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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/K/A 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

REPLY TO RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutions and Statutes **Page(s)**

Rules **Page(s)**

Miscellaneous **Page(s)**

NO. 20-0923

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REPLY TO RESPONSE TO PETITION FOR REVIEW

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioners, Jesus Virlar, M.D. ("Virlar") and GMG Health Systems Associates, P.A. a/k/a and d/b/a Gonzaba Medical Group ("Gonzaba") (collectively "Petitioners"), reply to the Response to Petition for Review[1] under Texas Rule of Appellate Procedure 53.5.[2]

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[1] The Petition for Review is cited as "Pet.," and Respondent's Response as "Resp."

[2] The absence of a reply to any point by Respondent should not be construed as acquiescence or waiver, given the word-limit constraints. *See* TEX. R. APP. P. 9.4(i)(2)(E).

ARGUMENT AND AUTHORITIES IN REPLY

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

A. Petitioners Proved Existence and Amount of Settlement

Contrary to Puente's argument (Resp.:21-22), Petitioners put the settlement amount in the record. The only requirement is that the record reflect the amount "in the settlement agreement or otherwise." *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998) (emphasis supplied). Mobil met that requirement when its attorney "plac[ed] the uncontested settlement amount in the record" by mentioning the amount in court and in written opposition to a motion for judgment. *Id.*; *see also Dalworth Restoration, Inc. v. Rife-Marshall*, 433 S.W.3d 773, 781-82 (Tex. App.—Fort Worth 2014, pet. dism'd w.o.j.) (*Ellender* met by informing trial court of amount without plaintiff's contradiction). Here, Petitioners did so in several ways.

First, at Puente's motion for judgment hearing, they tendered an envelope containing the settlement agreement to the trial court. 21RR7, 16, 30. The trial court acknowledged: "So there are two different settlements; one being the $200,000, and . . . the one in the envelope for the Court only . . .?" 21RR16.

Second, Petitioners openly stated the amount, $3.3 million, at that hearing, Puente objected to the statement of the amount as under seal, and the trial court acknowledged that Petitioners, "did state the amount." 21RR30-31.

Third, Petitioners included the amount in written post-judgment motions and again stated the amount at the hearing on those motions, without Puente's contradiction. 3CR5291; 3CR5322-34; 23RR5-8.

The court of appeals correctly concluded that the settlement amount was in the record, *Virlar v. Puente*, 613 S.W.3d 652, 687, & n.29 (Tex. App.—San Antonio 2020, pet. filed), consistent with Texas law. *Ellender*, 963 S.W.2d at 927; *Dalworth*, 433 S.W.3d at 781-82 (settlement amount in record when trial court is informed of that amount without Plaintiff's contradiction). Puente's discussion of lawyer assertions, "non-evidence," and constitutional violations regarding discharging burdens of proof (Resp.:22-23), have nothing to do with settlement credits and are irrelevant here.

B. No Open Courts Violation in Applying Chapter 33

Chapter 33 required the trial court to apply credits for the amount of "*all* settlements," including the Methodist Hospital settlement. (Pet.:5-12). Contrary to the Fourth Court's holding, this requirement does not violate the Texas Constitution's Open Courts Provision. TEX. CONST., Art. I, § 13.

Puente's argument in support of the court of appeals ignores Petitioners' principal point—Chapter 33's "claimant" definition does not extinguish a "common-law remed[y] for [a] well-established common-law cause of action[]." *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955). Statutory law has

for more than a century governed how to calculate awards when portions of the case have previously been settled, and the common law was not well-established before that legislative intervention. (*See* Pet.:9, and authorities cited therein). This undisputed historical record defeats any assertion that Chapter 33's definition of claimant is constitutionally infirm. "Matters of fact . . . are very stubborn things," Matthew Tindal, *The Will of Matthew Tindal* (1733), and facts alone defeat Puente's first issue.

Rather than address this problem, Puente simply assumes that plaintiffs were automatically entitled to a judgment for all legally and factually sufficient non-economic damage awards until the Medical Liability & Insurance Improvement Act was amended in 2003. From this meritless assumption, she spins multiple dubious arguments.

Initially, she discerns a distinction between "arbitrary" and "unreasonable" common-law restrictions in *Lebohm*, apparently arguing that she need satisfy only one of these to strike down the provision. The argument itself is arbitrary and unreasonable. Lexicographers treat these words as synonyms, often using one to describe the other. *See* Roget's International Thesaurus at 364.5 (7th ed. 2010). It is ironic to call this law either unreasonable or arbitrary in light of shenanigans like the ten-dollar settlements in *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002). (*See* Pet.:7).

Next, Puente claims that because Chapter 33's statutory scheme incorporates the one-satisfaction rule, "any burden placed on Puente's established common-law cause of action for economic damages is unreasonable and unrelated to the purpose of Chapter 33 if it goes beyond ensuring that she receives 'only one recovery for any damages suffered.'" (Resp.:24). This is wrong on three counts.

First, the one-satisfaction rule is a recovery cap, not a floor. *See Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 107 (Tex. 2018); *see generally Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964). Thus, "Chapter 33's proportionate-responsibility scheme . . . incorporates the one-satisfaction rule–a tort concept that *limits* a plaintiff to only one recovery for any damages suffered because of an injury." *In re Xerox Corp.*, 555 S.W.3d 518, 523 (Tex. 2018) (orig. proceeding) (emphasis added).

Second, this Court has already upheld the Legislature's authority to define "claimant" in Chapter 33. *See Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112, 121 (Tex. 1999) ("plain language" of Chapter 33 encompasses "all of the family members" who "are seeking recovery of damages for injury," and the Court is "bound to apply the Legislature's chosen definition"). The One-Satisfaction Rule is not a constitutional trump card.

Third, Puente fails to recognize that Section 33.012 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. *Virlar*, 613 S.W.3d at 706 (Marion, C.J., dissenting). Unlike the civil liability limitations struck down in *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988), Section 33.012 does not cap damages, limit civil liability for damages, or otherwise restrict the recoverable damages. *Id.*

C. Voluntary Remittitur is No Cure

Puente incorrectly asserts that her offer of voluntary remittitur is comprised of "conclusive evidence": other than $434,000, every penny of the settlement was applied for the sole and exclusive benefit of C.P. or for attorney's fees. (Resp.:26-27).

Petitioners provided evidence from C.P.'s ad litem, Dan Pozza, that: (1) settlement amounts were all paid to C.P., not to Puente, but Puente would dismiss her claim against the Hospital; and (2) if settlement proceeds were paid to Puente, they would go to reimburse her creditors, Medicare, and her workers' compensation benefits. 3CR5171; 2RR18, 20-21, 26, 28, 29. Non-settling defendants cross-examined Pozza, establishing that Puente's claim value was $18 million and C.P.'s claim value was only $126.000. 2RR25-29.

Thus, Puente received a benefit—her unreimbursed and unadjusted creditor obligations, the Medicare or workers' compensation benefits she received for her

care—a benefit that Pozza testified would have reduced the settlement's net value to nearly nothing. Puente's voluntary remittitur was of no consequence.

II. Error in Denying Statutory Periodic Payments

A. Trial Court Had Evidence Necessary to Fashion Periodic Payments

Puente's argument 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), is both legally and practically insupportable. (Resp.:28-30).

Puente assumes that Petitioners were required to present evidence with such granulated detail that any exercise of the trial court's discretion would have been irrelevant. (Resp.:30). But, Petitioners were only required to identify evidence from which the court could fashion periodic payments not "inconsistent with the jury's verdict." *Detrick* at 837-38.

Puente argues that because the jury awarded less than the total amount of damages requested (and detailed in Dr. Fairchild's report) it was "mathematically impossible" for the court to fashion periodic payments. (Resp.:30). This argument renders the legislative periodic payments scheme virtually irrelevant. Under Puente's approach, if a jury awards an amount different than the claimant's precise amount requested, which frequently, perhaps usually occurs, the trial court could not award periodic payments unless the jury made specific findings as to each

element of the claimant's life care plan. Such precision is not required by the statute or caselaw, and is inconsistent with Texas's preference for broad-form submission of jury questions.

Under the correct legal standard—the trial court may award periodic payments not inconsistent with the jury verdict—Puente fails to rebut Petitioners' argument that there was adequate evidence from which the court could have fashioned periodic payments under the requirements of Section 74.503(c) & (d). Notably, Puente admitted that the evidence necessary to prepare findings required was supplied in the trial record by the report from her damages expert, Dr. Fairchild.

Puente urged the trial court to take one element from Fairchild's report (routine outpatient costs), in the amount of $133,122, then go to 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.

