering from Wernicke's syndrome, which progressed to Korsakoff's syndrome. According to Dr. Wenzell, "Wernicke's syndrome is the acute presentation of the illness, and if it persists, it's called Korsakoff's syndrome." "When patients initially experience acute thiamine deficiency, they have Wernicke's syndrome. And if the problem is not dealt with, if it's not treated appropriately, then it progresses into Korsakoff's syndrome." Wernicke's syndrome can be reversed if the patient receives timely thiamine supplements intravenously.

On March 26, 2014, Puente [8] and her mother [9] sued Dr. Virlar, Gonzaba, and numerous other healthcare providers involved in Puente's care. [10] With regard to Dr. Virlar and his employer, Gonzaba, Puente and Carr sued them for negligence in diagnosing, monitoring, and treating nutritional deficiencies of Puente during her hospitalization at Metropolitan Methodist Hospital in January 2012. Puente sought damages for physical pain and mental anguish; she also alleged that she incurred loss of earnings in the past, loss of earning capacity in the future, and medical expenses in the past and future. Puente's minor daughter alleged that as a result of her mother's injuries, she had suffered damages in the past, and will incur damages in the future, for "loss of parental consortium, emotional trauma, and loss of care, maintenance, labor services, kindness, affection, protection, emotional support, attention, services, companionship, care, advice, and counsel." Puente's mother, Carr, alleged that she had suffered loss of services as a result of her daughter's injuries.

***5** Before trial, Carr, individually and as guardian of Puente's minor child, settled with or non-suited all defendants, including nonsuiting the claims against Dr. Virlar, Dr. Martinez, and Gonzaba. Puente settled with or non-suited her claims with all defendants except Dr. Virlar, Dr. Martinez, and Gonzaba. Thus, at the time of trial, the remaining claims were Puente's claims against Dr. Virlar, Dr. Martinez, and Gonzaba.

At trial, Puente's experts testified the failure of Dr. Virlar, Dr. Martinez, and Dr. Patel to recognize the risks or symptoms of Wernicke's encephalopathy and to replenish thiamine proximately caused Puente's permanent brain injury and neurological deficits for which Puente will require twenty-four-hour care for the rest of her life. According to Puente's experts, her thiamine deficiency was reversible from the time of her admission on January 14, 2012 until her discharge on January 26, 2012. However, after January 26th, her injuries were permanent.

Dr. Virlar and Gonzaba's defense at trial was that Puente had never suffered from Wernicke's encephalopathy but was suffering some other condition that no health care provider could have foreseen or prevented. [11] They emphasized that over two dozen healthcare providers had seen or treated Puente since her surgery, but none diagnosed her with Wernicke's until after January 26, 2012. Dr. Virlar testified that he took no responsibility for Puente's injuries, stating that he did his "best with the team" and they did what they "could under the circumstances." Dr. Virlar testified, "And I still agree that it is not Wernicke's encephalopathy–that she suffered a stroke."

The jury returned a verdict in favor of Puente; it found that Dr. Patel was 40% responsible; Dr. Virlar was 60% responsible; and Dr. Martinez was 0% responsible. [12] The jury awarded Puente $133,202.00 for past loss of earning capacity; $888,429.00 for future loss of earning capacity; and $13,263,874.86 for future medical expenses. Dr. Virlar and Gonzaba then filed a motion for settlement credit, arguing that the settlement paid to Puente's minor daughter by the hospital should be applied as a credit against the judgment. Dr. Virlar and Gonzaba also filed a motion for order of periodic payments. After a hearing, the trial court denied both motions. The trial court then signed a judgment against Dr. Virlar and Gonzaba, awarding Puente $14,109,349.02 in damages. [13]

***6** Dr. Virlar and Gonzaba then filed post-judgment motions, including a motion for new trial, motion for remittitur, motion for judgment notwithstanding the verdict, and motion to modify the judgment. The trial court denied all their motions. They then appealed.

EXCLUSION OF EXPERT TESTIMONY

[1] [2] [3] In their first issue, Dr. Virlar and Gonzaba argue the trial court erred in excluding deposition testimony from Dr. Ralph W. Kuncl, who would have testified about the liability of responsible third parties. "We review a trial court's exclusion of an expert witness's testimony for an abuse of discretion." *Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018). "A trial court abuses its discretion by failing to follow guiding rules and principles." *Id.* "To reverse a trial court's judgment based on the exclusion of evidence, we must find that the trial court did in fact commit error, and that the error was harmful." *Id.*

Here, Dr. Virlar and Gonzaba argue that Dr. Kuncl's testimony was relevant to responsible third parties in this case. Section 33.004 of the Texas Civil Practice and Remedies Code permits a defendant to seek to designate a person as a responsible third party by filing a motion for leave to designate that person on or before the 60th day before the trial date. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a). Section 33.003(a) requires a jury to determine, as to each cause of action asserted, "the percentage of responsibility, stated in whole numbers," for each claimant, each defendant, each settling person, and "each responsible third party who has been designated under [s]ection 33.004." *Id.* § 33.003(a). Section 33.003(b), however, "does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission." *Id.* § 33.003(b).

Dr. Virlar and Gonzaba pled the alleged responsibility of twenty-six different health-care providers. Pursuant to section 33.003(b), they were not entitled to a jury submission on the conduct of these twenty-six alleged responsible third parties unless at trial there was "sufficient evidence to support the submission." *Id.* Dr. Virlar and Gonzaba argue on appeal they were denied that opportunity because the trial court excluded their evidence in the form of Dr. Kuncl's deposition testimony.

A. Standards for Expert Testimony in Medical Malpractice Cases

[4] [5] [6] [7] "Recovery in a medical malpractice case requires proof to a reasonable medical probability that the injuries complained of were proximately caused by the negligence of a defendant." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 860 (Tex. 2009). "Proximate cause includes two components: cause-in-fact and foreseeability." *Id.* "Proof that negligence was a cause-in-fact of injury requires proof that (1) the negligence was a substantial factor in causing the injury, and (2) without the act or omission, the harm would not have occurred." *Id.* "Thus, to satisfy a legal sufficiency review in such cases, plaintiffs must adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence." *Gunn*, 554 S.W.3d at 658 (quoting *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017)). "In medical-malpractice cases, the general rule is that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors." *Id.* (citations omitted).

***7 [8] [9]** A person is qualified to give opinion testimony concerning the causal relationship between the alleged injury and the alleged departure from the applicable standard of care only if the person meets the requirements of section 74.402 of the Texas Civil Practice and Remedies Code and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402; *Diagnostic Res. Group v. Vora*, 473 S.W.3d 861, 868 (Tex. App.—San Antonio 2015, no pet.). To be so qualified under Texas Rule of Evidence 702, an expert must have "knowledge,

skill, experience, training, or education," regarding the specific issue. TEX. R. EVID. 702; *see* *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). Further, the expert's testimony must be reliable. *See* *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 555 (Tex. 1995) ("To constitute 'scientific knowledge,' the proffered testimony must be reliable."). In determining whether expert testimony is reliable, courts may consider the nonexclusive factors set out in *Robinson* regarding scientific theories and techniques, [14] as well as the expert's experience. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). When the *Robinson* factors do not readily lend themselves to a review of the expert's opinion, expert testimony is unreliable if there is simply too great an "analytical gap" between the foundational data and the opinion proffered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726-27 (Tex. 1998).

[10] **[11]** **[12]** **[13]** Finally, an expert's testimony cannot be conclusory. "An expert's testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation." *Bustamante*, 529 S.W.3d at 462. "If no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection." *Id.* "It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury." *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). "The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury." *Id.* "Stated differently, an expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of the statements to link the conclusions to the facts." *Bustamante*, 529 S.W.3d at 462.

B. Did the offer of proof presented by Dr. Virlar and Gonzaba meet these standards?

Dr. Kuncl, a neurologist, was an expert designated and retained by Puente, and not by Dr. Virlar or Gonzaba. Even though Dr. Kuncl was not their retained witness, Dr. Virlar and Gonzaba argued at trial that Dr. Kuncl's deposition testimony was relevant to the breach of standard of care (1) in failing to recognize the signs and symptoms of thiamine deficiency, and (2) in failing to order thiamine replenishment. Puente objected, arguing that Dr. Kuncl, as a neurologist, was not qualified to testify about the standard of care required of the twenty-six different healthcare providers, including nurses and emergency room physicians, who did not practice in the area of neurology. Further, Puente argued Dr. Kuncl's deposition testimony was too general and not sufficiently specific because his testimony did not address the standard of care and breach for each responsible third party. The trial court sustained Puente's objections. Dr. Virlar and Gonzaba then made an offer of proof. [15] The offer of proof included an Amended Designation of Deposition and Video Testimony of Ralph W. Kuncl, Ph.D., M.D., and the actual excerpts from Dr. Kuncl's deposition testimony.

***8** **[14]** On appeal, Dr. Virlar and Gonzaba point to excerpts of Dr. Kuncl's deposition testimony in support of their argument that the trial court erred in excluding his testimony. They refer to where Dr. Kuncl testified he was "critical of every physician, every nurse, every dietician, every member of the team that cared for Ms. Puente." However, Dr. Kuncl could not explain those criticisms. When asked about a specific physician, Dr. Kuncl admitted that he had not reviewed the records related to that physician, so he could not comment on that physician's care. Nevertheless, when asked whether he would be "critical" of that physician for failing to recognize the risk of thiamine deficiency and to order replacement thiamine if that physician had seen Puente during her hospital admissions on January 14 and February 3, 2012, Dr. Kuncl replied, "Yes." According to Dr. Kuncl, he would have the same criticisms of emergency room physicians who saw Puente "[i]f they knew that she had altered anatomy and nausea and vomiting." Dr. Kuncl testified that his "criticisms extend to, virtually, everyone who was involved as a team caring for her and all who saw her, because every one of them had the chance that they missed to recognize the risk and the curative benefit of thiamine and the zero risk of administering thiamine." The attorney questioning Dr. Kuncl during the deposition pointed out that Dr. Kuncl's statements constituted a "general response":

Q: *And I appreciate your general response, but I want to go through each physician.* So, you are critical and believe Dr. Lindsey, the emergency room physician or the physician at Val Verde Regional Medical Hospital, was negligent and below the standard of care?

A: Yes, *if you'd allow me a caveat. Obviously, some physicians and therapists had vanishing little time to spend with her*, so I can't tell you how long that Dr. Lindsey spent with Jo Ann Puente. But every person who had a moment or a hand on her had a chance to reverse an otherwise fatal disease. *I'm guessing that there are going to be levels of liability dependent on the nature of the continuing care provided and how integral a part of the team, the bariatric surgical team*, they were. So, you'll list a lot of names and I'm going to say they're all responsible in a way because they all had a chance to give her repletion doses of thiamine.

(emphasis added). Dr. Kuncl later testified again he was "critical" of every physician who saw Puente during her admissions in January and February 2012 "*with the caveat that her stays at Val Verde were very short.*" (emphasis added).

The above testimony by Dr. Kuncl is general in nature and does not explain how and why a specific physician breached the applicable standard of care and proximately caused Puente's injuries. *See Bustamante*, 529 S.W.3d at 462. Dr. Kuncl admitted this general response cannot apply to all the healthcare providers. Although Dr. Kuncl testified that all the physicians were liable for Puente's injuries because they were part of a "team," he then admitted that some physicians had "vanishing little time to spend with her" and he was "guessing that there are going to be levels of liability dependent on the nature of the continuing care provided and *how integral a part of the* team, the bariatric surgical team, they were." (emphasis added). Thus, Dr. Kuncl gave general statements of every member of the "team" being held responsible, while also admitting that some members of the team would have different "levels of liability" based on the circumstances presented. Dr. Kuncl, however, does not go through these circumstances and specifically explain the standard of care applicable to each alleged responsible third party and how that alleged responsible third party breached the standard and proximately caused Puente's injuries. Thus, the above testimony by Dr. Kuncl is general and conclusory; it is therefore not considered "probative evidence, regardless of whether there is no objection." *Bustamante*, 529 S.W.3d at 462.

Dr. Virlar and Gonzaba also point to where Dr. Kuncl was asked whether he believed "all the physicians should have been aware of ... the high risk for thiamine deficiency" to Puente. Dr. Kuncl, replied, "Yes, *because the literature and common medical knowledge* in the era of post-bariatric surgery always lists such patients, especially those with malabsorption surgery like Roux-en-Y procedure, as those being listed to be at high risk for thiamine depletion." (emphasis added). Thus, Dr. Kuncl testified that *all physicians* should be *aware* of the high risk posed to Puente, but did not specifically detail how the alleged responsible third parties in question failed to appreciate that risk. Dr. Kuncl admitted that the amount of time spent with Puente would be a "caveat" to his answer. Again, Dr. Kuncl's testimony is general and conclusory. *See Bustamante*, 529 S.W.3d at 462.

***9** Dr. Virlar and Gonzaba also point to where Dr. Kuncl in a conclusory fashion agreed to the following statements:

- And you're critical of all of those physicians and their failure to replete the thiamine?
- And do you believe that their failure to do was a cause, in fact, of Mrs. Puente's neurological deficits and current condition?
- If Dr. Silva was at the bedside on January 18th, would you be critical of him for not diagnosing Wernicke's encephalopathy?
- Are you critical of the ophthalmologist who saw her as an outpatient specifically evaluating this presentation to include ocular disorders?

In response to all these statements, Dr. Kuncl simply replied, "Yes." His agreement with these conclusory statements cannot be considered probative evidence. *See Bustamante*, 529 S.W.3d at 462.

With respect to hospital staff, nurses, or dieticians, Dr. Kuncl testified that he did not expect the nurses or dieticians to make the diagnosis of Wernicke's encephalopathy; he did expect them "to be aware of the risk factors and the need to prophylax to prevent it." Thus his "criticism" was they did not recognize the risk factors or "make a recommendation to replete." Once again, Dr. Kuncl's testimony is general and conclusory, and does not constitute probative evidence. *See Bustamante*, 529 S.W.3d at 462.

Given that the excerpts from Dr. Kuncl's deposition testimony presented in the offer of proof do not constitute probative evidence, Dr. Virlar and Gonzaba have failed to show the trial court erred in excluding Dr. Kuncl's deposition testimony.

TEXAS RULES OF EVIDENCE 403 AND 404

In their second issue, Dr. Virlar and Gonzaba argue the trial court abused its discretion by allowing questions and admitting evidence regarding (1) Dr. Virlar's loss of privileges in violation of Texas Rule of Evidence 403; and (2) prior acts in treating other patients in violation of Texas Rule of Evidence 404.

A. Rule 403: Loss of Privileges

According to Dr. Virlar and Gonzaba, Puente was allowed to ask Dr. Virlar repeatedly whether he had lost his privileges at Methodist Hospital, which they contend was "clearly intended to mislead the jury into believing Dr. Virlar had lost his privileges as a result of Puente's care."

1. Did Dr. Virlar and Gonzaba preserve error for appeal?

[15] Puente argues that Dr. Virlar and Gonzaba did not preserve this issue for appeal. In response, Dr. Virlar and Gonzaba contend they did preserve error and point to the portion of the reporter's record where the trial court ruled on motions in limine. A ruling on a motion in limine, however, does not preserve error for appeal. It "is designed solely to require an offering party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury." *Castaneda v. Tex. Dep't of Protective & Regulatory Servs.*, 148 S.W.3d 509, 520 (Tex. App.—El Paso 2004, pet. denied). Accordingly, a ruling on a motion in limine "has no bearing on the ultimate admissibility of the evidence," *id.*, and "preserves nothing for review", *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 873 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied). Dr. Virlar and Gonzaba's argument that portions of the reporter's record relating to the motion in limine show they preserved error is without merit. *See id.*

***10** **[16]** Once trial began, the record reflects that during Dr. Virlar's testimony, Puente's attorney informed the trial court outside the presence of the jury that he was "going to get into [Dr. Virlar's] loss of privileges." Puente's attorney noted that defense counsel had been allowed to ask his expert witnesses, who were physicians, whether they had privileges at hospitals. Defense counsel objected and argued the question was unfair to Dr. Virlar because he was barred by peer privilege from explaining why his privileges had been revoked. Defense counsel argued the question, "Do you have privileges now at Methodist?" was "[p]robably an appropriate question," because it "does not get into the peer review process." However, the question, "Were your privileges revoked?" did get into "an action by a peer review committee." Defense counsel then made an objection pursuant to rule 403:

> And, Judge, in addition to privilege, let me add something else. Under the rule–and I'm– I believe, in this case, prejudicial effect of this line of inquiry far exceeds any probative value it may have in this case. If he asks the question: "Did you lose privileges?", and I do not respond with a question like, "Did it have anything to do with this case?"–which it–manifestly did not. It was two years later–if I don't ask that question, the jury is going to speculate about why he lost his privileges, and certainly going to speculate that it had something to do with his care of Ms. Puente. So you have a huge prejudicial effect out of a simple small question there. If he answers then, "No, it had nothing to do with this case," arguably, I'm opening the

> door for [Puente's attorney] to come back and say, "Well, what did it have to do with?", and then we're back to the race going into things that the doctor is not permitted to talk about.

Puente's counsel then informed the trial court that he was "looking at Dr. Virlar's board of medical examiner site," and the information online showed Dr. Virlar "entered into an agreed order publicly reprimanding himself and requiring him to go back and complete 24 hours of continuing medical education, 8 hours in risk management, 8 hours in ethics, 8 hours in professional communications, and pay an administrative fee." According to Puente's counsel, all the information was public record. The trial court then stated to defense counsel, "I hear your argument, but if it's something we can look up, how can we say that's privileged information and can no longer be discussed?" The trial court overruled defense counsel's objection.

Puente's counsel then stated that he was "not going to ask [Dr. Virlar] what it arose out of." He was "just going to ask [Dr. Virlar] ... [whether he has] any privileges at any hospitals now?" Defense counsel replied that Dr. Virlar presently had privileges at two hospitals.

> COURT: Well, then, if the doctor has regained his privileges, then he regained his privileges. He can talk about that. But I don't want the trial–I don't want to try that case. And the actual intricate workings of the peer review of how the physician is not going to be–well, we don't know any of that information. We're not going to talk about that. We're not going to try that. I mean, we've got to keep it clean. You know, it's just have you–did you subsequently lose– and then they are going to come back and say, since then, you have gained it at some other hospitals. I'm going to give him some room to explain, if he feels like he wants to, you know, explain his–
>
> PLAINTIFF: Okay. But I just want to make everyone aware, if you open the door and try to explain it away, I'm going to get into the fact that he agreed to be disciplined.
>
> DEFENSE: And, again, it's not admissible. The facts in there are not admissible.

In the presence of the jury, Puente's attorney began questioning Dr. Virlar about privileges:

> Q: Okay. Doctor, what are privileges? When a hospital grants you privileges, what does that mean?
>
> ***11** A: It is a courtesy by the hospital that allows you to go into a hospital setting to evaluate patients.
>
> Q: Do you have to apply for those?
>
> A: Yes, sir.
>
> Q: Have you ever lost your privileges?
>
> A: Yes, sir.
>
> Q: How many times have you lost your privileges from hospitals?
>
> A: Once.
>
> Q: And that was in 2014?
>
> A: December of 2013.

Until this point in Dr. Virlar's testimony, any error has been preserved for appeal. Dr. Virlar's testimony was within the ruling of the trial court about what was admissible–that is, what Puente would be allowed to question Dr. Virlar about. *See* TEX. R. EVID. 103(b) ("When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal."); *see also Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235-36 (Tex. 2007) (explaining that at a bench conference, the trial court ruled it would allow

questions "about the prior patient's treatment to the extent that his statements concerning that treatment were inconsistent with his trial testimony," but that the cross-examination "went well beyond that limitation," thus requiring the attorney to object again to preserve the issue for appeal).

Puente's attorney then asked the question that is the basis of Dr. Virlar and Gonzaba's complaints on appeal:

Q: December of 2013. *So right after you took care of Jo Ann*?

DEFENSE: Objection, Your Honor. Can we approach?

PLAINTIFF: **I'll withdraw that, Your Honor.**

(emphasis added). Puente's attorney then continued his questioning about another subject without further comment by the defense. Thus, there was no evidence admitted here, and the trial court never ruled on the objection. If Dr. Virlar and Gonzaba believed the mere asking of the question was prejudicial, to preserve error, they needed to obtain a ruling on their objection, and if that objection was sustained, move for the trial court to instruct the jury to disregard the question. *See* TEX. R. APP. P. 33.1. They needed to request relief from the trial court at a point in the proceedings when the trial court could have cured any alleged error. *See* O'CONNOR'S TEXAS RULES–CIVIL TRIALS, ch. 8, § 5, at 839 (2019) (explaining that (1) "[g]enerally, an improper question that is not answered by the witness does not constitute reversible error," (2) "[i]n most cases, the error in asking a prejudicial question can be cured by an instruction to the jury to disregard the question"; and (3) when the trial court sustains an objection, "to preserve error, the party should pursue an adverse ruling"). Thus, whether this question was unduly prejudicial is not preserved on appeal.

[17] Finally, Dr. Virlar and Gonzaba point to where Puente's attorney again questioned Dr. Virlar about privileges:

Q: Which hospital did you lose your privileges at?

A: Methodist.

Q: The one where you had taken care of–the one where Ms. Puente was?

A: The Methodist Healthcare System.

Q: Do you have those back?

A: No, sir.

This evidence is within the ruling by the trial court and thus the rule 403 objection was preserved here. *See McShane*, 239 S.W.3d at 235-36.

***12** In summation, the complained of testimony that has been preserved on appeal consists of testimony that Dr. Virlar lost his privileges, once, in December 2013, at Methodist Hospital and does not have those privileges back.

2. *Did the trial court abuse its discretion in ruling this testimony did not violate Rule 403?*

[18] **[19]** **[20]** Texas Rule of Evidence 403 permits a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. Thus, "testimony is not inadmissible on the sole ground that it is 'prejudicial' because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent."

Diamond Offshore Servs. Ltd. v. Williams, 542 S.W.3d 539, 549 (Tex. 2018) (quoting *McShane*, 239 S.W.3d at 234). "Rather,

unfair prejudice is the proper inquiry." *Id.* (emphasis in original). " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (citations omitted). "When determining the admissibility of evidence under rule 403, trial judges must balance the probative value of the evidence against relevant countervailing factors." *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018).

[21] We review a trial court's admission of evidence for abuse of discretion. *See* *Williams*, 542 S.W.3d at 542; *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). A trial court abuses its discretion when it acts without regard for any guiding rules. *Caffe*, 487 S.W.3d at 142.

In arguing this testimony was unduly prejudicial under rule 403, Dr. Virlar and Gonzaba contend "[e]vidence of credentialing or the loss of privileges of a defendant physician to practice at a hospital are matters irrelevant and unduly prejudicial to that physician in a medical malpractice claim arising out of alleged negligence in the care and treatment of an unrelated patient." For support, they point to an unpublished opinion: *Neeble v. Sepulveda*, No. 01-96-01253-CV, 1999 WL 11710, at *6 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). In *Neeble*, the appellant argued the trial court erred because (1) it ordered a separate trial on the negligent credentialing and failure to monitor claims against the hospital from the negligence claims against the doctors; and (2) it ordered the appellant not to inform the jury of the claims against the hospital and of previous medical malpractice lawsuits against the appellee doctor. *Id.*

The court of appeals explained that "[t]he admission of evidence of previous claims and lawsuits is governed in part by Texas Rule of Evidence 404(b)," which precludes "a party from using evidence of other acts to prove a person acted in conformity with that past conduct." *Id.* The court concluded that "[t]he evidence of previous medical malpractice lawsuits against [appellee doctor] was, therefore, inadmissible in the current negligence action against him." *Id.* However, the evidence was "admissible to prove the negligent credentialing and failure to monitor claims against" the hospital. *Id.* According to the court of appeals, "[b]ecause trying both claims simultaneously would have unduly prejudiced" appellee doctor, the trial court did not abuse its discretion in ordering separate trials and in ordering appellant to not inform the jury of the claims against the hospital and of previous medical malpractice lawsuits against appellee doctor. *Id.*

***13** The facts presented in this appeal are distinguishable from those in *Neeble*. Here, there was no evidence of previous medical malpractice claims and lawsuits—the trial court explicitly limited the scope of the questions to just whether Dr. Virlar had lost his privileges and whether he had them now.

Further, Puente points out that Dr. Virlar testified as an expert witness on his own behalf. And, she emphasizes that the "qualifications of a medical expert include the nature and extent of his or her practice, including the existence or lack of hospital privileges." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.401 (requiring expert witness testifying about accepted standards of medical care to be "qualified on the basis of training or experience," which includes whether the witness "has other substantial training or experience in an area of medical practice relevant to the claim" and "is actively practicing medicine in rendering medical care services relevant to the claim"); *Tenet Health Ltd. v. Zamora*, 13 S.W.3d 464, 472 (Tex. App.—Corpus Christi–Edinburg 2000, pet. dism'd w.o.j.) (explaining that "bestowment of hospital privileges does not mean a physician has an unlimited right to practice medicine in a particular hospital, but rather whether he is *qualified* to practice there according to the scope of the privileges") (emphasis in original). Indeed, as noted by Puente, defense counsel at trial acknowledged that he had asked all his experts about whether they have privileges. In reviewing the record, we hold that the trial court did not abuse its discretion in ruling Dr. Virlar's testimony that he had lost his privileges, once, in December 2013, at Methodist Hospital and did not have those privileges back was not unduly prejudicial under rule 403.

B. Rule 404: Prior Acts

[22] In their second issue, Dr. Virlar and Gonzaba also complain that the trial court allowed Puente's attorney to question Dr. Virlar about "whether he had a history of not reading a patient's charting or examining the patient before administering treatment" in violation of rule 404. Puente again argues this issue is not preserved for appeal.

To preserve error for appellate review, the complaining party must (1) make a timely objection to the trial court that "state[s] the grounds for the ruling that the complaining party s[eeks] from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context," and (2) obtain an adverse ruling. *See* TEX. R. APP. P. 33.1.

In support of their argument that they did preserve error for appeal, Dr. Virlar and Gonzaba point to objections they made during a motion in limine:

> DEFENSE: Briefly, Your Honor, we would like to make an oral motion in limine relating to the testimony of Dr. Virlar. We would ask that the Court instruct counsel not to go into two issues. One is Dr. Virlar's prior lawsuit.... And the second thing is Dr. Virlar, in December of 2013, lost his privileges at Methodist Hospital....
>
> [discussion about loss of privileges]
>
> COURT: What about the prior lawsuit?
>
> PLAINTIFF: The prior lawsuit, I intend to question him about a bunch of answers he gave in that deposition. I was not going to say "This is a case where you got sued and I was the lawyer for the plaintiff" or whatever. I was going to say, "Is it true you have given prior testimony regarding other patients? For example, in this other patient, you did X, Y, and Z, which is pretty much the same that [you] did here." And so, you know, that's what I'm going to do with it. I'm going to be asking about specific answers he gave in his deposition back then.
>
> ***14** DEFENSE: Judge, this is going into a completely different character trait. If he is asking specific questions about the care of a patient during a prior lawsuit, then we're going to end up retrying the entire lawsuit, I mean, because then all that was done in that has to be re-justified, giving me another half a day that I've got to go into it. If he gives an answer to a question about this case that is contradicted by his answer on previous sworn testimony, that would certainly be permissible.
>
> COURT: Well, obviously, we're not going to try the other lawsuit. You can talk about it. But I think – I mean, it's sworn testimony. It's got to be relevant in some sense to this one.
>
> PLAINTIFF: It will be, Judge.
>
> COURT: And so why don't you, I guess, on both of these issues – Mr. Anderson, do you have any case law about this that the defense would not be able to go into the loss of privileges at a hospital?
>
> DEFENSE: Nothing directly on it. There is nothing. I can promise the Court I have looked. It's just general that all peer review is protected and privileged; and, therefore, we can't get to the records. We can't find out what was done or why, whether he did it voluntarily, or whether they were lost due to a problem totally unrelated to anything relevant to this case.
>
> COURT: But your client can testify as to his understanding. I mean, if he lost his privileges or if he voluntarily, you know, decided not to practice at the hospital anymore. *And then on the prior lawsuit, Mr. Rhodes [Puente's counsel], why don't we approach at that point when you get to the point?*

(emphasis added). As noted previously, a ruling by the trial court on a motion in limine "does not preserve error on evidentiary rulings at trial because it does not seek a ruling on admissibility; rather, the purpose of such a motion 'is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury' without seeking the trial court's permission." *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 n.3 (Tex. 2015) (quoting *Hartford Accident & Indem.*

Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963)). Thus, the above portions of the reporter's record do not show Dr. Virlar and Gonzaba preserved any complaint for appeal.

The parties continued their argument to the trial court:

> PLAINTIFF: Let me give you an example: "Isn't it true that you have a history of prescribing to patients without seeing them or looking at the records?" That's one of the questions.
>
> DEFENSE: Judge, it's totally irrelevant. There is no allegation that he did anything improper in prescribing to this patient. Th[ese are] other bad acts that are irrelevant to this case, and that kind of evidence is simply not permissible.
>
> PLAINTIFF: He never read the records in this case. It's totally relevant. He has a history of it. He didn't read the records.
>
> DEFENSE: Okay.
>
> PLAINTIFF: So how is that not relevant?
>
> DEFENSE: What are you contending he prescribed that hurt her?
>
> PLAINTIFF: The prescription – he treated the patient in a way that injured the patient without looking at the patient or looking at the records.
>
> DEFENSE: That's a prior bad act, Judge. It's one. There is no showing that it's a substantially similar circumstance. That kind of evidence should not be permitted.
>
> COURT: *When you get to that point, Mr. Rhodes [Puente's counsel], please approach.*

(emphasis added). The trial court thus again made a ruling on a motion in limine; no error was preserved for appeal. *See Kaufman*, 197 S.W.3d at 873.

***15** Dr. Virlar and Gonzaba also point to the following portions of Dr. Virlar's testimony at trial to show they preserved error for appeal:

> PLAINTIFF: Can we approach, Your Honor?
>
> COURT: Yes.
>
> PLAINTIFF: I'm going to – this is where I want to ask him about his history of not looking at records and not examining patients before he prescribes treatment or renders treatment.
>
> DEFENSE: And, again, Judge, it's past acts. [16] He has got one. There is no evidence of a history. It's just trying to get into some dirt that has no relevance to this case whatsoever -- one prior act that may be simple -- he hasn't established that he didn't examine the patient before he treated. So right now, it's not even relevant.
>
> COURT: I mean, I'm going to allow you to try to lay a proper predicate. [17]
>
> PLAINTIFF: Thank you.
>
> Q. (By Plaintiff): Doctor, do you have a history in the past of–
>
> DEFENSE: Excuse me, Your Honor. Can we approach? I'm sorry. I'm sorry. He is going to go to the history part of it going into a prior act. I thought what the Court said was that he could lay a predicate by establishing its relevancy in the presence. He can't do that by referring to the history. The question is, in this case, did he do what he is now saying he did in the past; and he hasn't established that yet. There is no predicate for that line of questioning.

PLAINTIFF: Your Honor, we have already laid the predicate, the fact that I asked him the question about the standard of care requiring him to look at the test and to look at the chart.

DEFENSE: He has not established that he didn't yet. That question and answer has not yet been had.

PLAINTIFF: Well, it's one of the two.

COURT: I need you to rephrase the question, a history of, you know. [18]

PLAINTIFF: Yes, Your Honor. I will rephrase it.

DEFENSE: Thank you.

Q. (By Plaintiff): Doctor, given your possibilities on the nutritional assessment that you either ignored it or you didn't look at it, do you sometimes, in other patients, not read the chart or examine the patient before you render treatment?

A. No, sir, usually we go through all the tabs to get the information that we need that's available at the time.

Q. Do you remember Charlotte Watson?

A. Yes, I do, sir.

Q. Isn't it true that you rendered treatment to her – that you rendered treatment to her without ever seeing her or without ever looking at her chart? That was a patient that was in the hospital for a knee surgery.

DEFENSE: Excuse me. Doctor, at this point, without going back into the old case, could you simply answer the question, please? [19]

WITNESS: Okay.

A. Can you repeat the question, please?

Q. (By Plaintiff) Did you render treatment to her, over the telephone from your couch, without looking at her or looking at her chart? [20]

A. Based on the information that the nurse provided to me over the phone regarding her clinical state and the clinical information that she had available at her disposal, yes, I did.

PLAINTIFF: Objection, nonresponsive, Your Honor. [21]

COURT: Sustained.

Thus, defense counsel did not object to the question about whether Dr. Virlar treated Charlotte Watson "over the phone, without looking at her or looking at her chart." And, any error based on Dr. Virlar's answer is not preserved for appellate review.

***16** The questioning continued:

Q. (By Mr. Plaintiff): Did you render treatment to her from your couch at home without seeing the patient or looking at her chart, "yes" or "no"?

A. Yes.

Q. Thank you. Do you do that a lot?

DEFENSE: Your Honor, objection, this goes –

COURT: I didn't hear the comment.

PLAINTIFF: The question was: Does he do it a lot?

DEFENSE: Your Honor, we're now opening up the entire practice. [22]

COURT: Overruled.

Q. (By Plaintiff) Do you do that a lot?

A. No, sir.

Thus, defense counsel obtained an adverse ruling to the question regarding whether Dr. Virlar treats patients "a lot" without looking at their chart or seeing them. However, Dr. Virlar responded that he did not practice that way. As Dr. Virlar did not agree with the question, any error from the asking of the question is harmless.

[23] Puente's counsel continued his questioning of Dr. Virlar:

Q. Because that's not the way you're supposed to practice medicine, is it? Is it?

A. Is that a question?

Q. Yes. That's not the way you're supposed to practice medicine, is it?

A. Which way?

Q. Where you render treatment to a patient without seeing the patient or looking at the chart. [23]

A. We render care of the patient based on the evaluation of the patient, and sometimes that may be via many means. Now, with social media, there is electronic means, over the phone. There is PubHelp. We may not have the chart at our disposal at the time.

Q. But you didn't have any of that with regard to Charlotte Watson, did you, none? You just rendered treatment over the phone without seeing her chart and without seeing the patient.

A. Yes, sir. [24]

Q. And you know what that resulted in, don't you?

DEFENSE: Your Honor, we're going well outside –

COURT: Sustained.

Thus, defense counsel obtained a ruling by the trial court to the question "And you know what that resulted in, don't you?" However, defense counsel did not obtain an adverse ruling. After the trial court sustained the objection made by defense counsel, Puente's counsel moved on to another topic. To preserve error, defense counsel would have needed to move to instruct the jury to disregard, and if the trial court complied, he would have then needed to move for a mistrial. *See* TEX. R. APP. P. 33.1.

Dr. Virlar and Gonzaba point to no other portions of the record. Therefore, we find no abuse of discretion by the trial court.

C. Harmless Error

[24] **[25]** Even if we were to assume that the trial court erred in admitting the above evidence, any error was harmless. "Erroneous admission of evidence requires reversal only if the error probably (though not necessarily) resulted in an improper judgment." *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004); *see* TEX. R. APP. P. 44.1(a). "We review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted." *Nissan*, 145 S.W.3d at 144.

***17** **[26]** **[27]** "Clearly, erroneous admission is harmless if it is merely cumulative." *Id.* "But beyond that, whether erroneous admission is harmful is more a matter of judgment than precise measurement." *Id.* "In making that judgment, we have sometimes looked to the efforts made by counsel to emphasize the erroneous evidence and whether there was contrary evidence that the improperly admitted evidence was calculated to overcome." *Id.*

[28] In arguing the evidence about the loss of hospital privileges was harmful, Dr. Virlar and Gonzaba point to statements made by Puente's counsel during closing argument.[25] While Puente's counsel did refer to Dr. Virlar's loss of privileges, the focus of his closing argument was on the facts of this particular case and the symptoms exhibited by Puente during her hospitalizations. Further, in considering the entire record, we conclude this case did not turn on whether Dr. Virlar lost his privileges once and whether he had those privileges back at Methodist Hospital. This case turned on whether Dr. Virlar breached the standard of care by failing to treat Puente for a thiamine deficiency.

Similarly, with regard to the evidence that Dr. Virlar rendered treatment to another patient over the phone without reviewing her chart, this case did not turn on that evidence, but instead turned on whether Dr. Virlar *in Puente's case* had failed to realize she was exhibiting signs of thiamine deficiency because he admittedly did not review nurses' notes or notes from the dietician and physical therapist.

At trial, Puente's counsel presented evidence from witnesses and Puente's medical records proving that during her hospitalizations, Puente exhibited classic signs of thiamine deficiency. Although nurses and the physical therapist wrote notes in her medical records documenting those symptoms and although a dietician recommended twice in her medical records to supplement her nutrition, Dr. Virlar admitted at trial he did not read those notes at the time and was thus unaware of Puente's many symptoms. He testified the symptoms were "not reported" to him. For example, Dr. Virlar admitted he had not read the nurses' notes regarding Puente not responding to questioning, having a "fixed gaze," and exhibiting abnormal eyeball movement. Dr. Virlar testified that when he was on the hospital floor, "it was never reported to [him]" and that if *he* had observed any nystagmus in her eyes during *his* exam, he would have documented it. Thus, while Dr. Virlar emphasized a "team approach"[26] to the medical professionals treating Puente, he admitted to not reading notes written by nurses, her physical therapist, and the dietician. For example, Dr. Virlar admitted he never looked at the progress note by the physical therapist reporting that Puente had exhibited a Trendelenburg gait. Dr. Virlar testified if the gait had been reported to him, he would have looked into the symptom. Later during his testimony, Dr. Virlar admitted that at the time of Puente's hospitalization, he had not known what a Trendelenburg gait was and only recently learned about it.

***18** Further, while Dr. Virlar claimed he would have documented a significant observation like nystagmus, he also claimed to have had a "general conversation" with Dr. Patel that he did not document in Puente's records. According to Dr. Virlar, he brought up putting Puente on TPN with Dr. Patel, but Dr. Patel wanted to keep advancing her oral diet: "I would discuss my concerns regarding the nutrition with Dr. Patel, who then advised me, based on his expertise, to basically give him more time to work on her diet." When asked why this conversation was not documented in Puente's medical records, Dr. Virlar testified that "[s]imply because it is not documented doesn't mean it was not discussed or considered." Puente's counsel responded, "What are you taught in medical school? If it ain't documented, it wasn't done, correct?" Dr. Virlar replied, "Yes and no. We cannot document every concern in the chart on every patient. The documentation is *for billing purposes*." (emphasis added). Puente's

counsel attempted to clarify Dr. Virlar's testimony: "Your understanding is the notes you are recording in your progress notes are just for billing?" Dr. Virlar responded,

> No. The progress note serves two purposes. It is a diary of my actions, for me to document what I consider important and relevant, plus whatever other purpose my entry may serve for me. In addition, it also serves the purpose as a billing record to basically ensure to payers that I did see the patient at that time and that it is appropriate for me to bill for that visit.

Puente's counsel then asked, "Is one of the purposes of charting patient's care the continuity of care?" Dr. Virlar admitted that "[i]t helps with the continuity of care."

Not only had Dr. Virlar not documented this conversation with Dr. Patel regarding Puente's nutrition in her medical records, but Dr. Virlar also failed to mention it during his deposition. He was asked during his deposition whether he recalled "[u]p until the time of discharge" "any specific conversations" he had with Dr. Patel about Puente. At the deposition, Dr. Virlar responded, "No." At trial, he claimed that after reviewing Puente's chart in preparation for his testimony, he had remembered the conversation with Dr. Patel. Puente's counsel then asked him whether he had reviewed Puente's chart before his deposition. Dr. Virlar testified he had not, but then admitted he could not recall. Dr. Virlar then clarified, "But I do remember the conversation with Dr. Patel."

Dr. Virlar's inconsistent testimony was so significant that defense counsel addressed the matter during closing argument:

> I need to do something now, and this is pretty painful for me. Dr. Virlar testified to conversations that he now remembers that he did not remember at the time of his deposition. One of two things is true. Either, as he said, that as he went through these records over and over again in the three weeks leading up to trial, he remembered some things that he had not remembered at the time of his deposition. The other thing that you could conclude and that I suspect [Puente's counsel] will suggest when he does the rebuttal portion is that Dr. Virlar made up some of those conversations. I can't read your minds. I don't know which way you're thinking about this. I will tell you if you believe he made up those conversations, that was wrong, and you have every right to be angry about that, because you're not supposed to do that under oath. And I can't endorse that, and I can't even try and defend that, and I won't. But recall your oath. What did you swear to do? Render a true verdict. The court is asking you, did the negligence, if any, of those doctors proximately cause the injury? Your concern with the evidence is five years ago, not what happened here last week. Five years ago. What you are entitled to do, and the court has told you this, you are the sole judges of the credibility of a witness. If you believe that Dr. Virlar was not reliable in his testimony, it is your right and indeed your duty to give no weight to anything that he said on that witness stand, no weight. That is your—that is the ability you have. What you cannot do consistent with your oath is to decide this case on the fact that you believe he did not tell you the truth.

***19** Finally, Dr. Virlar testified without objection that he no longer works for his previous employer: "I was given two options: one to basically be terminated or one to resign. I took the termination letter so that they wouldn't be able to enforce the non-compete. If I had taken a resignation letter, I wouldn't have been able to practice in the hospitals in San Antonio."

Given this entire appellate record, we cannot conclude that any error in the admission of evidence complained of by Dr. Virlar and Gonzaba "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a). Thus, even if the trial court had erred in allowing the evidence, any error was harmless.

LOSS OF FUTURE EARNING CAPACITY

[29] **[30]** **[31]** **[32]** **[33]** **[34]** In their third issue, Dr. Virlar and Gonzaba argue the judgment for loss of future earning capacity was supported by legally and factually insufficient evidence. "Lost earning capacity is an assessment of what the plaintiff's capacity to earn a livelihood actually was and the extent to which that capacity was impaired by the injury." *Hospadales v. McCoy*, 513 S.W.3d 724, 742 (Tex. App.—Houston [1st Dist.] 2017, no pet.). "Loss of past earning capacity is a plaintiff's diminished ability to work during the period between the injury and the date of trial." *Id.* "Loss of future earning capacity is the plaintiff's diminished capacity to earn a living after trial." *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 491 (Tex. App.—Amarillo 2006, no pet.); *see* *Tagle v. Galvan*, 155 S.W.3d 510, 519 (Tex. App.—San Antonio 2004, no pet.). "In order to support such a claim, the plaintiff must introduce evidence from which a jury may reasonably measure in monetary terms [her] earning capacity prior to injury." *Bituminous*, 223 S.W.3d at 491. "If the plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of [her] loss can best be shown by comparing [her] actual earnings before and after [her] injury." *Id.* "Because the amount of money a plaintiff might earn in the future is always uncertain, the jury has considerable discretion in determining this amount." *Id.*; *see* *Tagle*, 155 S.W.3d at 519 (same).

[35] **[36]** To support an award of damages for loss of future earning capacity, the plaintiff can introduce evidence of (1) past earnings; (2) the plaintiff's stamina, efficiency, and ability to work with pain; (3) the weakness and degenerative changes that will naturally result from the plaintiff's injury; and (4) the plaintiff's work-life expectancy. *Perez v. Arredondo*, 452 S.W.3d 847, 862 (Tex. App.—San Antonio 2014, no pet.); *Tagle*, 155 S.W.3d at 519. "There must be some evidence that the plaintiff had the capacity to work prior to the injury, and that [her] capacity was impaired as a result of the injury." *Tagle*, 155 S.W.3d at 520.

[37] **[38]** In considering whether the evidence is legally sufficient to support the jury's finding of loss of future earning capacity, we examine the record for evidence and inferences that support the jury's finding and disregard all contrary evidence and inferences. *See* *id.* at 517. If there is more than a scintilla of evidence to support the jury's finding, the evidence is legally sufficient to support the jury's finding. *See* *id.* at 518.

[39] **[40]** **[41]** **[42]** With regard to whether the evidence is factually sufficient to support the jury's finding of loss of future earning capacity, we consider all the evidence in the record, both for and against the jury's finding. *See* *id.* The evidence is factually insufficient if the jury's finding "is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* As the trier of fact, the jury "determines the credibility of the witnesses and the weight to be given their testimony, decides whether to believe or disbelieve all or any part of the testimony, and resolves any inconsistencies in the testimony." *Id.* Thus, when there is conflicting evidence, we defer to the jury as the trier of fact. *Id.*

***20** **[43]** Dr. Virlar and Gonzaba argue the evidence is legally and factually insufficient to support the jury's award of damages for loss of future earning capacity because the only evidence to support such an award was the testimony of Dr. Keith Fairchild, Puente's economist. Dr. Fairchild valued Puente's past and future loss of earning capacity, including her loss of employee benefits, at $1,013,631.00. The jury, however, awarded Puente $1,021,631.00, which is $8,000.00 more than Dr. Fairchild's valuation.

Dr. Fairchild testified that in making his calculations of Puente's loss of earning capacity, he assumed an average life expectancy based on vital statistics tables published by the Centers for Disease Control and Prevention. He projected Puente to live until February 23, 2062. According to Dr. Fairchild, Puente could live longer than this average life span or she could live less than this average life span. Dr. Fairchild also assumed an inflation rate of 2.29 percent per year and a discount rate based on a seven-year U.S. Treasury bond, which he testified was a "middle of the road" investment model. He also projected the remaining work-life expectancy to be May 21, 2038, at which time Puente will be sixty-two years of age. According to Dr. Fairchild, he based Puente's work-life expectancy on average statistics reported by the government, including the Bureau of Labor Statistics, which take into account gender and educational level. He projected Puente's loss of future earning capacity to be $880,429.00. He testified his opinions were based on a reasonable degree of economic and financial probability. The jury awarded Puente $888,429.00 for loss of future earning capacity, which exceeds the range of Dr. Fairchild's testimony by $8,000.00.

