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SUPREME COURT OF TEXAS
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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' REPLY BRIEF ON THE MERITS

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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"), submit this Reply Brief on the Merits, in reply to Respondent's Brief on the Merits.[1] In support of their Petition for Review, Petitioners reply as follows:

[1] To the extent Petitioners may not reply to every assertion, argument, or citation by Respondent, it should not be construed as acquiescence to any arguments, or as waiver of any argument. Petitioners stand on the arguments and authority set forth in their Petition for Review and Reply to Response to Petition for Review, as well as those asserted within their Brief on the

ARGUMENT AND AUTHORITIES IN REPLY

I. Error in Denying Dollar-for-Dollar Settlement Credit

A. Petitioners placed evidence of the settlement agreement and the amount of the settlement on the record—the issue is not waived.

Petitioners' counsel informed the trial court that Carr settled C.P.'s claims against Methodist for $3.3 million, placing both the existence of the settlement and the amount of the settlement in the record in several ways. First, at the hearing on Respondent's motion for judgment, Petitioners' counsel tendered an envelope containing the settlement agreement to the trial court. 21RR7, 16, 30. Second, Petitioners openly stated the settlement amount on the record at the hearing. 21RR30-31. And third, Petitioners included the settlement amount in written post-judgment motions. 2RR5291; 3CR5322-34; 23RR5-8. While Respondent objected to Petitioners' counsel for "saying those numbers," Respondent did not contest the amount that Methodist paid. 21RR30-31; 23RR5-8. Petitioners' statements of the settlement amount, both orally in open court and in filed documents, placed the settlement amount in the record and clearly met their burden of proof. *See Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998).

Respondent claims that Petitioners were required to introduce "the settlement agreement or some other evidence" of the settlement amount into the

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Merits, which is cited as ("BOM":[page #]). Petitioners refer herein to the Respondent's Brief on the Merits as ("RBOM":[page #]).

record and Petitioners' counsel's statements on the record are "insufficient to substitute for evidence." (RBOM:11-12). But Texas law is not so mindlessly strict.

In *Ellender*, the court of appeals affirmed the trial court's refusal to apply a settlement credit because the party seeking the credit did not prove the settlement through judicial admission, stipulation, judicial notice, or properly admitted documents or testimony. *Ellender*, 968 S.W.2d at 927. This Court disagreed, holding that "neither Chapter 33 nor existing caselaw demands such proof." Instead, the record must simply show the settlement amount "in the settlement agreement *or otherwise*." *Id*. (emphasis added). Once the non-settling defendant shows the existence of a settlement, the burden falls on the plaintiff to prove that the credit does not apply. *Id*. Because counsel mentioned the amount of the settlement in court and in a written opposition to a motion, counsel had "plac[ed] the uncontested settlement amount in the record," meeting the burden of proof on the settlement amount. *Id*.

Here, even if the settlement agreement was not formally offered into evidence, the trial court had the agreement, was aware of the settlement amount, and acknowledged on the record that Petitioners' counsel had stated the amount. Just as in *Ellender*, Petitioners sufficiently placed the settlement amount in the record and met their burden of proof.

B. Chapter 33 does not violate the Open Courts guarantee of the Texas Constitution.

1. *The settlement credit provision merely affects the judgment after a trial of a well-established common-law cause of action.*

Chapter 33's settlement credit provision does not violate the Open Courts provision because it does not "abrogate the right to assert a well-established common law cause of action" through failing to "afford" "meaningful remedies" to vindicate that right. *Trinity River Auth. v. URS Consultants, Inc.-Texas*, 889 S.W.2d 259, 261 (Tex. 1994). Unlike most legislative actions that have faced Open Courts challenges, Chapter 33's settlement credit provision eliminates no claims; each claimant continues to have a right to assert recognized common-law causes of action. Further, the definition of "claimant" falls far short of eliminating any meaningful remedy to vindicate a claimant's common-law right. Indeed, statutory restrictions with much greater impacts on recovery have withstood Open Courts challenges. *See, e.g., Id.* (upholding statute of repose that eliminated negligence action against architects and engineers against an as-applied challenge); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995) (minimum impairment requirement and reliance on medical association guides for standards upheld against Open Courts challenge).

The basis of the settlement credit provision is the well-established "'one satisfaction rule' . . . first articulated in Texas in *Bradshaw*." *Stewart Title*

Guaranty Co. v. Sterling, 822 S.W.2d 1, 2 (Tex. 1991). By its own terms, the one-satisfaction rule is a *rule*; it is not a cause of action and not a remedy. In describing the nature of the one satisfaction rule, the court of appeals quoted *Home Insurance Co. v. McClain*, No. 05-97-01479-CV, 2000 WL 144115, at *7 (Tex. App.—Dallas 2000, no pet.) (mem. op.)—that the one-satisfaction rule is intended to make "'a plaintiff whole, but not more than whole.'" *Virlar v. Puente*, 613 S.W.3d 652, 692-92 (Tex. App.—San Antonio 2020, pet. filed) (*Virlar III*) (quoting *Home Ins.*, 2000 WL 144115, at *7). This sentence from *Home Insurance* cites as its only authority the *Stewart Title* opinion from this Court. But *Stewart Title* states the actual and different purpose of the rule: "The one satisfaction rule applies to prevent a plaintiff from obtaining more than one recovery for the same injury." *Stewart Title*, 822 S.W.2d at 7. In fact, the *Home Insurance* court said the same before adding the one sentence quoted by the court of appeals here: "Under the one satisfaction rule, a plaintiff is entitled to only one recovery for any damages suffered." *Home Ins*., 2000 WL 144115, at *7. And rather than expanding the nature of the one satisfaction rule beyond what this Court has said, *Home Insurance* merely held that the settlement credit applied because there was a single injury from water damage.