But Puente's own life care plan and Fairchild's report (47RR[PX23]) provided the necessary evidence for all elements, 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
- information to extrapolate the discount rates to order an appropriate dollar amount of periodic payments for future medical care.

With evidence of the amount, interval, and number of periodic payments, 47RR[PX23], the trial court could fashion periodic payments in myriad ways consistent with the verdict. (Pet.:17-18).

Petitioners also pointed to other evidence before the jury that: (1) undisputed life expectancy was 31 years[3]; (2) medical needs are greater during the last decade of life[4]; (3) no immediate surgical needs to award lump sum[5]; (4) a need for ongoing care, so the entire award could be paid out over Puente's life expectancy[6]; and (5) attorney's fees could be paid periodically or lump sum.[7]

B. <u>Petitioners Properly Invoked the Statute</u>

Puente first claims that Virlar did not prove his financial responsibility. (Resp.:31). But, Petitioners are jointly and severally liable for the judgment, 3CR5192-94, and Gonzaba provided evidence that it can pay the portion of the judgment attributable to Virlar. *See Virlar* at 700. While the statute does not

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3 3CR5140; *see* 9RR161.

4 21RR40-41; *see* 9RR179-80, 183-84.

5 21RR41, 56.

6 21RR40-42; *see* 9RR177-78, 179-82.

7 21RR39.

address joint and several liability, TEX. CIV. PRAC. & REM. CODE § 74.505(a), Petitioners properly provided evidence of financial responsibility. *Virlar* at 700-01; *see* TEX. CIV. PRAC. & REM. CODE § 74.505.

Second, while Puente argues that a defendant must demonstrate sufficient financial responsibility to guarantee the value of all *future* payments, the statute requires evidence of financial responsibility to pay the amount of damages awarded by the judgment.[8] (Resp.:31). Ignoring the statute's plain language, Puente's backward logic also would require the trial court to determine, contrary to the statute, the periodic payment scheme *before* examining whether the defendant shows financial responsibility.[9] *Virlar* at 699 (recognizing that financial responsibility determination occurs before authorizing periodic payments) (citing TEX. CIV. PRAC. & REM. CODE § 74.505(a)).

Third, nothing in section 74.505(b) requires the defendant to provide evidence of its ability to use any of the methods of funding set out in that subsection. (Resp.:32). The statute instead states what the *court must include* in

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[8] *Compare* TEX. CIV. PRAC. & REM. CODE § 74.505(a) (requiring evidence of financial responsibility in amount adequate to assure full payment of damages awarded by judgment), *with Id.* § 74.503(c) (requiring trial court "finding" of dollar amount of periodic payments that will compensate claimant for future damages).

[9] Even Puente argued that the showing of financial responsibility was the first step before the issues of Section 74.503 should be addressed. 21RR57-59.

the judgment and allows the court to provide for payments to be funded by "any . . . satisfactory form of funding." TEX. CIV. PRAC. & REM. CODE § 74.505(b).

Fourth, no pretrial pleading, disclosure, or expert designation is required to invoke the right to periodic payments, and Petitioners provided uncontroverted evidence of financial responsibility. (Resp.:31-35). Gonzaba presented its balance sheet (as of the day following the verdict), a business records affidavit attesting to its veracity, to establish Gonzaba's assets exceeding $22 million, and the affiant, Melissa Keller—Gonzaba's Controller—testified live that Gonzaba had adequate financial responsibility to ensure full payment of the damages based on the jury's verdict based on her personal knowledge. 73RR3-5(DX-1); 72RR24(Ex.C-1); 22RR11-14. Accounts receivables, $20.4 million, were 100% collectible because the amount reflects the guaranteed and negotiated reimbursement rates for each of the billed charges, including Medicare and Medicaid. 22RR19-22. Petitioners did not need to plead or invoke the statute pretrial, it is not an affirmative defense, and Keller need not have been designated as an expert pretrial—as the issue is one for the court arising post-verdict. *Virlar* at 699 & n.36.

Further, there is no requirement that showing financial responsibility requires an agreement to place the full amount into the court's registry. *See 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) (discussing that defendant *offered* to do so if ordered by court).

Last, Puente contends section 74.507 is senseless unless the jury determines the amount and frequency of periodic payments. (Resp.:34-35). 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. TEX. CIV. PRAC. & REM. CODE §§ 74.503(c)-(d), 74.507.

C. Equitable Remand Appropriate

Petitioners seek a remand for the trial court to make the required findings on periodic payments based on ample record evidence. 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 the pre-*Detrick* trial, Petitioners accurately stated that neither this Court nor any other appellate court had written about Subchapter K's workings. *See* 21RR37-38.

Puente now argues that equitable remand is inappropriate because *Detrick* simply "interpret[ed] a statute clear in all relevant respects." (Resp.:35-36). But *Detrick* clarified an unspecific statute regarding how to submit a request for periodic payments under Subchapter K after a jury award of present value damages. If more evidence is needed, an equitable remand is proper. Subchapter

K was enacted for exactly this situation—a large future damages award to someone who dies shortly after trial.

PRAYER

THEREFORE, Petitioners pray for the relief requested in their petition 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 Reply to Response to Petition for Review 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 2,391 words.

/s/Diana L. Faust
DIANA L. FAUST

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this Reply to Response to Petition for Review upon on all counsel of record, via efile, on June 16, 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,
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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 REPLY TO RESPONSE TO PETITION FOR REVIEW

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 Reply to Response to Petition for Review containing the following items:

Tab A: TEX. CIV. PRAC. & REM. CODE §§ 74.503, 74.505, 74.507

Tab B: Opinion *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)

D/1036176v2

APPENDIX TAB “A”

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 § 74.503

§ 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 (28)

V. T. C. A., Civil Practice & Remedies Code § 74.503, TX CIV PRAC & REM § 74.503

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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 (Refs & Annos)

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.

Notes of Decisions (1)

V. T. C. A., Civil Practice & Remedies Code § 74.505, TX CIV PRAC & REM § 74.505
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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 § 74.507

§ 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
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APPENDIX TAB “B”

AFFIRM in part; REVERSE in part; REMAND; Opinion Issued August 24, 2012

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-10-00126-CV

MEENAKSHI S. PRABHAKAR, M.D. AND INFECTIOUS DISEASE DOCTORS, P.A., Appellants/Cross-Appellees

V.

DAVID FRITZGERALD, Appellee/Cross-Appellant

On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 05-08507-H

OPINION

Before Justices Moseley, Lang-Miers, and Murphy
Opinion By Justice Lang-Miers

This is an appeal from a jury verdict in a medical malpractice lawsuit. In three issues, appellants/cross-appellees Meenakshi S. Prabhakar, M.D. and Infectious Disease Doctors, P.A. challenge the sufficiency of the evidence to support certain jury findings and the trial court's refusal to order some portion of appellee/cross-appellant David Fritzgerald's future medical expenses to be made in periodic payments. In a cross-appeal, Fritzgerald argues that the $250,000 statutory cap on noneconomic damages violates the federal and state constitutions and that the trial court erred by reducing the jury's award of damages for past medical expenses. For the following reasons, we conclude that (1) the evidence is sufficient to support the jury's findings, (2) the trial court erred by

refusing to order periodic payments in the final judgment, (3) the statutory cap on noneconomic damages does not violate the federal or state constitutions, and (4) the trial court did not err by reducing the jury's damages award for past medical expenses. Based on our resolution of the parties' issues, we reverse the judgment insofar as it did not order periodic payments and remand to the trial court for an order pursuant to Chapter 74 subchapter K of the Texas Civil Practice and Remedies Code. In all other respects, we affirm the trial court's judgment.

BACKGROUND

On August 18, 2003, Fritzgerald presented to the emergency room of RHD Memorial Medical Center in Dallas, Texas, complaining of abdominal pain, lack of appetite, nausea, vomiting, a history of reflux, and a history of a 30-pound weight loss. The admitting physician consulted with Dr. Richard Holmes, a general surgeon, who determined that Fritzgerald had a duodenal ulcer and needed surgery. Holmes discharged Fritzgerald pending further testing and, 11 days later on August 29, Holmes performed surgery. Fritzgerald tolerated the procedure well. Holmes started Fritzgerald on an antibiotic to prevent a post-surgical abdominal infection and said he expected Fritzgerald to remain in the hospital for about three to five days.

Fritzgerald appeared to be recovering until September 1. Early that morning, Fritzgerald developed a high fever and his blood pressure began to drop. The nursing staff called Holmes about Fritzgerald's condition, and Holmes ordered tests. Fritzgerald exhibited symptoms of systemic inflammatory response syndrome, or sepsis. In other words, an infection was attacking his entire body. By late evening of September 1, Fritzgerald's condition had deteriorated to septic shock, meaning his organs were not getting adequately profused, and Fritzgerald was in a life-threatening condition. The hospitalist coordinating Fritzgerald's care consulted Prabhakar, an infectious disease doctor.