In response, Puente argues that Dr. Virlar and Gonzaba incorrectly assert Dr. Fairchild's testimony was the only evidence of her loss of future earning capacity. She states that Dr. Altman, Dr. Gavi, and "appellants' own damage witness testified to various aspects of Jo Ann Puente's impairment, its duration, her life expectancy, and the composite of factors that may affect a person's capacity to earn, such as pain, weakness, and diminished functional ability." Puente, however, does not cite to the record where these witnesses gave testimony. *See* TEX. R. APP. P. 38.1(i). Nor does Puente explain how the testimony from these witnesses would affect Dr. Fairchild's calculations. It is undisputed that Puente was employed as an administrative assistant with the San Felipe Consolidated School District earning approximately $26,000 per year at the time of her injuries. It is also undisputed that due to her permanent injuries, she is wholly incapable of working. [27] Thus, the extent of her impairment is really not at issue on appeal. *See Bituminous*, 223 S.W.3d at 491 (explaining that if a plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of her loss is relevant). Further, the testimony in this case was Puente will have a longer life expectancy than her work-life expectancy. *See Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 38 (Tex. App.—Tyler 2003, pet. denied) (noting that work-life expectancy is a retirement age of 65 less the plaintiff's age). Therefore, whether Puente has a shorter or longer life expectancy does not affect the calculations regarding her *work-life* expectancy.

***21** **[44]** **[45]** The jury's award of $888,429.00 exceeded the range of loss described by Dr. Fairchild, the expert witness, by $8,000. There is no other evidence in the record to support an award for this $8,000. A jury's award may not be based on conjecture and "must be based upon such facts as are available in the particular case" and " 'proved with that degree of certainty of which the case is susceptible.' " *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App.—Amarillo 2002, pet. denied) (quoting *McIver v. Gloria*, 140 Tex. 566, 169 S.W.2d 710, 712 (1943)). Thus, "where the plaintiff seeks special damages for loss of his earning capacity in a particular business or profession, the amount of his earnings or the value of his services in that business must be shown with reasonable certainty." *Id.* at 52 (quoting *McIver*, 169 S.W.2d at 712). Here, by awarding damages in excess of the range of evidence, the jury abused its discretion. *See* *id.*

We therefore hold there was sufficient evidence of loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00). In *Virlar I*, 2020 WL 557735, at *33, we suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00. Puente then filed a remittitur in the amount of $8,000.00. As we did in *Virlar II*, 2020 WL 2139313, at *1, we accept this remittitur and modify the trial court's judgment to reflect that Puente recover damages against appellants for loss of future earning capacity in the amount of $880,429.00. *See* TEX. R. APP. P. 46.3, 46.5. We do not disturb any other damages awarded by the jury.

SETTLEMENT CREDIT

Under a confidential settlement, Puente's minor daughter, C.P., received a sum of money from the hospital. [28] Puente, C.P., and Carr (Puente's mother) then dismissed all their claims against the hospital. On appeal, Dr. Virlar and Gonzaba argue that the

dollar amount of the settlement paid to C.P. should be deducted from the amount awarded to Puente pursuant to chapter 33 of the Texas Civil Practice and Remedies Code. In response, Puente argues that Dr. Virlar and Gonzaba did not meet their burden of proving they were entitled to the settlement credit because they did not introduce evidence of the settlement amount. Puente further argues that even if they did show the settlement amount, the amount of her daughter's settlement for her daughter's independent damages should not reduce her award for injuries she suffered as a result of Dr. Virlar and Gonzaba's negligence.

A. Chapter 33's Settlement Credit Provisions

Section 33.012(c) of the Texas Civil Practice and Remedies Code provides that if a claimant in a health care liability claim has settled with one or more persons, the amount recovered by the claimant should be reduced "by an amount equal to one of the following, as elected by the defendant: (1) the sum of the dollar amounts of all settlements; or (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact." TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(c). "Claimant" is defined as

> a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of *damages for injury to another person*, damage to the property of another person, the death of another person, or other harm to another person, "claimant" includes:
>
> (A) the person who was injured, was harmed, or died or whose property was damaged; and
>
> (B) *any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person* or for the damage to the property of that person.

***22** *Id.* § 33.011(1) (emphasis added). A "settling person" is "a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death or other harm for which recovery of damages is sought." *Id.* § 33.011(5).

B. Same Burden Under Chapter 33 and One-Satisfaction Rule

[46] **[47]** **[48]** Chapter 33 is based on the one-satisfaction rule, a common-law doctrine, but it is more narrowly applied. *See In re Xerox Corp.*, 555 S.W.3d 518, 523 (Tex. 2018) (orig. proceeding) (explaining that "chapter 33's proportionate-responsibility scheme ... incorporates the one-satisfaction rule"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a) (applying only to a "cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought" or an action brought under the DTPA "in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought"). The one-satisfaction rule is a common law rule providing that "a plaintiff is entitled to only one recovery for any damages suffered." *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 106 (Tex. 2018). This is true even though "more than one wrongdoer contributed to bring about his injuries." *Id.* at 107 (citations omitted). The "fundamental consideration in applying the one-satisfaction rule is *whether the plaintiff has suffered a single, indivisible injury*—not the causes of action the plaintiff asserts." *Id.* (emphasis added). Thus, the one-satisfaction rule "applies both when the defendants commit the same act as well as when defendants commit technically differing acts which result in a single injury." *Id.* (citations omitted). This rule applies to settlement credits for nonsettling defendants because the "plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settlement defendant has already partially contributed." *Id.* (citations omitted). "The plaintiff would otherwise be recovering an amount greater than the trier of fact determined would fully compensate for the injury." *Id.* (citations omitted).

[49] Because chapter 33 is silent about which party has the burden to prove the settlement amount, the supreme court has looked to the common law's one-satisfaction rule. *See* *Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998). Under the common law's one-satisfaction rule, "a defendant seeking a settlement credit has the burden of proving its right to such a credit." *Ellender*, 968 S.W.2d at 927. This burden "includes proving the settlement credit amount." *Id.* In applying this common-law burden to chapter 33, the supreme court has held that a defendant meets this burden if "the record show[s], in the settlement agreement or otherwise, the settlement credit amount." *Utts*, 81 S.W.3d at 828.

[50] **[51]** "Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation." *Sky View*, 555 S.W.3d at 107 (citing *Utts*, 81 S.W.3d at 828). "The plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award *would not provide for the plaintiff's double recovery.*" *Id.* at 107-08 (citations omitted) (emphasis added). "A written settlement agreement that specifically allocates damages to each cause of action will satisfy this burden." *Id.* at 108.

***23** **[52]** The supreme court has explained that a "nonsettling party should not be penalized for events over which it has no control." *Id.* (quoting *Utts*, 81 S.W.3d at 829). "Thus, this burden-shifting framework, based on the presumption that the nonsettling defendant is entitled to a settlement credit after it introduces evidence of the plaintiff's settlement, is appropriate because the plaintiff is 'in the best position' to demonstrate why rendering judgment based on the jury's damages award would not amount to the plaintiff's double recovery." *Id.* "If the plaintiff fails to satisfy this burden, then the defendant is entitled to a credit equal to the entire settlement amount." *Id.*

C. Did Dr. Virlar and Gonzaba meet their burden of showing the amount of the settlement credit?

[53] Puente argues Dr. Virlar and Gonzaba did not meet their burden to show entitlement to the settlement credit, because the settlement amount is not in the record, was not offered in evidence, and was not stipulated to by the parties. In response, Dr. Virlar and Gonzaba point to the supreme court's opinion in *Ellender*, 968 S.W.2d at 927, where the court recognized chapter 33 did not require proof of a settlement "by a judicial admission, a stipulation, judicial notice, or properly admitted documents or testimony." *Id.* According to the court, "neither chapter 33 nor existing case law demand[ed] such proof." *Id.* For the defendant to meet its burden, the record need only "show, in the settlement agreement *or otherwise*, the settlement credit amount." *Id.* (emphasis added). In reviewing its appellate record, the supreme court concluded the defendant had met its burden of showing a settlement amount:

> The record here shows that [the defendant] first informed the trial court of the $500,000 settlement amount when the [plaintiffs'] attorneys announced the settlement in open court during trial. Later, [the defendant's] written opposition to the [plaintiffs'] motion for judgment included the settlement amount. The [plaintiffs] did not contest the $500,000 settlement amount. Thus, we conclude that by placing the uncontested settlement amount in the record, [the defendant] met its burden of proof on the settlement amount.

Id.

Similarly, here, at the November 2, 2017 hearing, defense counsel informed the trial court that the hospital had settled with C.P. for a specified amount, [29] and "[a]ll the people suing [the hospital had] dismissed [their claims] with prejudice." Puente's counsel objected to defense counsel revealing the confidential amount in open court but did not dispute the amount was accurate. Because the amount placed in the record was uncontested by Puente, we conclude Dr. Virlar and Gonzaba met their burden of showing the settlement amount of C.P.'s settlement with the hospital. We thus must consider whether Puente's award should be reduced by the amount of C.P.'s settlement.

D. Post-Verdict Motion for Settlement Credit and Puente's Response

On October 20, 2017, Dr. Virlar and Gonzaba filed a post-verdict motion for settlement credit, arguing the amount of C.P.'s settlement with the hospital should be credited against Puente's award. On October 31, 2017, Puente filed a written response to the motion, arguing the amount of C.P.'s settlement should not be credited against her award for the following reasons: (1) because C.P.'s cause of action was separate and independent of Puente's common law medical malpractice action, section 33.012(c) did not apply; and (2) even if section 33.012(c) did apply, "any attempt to reduce one person's claim or cause of action by the amount received by another person on a separate and independent cause of action violates not only relevant statutes and common law, but also [Puente]'s rights under the Texas and U.S. Constitutions, including their respective due process, due course of law, equal protection, equal rights, jury trial, and open courts provisions." After hearing all the arguments of counsel, the trial court denied Dr. Virlar and Gonzaba's motion for settlement credit without stating its reasoning.

***24** On appeal, Dr. Virlar and Gonzaba argued in their appellants' brief that section 33.012(c) applied to the facts of this case and that the constitutional objections raised by Puente in the trial court were meritless because section 33.012(c) "was a valid exercise of the Legislature's police power." We conclude, however, that as applied to the facts raised in this appeal, application of section 33.012(c) violates the open courts provision of the Texas Constitution.

***1. The Texas Supreme Court first holds a statutory damages cap violates the Open Courts Provision in* Lucas.**

The Open Courts Provision of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. In *Lucas v. United States*, 757 S.W.2d 687, 687 (Tex. 1988), the Texas Supreme Court first recognized that a statute may violate the Open Courts Provision by restricting a plaintiff's recovery of damages in a medical malpractice action. In *Lucas*, a fourteen-month-old infant was paralyzed as the result of a federal army medical center improperly giving him a shot of antibiotics. *Id.* at 688. The child's parents brought a lawsuit in their individual capacities and as next friend of their son. *Lucas v. United States*, 811 F.2d 270, 271 (5th Cir. 1987). After a trial, the federal district court awarded the parents economic damages for medical expenses they had incurred and would incur until their son reached eighteen years of age. *Id.* The district court also awarded the son the following economic damages: "$350,000 as the present value of future medical expenses he will incur after his eighteenth birthday, and $600,000 as the present value of the impairment of his future earning capacity." *Id.* As for noneconomic damages, the district court awarded the son "$1.5 million for pain and suffering." *Id.* With respect to the parents' individual claims, the district court "made no findings concerning the parents' claims for their own mental anguish and loss of companionship." *Id.* Then, the "district court reduced the total award of damages against the United States by the $400,000 paid by Wyeth Laboratories to the Lucases in settlement of the state court suit." *Id.* On appeal, the Fifth Circuit certified the following question to the Texas Supreme Court: whether under these facts, application of former article 4590i's damages cap provision would be consistent with the Texas Constitution. *Lucas*, 757 S.W.2d at 688.

The supreme court explained that "there is no provision in the federal [C]onstitution corresponding to [the Texas] [C]onstitution's 'open courts' guarantee." *Id.* at 690. According to the court, the "open courts" "guarantee is embodied in Magna Carta and has been a part of our constitutional law since our republic." *Id.* The supreme court noted that in previously construing the Open Courts Provision, it had required a litigant to first show that he had "a cognizable common law cause of action that is being restricted." *Id.* (quoting *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983)). "Second, a litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Id.* (quoting *Sax*, 648 S.W.2d at 666).

With regard to the first prong, the supreme court explained that "Texas courts have long recognized that victims of medical negligence have a well-defined common law cause of action to sue for injuries negligently inflicted upon them." *Id.* Thus, according to the court, "the remaining inquiry [was] whether the restriction on Lucas' right of recovery 'is unreasonable *or* arbitrary when balanced against the purpose and basis of the statute.' " *Id.* (quoting *Sax*, 648 S.W.2d at 666) (emphasis in original).

***25** In reviewing the statute's language, the supreme court expressed its "first concern" was "that the legislature has failed to provide Lucas any adequate substitute to obtain redress for his injuries." *Id.* The court "reject[ed] any argument that the statute may be supported by alleged benefits to society generally." *Id.* While some may argue there was "a societal *quid pro quo* in that loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care,' " the court emphasized "[t]his *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act." *Id.* (citation omitted). And, in looking to other jurisdictions where statutes restricting the recovery of damages were upheld, the supreme court found "significant" that in those jurisdictions, "alternative remedies were provided," a fact which "weighed heavily in the decisions." *Id.* at 691. The supreme court noted that former article 4590i had been "based on recommendations of the Texas Medical Professional Liability Study Commission, sometimes referred to as the Keeton Report." *Id.* "Dean Keeton, in a separate statement, recommended a victim's compensation fund as a statutory substitute for limitations upon recovery." *Id.* The supreme court stressed that "[t]he legislature [had] chose[n] not to follow this recommendation." *Id.*

The supreme court then considered "whether the restrictions in sections 11.02 and 11.03 [of former article 4590i were] reasonable when balanced against the purposes and bases of the statute." *Id.* The court reasoned that "[t]he legislature, in enacting [former] article 4590i, apparently did not intend to strike at frivolous malpractice suits for it found in section 1.02(a)(2) that 'the filing of *legitimate* health care liability claims in Texas is a contributing factor affecting medical professional liability rates.' " *Id.* (quoting former article 4590i, § 1.02(a)(2)) (emphasis in original). The court noted "[t]he legislature did find that a 'medical malpractice insurance crisis' had been created and that 'satisfactory insurance coverage ... [was] often not available at any price,' but it then stated that 'adoption of certain modifications in the medical, insurance, and legal systems ... *may or may not have an effect* on the rates charged by insurers for medical professional liability coverage.' " *Id.* (quoting former article 4590i, § 1.02(a)(5), (10), (12)) (alterations in original). The supreme court concluded,

> In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high. As to the legislature's

> stated purpose to "assure that awards are rationally related to actual damages," section 1.02(b)(2), we simply note that this is a power properly attached to the judicial and not the legislative branch of government. TEX. CONST. art. II, § 1.

Lucas, 757 S.W.2d at 691 (emphasis in original). The supreme court thus held that it was "unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded." *Id.*

In support of its holding, the supreme court pointed to language found in an opinion by the Supreme Court of Florida:

> Access to the court is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.

Lucas, 757 S.W.2d at 692 (quoting *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987)). While the supreme court in *Lucas* understood "the legislature's concern in attempting to solve the health care problems it perceived during the middle of the 1970s," the court nevertheless concluded it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation." *Id.* (quoting *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 837 (1980)). Accordingly, the supreme court held that "the restriction [was] unreasonable *and* arbitrary and that [former] article 4590i, sections 11.02 and 11.03, unconstitutionally limit[ed] Lucas' right of access to the courts for a 'remedy by due course of law.' " *Id.* at 690 (quoting TEX. CONST. art. I, § 13) (emphasis in original). Therefore, the supreme court's answer to the Fifth Circuit's certified question was "that the limitation on medical malpractice damages in TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02 and 11.03, is inconsistent with and violative of article I, section 13, of the Texas Constitution." *Lucas*, 757 S.W.2d at 692.

2. The Texas Supreme Court does not extend its holding in Lucas to statutory claims.

***26** Two years after its holding in *Lucas*, the supreme court "again consider[ed] the constitutionality of the damages provisions of the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02 and 11.03 ..., this time in the context of a wrongful death action." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 842 (Tex. 1990). The court explained that in *Lucas*, it had held "statutory damages limitations are unconstitutional when applied to damages in common law medical malpractice actions." *Id.* (citing *Lucas*, 757 S.W.2d at 692). However, according to the court, its holding in *Lucas* "did not extend to wrongful death actions." *Id.* The court emphasized its "traditional distinction between common law personal injury and statutory wrongful death claims." *Id.* at 845. The court explained that it had "recognized this distinction in *Lucas*, restating the traditional rule that the [O]pen [C]ourts [P]rovision of our constitution applies only to common law claims." *Rose*, 801 S.W.2d at 845. According to the court, had it "faced a wrongful death claim in *Lucas*, [it]

could not have reached the same conclusion, for the [O]pen [C]ourts [P]rovision does not apply to statutory claims." *Rose*, 801 S.W.2d at 845.

In applying the required two prong-analysis, the supreme court first considered whether the plaintiffs' remedy was "based upon a cognizable common law cause of action." The court explained that "[l]ike all actions based upon theories of negligence, the [wrongful death plaintiffs'] cause of action was a common law claim [that] would have died with [the decedent] had it not been preserved by the legislature in the wrongful death statute." *Id.* The plaintiffs' "remedy, therefore, was conferred by statute, not by the common law." *Id.* According to the court, because the plaintiffs did "not seek a common law remedy, the [O]pen [C]ourts [P]rovision [did] not apply to their wrongful death claim." *Id.*

Similarly, in *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex. 2000), the supreme court held the damages cap provision under former article 4590i did not violate the Open Courts Provision because the plaintiff had brought a claim under the survival statute. The supreme court explained that "all negligence actions are common-law claims" and that at common law, "no personal injury cause of action survived a victim's death." *Id.* The court concluded that "[b]ecause wrongful-death and survival actions would not exist absent legislative enactment, they are derived not from the common law but from a statute." *Id.* Thus, wrongful-death and survival claimants "cannot establish an open-courts violation because they 'have no common law right to bring either.' " *Id.* (quoting *Bala v. Maxwell*, 909 S.W.2d 889, 893 (Tex. 1995)).

3. An amendment to the Texas Constitution permits limitation of noneconomic damages in suits against healthcare providers.

[54] In June 2003, the legislature enacted the Medical Malpractice and Tort Reform Act of 2003, otherwise known as House Bill 4, which provided for a statutory limitation on noneconomic [30] damages in medical malpractice lawsuits. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (limiting noneconomic damages as provided for by House Bill 4). Later that year, the Texas Constitution was amended to permit the Texas Legislature to cap noneconomic damages in civil lawsuits against healthcare providers. *See* TEX. CONST. art III, § 66. However, the amendment expressly did not apply to economic damages, which were defined as "compensatory damages for any pecuniary loss or damage" but did "not include any loss or damage, however characterized, for past, present, and future pain and suffering, mental anguish and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment." *Id.* § 66(a). Thus, *Lucas* and its progeny remain good law with respect to the recovery of *economic damages*; that is, pursuant to the Open Courts Provision of the Texas Constitution, the legislature may not restrict the recovery of economic damages in a common law medical malpractice action. *See* *Lucas*, 757 S.W.2d at 690-93 (explaining why limitation on recovery of damages in common-law medical malpractice action violates the open courts provision of Texas Constitution); *see also* *Horizon/CMS*, 34 S.W.3d at 903 (Tex. 2000) (explaining causes of action created by statute do not implicate open courts provision of constitution).

4. Open Courts Analysis to Puente's Common-Law Medical Malpractice Action

***27** In applying the two-prong open courts analysis, we first note that Puente brought a medical malpractice cause of action against Dr. Virlar and Gonzaba, which is a common law cause of action that "Texas courts have long recognized." *Lucas*, 757 S.W.2d at 688. Thus, she has met the first prong. *See* *Horizon/CMS*, 34 S.W.3d at 902; *Weiner v. Wasson*, 900 S.W.2d 316, 317 (Tex. 1995); *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. With regard to the second prong, Dr. Virlar and Gonzaba point to the fact that chapter 33's settlement credit provisions were enacted as part of House Bill 4's tort reform

efforts to reduce costs to the health care industry. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. However, in *Lucas* and its progeny, the supreme court has clearly stated that restricting *economic* damages awarded to victims of medical malpractice for the general goal of attempting to reduce overall costs to the healthcare industry violates the Open Courts Provision of the Texas Constitution. *See* *Horizon/CMS*, 34 S.W.3d at 902; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 692; *see also* TEX. CONST. art III, § 66 (permitting *restriction of noneconomic damages* in common-law medical malpractice actions). In doing so, the supreme court emphasized that the legislature had not provided a plaintiff who suffered injuries in excess of the damages cap "any adequate substitute to obtain redress for his injuries." *Lucas*, 757 S.W.2d at 690. According to the supreme court, "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation." *Lucas*, 757 S.W.2d at 692 (quoting *Carson*, 424 A.2d at 837). Today, there is still no adequate substitute for a plaintiff who has suffered economic injuries in excess of a legislative restriction. *See* *id.*

[55] **[56]** Further, we note that chapter 33 is titled "Proportionate Responsibility" and provides "a proportionate responsibility framework for apportioning percentages of responsibility in the calculation of damages." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 499 (Tex. 2010); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.017. Chapter 33 requires the trier of fact to determine "the percentage of responsibility, stated in whole numbers, for" "each claimant," "each defendant," "each settling person," and "each responsible third party who has been designated." TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a). It reduces the damages awarded by the trier of fact "by a percentage equal to the claimant's percentage of responsibility." *Id.* §§ 33.001, 33.012(a). Further, it provides for settlement credits to be applied to a claimant's recovery in a health care liability claim. *See id.* § 33.012(c). Thus, "chapter 33 embodies the fundamental tort-law principle that liability generally arises only from one's own injury-causing conduct and, as a result, liability for damages is commensurate with fault." *In re Xerox*, 555 S.W.3d at 523. "Chapter 33's proportionate responsibility scheme also incorporates the one-satisfaction rule—a tort concept that limits a plaintiff to only one recovery for any damages suffered because of an injury." *Id.* (emphasis added). "The one-satisfaction rule's purpose is to make the plaintiff whole, but not more than whole, for [her] injuries." *Home Ins. Co. v. McClain*, No. 05-97-01479-CV, 2000 WL 144115, at * 7 (Tex. App.—Dallas 2000, no pet.). This purpose of making the plaintiff whole, but not more than whole, is not consistent with restricting a plaintiff from recovering less than the full amount of her economic damages. Thus, we conclude that application of a settlement credit under chapter 33 that has the effect of preventing Puente from recovering the full amount of her economic damages violates the Open Courts Provision of the Texas Constitution.

[57] Here, all the damages awarded by the jury to Puente are economic damages.[31] Thus, applying chapter 33's settlement credit provisions and reducing Puente's award in an amount equal to C.P.'s settlement results in Puente recovering less than the full amount of her economic damages. The supreme court has clearly held the legislature may not restrict the recovery of the full amount of economic damages in a common-law medical malpractice action like the one brought by Puente in this case. *See* *Horizon/CMS*, 34 S.W.3d at 902; *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. We recognize that *Lucas* and its progeny involved statutes that "capped" damages while chapter 33 relates to the application of settlement credits to a jury's award; however, whether the statute involves a damages cap or whether it involves a settlement credit, the result is the same as applied to the facts of this case—application of the statute would prevent a plaintiff in a common-law medical malpractice action from recovering the full amount of her economic damages. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.011(1), 33.012(c), *with* *Horizon/CMS*, 34 S.W.3d at 902; *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. Under either scenario, the statute impermissibly restricts a cognizable common law action by preventing a plaintiff in a common-law medical malpractice action from recovering the full amount of her economic damages.[32]

***28** **[58]** **[59]** We note that Dr. Virlar and Gonzaba argue that Puente and her daughter C.P. are one "claimant" under chapter 33 and thus have not received less than the full amount of their economic damages. However, the legislature cannot circumvent the Open Courts Provision by simply statutorily changing the definition of "claimant" and thereby *restricting a common law cause of action protected by the Open Courts Provision.* As noted previously, the Texas Supreme Court has held that a medical malpractice cause of action like Puente's is a cognizable common law cause of action that "Texas courts have long recognized." *Lucas*, 757 S.W.2d at 688. And, in such a common-law cause of action, the legislature may not statutorily restrict a plaintiff's right to recover the full amount of her economic damages. *See* *Horizon/CMS*, 34 S.W.3d at 902; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 692; *see also* TEX. CONST. art III, § 66 (permitting restriction of noneconomic damages in common-law medical malpractice actions). The supreme court also recognized that under the common law, a child's claim for loss of consortium, like the one brought by C.P. in this case, is a "*separate and independent claim[ ] distinct from the underlying action.*" *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009) (emphasis added). The supreme court has also rejected the argument that allowing a party to recover damages for loss of consortium while also allowing the injured party to recover damages would result in a "double recovery." *See* *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978). According to the supreme court, "there is no duplication of recovery" and no violation of the one-satisfaction rule. *Id.* For example, in the context of (1) an injured spouse and (2) a spouse seeking recovery for loss of consortium, the supreme court has explained that "[e]ach spouse recovers for losses *peculiar to the injury sustained by each of them.*" *Id.* (emphasis added). "On the one hand, the impaired spouse recovers for those distinct damages arising out of the direct physical injuries." *Id.* "On the other hand, the recovery for the loss of consortium by the deprived spouse is predicated on separate and equally distinct damages to the emotional interests involved." *Id.*

Applying this reasoning by the supreme court to the facts presented here, under the common law, any damages suffered by C.P. for loss of consortium are her own; such damages would not constitute a double recovery and would not violate the one-satisfaction rule. *See* *In re Labatt Food Serv., L.P.*, 279 S.W.3d at 646; *Whittlesey*, 572 S.W.2d at 669. Because any damages suffered by C.P. for loss of consortium are her own, any credit applied pursuant to chapter 33 against Puente's award in an amount equal to C.P.'s damages would necessarily result in Puente failing to recover the full amount of her economic damages. Thus, application of chapter 33's settlement credit provision under the facts of this case is an impermissible statutory restriction of Puente's right to recover 100% of her economic damages under her common-law claim.

[60] Finally, we note that Dr. Virlar and Gonzaba argue on appeal that Puente failed to meet her burden in the trial court of raising an open courts challenge, arguing that "Puente provided no analysis of how applying a settlement credit for C.P.'s settlement to Puente's recovery violates the state and federal Constitutions." Dr. Virlar and Gonzaba, however, cite no authority that an open courts challenge must be "analyzed" in response to a post-verdict motion for settlement credits. It appears that no court has addressed the burden of a party asserting an open courts challenge in the context of responding to a post-verdict motion for settlement credits under chapter 33. In other contexts, courts have held that the party relying on the open courts provision has the burden to plead and prove the violation. *See* *Boyd v. Kallam*, 152 S.W.3d 670, 676 (Tex. App.—Fort Worth 2004, pet. denied). Here, by focusing on Puente's lack of "analysis," Dr. Virlar and Gonzaba do not argue that she failed to meet any evidentiary burden. Indeed, the facts on which Puente relied for her open courts challenge are undisputed, obviating any need to present evidence to prove the relevant facts. We therefore must determine whether Puente adequately pled an open courts challenge in her response to Dr. Virlar and Gonzaba's post-verdict motion for settlement credits.

[61] **[62]** Dr. Virlar and Gonzaba have not provided any authority as to the appropriate pleading standard for an open courts challenge. Generally, the purpose of a pleading is to "give fair notice of the nature and basic issues so the opposing party can prepare a defense." *Bos v. Smith*, 556 S.W.3d 293, 305-06 (Tex. 2018). There is no apparent reason why a heightened pleading standard should apply to open courts challenges. "When, as here, no special exception is made, we liberally construe

the pleadings in the pleader's favor." *Id.* at 306. "Even so, a liberal construction does not require a court to read into a petition what is plainly not there." *Id.* (citation omitted). Here, Puente stated in her response to Dr. Virlar and Gonzaba's post-verdict motion for settlement credits the following:

> ***29** In the alternative, Plaintiff would show that any attempt to reduce one person's claim or cause of action by the amount received by another person on a separate and independent cause of action violates not only relevant statutes and common law, but also Plaintiff's rights under the Texas and U.S. Constitutions, including their respective due process, due course of law, equal protection, equal rights, jury trial, and open courts provisions.

Although there is no lengthy legal argument in Puente's response, an open courts challenge is plainly there. *See Bos*, 556 S.W.3d at 306. Her response refers to the Open Courts Provision and provides the factual basis upon which her constitutional challenge is based. Her constitutional challenge stated the nature of the basic issue she was raising. Thus, we conclude Dr. Virlar and Gonzaba had fair notice of her open courts challenge as a bar to application of the settlement credit as argued by Dr. Virlar and Gonzaba in their post-verdict motion for settlement credits.

***5. Remand for Hearing Pursuant to* Utts**

While we have concluded that applying a dollar-for-dollar credit in the amount of C.P.'s settlement against Puente's award pursuant to chapter 33 would violate the Open Courts Provision of the Texas Constitution, we note that at the trial court and on appeal, Dr. Virlar and Gonzaba have argued that C.P.'s settlement was a "sham settlement," pointing to testimony by the guardian ad litem from the prove-up hearing for C.P.'s settlement. In *Utts v. Short*, 81 S.W.3d 822, 824 (Tex. 2002), the supreme court considered whether a pretrial settlement by a family member in a medical malpractice action should be applied to amounts awarded by the jury to the nonsettling family members. The supreme court explained that a defendant seeking a settlement credit has the burden of proving his right to such a credit. *Id.* at 828. According to the court, "the common law requires only that the record show, in the settlement agreement or otherwise, the settlement credit amount." *Id.* (citing *First Title Co. v. Garrett*, 860 S.W.2d 74, 78-79 (Tex. 1993), which explained that under the common law, a defendant is entitled to seek a settlement credit under the one-satisfaction rule). "Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation." *Utts*, 81 S.W.3d at 828.

[63] **[64]** **[65]** In *Utts*, the defendant contended the pretrial settlement by one family member was a "sham" transaction to avoid application of chapter 33's settlement-credit scheme to the other nonsettling family members. *Utts*, 81 S.W.3d at 829. In discussing the burden a defendant has to raise the issue of a "sham" settlement, the supreme court noted that "when a case involves facts suggesting that a nonsettling plaintiff may have benefited from the proceeds of another plaintiff's settlement, the nonsettling defendant must raise this allegation to the trial court–not the jury–and present evidence of the benefit as part of its burden in electing for a dollar-for-dollar credit." *Id.* The court noted that a defendant did not have to present evidence before the case was presented to the jury but could "urge its settlement-credit motion and introduce evidence" in a post-verdict motion. *Id.* "If the evidence shows such a benefit, then the trial court should apply the settlement credit reflecting that benefit unless the nonsettling plaintiff presents evidence that he or she did not benefit from the settlement." *Id.* "In other words, once the nonsettling defendant presents evidence of the nonsettling plaintiff's benefit from a settlement, the trial court shall presume the settlement credit applies unless the nonsettling plaintiff presents evidence to overcome this presumption." *Id.*

***30** In applying this law to the facts presented in *Utts*, the supreme court explained that the nonsettling defendant had placed the amount of the settlement with the settling family member (who was no longer a party at the time of trial) in the record. *Id.* at 830. The nonsettling defendant further offered evidence that the nonsettling family members (who were plaintiffs at the time of trial) benefitted from the settling family member's settlement. *Id.* The supreme court concluded the record evidence raised a presumption that the nonsettling defendant may be entitled to a settlement credit but that the record did not establish the amount. *Id.* The supreme court thus remanded the cause to the trial court to allow each family member an opportunity to present evidence to show that he or she did not receive any benefit from the settling family member's settlement. *See id.* (explaining that to avoid the settlement credit, each nonsettling family member on remand must "present evidence showing why the settlement credit should not apply").

[66] Similarly, here, Dr. Virlar and Gonzaba argued in their post-verdict motion that Puente benefited from C.P.'s settlement with the hospital. As evidence, they submitted the reporter's record from the prove-up hearing for C.P.'s settlement and pointed to testimony from C.P.'s guardian ad litem. They also stressed that after C.P. settled with the hospital, Puente and her mother (Carr) dismissed all their claims against the hospital with prejudice. We conclude Dr. Virlar and Gonzaba presented evidence raising a presumption that they may be entitled to a settlement credit under the common law. *See* *Utts*, 81 S.W.3d at 829; *First Title Co.*, 860 S.W.2d at 79 (application of settlement credit under common law's one-satisfaction rule). In response to the motion, Puente filed an affidavit by her counsel disputing that Puente received a benefit from C.P.'s settlement with the hospital. The trial court then denied Dr. Virlar and Gonzaba's motion for settlement credit but did not have an opportunity to make an evidentiary finding as to any benefit Puente received from C.P.'s settlement. Thus, as in *Utts*, we remand the case to the trial court so that it may conduct an evidentiary hearing.

[67] We note that in her second motion for rehearing, Puente again argues, as she did in *Virlar II*, that her second remittitur in the amount of $434,000.00 would cure any reversible error committed by the trial court with respect to Issue 4 (the settlement credit issue). *See* *Virlar II*, 2020 WL 2139313, at *1. We again reject her second remittitur of $434,000.00. As we explained in *Virlar II*, Texas Rule of Appellate Procedure 46.5 provides that if a court of appeals reversed a "trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may ... voluntarily remit the amount that the affected party believes will cure the reversible error." TEX. R. APP. P. 46.5. If "the court of appeals determines that the voluntary remittitur cures the reversible error, then the court must accept the remittitur and reform and affirm the trial court judgment in accordance with the remittitur." *Id.* "If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, *but that remittitur is appropriate*, the court must suggest a remittitur in accordance with Rule 46.3." *Id.* (emphasis added). As explained above, the trial court in this case denied Dr. Virlar and Gonzaba's motion for settlement credit but did not have an opportunity to make an evidentiary finding as to any benefit Puente received from C.P.'s settlement. Thus, we do not believe that remittitur is appropriate on the settlement credit issue. Nor can we conclude, based on the record before us, whether $434,000.00 would cure the error. We therefore reject Puente's second remittitur in the amount of $434,000.00. *See* TEX. R. APP. P. 46.5; *M & A Tech., Inc. v. iValue Grp., Inc.*, 295 S.W.3d 356, 372 (Tex. App.—El Paso 2009, pet. denied) (op. on reh'g) (rejecting voluntary remittitur because remittitur inappropriate under appellate record presented).

PERIODIC PAYMENTS

***31** In their final issue, Dr. Virlar and Gonzaba argue the trial court erred in failing to award future damages payable in periodic payments. Chapter 74 of the Texas Civil Practice and Remedies Code permits periodic payments when the award of

future damages exceeds a present value of $100,000.00. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.502.[33] Section 74.503 provides,

> (a) At the request of a defendant physician or health care provider or claimant, the court *shall* order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.
>
> (b) At the request of a defendant physician or health care provider or claimant, the court *may* order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.
>
> (c) The court *shall* make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.
>
> (d) The court *shall* specify in its judgment ordering the payment of future damages by periodic payments the:
>
> (1) recipient of the payments;
>
> (2) dollar amount of the payments;
>
> (3) interval between payments; and
>
> (4) number of payments or the period of time over which payments must be made.

Id. § 74.503 (emphasis added). Thus, section 74.503 has both discretionary and mandatory language.

With regard to future damages other than medical, health care, or custodial services, the trial court has discretion to order periodic payments. *See id.* § 74.503(b) (stating the trial court "may" order periodic payments). However, with regard to future medical, health care, or custodial services awarded, upon the request "by a defendant physician or health care provider, a trial court *must* order that medical, health care, or custodial services awarded" "be paid *in whole or in part in periodic payments.*" *Gunn v. McCoy*, 554 S.W.3d 645, 679 (Tex. 2018) (discussing subsection (a)) (emphasis added). "When periodic payments are ordered, the court must make specific findings as to the amount of periodic payments, and the court's judgment must specify the amount, the timing of payments, and the number of payments or time period over which payments are to be made." *Id.* (discussing subsections (c) and (d)).

In a post-trial motion, Dr. Virlar and Gonzaba filed a Motion for Order on Periodic Payments, requesting that the full amount of Puente's award for future medical expenses in the amount of $13,263,874.86 and future loss of earning capacity in the amount of $888,429.00 (minus any applicable settlement credits) be payable in periodic payments instead of a lump sum payment. According to Dr. Virlar and Gonzaba, because Dr. Altman testified Puente's reasonable life expectancy was thirty-one years, the trial court should divide the amount of the awards for future damages by thirty-one.[34] After a hearing, the trial court denied the motion for periodic payments.

***32** To the extent our determination of this issue involves statutory construction, statutory construction is a "legal question we review de novo." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). "In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Id.*

A. Waiver?

[68] According to Puente, Dr. Virlar and Gonzaba waived any right they had to periodic payments under section 74.503 because they "never pleaded this matter of defense and avoidance," and "did not object to the court submitting the damages question to the jury in the usual form of 'what sum if paid now in cash.' " Instead, they filed a post-trial motion. Section 74.503, however,

makes no mention of when a defendant must make the request for periodic payments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503. And, we agree with Dr. Virlar and Gonzaba that requesting periodic payments is not a matter "in avoidance" or an affirmative defense. *See* *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015); *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 136 (Tex. 2014). That is, section 74.503 is not a bar to recovery but merely a method of how recovery will be paid.

[69] Further, section 74.503 provides that the trial court, not a jury, shall make the specific finding of the *dollar* amount of periodic payments that will compensate the claimant for the future damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(c). It further requires the trial court, not the jury, to specify the interval between the payments, and "the number of payments or the period of time over which payments must be made." *Id.* § 74.503(d). Finally, section 74.503 does not become applicable until a jury awards future damages, and the court determines that the present value of that award equals or exceeds $100,000.00. *See id.* § 74.502 ("This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of future damages, *as determined by the court*, equals or exceeds $100,000") (emphasis added). Given that the trial court, and not the jury, is making the appropriate findings, there is no reason why it cannot do so at a post-trial hearing. [35] We therefore find no waiver by Dr. Virlar and Gonzaba in filing their request for periodic payments post-trial but before judgment was signed by the trial court.

B. Evidence of Financial Responsibility

***33** Pursuant to section 74.505, before the trial court may authorize periodic payments of future damages, it must require "a defendant who is not adequately insured *to provide evidence* of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment." TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a) (emphasis added). The judgment must then provide for payments to be funded by

> (1) an annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;
>
> (2) an obligation of the United States;
>
> (3) applicable and collectible liability insurance from one or more qualified insurers; or
>
> (4) any other satisfactory form of funding approved by the court.

Id. § 74.505(b).

[70] Puente argues that the trial court did not err in not ordering periodic payments because Dr. Virlar and Gonzaba never showed evidence of financial responsibility under section 74.505(a). Subsection (a) requires *a* defendant *to provide* evidence of financial responsibility in an amount adequate to assure full payment of damages awarded. *Id.* § 74.505(a). As noted, when construing a term in a statute, we ascertain and give effect to the Legislature's intent as expressed by the language used in the statute. *City of Rockwall*, 246 S.W.3d at 625. When the statute does not define a particular term, we construe the term according to its "plain and common meaning," "unless a contrary intention is apparent from the context" or "unless such a construction leads to absurd results." *Id.* Chapter 74 does not define "provide"; thus, we look to its plain and common meaning. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) ("Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law."). The plain meaning of "provide" is "to supply" or "to furnish." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1827 (1981).

[71] At the post-trial hearings on Dr. Virlar and Gonzaba's motion for periodic payments, they provided evidence of Gonzaba's financial responsibility in the form of a balance sheet and testimony from Melissa Keller, Gonzaba's controller. [36] In reviewing the balance sheet and testimony, we hold Gonzaba provided evidence of financial responsibility in an amount adequate to assure full payment of damages awarded. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a).

Even if Gonzaba provided evidence of financial responsibility, Puente emphasizes that Dr. Virlar did not. According to Puente, both Dr. Virlar and Gonzaba are required to provide evidence of financial responsibility under subsection (a). Subsection (a), by its plain language, requires "a defendant ... to provide evidence of financial responsibility." *Id.* We disagree with Puente.

When, as here, both defendants are jointly and severally liable for the full amount of the judgment, the practical ramifications of Puente's interpretation would frustrate the intent of the Legislature. "A party who is jointly and severally liable for the judgment is liable not only for its own share of the judgment but also, as between itself and the plaintiff, for the shares of the judgment attributable to other defendants." 5 TEX. PRAC. GUIDE: PERSONAL INJURY 2d § 16:49 (2019). "If one or more defendants are insolvent, the jointly and severally liable defendant can be made to pay the portion of the judgment attributable to those defendants." *Id.* "Further, the plaintiff can collect the entire amount of a joint and several judgment against any defendant jointly and severally responsible, and leave it to that defendant to collect contribution for any overpayments from the other defendants." *Id.* Assuming the facts of this case—that is, assuming Gonzaba provided evidence of financial responsibility but its employee, Dr. Virlar, did not—under Puente's interpretation of subsection (a), Gonzaba could be granted its requested relief of making periodic payments but, in practicality, be denied that relief because Puente could seek to collect the entire amount of the joint and several judgment from Gonzaba when Dr. Virlar did not pay the lump sum in full. We conclude the Legislature could not have intended such a result. Therefore, under the facts of this case, we hold that only one jointly and severally liable defendant was required to provide evidence of financial responsibility under subsection (a).

C. Subsection (b)'s Periodic Payments at Discretion of Court

***34** Dr. Virlar and Gonzaba first argue that the trial court erred in failing to order periodic payments in accordance with section 74.503(b). Subsection (b) allows the trial court at its discretion to order "future damages other than medical, health care, or custodial services awarded in a health care liability claim" to "be paid in whole or in part in periodic payments rather than by a lump sum payment." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(b) (providing that at the request of the defendant, the court "may" order "future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment").

[72] Here, Puente was awarded $888,429.00 in damages for loss of future earning capacity. [37] Unlike future medical expenses, a trial court's decision whether to order periodic payments to compensate for future loss of earning capacity is completely discretionary. *See id.* Dr. Virlar and Gonzaba's briefing in this appeal focuses on subsection (a)'s mandatory language and the fact that the trial court failed to order *any* amount to be paid in periodic payments. Dr. Virlar and Gonzaba, however, in their briefs do not adequately argue why the trial court erred under subsection (b). *See* TEX. R. APP. P. 38.1(i). Given that the trial court "may" order periodic payments under subsection (b), Dr. Virlar and Gonzaba were required to bring forth an argument explaining why the trial court abused this discretion. *See id.* We therefore hold they waived any error relating to subsection (b). Further, in reviewing the record, we find no abuse of discretion by the trial court in failing to award periodic payments for future loss of earning capacity.

D. Subsection (a)'s Periodic Payments Mandatory

[73] Unlike subsection (b), subsection (a) requires a trial court, at the request of a defendant health care provider, defendant physician, or claimant, to order "medical, health care, or custodial services awarded in a health care liability claim [to] be paid in whole or in part in periodic payments rather than by a lump-sum payment." TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (providing that trial court "shall" order periodic payments in whole or in part). "When a trial court orders periodic payments, it 'shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages' and shall specify the amount, number, timing, and recipient of those payments in its judgment." *Regent Care of San Antonio, L.P. v. Detrick*, No. 19-0117, —— S.W.3d ——, ——, 2020 WL 2311943, at *5 (Tex. May 8, 2020) (quoting TEX. CIV. PRAC. & REM. CODE § 74.503(c)-(d)).

[74] **[75]** **[76]** "The party requesting an order for periodic payments has the burden to identify for the trial court evidence regarding each of the findings required by section 74.503, and the findings must be supported by sufficient evidence." *Id.* "The trial court record may not contain all of the evidence necessary to make the required findings, and the trial court has discretion to receive additional evidence for that purpose." *Id.* "Such evidence may not be used to contradict the jury's findings on any issues submitted to it, however." *Id.* "Subchapter K gives the trial court no discretion to craft its own award of damages inconsistent with the jury's verdict." *Id.*

In *Regent Care*, the nursing facility argued the trial court abused its discretion by ordering that $256,358 in future medical damages be paid periodically because that figure was not supported by the evidence and did not conform to the verdict. *Id.* at ——, 2020 WL 2311943 at *4. The jury had "found that $3 million, 'if paid now in cash,' would compensate [the plaintiff] for his future medical expenses." *Id.* After trial, the nursing facility requested that the trial court order "payment of the jury's entire award periodically over five to eight years." *Id.* The trial court ordered the nursing facility to pay $256,358 periodically in twenty-four monthly installments. *Id.* In reviewing the trial court's decision, the supreme court agreed with the nursing facility "that the specific amount the trial court ordered to be paid periodically—$256,358—[was] not supported by sufficient evidence." *Id.* at ——, 2020 WL 2311943 at *5. The supreme court explained that while there was sufficient evidence to support an award of $3 million in damages for future medical care, "no evidence indicated that only $256,358 of these medical expenses would be incurred periodically." *Id.* at —— – ——, 2020 WL 2311943 at *5-*6.