More recently, this Court has correctly characterized the one satisfaction rule incorporated by Chapter 33 as "a tort concept that limits a plaintiff to only one recovery for any damages suffered because of any injury." *In re Xerox Corp*., 555

S.W.3d 518, 523 (Tex. 2018) (orig. proceeding). Earlier, the Court similarly explained the reason for the rule in *First Title Co. of Waco v. Garrett*, 860 S.W.2d 74, 78 (Tex. 1993), as guarding against a windfall for the tort plaintiff, rather than assuring full recovery. Thus, as one commentator has correctly observed, the "one satisfaction rule is a traditionally defense-friendly, judicially-created rule restricting plaintiffs to one recovery for a single injury." Amy Pattillo, Utts v. Short—*The Current State of Chapter 33 Settlements and How to Avoid Getting "Utts"ed*, 55 BAYLOR L. REV. 335, 395 (2003) (emphasis added). *Virlar III* is the only opinion holding that the one satisfaction rule ensures full recovery by a plaintiff, and that erroneous holding is itself a reason to grant review, lest other courts follow.

Because the one satisfaction rule is merely a rule applied at the judgment-formation stage, and not a common-law cause of action or remedy, the Legislature has been free to adopt different approaches to how this rule interplays with the concept of settlement credits under Chapter 33. Those legislative changes have met nary an Open Courts challenge—until the meritless challenge now being made.

Originally, settlement credits were an extension of the pro rata contribution statute enacted in 1917, article 2212 of the Revised Civil Statutes (now Chapter 32 of the Civil Practice & Remedies Code).[2] Before article 2212, the principles

[2] *See* App. Tab A, Changes in Settlement Credits from 1917 to Date.

governing settlement credits were in a state of "chaos" among courts. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 768 (Tex. 1964); *see also* Gus M. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947). Much later, *Duncan v. Cessna Aircraft Co*., 665 S.W.2d 414 (Tex. 1984), adopted a pure comparative system for cases involving strict liability. *Duncan* included an extended discussion of the history of settlement credits. *See* 665 S.W.2d at 429-32. In that discussion, the Court noted that pro rata settlement credits under article 2212 and *Palestine Contractors* could result in reducing or increasing the jury's award, depending on the amount of the settlement and the amount of the damages. The Court expressly recognized that the same could happen with its newly-adopted percentage reduction method of settlement credits—which was also the rule adopted in 2003 with House Bill 4, until the 2005 amendments to Chapter 33, and which still exists in health care claims.[3]

As *Duncan* explained, a plaintiff could get more than the amount awarded by the jury if the settling defendant paid a lot of money and its percentage responsibility was found to be small, or the plaintiff could get less than the award if the opposite were true. The Court also discussed the dollar-for-dollar credit. All of this discussion came with absolutely no hint that any of these various

[3] Acts 2003, 78th Leg., ch. 204, §§4.07, 4.10(5) [House Bill 4]; Acts 2005, 79th Leg., ch. 277, §1, ch. 728, §23.001(6).

approaches were sacrosanct as a common law remedy or cause of action. In fact, *Duncan* overruled *Bradshaw v. Baylor University* to the extent that it was contrary to the new percentage settlement scheme. 665 S.W.2d at 432.

A settlement credit method *Duncan* could not discuss was the later–adopted sliding scale credit existing between 1987 and 2003.[4] If the defendant elected the section 33.012 sliding scale, the plaintiff's recovery was reduced by an increasing percentage, as much as 20% of all damages greater than $500,000. Using the sliding scale, a small settlement in a large-damages case would dramatically reduce the net award in the judgment.

Whatever modifications the Legislature has made to settlement credits over the years, those modifications have never abrogated "meaningful remedies." In its various enactments on settlement credits, the Legislature has not "withdraw[n] common-law remedies for well established common-law causes of action." *Trinity River*, 889 S.W.2d at 261-62. Although it is true that the redefinition of "claimant" has affected settlement credits, the Open Courts provision does not prevent statutory changes, as this Court has noted: "The open courts provision guarantees that a common law remedy will not be unreasonably abridged, not that the Legislature will not amend or replace a statute." *Garcia*, 893 S.W.2d at 521.

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[4] Acts 1987, 70th Leg., 1st C.S., ch. 2, §2.05; Acts 2003, 78th Leg., ch. 204, §§4.07, 4.10(5) [House Bill 4].

C. Chapter 33 is neither arbitrary nor unreasonable.

Even if Chapter 33 were somehow considered to eliminate a meaningful remedy for a well-established common law cause of action, Respondent still could not establish an Open Courts violation because Chapter 33's definition of claimant is not "unreasonable or arbitrary." *See Sax v. Votteler*, 648 S.W.2d 661, 664-65 (Tex. 1983). Petitioners have already discussed this point at length (BOM:18-24). The current settlement credit provision encourages settlement of all claims arising out of a single injury and guards against collusive settlements. Petitioners will not burden the Court with redundant briefing on that point.

D. An *Utts* hearing is insufficient to remedy the harmful error.

Finally, the error in not applying the statutorily required settlement credit statute is not harmless, as Respondent asserts. (RBOM:17-18). Chapter 33 entitles Petitioners to a settlement credit for the full "sum of the dollar amounts of all settlements," § 33.012(c)(1)—here $3.3 million. In contrast, under *Utts*, Petitioners are entitled to a settlement credit only in the amount that Respondent benefited from the settlement. *Utts v. Short*, 81 S.W.3d 822, 829 (Tex. 2002). Respondent contends that, under *Utts*, the appropriate amount of the settlement credit would be $434,000—Respondent's claimed amount of the benefit that she actually derived from the settlement. (RBOM:17).

Thus, any error resulting from the court of appeals' invalidation of the settlement credit provision is far from harmless. The difference between a Chapter 33 settlement credit and the amount Respondent agreed to remit is $2.87 million. In asserting that a voluntary remittitur in the amount of $434,000 "would without question more than cure any error found by any court with respect to settlement credits," (RBOM:17), Respondent entirely disregards the difference between Chapter 33's and *Utts*'s settlement credit provisions. The harm that results from the court of appeals' error can be remedied only through the application of a $3.3 million settlement credit.