Prabhakar first saw Fritzgerald around 10 p.m. on September 1. After reviewing all available data and examining the patient, Prabhakar believed Fritzgerald had peritonitis, which is an intraabdominal infection. He believed the infection could be related to the surgery, but the source of the infection was yet undetermined. Based on his clinical assessment of Fritzgerald's condition, Prabhakar ordered empiric antibiotic therapy—a broad spectrum antibiotic—to treat the most common pathogens that could cause the infection. The antibiotic therapy Prabhakar prescribed did not treat hospital-acquired Methicillin-resistant staphylococcus aureus (MRSA). The antibiotic was started on the evening of September 1.

Other specialty physicians also consulted on Fritzgerald's case, including a pulmonary critical care physician. They ordered numerous tests and chest x-rays, but none was able to determine the source of Fritzgerald's infection. Meanwhile, Fritzgerald's organs began to fail and his body diverted blood flow away from his extremities and to his vital organs through a process called vascular redistribution phenomenon. He was given a drug called Xigris to counteract this phenomenon and was transferred to the intensive care unit. By September 3, Fritzgerald's extremities had become cool from poor circulation.

When Fritzgerald's condition had not improved by September 3, Holmes performed exploratory surgery to rule out an intraabdominal infection. The Xigris prescribed to keep Fritzgerald's blood circulating had to be discontinued twelve hours before Holmes performed the exploratory surgery and could not be restarted until twelve hours after the surgery. Holmes did not find anything that caused him to believe, and none of the tests he ran showed, that the source of Fritzgerald's infection was the abdomen. Prabhakar testified that ascites, or fluid collection, was found during the exploratory surgery and that the presence of ascites is unusual in the absence of an infection in the peritoneal cavity. He believed Fritzgerald had peritonitis.

At some point, Fritzgerald suffered renal failure and a nephrologist was consulted. On September 4, the nephrologist gave Fritzgerald a single dose of Vancomycin as a prophylactic measure before beginning hemodialysis. Vancomycin is a broad spectrum antibiotic that is effective against MRSA. She did this because of Fritzgerald's risk for skin pathogens like MRSA and Methicillin-sensitive staphylococcus aureus that could enter the blood system through the hemodialysis catheter.

On September 5, the physicians began to suspect that Fritzgerald might have pneumonia. By September 7, a sputum culture grew a hospital-acquired MRSA pneumonia and Fritzgerald was treated with Vancomycin. He remained in the intensive care unit at RHD for over a month. Ultimately, because of the lack of blood flow to Fritzgerald's extremities, he developed gangrene of the arms and legs, and he was transferred from RHD to Parkland Hospital in Dallas, Texas, for amputation of both arms below the elbow and both legs below the knee.

Fritzgerald sued RHD and most of the doctors who treated him for negligence. He settled with RHD, the pulmonary critical care physician, and the hospitalist before trial, leaving only Holmes and Prabhakar at trial. The jury found that Holmes's negligence, if any, did not proximately cause Fritzgerald's injuries. Fritzgerald and Prabhakar do not challenge the jury's finding with regard to Holmes and Holmes is not a party to this appeal.

Fritzgerald contended at trial that Prabhakar was negligent by failing to prescribe Vancomycin, the "drug of choice" to treat hospital-acquired MRSA pneumonia, on September 1. Fritzgerald's expert witnesses testified that pneumonia was the second most common cause of infection in a hospital setting and if Prabhakar had administered Vancomycin on September 1, Fritzgerald's condition would have stabilized over the next couple of days, he would not have needed the exploratory surgery, the Xigris would not have been discontinued, and Fritzgerald would not have lost his limbs.

Prabhakar contended that the use of Vancomycin was not indicated on September 1, 2, or 3 because Fritzgerald did not have any of the symptoms associated with pneumonia, the chest x-rays did not indicate that Fritzgerald had pneumonia, and none of the physicians treating Fritzgerald thought he had pneumonia. Prabhakar also contended that he treated Fritzgerald for all possible pathogens based on Fritzgerald's clinical evaluation. He contended that the cause of Fritzgerald's limb loss could not have been prevented and that he did not violate the standard of care by not prescribing Vancomycin.

The jury found that Prabhakar was 100% responsible for Fritzgerald's injuries. The jury awarded Fritzgerald $5 million for past and future physical pain and mental anguish; $144,350 for loss of earning capacity in the past; $300,300 for loss of earning capacity in the future; $3 million for past and future disfigurement; $3 million for past and future physical impairment; $1.28 million for medical expenses paid or incurred; and $5 million for future medical expenses. The trial court modified the damages to reflect the statutory damages cap, the credits from settling defendants, and the medical expenses actually paid. The court then rendered judgment in favor of Fritzgerald for $5,240,182.16.

SUFFICIENCY OF THE EVIDENCE

In two issues, appellants challenge the sufficiency of the evidence to support the jury's findings with respect to Prabhakar's and the settling defendants' liability.

Preservation of Error

As a preliminary matter, Fritzgerald contends that appellants did not preserve the sufficiency challenges with regard to the settling defendants for our review. We disagree.

A party may preserve a legal sufficiency challenge for appellate review following a jury trial by filing a motion for judgment notwithstanding the verdict (jnov) or a motion for new trial. *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 337 (Tex. App.—Dallas 2011, pet.

denied). To preserve a factual sufficiency challenge for appellate review following a jury trial, a party must file a motion for new trial complaining that the evidence is factually insufficient to support the jury finding. *See id.*; *see also* TEX. R. CIV. P. 324(b)(2).

Appellants filed two post-verdict motions: a motion for jnov and a motion for new trial in which they challenged the sufficiency of the evidence to support the jury's answers to the liability questions. They quoted the questions and the answers in their entirety. Fritzgerald contends that those motions are not sufficient to preserve error concerning the settling defendants' liability, however, because the argument sections of the motions addressed only Prabhakar's liability. Fritzgerald cites two cases from this Court which he contends support his argument. But those cases are distinguishable because in those cases the appellants did not raise the issue on appeal in a post-judgment motion. *See DFW Aero Mechanix, Inc. v. Airshares Inc.*, 366 S.W.3d 204, 205 (Tex. App.—Dallas 2010, no pet.) (appellant did not file motion for new trial raising factual sufficiency and did not challenge sufficiency of evidence regarding two of the jury's findings in jnov motion); *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 383 (Tex. App.—Dallas 2009, no pet.) (no record that appellant raised legal sufficiency of evidence in any motion).

The argument sections of appellants' motions were limited to the evidence of Prabhakar's liability, but the language in the motions specifically challenged the legal and factual sufficiency of the evidence to support the jury's findings as to all defendants' liability. We construe post-trial objections liberally so that the right to appeal is not lost unnecessarily. *See Arkoma Basin Exploration Co., Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387–88 (Tex. 2008). We conclude appellants' motions were sufficient to preserve the sufficiency challenges for appellate review. *See id.*

Standard of Review

In reviewing a challenge to the legal sufficiency of the evidence, we consider evidence that supports the verdict if reasonable jurors could have considered it and disregard contrary evidence unless reasonable jurors could not have disregarded it. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). We will sustain a legal sufficiency challenge "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). In reviewing a challenge to the factual sufficiency of the evidence, we consider all the evidence in the record, both supporting and contradicting the challenged finding, and will set the finding aside only if we determine that the evidence supporting it is so weak as to make the finding clearly wrong and manifestly unjust. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

When we review the evidence we are not free to reweigh the evidence and set aside the jury's finding merely because we feel a different result is more reasonable. *See Pool*, 715 S.W.2d at 634; *Ellis Cnty. State Bank v. Keever*, 936 S.W.2d 683, 685 (Tex. App.—Dallas 1996, no writ). We will reverse only if necessary to prevent a manifestly unjust result. *See Pool*, 715 S.W.2d at 664; *Neller v. Kirschke*, 922 S.W.2d 182, 188 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

The Jury Findings

The jury found as follows (handwritten answers in italics):

Question No. 1

Did the negligence, if any, of the persons named below proximately cause the injuries in question? Answer "Yes" or "No" for each of the following:

(a)	Richard B. Holmes, M.D.	*No*
(b)	Meenakshi S. Prabhakar, M.D.	*Yes*
(c)	Tenet Health System Hospitals Dallas, Inc. d/b/a RHD Memorial Medical Center	*No*
(d)	Ephraim T. Keng, M.D. [the hospitalist]	*No*
(e)	Vivek A. Padegal, M.D. [the pulmonologist]	*No*

Question No. 2

For each of those named below that you found caused or contributed to cause the injuries, find the percentage of responsibility attributable to each:

. . .