***35** However, even though no evidence supported the trial court's finding regarding periodic payments, the supreme court explained that the nursing facility was not entitled to reversal:

> Nevertheless, Regent Care is not entitled to reversal unless this error harmed it—that is, unless the trial court had discretion to order that a larger amount of Detrick's damages be paid periodically. We conclude such an order would be an abuse of discretion on this record because Regent Care did not point the court to any evidence supporting its request that the entire $3 million award be paid periodically, nor to evidence of *any* specific dollar amount of medical expenses that would be incurred periodically. At trial, the parties presented their evidence regarding damages *solely in present values without detailing how those damages were discounted*, and the jury found the amount that would fairly and reasonably compensate Detrick for future medical care expenses "if paid now in cash." No party requested that the jury find the amount that would compensate Detrick if paid periodically—unsurprisingly, as Subchapter K had not yet been invoked. Nor did Regent Care offer evidence post-trial from which the trial court could make such a finding. We agree with Detrick that simply ordering the jury's present-value damages award to be paid in periodic installments—whether in whole or in part—would be an abuse of discretion here because it would effectively "double discount" the award, undercompensating him for the expenses he would incur in each future period. *See* TEX. CIV. PRAC. & REM. CODE § 74.503(c) (requiring trial court to find dollar amount of periodic payments that will "compensate the claimant for the future damages.").

Regent Care, —— S.W.3d at ——, 2020 WL 2311943, at * 6 (emphasis added). According to the supreme court, "[b]ecause no other order was possible given the evidence before" the trial court, "the trial court did not abuse its discretion by declining to order that more of the damages Regent Care owed Detrick to be paid periodically." *Id.*

[77] Like in *Regent Care*, the parties in this case presented their evidence regarding damages solely in present value terms, without detailing how those damages were discounted. *See id.* Like the jury in *Regent Care*, the jury in this case was asked what sum of money, "if paid now in cash," would fairly and reasonably compensate Puente for future medical care expenses. *See id.* The jury answered $13,263,874.86. As in *Regent Care*, no party requested the jury to determine the amount of money that would compensate Puente if paid periodically. *See id.* Like the nursing facility in *Regent Care*, Dr. Virlar and Gonzaba did not offer any evidence post-trial from which the trial court could make such a finding. *See id.* The only argument made by Dr. Virlar and Gonzaba post-trial was that the trial court should divide the jury's award of future medical expenses into thirty-one equal annual payments because there was evidence that Puente was expected to live another thirty-one years. As the supreme court explained in *Regent Care*, "simply ordering the jury's present-value damages award to be paid in periodic installments —whether in whole or in part—would be an abuse of discretion" because "it would effectively 'double discount' the award, undercompensating" the plaintiff for expenses she would incur in each future period. *Id.*

***36** Dr. Virlar and Gonzaba admit there was no evidence presented from which the trial court could have made a finding on periodic payments of future medical expenses, but argue that "issues existed impacting the award of future damages in this case that should have been, but were not, decided by the trial court before any determination or presentation of evidence, if necessary, regarding the specific amounts of periodic payments [they] sought." According to Dr. Virlar and Gonzaba, those issues included (1) "the amount of the settlement credit to which [they] were entitled based on the hospital's settlement, and its impact on the award of future damages"; and (2) whether Dr. Virlar and Gonzaba had met their burden to present evidence of financial responsibility pursuant to section 74.505(a). [38] Dr. Virlar and Gonzaba argue that because the trial court denied their motions without giving findings of fact or conclusions of law, they "had no way to know that specific amount of future damages awarded would be subject to periodic payments."

However, as pointed out by Puente, Dr. Virlar and Gonzaba "had a full and fair opportunity to provide the trial court with evidence to support an order of periodic payments *after the trial court informed them it had denied their request for any credit* for Puente's daughter's settlement with the hospital." (emphasis in original). We agree with Puente that the record reflects "Virlar and Gonzaba knew at the time that the trial court heard their periodic payment evidence that the [trial] court had already disallowed any credit beyond the $200,000 credit for the settlement with Dr. Patel." Thus, after the trial court's ruling on the settlement credits, Virlar and Gonzaba had an opportunity to present evidence in support of their request for periodic payments of future medical expenses.

The supreme court in *Regent Care* recognized that in ordering periodic payments, a trial court may receive additional evidence to make the required findings under Subchapter K, but "[s]uch evidence may not be used to contradict the jury's findings on any issues submitted to it." *Regent Care*, —— S.W.3d at ——, 2020 WL 2311943, at *5. The supreme court stressed that "Subchapter K gives the trial court no discretion to craft its own award of damages *inconsistent with the jury's verdict.*" *Id.* (emphasis added). As noted, there was no evidence introduced post-verdict that would support an amount of periodic payments of future medical expenses. The evidence at trial supporting future medical expenses was presented in present-value terms. Puente's expert, Dr. Fairchild, presented evidence totaling almost $3 million more than the jury awarded. Further, his opinion with respect to future medical expenses consisted of different discount rates depending on the specific expense because Dr. Fairchild assumed different inflation rates for each. Thus, with this record, it was impossible for the trial court to order periodic payments that was *consistent with the jury's award.* As in *Regent Care*, "[b]ecause no other order was possible given the evidence before" the trial court, we hold the trial court did not err in declining to order periodic payments of future medical expenses. *Id.* at ——, 2020 WL 2311943 at *6.

CONCLUSION

We hold the trial court did not err in excluding the expert testimony of Dr. Kuncl or in admitting evidence of Dr. Virlar's loss of privileges and alleged extraneous bad acts. We further hold the evidence was legally and factually sufficient to support the jury's award of loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00). We accept the remittitur filed by Puente in the amount of $8,000.00 and modify the judgment to reflect that Puente recover damages against Dr. Virlar and Gonzaba for loss of future earning capacity in the amount of $880,429.00. *See* TEX. R. APP. P. 46.3, 46.5. We do not disturb any other damages awarded by the jury. Additionally, we find no reversible error by the trial court in failing to award periodic payments for future loss of earning capacity under section 74.503(b) or for future medical care expenses under section 74.503(a). Finally, with respect to any applicable settlement credit from C.P.'s settlement with the hospital pursuant to the common law's one-satisfaction rule, we conclude a benefits analysis should be conducted pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). Therefore, we reverse the judgment in part and remand the cause for the trial court (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts* and apply an appropriate settlement credit, if any, and (2) to sign a new judgment in conformity with this opinion.

CONCURRING AND DISSENTING OPINION

Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice

***37** I concur in the majority's opinion and judgment on Puente's second motion for rehearing in all respects except as to the issue of the settlement credit. Because I believe appellants are entitled to a dollar-for-dollar credit for the full amount of the confidential settlement and such a credit would not result in an open courts violation, I would reverse and remand for the trial court to reduce the judgment by the full amount of the settlement. Accordingly, I respectfully dissent in part.

Puente, Puente's mother, and Puente's daughter C.P. asserted a health care liability claim against appellants and the hospital for negligently injuring Puente. C.P. sought loss of consortium damages. The hospital and C.P. entered into a confidential settlement agreement, and C.P., Puente, and Puente's mother subsequently nonsuited their claims against the hospital. Puente proceeded to trial against appellants and obtained a jury verdict in her favor. Appellants sought a settlement credit for the full amount of the confidential settlement with C.P., which the trial court denied. On appeal, Puente argues appellants are not entitled to any settlement credit because C.P.'s loss of consortium claim is "a separate and independent claim distinct from" Puente's claim and that application of the settlement credit would result in an open courts violation. I disagree with both arguments.

The crux of the dispute is whether C.P. is a "claimant" for whose claim appellants are entitled to a settlement credit under Civil Practice and Remedies Code sections 33.011 and 33.012. When interpreting a statute, we must "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). "If the statutory text is unambiguous, [we] must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results." *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

Section 33.012 provides: "[I]f the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant ... by an amount equal to the sum of the dollar amounts of all settlements...." TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(c). Section 33.011 defines "claimant" to include *both* the injured person *and* "any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of" the injured person. *Id.* § 33.011(1). The statute's plain and unambiguous language does not distinguish between the injured person and a plaintiff seeking damages for that person's injury. Further, the statute does not carve out of the definition of "claimant" a plaintiff seeking damages the injured person could not recover herself, such as damages for loss of consortium.

Here, C.P. and Puente each pleaded the same claim—a health care liability claim. Although C.P. and Puente each sought different damages, both C.P.'s and Puente's damages arose from Puente's injury. And while the supreme court has characterized claims for loss of consortium as "separate and independent claims distinct from the underlying action," it nevertheless recognized they are "derivative" in the sense that a lost consortium plaintiff such as C.P. must establish a third party's "underlying injury in order to recover damages." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009); *see also* *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990) ("[C]hildren may recover for loss of consortium when a third party causes serious, permanent, and disabling *injuries to their parent*." (emphasis added)). In other words, regardless of whether C.P.'s claim for loss of consortium is separate and independent from Puente's claims, both C.P. and Puente sought damages for the injury to Puente. Therefore, both C.P. and Puente are the "claimant" under section 33.011's plain language.

***38** The supreme court's decision in *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999), interpreting substantially similar language in the prior version of the statute, is consistent. In *Drilex*, the supreme court construed "claimant" to include

every party seeking recovery for injury to the same person. *Id.* at 122. The court did not distinguish between a wholly derivative claim for damages versus a separate and independent claim for damages, such as for loss of consortium. Rather, the court held that what unifies parties as one "claimant" is the fact that they are seeking damages arising from injury to the same person. Although the supreme court has criticized its holding in *Drilex*, it has not overruled it, nor has it held the *Drilex* analysis is inapplicable to loss of consortium claims. Therefore, in light of the plain language of sections 33.011 and 33.012 and *Drilex*, I would conclude that because C.P. is a "claimant" who "has settled with one or more persons," appellants are entitled to a dollar-for-dollar credit for the amount of C.P.'s confidential settlement.

I also disagree with the majority's conclusion that application of section 33.012 in this case results in an open courts violation. In *Lucas*, the supreme court held an arbitrary damages cap unconstitutionally restricted a health care liability claimant's right to redress for a common law claim. *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988). Section 33.012, in contrast, does not restrict a health care liability claimant's recovery; rather, it requires every member of the claimant class to share in a single, but unrestricted, recovery for the underlying injury. Even if application of section 33.012 restricts an individual plaintiff's recovery, *Lucas* took issue with a statute that capped the damages recoverable for a common law claim. Here, as noted, Puente and C.P. are asserting the same health care liability claim, and section 33.012 neither caps nor otherwise restricts the damages recoverable for that claim.

For these reasons, I would sustain appellants' fourth issue and remand to the trial court with instructions to apply a credit in the full amount of the confidential settlement in accordance with section 33.012.

CONCURRING AND DISSENTING OPINION

Concurring and Dissenting Opinion by: Patricia O. Alvarez, Justice

I agree with the majority's opinion and judgment except for the settlement credit issue. On that issue, I join Chief Justice Marion's dissent. I write separately because I am concerned with the effect that section 33.012 has on parties when separate settlements involve derivative claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012.

In this case, the statute's plain language requires the trial court to reduce Puente's damages for her physical injury by the amount C.P. received for her separate loss of consortium. The statute penalizes Puente dollar-for-dollar for C.P.'s settlement for her separate damage. The facts of this case reveal a punitive aspect to the statute. For this reason, I invite the Texas Legislature to revisit the statute's construction to avoid punitive consequences in tragic circumstances like the one this case raises.

All Citations

--- S.W.3d ----, 2020 WL 6049652

Footnotes

1 Justice Rebeca C. Martinez has recused herself from this appeal.

2 TPN, or total parenteral nutrition, is a method of giving nutrients intravenously to a person. TPN may or may not include thiamine based on the physician's orders.

3 The "premix" TPN, which was not ordered by Dr. Virlar, did contain thiamine. At trial, Dr. Altman testified that giving supplemental thiamine is "very safe" and "very cheap." It should be given to any patient who might be at risk for thiamine deficiency because "the consequences can be devastating and permanent." Puente's treating neurologist, Dr. David Wenzell, also confirmed that there is no downside to giving thiamine because a patient who receives more than they need excretes the surplus in her urine. When asked why he did not give Puente thiamine, especially considering there was "no downside," Dr. Virlar responded that there "was no indication at the time based on my clinical judgment."

4 Wernicke's syndrome, or Wernicke's encephalopathy, is brain dysfunction associated with thiamine deficiency and is "usually associated with chronic alcoholism or other causes of severe malnutrition." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 761, 2495 (Donald Venes ed., 21st ed. 2009).

5 According to Dr. Altman, "the reference range–every lab has its own reference range, or normal range," and "in this case, the normal range for their thiamine level would be anywhere from 87 on the low end to 280 on the high end, nanomoles per liter–that's a concentration. And, in this case, Jo Ann [Puente]'s results were 30 nanomoles. So, in other words, less–well less than half of the low end of that reference range."

6 One of the experts at trial described encephalopathy as inflammation or irritation of the brain. Encephalopathy is defined as "[g]eneralized brain dysfunction marked by varying degrees of impairment of speech, cognition, orientation, and arousal." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 761 (Donald Venes ed., 21st ed. 2009). "In mild instances, brain dysfunction may be evident only during specialized neuropsychiatric testing; in severe instances (e.g., the last stages of hepatic encephalopathy), the patient may be unresponsive even to unpleasant stimuli." *Id.*

7 Wernicke encephalopathy is caused by thiamine deficiency. At trial, Dr. David Joseph Altman, a board certified neurologist, testified symptoms of Wernicke's encephalopathy include "ataxia, or problems with coordination; confusion, which is also called encephalopathy; and eye movement abnormalities, things like nystagmus where the eyes move rapidly or problems where the eyes are not moving together." Dr. Altman testified thiamine deficiency caused Puente to develop "changes in her mental state, causing confusion [and] behavioral changes." "It caused problems with her coordination ... as well as strength issues in her upper and lower extremities. And it also affected her eye movements, such that they were not moving together. She was experiencing jittery movements, called nystagmus of her eyes. All of those are classic for Wernicke's encephalopathy."

8 During the proceeding, the trial court appointed guardians ad litem for Puente and her minor daughter, respectively.

9 Maria Ester Carr brought suit individually and as guardian of Puente's minor daughter.

10 These healthcare providers were Dr. Nilesh Patel; James Houston, P.A.; Angela Garcia, R.D.; NITYA Surgical Associates, PLLC d/b/a Texas Bariatric Specialists, LLC; Manuel Martinez, M.D.; Methodist Healthcare System of San Antonio, Ltd. d/b/a Metropolitan Methodist Hospital; and "JKD" (an unknown registered dietician identified only by initials on medical records).

11 Defense expert, Dr. Darryl S. Camp, a neurologist, testified that after reviewing Puente's medical records, he believed she was suffering from Guillain-Barre syndrome. Puente's experts, on the other hand, testified she could not have been suffering from Guillain-Barre syndrome. According to Dr. Wenzell, the "typical presentation for Guillain-Barre syndrome is gradual evolution over several days to two weeks of ascending–meaning starting at the bottom and moving up–symptoms of numbness and weakness in the extremities, sometimes people can have eye movement abnormalities as well, and the diagnosis is confirmed by the presence of elevated protein [in] the spinal fluid and by certain electrical abnormalities where the nerves are tested." Dr. Wenzell testified Puente had no elevated spinal fluid protein and no "abnormality of nerve conduction studies." According to Dr. Wenzell, there was no support in Puente's medical records for a diagnosis of Guillain-Barre syndrome. Similarly, Dr. Altman testified that Puente was not suffering from Guillain-Barre syndrome because "Guillain-Barre doesn't cause mental confusion"; "by definition" it "affects only the peripheral nerves" and "has no effect on the central nervous system, the brain." Thus, it does not "cause confusion, behavioral changes, things of that nature." "Also, it's not going to be associated with spasticity," which was one of Puente's problems–"she's spastic in her arms and legs."

12 During Puente's January 2012 hospitalization, Dr. Martinez saw Puente for only the first two days of the two-week window in which her condition could have been reversed.

13 The jury awarded $14,285,505.86 in compensatory damages, of which $133,202.00 was for damages incurred in the past. The trial court awarded prejudgment interest, but also reduced the award by a $200,000.00 settlement credit relating to Puente's settlement with Dr. Patel. The net judgment was for $14,109,349.02. The judgment also awarded Puente court costs and post-judgment interest at the annual rate of 5% compounded annually.

14 *Robinson*'s list of nonexclusive factors include (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

15 Puente contends Dr. Virlar and Gonzaba have failed to preserve error on this issue because they withdrew Dr. Kuncl as a witness. In reviewing the record, we conclude that counsel for Dr. Virlar and Gonzaba did not withdraw Dr. Kuncl as a witness. Instead, counsel was merely recognizing that the trial court had already sustained two objections made by Puente to Dr. Kuncl being qualified to testify about the liability of other physicians, i.e. the responsible third parties. Defense counsel was recognizing that based on the trial court's rulings, it did not make sense to continue line by line through Dr. Kuncl's deposition testimony. Thus, he "withdrew" the remaining deposition excerpts and made an offer of proof of what Dr. Kuncl would have testified about. We find no waiver by Dr. Virlar and Gonzaba.

16 Defense counsel appears to be objecting under Texas Rule of Evidence 404.

17 This statement by the trial court is not a ruling on the admissibility of the evidence. The trial court was merely allowing Puente's counsel to lay a predicate.

18 Similarly, this statement by the trial court is not an adverse ruling on the admissibility of the evidence. The trial court was merely asking Puente's counsel to rephrase the question for purposes of laying a predicate.

19 Defense counsel did not object to the question; instead, he instructed his client to answer the question.

20 Defense counsel did not object.

21 Defense counsel did not object. The objection sustained was made by Puente's counsel.

22 Defense counsel did not specifically object under rule 404. From the context, we can assume counsel meant rule 404.

23 No objection was made by defense counsel.

24 No objection was made by defense counsel. Further, Dr. Virlar had already testified without objection about Charlotte Watson.

25 Puente's counsel stated during closing argument, without objection, that the jury could "believe it when [Dr. Virlar] says he lost his privileges at every hospital in San Antonio and cannot practice in any hospital in this city." Dr. Virlar testified he was currently employed at Doctors Hospital of Laredo as a full-time hospitalist and also "as a local at Fort Duncan in Eagle Pass." He testified he also worked at a clinic in San Antonio. Thus, Dr. Virlar testified that he had "admitting privileges at Doctors Hospital in Laredo and Fort Duncan in Eagle Pass." When he is in San Antonio, he is "in the clinic and at the nursing facilities."

26 When asked who was the "captain" of the team, Dr. Virlar testified that he was the "admitting attending physician," but then claimed "there is no real captain." "We work as a team. Basically, there is no like, hey, man, I'm the captain, you do what I say. It doesn't work that way." When pressed who was the physician of record, Dr. Virlar stated, "I was."

27 We note that Puente also makes an invited error argument in her brief. She points to Dr. Fairchild's testimony about the discount rate he used and Dr. Fairchild's acknowledgment that some economists use discount rates lower than the one he used in making his calculations. Puente then points to defense counsel's statements during closing argument where he stated to the jury: "With regards to the investment part and using T-bills, again use your common sense." Puente argues that defense counsel "invited the jury to use its own 'common sense' in choosing between putative investments and discount rates." According to Puente, the testimony "from over a dozen witnesses about [Puente]'s physical limitations and life expectancy, there was sufficient evidence to support the jury's judgment and any alleged error was invited and waived." We, however, find no invited error by defense counsel through the statement made during closing argument. Further, any statement made by defense counsel is not evidence.

28 Because the settlement amount is part of a confidential settlement, we do not refer to the exact amount in this opinion.

29 The record reflects that defense counsel informed the trial court of the exact amount of the settlement.

30 Economic damages are damages intended to compensate the claimant for actual economic or pecuniary loss. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(4). They do not include exemplary or noneconomic damages. Noneconomic damages are damages awarded to compensate the claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses other than exemplary damages. *Id.* § 41.001(12).

31 The jury found that Puente was entitled to the following: (1) $133,202 in loss of earning capacity sustained in the past; (2) $888,429 in loss of earning capacity that in reasonable probability Puente will sustain in the future; and (3) $13,263,874.86 in medical care expenses that in reasonable probability Puente will incur in the future.

32 As noted previously, the supreme court in *Lucas* answered the certified question posed by the Fifth Circuit by explaining why the Texas statute capping damages impermissibly restricted the common-law medical malpractice cause of action. 757 S.W.2d at 691-92. We recognize that in the background section of its opinion, the supreme court mentioned that the federal district court had applied a settlement credit to the amount awarded to the plaintiffs. *See id.* at 688. However, the supreme court did not analyze whether application of this settlement credit would violate the Open Courts Provision as no such question was posed to it. *See id.* at 688-92. We note that in considering the facts presented in *Lucas* under current caselaw interpreting the Open Courts Provision, application of the settlement credit in *Lucas* would not have resulted in the child recovering less than the full amount of his economic damages. The child's parents in *Lucas*, 811 F.2d at 271, brought a lawsuit in their individual capacities and as next friend of their son. *Id.* After a trial, the federal district court awarded the parents economic damages for medical expenses they had incurred and would incur until their son reached eighteen years of age. *Id.* However, with respect to their individual claims, the district court "made no findings concerning the parents' claims for their own mental anguish and loss of companionship." *Id.* The district court also awarded the son the following economic damages: "$350,000 as the present value of future medical expenses he will incur after his eighteenth birthday, and $600,000 as the present value of the impairment of his future earning capacity." *Id.* As for noneconomic damages, the district court awarded the son "$1.5 million for pain and suffering." *Id.* The district court then "reduced the total award of damages against the United States by the $400,000 paid by Wyeth Laboratories to the Lucases in settlement of the state court suit." *Id.* Because the son was awarded $1.5 million in noneconomic damages, an amount that far exceeded the amount of the $400,000 settlement credit, he necessarily received the full amount of his economic damages even after application of the settlement credit. Thus, reducing his award by the amount of the settlement credit did not violate his rights under the Open Courts Provision.

33 Section 74.502 provides that "[t]his subchapter applies only to an action on a health care liability claim against a physician or heath care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds $100,000." TEX. CIV. PRAC. & REM. CODE ANN. § 74.502.

34 Below and on appeal, Puente argued that such a calculation would constitute a "double discount." That is, the jury awarded, as instructed by the court, the value of future damages reduced to the present value of money. This was the first discount. Puente contends that Dr. Virlar and Gonzaba's formula of dividing this present value award for future damages by Puente's life expectancy of thirty-one years would constitute yet another discount of the value of money —hence, a "double discount." At oral argument, defense counsel acknowledged that such a formulation would be a discount of the jury's award.

35 We note that Puente also argues that if section 74.503 allows for a request for periodic payments to be made post-trial, then her rights to due process and due course of law under the Texas Constitution, along with the separation of powers doctrine, would be violated. Puente's argument is based on the assumption that no additional evidence can be brought to the trial court at the hearing on the motion for periodic payments. Puente argues that the trial court will have to engage in "speculation" to make the appropriate findings. However, given that chapter 74 presents a post-trial proceeding and the trial court is required to make fact findings, we find nothing in chapter 74 that would prevent the trial court from hearing additional evidence on matters like discount rates and the plaintiff's near and future financial expenses. Thus,

we do not believe Puente has shown any constitutional violation. *See* *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (explaining that courts presume a statute is constitutional and the "party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements").

36 Puente argues in her brief that she objected to Keller's testimony "because [Keller] had never been designated as an expert witness or even a person with knowledge of relevant facts." Puente's argument refers to pretrial discovery. As we have previously explained, Dr. Virlar and Gonzaba properly moved for periodic payments in a post-trial proceeding.

37 As noted previously, we have determined there is legally and factually sufficient evidence of $880,429.00 and have thus suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00.

38 As explained previously in this opinion, we have held that they did.

End of Document

APPENDIX TAB “B”

CAUSE NO. 2014-CI-04936

JO ANN PUENTE	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
VS.	§	**BEXAR COUNTY, TEXAS**
MANUEL MARTINEZ, M.D., JESUS VIRLAR, M.D., and GONZABA MEDICAL GROUP	§	
Defendants.	§	**131ST JUDICIAL DISTRICT**

FINAL JUDGMENT

On September 11, 2017, this cause came on to be heard and Jo Ann Puente, the Plaintiff, appeared in person through her representative and mother, Maria Esther Carr, and by attorney of record and announced ready for trial; and Manuel Martinez, M.D., Jesus Virlar, M.D., and Gonzaba Medical Group a/k/a GMG Health Systems Associates, P.A. a/k/a GMG Health Systems PA appeared in person and by attorney of record and announced ready for trial; and a jury having been previously demanded, a jury consisting of twelve qualified jurors was duly empaneled and the case proceeded to trial.

On September 28, 2017, at the conclusion of the evidence, the Court submitted questions of fact in the case to the jury. The charge of the Court and the verdict of the jury are incorporated for all purposes by reference. See attached Exhibit "A". Because it appears to the Court that the verdict of the jury was for the Plaintiff, the Court finds that judgment should be rendered in favor of the Plaintiff and against the Defendants, Jesus Virlar, M.D. and Gonzaba Medical Group a/k/a GMG Health Systems Associates, P.A. a/k/a GMG Health Systems PA, jointly and severally. NS

IT IS THEREFORE ORDERED by the Court that the motion of Plaintiff, Jo Ann Puente, for judgment is GRANTED to the extent and as reflected hereinbelow.

It appears to the Court that the Plaintiff, Jo Ann Puente, is entitled to have and recover actual damages from Defendants, Jesus Virlar, M.D. and Gonzaba Medical Group a/k/a GMG Health Systems Associates, P.A. a/k/a GMG Health Systems PA, jointly and severally, in the sum of $14,285,505.86, of which, $133,202 is for damages incurred in the past.

It appears to the Court that the Plaintiff, Jo Ann Puente, is entitled to have and recover prejudgment interest on past damages awarded by the jury of $133,202 at the rate of 5% per annum accruing from March 24, 2014 through October 24, 2017 (the date funds were received from a $200,000 settlement with a settling party) from Defendants, Jesus Virlar, M.D. and Gonzaba Medical Group a/k/a GMG Health Systems Associates, P.A. a/k/a GMG Health Systems PA, jointly and severally, in the sum of $23,843.16.

IT IS ORDERED THAT the amount of past damages and prejudgment interest to be recovered by Plaintiff Jo Ann Puente as reflected above shall be reduced by the sum of $200,000 received by Plaintiff in settlement from a third party on or about October 24, 2017. This eliminates any recovery of past damages or prejudgment interest and leaves an additional credit of $42,954.84 to be applied to the $14,152,303.86 in future damages awarded by the jury if paid now in cash, resulting in a net judgment for damages, if paid now in cash, of $14,109,349.02.

IT IS FURTHER ORDERED that the Plaintiff, Jo Ann Puente, have and recover all taxable costs of court from Defendant, Jesus Virlar, M.D. and Gonzaba Medical Group a/k/a GMG Health Systems Associates, P.A. a/k/a GMG Health Systems PA, jointly and severally.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff, Jo Ann Puente, is HEREBY AWARDED and DOES HAVE and RECOVER a TOTAL NET JUDGMENT from and against Defendants, Jesus Virlar, M.D. and Gonzaba Medical Group a/k/a GMG Health Systems Associates, P.A. a/k/a GMG Health Systems PA, jointly and

severally, in the sum of $14,109,349.02, plus post-judgment interest at the rate of 5% per annum from the date of this judgment until paid, plus all taxable costs of court as provided by law.

It is further ORDERED, ADJUDGED, AND DECREED that Plaintiff shall take nothing by her claims against Manuel Martinez, M.D., and that Defendant, Manuel Martinez, M.D. go hence with his costs without day and shall have and recover his costs from the Plaintiff, for which led execution issue if not timely paid.

All writs and processes for the enforcement and collection of this judgment may issue as necessary.

This is a final judgment finally disposing of all parties and claims. All relief prayed for by any party hereto and not granted herein is DENIED.

SIGNED on this 28th day of November, 2017.

JUDGE NORMA GONZALES

ORIGINAL

2014CI04936 -P08388

CAUSE NO. 2014-CI-04936

JO ANN PUENTE

VS.

MANUEL MARTINEZ, M.D.; and
JESUS VIRLAR, M.D.

FILED
o'clock M
SEP 29 2017
DONNA KAY M'KINNEY
District Clerk, Bexar County, Texas
By Cindi Flores DEPUTY

IN THE DISTRICT COURT

131st JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. You have already been given a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

EXHIBIT A 10

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition and which you are bound to accept in place of any other meaning.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless told otherwise. A "yes" answer must be based on a preponderance of the evidence. Whenever a question requires an answer other than "yes" or "no", your answer must be based on a preponderance of the evidence.

   The term "PREPONDERANCE OF THE EVIDENCE" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

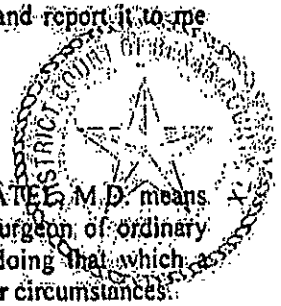
9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. The answers to the questions must be based on the decision of at least ten (10) out of the twelve (12) jurors. The same ten (10) jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten (10) jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would

waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.



DEFINITIONS

"Negligence," when used with respect to the conduct of NILESH PATEL, M.D. means failure to use ordinary care, that is, failing to do that which a Bariatric Surgeon of ordinary prudence would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of NILESH PATEL, M.D. means that degree of care that a Bariatric Surgeon of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of NILESH PATEL, M.D. means a cause that was a substantial factor in bringing about an occurrence or injury, and without which cause such occurrence or injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a Bariatric Surgeon using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury might reasonably result therefrom. There may be more than one proximate cause of an occurrence or injury.

"Negligence," when used with respect to the conduct of MANUEL MARTINEZ, M.D. means failure to use ordinary care, that is, failing to do that which a Hospitalist of ordinary prudence would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of MANUEL MARTINEZ, M.D. means that degree of care that a Hospitalist of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of MANUEL MARTINEZ, M.D. means a cause that was a substantial factor in bringing about an occurrence or injury, and without which cause such occurrence or injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a Hospitalist using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury might reasonably result therefrom. There may be more than one proximate cause of an occurrence or injury.

"Negligence," when used with respect to the conduct of JESUS VIRLAR, M.D. means failure to use ordinary care, that is, failing to do that which a Hospitalist of ordinary prudence

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would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of JESUS VIRLAR, M.D. means that degree of care that a Hospitalist of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of JESUS VIRLAR, M.D. means a cause that was a substantial factor in bringing about an occurrence or injury, and without which cause such occurrence or injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a Hospitalist using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury might reasonably result therefrom. There may be more than one proximate cause of an occurrence or injury.

DOCUMENT SCANNED AS FILED

GENERAL INSTRUCTIONS

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence.

QUESTION NO. 1

Did the negligence, if any, of those named below proximately cause the occurrence or injury to JO ANN PUENTE?

Answer "Yes" or "No" for each of the following:

a. NILESH PATEL, M.D. Yes

b. MANUEL MARTINEZ, M.D. No

c. JESUS VIRLAR, M.D. Yes

DOCUMENT SCANNED AS FILED

If you answered "Yes" to Question No. 1 for more than one of those named below, then answer the following Question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the occurrence or injury. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

QUESTION NO. 2

For each of those named below that you found caused or contributed to cause the occurrence or injury, find the percentage of responsibility attributable to each:

a.	NILESH PATEL, M.D.	40 %
b.	MANUEL MARTINEZ, M.D.	0 %
c.	JESUS VIRLAR, M.D.	60 %
	TOTAL	100 %

Answer Question No. 3 if you answered "Yes" to any one of those named in Question No. 1. Otherwise, do not answer the following question.

QUESTION NO. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate JO ANN PUENTE for her injuries, if any, that resulted from the injury or occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of JO ANN PUENTE. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Loss of earning capacity sustained in the past.

   ANSWER: $133,202.00

2. Loss of earning capacity that, in reasonable probability, JO ANN PUENTE will sustain in the future.

   ANSWER: $888,429.00

3. Medical care expenses, that in reasonable probability, JO ANN PUENTE will incur in the future.

   ANSWER: $13,263,874.80

5202

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:
   a. have the complete charge read aloud if it will be helpful to your deliberations;
   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
   c. give written questions or comments to the bailiff who will give them to the judge;
   d. write down the answers you agree on;
   e. get the signatures for the verdict certificate; and
   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

   If eleven jurors agree on every answer, those eleven jurors sign the verdict.

   If twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

   Do you understand these instructions? If you do not, please tell me now.

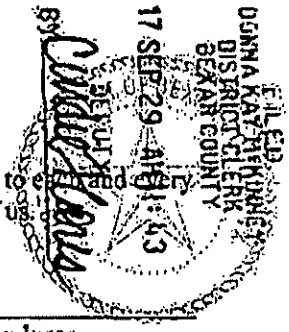
JUDGE PRESIDING

Norma Gonzales
Presiding Judge
131st Judicial District
Bexar County, Texas

DOCUMENT SCANNED AS FILED

5203

Verdict Certificate



Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

Signature of Presiding Juror

Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

__✓__ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.		Aaron A. Gonzales
2.		Valerie Jimenez
3.		Tiffany Russell
4.		FERNANDA V. TEJEDA
5.		Melissa Medina
6.		Denise J. Morales
7.		Armando Leon
8.		Chris Menden
9.		Josh Allen
10.		Daniel Ortiz
11.		

CERTIFIED COPY CERTIFICATE STATE OF TEXAS
I, DONNA KAY McKINNEY, BEXAR COUNTY DISTRICT CLERK, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL RECORD NOW IN MY LAWFUL CUSTODY. WITNESS MY OFFICIAL HAND AND SEAL OF OFFICE ON THIS:

October 02, 2017

DONNA KAY McKINNEY
BEXAR COUNTY, TEXAS

By: _____
RYAN BAUMAN, Deputy District Clerk
(NOT VALID WITHOUT THE CLERK'S ORIGINAL SIGNATURE)

DISTRICT COURT OF BEXAR COUNTY, TX

5205

APPENDIX TAB “C”

ORIGINAL

2014CI04936 -P00308

CAUSE NO. 2014-CI-04936

JO ANN PUENTE § IN THE DISTRICT COURT

VS. § 131st JUDICIAL DISTRICT

MANUEL MARTINEZ, M.D.; and § BEXAR COUNTY, TEXAS
JESUS VIRLAR, M.D. §

FILED
12:40 O'CLOCK P M
SEP 28 2017
DONNA KAY M'KINNEY
District Clerk, Bexar County, Texas
BY Cindi Flores
DEPUTY

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. You have already been given a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

4906

10

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition and which you are bound to accept in place of any other meaning.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless told otherwise. A "yes" answer must be based on a preponderance of the evidence. Whenever a question requires an answer other than "yes" or "no", your answer must be based on a preponderance of the evidence.

   The term "PREPONDERANCE OF THE EVIDENCE" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. The answers to the questions must be based on the decision of at least ten (10) out of the twelve (12) jurors. The same ten (10) jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten (10) jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would

waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

DEFINITIONS

"Negligence," when used with respect to the conduct of NILESH PATEL, M.D. means failure to use ordinary care, that is, failing to do that which a Bariatric Surgeon of ordinary prudence would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of NILESH PATEL, M.D. means that degree of care that a Bariatric Surgeon of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of NILESH PATEL, M.D. means a cause that was a substantial factor in bringing about an occurrence or injury, and without which cause such occurrence or injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a Bariatric Surgeon using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury might reasonably result therefrom. There may be more than one proximate cause of an occurrence or injury.

"Negligence," when used with respect to the conduct of MANUEL MARTINEZ, M.D. means failure to use ordinary care, that is, failing to do that which a Hospitalist of ordinary prudence would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of MANUEL MARTINEZ, M.D. means that degree of care that a Hospitalist of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of MANUEL MARTINEZ, M.D. means a cause that was a substantial factor in bringing about an occurrence or injury, and without which cause such occurrence or injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a Hospitalist using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury might reasonably result therefrom. There may be more than one proximate cause of an occurrence or injury.

"Negligence," when used with respect to the conduct of JESUS VIRLAR, M.D. means failure to use ordinary care, that is, failing to do that which a Hospitalist of ordinary prudence

would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of JESUS VIRLAR, M.D. means that degree of care that a Hospitalist of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of JESUS VIRLAR, M.D. means a cause that was a substantial factor in bringing about an occurrence or injury, and without which cause such occurrence or injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a Hospitalist using ordinary care would have foreseen that the occurrence or injury, or some similar occurrence or injury might reasonably result therefrom. There may be more than one proximate cause of an occurrence or injury.

GENERAL INSTRUCTIONS

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence.

QUESTION NO. 1

Did the negligence, if any, of those named below proximately cause the occurrence or injury to JO ANN PUENTE?

Answer "Yes" or "No" for each of the following:

a. NILESH PATEL, M.D. Yes

b. MANUEL MARTINEZ, M.D. No

c. JESUS VIRLAR, M.D. Yes

If you answered "Yes" to Question No. 1 for more than one of those named below, then answer the following Question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the occurrence or injury. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

QUESTION NO. 2

For each of those named below that you found caused or contributed to cause the occurrence or injury, find the percentage of responsibility attributable to each:

a.	NILESH PATEL, M.D.	40 %
b.	MANUEL MARTINEZ, M.D.	0 %
c.	JESUS VIRLAR, M.D.	60 %
	TOTAL	100 %

Answer Question No. 3 if you answered "Yes" to any one of those named in Question No. 1. Otherwise, do not answer the following question.

QUESTION NO. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate JO ANN PUENTE for her injuries, if any, that resulted from the injury or occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not ~~aware~~ award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of JO ANN PUENTE. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Loss of earning capacity sustained in the past.

   ANSWER: $133,202.00

2. Loss of earning capacity that, in reasonable probability, JO ANN PUENTE will sustain in the future.

   ANSWER: $888,429.00

3. Medical care expenses, that in reasonable probability, JO ANN PUENTE will incur in the future.

   ANSWER: $13,263,874.86

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:
   a. have the complete charge read aloud if it will be helpful to your deliberations;
   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
   c. give written questions or comments to the bailiff who will give them to the judge;
   d. write down the answers you agree on;
   e. get the signatures for the verdict certificate; and
   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

   If eleven jurors agree on every answer, those eleven jurors sign the verdict.

   If twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

   Do you understand these instructions? If you do not, please tell me now.

JUDGE PRESIDING

Norma Gonzales
Presiding Judge
131st Judicial District
Bexar County, Texas

4914

FILED
DONNA KAY McKINNEY
DISTRICT CLERK
BEXAR COUNTY
17 SEP 29 AM 11:43
BY: DEPUTY

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

✓ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.		Aaron A. Gonzalez
2.		Valerie Jimenez
3.		Tiffany Russell
4.		FERNANDA V. TESTAS
5.		Melissa Medina
6.		Denise J. Morales
7.		Armando Lerma
8.		Chris Menden
9.		Josh Allen
10.		Daniel Ortiz
11.		

4915

APPENDIX TAB “D”

CAUSE NO. 2014-CI-04936

JO ANN PUENTE	§	**IN THE DISTRICT COURT OF**
	§	
VS.	§	**BEXAR COUNTY, TEXAS**
	§	
MANUEL MARTINEZ, M.D., and	§	
JESUS VIRLAR, M.D., and	§	
GONZABA MEDICAL GROUP	§	**131ST JUDICIAL DISTRICT**

ORDER

On this day came on for consideration the Motion for New Trial or, Alternatively, Motion for Remittitur filed by Defendants Jesus Virlar, M.D. and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group in the above-styled and numbered cause, and after considering the evidence, the pleadings on file and argument of counsel, the Court is of the opinion that said motion should be DENIED. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Motion for New Trial or, Alternatively, Motion for Remittitur filed by Defendants is hereby DENIED.

SIGNED this 9th day of February, 2018.

Norma Gonzales
Presiding Judge
131st Judicial District
Bexar County, Texas

JUDGE PRESIDING

5338

2

Respectfully submitted,

THE SNAPKA LAW FIRM
606 N. Carancahua, Suite 1511
P.O. Box 23017
Corpus Christi, Texas 78403
Telephone: (361) 888-7676
Facsimile: (361) 884-8545

/s/ William J. Chriss
William J. Chriss
State Bar No. 04222100
Email: wjchrisspc@gmail.com
Kathryn Snapka
State Bar No. 18781200
Email: ksnapka@snapkalaw.com
Craig D. Henderson
State Bar No. 00784248
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AND

J. Thomas Rhodes, III
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Robert E. Brzezinski
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brzez@tomrhodeslaw.com
Erin J. Oglesby
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TOM RHODES LAW FIRM, P.C.
126 Villita Street
San Antonio, Texas 78205
Telephone: (210) 225-5251
Facsimile: (210) 225-6545

ATTORNEYS FOR PLAINTIFF

CAUSE NO. 2014-CI-04936

JO ANN PUENTE	§	IN THE DISTRICT COURT OF
	§	
VS.	§	BEXAR COUNTY, TEXAS
	§	
MANUEL MARTINEZ, M.D., and	§	
JESUS VIRLAR, M.D., and	§	
GONZABA MEDICAL GROUP	§	131ST JUDICIAL DISTRICT

ORDER

On this day came on for consideration the Motion for Judgment Notwithstanding the Verdict filed by Defendants Jesus Virlar, M.D. and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group in the above-styled and numbered cause, and after considering the evidence, the pleadings on file and argument of counsel, the Court is of the opinion that said motion should be DENIED. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Motion for Judgment Notwithstanding the Verdict filed by Defendants is hereby DENIED.

SIGNED this 9th day of February, 2018.

Norma Gonzales
Presiding Judge
131st Judicial District
Bexar County, Texas

JUDGE PRESIDING

5340

2

Respectfully submitted,

THE SNAPKA LAW FIRM
606 N. Carancahua, Suite 1511
P.O. Box 23017
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Telephone: (361) 888-7676
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/s/ William J. Chriss
William J. Chriss
State Bar No. 04222100
Email: wjchrisspc@gmail.com
Kathryn Snapka
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Craig D. Henderson
State Bar No. 00784248
Email: chenderson@snapkalaw.com

AND

J. Thomas Rhodes, III
State Bar No. 16820050
trhodes@tomrhodeslaw.com
Robert E. Brzezinski
State Bar No. 00783746
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Erin J. Oglesby
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TOM RHODES LAW FIRM, P.C.
126 Villita Street
San Antonio, Texas 78205
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Facsimile: (210) 225-6545

ATTORNEYS FOR PLAINTIFF

CAUSE NO. 2014-CI-04936

JO ANN PUENTE	§	IN THE DISTRICT COURT OF
	§	
VS.	§	BEXAR COUNTY, TEXAS
	§	
MANUEL MARTINEZ, M.D., and	§	
JESUS VIRLAR, M.D., and	§	
GONZABA MEDICAL GROUP	§	131ST JUDICIAL DISTRICT

ORDER

On this day came on for consideration the Motion to Modify, Correct and/or Reform the November 28, 2017 Final Judgment filed by Defendants Jesus Virlar, M.D. and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group in the above-styled and numbered cause, and after considering the evidence, the pleadings on file and argument of counsel, the Court is of the opinion that said motion should be DENIED. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Motion to Modify, Correct and/or Reform the November 28, 2017 Final Judgment filed by Defendants is hereby DENIED.

SIGNED this 9th day of February, 2018.

Norma Gonzales
Presiding Judge
131st Judicial District
Bexar County, Texas

JUDGE PRESIDING

5342

Respectfully submitted,

THE SNAPKA LAW FIRM
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/s/ William J. Chriss
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Craig D. Henderson
State Bar No. 00784248
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AND

J. Thomas Rhodes, III
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trhodes@tomrhodeslaw.com
Robert E. Brzezinski
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ATTORNEYS FOR PLAINTIFF

APPENDIX TAB “E”

SUPPLEMENTAL ASSESSMENT OF THE FUTURE LIFE CARE PLAN COSTS OF JO ANN PUENTE

SUMMARY OF FUTURE COSTS

Outpatient Physician Services	$ 94,532
Therapeutic Services	116,005
Supported Life Care	12,269,710
Medication	476,004
Diagnostics	86,059
Equipment & Supplies	248,679
~~Equipment & Supplies~~ ACUTE/INPATIENT MEDICAL CARE	2,763,986
Total Future Costs =	$ 16,054,975

Potential Care Needs	$ 1,542,662

ECOFIN, INC.
Economic and Financial Consulting
OFC: (210) 832-8200
keith@kfairchild.com

September 18, 2017

Mr. Craig Henderson
The Snapka Law Firm
606 N. Carancahua
Suite 1511
P.O. Drawer 23017
Corpus Christi, Texas 78401

Re: Jo Ann Puente

Dear Mr. Henderson:

You requested that I conduct an independent appraisal of the present value cost of the life care plan of Ms. Jo Ann Puente as prepared by Mr. Dan M. Bagwell and Dr. David Altman in their supplemental report dated May 30, 2017. The information provided to me, in addition to other sources, was used in determining a valuation of these factors. The rationale and methodology employed to arrive at my conclusions are briefly summarized below.

Background

Jo Ann Puente was born on May 21, 1976, and was just over 35½ years of age at the time that she sustained her injuries in January of 2012. Ms. Puente had undergone bariatric surgery in November of 2011 and was hospitalized on January 11th and 14th of 2012 due to complications. She was subsequently treated at hospitals on numerous occasions and is now essentially bed- and wheelchair-bound and currently lives in Del Rio Nursing & Rehab Center. Her daughter, Cynthia, is now living with Jo Ann Puente's parents.

Future Medical Costs

Jo Ann Puente has incurred substantial past medical costs as a result of her injury and will continue to incur significant future medical costs. Future medical care costs are based upon the supplemental report prepared by Dr. Altman and Mr. Bagwell dated May 30, 2017.