II. Error in Denying Statutory Periodic Payments

Respondent's arguments that Petitioners failed to meet the requirements of Texas Civil Practice and Remedies Code section 74.503 and *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020), are insupportable. (RBOM:19-40).

A. Petitioners provided evidence of financial responsibility.

Respondent argues Petitioners were not entitled to periodic payments because they provided no evidence of financial responsibility, where (1) Dr. Virlar's failure to provide evidence of financial responsibility is material, (2) Petitioners' request was tardy, and (3) Gonzaba's evidence was inadmissible and insufficient. (RBOM:20-29). The court of appeals correctly concluded that

Petitioners provided evidence of financial responsibility required by the statute. *Virlar III*, 613 S.W.3d at 699-701.

1. *Dr. Virlar's failure to provide evidence of financial responsibility was immaterial.*

Before the trial court may authorize periodic payments of future damages, section 74.505(a) requires "a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded in the judgment." TEX. CIV. PRAC. & REM. CODE § 74.505(a). Given its plain meaning, the court of appeals concluded that where Gonzaba, Dr. Virlar's employer, was jointly and severally liable for the full amount of the judgment based on Dr. Virlar's negligence, Petitioners were required to provide evidence of financial responsibility for only one of these jointly and severally liable defendants. *Id.* at 701. Petitioners did so through evidence of Gonzaba's balance sheet and its controller's testimony. *Id.*

Respondent argues the lack of Dr. Virlar's financial responsibility is material, that nothing in the statute excuses a defendant from proof of section 74.505(a)'s requirements if another defendant has done so, and Dr. Virlar failed to provide any evidence of financial responsibility. (RBOM:20-25[5]). Respondent further argues that under the court's interpretation, "*any* defendant who shows

[5] Dr. Virlar's bankruptcy filings made long *after* the judgment provides no support for Respondent's arguments. (RBOM:25, App. Tab B).

financial responsibility can provide *all* defendants the right to pay in future installments, even those clearly *financially unable to do so.*" (RBOM:23 (emphasis in original)). But Respondent inaccurately conflates "*any* defendant" with the jointly and severally liable employer and employee defendants in this case.

The statute speaks in terms of "a defendant" and does not address joint and several liability. TEX. CIV. PRAC. & REM. CODE § 74.505(a). Respondent established that in providing her care, Dr. Virlar was acting as an employee of Gonzaba, who was responsible for Dr. Virlar's actions. (21RR50-51; 22RR28-29). Thus, Respondent cannot dispute that Gonzaba's evidence of financial responsibility covers Dr. Virlar. The point of the statutory requirement is to "assure full payment of damages awarded by the judgment"—to protect the claimant. TEX. CIV. PRAC. & REM. CODE § 74.505. The statute does not require an employee of a jointly and severally liable employer to make a redundant showing of financial responsibility.

Respondent's example—a jury finding of Dr. Virlar's responsibility at 99% and Dr. Martinez's at 1% and only he provides financial responsibility evidence—supports Petitioners' and the court of appeals' interpretation. (RBOM:23-24). If Dr. Virlar and Dr. Martinez are unrelated defendants—unlike Dr. Virlar (employee) and Gonzaba (his employer)—then Dr. Virlar is required to provide evidence of financial responsibility to address *his* responsibility because there has

been no financial responsibility evidence for that amount. However, Dr. Virlar, as the employee of Gonzaba, renders Gonzaba jointly and severally liable for Dr. Virlar's conduct and Gonzaba provided the evidence of financial responsibility for Dr. Virlar's conduct.

Last, even under Respondent's theory (RBOM:25), Gonzaba cannot be penalized if Dr. Virlar does not show financial responsibility: "The only reasonable interpretation of the statute is that it provides each defendant who timely and properly invokes it with a separate right to pay a part of its share of any liability periodically over time." (*Id*.).

2. *Gonzaba's evidence was admissible and sufficient to provide evidence of financial responsibility.*

The court of appeals correctly concluded Petitioners provided sufficient evidence of financial responsibility. *Virlar III*, at 700-01. Nothing in subchapter K requires the defendant to "provide evidence" of its ability to use any of section 74.505(b)'s methods of funding or "of the ability to make payments as far into the future as any periodic judgment might provide." (RBOM:28). Rather, section 74.505(b) addresses what the judgment must include—payments to be funded by annuity contract, United States obligation, or liability insurance—alternatively,

trial court approval of any other satisfactory funding. TEX. CIV. PRAC. & REM. CODE § 74.505(b).[6]

Petitioners established, through Gonzaba's balance sheet and testimony of its controller, Keller, that Gonzaba was insured for $2 million and had assets exceeding $22 million—evidence of financial responsibility to ensure full payment of the damages to be awarded based on the jury's verdict. 22RR11, 14-15; 72RR24 (Ex.C-1); 73RR3-5 (DX-1). *Virlar III*, at 700-01. Nothing in the statute required Petitioners to provide evidence of financial responsibility in an amount of the *future* value of the judgment. (RBOM:29).

Keller testified that the balance sheet was true and accurate at the time prepared, that she was familiar with the preparation of the balance sheet, and that the full amount of the accounts receivable shown, $20.4 million, would be 100% collectible, in her opinion, because Gonzaba only records the "reimbursement rate" for accounts receivable, rather than billed rates. 22RR19-22. Thus, the amount reflected on the accounts receivable reflect the guaranteed and negotiated reimbursement rates for each of the billed charges included in the receivables, even as to Medicare and Medicaid. (*Id.*). That a large amount of the assets reflected on the balance sheet are held in accounts receivable does not mean Gonzaba failed to

[6] Petitioners requested they be allowed to present evidence of an annuity or comparable instrument to fund periodic payments once the court determined what amount would be awarded. (BOM:44-46).

provide evidence of financial responsibility. (RBOM:28-29). 21RR46; *see also* 22RR19-22. The statute does not limit the use of any asset to "provide evidence of financial responsibility." *See* TEX. CIV. PRAC. & REM. CODE § 74.505(a).