(b)	Meenakshi S. Prabhakar, M.D.	*100*

. . .

Issue One—Settling Defendants

In issue one, appellants contend that the expert testimony conclusively established that the settling defendants were negligent. Appellants argue that there is no or insufficient evidence to show the settling defendants acted within the standard of care and, consequently, the evidence does not support the jury's answers that the settling defendants' negligence, if any, was not the proximate cause of Fritzgerald's injuries.

A medical malpractice plaintiff bears the burden to prove two causal nexuses: between the defendant's conduct and the event sued upon, and between the event sued upon and the plaintiff's injuries. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010). Generally, a plaintiff carries this burden by presenting expert testimony explaining why the defendant's negligence caused the plaintiff's injuries based on a reasonable degree of medical probability. *Id.* at 536. The expert must provide a basis for his opinion. *Id.* Uncontroverted expert testimony may be regarded as conclusive if the nature of the subject matter requires the jury to be guided solely by the opinion of experts and

the evidence is otherwise credible and free from contradictions and inconsistencies. *Truck Ins. Exch. v. Smetak*, 102 S.W.3d 851, 855 (Tex. App.—Dallas 2003, no pet.). However, an expert's testimony may be contradicted by the testimony of other witnesses or by cross-examination. *Id.*

The experts all agreed that it was not possible to know the source of Fritzgerald's infection on September 1 or 2. Fritzgerald presented two expert witnesses who testified that if Fritzgerald's providers had treated him with Vancomycin on September 1, or even perhaps as late as September 2, Fritzgerald would not have lost his limbs. One of those experts, Dr. John Kress, testified that the most common causes of sepsis in a postoperative patient are infections that involve the lungs, the intraabdominal compartment, the urinary tract, or a catheter placed in a large blood vessel. He testified that he saw an area of concern in Fritzgerald's chest x-rays that, when combined with Fritzgerald's other symptoms, strongly indicated the presence of an infection in the lungs. He said because Fritzgerald had been in the hospital for several days he was at risk for developing a hospital-acquired pneumonia, and the antibiotics given to Fritzgerald on September 1, 2, and 3 covered all the possible sources of infection except hospital-acquired pneumonia. Dr. Charles Stratton, Fritzgerald's infectious disease expert, testified similarly. He criticized all the physicians treating Fritzgerald because they did not prescribe an antibiotic therapy broad enough to cover all the possible pathogens likely to be causing Fritzgerald's sepsis.

Prabhakar presented evidence that even if Fritzgerald had been given Vancomycin on September 1 or 2 it would not have prevented the loss of his limbs. Prabhakar's expert witness, Dr. David Tweardy, testified that he "thought that the physicians taking care of Mr. Fritzgerald did a very fine job of caring for him." He said he did not believe Fritzgerald's condition called for the empiric use of Vancomycin on September 1, 2, or 3 and he would not have used Vancomycin. He also explained that even if Vancomycin had been administered on September 1 or 2 it would not have changed the outcome because the process that led to the loss of limbs had already begun and

he did not believe Vancomycin could have stopped it. He also testified that, in his opinion, the organism causing Fritzgerald's infection on September 1 was not the MRSA that was subsequently found on September 5; he believed Fritzgerald had two infections and that the MRSA infection developed later, after the infection on September 1 which led to septic shock and the loss of limbs.

Prabhakar also testified that it would have been wrong to give Vancomycin to Fritzgerald on September 1 or 2 because it was not indicated and could have killed him, caused his kidneys to shut down and require dialysis for life, made his low blood pressure worse, or caused the tissue to die faster. He also did not believe that administering Vancomycin during this time period would have saved Fritzgerald's limbs because the limb loss was due to "an ongoing microvascularization thrombotic process," "extremely low life-threatening blood pressure," and vasopressors. Prabhakar explained that Fritzgerald had "developed millions of very micro blood clots which interfered with the circulation to his extremities" and the use of blood pressure medication further compromised the blood flow. This, not the failure to control the infection, in his opinion caused Fritzgerald to develop "symmetry peripheral gangrene," which he described as "a very bad complication in sepsis" resulting in the loss of Fritzgerald's limbs.

In summary, the expert testimony was disputed about whether the settling defendants' alleged negligence proximately caused Fritzgerald's injuries. The jury was at liberty to resolve the conflict and did so in Fritzgerald's favor. *See Smetak*, 102 S.W.3d at 856. We conclude that the evidence is legally sufficient to support the jury's answers with regard to the settling defendants' liability. Additionally, we conclude that the evidence contrary to the finding is not so overwhelming as to render the finding clearly wrong and manifestly unjust. *See id.* at 855–56. Consequently, we conclude that the evidence is factually sufficient to support the jury's answers with regard to the settling defendants' liability. We resolve issue one against appellants.

Issue Two—Dr. Prabhakar

In issue two, appellants challenge the factual sufficiency of the evidence to support the jury's finding that Prabhakar's negligence proximately caused the loss of Fritzgerald's limbs.

Fritzgerald presented expert testimony that Prabhakar was in the best position to diagnose Fritzgerald's condition and to identify the appropriate antibiotic therapy. Dr. Stratton testified that the two main concerns in a post-abdominal surgery patient are intraabdominal infection and pneumonia. He testified that the antibiotic therapy must cover the most likely bacteria that would cause an infection. He testified that a reasonable and prudent infectious disease doctor should have known that MRSA was recognized in medical literature as an increasing problem in postoperative infections and that Fritzgerald had risk factors for a MRSA infection. Dr. Stratton testified that based on reasonable medical probability Prabhakar's negligence proximately caused Fritzgerald's injuries. He said if Prabhakar had ordered Vancomycin on September 1, Fritzgerald would have stabilized on September 2 and would not have required exploratory surgery on September 3 for which the Xigris had to be discontinued. If the Xigris had not been discontinued, necrosis of the limbs would not have occurred, and Fritzgerald would not have lost his limbs. Dr. Kress offered similar expert testimony.

In contrast, Prabhakar presented evidence that Fritzgerald had no symptoms to indicate he had pneumonia. And he testified that Fritzgerald lost his limbs as a complication of septic shock and because his body shifted blood from his extremities to his vital organs. He said the vasopressors Fritzgerald was given to treat the septic shock and life-threatening low blood pressure saved Fritzgerald's life, but compressed his vasculature. Prabhakar testified that this process had already begun when he consulted on September 1 and that even if he had given Vancomycin that evening it would not have made a difference. He said the limb loss was not caused by the failure to treat infection, but from the vasopressors.

Prabhakar presented expert testimony from Dr. Tweardy to support his claim that he did not proximately cause Fritzgerald's injuries by failing to prescribe Vancomycin on September 1. Dr. Tweardy also testified that the process which led to the limb loss had already begun on September 1 and that giving Vancomycin on September 1 would not have made a difference in the outcome.

Having reviewed the record, we cannot conclude that the evidence supporting the jury's finding that Prabhakar's negligence proximately caused Fritzgerald's injuries is so weak as to make the finding clearly wrong and manifestly unjust. *See Ortiz*, 917 S.W.2d at 772; *Pool*, 715 S.W.2d at 635. We conclude that the evidence is factually sufficient to support the jury's answers with regard to Prabhakar's liability. We resolve issue two against appellants.

ISSUE THREE—PERIODIC PAYMENTS

In issue three, appellants argue that the trial court erred by not ordering periodic payments for some portion of future medical expenses in the final judgment.

The Statute

Section 74.503(a) of the Texas Civil Practice and Remedies Code states that upon request by a defendant physician a court shall order that payments for medical, health care, and custodial services awarded in the judgment be paid in whole or in part through periodic payments rather than one lump-sum payment. TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (West 2011). As a condition to authorizing periodic payments, "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." *Id.* § 74.505(a).

Standard of Review

The trial court conducted a hearing pursuant to section 74.505(a) because Prabhakar was not adequately insured to pay the $5,240,182.16 judgment. The court did not include an order for

periodic payments in the judgment. The parties contend and we agree that we review the trial court's determination of this issue under an abuse of discretion standard. The trial court abuses its discretion when it acts arbitrarily and unreasonably, that is, without reference to guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). In our review, we consider the evidence in the light most favorable to the trial court's ruling and indulge every reasonable inference in favor of the ruling. *See Daniels v. Indem. Ins. Co. of N. Am.*, 345 S.W.3d 736, 741 (Tex. App.—Dallas 2011, no pet.). A trial court does not abuse its discretion when it bases its decision on conflicting evidence or when some evidence exists to support its decision. *See RSR Corp. v. Siegmund*, 309 S.W.3d 686, 709 (Tex. App.—Dallas 2010, no pet.).