Outpatient Physician Services

Several categories of future care expenses have been considered. The first attached exhibit entitled Summary of Outpatient Physician Services Costs for Jo Ann Puente depicts the various physician services costs that will be incurred by Jo Ann Puente, the historical real, or inflation-adjusted, rate of increase in these costs, and the present value of the annual amounts

through the remainder of her life expectancy. Each cost item was increased by the projected rate of change in the Consumer Price Index (CPI) of 2.29%, the general consensus for the rate of inflation in the future as reported by the *Livingston Survey* and the *Survey of Professional Forecasters* conducted by the Federal Reserve Bank of Philadelphia, as well as a real (or inflation-adjusted) rate of increase characterized by the increase in each category's cost over the past. The projected future medical care costs were then discounted at a 2.03% rate of interest, the average rate of interest on government notes (*Wall Street Journal Online*, www.wsj.com, September 18, 2017), in order to arrive at a Present Value of each year's cost. The total present value was determined to be $94,532 from today through Jo Ann Puente's remaining life expectancy as indicated on the exhibit by category and individually by year in the following pages.

Therapeutic Services

The second set of exhibits details the Therapeutic Services costs for Jo Ann Puente that can be reasonably anticipated to be incurred. These future costs were found to have a total present value of $116,005.

Supported Life Care

The third set of exhibits delineates the cost of supported life care in a residential facility that Jo Ann Puente can reasonably expect to require over her remaining life expectancy. As indicated in the exhibits, the total value of this cost amounts to $12,269,710 in today's dollar terms.

Medication

The next set of exhibits depicts the future Medication costs that Jo Ann Puente requires. The total cost of her future medication requirements was found to be $476,004 in current dollar terms.

Diagnostics

The future Diagnostic costs that Jo Ann Puente will require are presented in the fifth set of exhibits. The total cost of her future diagnostic studies requirements was determined to be $86,059 in present value terms when discounted at a 2.03% rate of interest.

Equipment & Supplies

The future Equipment & Supplies that Ms. Puente requires are presented in the following set of exhibits. The total cost of these items is $248,679.

Inpatient/Other Acute Care Services

The seventh set of exhibits details the future Inpatient and Other Acute Care Services that Ms. Puente is expected to require. The combined cost of these future services sum to $2,763,986 in today's dollar terms.

Combined, the total future medical care costs of Jo Ann Puente sum to $16,054,975 in today's dollar terms. (Please see Figures 1, 2 and 3 for a graphical depiction of the future life care plan costs on an annual, present value and cumulative present value basis, respectively.)

Potential Care Needs

The last set of exhibits summarizes the Potential Care Needs costs that Jo Ann Puente may require through the remainder of her life expectancy. These future costs total $1,542,662 when discounted at a 2.03% rate of interest.

Summary and Conclusions

In summary, the injuries sustained by Jo Ann Puente in January of 2012, have resulted in significant future medical and assistive care costs that she will likely incur. These costs may be summarized in the following manner:

Outpatient Physician Services	**$ 94,532**
Therapeutic Services	**116,005**
Supported Life Care	**12,269,710**
Medication	**476,004**
Diagnostics	**86,059**
Equipment & Supplies	**248,679**
Equipment & Supplies	**2,763,986**
Total Future Costs =	**$ 16,054,975**

Potential Care Needs	**$ 1,542,662**

Please note that this report is based upon the information available to me at the time. Should additional information become available, it may be necessary to revise the opinions and conclusions elucidated herein.

If I can answer any questions, provide additional information, or be of further service in this or any other matters, please do not hesitate to call.

Sincerely,

Keith Wm. Fairchild, Ph.D.

REFERENCES

1. *United States Life Tables, 2012*, Volume 65 No. 8, Centers for Disease Control and Prevention, http://www.cdc.gov/nchs/nvss.htm

2. *Wall Street Journal Online*, www.wsj.com (September 18, 2017)

3. Medline Plus, http://www.nlm.nih.gov/medlineplus/druginformation.html

4. United States Department of Labor, Bureau of Labor Statistics, http://www.bls.gov/data/home.htm

5. *Livingston Survey*, Federal Reserve Board of Philadelphia, http://www.philadelphiafed.org/research-and-data/real-time-center/livingston-survey/

6. *Survey of Professional Forecasters*, Federal Reserve Board of Philadelphia, http://www.philadelphiafed.org/research-and-data/real-time-center/survey-of-professional-forecasters/index.cfm

My compensation for this report is based upon a wage rate of $375.00 per hour and is not dependent nor contingent upon, nor in any other manner tied to, the outcome of the trial, mediation or other resolution of the dispute.

Keith Wm. Fairchild, Ph.D.

SUMMARY OF ROUTINE OUTPATIENT PHYSICIAN SERVICES COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Internist/PCP (Additional)	0.96%	12,411
PM&R	0.96%	15,514
Neurologist	0.96%	9,309
Neuropsychiatrist	0.96%	36,766
Podiatrist	0.96%	8,677
Ophthalmology	0.96%	6,508
Other Physician Consultation	0.96%	5,347
Total Present Value of Costs =		**$ 94,532**

ANNUAL TOTALS OF ROUTINE OUTPATIENT PHYSICIAN SERVICES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	721	721	721
2018	2,614	2,573	3,294
2019	2,699	2,604	5,898
2020	2,787	2,636	8,534
2021	2,878	2,667	11,201
2022	2,972	2,700	13,901
2023	3,069	2,732	16,633
2024	3,169	2,765	19,398
2025	3,272	2,799	22,197
2026	3,379	2,833	25,030
2027	3,489	2,867	27,897
2028	3,603	2,902	30,798
2029	3,720	2,937	33,735
2030	3,842	2,972	36,707
2031	3,967	3,008	39,715
2032	4,096	3,045	42,760
2033	4,230	3,081	45,841
2034	4,368	3,119	48,960
2035	4,510	3,156	52,116
2036	4,658	3,195	55,311
2037	4,810	3,233	58,544
2038	4,966	3,272	61,816
2039	5,128	3,312	65,128
2040	5,296	3,352	68,480
2041	5,469	3,392	71,872
2042	5,647	3,433	75,306
2043	5,831	3,475	78,781
2044	6,021	3,517	82,298
2045	6,218	3,560	85,858
2046	6,421	3,603	89,460
2047	6,630	3,646	93,106
2048	2,645	1,426	94,532
Total =	$ 133,122	$ 94,532	

PROJECTED ROUTINE OUTPATIENT PHYSICIAN SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Internist/PCP (Additional)	PM&R	Neurologist	Neuropsychiatrist	Podiatrist
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	21-May-48
Procedure Cost	$166.15 per unit	$166.15 per unit	$166.15 per unit	$246.09 per unit	$58.08 per unit
Frequency	2.00 times/year	2.50 times/year	1.50 times/year	4.00 times/year	4.00 times/year
Category Inflation	0.96%	0.96%	0.96%	0.96%	0.96%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	95	95	118	118	71	71	280	280	66	66
2018	343	338	429	422	257	253	1,016	1,001	240	236
2019	354	342	443	427	266	256	1,050	1,013	248	239
2020	366	346	457	433	274	260	1,084	1,025	256	242
2021	378	350	472	438	283	263	1,119	1,037	264	245
2022	390	354	488	443	293	266	1,156	1,050	273	248
2023	403	359	504	448	302	269	1,193	1,063	282	251
2024	416	363	520	454	312	272	1,232	1,076	291	254
2025	430	367	537	459	322	276	1,273	1,089	300	257
2026	444	372	555	465	333	279	1,314	1,102	310	260
2027	458	376	573	471	344	282	1,357	1,115	320	263
2028	473	381	591	476	355	286	1,401	1,128	331	266
2029	488	386	611	482	366	289	1,447	1,142	341	270
2030	504	390	630	488	378	293	1,494	1,156	353	273
2031	521	395	651	494	391	296	1,543	1,170	364	276
2032	538	400	672	500	403	300	1,593	1,184	376	279
2033	555	405	694	506	417	303	1,645	1,198	388	283
2034	573	409	717	512	430	307	1,699	1,213	401	286
2035	592	414	740	518	444	311	1,754	1,228	414	290
2036	612	419	764	524	459	315	1,811	1,242	428	293
2037	631	424	789	531	474	318	1,871	1,257	441	297
2038	652	430	815	537	489	322	1,932	1,273	456	300
2039	673	435	842	544	505	326	1,995	1,288	471	304
2040	695	440	869	550	521	330	2,060	1,304	486	308

PROJECTED ROUTINE OUTPATIENT PHYSICIAN SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Internist/PCP (Additional)		PM&R		Neurologist		Neuropsychiatrist		Podiatrist	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	718	445	897	557	538	334	2,127	1,319	502	311
2042	741	451	927	563	556	338	2,196	1,335	518	315
2043	766	456	957	570	574	342	2,268	1,352	535	319
2044	791	462	988	577	593	346	2,342	1,368	553	323
2045	816	467	1,020	584	612	351	2,418	1,384	571	327
2046	843	473	1,054	591	632	355	2,497	1,401	589	331
2047	870	479	1,088	598	653	359	2,579	1,418	609	335
2048	347	187	434	234	260	140	1,029	554	243	131
TOTAL FUTURE LOSSES =		**$ 12,411**		**$ 15,514**		**$ 9,309**		**$ 36,766**		**$ 8,677**

PROJECTED ROUTINE OUTPATIENT PHYSICIAN SERVICES COMPONENT COSTS AND PRESENT VALUES

JO ANN PUENTE

	Ophthalmology	Other Physician Consultation	Category 8	Category 9	Category 10
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	18-Sep-17	18-Sep-17	18-Sep-17
Procedure Cost	$174.24 per unit	$286.32 per unit	$0.00 per unit	$0.00 per unit	$0.00 per unit
Frequency	1.00 times/year	0.50 times/year	0.00 times/year	0.00 times/year	0.00 times/year
Category Inflation	0.96%	0.96%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	50	50	41	41	0	0	0	0	0	0
2018	180	177	148	146	0	0	0	0	0	0
2019	186	179	153	147	0	0	0	0	0	0
2020	192	181	158	149	0	0	0	0	0	0
2021	198	184	163	151	0	0	0	0	0	0
2022	205	186	168	153	0	0	0	0	0	0
2023	211	188	174	155	0	0	0	0	0	0
2024	218	190	179	156	0	0	0	0	0	0
2025	225	193	185	158	0	0	0	0	0	0
2026	233	195	191	160	0	0	0	0	0	0
2027	240	197	197	162	0	0	0	0	0	0
2028	248	200	204	164	0	0	0	0	0	0
2029	256	202	210	166	0	0	0	0	0	0
2030	264	205	217	168	0	0	0	0	0	0
2031	273	207	224	170	0	0	0	0	0	0
2032	282	210	232	172	0	0	0	0	0	0
2033	291	212	239	174	0	0	0	0	0	0
2034	301	215	247	176	0	0	0	0	0	0
2035	311	217	255	179	0	0	0	0	0	0
2036	321	220	263	181	0	0	0	0	0	0
2037	331	223	272	183	0	0	0	0	0	0
2038	342	225	281	185	0	0	0	0	0	0
2039	353	228	290	187	0	0	0	0	0	0
2040	365	231	300	190	0	0	0	0	0	0

PROJECTED ROUTINE OUTPATIENT PHYSICIAN SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Ophthalmology		Other Physician Consultation		Category 8		Category 9		Category 10	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	376	234	309	192	0	0	0	0	0	0
2042	389	236	319	194	0	0	0	0	0	0
2043	401	239	330	197	0	0	0	0	0	0
2044	415	242	341	199	0	0	0	0	0	0
2045	428	245	352	201	0	0	0	0	0	0
2046	442	248	363	204	0	0	0	0	0	0
2047	456	251	375	206	0	0	0	0	0	0
2048	182	98	150	81	0	0	0	0	0	0
TOTAL FUTURE LOSSES =		$ 6,508		$ 5,347		$ -		$ -		$ -

SUMMARY OF THERAPEUTIC SERVICES COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Family Counseling	0.17%	2,686
Family Counseling	0.17%	4,048
Physical Therapy Evaluation	0.17%	4,881
Intermittent Physiotherapy	0.17%	37,474
Medical Case Management	0.17%	4,231
Medical Case Management	0.17%	52,672
Dietitian/Nutritionist	0.17%	10,013
Total Present Value of Costs =		**$ 116,005**

ANNUAL TOTALS OF THERAPEUTIC SERVICES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	3,387	3,387	3,387
2018	7,959	7,835	11,222
2019	5,482	5,290	16,511
2020	4,297	4,064	20,575
2021	3,552	3,292	23,868
2022	3,639	3,306	27,174
2023	3,729	3,320	30,494
2024	3,821	3,335	33,829
2025	3,915	3,349	37,178
2026	4,012	3,363	40,541
2027	4,110	3,377	43,918
2028	4,212	3,392	47,310
2029	4,315	3,406	50,717
2030	4,422	3,421	54,138
2031	4,531	3,436	57,573
2032	4,642	3,450	61,023
2033	4,757	3,465	64,488
2034	4,874	3,480	67,968
2035	4,994	3,495	71,462
2036	5,117	3,509	74,972
2037	5,243	3,524	78,496
2038	5,372	3,539	82,036
2039	5,504	3,555	85,590
2040	5,640	3,570	89,160
2041	5,779	3,585	92,745
2042	5,921	3,600	96,345
2043	6,067	3,616	99,961
2044	6,217	3,631	103,592
2045	6,370	3,647	107,239
2046	6,527	3,662	110,901
2047	6,687	3,678	114,579
2048	2,647	1,427	116,005
Total =	**$ 157,739**	**$ 116,005**	

PROJECTED THERAPEUTIC SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Family Counseling	Family Counseling	Physical Therapy Evaluation	Intermittent Physiotherapy	Medical Case Management
Start Date	18-Sep-17	21-May-18	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-18	21-May-20	21-May-48	21-May-48	21-May-18
Procedure Cost	$166.60 per unit	$3,998.45 per unit	$148.19 per unit	$3,413.10 per unit	$699.67 per unit
Frequency	24.00 times/year	0.50 times/year	1.00 times/year	0.33 times/year	9.00 times/year
Category Inflation	0.17%	0.17%	0.17%	0.17%	0.17%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	1,139	1,139	0	0	42	42	324	324	1,794	1,794
2018	1,571	1,547	1,257	1,238	152	149	1,166	1,148	2,475	2,436
2019	0	0	2,099	2,025	156	150	1,194	1,152	0	0
2020	0	0	831	786	159	151	1,224	1,157	0	0
2021	0	0	0	0	163	151	1,254	1,162	0	0
2022	0	0	0	0	167	152	1,285	1,167	0	0
2023	0	0	0	0	171	153	1,317	1,172	0	0
2024	0	0	0	0	176	153	1,349	1,177	0	0
2025	0	0	0	0	180	154	1,382	1,182	0	0
2026	0	0	0	0	184	155	1,416	1,187	0	0
2027	0	0	0	0	189	155	1,451	1,192	0	0
2028	0	0	0	0	194	156	1,487	1,198	0	0
2029	0	0	0	0	198	157	1,524	1,203	0	0
2030	0	0	0	0	203	157	1,561	1,208	0	0
2031	0	0	0	0	208	158	1,600	1,213	0	0
2032	0	0	0	0	213	159	1,639	1,218	0	0
2033	0	0	0	0	219	159	1,679	1,223	0	0
2034	0	0	0	0	224	160	1,721	1,229	0	0
2035	0	0	0	0	230	161	1,763	1,234	0	0
2036	0	0	0	0	235	161	1,806	1,239	0	0
2037	0	0	0	0	241	162	1,851	1,244	0	0
2038	0	0	0	0	247	163	1,897	1,250	0	0
2039	0	0	0	0	253	163	1,943	1,255	0	0
2040	0	0	0	0	259	164	1,991	1,260	0	0

PROJECTED THERAPEUTIC SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Family Counseling		Family Counseling		Physical Therapy Evaluation		Intermittent Physiotherapy		Medical Case Management	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	0	0	0	0	266	165	2,040	1,266	0	0
2042	0	0	0	0	272	166	2,090	1,271	0	0
2043	0	0	0	0	279	166	2,142	1,277	0	0
2044	0	0	0	0	286	167	2,195	1,282	0	0
2045	0	0	0	0	293	168	2,249	1,287	0	0
2046	0	0	0	0	300	168	2,304	1,293	0	0
2047	0	0	0	0	308	169	2,361	1,298	0	0
2048	0	0	0	0	122	66	935	504	0	0
TOTAL FUTURE LOSSES =		$ 2,686		$ 4,048		$ 4,881		$ 37,474		$ 4,231

PROJECTED THERAPEUTIC SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Medical Case Management	Dietitian/Nutritionist	Category 8	Category 9	Category 10
Start Date	21-May-18	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	18-Sep-17	18-Sep-17	18-Sep-17
Procedure Cost	$466.45 per unit	$304.00 per unit	$0.00 per unit	$0.00 per unit	$0.00 per unit
Frequency	3.50 times/year	1.00 times/year	0.00 times/year	0.00 times/year	0.00 times/year
Category Inflation	0.17%	0.17%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	0	0	87	87	0	0	0	0	0	0
2018	1,027	1,011	311	307	0	0	0	0	0	0
2019	1,714	1,654	319	308	0	0	0	0	0	0
2020	1,756	1,661	327	309	0	0	0	0	0	0
2021	1,799	1,668	335	311	0	0	0	0	0	0
2022	1,844	1,675	343	312	0	0	0	0	0	0
2023	1,889	1,682	352	313	0	0	0	0	0	0
2024	1,936	1,689	360	315	0	0	0	0	0	0
2025	1,983	1,697	369	316	0	0	0	0	0	0
2026	2,032	1,704	378	317	0	0	0	0	0	0
2027	2,082	1,711	388	319	0	0	0	0	0	0
2028	2,134	1,718	397	320	0	0	0	0	0	0
2029	2,186	1,726	407	321	0	0	0	0	0	0
2030	2,240	1,733	417	323	0	0	0	0	0	0
2031	2,295	1,741	427	324	0	0	0	0	0	0
2032	2,352	1,748	438	325	0	0	0	0	0	0
2033	2,410	1,755	449	327	0	0	0	0	0	0
2034	2,469	1,763	460	328	0	0	0	0	0	0
2035	2,530	1,770	471	330	0	0	0	0	0	0
2036	2,592	1,778	483	331	0	0	0	0	0	0
2037	2,656	1,786	495	332	0	0	0	0	0	0
2038	2,722	1,793	507	334	0	0	0	0	0	0
2039	2,789	1,801	519	335	0	0	0	0	0	0
2040	2,857	1,809	532	337	0	0	0	0	0	0

PROJECTED THERAPEUTIC SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Medical Case Management		Dietitian/Nutritionist		Category 8		Category 9		Category 10	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	2,928	1,816	545	338	0	0	0	0	0	0
2042	3,000	1,824	559	340	0	0	0	0	0	0
2043	3,074	1,832	572	341	0	0	0	0	0	0
2044	3,149	1,840	586	343	0	0	0	0	0	0
2045	3,227	1,847	601	344	0	0	0	0	0	0
2046	3,307	1,855	616	345	0	0	0	0	0	0
2047	3,388	1,863	631	347	0	0	0	0	0	0
2048	1,341	723	250	135	0	0	0	0	0	0
TOTAL FUTURE LOSSES =		$ 52,672		$ 10,013		$ -		$ -		$ -

SUMMARY OF SUPPORTED LIFE CARE COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Average per Diem	1.77%	12,269,710
Total Present Value of Costs =		**$ 12,269,710**

ANNUAL TOTALS OF SUPPORTED LIFE CARE COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	81,714	81,714	81,714
2018	298,542	293,898	375,612
2019	310,782	299,867	675,479
2020	323,524	305,956	981,435
2021	336,788	312,170	1,293,605
2022	350,596	318,509	1,612,114
2023	364,970	324,977	1,937,091
2024	379,934	331,576	2,268,667
2025	395,511	338,310	2,606,977
2026	411,727	345,180	2,952,157
2027	428,607	352,190	3,304,347
2028	446,180	359,342	3,663,689
2029	464,473	366,639	4,030,328
2030	483,516	374,085	4,404,413
2031	503,340	381,682	4,786,095
2032	523,976	389,432	5,175,527
2033	545,459	397,341	5,572,868
2034	567,822	405,410	5,978,278
2035	591,103	413,643	6,391,921
2036	615,338	422,043	6,813,963
2037	640,566	430,613	7,244,577
2038	666,829	439,358	7,683,935
2039	694,168	448,280	8,132,215
2040	722,629	457,384	8,589,599
2041	752,256	466,672	9,056,271
2042	783,098	476,149	9,532,420
2043	815,204	485,818	10,018,238
2044	848,627	495,684	10,513,922
2045	883,420	505,750	11,019,672
2046	919,640	516,021	11,535,693
2047	957,344	526,500	12,062,192
2048	384,986	207,518	12,269,710
Total =	$ 17,492,670	$ 12,269,710	

PROJECTED SUPPORTED LIFE CARE COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Average per Diem	Category 2	Category 3	Category 4	Category 5
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
Procedure Cost	$785.71 per unit	$0.00 per unit	$0.00 per unit	$0.00 per unit	$0.00 per unit
Frequency	365.00 times/year	0.00 times/year	0.00 times/year	0.00 times/year	0.00 times/year
Category Inflation	1.77%	0.00%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	81,714	81,714	0	0	0	0	0	0	0	0
2018	298,542	293,898	0	0	0	0	0	0	0	0
2019	310,782	299,867	0	0	0	0	0	0	0	0
2020	323,524	305,956	0	0	0	0	0	0	0	0
2021	336,788	312,170	0	0	0	0	0	0	0	0
2022	350,596	318,509	0	0	0	0	0	0	0	0
2023	364,970	324,977	0	0	0	0	0	0	0	0
2024	379,934	331,576	0	0	0	0	0	0	0	0
2025	395,511	338,310	0	0	0	0	0	0	0	0
2026	411,727	345,180	0	0	0	0	0	0	0	0
2027	428,607	352,190	0	0	0	0	0	0	0	0
2028	446,180	359,342	0	0	0	0	0	0	0	0
2029	464,473	366,639	0	0	0	0	0	0	0	0
2030	483,516	374,085	0	0	0	0	0	0	0	0
2031	503,340	381,682	0	0	0	0	0	0	0	0
2032	523,976	389,432	0	0	0	0	0	0	0	0
2033	545,459	397,341	0	0	0	0	0	0	0	0
2034	567,822	405,410	0	0	0	0	0	0	0	0
2035	591,103	413,643	0	0	0	0	0	0	0	0
2036	615,338	422,043	0	0	0	0	0	0	0	0
2037	640,566	430,613	0	0	0	0	0	0	0	0
2038	666,829	439,358	0	0	0	0	0	0	0	0
2039	694,168	448,280	0	0	0	0	0	0	0	0
2040	722,629	457,384	0	0	0	0	0	0	0	0

PROJECTED SUPPORTED LIFE CARE COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Average per Diem		Category 2		Category 3		Category 4		Category 5	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	752,256	466,672	0	0	0	0	0	0	0	0
2042	783,098	476,149	0	0	0	0	0	0	0	0
2043	815,204	485,818	0	0	0	0	0	0	0	0
2044	848,627	495,684	0	0	0	0	0	0	0	0
2045	883,420	505,750	0	0	0	0	0	0	0	0
2046	919,640	516,021	0	0	0	0	0	0	0	0
2047	957,344	526,500	0	0	0	0	0	0	0	0
2048	384,986	207,518	0	0	0	0	0	0	0	0
TOTAL FUTURE LOSSES =		$ 12,269,710		$ -		$ -		$ -		$ -

SUMMARY OF MEDICATION COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Zoloft/Other Antidepressant	1.59%	68,558
Anti-Spasticity Agent	1.59%	40,711
Keppra/Other Anticonvulsant	1.59%	151,190
MiraLAX/Fiber/Stool Softener	-1.38%	3,974
Oral Antibiotics	1.59%	17,047
Oral Antibiotics	1.59%	4,691
IV Antibiotics	1.59%	84,184
IV Antibiotics	1.59%	74,461
Nebulizer Treatments	0.00%	708
Nebulizer Treatments	0.00%	828
Topical Antibiotics/Antifungus	-1.38%	5,905
Calcium with Vitamin D	0.00%	1,637
Other PRN Medications	0.00%	22,109
Total Present Value of Costs =		**$ 476,004**

ANNUAL TOTALS OF MEDICATION COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	2,949	2,949	2,949
2018	10,731	10,564	13,514
2019	11,126	10,736	24,249
2020	11,536	10,910	35,159
2021	11,962	11,088	46,247
2022	12,404	11,269	57,516
2023	12,863	11,453	68,969
2024	13,339	11,641	80,610
2025	13,834	11,833	92,443
2026	14,347	12,028	104,472
2027	14,880	12,227	116,699
2028	15,433	12,430	129,128
2029	16,008	12,636	141,765
2030	16,605	12,847	154,611
2031	17,224	13,061	167,672
2032	17,867	13,279	180,951
2033	18,535	13,502	194,453
2034	19,228	13,728	208,181
2035	19,948	13,959	222,140
2036	20,695	14,194	236,335
2037	21,471	14,434	250,769
2038	22,277	14,678	265,447
2039	23,114	14,927	280,373
2040	23,983	15,180	295,553
2041	24,886	15,438	310,992
2042	25,823	15,701	326,693
2043	26,796	15,969	342,662
2044	43,027	25,132	367,794
2045	54,622	31,271	399,065
2046	56,714	31,823	430,887
2047	58,887	32,385	463,273
2048	23,620	12,732	476,004
Total =	**$ 696,736**	**$ 476,004**	

PROJECTED MEDICATION COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Zoloft/Other Antidepressant	Anti-Spasticity Agent	Keppra/Other Anticonvulsant	MiraLAX/Fiber/Stool Softener	Oral Antibiotics
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	21-May-44
Procedure Cost	$4.53 per unit	$2.69 per unit	$9.99 per unit	$0.42 per unit	$196.78 per unit
Frequency	365.00 times/year	365.00 times/year	365.00 times/year	365.00 times/year	2.50 times/year
Category Inflation	1.59%	1.59%	1.59%	-1.38%	1.59%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	471	471	280	280	1,039	1,039	44	44	140	140
2018	1,718	1,691	1,020	1,004	3,789	3,730	155	152	511	503
2019	1,785	1,723	1,060	1,023	3,937	3,799	156	150	531	513
2020	1,855	1,754	1,102	1,042	4,091	3,869	157	149	552	522
2021	1,928	1,787	1,145	1,061	4,251	3,940	159	147	573	532
2022	2,003	1,820	1,189	1,080	4,417	4,013	160	145	596	541
2023	2,081	1,853	1,236	1,100	4,590	4,087	161	144	619	551
2024	2,162	1,887	1,284	1,121	4,769	4,162	163	142	643	562
2025	2,247	1,922	1,334	1,141	4,955	4,239	164	141	669	572
2026	2,335	1,957	1,386	1,162	5,149	4,317	166	139	695	582
2027	2,426	1,994	1,441	1,184	5,350	4,396	167	137	722	593
2028	2,521	2,030	1,497	1,206	5,559	4,477	169	136	750	604
2029	2,619	2,068	1,555	1,228	5,777	4,560	170	134	779	615
2030	2,722	2,106	1,616	1,250	6,003	4,644	172	133	810	627
2031	2,828	2,145	1,679	1,274	6,237	4,730	173	131	841	638
2032	2,939	2,184	1,745	1,297	6,481	4,817	175	130	874	650
2033	3,054	2,224	1,813	1,321	6,734	4,906	176	128	909	662
2034	3,173	2,265	1,884	1,345	6,997	4,996	178	127	944	674
2035	3,297	2,307	1,958	1,370	7,271	5,088	179	125	981	686
2036	3,426	2,350	2,034	1,395	7,555	5,182	181	124	1,019	699
2037	3,560	2,393	2,114	1,421	7,851	5,277	182	123	1,059	712
2038	3,699	2,437	2,197	1,447	8,157	5,375	184	121	1,101	725
2039	3,844	2,482	2,282	1,474	8,476	5,474	185	120	1,144	738
2040	3,994	2,528	2,372	1,501	8,808	5,575	187	118	1,188	752

PROJECTED MEDICATION COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Zoloft/Other Antidepressant		Anti-Spasticity Agent		Keppra/Other Anticonvulsant		MiraLAX/Fiber/Stool Softener		Oral Antibiotics	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	4,150	2,574	2,464	1,529	9,152	5,677	189	117	1,235	766
2042	4,312	2,622	2,561	1,557	9,510	5,782	190	116	1,283	780
2043	4,481	2,670	2,661	1,586	9,881	5,889	192	114	1,333	794
2044	4,656	2,719	2,765	1,615	10,267	5,997	194	113	535	313
2045	4,838	2,770	2,873	1,645	10,669	6,108	195	112	0	0
2046	5,027	2,821	2,985	1,675	11,086	6,220	197	111	0	0
2047	5,223	2,873	3,102	1,706	11,519	6,335	199	109	0	0
2048	2,097	1,130	1,245	671	4,624	2,492	77	42	0	0
TOTAL FUTURE LOSSES =		$ 68,558		$ 40,711		$ 151,190		$ 3,974		$ 17,047

PROJECTED MEDICATION COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Oral Antibiotics	IV Antibiotics	IV Antibiotics	Nebulizer Treatments	Nebulizer Treatments
Start Date	21-May-44	18-Sep-17	21-May-44	18-Sep-17	21-May-44
End Date	21-May-48	21-May-44	21-May-48	21-May-44	21-May-48
Procedure Cost	$196.78 per unit	$7,288.14 per unit	$7,288.14 per unit	$76.65 per unit	$76.65 per unit
Frequency	3.50 times/year	0.33 times/year	1.50 times/year	0.33 times/year	2.50 times/year
Category Inflation	1.59%	1.59%	1.59%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	0	0	692	692	0	0	7	7	0	0
2018	0	0	2,524	2,485	0	0	26	26	0	0
2019	0	0	2,623	2,531	0	0	27	26	0	0
2020	0	0	2,726	2,578	0	0	27	26	0	0
2021	0	0	2,832	2,625	0	0	28	26	0	0
2022	0	0	2,943	2,673	0	0	29	26	0	0
2023	0	0	3,058	2,723	0	0	29	26	0	0
2024	0	0	3,177	2,773	0	0	30	26	0	0
2025	0	0	3,302	2,824	0	0	31	26	0	0
2026	0	0	3,431	2,876	0	0	31	26	0	0
2027	0	0	3,565	2,929	0	0	32	26	0	0
2028	0	0	3,704	2,983	0	0	33	26	0	0
2029	0	0	3,849	3,038	0	0	34	26	0	0
2030	0	0	3,999	3,094	0	0	34	27	0	0
2031	0	0	4,156	3,151	0	0	35	27	0	0
2032	0	0	4,318	3,209	0	0	36	27	0	0
2033	0	0	4,487	3,268	0	0	37	27	0	0
2034	0	0	4,662	3,329	0	0	38	27	0	0
2035	0	0	4,844	3,390	0	0	38	27	0	0
2036	0	0	5,034	3,452	0	0	39	27	0	0
2037	0	0	5,230	3,516	0	0	40	27	0	0
2038	0	0	5,435	3,581	0	0	41	27	0	0
2039	0	0	5,647	3,647	0	0	42	27	0	0
2040	0	0	5,868	3,714	0	0	43	27	0	0

PROJECTED MEDICATION COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Oral Antibiotics		IV Antibiotics		IV Antibiotics		Nebulizer Treatments		Nebulizer Treatments	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	0	0	6,097	3,783	0	0	44	27	0	0
2042	0	0	6,336	3,852	0	0	45	27	0	0
2043	0	0	6,583	3,923	0	0	46	27	0	0
2044	1,190	695	2,643	1,544	18,892	11,035	18	11	216	126
2045	2,015	1,154	0	0	31,986	18,312	0	0	361	207
2046	2,094	1,175	0	0	33,237	18,649	0	0	369	207
2047	2,176	1,197	0	0	34,536	18,993	0	0	377	208
2048	873	471	0	0	13,863	7,472	0	0	149	80
TOTAL FUTURE LOSSES =		$ 4,691		$ 84,184		$ 74,461		$ 708		$ 828

PROJECTED MEDICATION COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Topical Antibiotics/Antifungus	Calcium with Vitamin D	Other PRN Medications	Category 14	Category 15
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	18-Sep-17	18-Sep-17
Procedure Cost	$45.56 per unit	$0.14 per unit	$57.50 per unit	$0.00 per unit	$0.00 per unit
Frequency	5.00 times/year	365.00 times/year	12.00 times/year	0.00 times/year	0.00 times/year
Category Inflation	-1.38%	0.00%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	65	65	15	15	197	197	0	0	0	0
2018	230	226	52	51	706	695	0	0	0	0
2019	232	224	53	52	722	697	0	0	0	0
2020	234	221	55	52	738	698	0	0	0	0
2021	236	219	56	52	755	700	0	0	0	0
2022	238	216	57	52	773	702	0	0	0	0
2023	240	214	59	52	790	704	0	0	0	0
2024	242	211	60	52	808	705	0	0	0	0
2025	244	209	61	52	827	707	0	0	0	0
2026	246	206	63	53	846	709	0	0	0	0
2027	248	204	64	53	865	711	0	0	0	0
2028	251	202	66	53	885	712	0	0	0	0
2029	253	199	67	53	905	714	0	0	0	0
2030	255	197	69	53	926	716	0	0	0	0
2031	257	195	70	53	947	718	0	0	0	0
2032	259	193	72	53	968	720	0	0	0	0
2033	262	191	73	53	990	722	0	0	0	0
2034	264	188	75	54	1,013	723	0	0	0	0
2035	266	186	77	54	1,036	725	0	0	0	0
2036	268	184	78	54	1,060	727	0	0	0	0
2037	271	182	80	54	1,084	729	0	0	0	0
2038	273	180	82	54	1,109	731	0	0	0	0
2039	276	178	84	54	1,134	732	0	0	0	0
2040	278	176	86	54	1,160	734	0	0	0	0

PROJECTED MEDICATION COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Topical Antibiotics/Antifungus		Calcium with Vitamin D		Other PRN Medications		Category 14		Category 15	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	280	174	88	55	1,187	736	0	0	0	0
2042	283	172	90	55	1,214	738	0	0	0	0
2043	285	170	92	55	1,242	740	0	0	0	0
2044	288	168	94	55	1,270	742	0	0	0	0
2045	290	166	96	55	1,299	744	0	0	0	0
2046	293	164	98	55	1,329	745	0	0	0	0
2047	295	162	101	55	1,359	747	0	0	0	0
2048	115	62	40	21	537	289	0	0	0	0
TOTAL FUTURE LOSSES =		$ 5,905		$ 1,637		$ 22,109		$ -		$ -

SUMMARY OF DIAGNOSTICS COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
X-ray (Limbs/Joints)	0.17%	2,264
X-ray (Chest)	0.17%	5,929
X-ray (Chest)	0.17%	2,214
CT/MRI (Extremity Joint)	0.17%	16,775
CT/MRI (Brain)	0.17%	6,168
Complete Blood Count	0.17%	3,032
Metabolic Panel	0.17%	4,733
Urinalysis	0.17%	2,278
Urine C&S	0.17%	10,798
Other Culture	0.17%	7,625
Other Culture	0.17%	1,708
Drug Levels	0.17%	6,804
EEG	0.17%	6,493
Extremity Doppler Ultrasound	0.17%	6,242
DEXA Scan	0.17%	2,995
Total Present Value of Costs =		**$ 86,059**

ANNUAL TOTALS OF DIAGNOSTICS COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	729	729	729
2018	2,623	2,582	3,311
2019	2,687	2,593	5,904
2020	2,753	2,604	8,508
2021	2,821	2,615	11,123
2022	2,891	2,626	13,749
2023	2,962	2,637	16,386
2024	3,035	2,649	19,035
2025	3,110	2,660	21,695
2026	3,186	2,671	24,366
2027	3,265	2,683	27,049
2028	3,345	2,694	29,743
2029	3,428	2,706	32,449
2030	3,512	2,717	35,166
2031	3,599	2,729	37,894
2032	3,687	2,740	40,635
2033	3,778	2,752	43,387
2034	3,871	2,764	46,151
2035	3,966	2,776	48,926
2036	4,064	2,787	51,714
2037	4,164	2,799	54,513
2038	4,267	2,811	57,325
2039	4,372	2,823	60,148
2040	4,480	2,835	62,983
2041	4,590	2,847	65,831
2042	4,703	2,860	68,690
2043	4,819	2,872	71,562
2044	5,394	3,151	74,713
2045	5,822	3,333	78,046
2046	5,965	3,347	81,393
2047	6,112	3,362	84,755
2048	2,419	1,304	86,059
Total =	$ 120,420	$ 86,059	

PROJECTED DIAGNOSTICS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	X-ray (Limbs/Joints)	X-ray (Chest)	X-ray (Chest)	CT/MRI (Extremity Joint)	CT/MRI (Brain)
Start Date	18-Sep-17	18-Sep-17	21-May-44	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-44	21-May-48	21-May-48	21-May-48
Procedure Cost	$137.49 per unit	$139.21 per unit	$139.21 per unit	$1,527.89 per unit	$1,498.07 per unit
Frequency	0.50 times/year	1.50 times/year	3.50 times/year	0.33 times/year	0.13 times/year
Category Inflation	0.17%	0.17%	0.17%	0.17%	0.17%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	20	20	59	59	0	0	145	145	53	53
2018	70	69	214	211	0	0	522	514	192	189
2019	72	70	219	212	0	0	535	516	197	190
2020	74	70	225	212	0	0	548	518	201	191
2021	76	70	230	213	0	0	561	520	206	191
2022	78	71	236	214	0	0	575	523	211	192
2023	80	71	242	215	0	0	589	525	217	193
2024	82	71	248	216	0	0	604	527	222	194
2025	84	71	254	217	0	0	619	529	228	195
2026	86	72	260	218	0	0	634	532	233	195
2027	88	72	266	219	0	0	650	534	239	196
2028	90	72	273	220	0	0	666	536	245	197
2029	92	73	280	221	0	0	682	538	251	198
2030	94	73	287	222	0	0	699	541	257	199
2031	97	73	294	223	0	0	716	543	263	200
2032	99	74	301	224	0	0	734	545	270	200
2033	101	74	308	225	0	0	752	548	276	201
2034	104	74	316	225	0	0	770	550	283	202
2035	107	75	324	226	0	0	789	552	290	203
2036	109	75	332	227	0	0	809	555	297	204
2037	112	75	340	228	0	0	829	557	305	205
2038	115	76	348	229	0	0	849	559	312	206
2039	117	76	357	230	0	0	870	562	320	207
2040	120	76	365	231	0	0	891	564	328	207

PROJECTED DIAGNOSTICS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	X-ray (Limbs/Joints)		X-ray (Chest)		X-ray (Chest)		CT/MRI (Extremity Joint)		CT/MRI (Brain)	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	123	76	374	232	0	0	913	567	336	208
2042	126	77	384	233	0	0	936	569	344	209
2043	129	77	393	234	0	0	959	571	353	210
2044	133	77	156	91	577	337	982	574	361	211
2045	136	78	0	0	963	551	1,007	576	370	212
2046	139	78	0	0	987	554	1,031	579	379	213
2047	143	78	0	0	1,011	556	1,057	581	389	214
2048	56	30	0	0	400	216	418	225	154	83
TOTAL FUTURE LOSSES =		$ 2,264		$ 5,929		$ 2,214		$ 16,775		$ 6,168

PROJECTED DIAGNOSTICS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Complete Blood Count	Metabolic Panel	Urinalysis	Urine C&S	Other Culture
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	21-May-44
Procedure Cost	$36.82 per unit	$57.48 per unit	$19.76 per unit	$131.13 per unit	$107.42 per unit
Frequency	2.50 times/year	2.50 times/year	3.50 times/year	2.50 times/year	2.50 times/year
Category Inflation	0.17%	0.17%	0.17%	0.17%	0.17%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	26	26	41	41	20	20	93	93	77	77
2018	94	93	147	145	71	70	336	331	275	271
2019	97	93	151	146	73	70	344	332	282	272
2020	99	94	155	146	74	70	353	334	289	273
2021	101	94	158	147	76	71	361	335	296	274
2022	104	94	162	147	78	71	370	336	303	276
2023	107	95	166	148	80	71	379	338	311	277
2024	109	95	170	149	82	72	389	339	318	278
2025	112	96	175	149	84	72	398	341	326	279
2026	115	96	179	150	86	72	408	342	334	280
2027	117	96	183	151	88	72	418	344	343	281
2028	120	97	188	151	90	73	428	345	351	283
2029	123	97	192	152	93	73	439	347	360	284
2030	126	98	197	153	95	73	450	348	368	285
2031	129	98	202	153	97	74	461	349	378	286
2032	133	99	207	154	100	74	472	351	387	288
2033	136	99	212	155	102	74	484	352	396	289
2034	139	99	217	155	105	75	496	354	406	290
2035	143	100	223	156	107	75	508	356	416	291
2036	146	100	228	156	110	75	521	357	426	292
2037	150	101	234	157	113	76	533	359	437	294
2038	153	101	240	158	115	76	546	360	448	295
2039	157	102	245	159	118	76	560	362	459	296
2040	161	102	252	159	121	77	574	363	470	297

PROJECTED DIAGNOSTICS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Complete Blood Count		Metabolic Panel		Urinalysis		Urine C&S		Other Culture	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	165	102	258	160	124	77	588	365	482	299
2042	169	103	264	161	127	77	602	366	493	300
2043	173	103	271	161	130	78	617	368	506	301
2044	178	104	277	162	133	78	632	369	200	117
2045	182	104	284	163	137	78	648	371	0	0
2046	186	105	291	163	140	79	664	373	0	0
2047	191	105	298	164	144	79	680	374	0	0
2048	76	41	118	64	57	31	269	145	0	0
TOTAL FUTURE LOSSES =		$ 3,032		$ 4,733		$ 2,278		$ 10,798		$ 7,625

PROJECTED DIAGNOSTICS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Other Culture	Drug Levels	EEG	Extremity Doppler Ultrasound	DEXA Scan
Start Date	21-May-44	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	21-May-48
Procedure Cost	$107.42 per unit	$103.28 per unit	$788.55 per unit	$568.51 per unit	$363.74 per unit
Frequency	3.50 times/year	2.00 times/year	0.25 times/year	0.33 times/year	0.25 times/year
Category Inflation	0.17%	0.17%	0.17%	0.17%	0.17%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	0	0	59	59	56	56	54	54	26	26
2018	0	0	212	208	202	199	194	191	93	92
2019	0	0	217	209	207	200	199	192	95	92
2020	0	0	222	210	212	201	204	193	98	93
2021	0	0	228	211	217	201	209	194	100	93
2022	0	0	233	212	223	202	214	194	103	93
2023	0	0	239	213	228	203	219	195	105	94
2024	0	0	245	214	234	204	225	196	108	94
2025	0	0	251	215	240	205	230	197	110	95
2026	0	0	257	216	245	206	236	198	113	95
2027	0	0	263	216	251	207	242	199	116	95
2028	0	0	270	217	258	208	248	199	119	96
2029	0	0	277	218	264	208	254	200	122	96
2030	0	0	283	219	270	209	260	201	125	97
2031	0	0	290	220	277	210	266	202	128	97
2032	0	0	298	221	284	211	273	203	131	97
2033	0	0	305	222	291	212	280	204	134	98
2034	0	0	312	223	298	213	287	205	138	98
2035	0	0	320	224	305	214	294	206	141	99
2036	0	0	328	225	313	215	301	206	144	99
2037	0	0	336	226	321	216	308	207	148	99
2038	0	0	344	227	329	217	316	208	152	100
2039	0	0	353	228	337	217	324	209	155	100
2040	0	0	362	229	345	218	332	210	159	101

PROJECTED DIAGNOSTICS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Other Culture		Drug Levels		EEG		Extremity Doppler Ultrasound		DEXA Scan	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	0	0	370	230	354	219	340	211	163	101
2042	0	0	380	231	362	220	348	212	167	102
2043	0	0	389	232	371	221	357	213	171	102
2044	445	260	398	233	380	222	366	214	175	102
2045	743	425	408	234	390	223	375	214	180	103
2046	761	427	418	235	399	224	384	215	184	103
2047	780	429	429	236	409	225	393	216	189	104
2048	309	166	170	91	162	87	156	84	75	40
TOTAL FUTURE LOSSES =		$ 1,708		$ 6,804		$ 6,493		$ 6,242		$ 2,995

SUMMARY OF EQUIPMENT & SUPPLIES COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Specialty Mattress	-1.17%	18,996
Custom Seating Manual Wheelchair	-1.17%	35,045
Cushion	0.00%	4,435
W/C Maintenance	0.00%	9,132
Clothing Adaptation	0.00%	24,993
Multi Podus Boots	-1.17%	4,030
Fleece Insert	-1.17%	3,883
Compression Stocking	0.00%	19,994
Nebulizer	0.00%	561
Nebulizer Circuits	0.00%	42
Nebulizer Circuits	0.00%	29
Wet Ones/Equivalent	0.00%	14,736
Adult Briefs	0.00%	37,075
Gloves Non-latex	0.00%	4,901
Heel Protectors	0.00%	8,405
Waterproof Mattress Pads	0.00%	7,370
Disposable Incontinence Pads	0.00%	37,425
Wound/Skin Care Products	0.00%	14,019
Prescription Lenses w/ Prism	-0.54%	3,607
Total Present Value of Costs =		**$ 248,679**