Further, Chapter 74 requires no pretrial disclosure to "provide evidence of financial responsibility," TEX. CIV. PRAC. & REM. CODE §§ 74.501-.507, and nothing in the Rules of Procedure required Petitioners to designate Keller as a person with knowledge of relevant facts related to the care and treatment of Respondent, or as a testifying expert regarding same. (RBOM:28; *see* TEX. R. CIV. P. 193.6; 194). The court of appeals correctly concluded that Petitioners need not have designated any witness pretrial for purposes of financial responsibility. *Virlar III*, at 700, n.36.

Next, there is no requirement that in showing financial responsibility, a defendant is required to place the full amount of the judgment into the court's registry. (RBOM:29). Rather, in *Prabhakar v. Fritzgerald*, No. 05-10-00126-CV, 2012 WL 3667400 (Tex. App.—Dallas Aug. 24, 2012, no pet.), *judgment vacated by agreement* (Oct. 15, 2016), in providing evidence of financial responsibility, the defendant *offered* to do so if ordered by court.

3. *Petitioners timely requested periodic payments.*

Petitioners do not contend the jury failed to make material findings on disputed issues of fact. (RBOM:26-27). Rather, where life expectancy is

undisputed and evidence of inflation, discount rates, and determinations of year-by-year future medical is contained in Respondent's own evidence (PX-23 and her experts' testimony), no additional jury findings are required. This is unlike *Detrick* and Respondent agreed post-verdict that the evidence required by the statute to order periodic payments was contained in the record before the jury [(PX-23) (21RR47)], and explained how to use PX-23 in forming a judgment awarding periodic payments. (BOM:29-35). *See Detrick*, at 838-39 (explaining that record failed to contain evidence required for award of periodic payments as defendant requested). The court of appeals too narrowly applied *Detrick*. *Id.*

B. The trial court had the evidence necessary to order periodic payments.

Detrick requires identification of evidence that enables the court to make reasonable findings that are not "inconsistent with the jury's verdict," and allows the trial court to receive additional evidence if the trial record does not contain the evidence necessary to comply with Subchapter K. *Detrick*, 610 S.W.3d at 837-38. As previously detailed, through each stage of the post-trial proceedings, Petitioners explained and provided options to fashion a periodic payments judgment and make the findings required by the statute. (BOM:39-42). Contrary to Respondent's characterization, Petitioners demonstrated how the trial court could avoid double discounting while ordering payments extending through Respondent's undisputed life expectancy of 31 years. (RBOM:29-30).

Petitioners pointed to evidence that: (1) undisputed life expectancy of 31 years[7]; (2) medical needs greater during the last decade of life[8]; (3) immediate surgical needs to award lump sum[9]; (4) a need for ongoing care, so the entire award could be paid out over the life expectancy.[10] Petitioners urged that the trial court should use Dr. Altman's evidence regarding life expectancy and life care needs, as valued by Dr. Fairchild's projections, to support the findings required in Subchapter K. 3CR5297. Petitioners made clear that the trial court should order that: (1) the amounts for any immediate medical or surgical needs be paid in lump sum, (2) periodic payments should be higher 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 present value amount of the remainder be ordered to be paid to fund an instrument to pay the future damages. 3CR5297-98. Thus, the entire jury's verdict (after settlement credits) in present value dollars would be immediately paid through lump sum payments for (1) attorney's fees and any immediate care needs and (2) the funding of an instrument to pay the future payments.

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7 3CR5140; *see* 9RR161.

8 21RR40-41; *see* 9RR179-80, 183-84.

9 21RR41, 56.

10 21RR40-42; *see* 9RR177-78, 179-82.

The statute gives the trial court the discretion to decide how much to be paid periodically in accordance with the evidence (here, provided to the jury through PX-23, and Dr. Fairchild's and Dr. Altman's testimony), and even Respondent agreed the evidence existed in PX-23 from which the trial court could make the determinations required for a periodic payments judgment. *See* TEX. CIV. PRAC. & REM. CODE § 74.503(a), (c), (d). The statute does not require that Petitioners provide the *exact* values to be specified in the judgment; rather, that is a matter for the trial court's discretion so long as its determination is supported by the record. *Id.*

Nor does the statute require that the jury value each element of the life care plan in future dollars (rather than in present value) for each year of life expectancy (especially where, as here, life expectancy is undisputed). Rather, the statute itself contemplates the trial court's discretion in forming the judgment to order future medical expenses be paid periodically by providing the court with the authority to order future damages be paid "in whole or in part" in periodic payments rather than lump sum. TEX. CIV. PRAC. & REM. CODE § 74.503(a). If the trial court's assessment of periodic payments lies within the range of the jury's verdict as supported by the evidence, the trial court properly exercises its discretion. *See Detrick*, at 837-38. Although the jury awarded less than the full amount of Dr. Fairchild's valued life care plan, the trial court could have used his plan, just as

Respondent's counsel instructed, in properly exercising its discretion—so long as the trial court's periodic payments determination was reasonable under the record—because the record contained:

- the different discount rates for each element of Respondent's life care plan;
- the computation of present and future value for the entire life care plan;
- information to extrapolate the discount rates to order an appropriate dollar amount of periodic payments for future medical care.

The trial court could have fashioned periodic payments in myriad ways consistent with the verdict without the jury having to make findings assessing each element of the life care plan for each year of life expectancy.[11] (BOM:38-40).

C. Petitioners properly invoked the statute.

Next, the right to periodic payments is not an affirmative defense; it is not a matter of avoidance requiring a specific pleading under Rule 94—it is a method of how recovery will be paid. *Virlar III*, at 699 (citing *Zorilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015); *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 137 (Tex. 2014)). (RBOM:33). In other words, even if Respondent is entitled to recover based on Petitioners' liability, the periodic

[11] *Columbia Valley Healthcare Sys. L.P. v. A.A.* is distinguishable. No. 13-18-00362-CV, 2020 WL 4382264 (Tex. App.—Corpus Christi-Edinburg 2020, pet. granted) (mem. op.). There, *disputed* life expectancy was requested to be submitted by the defendant hospital to provide the trial court with information to order periodic payments. The trial court refused to submit the requested questions, and the court of appeals held no reversible error in failing to do so. *Id.*, *5.

payments provision is not a bar to recovery; Subchapter K does not require Respondent to rebut anything. Rather, it simply provides the method and mechanics for carrying out and receiving the recovery of future damages. *Virlar III*, at 699.