To the extent our determination of this issue involves statutory construction, we review a trial court's interpretation of a statute de novo. *See Tex. W. Oaks Hosp., LP v. Williams*, No. 10-0603, 2012 WL 2476807, at *3 (Tex. June 29, 2012).

Prabhakar's Burden of Proof

The question on appeal is whether Prabhakar "provide[d] evidence of financial responsibility in an amount adequate to assure full payment of the damages awarded by the judgment." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a). Prabhakar contends he did; Fritzgerald contends Prabhakar did not. The parties do not cite any authority addressing the factors we must consider in determining whether a defendant satisfied his burden under section 74.505(a) and we have not found any. The issue is one of first impression.

To determine whether Prabhakar satisfied his burden we look to the language of the statute. When we construe a term in a statute, we strive to determine and give effect to the legislature's intent as expressed by the language used in the statute. *Key v. Muse*, 352 S.W.3d 857, 860 (Tex. App.—Dallas 2011, no pet.) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008)). If a term is defined, we use that definition. *Id.*

The statute states that the court shall require the defendant to "provide evidence of" financial responsibility. Because "provide" is not defined, we follow the mandate in Chapter 74 that instructs that undefined terms "shall have such meaning as is consistent with the common law." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) (West 2011)). We construe undefined terms "according to their plain and common meaning . . . unless such a construction leads to absurd results." *Jose Carerras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011).

The parties use several different words, other than "provide," to describe Prabhakar's burden under the statute, variously stating that he must "demonstrate," "establish," or "prove" financial responsibility. Those words have different meanings. "Demonstrate" means "to manifest clearly, certainly, or unmistakably: show clearly the existence of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 600 (1981). "Prove" means "[t]o establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence." *Id.* at 1826. And "establish" means "to prove or make acceptable beyond a reasonable doubt" or "to provide strong evidence for." *Id.* at 778. But, as we noted, the statute uses the word "provide." The plain meaning of "provide" is "to supply" or "to furnish." *Id.* at 1827. Consequently, we follow a cardinal rule of statutory construction that requires us to assume the legislature said what it meant. *See Muse*, 352 S.W.3d at 860. Because the legislature, rather than using some other term, said the defendant must "provide" evidence, we analyze the record based on that language to determine whether Prabhakar provided, meaning supplied or furnished, evidence of financial responsibility.

The Evidence & Arguments

Prabhakar argues that he satisfied his burden. At the hearing, Prabhakar offered evidence of financial responsibility through the testimony of his wife, who is also his office administrator. She testified that she was familiar with their personal assets and the assets of her husband's professional association. In addition to the insurance policy providing for $200,000 in coverage, Mrs. Prabhakar

identified a Chase bank account statement showing a balance of $638,035.19. She testified that the Chase account is owned by their family limited partnership and that she could withdraw those funds if needed to pay a judgment. She said she is the general manager of the family limited partnership and if her husband asked to use the money in the account as payment on the judgment she would agree to do so. Mrs. Prabhakar also identified a statement from Bank of America showing a line of credit for $2.5 million. She testified that the entire amount is available to pay toward the judgment. Finally, she identified a statement from a Wells Fargo account for Prabhakar's professional association showing a balance of $2,577,118.21. She said the account is not used for the professional association's operating expenses and would be available to satisfy the judgment. She testified that if the trial court ordered Prabhakar to put $5 million into the registry of the court for purposes of periodic payments that he would be able to do so.[1]

Mrs. Prabhakar testified that the security for the line of credit at Bank of America was "our relationship with them and previous business that we had had with them. There is also real estate that they have funded in the past, and that we have paid off." She said the real estate she referred to is held by different entities within the family limited partnership to, among other things, protect the assets from creditors. She said some of the properties that secure the line of credit have liens and some do not. She did not have the information about the liens with her and could not testify about any properties with liens. She thought she and her husband had to provide a personal guaranty with respect to some of the properties purchased by the family limited partnership, but she did not recall which ones or the amount, and she did not have any of those records with her. Mrs. Prabhakar also testified that she and her husband are current on their property taxes and that her husband's

[1]The record shows that after the trial court declined to order periodic payments in the final judgment, Prabhakar superseded the judgment with cash in lieu of supersedeas bond of almost $6 million.

professional association is current on its taxes. She said there are no restrictions on the use of the $2.5 million line of credit with Bank of America and that they have never used it.

Fritzgerald argues that the evidence Prabhakar presented at the hearing supports the trial court's implied finding that Prabhakar did not provide evidence of financial responsibility as required under the statute. He argues that Prabhakar did not offer any evidence of his liabilities or that the assets were reserved solely to satisfy Fritzgerald's judgment. Fritzgerald does not explain how the possibility that Prabhakar might have other liabilities refutes the evidence he provided of financial responsibility. And the uncontradicted testimony was that all of the described assets would be used to satisfy the judgment.

Fritzgerald also contends that Prabhakar's only assets were, at best, the $200,000 liability insurance policy and the $2,570,000 in the Wells Fargo account. He argues that the family limited partnership account is not owned by Prabhakar and is subject to his wife's exclusive authority and discretion to determine how the partnership's assets are used. The uncontradicted testimony, however, was that the wife had authority to determine how the assets in the family limited partnership were used and that she would use them to pay the judgment if Prabhakar asked.

Fritzgerald additionally argues that the Bank of America line of credit is not an "unencumbered asset," it is "a theoretical source of funds that might have been available . . . at the time of the . . . hearing. But a line of credit is not an asset; to the contrary, it becomes a liability once the line of credit is drawn upon. . . [T]here is no functional difference between an unused line of credit and a basic credit card with an available credit limit." He contends that "one cannot demonstrate his financial responsibility merely by obtaining more credit cards or securing a line of credit."

Analysis

We do not agree that the line of credit could not be considered as evidence of financial responsibility under these facts. A "line of credit" is "[t]he maximum amount of borrowing power extended to a borrower by a given lender, to be drawn upon by the borrower as needed." BLACK'S LAW DICTIONARY 949 (8th ed. 2004). Once the line of credit is drawn upon, the borrower owes the lender for the borrowed funds. Using Fritzgerald's credit card analogy, when someone makes a purchase with a credit card, he becomes a borrower and owes the lender (the credit card company) for the amount of the charge. The credit card company pays the vendor. If the borrower does not pay the lender and defaults on the loan, in this case the line of credit, the lender's remedies are against the borrower according to the terms of their agreement. Whether that loan is secured and how and whether it will be repaid are issues between the lender and the borrower. The issue for the court in this case was whether Prabhakar provided evidence of financial responsibility. Fritzgerald's argument that Prabhakar may have had other possible liabilities does not refute the evidence that the line of credit represented funds available to Prabhakar to allow him to satisfy the judgment. We conclude that under these facts, the line of credit was evidence of financial responsibility. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505(a).

Even if we disregard the funds in the family limited partnership account, Prabhakar provided evidence of a $2,500,000 line of credit, over $2,570,000 in a savings account, and a $200,000 insurance policy, totaling approximately $5,270,000; the judgment was for $5,240,182.16. Fritzgerald did not offer any evidence to refute Mrs. Prabhakar's testimony that these funds are available to satisfy the judgment. And at the hearing, Fritzgerald conceded that "the testimony was that she could put 5 million into the Registry [of] the Court today, if the Court were to order that." Instead, he argued that "there is no guarantee with the testimony that was offered today that this money will be available 30 days from now, 60 days from now, a year from now, two years from

now." But speculation that the funds might not be available in the future is not evidence and does not refute the testimony that the funds were available and will be used to pay the judgment.

The purpose of requiring the defendant to provide evidence of financial responsibility is for the court to determine whether some periodic payments rather than a lump sum payment should be awarded. When the defendant provided evidence that he could and would provide funds adequate to assure full payment of damages, and the evidence was not refuted, the condition to authorizing periodic payments was satisfied and, according to the statute, 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 a lump-sum payment." *Id.* § 74.503. Because the trial court did not order that medical, health care, or custodial services awarded in the judgment be paid in whole or in part in periodic payments rather than by a lump-sum payment, we conclude the trial court erred. We resolve issue three in appellants' favor.

FRITZGERALD'S CROSS-APPEAL

In a cross-appeal, Fritzgerald contends that the Texas statute capping noneconomic damages in a medical malpractice lawsuit is unconstitutional and that the trial court erred by reducing the damages for past medical expenses.