ANNUAL TOTALS OF EQUIPMENT & SUPPLIES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	2,322	2,322	2,322
2018	8,308	8,179	10,501
2019	8,469	8,172	18,673
2020	8,634	8,165	26,838
2021	8,802	8,159	34,997
2022	8,974	8,152	43,149
2023	9,149	8,146	51,295
2024	9,328	8,140	59,435
2025	9,510	8,135	67,570
2026	9,697	8,129	75,699
2027	9,887	8,124	83,823
2028	10,081	8,119	91,943
2029	10,280	8,114	100,057
2030	10,482	8,110	108,167
2031	10,689	8,106	116,272
2032	10,900	8,101	124,374
2033	11,116	8,098	132,471
2034	11,336	8,094	140,565
2035	11,561	8,090	148,655
2036	11,791	8,087	156,743
2037	12,025	8,084	164,827
2038	12,265	8,081	172,908
2039	12,510	8,078	180,986
2040	12,759	8,076	189,062
2041	13,015	8,074	197,136
2042	13,275	8,072	205,208
2043	13,541	8,070	213,277
2044	13,819	8,072	221,349
2045	14,100	8,072	229,421
2046	14,384	8,071	237,492
2047	14,674	8,070	245,562
2048	5,783	3,117	248,679
Total =	$ 343,466	$ 248,679	

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Specialty Mattress	Custom Seating Manual Wheelchair	Cushion	W/C Maintenance	Clothing Adaptation
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	21-May-48
Procedure Cost	$7,093.50 per unit	$5,234.50 per unit	$415.27 per unit	$285.00 per unit	$780.00 per unit
Frequency	0.10 times/year	0.25 times/year	0.33 times/year	1.00 times/year	1.00 times/year
Category Inflation	-1.17%	-1.17%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	202	202	373	373	39	39	81	81	222	222
2018	717	706	1,323	1,302	142	139	292	287	798	785
2019	725	699	1,337	1,290	145	140	298	288	816	787
2020	733	693	1,352	1,279	148	140	305	288	835	789
2021	741	687	1,367	1,267	152	140	312	289	854	791
2022	749	680	1,382	1,255	155	141	319	290	873	793
2023	757	674	1,397	1,244	159	141	326	291	893	795
2024	765	668	1,412	1,232	162	142	334	291	914	797
2025	774	662	1,427	1,221	166	142	341	292	935	799
2026	782	656	1,443	1,210	170	142	349	293	956	801
2027	791	650	1,459	1,199	174	143	357	294	978	803
2028	799	644	1,475	1,188	177	143	365	294	1,000	805
2029	808	638	1,491	1,177	182	143	374	295	1,023	807
2030	817	632	1,507	1,166	186	144	382	296	1,046	809
2031	826	626	1,523	1,155	190	144	391	297	1,070	812
2032	835	620	1,540	1,145	194	144	400	297	1,095	814
2033	844	615	1,557	1,134	199	145	409	298	1,120	816
2034	853	609	1,574	1,124	203	145	418	299	1,145	818
2035	862	604	1,591	1,113	208	145	428	300	1,171	820
2036	872	598	1,608	1,103	213	146	438	300	1,198	822
2037	881	593	1,626	1,093	217	146	448	301	1,226	824
2038	891	587	1,644	1,083	222	147	458	302	1,254	826
2039	901	582	1,662	1,073	228	147	468	303	1,282	828
2040	911	576	1,680	1,063	233	147	479	303	1,312	830

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Specialty Mattress		Custom Seating Manual Wheelchair		Cushion		W/C Maintenance		Clothing Adaptation	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	921	571	1,698	1,054	238	148	490	304	1,341	832
2042	931	566	1,717	1,044	244	148	501	305	1,372	834
2043	941	561	1,736	1,034	249	148	513	306	1,403	836
2044	951	555	1,754	1,025	255	149	525	306	1,436	839
2045	961	550	1,774	1,015	261	149	537	307	1,468	841
2046	972	545	1,793	1,006	267	150	549	308	1,502	843
2047	983	540	1,813	997	273	150	561	309	1,536	845
2048	384	207	708	382	108	58	222	120	607	327
TOTAL FUTURE LOSSES =		$ 18,996		$ 35,045		$ 4,435		$ 9,132		$ 24,993

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Multi Podus Boots	Fleece Insert	Compression Stocking	Nebulizer	Nebulizer Circuits
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	21-May-44
Procedure Cost	$301.00 per unit	$145.00 per unit	$156.00 per unit	$140.00 per unit	$4.50 per unit
Frequency	0.50 times/year	1.00 times/year	4.00 times/year	0.13 times/year	0.33 times/year
Category Inflation	-1.17%	-1.17%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	43	43	41	41	178	178	5	5	0	0
2018	152	150	147	144	638	628	18	18	2	2
2019	154	148	148	143	653	630	18	18	2	2
2020	155	147	150	142	668	632	19	18	2	2
2021	157	146	151	140	683	633	19	18	2	2
2022	159	144	153	139	699	635	20	18	2	2
2023	161	143	155	138	715	636	20	18	2	2
2024	162	142	156	137	731	638	20	18	2	2
2025	164	140	158	135	748	639	21	18	2	2
2026	166	139	160	134	765	641	21	18	2	2
2027	168	138	162	133	782	643	22	18	2	2
2028	170	137	163	132	800	644	22	18	2	2
2029	171	135	165	130	818	646	23	18	2	2
2030	173	134	167	129	837	648	23	18	2	2
2031	175	133	169	128	856	649	24	18	2	2
2032	177	132	171	127	876	651	25	18	2	2
2033	179	130	173	126	896	652	25	18	2	2
2034	181	129	174	125	916	654	26	18	2	2
2035	183	128	176	123	937	656	26	18	2	2
2036	185	127	178	122	959	657	27	18	2	2
2037	187	126	180	121	980	659	27	18	2	2
2038	189	125	182	120	1,003	661	28	19	2	2
2039	191	123	184	119	1,026	662	29	19	2	2
2040	193	122	186	118	1,049	664	29	19	3	2

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Multi Podus Boots		Fleece Insert		Compression Stocking		Nebulizer		Nebulizer Circuits	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	195	121	188	117	1,073	666	30	19	3	2
2042	197	120	190	116	1,098	667	31	19	3	2
2043	200	119	192	115	1,123	669	31	19	3	2
2044	202	118	194	114	1,148	671	32	19	1	1
2045	204	117	197	113	1,175	672	33	19	0	0
2046	206	116	199	111	1,202	674	34	19	0	0
2047	208	115	201	110	1,229	676	34	19	0	0
2048	81	44	78	42	486	262	14	7	0	0
TOTAL FUTURE LOSSES =		$ 4,030		$ 3,883		$ 19,994		$ 561		$ 42

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Nebulizer Circuits		Wet Ones/Equivalent		Adult Briefs		Gloves Non-latex		Heel Protectors	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	0	0	791	491	1,990	1,234	263	163	451	280
2042	0	0	809	492	2,035	1,238	269	164	461	281
2043	0	0	828	493	2,082	1,241	275	164	472	281
2044	8	4	846	494	2,129	1,244	281	164	483	282
2045	13	7	866	496	2,178	1,247	288	165	494	283
2046	13	7	886	497	2,228	1,250	295	165	505	283
2047	13	7	906	498	2,279	1,253	301	166	517	284
2048	5	3	358	193	900	485	119	64	204	110
TOTAL FUTURE LOSSES =		$ 29		$ 14,736		$ 37,075		$ 4,901		$ 8,405

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Waterproof Mattress Pads	Disposable Incontinence Pads	Wound/Skin Care Products	Prescription Lenses w/ Prism	Category 20
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-48	18-Sep-17
Procedure Cost	$57.50 per unit	$3.20 per unit	$437.50 per unit	$245.00 per unit	$0.00 per unit
Frequency	4.00 times/year	365.00 times/year	1.00 times/year	0.50 times/year	0.00 times/year
Category Inflation	0.00%	0.00%	0.00%	-0.54%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	66	66	333	333	125	125	35	35	0	0
2018	235	232	1,195	1,176	447	441	125	123	0	0
2019	241	232	1,222	1,179	458	442	127	122	0	0
2020	246	233	1,250	1,182	468	443	129	122	0	0
2021	252	233	1,278	1,185	479	444	131	122	0	0
2022	258	234	1,308	1,188	490	445	133	121	0	0
2023	263	235	1,338	1,191	501	446	136	121	0	0
2024	269	235	1,368	1,194	512	447	138	121	0	0
2025	276	236	1,399	1,197	524	448	141	120	0	0
2026	282	236	1,431	1,200	536	449	143	120	0	0
2027	288	237	1,464	1,203	548	451	145	119	0	0
2028	295	237	1,498	1,206	561	452	148	119	0	0
2029	302	238	1,532	1,209	574	453	150	119	0	0
2030	309	239	1,567	1,212	587	454	153	118	0	0
2031	316	239	1,603	1,215	600	455	156	118	0	0
2032	323	240	1,639	1,218	614	456	158	118	0	0
2033	330	241	1,677	1,221	628	457	161	117	0	0
2034	338	241	1,715	1,224	642	459	164	117	0	0
2035	345	242	1,754	1,227	657	460	167	117	0	0
2036	353	242	1,794	1,231	672	461	170	116	0	0
2037	361	243	1,835	1,234	687	462	173	116	0	0
2038	370	244	1,877	1,237	703	463	176	116	0	0
2039	378	244	1,920	1,240	719	464	179	115	0	0
2040	387	245	1,964	1,243	736	466	182	115	0	0

PROJECTED EQUIPMENT & SUPPLIES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Waterproof Mattress Pads		Disposable Incontinence Pads		Wound/Skin Care Products		Prescription Lenses w/ Prism		Category 20	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	396	245	2,009	1,246	752	467	185	115	0	0
2042	405	246	2,055	1,249	770	468	188	114	0	0
2043	414	247	2,102	1,252	787	469	191	114	0	0
2044	423	247	2,150	1,256	805	470	195	114	0	0
2045	433	248	2,199	1,259	824	471	198	113	0	0
2046	443	248	2,249	1,262	842	473	201	113	0	0
2047	453	249	2,300	1,265	862	474	205	113	0	0
2048	179	96	909	490	340	184	81	43	0	0
TOTAL FUTURE LOSSES =		$ 7,370		$ 37,425		$ 14,019		$ 3,607		$ -

SUMMARY OF INPATIENT/OTHER ACUTE CARE SERVICES COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Bacteriuria/Problematic UTI	3.66%	337,168
Bacteriuria/Problematic UTI	3.66%	262,124
Pneumonia/Septicemia	3.66%	506,287
Pneumonia/Septicemia	3.66%	1,312,006
Wound Care, Outpatient	3.80%	19,369
Decubiti	3.66%	274,886
Bilateral Achilles Tendon Release	3.66%	52,146
Total Present Value of Costs =		**$ 2,763,986**

ANNUAL TOTALS OF INPATIENT/OTHER ACUTE CARE SERVICES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	15,030	15,030	15,030
2018	55,929	55,059	70,089
2019	38,588	37,233	107,322
2020	27,251	25,771	133,093
2021	28,893	26,781	159,874
2022	30,634	27,831	187,705
2023	32,481	28,922	216,626
2024	34,438	30,055	246,682
2025	36,514	31,233	277,915
2026	38,715	32,457	310,372
2027	41,048	33,730	344,102
2028	43,522	35,052	379,154
2029	46,145	36,426	415,579
2030	48,927	37,853	453,433
2031	51,876	39,337	492,770
2032	55,002	40,879	533,649
2033	58,317	42,481	576,130
2034	61,832	44,146	620,277
2035	65,559	45,877	666,153
2036	69,510	47,675	713,829
2037	73,700	49,544	763,372
2038	78,142	51,486	814,858
2039	82,851	53,504	868,362
2040	87,845	55,601	923,963
2041	93,139	57,780	981,743
2042	98,753	60,045	1,041,788
2043	104,705	62,399	1,104,187
2044	441,817	258,066	1,362,253
2045	689,212	394,568	1,756,820
2046	730,740	410,027	2,166,847
2047	774,770	426,091	2,592,938
2048	317,328	171,048	2,763,986
Total =	$ 4,453,214	$ 2,763,986	

PROJECTED INPATIENT/OTHER ACUTE CARE SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Bacteriuria/Problematic UTI	Bacteriuria/Problematic UTI	Pneumonia/Septicemia	Pneumonia/Septicemia	Wound Care, Outpatient
Start Date	18-Sep-17	21-May-44	18-Sep-17	21-May-44	18-Sep-17
End Date	21-May-44	21-May-48	21-May-44	21-May-48	21-May-48
Procedure Cost	$42,954.53 per unit	$42,954.53 per unit	$107,499.80 per unit	$107,499.80 per unit	$9,861.41 per unit
Frequency	0.17 times/year	0.50 times/year	0.10 times/year	1.00 times/year	0.03 times/year
Category Inflation	3.66%	3.66%	3.66%	3.66%	3.80%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	2,040	2,040	0	0	3,063	3,063	0	0	91	91
2018	7,590	7,472	0	0	11,398	11,220	0	0	338	333
2019	8,048	7,765	0	0	12,084	11,660	0	0	359	346
2020	8,533	8,069	0	0	12,812	12,117	0	0	381	360
2021	9,047	8,385	0	0	13,584	12,591	0	0	404	375
2022	9,592	8,714	0	0	14,403	13,085	0	0	429	390
2023	10,170	9,055	0	0	15,271	13,597	0	0	456	406
2024	10,782	9,410	0	0	16,191	14,130	0	0	484	422
2025	11,432	9,779	0	0	17,166	14,684	0	0	514	439
2026	12,121	10,162	0	0	18,200	15,259	0	0	546	457
2027	12,851	10,560	0	0	19,297	15,857	0	0	579	476
2028	13,625	10,974	0	0	20,460	16,478	0	0	615	495
2029	14,446	11,403	0	0	21,692	17,123	0	0	653	515
2030	15,317	11,850	0	0	22,999	17,794	0	0	693	536
2031	16,240	12,314	0	0	24,385	18,491	0	0	736	558
2032	17,218	12,797	0	0	25,854	19,216	0	0	782	581
2033	18,255	13,298	0	0	27,412	19,968	0	0	830	605
2034	19,355	13,819	0	0	29,064	20,751	0	0	881	629
2035	20,521	14,360	0	0	30,815	21,563	0	0	936	655
2036	21,758	14,923	0	0	32,671	22,408	0	0	993	681
2037	23,069	15,508	0	0	34,640	23,286	0	0	1,055	709
2038	24,459	16,115	0	0	36,727	24,198	0	0	1,120	738
2039	25,932	16,747	0	0	38,939	25,146	0	0	1,189	768
2040	27,495	17,403	0	0	41,286	26,131	0	0	1,262	799

PROJECTED INPATIENT/OTHER ACUTE CARE SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Bacteriuria/Problematic UTI		Bacteriuria/Problematic UTI		Pneumonia/Septicemia		Pneumonia/Septicemia		Wound Care, Outpatient	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	29,151	18,084	0	0	43,773	27,155	0	0	1,340	832
2042	30,908	18,793	0	0	46,410	28,219	0	0	1,423	865
2043	32,770	19,529	0	0	49,206	29,324	0	0	1,511	900
2044	13,422	7,840	63,967	37,363	20,154	11,772	320,174	187,014	1,604	937
2045	0	0	110,512	63,267	0	0	553,145	316,670	1,703	975
2046	0	0	117,171	65,746	0	0	586,472	329,076	1,809	1,015
2047	0	0	124,230	68,321	0	0	621,807	341,968	1,920	1,056
2048	0	0	50,882	27,427	0	0	254,677	137,278	788	425
TOTAL FUTURE LOSSES =		$ 337,168		$ 262,124		$ 506,287		$ 1,312,006		$ 19,369

PROJECTED INPATIENT/OTHER ACUTE CARE SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Decubiti	Bilateral Achilles Tendon Release	Category 8	Category 9	Category 10
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-19	18-Sep-17	18-Sep-17	18-Sep-17
Procedure Cost	$71,848.86 per unit	$59,775.53 per unit	$0.00 per unit	$0.00 per unit	$0.00 per unit
Frequency	0.06 times/year	0.50 times/year	0.00 times/year	0.00 times/year	0.00 times/year
Category Inflation	3.66%	3.66%	0.00%	0.00%	0.00%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	1,321	1,321	8,516	8,516	0	0	0	0	0	0
2018	4,915	4,838	31,689	31,196	0	0	0	0	0	0
2019	5,211	5,028	12,887	12,434	0	0	0	0	0	0
2020	5,525	5,225	0	0	0	0	0	0	0	0
2021	5,858	5,429	0	0	0	0	0	0	0	0
2022	6,211	5,642	0	0	0	0	0	0	0	0
2023	6,585	5,863	0	0	0	0	0	0	0	0
2024	6,981	6,093	0	0	0	0	0	0	0	0
2025	7,402	6,332	0	0	0	0	0	0	0	0
2026	7,848	6,580	0	0	0	0	0	0	0	0
2027	8,321	6,837	0	0	0	0	0	0	0	0
2028	8,822	7,105	0	0	0	0	0	0	0	0
2029	9,354	7,384	0	0	0	0	0	0	0	0
2030	9,917	7,673	0	0	0	0	0	0	0	0
2031	10,515	7,973	0	0	0	0	0	0	0	0
2032	11,148	8,286	0	0	0	0	0	0	0	0
2033	11,820	8,610	0	0	0	0	0	0	0	0
2034	12,532	8,948	0	0	0	0	0	0	0	0
2035	13,287	9,298	0	0	0	0	0	0	0	0
2036	14,088	9,662	0	0	0	0	0	0	0	0
2037	14,937	10,041	0	0	0	0	0	0	0	0
2038	15,837	10,434	0	0	0	0	0	0	0	0
2039	16,791	10,843	0	0	0	0	0	0	0	0
2040	17,802	11,268	0	0	0	0	0	0	0	0

PROJECTED INPATIENT/OTHER ACUTE CARE SERVICES COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Decubiti		Bilateral Achilles Tendon Release		Category 8		Category 9		Category 10	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	18,875	11,709	0	0	0	0	0	0	0	0
2042	20,012	12,168	0	0	0	0	0	0	0	0
2043	21,218	12,645	0	0	0	0	0	0	0	0
2044	22,496	13,140	0	0	0	0	0	0	0	0
2045	23,852	13,655	0	0	0	0	0	0	0	0
2046	25,289	14,190	0	0	0	0	0	0	0	0
2047	26,812	14,746	0	0	0	0	0	0	0	0
2048	10,982	5,919	0	0	0	0	0	0	0	0
TOTAL FUTURE LOSSES =		$ 274,886		$ 52,146		$ -		$ -		$ -

FIGURE 1

ANNUAL COSTS OF LIFE CARE PLAN

JO ANN PUENTE

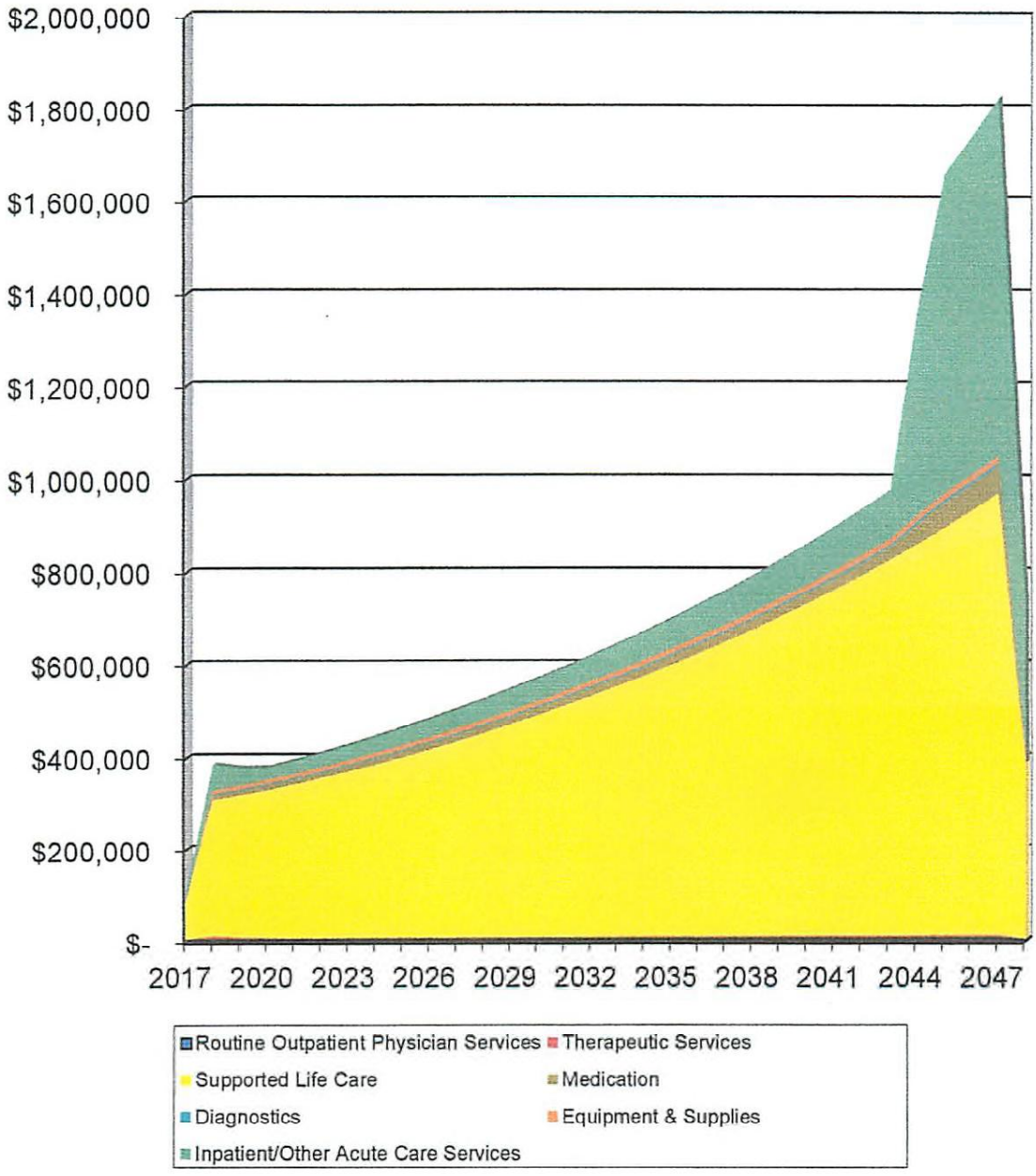


FIGURE 2

PRESENT VALUE OF ANNUAL COSTS OF LIFE CARE PLAN

JO ANN PUENTE

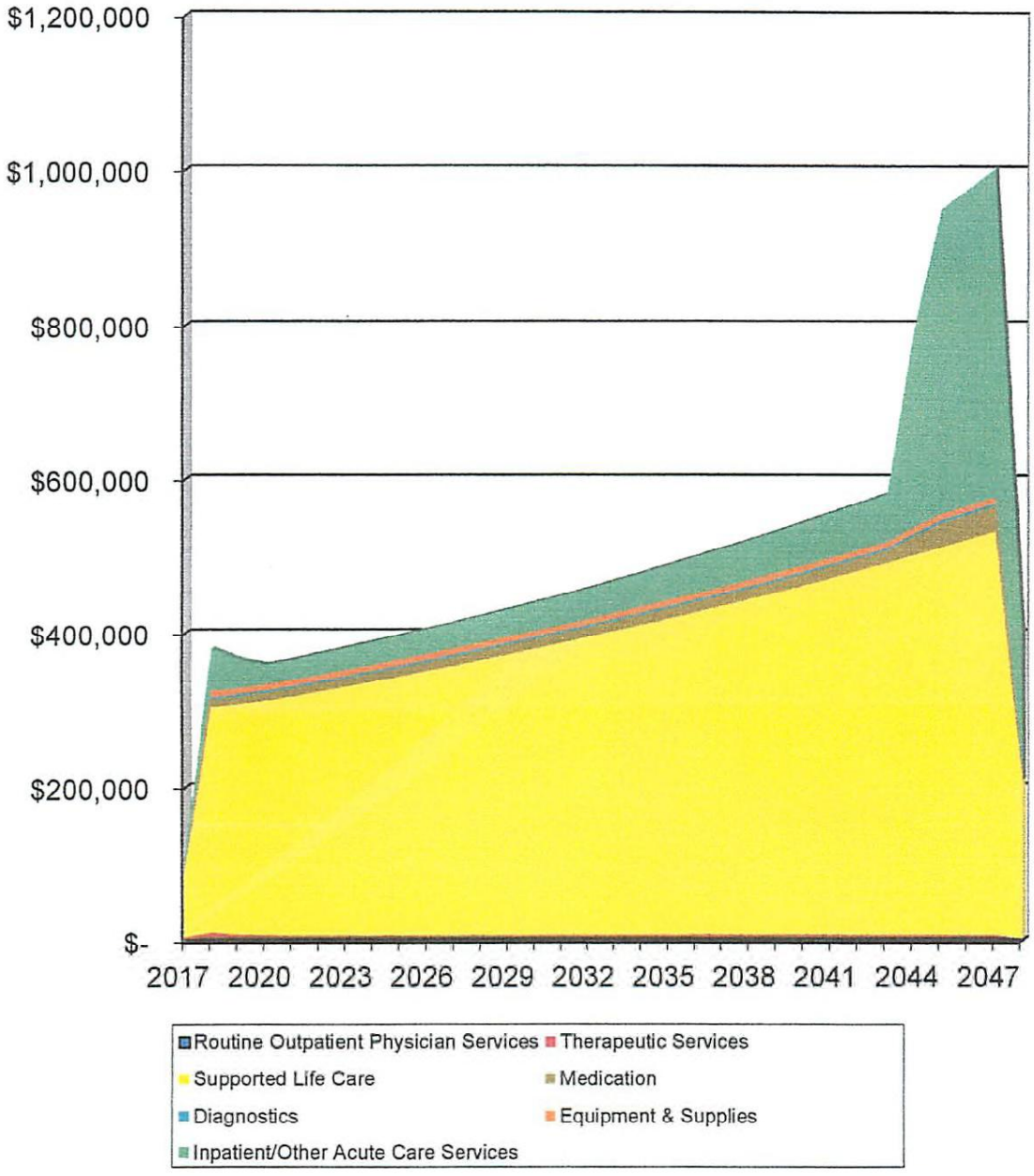
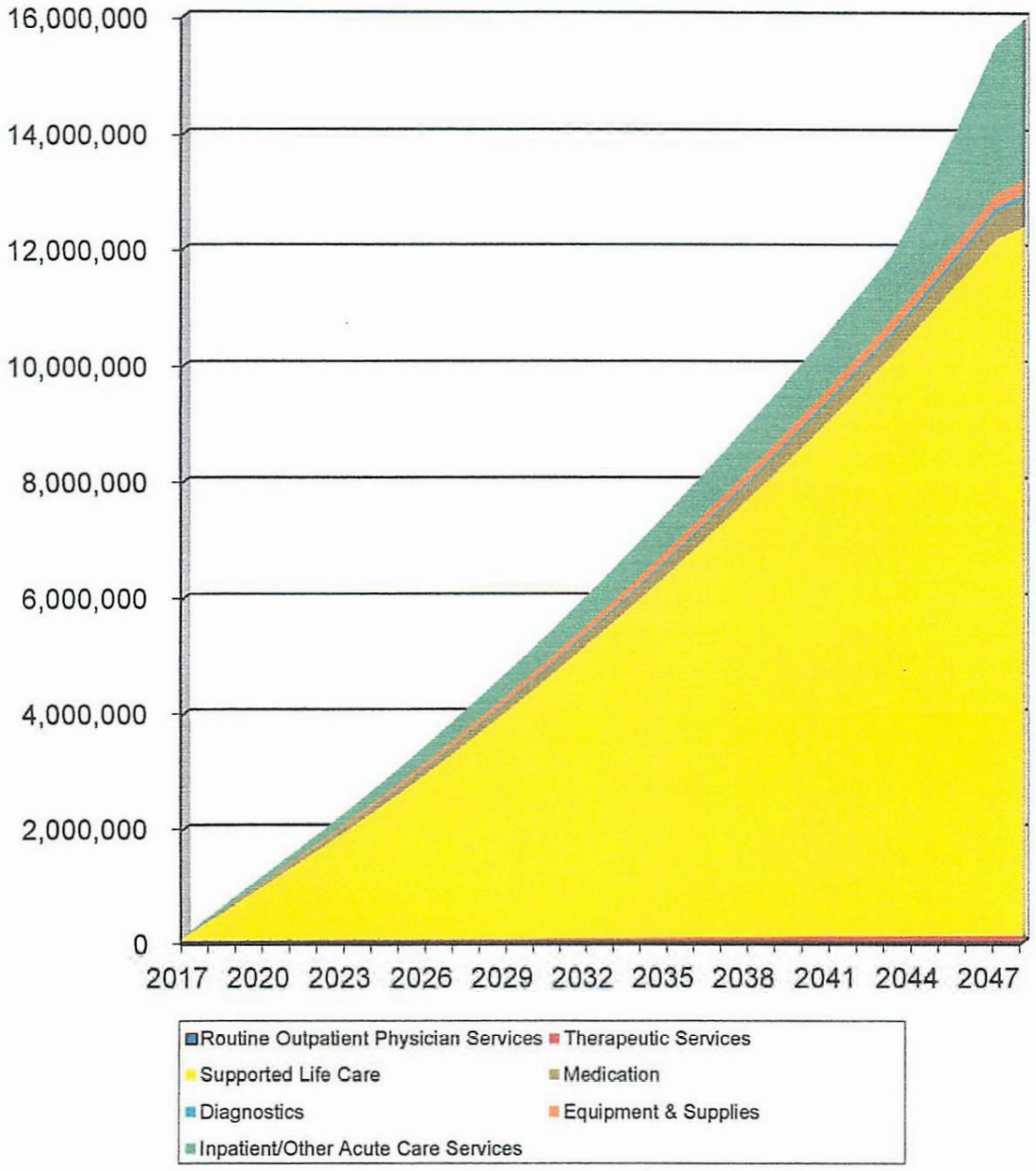


FIGURE 3

PRESENT VALUE OF ANNUAL COSTS OF LIFE CARE PLAN

JO ANN PUENTE



SUMMARY OF OTHER POTENTIAL CARE NEEDS COSTS
JO ANN PUENTE

Category	Component Inflation	Present Value of Cost
Cholinesterase Inhibitor	1.59%	152,099
NMDA Antagonist	1.59%	213,089
Decubiti (Operative)	3.66%	206,854
Intrathecal Baclofen Trial & Implant	3.66%	137,832
Pump Replacement	3.66%	581,890
Follow-up	0.96%	99,631
Refill	0.96%	151,267
Total Present Value of Costs =		**$ 1,542,662**

ANNUAL TOTALS OF OTHER POTENTIAL CARE NEEDS COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	146,045	146,045	146,045
2018	30,190	29,721	175,766
2019	31,624	30,513	206,279
2020	33,130	31,331	237,610
2021	34,713	32,175	269,785
2022	36,376	33,047	302,832
2023	38,124	33,946	336,778
2024	39,961	34,875	371,653
2025	41,893	35,834	407,487
2026	43,924	36,824	444,311
2027	46,059	37,847	482,158
2028	48,305	38,903	521,062
2029	50,667	39,995	561,056
2030	53,151	41,122	602,178
2031	55,765	42,286	644,465
2032	58,515	43,490	687,955
2033	61,409	44,734	732,688
2034	64,454	46,019	778,707
2035	67,660	47,347	826,054
2036	71,034	48,720	874,774
2037	74,586	50,140	924,913
2038	78,326	51,607	976,521
2039	82,264	53,124	1,029,645
2040	86,411	54,693	1,084,338
2041	90,778	56,316	1,140,654
2042	95,379	57,994	1,198,647
2043	100,225	59,729	1,258,376
2044	105,331	61,524	1,319,900
2045	110,711	63,381	1,383,281
2046	116,380	65,302	1,448,583
2047	122,354	67,290	1,515,873
2048	49,698	26,789	1,542,662
Total =	$ 2,165,442	$ 1,542,662	

PROJECTED OTHER POTENTIAL CARE NEEDS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Cholinesterase Inhibitor	NMDA Antagonist	Decubiti (Operative)	Intrathecal Baclofen Trial & Implant	Pump Replacement
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	21-May-48	21-May-18	21-May-48
Procedure Cost	$10.05 per unit	$14.08 per unit	$108,133.64 per unit	$137,831.52 per unit	$58,874.67 per unit
Frequency	365.00 times/year	365.00 times/year	0.03 times/year	1.00 times/year	0.17 times/year
Category Inflation	1.59%	1.59%	3.66%	3.66%	3.66%

Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2017	1,045	1,045	1,464	1,464	994	994	137,832	137,832	2,796	2,796
2018	3,812	3,752	5,340	5,257	3,698	3,641	0	0	10,404	10,242
2019	3,961	3,822	5,549	5,354	3,921	3,783	0	0	11,030	10,643
2020	4,115	3,892	5,766	5,453	4,157	3,932	0	0	11,695	11,060
2021	4,276	3,964	5,991	5,553	4,408	4,086	0	0	12,400	11,493
2022	4,443	4,037	6,225	5,655	4,673	4,246	0	0	13,147	11,944
2023	4,617	4,111	6,469	5,760	4,955	4,412	0	0	13,939	12,411
2024	4,798	4,187	6,721	5,866	5,254	4,585	0	0	14,779	12,898
2025	4,985	4,264	6,984	5,974	5,570	4,765	0	0	15,669	13,403
2026	5,180	4,343	7,257	6,084	5,906	4,951	0	0	16,613	13,928
2027	5,382	4,423	7,541	6,196	6,262	5,145	0	0	17,614	14,474
2028	5,593	4,504	7,836	6,311	6,639	5,347	0	0	18,675	15,041
2029	5,811	4,587	8,142	6,427	7,039	5,556	0	0	19,801	15,630
2030	6,039	4,672	8,460	6,545	7,463	5,774	0	0	20,993	16,242
2031	6,275	4,758	8,791	6,666	7,913	6,000	0	0	22,258	16,878
2032	6,520	4,846	9,134	6,789	8,389	6,235	0	0	23,599	17,540
2033	6,775	4,935	9,491	6,914	8,895	6,479	0	0	25,021	18,227
2034	7,040	5,026	9,862	7,041	9,431	6,733	0	0	26,529	18,941
2035	7,315	5,119	10,248	7,171	9,999	6,997	0	0	28,127	19,683
2036	7,601	5,213	10,648	7,303	10,601	7,271	0	0	29,822	20,454
2037	7,898	5,309	11,065	7,438	11,240	7,556	0	0	31,619	21,255
2038	8,206	5,407	11,497	7,575	11,917	7,852	0	0	33,524	22,088
2039	8,527	5,507	11,946	7,715	12,635	8,160	0	0	35,543	22,953
2040	8,860	5,608	12,413	7,857	13,396	8,479	0	0	37,685	23,852

PROJECTED OTHER POTENTIAL CARE NEEDS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Cholinesterase Inhibitor		NMDA Antagonist		Decubiti (Operative)		Intrathecal Baclofen Trial & Implant		Pump Replacement	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	9,207	5,712	12,899	8,002	14,204	8,811	0	0	39,955	24,787
2042	9,567	5,817	13,403	8,149	15,059	9,157	0	0	42,363	25,758
2043	9,941	5,924	13,927	8,300	15,967	9,515	0	0	44,915	26,767
2044	10,329	6,033	14,471	8,453	16,929	9,888	0	0	47,621	27,816
2045	10,733	6,144	15,037	8,608	17,949	10,275	0	0	50,490	28,905
2046	11,152	6,258	15,624	8,767	19,030	10,678	0	0	53,532	30,038
2047	11,588	6,373	16,235	8,929	20,177	11,096	0	0	56,758	31,214
2048	4,652	2,507	6,517	3,513	8,264	4,454	0	0	23,247	12,531
TOTAL FUTURE LOSSES =		$ 152,099		$ 213,089		$ 206,854		$ 137,832		$ 581,890

PROJECTED OTHER POTENTIAL CARE NEEDS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

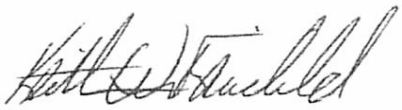
	Follow-up	Refill	Category 8	Category 9	Category 10
Start Date	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17	18-Sep-17
End Date	21-May-48	21-May-48	18-Sep-17	18-Sep-17	18-Sep-17
Procedure Cost	$533.50 per unit	$810.00 per unit	$0.00 per unit	$0.00 per unit	$0.00 per unit
Frequency	5.00 times/year	5.00 times/year	0.00 times/year	0.00 times/year	0.00 times/year
Category Inflation	0.96%	0.96%	0.00%	0.00%	0.00%

Year	Follow-up Projected Cost	Follow-up Present Value	Refill Projected Cost	Refill Present Value	Category 8 Projected Cost	Category 8 Present Value	Category 9 Projected Cost	Category 9 Present Value	Category 10 Projected Cost	Category 10 Present Value
2017	760	760	1,154	1,154	0	0	0	0	0	0
2018	2,755	2,712	4,182	4,117	0	0	0	0	0	0
2019	2,844	2,744	4,319	4,167	0	0	0	0	0	0
2020	2,937	2,778	4,459	4,217	0	0	0	0	0	0
2021	3,033	2,811	4,605	4,268	0	0	0	0	0	0
2022	3,132	2,845	4,755	4,320	0	0	0	0	0	0
2023	3,234	2,880	4,910	4,372	0	0	0	0	0	0
2024	3,340	2,915	5,070	4,425	0	0	0	0	0	0
2025	3,449	2,950	5,236	4,479	0	0	0	0	0	0
2026	3,561	2,985	5,407	4,533	0	0	0	0	0	0
2027	3,677	3,022	5,583	4,588	0	0	0	0	0	0
2028	3,797	3,058	5,765	4,643	0	0	0	0	0	0
2029	3,921	3,095	5,953	4,699	0	0	0	0	0	0
2030	4,049	3,133	6,147	4,756	0	0	0	0	0	0
2031	4,181	3,170	6,348	4,814	0	0	0	0	0	0
2032	4,317	3,209	6,555	4,872	0	0	0	0	0	0
2033	4,458	3,248	6,769	4,931	0	0	0	0	0	0
2034	4,604	3,287	6,990	4,990	0	0	0	0	0	0
2035	4,754	3,327	7,218	5,051	0	0	0	0	0	0
2036	4,909	3,367	7,453	5,112	0	0	0	0	0	0
2037	5,069	3,408	7,696	5,174	0	0	0	0	0	0
2038	5,234	3,449	7,947	5,236	0	0	0	0	0	0
2039	5,405	3,491	8,206	5,300	0	0	0	0	0	0
2040	5,581	3,533	8,474	5,364	0	0	0	0	0	0

PROJECTED OTHER POTENTIAL CARE NEEDS COMPONENT COSTS AND PRESENT VALUES
JO ANN PUENTE

	Follow-up		Refill		Category 8		Category 9		Category 10	
Year	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value	Projected Cost	Present Value
2041	5,763	3,575	8,751	5,429	0	0	0	0	0	0
2042	5,951	3,619	9,036	5,494	0	0	0	0	0	0
2043	6,146	3,662	9,331	5,561	0	0	0	0	0	0
2044	6,346	3,707	9,635	5,628	0	0	0	0	0	0
2045	6,553	3,752	9,949	5,696	0	0	0	0	0	0
2046	6,767	3,797	10,274	5,765	0	0	0	0	0	0
2047	6,988	3,843	10,609	5,835	0	0	0	0	0	0
2048	2,787	1,502	4,232	2,281	0	0	0	0	0	0
TOTAL FUTURE LOSSES =		$ 99,631		$ 151,267		$ -		$ -		$ -

My compensation for this report is based upon a wage rate of $375.00 per hour and is not dependent nor contingent upon, nor in any other manner tied to, the outcome of the trial, mediation or other resolution of the dispute.



Keith Wm. Fairchild, Ph.D.

APPENDIX TAB “F”

ANNUAL TOTALS OF ROUTINE OUTPATIENT PHYSICIAN SERVICES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	721	721	721
2018	2,614	2,573	3,294
2019	2,699	2,604	5,898
2020	2,787	2,636	8,534
2021	2,878	2,667	11,201
2022	2,972	2,700	13,901
2023	3,069	2,732	16,633
2024	3,169	2,765	19,398
2025	3,272	2,799	22,197
2026	3,379	2,833	25,030
2027	3,489	2,867	27,897
2028	3,603	2,902	30,798
2029	3,720	2,937	33,735
2030	3,842	2,972	36,707
2031	3,967	3,008	39,715
2032	4,096	3,045	42,760
2033	4,230	3,081	45,841
2034	4,368	3,119	48,960
2035	4,510	3,156	52,116
2036	4,658	3,195	55,311
2037	4,810	3,233	58,544
2038	4,966	3,272	61,816
2039	5,128	3,312	65,128
2040	5,296	3,352	68,480
2041	5,469	3,392	71,872
2042	5,647	3,433	75,306
2043	5,831	3,475	78,781
2044	6,021	3,517	82,298
2045	6,218	3,560	85,858
2046	6,421	3,603	89,460
2047	6,630	3,646	93,106
2048	2,645	1,426	94,532
Total =	$ 133,122	$ 94,532	

ANNUAL TOTALS OF THERAPEUTIC SERVICES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	3,387	3,387	3,387
2018	7,959	7,835	11,222
2019	5,482	5,290	16,511
2020	4,297	4,064	20,575
2021	3,552	3,292	23,868
2022	3,639	3,306	27,174
2023	3,729	3,320	30,494
2024	3,821	3,335	33,829
2025	3,915	3,349	37,178
2026	4,012	3,363	40,541
2027	4,110	3,377	43,918
2028	4,212	3,392	47,310
2029	4,315	3,406	50,717
2030	4,422	3,421	54,138
2031	4,531	3,436	57,573
2032	4,642	3,450	61,023
2033	4,757	3,465	64,488
2034	4,874	3,480	67,968
2035	4,994	3,495	71,462
2036	5,117	3,509	74,972
2037	5,243	3,524	78,496
2038	5,372	3,539	82,036
2039	5,504	3,555	85,590
2040	5,640	3,570	89,160
2041	5,779	3,585	92,745
2042	5,921	3,600	96,345
2043	6,067	3,616	99,961
2044	6,217	3,631	103,592
2045	6,370	3,647	107,239
2046	6,527	3,662	110,901
2047	6,687	3,678	114,579
2048	2,647	1,427	116,005
Total =	**$ 157,739**	**$ 116,005**	

ANNUAL TOTALS OF SUPPORTED LIFE CARE COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	81,714	81,714	81,714
2018	298,542	293,898	375,612
2019	310,782	299,867	675,479
2020	323,524	305,956	981,435
2021	336,788	312,170	1,293,605
2022	350,596	318,509	1,612,114
2023	364,970	324,977	1,937,091
2024	379,934	331,576	2,268,667
2025	395,511	338,310	2,606,977
2026	411,727	345,180	2,952,157
2027	428,607	352,190	3,304,347
2028	446,180	359,342	3,663,689
2029	464,473	366,639	4,030,328
2030	483,516	374,085	4,404,413
2031	503,340	381,682	4,786,095
2032	523,976	389,432	5,175,527
2033	545,459	397,341	5,572,868
2034	567,822	405,410	5,978,278
2035	591,103	413,643	6,391,921
2036	615,338	422,043	6,813,963
2037	640,566	430,613	7,244,577
2038	666,829	439,358	7,683,935
2039	694,168	448,280	8,132,215
2040	722,629	457,384	8,589,599
2041	752,256	466,672	9,056,271
2042	783,098	476,149	9,532,420
2043	815,204	485,818	10,018,238
2044	848,627	495,684	10,513,922
2045	883,420	505,750	11,019,672
2046	919,640	516,021	11,535,693
2047	957,344	526,500	12,062,192
2048	384,986	207,518	12,269,710
Total =	$ 17,492,670	$ 12,269,710	

ANNUAL TOTALS OF MEDICATION COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	2,949	2,949	2,949
2018	10,731	10,564	13,514
2019	11,126	10,736	24,249
2020	11,536	10,910	35,159
2021	11,962	11,088	46,247
2022	12,404	11,269	57,516
2023	12,863	11,453	68,969
2024	13,339	11,641	80,610
2025	13,834	11,833	92,443
2026	14,347	12,028	104,472
2027	14,880	12,227	116,699
2028	15,433	12,430	129,128
2029	16,008	12,636	141,765
2030	16,605	12,847	154,611
2031	17,224	13,061	167,672
2032	17,867	13,279	180,951
2033	18,535	13,502	194,453
2034	19,228	13,728	208,181
2035	19,948	13,959	222,140
2036	20,695	14,194	236,335
2037	21,471	14,434	250,769
2038	22,277	14,678	265,447
2039	23,114	14,927	280,373
2040	23,983	15,180	295,553
2041	24,886	15,438	310,992
2042	25,823	15,701	326,693
2043	26,796	15,969	342,662
2044	43,027	25,132	367,794
2045	54,622	31,271	399,065
2046	56,714	31,823	430,887
2047	58,887	32,385	463,273
2048	23,620	12,732	476,004
Total =	$ 696,736	$ 476,004	

ANNUAL TOTALS OF DIAGNOSTICS COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	729	729	729
2018	2,623	2,582	3,311
2019	2,687	2,593	5,904
2020	2,753	2,604	8,508
2021	2,821	2,615	11,123
2022	2,891	2,626	13,749
2023	2,962	2,637	16,386
2024	3,035	2,649	19,035
2025	3,110	2,660	21,695
2026	3,186	2,671	24,366
2027	3,265	2,683	27,049
2028	3,345	2,694	29,743
2029	3,428	2,706	32,449
2030	3,512	2,717	35,166
2031	3,599	2,729	37,894
2032	3,687	2,740	40,635
2033	3,778	2,752	43,387
2034	3,871	2,764	46,151
2035	3,966	2,776	48,926
2036	4,064	2,787	51,714
2037	4,164	2,799	54,513
2038	4,267	2,811	57,325
2039	4,372	2,823	60,148
2040	4,480	2,835	62,983
2041	4,590	2,847	65,831
2042	4,703	2,860	68,690
2043	4,819	2,872	71,562
2044	5,394	3,151	74,713
2045	5,822	3,333	78,046
2046	5,965	3,347	81,393
2047	6,112	3,362	84,755
2048	2,419	1,304	86,059
Total =	$ 120,420	$ 86,059	

ANNUAL TOTALS OF EQUIPMENT & SUPPLIES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	2,322	2,322	2,322
2018	8,308	8,179	10,501
2019	8,469	8,172	18,673
2020	8,634	8,165	26,838
2021	8,802	8,159	34,997
2022	8,974	8,152	43,149
2023	9,149	8,146	51,295
2024	9,328	8,140	59,435
2025	9,510	8,135	67,570
2026	9,697	8,129	75,699
2027	9,887	8,124	83,823
2028	10,081	8,119	91,943
2029	10,280	8,114	100,057
2030	10,482	8,110	108,167
2031	10,689	8,106	116,272
2032	10,900	8,101	124,374
2033	11,116	8,098	132,471
2034	11,336	8,094	140,565
2035	11,561	8,090	148,655
2036	11,791	8,087	156,743
2037	12,025	8,084	164,827
2038	12,265	8,081	172,908
2039	12,510	8,078	180,986
2040	12,759	8,076	189,062
2041	13,015	8,074	197,136
2042	13,275	8,072	205,208
2043	13,541	8,070	213,277
2044	13,819	8,072	221,349
2045	14,100	8,072	229,421
2046	14,384	8,071	237,492
2047	14,674	8,070	245,562
2048	5,783	3,117	248,679
Total =	$ 343,466	$ 248,679	

ANNUAL TOTALS OF INPATIENT/OTHER ACUTE CARE SERVICES COSTS
JO ANN PUENTE

Year	Projected Costs	Present Value	Cumulative Present Value
2017	15,030	15,030	15,030
2018	55,929	55,059	70,089
2019	38,588	37,233	107,322
2020	27,251	25,771	133,093
2021	28,893	26,781	159,874
2022	30,634	27,831	187,705
2023	32,481	28,922	216,626
2024	34,438	30,055	246,682
2025	36,514	31,233	277,915
2026	38,715	32,457	310,372
2027	41,048	33,730	344,102
2028	43,522	35,052	379,154
2029	46,145	36,426	415,579
2030	48,927	37,853	453,433
2031	51,876	39,337	492,770
2032	55,002	40,879	533,649
2033	58,317	42,481	576,130
2034	61,832	44,146	620,277
2035	65,559	45,877	666,153
2036	69,510	47,675	713,829
2037	73,700	49,544	763,372
2038	78,142	51,486	814,858
2039	82,851	53,504	868,362
2040	87,845	55,601	923,963
2041	93,139	57,780	981,743
2042	98,753	60,045	1,041,788
2043	104,705	62,399	1,104,187
2044	441,817	258,066	1,362,253
2045	689,212	394,568	1,756,820
2046	730,740	410,027	2,166,847
2047	774,770	426,091	2,592,938
2048	317,328	171,048	2,763,986
Total =	$ 4,453,214	$ 2,763,986	

APPENDIX TAB “G”

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice
Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice
Concurring and Dissenting Opinion by: Patricia O. Alvarez, Justice

Sitting:[1] Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: February 5, 2020

AFFIRMED IN PART ON CONDITION OF REMITTITUR, REVERSED AND REMANDED IN PART

This appeal arises from a medical malpractice action filed by Jo Ann Puente against Dr. Jesus Virlar and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

("Gonzaba"). A jury found Dr. Virlar liable for Puente's injuries, and judgment was rendered in favor of Puente and against Dr. Virlar and his employer, Gonzaba. On appeal, Dr. Virlar and Gonzaba bring five issues:

(1) whether the trial court erred in excluding the expert testimony of Dr. Ralph W. Kuncl;

(2) whether the trial court erred in admitting evidence of Dr. Virlar's loss of privileges and alleged extraneous bad acts in treating other patients in violation of Texas Rule of Evidence 403;

(3) whether the evidence is legally and factually sufficient to support the jury's award of $888,429.00 in future loss of earning capacity;

(4) whether the trial court erred in refusing to apply a settlement credit in the amount of the hospital's settlement with Puente's minor daughter; and

(5) whether the trial court erred in failing to order that future damages should be paid in whole or in part in periodic payments rather than by lump sum pursuant to section 74.503 of the Texas Civil Practice and Remedies Code.