Respondent contends section 74.507 requires the jury to determine the amount and frequency of periodic payments. (RBOM:37). When read with the other provisions of the statute, however, it is clear that, *after* the jury awards damages, the *trial court* issues the required findings and makes the determination to award all or part of these damages in periodic payments. TEX. CIV. PRAC. & REM. CODE §§ 74.503(a), (c)-(d), 74.507. If evidence has not been presented to the jury that could be used for periodic payments determinations, *Detrick* provides that post-trial evidence may be submitted. *Detrick* at 837-38. But, again, under this record, the trial court had, as Respondent pointed out, Dr. Fairchild's report, PX-23, which provided the necessary information and method for the trial court to exercise its discretion in making the required findings.[12]

Thus, Petitioners met their burden to provide evidence of financial responsibility, timely invoked the statute, and did not waive entitlement to statutory periodic payments.

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[12] *Gunn v. McCoy*, 554 S.W.3d 645, 669 (Tex. 2018), is also distinguishable. (RBOM:33-34). There, defendants never requested periodic payments anytime before appeal to this Court.

D. No Constitutional infirmity has been shown.

When reviewing the constitutionality of a statute, courts begin with the presumption that it is constitutional. *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003). The party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements. *Id.*

Respondent summarily argues that to meet federal due process, she must be given reasonable notice and an opportunity to be heard to rebut any claim or defense by controverting evidence, which did not occur because Petitioners failed to plead or supplement disclosures to identify periodic payments as an issue. (RBOM:34-36 (also referencing guarantees of due course of law, open courts, and the right to jury trial. U.S. CONST., AM. 7[13], 14[14]; TEX. CONST., art. I, Section 13[15], 15[16] and 19[17]). (RBOM:34-35). The court of appeals noted and properly rejected

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[13] The Seventh Amendment provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

[14] The Fourteenth Amendment provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[15] Texas Constitution, Art. I, Section 13 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."

[16] Texas Constitution, Art. I, Section 15 provides, "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

similar arguments—that if section 74.503 allows for a request for periodic payments to be made post-trial, then Respondent's rights to due process and due course of law under the Texas Constitution, along with the separation of powers doctrine, would be violated. *Virlar III*, at 699, n.35.

Here, as below, Respondent fails to show how these rights have been violated through Subchapter K, which provides a tort victim with monies to pay for future care at the time that future care is needed when a liable defendant has provided evidence of financial responsibility. Allowing Petitioners to invoke Subchapter K post-verdict—only once the jury has reached a verdict in present value that equals or exceeds $100,000 in future damages subject to periodic payments under Subchapter K—has not been shown to deprive due process or due course of law, to violate open courts, or to deprive Respondent of the right to a civil jury trial. *See id.*

1. *No violation of the right to jury trial.*

Assuming that the jury must make express findings on all issues to be addressed in a periodic payments judgment, Respondent contends that not submitting "periodic payments" questions to the jury unconstitutionally abridges the right to jury trial under the Seventh Amendment and the Texas Constitution,

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[17] Texas Constitution, Art. I, Section 19 provides, "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

art. I, § 15. (RBOM:32, 36 (citing *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666-67 (Tex. 1996)). First, Respondent incorrectly assumes the jury must make express findings addressing the periodic payments plan to be included in a judgment. Again, here life expectancy is undisputed and PX-23 provides the information for the trial court to order periodic payments.

Next, *Rhyne* involved the complete denial of a jury trial after one was requested, the jury fee was untimely paid, and the trial court had previously signed an order setting the jury trial—circumstances inapplicable here. *See id.*

Regardless, no right to jury trial is compromised through Subchapter K's provisions. Initially, the Seventh Amendment has not been incorporated to the states. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 417-18 (1987) (holding that Seventh Amendment applies only to federal court proceedings, not state court proceedings); *Dohaney v. Rogers*, 281 U.S. 362, 369 (1930) ("The due process clause does not guarantee to state citizens any particular form or method of state procedure.); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (reiterating that Supreme Court has not held that right to jury trial in civil cases is an element of due process applicable to state courts"); *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 418 (1996) (noting that the Seventh Amendment "governs proceedings in federal court, but not in state court. . . ."). And, Respondent makes no argument for incorporation.

Even if it applied, there can be no violation of either the Preservation or Reexamination Clauses of the Seventh Amendment. Subchapter K does not impede the jury's function to assess liability and determine past and future damages. The statute is clear that the jury remains the ultimate decision-maker of the plaintiff's total past and future damages and the court fashions the specific details of the periodic payments award—designating the dollar amount of the payments, the interval between payments and the period of time over which the payments are made. TEX. CIV. PRAC. & REM. CODE § 74.502 (Subchapter K applies only where present value of jury award exceeds $100,000); §§ 74.503(c), (d). Nothing in the statute takes away the right to jury trial. Rather, a defendant timely raises the right to periodic payments post-verdict, and no pretrial discovery supplementation is required. *Virlar III*, at 700, n.36.

No reexamination of the jury's verdict occurs through implementation of Subchapter K—the court merely utilizes the evidence before it to determine what amounts of future damages awarded by the jury should be paid in lump sum (such as attorney's fees and immediate care needs), and what amounts should be paid periodically.

For similar reasons, nothing in Subchapter K violates the right to jury trial provided by the Texas Constitution. Respondent makes no arguments to address "whether the Legislature has so restricted the jury's role in deciding these issues

that it has transgressed the inviolate right to jury trial." *Garcia*, 893 S.W.2d at 528. Plainly, it does not. Where ultimate questions of liability and damages remain within the jury's province, Subchapter K's requirements for the trial court to form the judgment does not implicate the right to a jury trial. *See id.* at 527.