Cross-Appeal Issue One—Constitutionality of Statutory Damages Cap

Section 74.301(a) of the civil practice and remedies code states that in a health care liability claim where final judgment is rendered against a physician the limit of civil liability for noneconomic damages shall not exceed $250,000 for each claimant. *Id.* § 74.301(a). The statute became effective September 1, 2003, the same date that Fritzgerald alleges his injury occurred. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 864, 873. Pursuant to the statute, the trial court reduced the jury's award for noneconomic damages from $11,000,000 to $250,000.

In his first cross-appeal issue, Fritzgerald argues that the cap on noneconomic damages in section 74.301(a) violates the state and federal constitutions.

State Constitution

In 2003, Texas voters approved a constitutional amendment giving the Texas Legislature authority to "determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care . . . that is or is claimed to be a cause of . . . disease, injury, or death of a person." TEX. CONST. art. III, § 66(b). Fritzgerald argues in his reply brief that the legislative history of section 66 does not indicate any intent "to override any other constitutional protection available to persons affected by the statutory cap." We disagree.

Section 66 begins with the following phrase: "Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages . . ., other than economic damages . . . ." The plain language of the constitutional amendment evidenced an intent of the voters of Texas to authorize the legislature to limit noneconomic damages despite any other constitutional provision to the contrary. *See id.*; *see also Rivera v. United States*, No. SA-05-CV-0101-WRF, 2007 WL 1113034, at *3–5 (W.D. Tex. Mar. 7, 2007) (concluding that section 66 manifests intent for legislature to set damages caps in health care liability claims and Chapter 74 does not violate Texas constitution). Fritzgerald does not argue that section 66 is unconstitutional.

We conclude that Fritzgerald has not shown that section 74.301 violates the Texas constitution.

Federal Constitution

Fritzgerald also contends that section 74.301 violates the federal constitution. He contends that section 74.301 violates his right to a jury trial, his right to equal protection, and the takings

clause. We did not find any Texas state court authority addressing this issue and the parties cited none. However, a Texas federal district court has considered the constitutionality of Chapter 74 in *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012).

In the *Watson* case, the plaintiffs filed a lawsuit in 2008 seeking a declaratory judgment that the Medical Malpractice and Tort Reform Act of 2003, which includes section 74.301, violates the United States constitution. *Id.* at 799. The plaintiffs argued, among other things, that the statute violated their rights under the Seventh Amendment, the Equal Protection Clause, and constituted a taking. The matter was referred to a magistrate judge.

The magistrate judge issued a Report and Recommendation in 2009 addressing the Seventh Amendment and equal protection claims. In the Report, the magistrate judge issued a recommendation to the district court to dismiss many of the plaintiffs' claims, including claims under the Seventh Amendment and Equal Protection Clause. *Watson v. Hortman*, No. 2:08-CV-81, slip op. at 12–13 (Dkt. No. 66) (N.D. Tex. Mar. 12, 2009). The magistrate judge recommended dismissal of the Seventh Amendment right-to-jury-trial claims because "the Seventh Amendment has not been incorporated by the Fourteenth Amendment to apply to state court proceedings." *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 324 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969)). The magistrate judge also stated that even if the Seventh Amendment applied to the case, "federal courts routinely hold that statutory damage caps do not violate the Seventh Amendment, largely because a court does not 'reexamine' a jury's verdict or impose its own factual determination regarding what a proper award might be." *Id.* (citations omitted).

In recommending dismissal of the plaintiffs' equal protection claims, the magistrate judge relied on *Lucas v. United States*, 807 F.2d 414, 421 (5th Cir. 1986), which considered whether the predecessor statute (article 4590i) violated the equal protection clause. In the *Lucas* case, the Fifth Circuit applied the rational basis test and said it was "at a loss to see how [the statute] violates equal

protection notions. *Every* malpractice victim is limited by the statute. . . . [T]he cap applies to all. All malpractice victims receive equal protection." *Id.* The court concluded that the "federal equal protection argument fails" because "we find that there is a rational basis for [the statute] and that the legislature enacted the statute in an attempt to accomplish a legitimate purpose." *Id.* at 422. The magistrate judge concluded that similar legislative findings were present in the *Watson* case and that *Lucas* "forecloses the plaintiff's equal protection claim." *Watson*, slip op. at 15 (Dkt. No. 66). The district court overruled the parties' objections to the magistrate judge's Report and Recommendation and adopted its findings and conclusions. *See Watson*, 844 F. Supp. 2d at 797.

The magistrate judge next considered the plaintiffs' claims that the statute violated their right of access to the courts and constituted a taking under the Fifth Amendment. The magistrate judge issued a second Report and Recommendation dated September 13, 2010, addressing those issues. In that Report, the magistrate judge stated, "[t]he Supreme Court has stated that 'statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.'" *Watson*, 844 F. Supp. 2d at 800 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978)).

In recommending dismissal of the plaintiffs' right-of-access claim, the magistrate judge was "not persuaded that [the statutory] cap on recovery denies medical malpractice victims an 'adequate, effective, and meaningful' legal remedy." *Id.* In addition, the magistrate judge concluded that the statute "meets the rational basis test because the plaintiffs have not shown that the damages cap is clearly arbitrary and irrational" and "[t]he cap on noneconomic damages is reasonably related to the State of Texas's goals of reducing malpractice insurance premiums and improving access of care." *Id.* at 800–01.

The magistrate judge also considered whether the statute was a taking under the United States constitution. *Id.* at 801–04. The magistrate judge concluded it was not because anyone injured on

or after the effective date of the statute did not have a vested property right in "the full, uncapped value of the noneconomic damages resulting from medical malpractice." *Id.* at 801–02. The magistrate judge again relied on the *Lucas* case to conclude that "a person has no property, no vested interest, in any rule of the common law." *Id.* at 802 (quoting *Duke Power*, 438 U.S. at 88). Consequently, the magistrate judge concluded that the plaintiffs who were injured on or after the effective date of the statute "have no takings claim" under the United States constitution. *Id.* The district court adopted the magistrate judge's "Report and Recommendation in accordance with the reasons set forth in the same" and dismissed the plaintiffs' claims. *Id.* at 798.

Although we are not bound by a federal district court's interpretation of federal law, its decisions may be persuasive. *See Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 803–04 (Tex. App.—Dallas 2008, pet. denied). We conclude that the magistrate judge's two Reports and Recommendations and the district court's adoption of those Reports and Recommendations on the federal constitutional questions are persuasive. *See id.*

We resolve Fritzgerald's first cross-appeal issue against him.

Cross-Appeal Issue Two—Past Medical Expenses

In his second cross-appeal issue, Fritzgerald argues that the trial court erred by reducing the jury's award of $1,280,000 for past medical expenses. At trial, the parties stipulated to the jury that "the amount of David Fritzgerald's medical bills is [$]1,280,041.32, and that this amount was reasonable and necessary for his medical care." The jury's award of $1,280,000 appears to be based on this stipulation. The judgment awarded damages in the full amount of the jury's finding for past medical expenses. Prabhakar argued that the damages for past medical expenses should be reduced to the amount the parties had stipulated as the "actual amount paid." The trial court modified the judgment and reduced the damages amount by $347,391.84. Fritzgerald contends this was error. We disagree.

Section 41.0105 of the civil practice and remedies code states that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008). The Texas Supreme Court has stated that the language "actually paid or incurred" "means expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid" because of adjustments or credits by insurers. *Haygood v. De Escabedo*, 356 S.W.3d 390, 397 (Tex. 2011). The court said section 41.0105 "limits a claimant's recovery of medical expenses to those which have been or must be paid by or for the claimant." *Id.* at 398; *see Rosenbaum v. Dupor*, No. 05-09-00994-CV, 2011 WL 2139138, at *2 (Tex. App.—Dallas June 1, 2011, no pet.) (mem. op.); *Pierre v. Swearingen*, 331 S.W.3d 150, 155–56 (Tex. App.—Dallas 2011, no pet.). In other words, amounts written off by medical providers are not amounts "actually paid or incurred" under the statute. *See Rosenbaum*, 2011 WL 2139138, at *2; *Pierre*, 331 S.W.3d at 155–56.

Under *Haygood*, the trial court was required to reduce Fritzgerald's recovery pursuant to section 41.0105 if the court had the necessary information to do so. *See Rosenbaum*, 2011 WL 2139138, at *2. We conclude that the court had the necessary information to do so based on the parties' Rule 11 agreement.