With respect to the first and second issues, we find no error on the part of the trial court. With respect to the third issue, we hold the evidence was legally and factually sufficient to support loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00). We therefore suggest a remittitur decreasing the award for loss of future earning capacity by $8,000.00. *See* TEX. R. APP. P. 46.3. We affirm the judgment in part conditioned on a remittitur of damages in the amount of $8,000.00. Regarding the fourth issue, we remand the cause for the trial court to conduct a benefits analysis pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). Finally, we find no abuse of discretion by the trial court in failing to award periodic payments for future loss of earning capacity under section 74.503(b) of the Texas Civil Practice and Remedies Code. However, with respect to future medical care expenses, we hold that because the trial court did not order any part of the amount awarded for future medical care expenses to be

paid in periodic payments, it abused its discretion under section 74.503(a). We therefore reverse the trial court's judgment in part and remand the cause for the trial court (1) to conduct a benefits analysis pursuant to *Utts* and apply an appropriate settlement credit, if any; (2) to make a determination under section 74.503 (c) and (d) of the amount of damages awarded for future medical care expenses that should be paid in periodic payments; and (3) to sign a new judgment in conformity with this court's opinion.

BACKGROUND

On November 28, 2011, Appellee Jo Ann Puente underwent "Roux-en-Y" gastric bypass surgery, which was performed by Dr. Nilesh Patel. On December 24, 2011, she began having complications from her surgery, including nausea and vomiting. She reported to Dr. Patel that when she attempted to eat solids, she vomited but was able to keep liquids down. On January 11, 2012, Dr. Patel performed an outpatient dilation procedure for a suspected stricture related to the bypass surgery. On January 13, 2012, Puente went to Dr. Patel's clinic in Del Rio, Texas, and was treated for dehydration. The next day, January 14, 2012, Puente went to the emergency room at Metropolitan Methodist Hospital in San Antonio, Texas, where her main complaint was vomiting. She reported she had just had a dilation outpatient procedure and was not better. In the six weeks since her bariatric surgery, Puente had lost 100 pounds. While she was at the emergency room, the results of a CAT scan raised concerns she was suffering from an esophageal rupture. She was admitted to the intensive care unit on the orders of Dr. Manuel Martinez, a hospitalist and employee of Gonzaba, and placed under his care. Dr. Martinez diagnosed Puente with pancreatitis and dehydration. Puente's medical records reflect that she was awake, alert, and able to follow commands. She did not have any "deficit of movement" to her upper or lower extremities.

Because of the possible esophageal rupture, Dr. Martinez ordered Puente to take nothing by mouth and ordered all the medications Puente had been taking since her surgery, including

vitamins, to be stopped during her hospitalization. A nutritional assessment was performed by the hospital's nutritional dietician, who noted that Puente was at nutritional risk; the dietician recommended that "alternate support with TPN needs to be considered."[2]

On January 16, 2012, Appellant Dr. Jesus Virlar, also a hospitalist and Gonzaba employee, assumed Puente's care and treated her until she was discharged on January 26, 2012. On January 16th, medical records indicate Puente was having trouble walking, even with help of the nurses. The nurses noted that Puente complained of dizziness, "tingles" in her fingers, and tight muscles in her shoulder. She was still vomiting. The nurses further noted that Puente had lost control of her bowels; after being helped to the bathroom, Puente did not respond to questions, and her gaze became "fixed." The nurses also noted that Puente needed "additional fall risk elements," including a "tether device," because of an "unsteady gait."

Dr. Virlar noted in Puente's medical records that Puente had "refused" to ambulate and wrote "MAT evaluate for depression?" According to Dr. Virlar, he wrote "MAT," or Mental Assessment TEAM, because he was considering getting a consultation for Puente's mental state. Dr. Virlar testified he thought she might have "a psychological issue" and that she "need[ed] to try harder to walk." Dr. Virlar testified, "Based at the time, under those circumstances, to me, she was depressed and possibly something else [was] going on. I just couldn't put it together." When asked why he did not find significant the nurses' notes that Puente had fixed gaze and was not responding to questions, Dr. Virlar responded, "It was not reported to me." Dr. Virlar admitted that he did not read the nurses' notes. He was asked at trial whether it was true that he never read any of the nurses' notes during the time of Puente's hospitalizations. Dr. Virlar replied, "Not every single one. Maybe I read one or two. I don't recall a specific number, but the majority of the nurses'

[2] TPN, or total parenteral nutrition, is a method of giving nutrients intravenously to a person. TPN may or may not include thiamine based on the physician's orders.

notes, no, I did not read, sir." Later during his testimony, Dr. Virlar clarified that he "did not look at the nurses' notes." He was then asked if he wished now that he had reviewed them; Dr. Virlar replied, "No, because that's–it's their subjective interpretation. Somebody's weakness of level of 4, to me may be a level of 3, part of that assessment."

On January 20, 2012, a second nutritional assessment was performed. Since her admission, Puente had been without food and had had nothing by the mouth; the only fluid Puente had received intravenously was saline. Puente was also still vomiting, a condition which started before she was hospitalized. The dietician again recommended TPN. That same day, Puente was put on a trial of clear fluids, but was not able to tolerate the fluids by mouth. Dr. Virlar returned her status to nothing by mouth.

On January 21, 2012, Puente's surgeon, Dr. Patel, wrote in her medical records to "start TPN"; however, Puente was not started on TPN that day. Dr. Patel testified he relied on the hospitalist, Dr. Virlar, to write the appropriate orders. That same day, the physical therapist's progress note stated that Puente was feeling nauseated and vomited "clear spital" in the trash. The physical therapist wrote in the medical records that Puente was demonstrating "Trendelenburg gait," which is a gait seen with people who have weakness in the pelvic muscles. On January 23, 2012, nurses' notes reflected that Puente was still complaining of dizziness and that she was exhibiting right eye nystagmus. On January 24, 2012, Puente said she was having nausea when she opened her eyes.

On January 26, 2012, Puente was discharged with orders for administration of TPN through home health care. Dr. Virlar's discharge diagnosis was (1) "intractable nausea and vomiting"; (2) "obesity"; and (3) "obstructive sleep apnea." Puente never received intravenous vitamins, including any supplemental thiamine, while she was admitted in the hospital. Further, the TPN order written by Dr. Virlar was a custom TPN order, which did not provide for the supplementation

of thiamine.[3] The TPN ordered by Dr. Virlar contained nutrients, including glucose. At trial, Dr. Virlar admitted that if a patient is given glucose before thiamine, the patient's thiamine levels will diminish more rapidly because the thiamine will be "used for the metabolism." According to Dr. Virlar, he learned this fact after he was served with this lawsuit. He admitted that at time of Puente's hospitalizations, he did not know giving glucose to a patient without knowing the patient's thiamine level could be devastating to the patient. Dr. Virlar also admitted at trial that he did not know Wernicke's syndrome[4] was a risk in a post-bariatric patient suffering from "intractable vomiting."

On January 27, 2012, the day after she was discharged, Puente had blood drawn based on orders from Dr. Patel's office; the results showed she had an "abnormal, very abnormally low" level of vitamin B-1 thiamine.[5] Dr. Patel, Puente's surgeon, testified the results were not sent to his office, and he did not see them. On January 31, 2012, Puente went to the emergency room at Val Verde Regional Hospital but was not admitted. On February 2, 2012, she returned to Val Verde Regional Hospital and was admitted. On February 3, 2012, she was transferred to Metropolitan Methodist Hospital in San Antonio and admitted on Dr. Virlar's orders.

Puente's medical records reflect that upon being admitted the second time to Metropolitan Methodist Hospital, she was not responding to stimuli. She became progressively more confused

[3] The "premix" TPN, which was not ordered by Dr. Virlar, did contain thiamine. At trial, Dr. Altman testified that giving supplemental thiamine is "very safe" and "very cheap." It should be given to any patient who might be at risk for thiamine deficiency because "the consequences can be devastating and permanent." Puente's treating neurologist, Dr. David Wenzell, also confirmed that there is no downside to giving thiamine because a patient who receives more than they need excretes the surplus in her urine. When asked why he did not give Puente thiamine, especially considering there was "no downside," Dr. Virlar responded that there "was no indication at the time based on my clinical judgment."

[4] Wernicke's syndrome, or Wernicke's encephalopathy, is brain dysfunction associated with thiamine deficiency and is "usually associated with chronic alcoholism or other causes of severe malnutrition." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 761, 2495 (Donald Venes ed., 21st ed. 2009).

[5] According to Dr. Altman, "the reference range–every lab has its own reference range, or normal range," and "in this case, the normal range for their thiamine level would be anywhere from 87 on the low end to 280 on the high end, nanomoles per liter–that's a concentration. And, in this case, Jo Ann [Puente]'s results were 30 nanomoles. So, in other words, less–well less than half of the low end of that reference range."

and her mental status declined. She ultimately needed respiratory support and was put on a ventilator to help her breathe. She experienced weakness in all four extremities and continued to have eye movement abnormalities. On February 11, 2012, a neurosurgeon's diagnostic impression was "encephalopathy[6] of unknown etiology . . . with normal MRI and CT scan of the brain . . . and in the face of [Puente's] history of a prior bariatric surgery, the suspicion is malnutrition related encephalopathy, such as Wernicke encephalopathy[7] as a consideration." On February 13, 2012, Puente's medical records show that thiamine was finally added to her TPN orders.

Puente was discharged on March 9, 2012 and began receiving care at long-term care facilities. She suffered permanent brain damage. Dr. David Wenzell, her treating neurologist, testified Puente was later diagnosed as suffering from Wernicke's syndrome, which progressed to Korsakoff's syndrome. According to Dr. Wenzell, "Wernicke's syndrome is the acute presentation of the illness, and if it persists, it's called Korsakoff's syndrome." "When patients initially experience acute thiamine deficiency, they have Wernicke's syndrome. And if the problem is not dealt with, if it's not treated appropriately, then it progresses into Korsakoff's syndrome." Wernicke's syndrome can be reversed if the patient receives timely thiamine supplements intravenously.

[6] One of the experts at trial described encephalopathy as inflammation or irritation of the brain. Encephalopathy is defined as "[g]eneralized brain dysfunction marked by varying degrees of impairment of speech, cognition, orientation, and arousal." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 761 (Donald Venes ed., 21st ed. 2009). "In mild instances, brain dysfunction may be evident only during specialized neuropsychiatric testing; in severe instances (e.g., the last stages of hepatic encephalopathy), the patient may be unresponsive even to unpleasant stimuli." *Id.*

[7] Wernicke encephalopathy is caused by thiamine deficiency. At trial, Dr. David Joseph Altman, a board certified neurologist, testified symptoms of Wernicke's encephalopathy include "ataxia, or problems with coordination; confusion, which is also called encephalopathy; and eye movement abnormalities, things like nystagmus where the eyes move rapidly or problems where the eyes are not moving together." Dr. Altman testified thiamine deficiency caused Puente to develop "changes in her mental state, causing confusion [and] behavioral changes." "It caused problems with her coordination . . . as well as strength issues in her upper and lower extremities. And it also affected her eye movements, such that they were not moving together. She was experiencing jittery movements, called nystagmus of her eyes. All of those are classic for Wernicke's encephalopathy."

On March 26, 2014, Puente[8] and her mother[9] sued Dr. Virlar, Gonzaba, and numerous other healthcare providers involved in Puente's care.[10] With regard to Dr. Virlar and his employer, Gonzaba, Puente and Carr sued them for negligence in diagnosing, monitoring, and treating nutritional deficiencies of Puente during her hospitalization at Metropolitan Methodist Hospital in January 2012. Puente sought damages for physical pain and mental anguish; she also alleged that she incurred loss of earnings in the past, loss of earning capacity in the future, and medical expenses in the past and future. Puente's minor daughter alleged that as a result of her mother's injuries, she had suffered damages in the past, and will incur damages in the future, for "loss of parental consortium, emotional trauma, and loss of care, maintenance, labor services, kindness, affection, protection, emotional support, attention, services, companionship, care, advice, and counsel." Puente's mother, Carr, alleged that she had suffered loss of services as a result of her daughter's injuries.

Before trial, Carr, individually and as guardian of Puente's minor child, settled with or non-suited all defendants, including nonsuiting the claims against Dr. Virlar, Dr. Martinez, and Gonzaba. Puente settled with or non-suited her claims with all defendants except Dr. Virlar, Dr. Martinez, and Gonzaba. Thus, at the time of trial, the remaining claims were Puente's claims against Dr. Virlar, Dr. Martinez, and Gonzaba.

At trial, Puente's experts testified the failure of Dr. Virlar, Dr. Martinez, and Dr. Patel to recognize the risks or symptoms of Wernicke's encephalopathy and to replenish thiamine proximately caused Puente's permanent brain injury and neurological deficits for which Puente

[8] During the proceeding, the trial court appointed guardians ad litem for Puente and her minor daughter, respectively.
[9] Maria Ester Carr brought suit individually and as guardian of Puente's minor daughter.
[10] These healthcare providers were Dr. Nilesh Patel; James Houston, P.A.; Angela Garcia, R.D.; NITYA Surgical Associates, PLLC d/b/a Texas Bariatric Specialists, LLC; Manuel Martinez, M.D.; Methodist Healthcare System of San Antonio, Ltd. d/b/a Metropolitan Methodist Hospital; and "JKD" (an unknown registered dietician identified only by initials on medical records).

will require twenty-four-hour care for the rest of her life. According to Puente's experts, her thiamine deficiency was reversible from the time of her admission on January 14, 2012 until her discharge on January 26, 2012. However, after January 26th, her injuries were permanent.

Dr. Virlar and Gonzaba's defense at trial was that Puente had never suffered from Wernicke's encephalopathy but was suffering some other condition that no health care provider could have foreseen or prevented.[11] They emphasized that over two dozen healthcare providers had seen or treated Puente since her surgery, but none diagnosed her with Wernicke's until after January 26, 2012. Dr. Virlar testified that he took no responsibility for Puente's injuries, stating that he did his "best with the team" and they did what they "could under the circumstances." Dr. Virlar testified, "And I still agree that it is not Wernicke's encephalopathy–that she suffered a stroke."

The jury returned a verdict in favor of Puente; it found that Dr. Patel was 40% responsible; Dr. Virlar was 60% responsible; and Dr. Martinez was 0% responsible.[12] The jury awarded Puente $133,202.00 for past loss of earning capacity; $888,429.00 for future loss of earning capacity; and $13,263,874.86 for future medical expenses. Dr. Virlar and Gonzaba then filed a motion for settlement credit, arguing that the settlement paid to Puente's minor daughter by the hospital

[11] Defense expert, Dr. Darryl S. Camp, a neurologist, testified that after reviewing Puente's medical records, he believed she was suffering from Guillain-Barre syndrome. Puente's experts, on the other hand, testified she could not have been suffering from Guillain-Barre syndrome. According to Dr. Wenzell, the "typical presentation for Guillain-Barre syndrome is gradual evolution over several days to two weeks of ascending–meaning starting at the bottom and moving up–symptoms of numbness and weakness in the extremities, sometimes people can have eye movement abnormalities as well, and the diagnosis is confirmed by the presence of elevated protein [in] the spinal fluid and by certain electrical abnormalities where the nerves are tested." Dr. Wenzell testified Puente had no elevated spinal fluid protein and no "abnormality of nerve conduction studies." According to Dr. Wenzell, there was no support in Puente's medical records for a diagnosis of Guillain-Barre syndrome. Similarly, Dr. Altman testified that Puente was not suffering from Guillain-Barre syndrome because "Guillain-Barre doesn't cause mental confusion"; "by definition" it "affects only the peripheral nerves" and "has no effect on the central nervous system, the brain." Thus, it does not "cause confusion, behavioral changes, things of that nature." "Also, it's not going to be associated with spasticity," which was one of Puente's problems–"she's spastic in her arms and legs."

[12] During Puente's January 2012 hospitalization, Dr. Martinez saw Puente for only the first two days of the two-week window in which her condition could have been reversed.

should be applied as a credit against the judgment. Dr. Virlar and Gonzaba also filed a motion for order of periodic payments. After a hearing, the trial court denied both motions. The trial court then signed a judgment against Dr. Virlar and Gonzaba, awarding Puente $14,109,349.02 in damages.[13]

Dr. Virlar and Gonzaba then filed post-judgment motions, including a motion for new trial, motion for remittitur, motion for judgment notwithstanding the verdict, and motion to modify the judgment. The trial court denied all their motions. They then appealed.

EXCLUSION OF EXPERT TESTIMONY

In their first issue, Dr. Virlar and Gonzaba argue the trial court erred in excluding deposition testimony from Dr. Ralph W. Kuncl, who would have testified about the liability of responsible third parties. "We review a trial court's exclusion of an expert witness's testimony for an abuse of discretion." *Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018). "A trial court abuses its discretion by failing to follow guiding rules and principles." *Id.* "To reverse a trial court's judgment based on the exclusion of evidence, we must find that the trial court did in fact commit error, and that the error was harmful." *Id.*

Here, Dr. Virlar and Gonzaba argue that Dr. Kuncl's testimony was relevant to responsible third parties in this case. Section 33.004 of the Texas Civil Practice and Remedies Code permits a defendant to seek to designate a person as a responsible third party by filing a motion for leave to designate that person on or before the 60th day before the trial date. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a). Section 33.003(a) requires a jury to determine, as to each cause of action asserted, "the percentage of responsibility, stated in whole numbers," for each claimant, each

[13] The jury awarded $14,285,505.86 in compensatory damages, of which $133,202.00 was for damages incurred in the past. The trial court awarded prejudgment interest, but also reduced the award by a $200,000.00 settlement credit relating to Puente's settlement with Dr. Patel. The net judgment was for $14,109,349.02. The judgment also awarded Puente court costs and post-judgment interest at the annual rate of 5% compounded annually.

defendant, each settling person, and "each responsible third party who has been designated under [s]ection 33.004." *Id.* § 33.003(a). Section 33.003(b), however, "does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission." *Id.* § 33.003(b).

Dr. Virlar and Gonzaba pled the alleged responsibility of twenty-six different health-care providers. Pursuant to section 33.003(b), they were not entitled to a jury submission on the conduct of these twenty-six alleged responsible third parties unless at trial there was "sufficient evidence to support the submission." *Id*. Dr. Virlar and Gonzaba argue on appeal they were denied that opportunity because the trial court excluded their evidence in the form of Dr. Kuncl's deposition testimony.

A. Standards for Expert Testimony in Medical Malpractice Cases

"Recovery in a medical malpractice case requires proof to a reasonable medical probability that the injuries complained of were proximately caused by the negligence of a defendant." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 860 (Tex. 2009). "Proximate cause includes two components: cause-in-fact and foreseeability." *Id*. "Proof that negligence was a cause-in-fact of injury requires proof that (1) the negligence was a substantial factor in causing the injury, and (2) without the act or omission, the harm would not have occurred." *Id*. "Thus, to satisfy a legal sufficiency review in such cases, plaintiffs must adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence." *Gunn*, 554 S.W.3d at 658 (quoting *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017)). "In medical-malpractice cases, the general rule is that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors." *Id.* (citations omitted).

A person is qualified to give opinion testimony concerning the causal relationship between the alleged injury and the alleged departure from the applicable standard of care only if the person meets the requirements of section 74.402 of the Texas Civil Practice and Remedies Code and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402; *Diagnostic Res. Group v. Vora*, 473 S.W.3d 861, 868 (Tex. App.—San Antonio 2015, no pet.). To be so qualified under Texas Rule of Evidence 702, an expert must have "knowledge, skill, experience, training, or education, regarding the specific issue." TEX. R. EVID. 702; *see Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). Further, the expert's testimony must be reliable. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 555 (Tex. 1995) ("To constitute 'scientific knowledge,' the proffered testimony must be reliable."). In determining whether expert testimony is reliable, courts may consider the nonexclusive factors set out in *Robinson* regarding scientific theories and techniques,[14] as well as the expert's experience. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). When the *Robinson* factors do not readily lend themselves to a review of the expert's opinion, expert testimony is unreliable if there is simply too great an "analytical gap" between the foundational data and the opinion proffered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726-27 (Tex. 1998).

Finally, an expert's testimony cannot be conclusory. "An expert's testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation." *Bustamante*, 529 S.W.3d at 462. "If no basis for the opinion is offered, or the basis offered provides

[14] *Robinson*'s list of nonexclusive factors include (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection." *Id.* "It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury." *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). "The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury." *Id*. "Stated differently, an expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of the statements to link the conclusions to the facts." *Bustamante*, 529 S.W.3d at 462.

B. Did the offer of proof presented by Dr. Virlar and Gonzaba meet these standards?

Dr. Kuncl, a neurologist, was an expert designated and retained by Puente, and not by Dr. Virlar or Gonzaba. Even though Dr. Kuncl was not their retained witness, Dr. Virlar and Gonzaba argued at trial that Dr. Kuncl's deposition testimony was relevant to the breach of standard of care (1) in failing to recognize the signs and symptoms of thiamine deficiency, and (2) in failing to order thiamine replenishment. Puente objected, arguing that Dr. Kuncl, as a neurologist, was not qualified to testify about the standard of care required of the twenty-six different healthcare providers, including nurses and emergency room physicians, who did not practice in the area of neurology. Further, Puente argued Dr. Kuncl's deposition testimony was too general and not sufficiently specific because his testimony did not address the standard of care and breach for each responsible third party. The trial court sustained Puente's objections. Dr. Virlar and Gonzaba then made an offer of proof.[15] The offer of proof included an Amended Designation of Deposition and

[15] Puente contends Dr. Virlar and Gonzaba have failed to preserve error on this issue because they withdrew Dr. Kuncl as a witness. In reviewing the record, we conclude that counsel for Dr. Virlar and Gonzaba did not withdraw Dr. Kuncl as a witness. Instead, counsel was merely recognizing that the trial court had already sustained two objections made by Puente to Dr. Kuncl being qualified to testify about the liability of other physicians, i.e. the responsible third parties. Defense counsel was recognizing that based on the trial court's rulings, it did not make sense to continue line by line through Dr. Kuncl's deposition testimony. Thus, he "withdrew" the remaining deposition excerpts and made an offer of proof of what Dr. Kuncl would have testified about. We find no waiver by Dr. Virlar and Gonzaba.

Video Testimony of Ralph W. Kuncl, Ph.D., M.D., and the actual excerpts from Dr. Kuncl's deposition testimony.

On appeal, Dr. Virlar and Gonzaba point to excerpts of Dr. Kuncl's deposition testimony in support of their argument that the trial court erred in excluding his testimony. They refer to where Dr. Kuncl testified he was "critical of every physician, every nurse, every dietician, every member of the team that cared for Ms. Puente." However, Dr. Kuncl could not explain those criticisms. When asked about a specific physician, Dr. Kuncl admitted that he had not reviewed the records related to that physician, so he could not comment on that physician's care. Nevertheless, when asked whether he would be "critical" of that physician for failing to recognize the risk of thiamine deficiency and to order replacement thiamine if that physician had seen Puente during her hospital admissions on January 14 and February 3, 2012, Dr. Kuncl replied, "Yes." According to Dr. Kuncl, he would have the same criticisms of emergency room physicians who saw Puente "[i]f they knew that she had altered anatomy and nausea and vomiting." Dr. Kuncl testified that his "criticisms extend to, virtually, everyone who was involved as a team caring for her and all who saw her, because every one of them had the chance that they missed to recognize the risk and the curative benefit of thiamine and the zero risk of administering thiamine." The attorney questioning Dr. Kuncl during the deposition pointed out that Dr. Kuncl's statements constituted a "general response":

> Q: *And I appreciate your general response*, *but I want to go through each physician.* So, you are critical and believe Dr. Lindsey, the emergency room physician or the physician at Val Verde Regional Medical Hospital, was negligent and below the standard of care?
>
> A: Yes, *if you'd allow me a caveat*. *Obviously, some physicians and therapists had vanishing little time to spend with her*, so I can't tell you how long that Dr. Lindsey spent with Jo Ann Puente. But every person who had a moment or a hand on her had a chance to reverse an otherwise fatal disease. *I'm*

> *guessing that there are going to be levels of liability dependent on the nature of the continuing care provided and how integral a part of the team, the bariatric surgical team*, they were. So, you'll list a lot of names and I'm going to say they're all responsible in a way because they all had a chance to give her repletion doses of thiamine.

(emphasis added). Dr. Kuncl later testified again he was "critical" of every physician who saw Puente during her admissions in January and February 2012 "*with the caveat that her stays at Val Verde were very short*." (emphasis added).

The above testimony by Dr. Kuncl is general in nature and does not explain how and why a specific physician breached the applicable standard of care and proximately caused Puente's injuries. *See Bustamante*, 529 S.W.3d at 462. Dr. Kuncl admitted this general response cannot apply to all the healthcare providers. Although Dr. Kuncl testified that all the physicians were liable for Puente's injuries because they were part of a "team," he then admitted that some physicians had "vanishing little time to spend with her" and he was "guessing that there are going to be levels of liability dependent on the nature of the continuing care provided and *how integral a part of the* team, the bariatric surgical team, they were." (emphasis added). Thus, Dr. Kuncl gave general statements of every member of the "team" being held responsible, while also admitting that some members of the team would have different "levels of liability" based on the circumstances presented. Dr. Kuncl, however, does not go through these circumstances and specifically explain the standard of care applicable to each alleged responsible third party and how that alleged responsible third party breached the standard and proximately caused Puente's injuries. Thus, the above testimony by Dr. Kuncl is general and conclusory; it is therefore not considered "probative evidence, regardless of whether there is no objection." *Bustamante*, 529 S.W.3d at 462.

Dr. Virlar and Gonzaba also point to where Dr. Kuncl was asked whether he believed "all the physicians should have been aware of . . . the high risk for thiamine deficiency" to Puente. Dr. Kuncl, replied, "Yes, *because the literature and common medical knowledge* in the era of post-bariatric surgery always lists such patients, especially those with malabsorption surgery like Roux-en-Y procedure, as those being listed to be at high risk for thiamine depletion." (emphasis added). Thus, Dr. Kuncl testified that *all physicians* should be *aware* of the high risk posed to Puente, but did not specifically detail how the alleged responsible third parties in question failed to appreciate that risk. Dr. Kuncl admitted that the amount of time spent with Puente would be a "caveat" to his answer. Again, Dr. Kuncl's testimony is general and conclusory. *See Bustamante*, 529 S.W.3d at 462.

Dr. Virlar and Gonzaba also point to where Dr. Kuncl in a conclusory fashion agreed to the following statements:

- And you're critical of all of those physicians and their failure to replete the thiamine?
- And do you believe that their failure to do was a cause, in fact, of Mrs. Puente's neurological deficits and current condition?
- If Dr. Silva was at the bedside on January 18th, would you be critical of him for not diagnosing Wernicke's encephalopathy?
- Are you critical of the ophthalmologist who saw her as an outpatient specifically evaluating this presentation to include ocular disorders?

In response to all these statements, Dr. Kuncl simply replied, "Yes." His agreement with these conclusory statements cannot be considered probative evidence. *See Bustamante*, 529 S.W.3d at 462.

With respect to hospital staff, nurses, or dieticians, Dr. Kuncl testified that he did not expect the nurses or dieticians to make the diagnosis of Wernicke's encephalopathy; he did expect them "to be aware of the risk factors and the need to prophylax to prevent it." Thus his "criticism" was they did not recognize the risk factors or "make a recommendation to replete." Once again, Dr.

Kuncl's testimony is general and conclusory, and does not constitute probative evidence. *See Bustamante*, 529 S.W.3d at 462.

Given that the excerpts from Dr. Kuncl's deposition testimony presented in the offer of proof do not constitute probative evidence, Dr. Virlar and Gonzaba have failed to show the trial court erred in excluding Dr. Kuncl's deposition testimony.

TEXAS RULES OF EVIDENCE 403 AND 404

In their second issue, Dr. Virlar and Gonzaba argue the trial court abused its discretion by allowing questions and admitting evidence regarding (1) Dr. Virlar's loss of privileges in violation of Texas Rule of Evidence 403; and (2) prior acts in treating other patients in violation of Texas Rule of Evidence 404.

A. Rule 403: Loss of Privileges

According to Dr. Virlar and Gonzaba, Puente was allowed to ask Dr. Virlar repeatedly whether he had lost his privileges at Methodist Hospital, which they contend was "clearly intended to mislead the jury into believing Dr. Virlar had lost his privileges as a result of Puente's care."

1. Did Dr. Virlar and Gonzaba preserve error for appeal?

Puente argues that Dr. Virlar and Gonzaba did not preserve this issue for appeal. In response, Dr. Virlar and Gonzaba contend they did preserve error and point to the portion of the reporter's record where the trial court ruled on motions in limine. A ruling on a motion in limine, however, does not preserve error for appeal. It "is designed solely to require an offering party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury." *Castaneda v. Tex. Dep't of Protective & Regulatory Servs*., 148 S.W.3d 509, 520 (Tex. App.—El Paso 2004, pet. denied). Accordingly, a ruling on a motion in limine "has no bearing on the ultimate admissibility of the evidence," *id.*, and "preserves nothing for review", *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 873 (Tex. App.—Corpus Christi–

Edinburg 2006, pet. denied). Dr. Virlar and Gonzaba's argument that portions of the reporter's record relating to the motion in limine show they preserved error is without merit. *See id*.

Once trial began, the record reflects that during Dr. Virlar's testimony, Puente's attorney informed the trial court outside the presence of the jury that he was "going to get into [Dr. Virlar's] loss of privileges." Puente's attorney noted that defense counsel had been allowed to ask his expert witnesses, who were physicians, whether they had privileges at hospitals. Defense counsel objected and argued the question was unfair to Dr. Virlar because he was barred by peer privilege from explaining why his privileges had been revoked. Defense counsel argued the question, "Do you have privileges now at Methodist?" was "[p]robably an appropriate question," because it "does not get into the peer review process." However, the question, "Were your privileges revoked?" did get into "an action by a peer review committee." Defense counsel then made an objection pursuant to rule 403:

> And, Judge, in addition to privilege, let me add something else. Under the rule–and I'm– I believe, in this case, prejudicial effect of this line of inquiry far exceeds any probative value it may have in this case. If he asks the question: "Did you lose privileges?", and I do not respond with a question like, "Did it have anything to do with this case?"–which it–manifestly did not. It was two years later–if I don't ask that question, the jury is going to speculate about why he lost his privileges, and certainly going to speculate that it had something to do with his care of Ms. Puente. So you have a huge prejudicial effect out of a simple small question there. If he answers then, "No, it had nothing to do with this case," arguably, I'm opening the door for [Puente's attorney] to come back and say, "Well, what did it have to do with?", and then we're back to the race going into things that the doctor is not permitted to talk about.

Puente's counsel then informed the trial court that he was "looking at Dr. Virlar's board of medical examiner site," and the information online showed Dr. Virlar "entered into an agreed order publicly reprimanding himself and requiring him to go back and complete 24 hours of continuing medical education, 8 hours in risk management, 8 hours in ethics, 8 hours in professional

communications, and pay an administrative fee." According to Puente's counsel, all the information was public record. The trial court then stated to defense counsel, "I hear your argument, but if it's something we can look up, how can we say that's privileged information and can no longer be discussed?" The trial court overruled defense counsel's objection.

Puente's counsel then stated that he was "not going to ask [Dr. Virlar] what it arose out of." He was "just going to ask [Dr. Virlar] . . . [whether he has] any privileges at any hospitals now?" Defense counsel replied that Dr. Virlar presently had privileges at two hospitals.

> COURT: Well, then, if the doctor has regained his privileges, then he regained his privileges. He can talk about that. But I don't want the trial–I don't want to try that case. And the actual intricate workings of the peer review of how the physician is not going to be–well, we don't know any of that information. We're not going to talk about that. We're not going to try that. I mean, we've got to keep it clean. You know, it's just have you–did you subsequently lose– and then they are going to come back and say, since then, you have gained it at some other hospitals. I'm going to give him some room to explain, if he feels like he wants to, you know, explain his–
>
> PLAINTIFF: Okay. But I just want to make everyone aware, if you open the door and try to explain it away, I'm going to get into the fact that he agreed to be disciplined.
>
> DEFENSE: And, again, it's not admissible. The facts in there are not admissible.

In the presence of the jury, Puente's attorney began questioning Dr. Virlar about privileges:

> Q: Okay. Doctor, what are privileges? When a hospital grants you privileges, what does that mean?
> A: It is a courtesy by the hospital that allows you to go into a hospital setting to evaluate patients.
> Q: Do you have to apply for those?
> A: Yes, sir.
> Q: Have you ever lost your privileges?
> A: Yes, sir.
> Q: How many times have you lost your privileges from hospitals?
> A: Once.

Q: And that was in 2014?
A: December of 2013.

Until this point in Dr. Virlar's testimony, any error has been preserved for appeal. Dr. Virlar's testimony was within the ruling of the trial court about what was admissible–that is, what Puente would be allowed to question Dr. Virlar about. *See* TEX. R. EVID. 103(b) ("When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal."); *see also Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235-36 (Tex. 2007) (explaining that at a bench conference, the trial court ruled it would allow questions "about the prior patient's treatment to the extent that his statements concerning that treatment were inconsistent with his trial testimony," but that the cross-examination "went well beyond that limitation," thus requiring the attorney to object again to preserve the issue for appeal).

Puente's attorney then asked the question that is the basis of Dr. Virlar and Gonzaba's complaints on appeal:

Q: December of 2013. *So right after you took care of Jo Ann*?

DEFENSE: Objection, Your Honor. Can we approach?

PLAINTIFF: **I'll withdraw that, Your Honor.**

(emphasis added). Puente's attorney then continued his questioning about another subject without further comment by the defense. Thus, there was no evidence admitted here, and the trial court never ruled on the objection. If Dr. Virlar and Gonzaba believed the mere asking of the question was prejudicial, to preserve error, they needed to obtain a ruling on their objection, and if that objection was sustained, move for the trial court to instruct the jury to disregard the question. *See* TEX. R. APP. P. 33.1. They needed to request relief from the trial court at a point in the proceedings when the trial court could have cured any alleged error. *See* O'CONNOR'S TEXAS RULES–CIVIL

TRIALS, ch. 8, § 5, at 839 (2019) (explaining that (1) "[g]enerally, an improper question that is not answered by the witness does not constitute reversible error," (2) "[i]n most cases, the error in asking a prejudicial question can be cured by an instruction to the jury to disregard the question"; and (3) when the trial court sustains an objection, "to preserve error, the party should pursue an adverse ruling"). Thus, whether this question was unduly prejudicial is not preserved on appeal.

Finally, Dr. Virlar and Gonzaba point to where Puente's attorney again questioned Dr. Virlar about privileges:

Q: Which hospital did you lose your privileges at?
A: Methodist.
Q: The one where you had taken care of–the one where Ms. Puente was?
A: The Methodist Healthcare System.
Q: Do you have those back?
A: No, sir.

This evidence is within the ruling by the trial court and thus the rule 403 objection was preserved here. *See McShane*, 239 S.W.3d at 235-36.

In summation, the complained of testimony that has been preserved on appeal consists of testimony that Dr. Virlar lost his privileges, once, in December 2013, at Methodist Hospital and does not have those privileges back.

2. *Did the trial court abuse its discretion in ruling this testimony did not violate Rule 403?*

Texas Rule of Evidence 403 permits a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. Thus, "testimony is not inadmissible on the sole ground that it is 'prejudicial' because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent." *Diamond Offshore Servs. Ltd v. Williams*, 542 S.W.3d 539, 549 (Tex. 2018) (quoting

McShane, 239 S.W.3d at 234). "Rather, *unfair* prejudice is the proper inquiry." *Id.* (emphasis in original). "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (citations omitted). "When determining the admissibility of evidence under rule 403, trial judges must balance the probative value of the evidence against relevant countervailing factors." *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018).

We review a trial court's admission of evidence for abuse of discretion. *See Williams*, 542 S.W.3d at 542; *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). A trial court abuses its discretion when it acts without regard for any guiding rules. *Caffe*, 487 S.W.3d at 142.

In arguing this testimony was unduly prejudicial under rule 403, Dr. Virlar and Gonzaba contend "[e]vidence of credentialing or the loss of privileges of a defendant physician to practice at a hospital are matters irrelevant and unduly prejudicial to that physician in a medical malpractice claim arising out of alleged negligence in the care and treatment of an unrelated patient." For support, they point to an unpublished opinion: *Neeble v. Sepulveda*, No. 01-96-01253-CV, 1999 WL 11710, at *6 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). In *Neeble*, the appellant argued the trial court erred because (1) it ordered a separate trial on the negligent credentialing and failure to monitor claims against the hospital from the negligence claims against the doctors; and (2) it ordered the appellant not to inform the jury of the claims against the hospital and of previous medical malpractice lawsuits against the appellee doctor. *Id.*

The court of appeals explained that "[t]he admission of evidence of previous claims and lawsuits is governed in part by Texas Rule of Evidence 404(b)," which precludes "a party from using evidence of other acts to prove a person acted in conformity with that past conduct." *Id.* The court concluded that "[t]he evidence of previous medical malpractice lawsuits against [appellee doctor] was, therefore, inadmissible in the current negligence action against him." *Id.* However,

the evidence was "admissible to prove the negligent credentialing and failure to monitor claims against" the hospital. *Id.* According to the court of appeals, "[b]ecause trying both claims simultaneously would have unduly prejudiced" appellee doctor, the trial court did not abuse its discretion in ordering separate trials and in ordering appellant to not inform the jury of the claims against the hospital and of previous medical malpractice lawsuits against appellee doctor. *Id.*

The facts presented in this appeal are distinguishable from those in *Neeble*. Here, there was no evidence of previous medical malpractice claims and lawsuits—the trial court explicitly limited the scope of the questions to just whether Dr. Virlar had lost his privileges and whether he had them now.

Further, Puente points out that Dr. Virlar testified as an expert witness on his own behalf. And, she emphasizes that the "qualifications of a medical expert include the nature and extent of his or her practice, including the existence or lack of hospital privileges." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.401 (requiring expert witness testifying about accepted standards of medical care to be "qualified on the basis of training or experience," which includes whether the witness "has other substantial training or experience in an area of medical practice relevant to the claim" and "is actively practicing medicine in rendering medical care services relevant to the claim"); *Tenet Health Ltd. v. Zamora*, 13 S.W.3d 464, 472 (Tex. App.—Corpus Christi–Edinburg 2000, pet. dism'd w.o.j.) (explaining that "bestowment of hospital privileges does not mean a physician has an unlimited right to practice medicine in a particular hospital, but rather whether he is *qualified* to practice there according to the scope of the privileges") (emphasis in original). Indeed, as noted by Puente, defense counsel at trial acknowledged that he had asked all his experts about whether they have privileges. In reviewing the record, we hold that the trial court did not abuse its discretion in ruling Dr. Virlar's testimony that he had lost his privileges, once, in December 2013,

at Methodist Hospital and did not have those privileges back was not unduly prejudicial under rule 403.

B. Rule 404: Prior Acts

In their second issue, Dr. Virlar and Gonzaba also complain that the trial court allowed Puente's attorney to question Dr. Virlar about "whether he had a history of not reading a patient's charting or examining the patient before administering treatment" in violation of rule 404. Puente again argues this issue is not preserved for appeal.

To preserve error for appellate review, the complaining party must (1) make a timely objection to the trial court that "state[s] the grounds for the ruling that the complaining party s[eeks] from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context," and (2) obtain an adverse ruling. *See* TEX. R. APP. P. 33.1.

In support of their argument that they did preserve error for appeal, Dr. Virlar and Gonzaba point to objections they made during a motion in limine:

> DEFENSE: Briefly, Your Honor, we would like to make an oral motion in limine relating to the testimony of Dr. Virlar. We would ask that the Court instruct counsel not to go into two issues. One is Dr. Virlar's prior lawsuit. . . . And the second thing is Dr. Virlar, in December of 2013, lost his privileges at Methodist Hospital. . . .
>
> [discussion about loss of privileges]
>
> COURT: What about the prior lawsuit?
>
> PLAINTIFF: The prior lawsuit, I intend to question him about a bunch of answers he gave in that deposition. I was not going to say "This is a case where you got sued and I was the lawyer for the plaintiff" or whatever. I was going to say, "Is it true you have given prior testimony regarding other patients? For example, in this other patient, you did X, Y, and Z, which is pretty much the same that [you] did here." And so, you know, that's what I'm going to do with it. I'm going to be asking about specific answers he gave in his deposition back then.