2. *No violation of due process, due course of law, or Open Courts.*

a. Subchapter K is a constitutional exercise of the Legislature's police powers.

The police power of the Legislature supports the enactment of Subchapter K of Chapter 74 that Respondent vaguely argues takes away her rights of redress. *See, e.g., Methodist Healthcare Sys. Of San Antonio, Ltd. LLP v. Rankin*, 307 S.W.3d 283, 286-87 (Tex. 2010) (discussing *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955) ("[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. Legislative action of this type is not sustained when it is arbitrary or unreasonable.")).[18] Respondent made no showing of any

[18] Subchapter K was enacted in 2003 as part of House Bill 4, a top-to-bottom overhaul of Texas malpractice law to "make affordable medical and health care more accessible and available to the citizens of Texas," and to "do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis." The omnibus bill makes explicit findings describing the Legislature's concern that a spike in health care liability claims had fueled an insurance crisis that was harming healthcare delivery in Texas. The Legislature

alleged arbitrary or unreasonable nature or effect of the periodic payments provisions.

In enacting Subchapter K, the Legislature considered that medical expenses should be funded as the plaintiff needs medical care, over the term 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. Thus, even if Subchapter K withdraws common-law remedies—which it does not—it is a valid exercise of the Legislature's police powers.

b. Due process/due course of law arguments fail.

Respondent's conclusory due process and due course of law arguments fail.[19] *See* TEX. CONST., art. I, §§ 13, 19; U.S. CONST., AM. 14. Under federal and state guarantees of due process, legislation that does not affect a fundamental right or interest is valid if it bears a rational relationship to a legitimate state interest. *Hebert v. Hopkins*, 395 S.W.3d 884, 898 (Tex. App.—Austin 2013, no pet.).

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specifically found that the crisis had often made insurance unavailable at any price. *See Rankin*, at 287-288.

[19] The Texas due course of law clause is nearly identical to the federal due process clause, and Texas courts analyze the terms and related claims in the same manner. *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

Respondent claims the lack of affirmative defense pleading and lack of discovery supplementation constitutes lack of reasonable notice and opportunity to be heard. (RBOM:34-35).

Any right by Respondent to recover for medical malpractice or receive her recovery in lump sum does not fall within the fundamental interests recognized by the U.S. Supreme Court. *Watson v. Hortman*, 844 F.Supp.2d 795, 801 (E.D. Tex. 2012). Respondent has not shown how Subchapter K deprives her of life, liberty, property, privileges, or immunities, or that she has been "disfranchised." (RBOM:34-35). No affirmative defense pleading is required because Subchapter K does not require any defense assertion of any proposition which, if established, *avoids* liability based on the existence of other facts which justify or excuse it. *See Zorilla*, 469 S.W.3d at 156. Rather, Subchapter K provides the rules and method for payment of a judgment awarding future medical expenses found by the jury. *See id* at 157.

c. No Open Courts violation.

Respondent's open courts argument is equally misguided. (RBOM:35). The open courts provision, TEX. CONST., art. I, § 13, is premised upon the rationale that the legislature has no power to make a remedy by due course of law contingent upon an "impossible condition." *Moreno v. Sterling Drug, Inc*., 787 S.W.2d 348, 355 (Tex. 1990). A claimant who brings an open courts challenge has the burden to

show that the statute actually prevented her from pursuing her claims. *Id.* Respondent makes no showing that Subchapter K or any of its provisions prevented her from pursuing her claims against Petitioners.

d. No Equal Protection/Equal Rights Violation.

Respondent's vague claims regarding equal protection and equal rights also fail. The United States Constitution provides that no state shall deny any person within its jurisdiction the equal protection of the laws. U.S. CONST. AM. XIV; TEXAS CONST., art. I, §§ 3, 19. (RBOM:34-35). Texas echoes federal standards when determining whether a statute violates equal protection under either provision. *Rose v. Doctors Hosp*., 801 S.W.2d 841, 845-46 (Tex. 1990). First, Respondent has shown no fundamental right to medical malpractice recovery or to a lump-sum judgment and she has not identified any suspect class affected here. Accordingly, there can be no violation of equal protection/equal rights under either the federal or state constitution. *See, e.g., Suber v. Ohio Med. Prods., Inc*., 811 S.W.2d 646, 650 (Tex. App.—Houston [14th Dist.] 1991, writ denied). As shown, Chapter 74's provisions are rationally and reasonably related to the state's interests in reducing malpractice insurance premiums and improving access to care.

Respondent argues that without a pleading of affirmative defense invoking Subchapter K, she has no reasonable notice or opportunity to be heard. (RBOM:34-35). The purpose of an affirmative defense "is to give the opposing

party notice of the defensive issue to be tried." *MAN Engines*, 434 S.W.3d at 136. An affirmative defense presents a "situation where a plaintiff cannot recover even if his claims are true because of some other *fact* that the defendant has pled as a bar." *Id.* at 137. Subchapter K presents no "fact" issue to be resolved that *bars* recovery; rather, the statute provides the method for payment of future damages assessed by the jury, so no violation of the federal or state constitution results. *See id.*

E. Equitable remand is appropriate.

Petitioners seek a remand for the trial court to order periodic payments. If, however, this Court concludes that the record does not satisfy *Detrick*, an equitable remand is proper. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 841 (Tex. 2000).

At trial, Petitioners accurately stated that neither this Court nor any other appellate court had written about Subchapter K's workings. *See* 21RR37-38. *Detrick* issued shortly after the court of appeals issued its opinion in *Virlar II*, in which the court of appeals remanded the cause to the trial court for periodic payments. Because neither the parties nor the trial court had guidance regarding how to apply the requirements of Subchapter K at the time of the post-verdict hearings, remand is appropriate. *See In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000) (explaining remand appropriate where trial court hearing was prior to statute's

interpretation and trial court must apply requirements of unique or novel statutory scheme).