Fritzgerald's attorneys sent a proposed Rule 11 letter agreement to Prabhakar's attorneys stating:

> **3rd AMENDED RULE 11 AGREEMENT - Medical Bills**
>
> Dear Counsel:
>
> I am writing to seek your agreement pursuant to Texas Rule of Civil Procedure 11 as to the reasonableness and necessity of Mr. Fritzgerald's gross healthcare expenses for the upcoming trial. In addition, we would like to agree that

the billed amount was $1,280,041.32. The amount paid was $932,649.42. The amount written off was $347,391.90.[2]

[itemized list of each health care provider's "Billed Charges" and the "Total Payments" to that health care provider]

1. The parties stipulate that the amount of David Fritzgerald's medical bills is $1,280,041.32, and that this amount was reasonable and necessary for his medical care.

2. The parties stipulate that [the] actual amount paid for David Fritzgerald's medical bills was $932.649.42.

If this is your agreement, please sign where indicated and return to me for filing with the Court.

The agreement was signed by Fritzgerald's counsel as the author of the letter and by other counsel as "AGREED TO BY[.]" Fritzgerald acknowledges that the parties signed the Rule 11 agreement and stipulated to the actual amount paid. He argues, however, that this stipulation "is ultimately irrelevant to the analysis" because the stipulation was not read to the jury, the jury was asked to find the amount of medical expenses "actually paid *or* incurred," he proved the amount incurred, and no contrary evidence was offered at trial. He argues further that even though the Rule 11 agreement states the amount of past medical expenses written off, "that assertion was not actually included in the parties' stipulation . . . and no competent evidence was adduced before, during, or after trial regarding the write-off of any medical bills." We disagree.

The purpose of a Rule 11 agreement is "to remove misunderstandings and controversies that accompany verbal assurances, and the written agreements 'speak for themselves.'" *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 (Tex. 2007) (quoting *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995)); *see also Collins v. Collins*, 345 S.W.3d 644, 649–50 (Tex. App.—Dallas 2011, no pet.) (stating Rule 11 agreements are enforceable as contracts). When parties enter into a Rule 11

[2]The trial court reduced the judgment by an amount six cents less than this stipulated amount. No one complains about the six cents.

agreement, they are "bound by the specific language" in the agreement and the trial court has "a duty to enforce its terms." *Fortis Benefits*, 234 S.W.3d at 651.

The attorneys for Fritzgerald and Prabhakar signed the Rule 11 agreement in this case and filed it with the court. It included the parties' agreement that the amount of medical expenses "written off" was $347,391.90 and the amount "actually paid or incurred" was $932,649.42. The trial court's judgment for past medical expenses was consistent with the parties' agreement. As a result, we conclude that the court did not err by reducing the damages for past medical expenses to the amount the parties agreed was "actually paid or incurred." *See Haygood*, 356 S.W.3d at 397. We resolve Fritzgerald's second cross-appeal issue against him.

CONCLUSION

We reverse the trial court's judgment insofar as it did not order that medical, health care, or custodial services awarded in the judgment be paid in whole or in part in periodic payments rather than by a lump-sum payment and remand the case to the trial court to determine periodic payments pursuant to Chapter 74 subchapter K of the Texas Civil Practice and Remedies Code. We otherwise affirm the trial court's judgment.

ELIZABETH LANG-MIERS
JUSTICE

100126F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MEENAKSHI S. PRABHAKAR, M.D. and INFECTIOUS DISEASE DOCTORS, P.A., Appellants/Cross-Appellees

No. 05-10-00126-CV V.

DAVID FRITZGERALD, Appellee/Cross-Appellant

Appeal from the 160th Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 05-08507-H).
Opinion delivered by Justice Lang-Miers, Justices Moseley and Murphy participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** insofar as it did not order periodic payments under Chapter 74 subchapter K of the Texas Civil Practice and Remedies Code and **REMANDED** to the trial court for an order pursuant to Chapter 74 subchapter K of the Texas Civil Practice and Remedies Code. In all other respects, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellee/cross-appellant David Fritzgerald recover his costs of this appeal from appellants/cross-appellees Meenakshi S. Prabhakar, M.D. and Infectious Disease Doctors, P.A. and from the cash deposit in lieu of supersedeas bond. After all costs have been paid, the clerk of the district court is directed to release the balance of the cash deposit to appellant/cross-appellee Meenakshi S. Prabhakar, M.D.

Judgment entered August 24, 2012.

Elizabeth Lang-Miers

ELIZABETH LANG-MIERS
JUSTICE

2012 WL 3667400
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas,
Dallas.

Meenakshi S. PRABHAKAR, M.D. and Infectious Disease Doctors, P.A., Appellants/Cross–Appellees
v.
David FRITZGERALD, Appellee/Cross–Appellant.

No. 05–10–00126–CV. | Aug. 24, 2012.

Synopsis

Background: Patient filed a medical malpractice lawsuit against general surgeon and infectious disease physician after he developed methicillin-resistant staphylococcus aureus (MRSA) following surgery and had to have both arms amputated below the elbows and both legs amputated below the knees. The 160th Judicial District Court, Dallas County, entered judgment on jury verdict that found surgeon's negligence did not proximately cause patient's injuries, that physician caused patient's injuries, and awarded five million dollars for past and future pain and suffering, $144,350 for loss of earning capacity in the past, $300,300 for loss of earning capacity in the future, three million for past and future disfigurement, three million for past and future physical impairment, $1.28 million for medical expenses paid or incurred, and five million for future medical expenses. The trial court modified the damages to reflect the statutory damages cap, the credits from settling defendants, and the medical expenses actually paid and rendered judgment in favor of patient for $5,240,182.16. Physician appealed.

Holdings: The Court of Appeals, Lang-Miers, J., held that:
[1] evidence was legally and factually sufficient to support the jury's determination that infectious disease physician's negligence was the sole proximate cause of patient's injuries;
[2] evidence was factually sufficient to support finding that infectious disease physician's negligence proximately caused the loss of patient's limbs;
[3] physician adequately established evidence of financial responsibility;
[4] the statute capping noneconomic damages in a medical malpractice lawsuit did not violate the state constitution; and
[5] statute capping noneconomic damages in a medical malpractice lawsuit did not violate patient's Seventh Amendment right to a jury trial.

Affirmed in part and reversed in part.

West Headnotes (22)

[1] Health

Physician adequately preserved for appellate review his challenge to the sufficiency of the evidence, in medical malpractice case, where physician filed a motion for a new trial that challenged the sufficiency of the evidence.

[2] Appeal and Error

A party may preserve a legal sufficiency challenge for appellate review following a jury trial by filing a motion for judgment notwithstanding the verdict (jnov) or a motion for new trial.

[3] Appeal and Error

In reviewing a challenge to the legal sufficiency of the evidence, the Court of Appeals considers evidence that supports the verdict if reasonable jurors could have considered it and disregard contrary evidence unless reasonable jurors could

not have disregarded it.

[4] Appeal and Error

The Court of Appeals will sustain a legal sufficiency challenge when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact.

[5] Appeal and Error

In reviewing a challenge to the factual sufficiency of the evidence, the Court of Appeals considers all the evidence in the record, both supporting and contradicting the challenged finding, and will set the finding aside only if it determines that the evidence supporting it is so weak as to make the finding clearly wrong and manifestly unjust.

[6] Appeal and Error

When the Court of Appeals reviews the evidence it is not free to reweigh the evidence and set aside the jury's finding merely because it feels a different result is more reasonable.

[7] Health

Evidence was legally and factually sufficient to support the jury's determination that infectious disease physician's negligence was the sole proximate cause of patient's injuries; physician treated patient's infection, medical expert testified that of patient's physicians had treated him with a different antibiotic on September 1st or 2nd he would not have had to have his limbs amputated, and second expert testified that patient was at risk for developing hospital-acquired pneumonia because he had been hospitalized for seven days, and that the antibiotics patient was given covered all possible sources of infection except for hospital-acquired pneumonia, and infectious disease expert testified similarly.

[8] Health

A medical malpractice plaintiff bears the burden to prove two causal nexuses: between the defendant's conduct and the event sued upon, and between the event sued upon and the plaintiff's injuries.

[9] Health

Generally, a plaintiff carries his burden in a medical malpractice case by presenting expert testimony explaining why the defendant's negligence caused the plaintiff's injuries based on a reasonable degree of medical probability.

[10] Witnesses

Uncontroverted expert testimony may be regarded as conclusive if the nature of the subject matter requires the jury to be guided solely by the opinion of experts and the evidence is otherwise credible and free from contradictions and inconsistencies.

[11] Witnesses

An expert's testimony may be contradicted by the testimony of other witnesses or by cross-examination.