> DEFENSE: Judge, this is going into a completely different character trait. If he is asking specific questions about the care of a patient during a prior lawsuit, then we're going to end up retrying the entire lawsuit, I mean, because then all that was done in that has to be re-justified, giving me another half a day that I've got to go into it. If he gives an answer to a question about this case that is contradicted by his answer on previous sworn testimony, that would certainly be permissible.
>
> COURT: Well, obviously, we're not going to try the other lawsuit. You can talk about it. But I think – I mean, it's sworn testimony. It's got to be relevant in some sense to this one.
>
> PLAINTIFF: It will be, Judge.
>
> COURT: And so why don't you, I guess, on both of these issues – Mr. Anderson, do you have any case law about this that the defense would not be able to go into the loss of privileges at a hospital?
>
> DEFENSE: Nothing directly on it. There is nothing. I can promise the Court I have looked. It's just general that all peer review is protected and privileged; and, therefore, we can't get to the records. We can't find out what was done or why, whether he did it voluntarily, or whether they were lost due to a problem totally unrelated to anything relevant to this case.
>
> COURT: But your client can testify as to his understanding. I mean, if he lost his privileges or if he voluntarily, you know, decided not to practice at the hospital anymore. *And then on the prior lawsuit, Mr. Rhodes [Puente's counsel], why don't we approach at that point when you get to the point?*

(emphasis added). As noted previously, a ruling by the trial court on a motion in limine "does not preserve error on evidentiary rulings at trial because it does not seek a ruling on admissibility; rather, the purpose of such a motion 'is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury' without seeking the trial court's permission." *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 n.3 (Tex. 2015) (quoting *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963)). Thus, the above portions of the reporter's record do not show Dr. Virlar and Gonzaba preserved any complaint for appeal.

The parties continued their argument to the trial court:

> PLAINTIFF: Let me give you an example: "Isn't it true that you have a history of prescribing to patients without seeing them or looking at the records?" That's one of the questions.
>
> DEFENSE: Judge, it's totally irrelevant. There is no allegation that he did anything improper in prescribing to this patient. Th[ese are] other bad acts that are irrelevant to this case, and that kind of evidence is simply not permissible.
>
> PLAINTIFF: He never read the records in this case. It's totally relevant. He has a history of it. He didn't read the records.
>
> DEFENSE: Okay.
>
> PLAINTIFF: So how is that not relevant?
>
> DEFENSE: What are you contending he prescribed that hurt her?
>
> PLAINTIFF: The prescription – he treated the patient in a way that injured the patient without looking at the patient or looking at the records.
>
> DEFENSE: That's a prior bad act, Judge. It's one. There is no showing that it's a substantially similar circumstance. That kind of evidence should not be permitted.
>
> COURT: *When you get to that point, Mr. Rhodes [Puente's counsel], please approach*.

(emphasis added). The trial court thus again made a ruling on a motion in limine; no error was preserved for appeal. *See Kaufman*, 197 S.W.3d at 873.

Dr. Virlar and Gonzaba also point to the following portions of Dr. Virlar's testimony at trial to show they preserved error for appeal:

> PLAINTIFF: Can we approach, Your Honor?
>
> COURT: Yes.

PLAINTIFF: I'm going to – this is where I want to ask him about his history of not looking at records and not examining patients before he prescribes treatment or renders treatment.

DEFENSE: And, again, Judge, it's past acts.[16] He has got one. There is no evidence of a history. It's just trying to get into some dirt that has no relevance to this case whatsoever -- one prior act that may be simple -- he hasn't established that he didn't examine the patient before he treated. So right now, it's not even relevant.

COURT: I mean, I'm going to allow you to try to lay a proper predicate.[17]

PLAINTIFF: Thank you.

Q. (By Plaintiff): Doctor, do you have a history in the past of–

DEFENSE: Excuse me, Your Honor. Can we approach? I'm sorry. I'm sorry. He is going to go to the history part of it going into a prior act. I thought what the Court said was that he could lay a predicate by establishing its relevancy in the presence. He can't do that by referring to the history. The question is, in this case, did he do what he is now saying he did in the past; and he hasn't established that yet. There is no predicate for that line of questioning.

PLAINTIFF: Your Honor, we have already laid the predicate, the fact that I asked him the question about the standard of care requiring him to look at the test and to look at the chart.

DEFENSE: He has not established that he didn't yet. That question and answer has not yet been had.

PLAINTIFF: Well, it's one of the two.

COURT: I need you to rephrase the question, a history of, you know.[18]

[16] Defense counsel appears to be objecting under Texas Rule of Evidence 404.
[17] This statement by the trial court is not a ruling on the admissibility of the evidence. The trial court was merely allowing Puente's counsel to lay a predicate.
[18] Similarly, this statement by the trial court is not an adverse ruling on the admissibility of the evidence. The trial court was merely asking Puente's counsel to rephrase the question for purposes of laying a predicate.

PLAINTIFF: Yes, Your Honor. I will rephrase it.

DEFENSE: Thank you.

Q. (By Plaintiff): Doctor, given your possibilities on the nutritional assessment that you either ignored it or you didn't look at it, do you sometimes, in other patients, not read the chart or examine the patient before you render treatment?

A. No, sir, usually we go through all the tabs to get the information that we need that's available at the time.

Q. Do you remember Charlotte Watson?

A. Yes, I do, sir.

Q. Isn't it true that you rendered treatment to her – that you rendered treatment to her without ever seeing her or without ever looking at her chart? That was a patient that was in the hospital for a knee surgery.

DEFENSE: Excuse me. Doctor, at this point, without going back into the old case, could you simply answer the question, please?[19]

WITNESS: Okay.

A. Can you repeat the question, please?

Q. (By Plaintiff) Did you render treatment to her, over the telephone from your couch, without looking at her or looking at her chart?[20]

A. Based on the information that the nurse provided to me over the phone regarding her clinical state and the clinical information that she had available at her disposal, yes, I did.

PLAINTIFF: Objection, nonresponsive, Your Honor.[21]

COURT: Sustained.

[19] Defense counsel did not object to the question; instead, he instructed his client to answer the question.
[20] Defense counsel did not object.
[21] Defense counsel did not object. The objection sustained was made by Puente's counsel.

Thus, defense counsel did not object to the question about whether Dr. Virlar treated Charlotte Watson "over the phone, without looking at her or looking at her chart." And, any error based on Dr. Virlar's answer is not preserved for appellate review.

The questioning continued:

Q. (By Mr. Plaintiff): Did you render treatment to her from your couch at home without seeing the patient or looking at her chart, "yes" or "no"?

A. Yes.

Q. Thank you. Do you do that a lot?

DEFENSE: Your Honor, objection, this goes –

COURT: I didn't hear the comment.

PLAINTIFF: The question was: Does he do it a lot?

DEFENSE: Your Honor, we're now opening up the entire practice.[22]

COURT: Overruled.

Q. (By Plaintiff) Do you do that a lot?

A. No, sir.

Thus, defense counsel obtained an adverse ruling to the question regarding whether Dr. Virlar treats patients "a lot" without looking at their chart or seeing them. However, Dr. Virlar responded that he did not practice that way. As Dr. Virlar did not agree with the question, any error from the asking of the question is harmless.

Puente's counsel continued his questioning of Dr. Virlar:

Q. Because that's not the way you're supposed to practice medicine, is it? Is it?

[22] Defense counsel did not specifically object under rule 404. From the context, we can assume counsel meant rule 404.

A. Is that a question?

Q. Yes. That's not the way you're supposed to practice medicine, is it?

A. Which way?

Q. Where you render treatment to a patient without seeing the patient or looking at the chart.[23]

A. We render care of the patient based on the evaluation of the patient, and sometimes that may be via many means. Now, with social media, there is electronic means, over the phone. There is PubHelp. We may not have the chart at our disposal at the time.

Q. But you didn't have any of that with regard to Charlotte Watson, did you, none? You just rendered treatment over the phone without seeing her chart and without seeing the patient.

A. Yes, sir.[24]

Q. And you know what that resulted in, don't you?

DEFENSE: Your Honor, we're going well outside –

COURT: Sustained.

Thus, defense counsel obtained a ruling by the trial court to the question "And you know what that resulted in, don't you?" However, defense counsel did not obtain an adverse ruling. After the trial court sustained the objection made by defense counsel, Puente's counsel moved on to another topic. To preserve error, defense counsel would have needed to move to instruct the jury to disregard, and if the trial court complied, he would have then needed to move for a mistrial. *See* TEX. R. APP. P. 33.1.

[23] No objection was made by defense counsel.
[24] No objection was made by defense counsel. Further, Dr. Virlar had already testified without objection about Charlotte Watson.

Dr. Virlar and Gonzaba point to no other portions of the record. Therefore, we find no abuse of discretion by the trial court.

*C. **Harmless Error***

Even if we were to assume that the trial court erred in admitting the above evidence, any error was harmless. "Erroneous admission of evidence requires reversal only if the error probably (though not necessarily) resulted in an improper judgment." *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004); *see* TEX. R. APP. P. 44.1(a). "We review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted." *Nissan*, 145 S.W.3d at 144.

"Clearly, erroneous admission is harmless if it is merely cumulative." *Id.* "But beyond that, whether erroneous admission is harmful is more a matter of judgment than precise measurement." *Id.* "In making that judgment, we have sometimes looked to the efforts made by counsel to emphasize the erroneous evidence and whether there was contrary evidence that the improperly admitted evidence was calculated to overcome." *Id.*

In arguing the evidence about the loss of hospital privileges was harmful, Dr. Virlar and Gonzaba point to statements made by Puente's counsel during closing argument.[25] While Puente's counsel did refer to Dr. Virlar's loss of privileges, the focus of his closing argument was on the facts of this particular case and the symptoms exhibited by Puente during her hospitalizations. Further, in considering the entire record, we conclude this case did not turn on whether Dr. Virlar lost his privileges once and whether he had those privileges back at Methodist Hospital. This case

[25] Puente's counsel stated during closing argument, without objection, that the jury could "believe it when [Dr. Virlar] says he lost his privileges at every hospital in San Antonio and cannot practice in any hospital in this city." Dr. Virlar testified he was currently employed at Doctors Hospital of Laredo as a full-time hospitalist and also "as a local at Fort Duncan in Eagle Pass." He testified he also worked at a clinic in San Antonio. Thus, Dr. Virlar testified that he had "admitting privileges at Doctors Hospital in Laredo and Fort Duncan in Eagle Pass." When he is in San Antonio, he is "in the clinic and at the nursing facilities."

turned on whether Dr. Virlar breached the standard of care by failing to treat Puente for a thiamine deficiency.

Similarly, with regard to the evidence that Dr. Virlar rendered treatment to another patient over the phone without reviewing her chart, this case did not turn on that evidence, but instead turned on whether Dr. Virlar *in Puente's case* had failed to realize she was exhibiting signs of thiamine deficiency because he admittedly did not review nurses' notes or notes from the dietician and physical therapist.

At trial, Puente's counsel presented evidence from witnesses and Puente's medical records proving that during her hospitalizations, Puente exhibited classic signs of thiamine deficiency. Although nurses and the physical therapist wrote notes in her medical records documenting those symptoms and although a dietician recommended twice in her medical records to supplement her nutrition, Dr. Virlar admitted at trial he did not read those notes at the time and was thus unaware of Puente's many symptoms. He testified the symptoms were "not reported" to him. For example, Dr. Virlar admitted he had not read the nurses' notes regarding Puente not responding to questioning, having a "fixed gaze," and exhibiting abnormal eyeball movement. Dr. Virlar testified that when he was on the hospital floor, "it was never reported to [him]" and that if *he* had observed any nystagmus in her eyes during *his* exam, he would have documented it. Thus, while Dr. Virlar emphasized a "team approach"[26] to the medical professionals treating Puente, he admitted to not reading notes written by nurses, her physical therapist, and the dietician. For example, Dr. Virlar admitted he never looked at the progress note by the physical therapist reporting that Puente had exhibited a Trendelenburg gait. Dr. Virlar testified if the gait had been reported to him, he would

[26] When asked who was the "captain" of the team, Dr. Virlar testified that he was the "admitting attending physician," but then claimed "there is no real captain." "We work as a team. Basically, there is no like, hey, man, I'm the captain, you do what I say. It doesn't work that way." When pressed who was the physician of record, Dr. Virlar stated, "I was."

have looked into the symptom. Later during his testimony, Dr. Virlar admitted that at the time of Puente's hospitalization, he had not known what a Trendelenburg gait was and only recently learned about it.

Further, while Dr. Virlar claimed he would have documented a significant observation like nystagmus, he also claimed to have had a "general conversation" with Dr. Patel that he did not document in Puente's records. According to Dr. Virlar, he brought up putting Puente on TPN with Dr. Patel, but Dr. Patel wanted to keep advancing her oral diet: "I would discuss my concerns regarding the nutrition with Dr. Patel, who then advised me, based on his expertise, to basically give him more time to work on her diet." When asked why this conversation was not documented in Puente's medical records, Dr. Virlar testified that "[s]imply because it is not documented doesn't mean it was not discussed or considered." Puente's counsel responded, "What are you taught in medical school? If it ain't documented, it wasn't done, correct?" Dr. Virlar replied, "Yes and no. We cannot document every concern in the chart on every patient. The documentation is *for billing purposes*." (emphasis added). Puente's counsel attempted to clarify Dr. Virlar's testimony: "Your understanding is the notes you are recording in your progress notes are just for billing?" Dr. Virlar responded,

> No. The progress note serves two purposes. It is a diary of my actions, for me to document what I consider important and relevant, plus whatever other purpose my entry may serve for me. In addition, it also serves the purpose as a billing record to basically ensure to payers that I did see the patient at that time and that it is appropriate for me to bill for that visit.

Puente's counsel then asked, "Is one of the purposes of charting patient's care the continuity of care?" Dr. Virlar admitted that "[i]t helps with the continuity of care."

Not only had Dr. Virlar not documented this conversation with Dr. Patel regarding Puente's nutrition in her medical records, but Dr. Virlar also failed to mention it during his deposition. He

was asked during his deposition whether he recalled "[u]p until the time of discharge" "any specific conversations" he had with Dr. Patel about Puente. At the deposition, Dr. Virlar responded, "No." At trial, he claimed that after reviewing Puente's chart in preparation for his testimony, he had remembered the conversation with Dr. Patel. Puente's counsel then asked him whether he had reviewed Puente's chart before his deposition. Dr. Virlar testified he had not, but then admitted he could not recall. Dr. Virlar then clarified, "But I do remember the conversation with Dr. Patel."

Dr. Virlar's inconsistent testimony was so significant that defense counsel addressed the matter during closing argument:

> I need to do something now, and this is pretty painful for me. Dr. Virlar testified to conversations that he now remembers that he did not remember at the time of his deposition. One of two things is true. Either, as he said, that as he went through these records over and over again in the three weeks leading up to trial, he remembered some things that he had not remembered at the time of his deposition. The other thing that you could conclude and that I suspect [Puente's counsel] will suggest when he does the rebuttal portion is that Dr. Virlar made up some of those conversations. I can't read your minds. I don't know which way you're thinking about this. I will tell you if you believe he made up those conversations, that was wrong, and you have every right to be angry about that, because you're not supposed to do that under oath. And I can't endorse that, and I can't even try and defend that, and I won't. But recall your oath. What did you swear to do? Render a true verdict. The court is asking you, did the negligence, if any, of those doctors proximately cause the injury? Your concern with the evidence is five years ago, not what happened here last week. Five years ago. What you are entitled to do, and the court has told you this, you are the sole judges of the credibility of a witness. If you believe that Dr. Virlar was not reliable in his testimony, it is your right and indeed your duty to give no weight to anything that he said on that witness stand, no weight. That is your—that is the ability you have. What you cannot do consistent with your oath is to decide this case on the fact that you believe he did not tell you the truth.

Finally, Dr. Virlar testified without objection that he no longer works for his previous employer: "I was given two options: one to basically be terminated or one to resign. I took the termination letter so that they wouldn't be able to enforce the non-compete. If I had taken a resignation letter, I wouldn't have been able to practice in the hospitals in San Antonio."

Given this entire appellate record, we cannot conclude that any error in the admission of evidence complained of by Dr. Virlar and Gonzaba "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a). Thus, even if the trial court had erred in allowing the evidence, any error was harmless.

LOSS OF FUTURE EARNING CAPACITY

In their third issue, Dr. Virlar and Gonzaba argue the judgment for loss of future earning capacity was supported by legally and factually insufficient evidence. "Lost earning capacity is an assessment of what the plaintiff's capacity to earn a livelihood actually was and the extent to which that capacity was impaired by the injury." *Hospadales v. McCoy*, 513 S.W.3d 724, 742 (Tex. App.—Houston [1st Dist.] 2017, no pet.). "Loss of past earning capacity is a plaintiff's diminished ability to work during the period between the injury and the date of trial." *Id.* "Loss of future earning capacity is the plaintiff's diminished capacity to earn a living after trial." *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 491 (Tex. App.—Amarillo 2006, no pet.); *see Tagle v. Galvan*, 155 S.W.3d 510, 519 (Tex. App.—San Antonio 2004, no pet.). "In order to support such a claim, the plaintiff must introduce evidence from which a jury may reasonably measure in monetary terms [her] earning capacity prior to injury." *Bituminous*, 223 S.W.3d at 491. "If the plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of [her] loss can best be shown by comparing [her] actual earnings before and after [her] injury." *Id*. "Because the amount of money a plaintiff might earn in the future is always uncertain, the jury has considerable discretion in determining this amount." *Id*.; *see Tagle*, 155 S.W.3d at 519 (same).

To support an award of damages for loss of future earning capacity, the plaintiff can introduce evidence of (1) past earnings; (2) the plaintiff's stamina, efficiency, and ability to work with pain; (3) the weakness and degenerative changes that will naturally result from the plaintiff's injury; and (4) the plaintiff's work-life expectancy. *Perez v. Arredondo*, 452 S.W.3d 847, 862

(Tex. App.—San Antonio 2014, no pet.); *Tagle*, 155 S.W.3d at 519. "There must be some evidence that the plaintiff had the capacity to work prior to the injury, and that [her] capacity was impaired as a result of the injury." *Tagle*, 155 S.W.3d at 520.

In considering whether the evidence is legally sufficient to support the jury's finding of loss of future earning capacity, we examine the record for evidence and inferences that support the jury's finding and disregard all contrary evidence and inferences. *See id.* at 517. If there is more than a scintilla of evidence to support the jury's finding, the evidence is legally sufficient to support the jury's finding. *See id.* at 518.

With regard to whether the evidence is factually sufficient to support the jury's finding of loss of future earning capacity, we consider all the evidence in the record, both for and against the jury's finding. *See id*. The evidence is factually insufficient if the jury's finding "is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* As the trier of fact, the jury "determines the credibility of the witnesses and the weight to be given their testimony, decides whether to believe or disbelieve all or any part of the testimony, and resolves any inconsistencies in the testimony." *Id.* Thus, when there is conflicting evidence, we defer to the jury as the trier of fact. *Id*.

Dr. Virlar and Gonzaba argue the evidence is legally and factually insufficient to support the jury's award of damages for loss of future earning capacity because the only evidence to support such an award was the testimony of Dr. Keith Fairchild, Puente's economist. Dr. Fairchild valued Puente's past and future loss of earning capacity, including her loss of employee benefits, at $1,013,631.00. The jury, however, awarded Puente $1,021,631.00, which is $8,000.00 more than Dr. Fairchild's valuation.

Dr. Fairchild testified that in making his calculations of Puente's loss of earning capacity, he assumed an average life expectancy based on vital statistics tables published by the Centers for

Disease Control and Prevention. He projected Puente to live until February 23, 2062. According to Dr. Fairchild, Puente could live longer than this average life span or she could live less than this average life span. Dr. Fairchild also assumed an inflation rate of 2.29 percent per year and a discount rate based on a seven-year U.S. Treasury bond, which he testified was a "middle of the road" investment model. He also projected the remaining work-life expectancy to be May 21, 2038, at which time Puente will be sixty-two years of age. According to Dr. Fairchild, he based Puente's work-life expectancy on average statistics reported by the government, including the Bureau of Labor Statistics, which take into account gender and educational level. He projected Puente's loss of future earning capacity to be $880,429.00. He testified his opinions were based on a reasonable degree of economic and financial probability. The jury awarded Puente $888,429.00 for loss of future earning capacity, which exceeds the range of Dr. Fairchild's testimony by $8,000.00.

In response, Puente argues that Dr. Virlar and Gonzaba incorrectly assert Dr. Fairchild's testimony was the only evidence of her loss of future earning capacity. She states that Dr. Altman, Dr. Gavi, and "appellants' own damage witness testified to various aspects of Jo Ann Puente's impairment, its duration, her life expectancy, and the composite of factors that may affect a person's capacity to earn, such as pain, weakness, and diminished functional ability." Puente, however, does not cite to the record where these witnesses gave testimony. *See* TEX. R. APP. P. 38.1(i). Nor does Puente explain how the testimony from these witnesses would affect Dr. Fairchild's calculations. It is undisputed that Puente was employed as an administrative assistant with the San Felipe Consolidated School District earning approximately $26,000 per year at the time of her injuries. It is also undisputed that due to her permanent injuries, she is wholly incapable

of working.[27] Thus, the extent of her impairment is really not at issue on appeal. *See Bituminous*, 223 S.W.3d at 491 (explaining that if a plaintiff's earning capacity is not totally destroyed, but only impaired, the extent of her loss is relevant). Further, the testimony in this case was Puente will have a longer life expectancy than her work-life expectancy. *See Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 38 (Tex. App.—Tyler 2003, pet. denied) (noting that work-life expectancy is a retirement age of 65 less the plaintiff's age). Therefore, whether Puente has a shorter or longer life expectancy does not affect the calculations regarding her *work-life* expectancy.

The jury's award of $888,429.00 exceeded the range of loss described by Dr. Fairchild, the expert witness, by $8,000. There is no other evidence in the record to support an award for this $8,000. A jury's award may not be based on conjecture and "must be based upon such facts as are available in the particular case" and "'proved with that degree of certainty of which the case is susceptible.'" *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App.—Amarillo 2002, pet. denied) (quoting *McIver v. Gloria*, 140 Tex. 566, 169 S.W.2d 710, 712 (1943)). Thus, "where the plaintiff seeks special damages for loss of his earning capacity in a particular business or profession, the amount of his earnings or the value of his services in that business must be shown with reasonable certainty." *Id*. at 52 (quoting *McIver*, 169 S.W.2d at 712). Here, by awarding damages in excess of the range of evidence, the jury abused its discretion. *See id*.

[27] We note that Puente also makes an invited error argument in her brief. She points to Dr. Fairchild's testimony about the discount rate he used and Dr. Fairchild's acknowledgment that some economists use discount rates lower than the one he used in making his calculations. Puente then points to defense counsel's statements during closing argument where he stated to the jury: "With regards to the investment part and using T-bills, again use your common sense." Puente argues that defense counsel "invited the jury to use its own 'common sense' in choosing between putative investments and discount rates." According to Puente, the testimony "from over a dozen witnesses about [Puente]'s physical limitations and life expectancy, there was sufficient evidence to support the jury's judgment and any alleged error was invited and waived." We, however, find no invited error by defense counsel through the statement made during closing argument. Further, any statement made by defense counsel is not evidence.

We therefore hold there was sufficient evidence of loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00).

SETTLEMENT CREDIT

Under a confidential settlement, Puente's minor daughter, C.P., received a sum of money from the hospital.[28] Puente, C.P., and Carr (Puente's mother) then dismissed all their claims against the hospital. On appeal, Dr. Virlar and Gonzaba argue that the dollar amount of the settlement paid to C.P. should be deducted from the amount awarded to Puente pursuant to chapter 33 of the Texas Civil Practice and Remedies Code. In response, Puente argues that Dr. Virlar and Gonzaba did not meet their burden of proving they were entitled to the settlement credit because they did not introduce evidence of the settlement amount. Puente further argues that even if they did show the settlement amount, the amount of her daughter's settlement for her daughter's independent damages should not reduce her award for injuries she suffered as a result of Dr. Virlar and Gonzaba's negligence.

A. Chapter 33's Settlement Credit Provisions

Section 33.012(c) of the Texas Civil Practice and Remedies Code provides that if a claimant in a health care liability claim has settled with one or more persons, the amount recovered by the claimant should be reduced "by an amount equal to one of the following, as elected by the defendant: (1) the sum of the dollar amounts of all settlements; or (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact." TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(c). "Claimant" is defined as

[28] Because the settlement amount is part of a confidential settlement, we do not refer to the exact amount in this opinion.

> a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of *damages for injury to another person*, damage to the property of another person, the death of another person, or other harm to another person, "claimant" includes:
>
> (A) the person who was injured, was harmed, or died or whose property was damaged; and
>
> (B) *any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person* or for the damage to the property of that person.

Id. § 33.011(1) (emphasis added). A "settling person" is "a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death or other harm for which recovery of damages is sought." *Id.* § 33.011(5).

B. Same Burden Under Chapter 33 and One-Satisfaction Rule

Chapter 33 is based on the one-satisfaction rule, a common-law doctrine, but it is more narrowly applied. *See In re Xerox Corp.*, 555 S.W.3d 518, 523 (Tex. 2018) (orig. proceeding) (explaining that "chapter 33's proportionate-responsibility scheme . . . incorporates the one-satisfaction rule"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a) (applying only to a "cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought" or an action brought under the DTPA "in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought"). The one-satisfaction rule is a common law rule providing that "a plaintiff is entitled to only one recovery for any damages suffered." *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 106 (Tex. 2018). This is true even though "more than one wrongdoer contributed to bring about his injuries." *Id.* at 107 (citations omitted). The "fundamental consideration in applying the one-satisfaction rule is *whether the plaintiff has suffered a single, indivisible injury*—not the causes of action the plaintiff

asserts." *Id.* (emphasis added). Thus, the one-satisfaction rule "applies both when the defendants commit the same act as well as when defendants commit technically differing acts which result in a single injury." *Id.* (citations omitted). This rule applies to settlement credits for nonsettling defendants because the "plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settlement defendant has already partially contributed." *Id.* (citations omitted). "The plaintiff would otherwise be recovering an amount greater than the trier of fact determined would fully compensate for the injury." *Id.* (citations omitted).

Because chapter 33 is silent about which party has the burden to prove the settlement amount, the supreme court has looked to the common law's one-satisfaction rule. *See Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998). Under the common law's one-satisfaction rule, "a defendant seeking a settlement credit has the burden of proving its right to such a credit." *Ellender*, 968 S.W.2d at 927. This burden "includes proving the settlement credit amount." *Id*. In applying this common-law burden to chapter 33, the supreme court has held that a defendant meets this burden if "the record show[s], in the settlement agreement or otherwise, the settlement credit amount." *Utts*, 81 S.W.3d at 828.

"Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation." *Sky View*, 555 S.W.3d at 107 (citing *Utts*, 81 S.W.3d at 828). "The plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award *would not provide for the plaintiff's double recovery*." *Id.* at 107-08 (citations omitted) (emphasis added). "A written

settlement agreement that specifically allocates damages to each cause of action will satisfy this burden." *Id.* at 108.

The supreme court has explained that a "nonsettling party should not be penalized for events over which it has no control." *Id.* (quoting *Utts*, 81 S.W.3d at 829). "Thus, this burden-shifting framework, based on the presumption that the nonsettling defendant is entitled to a settlement credit after it introduces evidence of the plaintiff's settlement, is appropriate because the plaintiff is 'in the best position' to demonstrate why rendering judgment based on the jury's damages award would not amount to the plaintiff's double recovery." *Id.* "If the plaintiff fails to satisfy this burden, then the defendant is entitled to a credit equal to the entire settlement amount." *Id.*

C. Did Dr. Virlar and Gonzaba meet their burden of showing the amount of the settlement credit?

Puente argues Dr. Virlar and Gonzaba did not meet their burden to show entitlement to the settlement credit, because the settlement amount is not in the record, was not offered in evidence, and was not stipulated to by the parties. In response, Dr. Virlar and Gonzaba point to the supreme court's opinion in *Ellender*, 968 S.W.2d at 927, where the court recognized chapter 33 did not require proof of a settlement "by a judicial admission, a stipulation, judicial notice, or properly admitted documents or testimony." *Id.* According to the court, "neither chapter 33 nor existing case law demand[ed] such proof." *Id*. For the defendant to meet its burden, the record need only "show, in the settlement agreement *or otherwise*, the settlement credit amount." *Id.* (emphasis added). In reviewing its appellate record, the supreme court concluded the defendant had met its burden of showing a settlement amount:

> The record here shows that [the defendant] first informed the trial court of the $500,000 settlement amount when the [plaintiffs'] attorneys announced the settlement in open court during trial. Later, [the defendant's] written opposition to

> the [plaintiffs'] motion for judgment included the settlement amount. The [plaintiffs] did not contest the $500,000 settlement amount. Thus, we conclude that by placing the uncontested settlement amount in the record, [the defendant] met its burden of proof on the settlement amount.

Id.

Similarly, here, at the November 2, 2017 hearing, defense counsel informed the trial court that the hospital had settled with C.P. for a specified amount,[29] and "[a]ll the people suing [the hospital had] dismissed [their claims] with prejudice." Puente's counsel objected to defense counsel revealing the confidential amount in open court but did not dispute the amount was accurate. Because the amount placed in the record was uncontested by Puente, we conclude Dr. Virlar and Gonzaba met their burden of showing the settlement amount of C.P.'s settlement with the hospital. We thus must consider whether Puente's award should be reduced by the amount of C.P.'s settlement.

D. Post-Verdict Motion for Settlement Credit and Puente's Response

On October 20, 2017, Dr. Virlar and Gonzaba filed a post-verdict motion for settlement credit, arguing the amount of C.P.'s settlement with the hospital should be credited against Puente's award. On October 31, 2017, Puente filed a written response to the motion, arguing the amount of C.P.'s settlement should not be credited against her award for the following reasons: (1) because C.P.'s cause of action was separate and independent of Puente's common law medical malpractice action, section 33.012(c) did not apply; and (2) even if section 33.012(c) did apply, "any attempt to reduce one person's claim or cause of action by the amount received by another person on a separate and independent cause of action violates not only relevant statutes and common law, but also [Puente]'s rights under the Texas and U.S. Constitutions, including their

[29] The record reflects that defense counsel informed the trial court of the exact amount of the settlement.

respective due process, due course of law, equal protection, equal rights, jury trial, and open courts provisions." After hearing all the arguments of counsel, the trial court denied Dr. Virlar and Gonzaba's motion for settlement credit without stating its reasoning.

On appeal, Dr. Virlar and Gonzaba argued in their appellants' brief that section 33.012(c) applied to the facts of this case and that the constitutional objections raised by Puente in the trial court were meritless because section 33.012(c) "was a valid exercise of the Legislature's police power." We conclude, however, that as applied to the facts raised in this appeal, application of section 33.012(c) violates the open courts provision of the Texas Constitution.

1. The Texas Supreme Court first holds a statutory damages cap violates the Open Courts Provision in Lucas.

The Open Courts Provision of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. In *Lucas v. United States*, 757 S.W.2d 687, 687 (Tex. 1988), the Texas Supreme Court first recognized that a statute may violate the Open Courts Provision by restricting a plaintiff's recovery of damages in a medical malpractice action. In *Lucas*, a fourteen-month-old infant was paralyzed as the result of a federal army medical center improperly giving him a shot of antibiotics. *Id*. at 688. The child's parents brought a lawsuit in their individual capacities and as next friend of their son. *Lucas v. United States*, 811 F.2d 270, 271 (5th Cir. 1987). After a trial, the federal district court awarded the parents economic damages for medical expenses they had incurred and would incur until their son reached eighteen years of age. *Id*. The district court also awarded the son the following economic damages: "$350,000 as the present value of future medical expenses he will incur after his eighteenth birthday, and $600,000 as the present value of the impairment of his future earning capacity." *Id*. As for noneconomic damages, the district court awarded the son "$1.5 million for pain and suffering." *Id*. With respect

to the parents' individual claims, the district court "made no findings concerning the parents' claims for their own mental anguish and loss of companionship." *Id*. Then, the "district court reduced the total award of damages against the United States by the $400,000 paid by Wyeth Laboratories to the Lucases in settlement of the state court suit." *Id*. On appeal, the Fifth Circuit certified the following question to the Texas Supreme Court: whether under these facts, application of former article 4590i's damages cap provision would be consistent with the Texas Constitution. *Lucas*, 757 S.W.2d at 688.

The supreme court explained that "there is no provision in the federal [C]onstitution corresponding to [the Texas] [C]onstitution's 'open courts' guarantee." *Id*. at 690. According to the court, the "open courts" "guarantee is embodied in Magna Carta and has been a part of our constitutional law since our republic." *Id*. The supreme court noted that in previously construing the Open Courts Provision, it had required a litigant to first show that he had "a cognizable common law cause of action that is being restricted." *Id*. (quoting *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983)). "Second, a litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Id*. (quoting *Sax*, 648 S.W.2d at 666).

With regard to the first prong, the supreme court explained that "Texas courts have long recognized that victims of medical negligence have a well-defined common law cause of action to sue for injuries negligently inflicted upon them." *Id*. Thus, according to the court, "the remaining inquiry [was] whether the restriction on Lucas' right of recovery 'is unreasonable *or* arbitrary when balanced against the purpose and basis of the statute.'" *Id*. (quoting *Sax*, 648 S.W.2d at 666) (emphasis in original).

In reviewing the statute's language, the supreme court expressed its "first concern" was "that the legislature has failed to provide Lucas any adequate substitute to obtain redress for his injuries." *Id*. The court "reject[ed] any argument that the statute may be supported by alleged

benefits to society generally." *Id.* While some may argue there was "a societal *quid pro quo* in that loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care,'" the court emphasized "[t]his *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act." *Id*. (citation omitted). And, in looking to other jurisdictions where statues restricting the recovery of damages were upheld, the supreme court found "significant" that in those jurisdictions, "alternative remedies were provided," a fact which "weighed heavily in the decisions." *Id*. at 691. The supreme court noted that former article 4590i had been "based on recommendations of the Texas Medical Professional Liability Study Commission, sometimes referred to as the Keeton Report." *Id*. "Dean Keeton, in a separate statement, recommended a victim's compensation fund as a statutory substitute for limitations upon recovery." *Id*. The supreme court stressed that "[t]he legislature [had] chose[n] not to follow this recommendation." *Id*.

The supreme court then considered "whether the restrictions in sections 11.02 and 11.03 [of former article 4590i were] reasonable when balanced against the purposes and bases of the statute." *Id*. The court reasoned that "[t]he legislature, in enacting [former] article 4590i, apparently did not intend to strike at frivolous malpractice suits for it found in section 1.02(a)(2) that 'the filing of *legitimate* health care liability claims in Texas is a contributing factor affecting medical professional liability rates.'" *Id*. (quoting former article 4590i, § 1.02(a)(2)) (emphasis in original). The court noted "[t]he legislature did find that a 'medical malpractice insurance crisis' had been created and that 'satisfactory insurance coverage . . . [was] often not available at any price,' but it then stated that 'adoption of certain modifications in the medical, insurance, and legal systems . . . *may or may not have an effect* on the rates charged by insurers for medical professional

liability coverage.'" *Id*. (quoting former article 4590i, § 1.02(a)(5), (10), (12)) (alterations in original). The supreme court concluded,

> In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high. As to the legislature's stated purpose to "assure that awards are rationally related to actual damages," section 1.02(b)(2), we simply note that this is a power properly attached to the judicial and not the legislative branch of government. TEX. CONST. art. II, § 1.

Lucas, 757 S.W.2d at 691 (emphasis in original). The supreme court thus held that it was "unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded." *Id*.

In support of its holding, the supreme court pointed to language found in an opinion by the Supreme Court of Florida:

> Access to the court is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.

Lucas, 757 S.W.2d at 692 (quoting *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987)). While the supreme court in *Lucas* understood "the legislature's concern in attempting to solve the health care problems it perceived during the middle of the 1970s," the court nevertheless concluded it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation." *Id*. (quoting *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 837 (1980)). Accordingly, the supreme court held that "the restriction [was] unreasonable *and* arbitrary and that

[former] article 4590i, sections 11.02 and 11.03, unconstitutionally limit[ed] Lucas' right of access to the courts for a 'remedy by due course of law.'" *Id*. at 690 (quoting TEX. CONST. art. I, § 13) (emphasis in original). Therefore, the supreme court's answer to the Fifth Circuit's certified question was "that the limitation on medical malpractice damages in TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02 and 11.03, is inconsistent with and violative of article I, section 13, of the Texas Constitution." *Lucas*, 757 S.W.2d at 692.

2. The Texas Supreme Court does not extend its holding in* Lucas *to statutory claims.

Two years after its holding in *Lucas*, the supreme court "again consider[ed] the constitutionality of the damages provisions of the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02 and 11.03 . . ., this time in the context of a wrongful death action." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 842 (Tex. 1990). The court explained that in *Lucas*, it had held "statutory damages limitations are unconstitutional when applied to damages in common law medical malpractice actions." *Id*. (citing *Lucas*, 757 S.W.2d at 692). However, according to the court, its holding in *Lucas* "did not extend to wrongful death actions." *Id*. The court emphasized its "traditional distinction between common law personal injury and statutory wrongful death claims." *Id*. at 845. The court explained that it had "recognized this distinction in *Lucas*, restating the traditional rule that the [O]pen [C]ourts [P]rovision of our constitution applies only to common law claims." *Rose*, 801 S.W.2d at 845. According to the court, had it "faced a wrongful death claim in *Lucas*, [it] could not have reached the same conclusion, for the [O]pen [C]ourts [P]rovision does not apply to statutory claims." *Rose*, 801 S.W.2d at 845.

In applying the required two prong-analysis, the supreme court first considered whether the plaintiffs' remedy was "based upon a cognizable common law cause of action." The court explained that "[l]ike all actions based upon theories of negligence, the [wrongful death plaintiffs'] cause of action was a common law claim [that] would have died with [the decedent] had it not

been preserved by the legislature in the wrongful death statute." *Id*. The plaintiffs' "remedy, therefore, was conferred by statute, not by the common law." *Id*. According to the court, because the plaintiffs did "not seek a common law remedy, the [O]pen [C]ourts [P]rovision [did] not apply to their wrongful death claim." *Id*.

Similarly, in *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex. 2000), the supreme court held the damages cap provision under former article 4590i did not violate the Open Courts Provision because the plaintiff had brought a claim under the survival statute. The supreme court explained that "all negligence actions are common-law claims" and that at common law, "no personal injury cause of action survived a victim's death." *Id*. The court concluded that "[b]ecause wrongful-death and survival actions would not exist absent legislative enactment, they are derived not from the common law but from a statute." *Id*. Thus, wrongful-death and survival claimants "cannot establish an open-courts violation because they 'have no common law right to bring either.'" *Id*. (quoting *Bala v. Maxwell*, 909 S.W.2d 889, 893 (Tex. 1995)).

3. An amendment to the Texas Constitution permits limitation of noneconomic damages in suits against healthcare providers.

In June 2003, the legislature enacted the Medical Malpractice and Tort Reform Act of 2003, otherwise known as House Bill 4, which provided for a statutory limitation on noneconomic[30] damages in medical malpractice lawsuits. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (limiting noneconomic damages as provided for by House Bill 4). Later that year, the Texas Constitution was amended to permit the Texas Legislature to cap noneconomic damages in civil lawsuits

[30] Economic damages are damages intended to compensate the claimant for actual economic or pecuniary loss. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(4). They do not include exemplary or noneconomic damages. Noneconomic damages are damages awarded to compensate the claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses other than exemplary damages. *Id.* § 41.001(12).

against healthcare providers. *See* TEX. CONST. art III, § 66. However, the amendment expressly did not apply to economic damages, which were defined as "compensatory damages for any pecuniary loss or damage" but did "not include any loss or damage, however characterized, for past, present, and future pain and suffering, mental anguish and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment." *Id*. § 66(a). Thus, *Lucas* and its progeny remain good law with respect to the recovery of *economic damages*; that is, pursuant to the Open Courts Provision of the Texas Constitution, the legislature may not restrict the recovery of economic damages in a common law medical malpractice action. *See Lucas*, 757 S.W.3d at 690-93 (explaining why limitation on recovery of damages in common-law medical malpractice action violates the open courts provision of Texas Constitution); *see also Horizon/CMS*, 34 S.W.3d at 903 (Tex. 2000) (explaining causes of action created by statute do not implicate open courts provision of constitution).

4. Open Courts Analysis to Puente's Common-Law Medical Malpractice Action

In applying the two-prong open courts analysis, we first note that Puente brought a medical malpractice cause of action against Dr. Virlar and Gonzaba, which is a common law cause of action that "Texas courts have long recognized." *Lucas*, 757 S.W.2d at 688. Thus, she has met the first prong. *See Horizon/CMS*, 34 S.W.3d at 902; *Weiner v. Wasson*, 900 S.W.2d 316, 317 (Tex. 1995); *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. With regard to the second prong, Dr. Virlar and Gonzaba point to the fact that chapter 33's settlement credit provisions were enacted as part of House Bill 4's tort reform efforts to reduce costs to the health care industry. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. However, in *Lucas* and its progeny, the supreme court has clearly stated that restricting *economic* damages awarded to victims of medical malpractice for the general goal of attempting to reduce overall costs to the healthcare industry violates the Open Courts Provision of the Texas Constitution. *See Horizon/CMS*, 34 S.W.3d at

902; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 692; *see also* TEX. CONST. art III, § 66 (permitting *restriction of noneconomic damages* in common-law medical malpractice actions). In doing so, the supreme court emphasized that the legislature had not provided a plaintiff who suffered injuries in excess of the damages cap "any adequate substitute to obtain redress for his injuries." *Lucas*, 757 S.W.2d at 690. According to the supreme court, "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation." *Lucas*, 757 S.W.2d at 692 (quoting *Carson*, 424 A.2d at 837). Today, there is still no adequate substitute for a plaintiff who has suffered economic injuries in excess of a legislative restriction. *See id*.

Further, we note that chapter 33 is titled "Proportionate Responsibility" and provides "a proportionate responsibility framework for apportioning percentages of responsibility in the calculation of damages." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 499 (Tex. 2010); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-.017. Chapter 33 requires the trier of fact to determine "the percentage of responsibility, stated in whole numbers, for" "each claimant," "each defendant," "each settling person," and "each responsible third party who has been designated." TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a). It reduces the damages awarded by the trier of fact "by a percentage equal to the claimant's percentage of responsibility." *Id*. §§ 33.001, 33.012(a). Further, it provides for settlement credits to be applied to a claimant's recovery in a health care liability claim. *See id*. § 33.012(c). Thus, "chapter 33 embodies the fundamental tort-law principle that liability generally arises only from one's own injury-causing conduct and, as a result, liability for damages is commensurate with fault." *In re Xerox*, 555 S.W.3d at 523. "Chapter 33's proportionate responsibility scheme also incorporates the one-satisfaction rule—a tort concept that limits a plaintiff to only one recovery for any damages suffered because of an injury." *Id*. (emphasis added). "The one-satisfaction rule's purpose is to make the plaintiff whole, but not

more than whole, for [her] injuries." *Home Ins. Co. v. McClain*, No. 05-97-01479-CV, 2000 WL 144115, at * 7 (Tex. App.—Dallas 2000, no pet.). This purpose of making the plaintiff whole, but not more than whole, is not consistent with restricting a plaintiff from recovering less than the full amount of her economic damages. Thus, we conclude that application of a settlement credit under chapter 33 that has the effect of preventing Puente from recovering the full amount of her economic damages violates the Open Courts Provision of the Texas Constitution.

Here, all the damages awarded by the jury to Puente are economic damages.[31] Thus, applying chapter 33's settlement credit provisions and reducing Puente's award in an amount equal to C.P.'s settlement results in Puente recovering less than the full amount of her economic damages. The supreme court has clearly held the legislature may not restrict the recovery of the full amount of economic damages in a common-law medical malpractice action like the one brought by Puente in this case. *See Horizon/CMS*, 34 S.W.3d at 902; *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. We recognize that *Lucas* and its progeny involved statutes that "capped" damages while chapter 33 relates to the application of settlement credits to a jury's award; however, whether the statute involves a damages cap or whether it involves a settlement credit, the result is the same as applied to the facts of this case—application of the statute would prevent a plaintiff in a common-law medical malpractice action from recovering the full amount of her economic damages. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.011(1), 33.012(c), *with Horizon/CMS*, 34 S.W.3d at 902; *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 690. Under either scenario, the statute

[31] The jury found that Puente was entitled to the following: (1) $133,202 in loss of earning capacity sustained in the past; (2) $888,429 in loss of earning capacity that in reasonable probability Puente will sustain in the future; and (3) $13,263,874.86 in medical care expenses that in reasonable probability Puente will incur in the future.

impermissibly restricts a cognizable common law action by preventing a plaintiff in a common-law medical malpractice action from recovering the full amount of her economic damages.[32]

We note that Dr. Virlar and Gonzaba argue that Puente and her daughter C.P. are one "claimant" under chapter 33 and thus have not received less than the full amount of their economic damages. However, the legislature cannot circumvent the Open Courts Provision by simply statutorily changing the definition of "claimant" and thereby *restricting a common law cause of action protected by the Open Courts Provision*. As noted previously, the Texas Supreme Court has held that a medical malpractice cause of action like Puente's is a cognizable common law cause of action that "Texas courts have long recognized." *Lucas*, 757 S.W.2d at 688. And, in such a common-law cause of action, the legislature may not statutorily restrict a plaintiff's right to recover the full amount of her economic damages. *See Horizon/CMS*, 34 S.W.3d at 902; *Rose*, 801 S.W.2d at 842; *Lucas*, 757 S.W.2d at 692; *see also* TEX. CONST. art III, § 66 (permitting restriction of noneconomic damages in common-law medical malpractice actions). The supreme court also recognized that under the common law, a child's claim for loss of consortium, like the one brought

[32] As noted previously, the supreme court in *Lucas* answered the certified question posed by the Fifth Circuit by explaining why the Texas statute capping damages impermissibly restricted the common-law medical malpractice cause of action. 757 S.W.2d at 691-92. We recognize that in the background section of its opinion, the supreme court mentioned that the federal district court had applied a settlement credit to the amount awarded to the plaintiffs. *See id*. at 688. However, the supreme court did not analyze whether application of this settlement credit would violate the Open Courts Provision as no such question was posed to it. *See id*. at 688-92. We note that in considering the facts presented in *Lucas* under current caselaw interpreting the Open Courts Provision, application of the settlement credit in *Lucas* would not have resulted in the child recovering less than the full amount of his economic damages. The child's parents in *Lucas*, 811 F.2d at 271, brought a lawsuit in their individual capacities and as next friend of their son. *Id*. After a trial, the federal district court awarded the parents economic damages for medical expenses they had incurred and would incur until their son reached eighteen years of age. *Id*. However, with respect to their individual claims, the district court "made no findings concerning the parents' claims for their own mental anguish and loss of companionship." *Id*. The district court also awarded the son the following economic damages: "$350,000 as the present value of future medical expenses he will incur after his eighteenth birthday, and $600,000 as the present value of the impairment of his future earning capacity." *Id*. As for noneconomic damages, the district court awarded the son "$1.5 million for pain and suffering." *Id*. The district court then "reduced the total award of damages against the United States by the $400,000 paid by Wyeth Laboratories to the Lucases in settlement of the state court suit." *Id*. Because the son was awarded $1.5 million in noneconomic damages, an amount that far exceeded the amount of the $400,000 settlement credit, he necessarily received the full amount of his economic damages even after application of the settlement credit. Thus, reducing his award by the amount of the settlement credit did not violate his rights under the Open Courts Provision.

by C.P. in this case, is a "*separate and independent claim[] distinct from the underlying action*." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009) (emphasis added). The supreme court has also rejected the argument that allowing a party to recover damages for loss of consortium while also allowing the injured party to recover damages would result in a "double recovery." *See Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978). According to the supreme court, "there is no duplication of recovery" and no violation of the one-satisfaction rule. *Id*. For example, in the context of (1) an injured spouse and (2) a spouse seeking recovery for loss of consortium, the supreme court has explained that "[e]ach spouse recovers for losses *peculiar to the injury sustained by each of them*." *Id*. (emphasis added). "On the one hand, the impaired spouse recovers for those distinct damages arising out of the direct physical injuries." *Id*. "On the other hand, the recovery for the loss of consortium by the deprived spouse is predicated on separate and equally distinct damages to the emotional interests involved." *Id*.