Respondent argues that equitable remand is inappropriate because *Detrick* simply interpreted a statute clear in all relevant respects and compelled by ancient legal principles such as the right to a jury trial. (RBOM:38-40). But *Detrick* clarified a unique, novel, and unspecific statute by explaining what and how to submit a request for periodic payments under Subchapter K after a jury award of present value damages but where no information was included in the record to allow the trial court to form a judgment awarding future damages in periodic payments.

As Respondent agreed and explained to the trial court, her own evidence provided the trial court with the information required for a judgment ordering periodic payments and Respondent's life expectancy was undisputed. No infringement of the right to jury trial occurs through remand to consider this evidence under the novel statutory scheme and to fashion the payment of the jury's damages in periodic payments. (RBOM:39-40). The record here is unlike *Detrick*: the evidence to perform the Subchapter K requirements exist and Respondent agreed. Under these circumstances, an equitable remand in the interests of justice is proper.

III. Defendants Entitled to New Trial Because of Erroneous, Harmful Evidentiary Rulings

A. The exclusion of Dr. Kuncl's testimony merits a new trial.

Respondent's counsel started out with a shotgun approach, blaming many health care providers, and then after reaching settlements, counsel changed to a rifle-shot approach, aiming the case solely against Gonzaba and Virlar. Not surprisingly, then, Respondent's counsel objected to Dr. Kuncl's testimony that all treaters were at fault, even though they had retained Kuncl as an expert for Respondent to give that testimony.

Contrary to the claims of waiver, which litter the Respondent's brief, counsel for Respondent made objections to two critical portions of Dr. Kuncl's opinion testimony, testimony that assigned fault to other treaters, and the trial court sustained both objections. 17RR177-86; Deposition of Kuncl at 60-64; CE-1 at 2. Defendants further made an offer of proof, including all designations from Dr. Kuncl, and Respondent made counter-offers. 17RR188-90. Of course, once the key portions of Dr. Kuncl's testimony were excluded, there was no reason to read the rest of his deposition to the jury, so the testimony was withdrawn from the jury's consideration. *See* 17RR188.

Preservation of the complaint about the judge's ruling on Kuncl requires what defendant did; they presented a timely request and obtained a ruling on the record. *See* TEX. R. APP. P. 33.1(a). The offer of proof cemented the preservation

of this complaint. *See Garden Ridge, L.P. v. Clear Lake Ctr., L.P.*, 504 S.W.3d 428, 439 (Tex. App.— Houston [14th Dist.] 2016, no pet.).

As shown in the offer of proof, Dr. Kuncl was a neurologist familiar with the diagnosis and treatment of Wernicke's encephalopathy. CE-1, Kuncl deposition at 11-18, 44-45 39-40, 44-45, 152 157, 159-160. The exclusion of Dr. Kuncl's testimony was harmful error because his testimony was neither conclusory nor cumulative. No other expert offered the same kind of specific, damning testimony against Dr. Patel or other responsible third parties—the very testimony that he was retained to give by counsel for Respondent. Consequently, defendants had no basis for submitting responsible third parties without Dr. Kuncl's testimony. *See* TEX. PRAC. & REM. CODE § 33.003(b); *Olympic Arms, Inc. v. Green*, 176 S.W.3d 567, 573 (Tex. App.— Houston [1st Dist.] 2004, no pet.).

B. Improper cross-examination of Dr. Virlar merits a new trial.

Respondent's counsel was improperly allowed through two categories of cross-examination to create the false impression that Dr. Virlar was a bad doctor who should not be treating anyone.

First, the trial court erroneously admitted testimony regarding Dr. Virlar's loss of hospital privileges, including the hospital where Dr. Virlar had treated Respondent, which undoubtedly led the jury to believe, falsely, that Dr. Virlar was fired at that hospital for his treatment of Respondent. Because of confidentiality

rules, Dr. Virlar was helpless to rebut the false impressions created by counsel. *See* TEX. OCC. CODE § 160.007. Second, the trial court allowed cross-examination on the subject of other unrelated treatment, enabling Respondent's counsel to suggest that Dr. Virlar treated all his patients without ever reading their charts. 12RR7-8, 47-48, 50-51.

The waiver arguments on these two evidentiary errors are no more merited than Respondent's other waiver arguments. Petitioners preserved complaints by unsuccessfully moving to exclude and objecting to any question on whether Dr. Virlar lost privileges. 12RR5-10, 61-70. Likewise, defendants urged the trial judge to exclude questions designed to elicit that Dr. Virlar had a "history" of prescribing to patients without seeing them or looking at records were impermissible as bad acts evidence and irrelevant. (12RR5-9); *See* TEX. R. EVID. 404 ; *Serv. Corp. Intern. v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011).

Because of his improper cross-examination, counsel was able to argue in rebuttal at the end of trial that Dr. Virlar was not a doctor who should be "taking care of our families," an invocation of the "reptile theory" now in vogue. 19RR99.

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 for the relief

requested in their petition and Brief on the Merits, and 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' Reply 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 7,485 words.

/s/Diana L. Faust
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this Petitioners' Reply Brief on the Merits upon on all counsel of record, via efile, on February 8, 2022, 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' REPLY BRIEF ON THE MERITS

In compliance with rule 53.2(k)(2) 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 Reply Brief on the Merits containing the following items:

Tab A: Changes in Settlement Credits from 1917 To Date

D/1044647v1

APPENDIX TAB "A"

CHANGES IN SETTLEMENT CREDITS FROM 1917 TO DATE

Article 2212 of the Texas Revised Civil Statutes Acts 1917, p. 360 (now Chapter 32 of the Texas Civil Practice & Remedies Code)

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of or based on tort except in causes wherein the right of contribution or of indemnity or of recovery over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, the recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency.

Article 2212a of the Texas Revised Civil Statutes, Acts 1973, 63rd Leg., p. 41, ch. 28, ss 1, 2, eff. Sept. 1, 1973

Comparative negligence; contribution among joint tortfeasors

. . . .

Sec. 2. (a) In this section:

(1) “Claimant” means any party seeking relief, whether he is a plaintiff, counterclaimant, or crossclaimant.

. . . .

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

. . . .

THE ORIGINAL CHAPTER 33
(Acts 1985, 69th Leg., ch. 959. §1)
[Enacted in 1985 merely as a codification of article 2212a]

CHAPTER 33. COMPARATIVE NEGLIGENCE

. . . .

Sec. 33.011. DEFINITIONS. In this subchapter:

(I) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant.

(2)"Defendant" includes any party from whom a claimant seeks relief.

. . . .

Sec. 33.014. SETTLEMENT: TORT-FEASOR NOT PARTY DEFENDANT. If the existence and amount of an alleged joint tortfeasor's negligence are not submitted to the jury because the tort-feasor has paid an amount in settlement to a claimant and was not joined as a party defendant or having been joined, was dismissed or nonsuited after settling, each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the ratio of the defendant's negligence to the total negligence of all defendants.

Sec. 33.015. SETTLEMENT: TORT-FEASOR PARTY DEFENDANT. If an alleged joint tort-feasor settles with a claimant but is joined as a party defendant when the case is submitted to the jury so that the existence and amount of his negligence are submitted to the jury and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to him.

. . . .

1987 VERSION OF CHAPTER 33
(Acts 1987, 70th Leg., 1st C.S., ch. 2, §2.05)
[Enacted in response to and overruling *Duncan v. Cessna*]

CHAPTER 33. COMPARATIVE RESPONSIBILITY

. . . .

Sec. 33.011. DEFINITIONS. In this chapter:

(1)"Claimant" means a party seeking recovery of damages pursuant to the provisions of Section 33.001, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff seeking recovery of damages. 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 both that other person and the party seeking recovery of damages pursuant to the provisions of Section 33.001.

. . . .

Sec. 33.012. AMOUNT OF RECOVERY. (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 a credit equal to one of the following, as elected in accordance with Section 33.014:

(1)the sum of the dollar amounts of all settlements; or

2) a dollar amount equal to the sum of the following percentages of damages found by the trier of fact:

(A) 5 percent of those damages up to $200,000;

(B) 10 percent of those damages from $200,001 to $400,000;

(C) 15 percent of those damages from $400,001 to $500,000; and

(D) 20 percent of those damages greater than $500,000.

(c) The amount of damages recoverable by the claimant may only be reduced once by the credit provided for in Subsection (b).

. . . .

1989 AMENDMENT
(Acts 1989, 71st Leg., ch. 380, §4)

[No change to settlement credits.]

1995 AMENDMENTS TO CHAPTER 33
(Acts 1995, 74th Leg., ch. 136, §1)

SECTION 1. Chapter 33, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 33. PROPORTIONATE RESPONSIBILITY

Sec. 33.011. DEFINITIONS. In this chapter:

(1)“Claimant” means a party seeking recovery of damages pursuant to the provisions of Section 33.001, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff seeking recovery of damages. 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 both that other person and the party seeking recovery of damages pursuant to the provisions of Section 33.001.

. . . .

Sec. 33.012. AMOUNT OF RECOVERY. (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 a credit equal to one of the following, as elected in accordance with Section 33.014:

(1)the sum of the dollar amounts of all settlements; or

(2) a dollar amount equal to the sum of the following percentages of damages found by the trier of fact:

(A) 5 percent of those damages up to $200,000;

(B) 10 percent of those damages from $200,001 to $400,000;

(C) 15 percent of those damages from $400,001 to $500,000; and

(D) 20 percent of those damages greater than $500,000.

(c) The amount of damages recoverable by the claimant may only be reduced once by the credit provided for in Subsection (b).

. . . .

2001 AMENDMENT
(Acts 2001, 77th Leg., ch. 643, §4)

[No change to settlement credits]

2003 AMENDMENTS TO CHAPTER 33
(Acts 2003, 78th Leg., ch. 204, §§4.07, 4.10(5))
[Commonly called House Bill 4]

SECTION 4.05. Sections 33.011(1), (2), (5), and (6), Civil Practice and Remedies Code, are amended to read as follows:

(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.

. . . .

SECTION 4.06. Section 33.012, Civil Practice and Remedies Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

(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 a percentage equal to each settling person's percentage of responsibility.

(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).

. . . .

2005 AMENDMENT TO CHAPTER 33
(Acts 2005, 79th Leg., ch. 277, §1, ch. 728, §23.001(6))

SECTION 1. Subsection (b), Section 33.012, Civil Practice and Remedies Code, is amended to read as follows:

(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.

2007 AMENDMENT TO CHAPTER 33
(Acts 2007, 80th Leg., ch. 593, §3.02)

[No change to settlement credits.]

2011 AMENDMENT TO CHAPTER 33
(Acts 2011, 82nd Leg., ch. 203, §§5.01, 5.02)

[No change to settlement credits.]

CURRENT CHAPTER 33. PROPORTIONATE RESPONSIBILITY

. . . .

Sec. 33.011. DEFINITIONS. 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.

. . . .

Sec. 33.012 AMOUNT OF RECOVERY. (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).

. . . .

Automated Certificate of eService

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Diana Faust on behalf of Diana Faust
Bar No. 793717
diana.faust@cooperscully.com
Envelope ID: 61553065
Status as of 2/8/2022 3:29 PM CST

Associated Case Party: GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group

Name	BarNumber	Email	TimestampSubmitted	Status
Reagan Simpson	18404700	rsimpson@yettercoleman.com	2/8/2022 3:12:24 PM	SENT
Thomas R. Phillips	22	tom.phillips@bakerbotts.com	2/8/2022 3:12:24 PM	SENT
R. Brent Cooper	4783250	brent.cooper@cooperscully.com	2/8/2022 3:12:24 PM	SENT
Diana L.Faust		diana.faust@cooperscully.com	2/8/2022 3:12:24 PM	SENT

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Associated Case Party: Jesus Virlar

Name	BarNumber	Email	TimestampSubmitted	Status
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