Applying this reasoning by the supreme court to the facts presented here, under the common law, any damages suffered by C.P. for loss of consortium are her own; such damages would not constitute a double recovery and would not violate the one-satisfaction rule. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d at 646; *Whittlesey*, 572 S.W.2d at 669. Because any damages suffered by C.P. for loss of consortium are her own, any credit applied pursuant to chapter 33 against Puente's award in an amount equal to C.P.'s damages would necessarily result in Puente failing to recover the full amount of her economic damages. Thus, application of chapter 33's settlement credit provision under the facts of this case is an impermissible statutory restriction of Puente's right to recover 100% of her economic damages under her common-law claim.

Finally, we note that Dr. Virlar and Gonzaba argue on appeal that Puente failed to meet her burden in the trial court of raising an open courts challenge, arguing that "Puente provided no analysis of how applying a settlement credit for C.P.'s settlement to Puente's recovery violates the

state and federal Constitutions." Dr. Virlar and Gonzaba, however, cite no authority that an open courts challenge must be "analyzed" in response to a post-verdict motion for settlement credits. It appears that no court has addressed the burden of a party asserting an open courts challenge in the context of responding to a post-verdict motion for settlement credits under chapter 33. In other contexts, courts have held that the party relying on the open courts provision has the burden to plead and prove the violation. *See Boyd v. Kallam*, 152 S.W.3d 670, 676 (Tex. App.—Fort Worth 2004, pet. denied). Here, by focusing on Puente's lack of "analysis," Dr. Virlar and Gonzaba do not argue that she failed to meet any evidentiary burden. Indeed, the facts on which Puente relied for her open courts challenge are undisputed, obviating any need to present evidence to prove the relevant facts. We therefore must determine whether Puente adequately pled an open courts challenge in her response to Dr. Virlar and Gonzaba's post-verdict motion for settlement credits.

Dr. Virlar and Gonzaba have not provided any authority as to the appropriate pleading standard for an open courts challenge. Generally, the purpose of a pleading is to "give fair notice of the nature and basic issues so the opposing party can prepare a defense." *Bos v. Smith*, 556 S.W.3d 293, 305-06 (Tex. 2018). There is no apparent reason why a heightened pleading standard should apply to open courts challenges. "When, as here, no special exception is made, we liberally construe the pleadings in the pleader's favor." *Id*. at 306. "Even so, a liberal construction does not require a court to read into a petition what is plainly not there." *Id*. (citation omitted). Here, Puente stated in her response to Dr. Virlar and Gonzaba's post-verdict motion for settlement credits the following:

> In the alternative, Plaintiff would show that any attempt to reduce one person's claim or cause of action by the amount received by another person on a separate and independent cause of action violates not only relevant statutes and common law, but also Plaintiff's rights under the Texas and U.S. Constitutions, including their respective due process, due course of law, equal protection, equal rights, jury trial, and open courts provisions.

Although there is no lengthy legal argument in Puente's response, an open courts challenge is plainly there. *See Bos*, 556 S.W.3d at 306. Her response refers to the Open Courts Provision and provides the factual basis upon which her constitutional challenge is based. Her constitutional challenge stated the nature of the basic issue she was raising. Thus, we conclude Dr. Virlar and Gonzaba had fair notice of her open courts challenge as a bar to application of the settlement credit as argued by Dr. Virlar and Gonzaba in their post-verdict motion for settlement credits.

***5. Remand for Hearing Pursuant to* Utts**

While we have concluded that applying a dollar-for dollar credit in the amount of C.P.'s settlement against Puente's award pursuant to chapter 33 would violate the Open Courts Provision of the Texas Constitution, we note that at the trial court and on appeal, Dr. Virlar and Gonzaba have argued that C.P.'s settlement was a "sham settlement," pointing to testimony by the guardian ad litem from the prove-up hearing for C.P.'s settlement. In *Utts v. Short*, 81 S.W.3d 822, 824 (Tex. 2002), the supreme court considered whether a pretrial settlement by a family member in a medical malpractice action should be applied to amounts awarded by the jury to the nonsettling family members. The supreme court explained that a defendant seeking a settlement credit has the burden of proving his right to such a credit. *Id*. at 828. According to the court, "the common law requires only that the record show, in the settlement agreement or otherwise, the settlement credit amount." *Id*. (citing *First Title Co. v. Garrett*, 860 S.W.2d 74, 78-79 (Tex. 1993), which explained that under the common law, a defendant is entitled to seek a settlement credit under the one-satisfaction rule). "Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation." *Utts*, 81 S.W.3d at 828.

In *Utts*, the defendant contended the pretrial settlement by one family member was a "sham" transaction to avoid application of chapter 33's settlement-credit scheme to the other

nonsettling family members. *Utts*, 81 S.W.3d at 829. In discussing the burden a defendant has to raise the issue of a "sham" settlement, the supreme court noted that "when a case involves facts suggesting that a nonsettling plaintiff may have benefited from the proceeds of another plaintiff's settlement, the nonsettling defendant must raise this allegation to the trial court–not the jury–and present evidence of the benefit as part of its burden in electing for a dollar-for-dollar credit." *Id*. The court noted that a defendant did not have to present evidence before the case was presented to the jury but could "urge its settlement-credit motion and introduce evidence" in a post-verdict motion. *Id*. "If the evidence shows such a benefit, then the trial court should apply the settlement credit reflecting that benefit unless the nonsettling plaintiff presents evidence that he or she did not benefit from the settlement." *Id*. "In other words, once the nonsettling defendant presents evidence of the nonsettling plaintiff's benefit from a settlement, the trial court shall presume the settlement credit applies unless the nonsettling plaintiff presents evidence to overcome this presumption." *Id*.

In applying this law to the facts presented in *Utts*, the supreme court explained that the nonsettling defendant had placed the amount of the settlement with the settling family member (who was no longer a party at the time of trial) in the record. *Id.* at 830. The nonsettling defendant further offered evidence that the nonsettling family members (who were plaintiffs at the time of trial) benefitted from the settling family member's settlement. *Id*. The supreme court concluded the record evidence raised a presumption that the nonsettling defendant may be entitled to a settlement credit but that the record did not establish the amount. *Id*. The supreme court thus remanded the cause to the trial court to allow each family member an opportunity to present evidence to show that he or she did not receive any benefit from the settling family member's settlement. *See id*. (explaining that to avoid the settlement credit, each nonsettling family member on remand must "present evidence showing why the settlement credit should not apply").

Similarly, here, Dr. Virlar and Gonzaba argued in their post-verdict motion that Puente benefited from C.P.'s settlement with the hospital. As evidence, they submitted the reporter's record from the prove-up hearing for C.P.'s settlement and pointed to testimony from C.P.'s guardian ad litem. They also stressed that after C.P. settled with the hospital, Puente and her mother (Carr) dismissed all their claims against the hospital with prejudice. We conclude Dr. Virlar and Gonzaba presented evidence raising a presumption that they may be entitled to a settlement credit under the common law. *See Utts*, 81 S.W.3d at 829; *First Title Co*., 860 S.W.2d at 79 (application of settlement credit under common law's one-satisfaction rule). In response to the motion, Puente filed an affidavit by her counsel disputing that Puente received a benefit from C.P.'s settlement with the hospital. The trial court then denied Dr. Virlar and Gonzaba's motion for settlement credit but did not have an opportunity to make an evidentiary finding as to any benefit Puente received from C.P.'s settlement. Thus, as in *Utts*, we remand the case to the trial court so that it may conduct an evidentiary hearing.

PERIODIC PAYMENTS

In their final issue, Dr. Virlar and Gonzaba argue the trial court erred in failing to award future damages payable in periodic payments. Chapter 74 of the Texas Civil Practice and Remedies Code permits periodic payments when the award of future damages exceeds a present value of $100,000.00. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.502.[33] Section 74.503 provides,

> (a) At the request of a defendant physician or health care provider or claimant, the court *shall* order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

[33] Section 74.502 provides that "[t]his subchapter applies only to an action on a health care liability claim against a physician or heath care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds $100,000." TEX. CIV. PRAC. & REM. CODE ANN. § 74.502.

> (b) At the request of a defendant physician or health care provider or claimant, the court *may* order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.
>
> (c) The court *shall* make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.
>
> (d) The court *shall* specify in its judgment ordering the payment of future damages by periodic payments the:
> (1) recipient of the payments;
> (2) dollar amount of the payments;
> (3) interval between payments; and
> (4) number of payments or the period of time over which payments must be made.

Id. § 74.503 (emphasis added). Thus, section 74.503 has both discretionary and mandatory language.

With regard to future damages other than medical, health care, or custodial services, the trial court has discretion to order periodic payments. *See id.* § 74.503(b) (stating the trial court "may" order periodic payments). However, with regard to future medical, health care, or custodial services awarded, upon the request "by a defendant physician or health care provider, a trial court *must* order that medical, health care, or custodial services awarded" "be paid *in whole or in part in periodic payments*." *Gunn v. McCoy*, 554 S.W.3d 645, 679 (Tex. 2018) (discussing subsection (a)) (emphasis added). "When periodic payments are ordered, the court must make specific findings as to the amount of periodic payments, and the court's judgment must specify the amount, the timing of payments, and the number of payments or time period over which payments are to be made." *Id.* (discussing subsections (c) and (d)).

In a post-trial motion, Dr. Virlar and Gonzaba filed a Motion for Order on Periodic Payments, requesting that the full amount of Puente's award for future medical expenses in the

amount of $13,263,874.86 and future loss of earning capacity in the amount of $888,429.00 (minus any applicable settlement credits) be payable in periodic payments instead of a lump sum payment. According to Dr. Virlar and Gonzaba, because Dr. Altman testified Puente's reasonable life expectancy was thirty-one years, the trial court should divide the amount of the awards for future damages by thirty-one.[34] After a hearing, the trial court denied the motion for periodic payments.

To the extent our determination of this issue involves statutory construction, statutory construction is a "legal question we review de novo." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). "In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Id.*

A. Waiver?

According to Puente, Dr. Virlar and Gonzaba waived any right they had to periodic payments under section 74.503 because they "never pleaded this matter of defense and avoidance," and "did not object to the court submitting the damages question to the jury in the usual form of 'what sum if paid now in cash.'" Instead, they filed a post-trial motion. Section 74.503, however, makes no mention of when a defendant must make the request for periodic payments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503. And, we agree with Dr. Virlar and Gonzaba that requesting periodic payments is not a matter "in avoidance" or an affirmative defense. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015); *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 136 (Tex. 2014). That is, section 74.503 is not a bar to recovery but merely a method of how recovery will be paid.

[34] Below and on appeal, Puente argued that such a calculation would constitute a "double discount." That is, the jury awarded, as instructed by the court, the value of future damages reduced to the present value of money. This was the first discount. Puente contends that Dr. Virlar and Gonzaba's formula of dividing this present value award for future damages by Puente's life expectancy of thirty-one years would constitute yet another discount of the value of money —hence, a "double discount." At oral argument, defense counsel acknowledged that such a formulation would be a discount of the jury's award.

Further, section 74.503 provides that the trial court, not a jury, shall make the specific finding of the *dollar* amount of periodic payments that will compensate the claimant for the future damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(c). It further requires the trial court, not the jury, to specify the interval between the payments, and "the number of payments or the period of time over which payments must be made." *Id.* § 74.503(d). Finally, section 74.503 does not become applicable until a jury awards future damages, and the court determines that the present value of that award equals or exceeds $100,000.00. *See id.* § 74.502 ("This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of the award of future damages, *as determined by the court*, equals or exceeds $100,000") (emphasis added). Given that the trial court, and not the jury, is making the appropriate findings, there is no reason why it cannot do so at a post-trial hearing.[35] We therefore find no waiver by Dr. Virlar and Gonzaba in filing their request for periodic payments post-trial but before judgment was signed by the trial court.

B. Evidence of Financial Responsibility

Pursuant to section 74.505, before the trial court may authorize periodic payments of future damages, it must require "a defendant who is not adequately insured *to provide evidence* of financial responsibility in an amount adequate to assure full payment of damages awarded by the

[35] We note that Puente also argues that if section 74.503 allows for a request for periodic payments to be made post-trial, then her rights to due process and due course of law under the Texas Constitution, along with the separation of powers doctrine, would be violated. Puente's argument is based on the assumption that no additional evidence can be brought to the trial court at the hearing on the motion for periodic payments. Puente argues that the trial court will have to engage in "speculation" to make the appropriate findings. However, given that chapter 74 presents a post-trial proceeding and the trial court is required to make fact findings, we find nothing in chapter 74 that would prevent the trial court from hearing additional evidence on matters like discount rates and the plaintiff's near and future financial expenses. Thus, we do not believe Puente has shown any constitutional violation. *See Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (explaining that courts presume a statute is constitutional and the "party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements").

judgment." TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a) (emphasis added). The judgment must then provide for payments to be funded by

> (1) an annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;
> (2) an obligation of the United States;
> (3) applicable and collectible liability insurance from one or more qualified insurers; or
> (4) any other satisfactory form of funding approved by the court.

Id. § 74.505(b).

Puente argues that the trial court did not err in not ordering periodic payments because Dr. Virlar and Gonzaba never showed evidence of financial responsibility under section 74.505(a). Subsection (a) requires *a* defendant *to provide* evidence of financial responsibility in an amount adequate to assure full payment of damages awarded. *Id.* § 74.505(a). As noted, when construing a term in a statute, we ascertain and give effect to the Legislature's intent as expressed by the language used in the statute. *City of Rockwall*, 246 S.W.3d at 625. When the statute does not define a particular term, we construe the term according to its "plain and common meaning," "unless a contrary intention is apparent from the context" or "unless such a construction leads to absurd results." *Id*. Chapter 74 does not define "provide"; thus, we look to its plain and common meaning. *See id*.; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) ("Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law."). The plain meaning of "provide" is "to supply" or "to furnish." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1827 (1981).

At the post-trial hearings on Dr. Virlar and Gonzaba's motion for periodic payments, they provided evidence of Gonzaba's financial responsibility in the form of a balance sheet and

testimony from Melissa Keller, Gonzaba's controller.[36] In reviewing the balance sheet and testimony, we hold Gonzaba provided evidence of financial responsibility in an amount adequate to assure full payment of damages awarded. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a).

Even if Gonzaba provided evidence of financial responsibility, Puente emphasizes that Dr. Virlar did not. According to Puente, both Dr. Virlar and Gonzaba are required to provide evidence of financial responsibility under subsection (a). Subsection (a), by its plain language, requires "a defendant . . . to provide evidence of financial responsibility." *Id.* We disagree with Puente.

When, as here, both defendants are jointly and severally liable for the full amount of the judgment, the practical ramifications of Puente's interpretation would frustrate the intent of the Legislature. "A party who is jointly and severally liable for the judgment is liable not only for its own share of the judgment but also, as between itself and the plaintiff, for the shares of the judgment attributable to other defendants." 5 TEX. PRAC. GUIDE: PERSONAL INJURY 2d § 16:49 (2019). "If one or more defendants are insolvent, the jointly and severally liable defendant can be made to pay the portion of the judgment attributable to those defendants." *Id.* "Further, the plaintiff can collect the entire amount of a joint and several judgment against any defendant jointly and severally responsible, and leave it to that defendant to collect contribution for any overpayments from the other defendants." *Id.* Assuming the facts of this case—that is, assuming Gonzaba provided evidence of financial responsibility but its employee, Dr. Virlar, did not— under Puente's interpretation of subsection (a), Gonzaba could be granted its requested relief of making periodic payments but, in practicality, be denied that relief because Puente could seek to collect the entire amount of the joint and several judgment from Gonzaba when Dr. Virlar did not pay the lump sum

[36] Puente argues in her brief that she objected to Keller's testimony "because [Keller] had never been designated as an expert witness or even a person with knowledge of relevant facts." Puente's argument refers to pretrial discovery. As we have previously explained, Dr. Virlar and Gonzaba properly moved for periodic payments in a post-trial proceeding.

in full. We conclude the Legislature could not have intended such a result. Therefore, under the facts of this case, we hold that only one jointly and severally liable defendant was required to provide evidence of financial responsibility under subsection (a).

C. Subsection (b)'s Periodic Payments at Discretion of Court

Dr. Virlar and Gonzaba first argue that the trial court erred in failing to order periodic payments in accordance with section 74.503(b). Subsection (b) allows the trial court at its discretion to order "future damages other than medical, health care, or custodial services awarded in a health care liability claim" to "be paid in whole or in part in periodic payments rather than by a lump sum payment." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(b) (providing that at the request of the defendant, the court "may" order "future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment").

Here, Puente was awarded $888,429.00 in damages for loss of future earning capacity.[37] Unlike future medical expenses, a trial court's decision whether to order periodic payments to compensate for future loss of earning capacity is completely discretionary. *See id*. Dr. Virlar and Gonzaba's briefing in this appeal focuses on subsection (a)'s mandatory language and the fact that the trial court failed to order *any* amount to be paid in periodic payments. Dr. Virlar and Gonzaba, however, in their briefs do not adequately argue why the trial court erred under subsection (b). *See* TEX. R. APP. P. 38.1(i). Given that the trial court "may" order periodic payments under subsection (b), Dr. Virlar and Gonzaba were required to bring forth an argument explaining why the trial court abused this discretion. *See id*. We therefore hold they waived any error relating to subsection (b).

[37] As noted previously, we have determined there is legally and factually sufficient evidence of $880,429.00 and have thus suggested a remittitur decreasing the award for loss of future earning capacity by $8,000.00.

Further, in reviewing the record, we find no abuse of discretion by the trial court in failing to award periodic payments for future loss of earning capacity.

D. Subsection (a)'s Periodic Payments Mandatory

Unlike subsection (b), subsection (a) requires a trial court, at the request of a defendant health care provider, defendant physician, or claimant, to order "medical, health care, or custodial services awarded in a health care liability claim [to] be paid in whole or in part in periodic payments rather than by a lump-sum payment." TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (providing that trial court "shall" order periodic payments in whole or in part). "The clear language of [subsection (a)] demonstrates that its application is mandatory." *Regent Care Ctr. of San Antonio, L.P. v. Detrick*, 567 S.W.3d 752, 770 (Tex. App.—San Antonio 2018, pet. granted). However, while it is mandatory that the trial court order *some* of the medical, health care, or custodial services awarded to be paid in periodic payments, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) ("in whole or in part"), the "determination of the amount to be paid periodically is within the trial court's discretion," *Regent Care*, 567 S.W.3d at 770.

In this case, Puente was awarded $13,263,874.86 in damages for future medical care expenses. The trial court did not order any part of this amount to be paid in periodic payments. By not awarding *any amount* of the future medical care expenses to be paid in periodic payments, the trial court abused its discretion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (stating trial court "shall" order periodic payments of future medical expenses at request of defendant); *Id.* § 74.503(c) (requiring the trial court to "make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages"); *Lee v. United States*, 765 F.3d 521, 529 (5th Cir. 2014) ("[T]he court does not have discretion as to whether it must order periodic payments for at least a portion of the damages for medical care."). We therefore reverse in part and remand so that the trial court can make a determination under subsections (c) and (d)

of the amount of damages awarded for future medical care expenses that should be paid in periodic payments.

CONCLUSION

We hold the trial court did not err in excluding the expert testimony of Dr. Kuncl or in admitting evidence of Dr. Virlar's loss of privileges and alleged extraneous bad acts. We further hold the evidence was legally and factually sufficient to support the jury's award of loss of future earning capacity in the amount of $880,429.00, but not in the full amount awarded ($888,429.00). We therefore suggest a remittitur decreasing the award for loss of future earning capacity by $8,000.00. *See* TEX. R. APP. P. 46.3. We affirm the judgment in part conditioned on a remittitur of damages in the amount of $8,000.00. We do not disturb any other damages awarded by the jury. Additionally, we find no error by the trial court in failing to award periodic payments for future loss of earning capacity under section 74.503(b). However, because the trial court did not order *any* part of the amount awarded for future medical care expenses to be paid in periodic payments, it abused its discretion under section 74.503(a). Finally, with respect to any applicable settlement credit from C.P.'s settlement with the hospital pursuant to the common law's one-satisfaction rule, we conclude a benefits analysis should be conducted pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). Therefore, we reverse the judgment in part and remand the cause for the trial court (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts* and apply an appropriate settlement credit, if any; (2) to make a determination under section 74.503(c) and (d) of the amount of damages awarded for future medical care expenses that should be paid in periodic payments, and (3) to sign a new judgment in conformity with this opinion.

Liza A. Rodriguez, Justice

Fourth Court of Appeals
San Antonio, Texas

CONCURRING AND DISSENTING OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A.,
a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice
Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice
Concurring and Dissenting Opinion by: Patricia O. Alvarez, Justice

Sitting:[1] Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: February 5, 2020

I concur in the majority's judgment except for the settlement credit issue. On that issue, I join Chief Justice Marion's dissent. I write separately because I am concerned with the effect that

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

section 33.012 has on parties when separate settlements involve derivative claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012.

In this case, the statute's plain language requires the trial court to reduce Puente's damages for her physical injury by the amount C.P. received for her separate loss of consortium. The statute penalizes Puente dollar-for-dollar for C.P.'s settlement for her separate damage. The facts of this case reveal a punitive aspect to the statute. For this reason, I invite the Texas Legislature to revisit the statute's construction to avoid punitive consequences in tragic circumstances like the one this case raises.

Patricia O. Alvarez, Justice

Fourth Court of Appeals
San Antonio, Texas

CONCURRING AND DISSENTING OPINION

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Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: February 5, 2020

I concur in the majority's opinion and judgment in all respects except as to the issue of the settlement credit. Because I believe appellants are entitled to a dollar-for-dollar credit for the full amount of the confidential settlement and such a credit would not result in an open courts violation,

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

I would reverse and remand for the trial court to reduce the judgment by the full amount of the settlement. Accordingly, I respectfully dissent in part.

Puente, Puente's mother, and Puente's daughter C.P. asserted a health care liability claim against appellants and the hospital for negligently injuring Puente. C.P. sought loss of consortium damages. The hospital and C.P. entered into a confidential settlement agreement, and C.P., Puente, and Puente's mother subsequently nonsuited their claims against the hospital. Puente proceeded to trial against appellants and obtained a jury verdict in her favor. Appellants sought a settlement credit for the full amount of the confidential settlement with C.P., which the trial court denied. On appeal, Puente argues appellants are not entitled to any settlement credit because C.P.'s loss of consortium claim is "a separate and independent claim distinct from" Puente's claim and that application of the settlement credit would result in an open courts violation. I disagree with both arguments.

The crux of the dispute is whether C.P. is a "claimant" for whose claim appellants are entitled to a settlement credit under Civil Practice and Remedies Code sections 33.011 and 33.012. When interpreting a statute, we must "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). "If the statutory text is unambiguous, [we] must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results." *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

Section 33.012 provides: "[I]f the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant . . . by an amount equal to the sum of the dollar amounts of all settlements . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(c). Section 33.011 defines

"claimant" to include ***both*** the injured person ***and*** "any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of" the injured person. *Id*. § 33.011(1). The statute's plain and unambiguous language does not distinguish between the injured person and a plaintiff seeking damages for that person's injury. Further, the statute does not carve out of the definition of "claimant" a plaintiff seeking damages the injured person could not recover herself, such as damages for loss of consortium.

Here, C.P. and Puente each pleaded the same claim—a health care liability claim. Although C.P. and Puente each sought different damages, both C.P.'s and Puente's damages arose from Puente's injury. And while the supreme court has characterized claims for loss of consortium as "separate and independent claims distinct from the underlying action," it nevertheless recognized they are "derivative" in the sense that a lost consortium plaintiff such as C.P. must establish a third party's "underlying injury in order to recover damages." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009); *see also Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990) ("[C]hildren may recover for loss of consortium when a third party causes serious, permanent, and disabling *injuries to their parent*." (emphasis added)). In other words, regardless of whether C.P.'s claim for loss of consortium is separate and independent from Puente's claims, both C.P. and Puente sought damages for the injury to Puente. Therefore, both C.P. and Puente are the "claimant" under section 33.011's plain language.

The supreme court's decision in *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999), interpreting substantially similar language in the prior version of the statute, is consistent. In *Drilex*, the supreme court construed "claimant" to include every party seeking recovery for injury to the same person. *Id.* at 122. The court did not distinguish between a wholly derivative claim for damages versus a separate and independent claim for damages, such as for loss of consortium.

Rather, the court held that what unifies parties as one "claimant" is the fact that they are seeking damages arising from injury to the same person. Although the supreme court has criticized its holding in *Drilex*, it has not overruled it, nor has it held the *Drilex* analysis is inapplicable to loss of consortium claims. Therefore, in light of the plain language of sections 33.011 and 33.012 and *Drilex*, I would conclude that because C.P. is a "claimant" who "has settled with one or more persons," appellants are entitled to a dollar-for-dollar credit for the amount of C.P.'s confidential settlement.

I also disagree with the majority's conclusion that application of section 33.012 in this case results in an open courts violation. In *Lucas*, the supreme court held an arbitrary damages cap unconstitutionally restricted a health care liability claimant's right to redress for a common law claim. *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988). Section 33.012, in contrast, does not restrict a health care liability claimant's recovery; rather, it requires every member of the claimant class to share in a single, but unrestricted, recovery for the underlying injury. Even if application of section 33.012 restricts an individual plaintiff's recovery, *Lucas* took issue with a statute that capped the damages recoverable for a common law claim. Here, as noted, Puente and C.P. are asserting the same health care liability claim, and section 33.012 neither caps nor otherwise restricts the damages recoverable for that claim.

For these reasons, I would sustain appellants' fourth issue and remand to the trial court with instructions to apply a credit in the full amount of the confidential settlement in accordance with section 33.012.

Sandee Bryan Marion, Chief Justice

2020 WL 557735
Only the Westlaw citation is currently available.
Court of Appeals of Texas, San Antonio.

Jesus VIRLAR, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group, Appellants

v.

Jo Ann PUENTE, Appellee

No. 04-18-00118-CV

Delivered and Filed: February 5, 2020

Editor's Note:: withdrawn and superseded on rehearing by 2020 WL 6049652.

All Citations

Not Reported in S.W. Rptr., 2020 WL 557735

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

BEFORE THE EN BANC COURT[1]

In accordance with this court's opinion of this date, the portion of the trial court's judgment awarding damages for future loss of earning capacity is AFFIRMED, CONDITIONED ON A REMITTITUR of damages in the amount of $8,000.00. If this remittitur is not filed within twenty days from the date of this judgment, the portion of the trial court's judgment awarding damages for future loss of earning capacity will be reversed, and the cause remanded for a new trial. We do not disturb any other damages awarded by the jury. Further, the judgment of the trial court is REVERSED IN PART and this cause is REMANDED for the trial court (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002), and apply any appropriate settlement credit, if any; (2) to make a determination of the amount of damages awarded for future medical care expenses that should be paid in periodic payments pursuant to section 74.503(c) and (d) of the Texas Civil Practice and Remedies Code; and (3) to sign a new judgment in conformity with this court's opinion. Costs of appeal are taxed against the party incurring same.

SIGNED February 5, 2020.

Liza A. Rodriguez

Liza A. Rodriguez, Justice

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

APPENDIX TAB “H”

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

OPINION ON MOTION FOR REHEARING AND REMITTITUR

Opinion by: Liza A. Rodriguez, Justice
Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice, joined by Patricia O. Alvarez, Justice

Sitting:[1] Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 6, 2020

AFFIRMED IN PART AS MODIFIED, REVERSED AND REMANDED IN PART; MOTION FOR REHEARING DENIED

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

Appellee Jo Ann Puente has filed two remittiturs with the clerk of this court. The first is a remittitur in the amount of $8,000.00 as suggested in our original opinion dated February 5, 2020. *See Virlar v. Puente*, No. 04-18-00118-CV, 2020 WL 557735, at *32 (Tex. App.—San Antonio Feb. 5, 2020, no pet. h.) (suggesting remittitur pursuant to Texas Rule of Appellate Procedure 46.3). The second is a voluntary remittitur in the amount of $434,000.00 pursuant to Texas Rule of Appellate Procedure 46.5, which Puente argues will cure any reversible error committed by the trial court with respect to Issue 4 (the settlement credit issue). *See id*. at *20-29. Puente has also filed a motion for rehearing, requesting that this court reconsider its holdings with respect to Issue 4 (the settlement credit issue) and Issue 5 (the periodic payments of future medical expenses issue). We accept Puente's first remittitur of $8,000.00. However, we reject Puente's second remittitur of $434,000.00 and deny her motion for rehearing.

Texas Rule of Appellate Procedure 46.5 provides that if a court of appeals reverses a "trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may . . . voluntarily remit the amount that the affected party believes will cure the reversible error." TEX. R. APP. P. 46.5. If "the court of appeals determines that the voluntary remittitur cures the reversible error, then the court must accept the remittitur and reform and affirm the trial court judgment in accordance with the remittitur." *Id*. "If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, *but that remittitur is appropriate*, the court must suggest a remittitur in accordance with Rule 46.3." *Id*. (emphasis added). For the reasons stated in our opinion with regard to Issue 4, we do not believe that remittitur is appropriate on the settlement credit issue. *See Virlar*, at *29 (explaining that the trial court denied Dr. Virlar and Gonzaba's motion for settlement credit but did not have an opportunity to make an evidentiary finding as to any benefit Puente received from C.P.'s settlement). Nor can we conclude, based on the record before us, whether $434,000.00 would cure

the error. *See id*. (summarizing testimony by guardian ad litem at friendly suit hearing and affidavit filed by Puente's counsel). We therefore reject Puente's second remittitur in the amount of $434,000.00. *See* TEX. R. APP. P. 46.5; *M & A Tech., Inc. v. iValue Grp., Inc.*, 295 S.W.3d 356, 372 (Tex. App.—El Paso 2009, pet. denied) (op. on reh'g) (rejecting voluntary remittitur because remittitur inappropriate under appellate record presented).

The trial court's judgment is modified to reflect that Appellee Jo Ann Puente recover damages against appellants for loss of future earning capacity in the amount of $880,429.00. *See* TEX. R. APP. P. 46.3, 46.5; *see Virlar*, 2020 WL 557735, at *32. We do not disturb any other damages awarded by the jury. For reasons explained fully in our original opinion, the trial court's judgment is reversed in part, and the cause is remanded to the trial court for it (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts* and apply an appropriate settlement credit, if any; (2) to make a determination under section 74.503(c) and (d) of the amount of damages awarded for future medical care expenses that should be paid in periodic payments; and (3) to sign a new judgment in conformity with this opinion and our previous opinion of February 5, 2020. *See Virlar*, 2020 WL 557735, at *28-33.

Liza A. Rodriguez, Justice

Fourth Court of Appeals
San Antonio, Texas

CONCURRING AND DISSENTING OPINION

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

CONCURRING AND DISSENTING OPINION ON MOTION FOR REHEARING AND REMITTITUR

Opinion by: Liza A. Rodriguez, Justice
Concurring and Dissenting Opinion by: Sandee Bryan Marion, Chief Justice, joined by Patricia O. Alvarez, Justice

Sitting:[1] Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 6, 2020

I concur in the majority's opinion on motion for rehearing and remittitur in all respects except its conclusion that remittitur is not appropriate on the settlement credit issue. Because I

[1]Justice Rebeca C. Martinez has recused herself from this appeal.

would hold remittitur is appropriate on the settlement credit issue for the reasons stated in my concurring and dissenting opinion dated February 5, 2020, I would suggest a remittitur in the full amount of the settlement. *See* TEX. R. APP. P. 46.3. I, therefore, respectfully dissent in part as to that issue. I join the majority in its decision to affirm the judgment as modified regarding the award of damages for future loss of earning capacity, as well as its decision to deny Puente's motion for rehearing.

Sandee Bryan Marion, Chief Justice

2020 WL 2139313
Only the Westlaw citation is currently available.
Court of Appeals of Texas, San Antonio.

Jesus VIRLAR, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group, Appellants

v.

Jo Ann PUENTE, Appellee

No. 04-18-00118-CV

Delivered and Filed: May 6, 2020

Editor's Note: withdrawn and superseded on rehearing by 2020 WL 6049652

All Citations

Not Reported in S.W. Rptr., 2020 WL 2139313

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-18-00118-CV

Jesus **VIRLAR**, M.D. and GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group,
Appellants

v.

Jo Ann **PUENTE**,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-04936
Honorable Norma Gonzales, Judge Presiding

BEFORE THE EN BANC COURT[1]

In accordance with this court's opinions of February 5, 2020 and of this date, the portion of the trial court's judgment awarding damages for future loss of earning capacity is MODIFIED to reflect that Appellee Jo Ann Puente recover damages against appellants in the amount of $880,429.00. As modified, the portion of the trial court's judgment awarding damages for future loss of earning capacity is AFFIRMED. We do not disturb any other damages awarded by the jury. Further, the judgment of the trial court is REVERSED IN PART and this cause is REMANDED for the trial court (1) to conduct an evidentiary hearing on any benefit received by Puente from C.P.'s settlement with the hospital pursuant to *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002), and apply any appropriate settlement credit, if any; (2) to make a determination of the amount of damages awarded for future medical care expenses that should be paid in periodic payments pursuant to section 74.503(c) and (d) of the Texas Civil Practice and Remedies Code; and (3) to sign a new judgment in conformity with this court's opinion. Costs of appeal are taxed against the party incurring same.

Appellee Jo Ann Puente's motion for rehearing is DENIED.

SIGNED May 6, 2020.

Liza A. Rodriguez

Liza A. Rodriguez, Justice

[1] Justice Rebeca C. Martinez has recused herself from this appeal.

APPENDIX TAB “I”

V.T.C.A., Civil Practice & Remedies Code § 33.004

§ 33.004. Designation of Responsible Third Party

Effective: September 1, 2011
Currentness

(a) A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

(b) Nothing in this section affects the third-party practice as previously recognized in the rules and statutes of this state with regard to the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

(c) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(2).

(d) A defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure.

(e) Repealed by Acts 2011, 82nd Leg., ch. 203 (H.B. 274), § 5.02.

(f) A court shall grant leave to designate the named person as a responsible third party unless another party files an objection to the motion for leave on or before the 15th day after the date the motion is served.

(g) If an objection to the motion for leave is timely filed, the court shall grant leave to designate the person as a responsible third party unless the objecting party establishes:

(1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and

(2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.

(h) By granting a motion for leave to designate a person as a responsible third party, the person named in the motion is designated as a responsible third party for purposes of this chapter without further action by the court or any party.

(i) The filing or granting of a motion for leave to designate a person as a responsible third party or a finding of fault against the person:

(1) does not by itself impose liability on the person; and

(2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.

(j) Notwithstanding any other provision of this section, if, not later than 60 days after the filing of the defendant's original answer, the defendant alleges in an answer filed with the court that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit, the court shall grant a motion for leave to designate the unknown person as a responsible third party if:

(1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;

(2) the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and

(3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.

(k) An unknown person designated as a responsible third party under Subsection (j) is denominated as “Jane Doe” or “John Doe” until the person's identity is known.

(*l*) After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.

Credits

Added by Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995. Amended by Acts 2003, 78th Leg., ch. 204, §§ 4.03, 4.04, 4.10(2), eff. Sept. 1, 2003; Acts 2011, 82nd Leg., ch. 203 (H.B. 274), §§ 5.01, 5.02, eff. Sept. 1, 2011.

Notes of Decisions (142)

V. T. C. A., Civil Practice & Remedies Code § 33.004, TX CIV PRAC & REM § 33.004
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle C. Judgments
Chapter 33. Proportionate Responsibility (Refs & Annos)
Subchapter B. Contribution

V.T.C.A., Civil Practice & Remedies Code § 33.011

§ 33.011. Definitions

Effective: September 1, 2003
Currentness

In this chapter:

(1) "Claimant" means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes:

(A) the person who was injured, was harmed, or died or whose property was damaged; and

(B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.

(2) "Defendant" includes any person from whom, at the time of the submission of the case to the trier of fact, a claimant seeks recovery of damages.

(3) "Liable defendant" means a defendant against whom a judgment can be entered for at least a portion of the damages awarded to the claimant.

(4) "Percentage of responsibility" means that percentage, stated in whole numbers, attributed by the trier of fact to each claimant, each defendant, each settling person, or each responsible third party with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.

(5) "Settling person" means a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

(6) "Responsible third party" means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these. The term "responsible third party" does not include a seller eligible for indemnity under Section 82.002.

(7) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(3).

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, §§ 4.05, 4.10(3), eff. Sept. 1, 2003.

Notes of Decisions (55)

V. T. C. A., Civil Practice & Remedies Code § 33.011, TX CIV PRAC & REM § 33.011
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle C. Judgments
Chapter 33. Proportionate Responsibility (Refs & Annos)
Subchapter B. Contribution

V.T.C.A., Civil Practice & Remedies Code § 33.012

§ 33.012. Amount of Recovery

Effective: September 1, 2005
Currentness

(a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.

(b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.

(c) Notwithstanding Subsection (b), if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:

(1) the sum of the dollar amounts of all settlements; or

(2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

(d) An election made under Subsection (c) shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected Subsection (c)(1).

(e) This section shall not apply to benefits paid by or on behalf of an employer to an employee pursuant to workers' compensation insurance coverage, as defined in Section 401.011(44), Labor Code, in effect at the time of the act, event, or occurrence made the basis of claimant's suit.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.08, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, §§ 4.06, 4.10(4), eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 277, § 1, eff. June 9, 2005; Acts 2005, 79th Leg., ch. 728, § 23.001(6), eff. Sept. 1, 2005.

Notes of Decisions (160)

V. T. C. A., Civil Practice & Remedies Code § 33.012, TX CIV PRAC & REM § 33.012
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 33.013

§ 33.013. Amount of Liability

Effective: September 1, 2021
Currentness

(a) Except as provided in Subsection (b), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

(b) Notwithstanding Subsection (a), each liable defendant is, in addition to the defendant's liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:

(1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent; or

(2) the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the following provisions of the Penal Code and in so doing proximately caused the damages legally recoverable by the claimant:

(A) Section 19.02 (murder);

(B) Section 19.03 (capital murder);

(C) Section 20.04 (aggravated kidnapping);

(D) Section 22.02 (aggravated assault);

(E) Section 22.011 (sexual assault);

(F) Section 22.021 (aggravated sexual assault);

(G) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(H) Section 32.21 (forgery);

(I) Section 32.43 (commercial bribery);

(J) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(K) Section 32.46 (fraudulent securing of document execution);

(L) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(M) conduct described in Chapter 31 the punishment level for which is a felony of the third degree or higher; or

(N) Section 21.02 (continuous sexual abuse of young child or disabled individual).

(c) Repealed by Acts 2003, 78th Leg., ch. 204, § 4.10(5).

(d) This section does not create a cause of action.

(e) Notwithstanding anything to the contrary stated in the provisions of the Penal Code listed in Subsection (b)(2), that subsection applies only if the claimant proves the defendant acted or failed to act with specific intent to do harm. A defendant acts with specific intent to do harm with respect to the nature of the defendant's conduct and the result of the person's conduct when it is the person's conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

(f) The jury may not be made aware through voir dire, introduction into evidence, instruction, or any other means that the conduct to which Subsection (b)(2) refers is defined by the Penal Code.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, §§ 4.07, 4.10(5), eff. Sept. 1, 2003; Acts 2007, 80th Leg., ch. 593, § 3.02, eff. Sept. 1, 2007; Acts 2021, 87th Leg., ch. 221 (H.B. 375), § 2.02, eff. Sept. 1, 2021; Acts 2021, 87th Leg., ch. 837 (S.B. 109), § 4, eff. Sept. 1, 2021.

Notes of Decisions (60)

V. T. C. A., Civil Practice & Remedies Code § 33.013, TX CIV PRAC & REM § 33.013
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

APPENDIX TAB “J”

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses

V.T.C.A., Civil Practice & Remedies Code § 74.501

§ 74.501. Definitions

Effective: September 1, 2003
Currentness

In this subchapter:

(1) "Future damages" means damages that are incurred after the date of judgment for:

(A) medical, health care, or custodial care services;

(B) physical pain and mental anguish, disfigurement, or physical impairment;

(C) loss of consortium, companionship, or society; or

(D) loss of earnings.

(2) "Future loss of earnings" means the following losses incurred after the date of the judgment:

(A) loss of income, wages, or earning capacity and other pecuniary losses; and

(B) loss of inheritance.

(3) "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

Notes of Decisions (5)

V. T. C. A., Civil Practice & Remedies Code § 74.501, TX CIV PRAC & REM § 74.501
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses

V.T.C.A., Civil Practice & Remedies Code § 74.502

§ 74.502. Scope of Subchapter

Effective: September 1, 2003
Currentness

This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds $100,000.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

V. T. C. A., Civil Practice & Remedies Code § 74.502, TX CIV PRAC & REM § 74.502
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses

V.T.C.A., Civil Practice & Remedies Code § 74.503

§ 74.503. Court Order for Periodic Payments

Effective: September 1, 2003
Currentness

(a) At the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

(b) At the request of a defendant physician or health care provider or claimant, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.

(c) The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.

(d) The court shall specify in its judgment ordering the payment of future damages by periodic payments the:

(1) recipient of the payments;

(2) dollar amount of the payments;

(3) interval between payments; and

(4) number of payments or the period of time over which payments must be made.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

Notes of Decisions (2)

V. T. C. A., Civil Practice & Remedies Code § 74.503, TX CIV PRAC & REM § 74.503

Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 74.504

§ 74.504. Release

Effective: September 1, 2003
Currentness

The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by the claimant.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

V. T. C. A., Civil Practice & Remedies Code § 74.504, TX CIV PRAC & REM § 74.504
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses

V.T.C.A., Civil Practice & Remedies Code § 74.505

§ 74.505. Financial Responsibility

Effective: September 1, 2003
Currentness

(a) As a condition to authorizing periodic payments of future damages, the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.

(b) The judgment must provide for payments to be funded by:

(1) an annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;

(2) an obligation of the United States;

(3) applicable and collectible liability insurance from one or more qualified insurers; or

(4) any other satisfactory form of funding approved by the court.

(c) On termination of periodic payments of future damages, the court shall order the return of the security, or as much as remains, to the defendant.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

V. T. C. A., Civil Practice & Remedies Code § 74.505, TX CIV PRAC & REM § 74.505
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses

V.T.C.A., Civil Practice & Remedies Code § 74.506

§ 74.506. Death of Recipient

Effective: September 1, 2003
Currentness

(a) On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction.

(b) Periodic payments, other than future loss of earnings, terminate on the death of the recipient.

(c) If the recipient of periodic payments dies before all payments required by the judgment are paid, the court may modify the judgment to award and apportion the unpaid damages for future loss of earnings in an appropriate manner.

(d) Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant physician or health care provider to make further payments ends and any security given reverts to the defendant.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

Notes of Decisions (1)

V. T. C. A., Civil Practice & Remedies Code § 74.506, TX CIV PRAC & REM § 74.506
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter K. Payment for Future Losses

V.T.C.A., Civil Practice & Remedies Code § 74.507

§ 74.507. Award of Attorney's Fees

Effective: September 1, 2003
Currentness

For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments, the court shall:

(1) place a total value on the payments based on the claimant's projected life expectancy; and

(2) reduce the amount in Subdivision (1) to present value.

Credits
Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

V. T. C. A., Civil Practice & Remedies Code § 74.507, TX CIV PRAC & REM § 74.507
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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