[12] Health

Evidence was factually sufficient to support finding that infectious disease physician's negligence proximately caused the loss of patient's limbs; expert testified that physician was in the best position to diagnose patient's condition and to identify the appropriate antibiotic therapy, that physicians's negligence proximately caused patient's injuries, resulting in the amputations, and that if physician had treated patient with an antibiotic that worked against hospital-acquired pneumonia on the first day he treated patient then patient would have required exploratory surgery and would not have developed necrosis of the limbs.

[13] Health

Infectious disease physician adequately established evidence of financial responsibility, and thus the trial court was required to order periodic payments for a portion of future medical expenses in the final medical malpractice judgment; physician presented evidence that he had a $200,000 insurance policy, a $2,500,000 line of credit, and over $2,570,000 in a savings account. V.T.C.A., Civil Practice & Remedies Code § 74.503(a); V.T.C.A., Civil Practice & Remedies Code § 74.505(a).

[14] Appeal and Error

A trial court does not abuse its discretion when it bases its decision on conflicting evidence or when some evidence exists to support its decision.

[15] Statutes

The Court of Appeals reviews a trial court's interpretation of a statute de novo.

[16] Statutes

When the Court of Appeals construes a term in a statute, it strives to determine and give effect to the legislature's intent as expressed by the language used in the statute.

[17] Statutes

The Court of Appeals construes undefined statutory terms according to their plain and common meaning unless such a construction

leads to absurd results.

[18] Health

The Texas statute capping noneconomic damages in a medical malpractice lawsuit did not violate the state constitution; constitutional amendment gave the legislature the authority to determine the limit of liability for all damages and losses, other than economic damages, in a medical malpractice case. Vernon's Ann.Texas Const. Art. 3, § 66(b); V.T.C.A., Civil Practice & Remedies Code § 74.301(a).

[19] Health

The Texas statute capping noneconomic damages in a medical malpractice lawsuit did not violate patient's Seventh Amendment right to a jury trial; the Seventh Amendment has not been incorporated by the Fourteenth Amendment to apply to state court proceedings. U.S.C.A. Const.Amend. 7, 14; V.T.C.A., Civil Practice & Remedies Code § 74.301(a).

[20] Health

The Texas statute capping noneconomic damages in a medical malpractice lawsuit did not violate patient's equal protection rights; every medical malpractice victim was treated the same under the statute, and there was a rational basis for the statute. U.S.C.A. Const.Amend. 5, 14; V.T.C.A., Civil Practice & Remedies Code § 74.301(a).

[21] Health

The Texas statute capping noneconomic damages in a medical malpractice lawsuit did not constitute a taking under the federal constitution; anyone injured on or after the effective date of the statute did not have a vested property right in the full, uncapped value of the noneconomic damages resulting from medical malpractice.

[22] Health

The trial court's reduction of patient's jury's award of $1,280,000 for past medical expenses to $347,391.84, which represented the amount actually paid, was not erroneous; statute limited recovery of medical or healthcare expenses incurred to the amount actually paid or incurred by patient, and the parties entered into an agreement that reflected the amount of medical expenses that were actually paid. V.T.C.A., Civil Practice & Remedies Code § 41.0105; Vernon's Ann.Texas Rules Civ.Proc., Rule 11.

On Appeal from the 160th Judicial District Court, Dallas County, Texas, Trial Court Cause No. 05–08507–H.

Attorneys and Law Firms

Diana L. Faust, Michelle E. Robberson, for Meenakshi S. Prabhakar, M.D. and Infectious Disease Doctors, P.A.

Jeffrey S. Levinger, Linda Turley, Patrick Wigle, Brett D. Kutnick, for David Fritzgerald.

Before Justices MOSELEY, LANG–MIERS, and MURPHY.

Opinion

OPINION

Opinion by Justice LANG–MIERS.

***1** This is an appeal from a jury verdict in a medical malpractice lawsuit. In three issues, appellants/cross-appellees Meenakshi S. Prabhakar, M.D. and Infectious Disease Doctors, P.A. challenge the sufficiency of the evidence to support certain jury findings and the trial court's refusal to order some portion of appellee/cross-appellant David Fritzgerald's future medical expenses to be made in periodic payments. In a cross-appeal, Fritzgerald argues that the $250,000 statutory cap on noneconomic damages violates the federal and state constitutions and that the trial court erred by reducing the jury's award of damages for past medical expenses. For the following reasons, we conclude that (1) the evidence is sufficient to support the jury's findings, (2) the trial court erred by refusing to order periodic payments in the final judgment, (3) the statutory cap on noneconomic damages does not violate the federal or state constitutions, and (4) the trial court did not err by reducing the jury's damages award for past medical expenses. Based on our resolution of the parties' issues, we reverse the judgment insofar as it did not order periodic payments and remand to the trial court for an order pursuant to Chapter 74 subchapter K of the Texas Civil Practice and Remedies Code. In all other respects, we affirm the trial court's judgment.

BACKGROUND

On August 18, 2003, Fritzgerald presented to the emergency room of RHD Memorial Medical Center in Dallas, Texas, complaining of abdominal pain, lack of appetite, nausea, vomiting, a history of reflux, and a history of a 30–pound weight loss. The admitting physician consulted with Dr. Richard Holmes, a general surgeon, who determined that Fritzgerald had a duodenal ulcer and needed surgery. Holmes discharged Fritzgerald pending further testing and, 11 days later on August 29, Holmes performed surgery. Fritzgerald tolerated the procedure well. Holmes started Fritzgerald on an antibiotic to prevent a post-surgical abdominal infection and said he expected Fritzgerald to remain in the hospital for about three to five days.

Fritzgerald appeared to be recovering until September 1. Early that morning, Fritzgerald developed a high fever and his blood pressure began to drop. The nursing staff called Holmes about Fritzgerald's condition, and Holmes ordered tests. Fritzgerald exhibited symptoms of systemic inflammatory response syndrome, or sepsis. In other words, an infection was attacking his entire body. By late evening of September 1, Fritzgerald's condition had deteriorated to septic shock, meaning his organs were not getting adequately profused, and Fritzgerald was in a life-threatening condition. The hospitalist coordinating Fritzgerald's care consulted Prabhakar, an infectious disease doctor.

Prabhakar first saw Fritzgerald around 10 p.m. on September 1. After reviewing all available data and examining the patient, Prabhakar believed Fritzgerald had peritonitis, which is an intraabdominal infection. He believed the infection could be related to the surgery, but the source of the infection was yet undetermined. Based on his clinical assessment of Fritzgerald's condition, Prabhakar ordered empiric antibiotic therapy—a broad spectrum antibiotic—to treat the most common pathogens that could cause the infection. The antibiotic therapy Prabhakar prescribed did not treat hospital-acquired Methicillin-resistant staphylococcus aureus (MRSA). The antibiotic was started on the evening of September 1.

***2** Other specialty physicians also consulted on Fritzgerald's case, including a pulmonary critical care physician. They ordered numerous tests and chest x-rays, but none was able to determine the source of Fritzgerald's infection. Meanwhile, Fritzgerald's organs began to fail and his body diverted blood flow away from his extremities and to his vital organs through a process called vascular redistribution phenomenon. He was given a drug called Xigris to counteract this phenomenon and was transferred to the intensive care unit. By September 3, Fritzgerald's extremities had become cool from poor circulation.

When Fritzgerald's condition had not improved by September 3, Holmes performed exploratory surgery to rule out an intraabdominal infection. The Xigris prescribed to keep Fritzgerald's blood circulating had to be discontinued twelve hours before Holmes performed the exploratory surgery and could not be restarted until twelve hours after the surgery. Holmes did not find anything that caused him to believe, and none of the tests he ran showed, that the source of Fritzgerald's infection was the abdomen. Prabhakar testified that ascites, or fluid collection, was found during the exploratory surgery and that the presence of ascites is unusual in the absence of an infection in the peritoneal cavity. He believed Fritzgerald had peritonitis.

At some point, Fritzgerald suffered renal failure and a nephrologist was consulted. On September 4, the nephrologist gave Fritzgerald a single dose of Vancomycin as a prophylactic measure before beginning hemodialysis. Vancomycin is a broad spectrum antibiotic that is effective against MRSA. She did this because of Fritzgerald's risk for skin pathogens like MRSA and Methicillin-sensitive staphylococcus aureus that could enter the blood system through the hemodialysis catheter.

On September 5, the physicians began to suspect that Fritzgerald might have pneumonia. By September 7, a sputum culture grew a hospital-acquired MRSA pneumonia and Fritzgerald was treated with Vancomycin. He remained in the intensive care unit at RHD for over a month. Ultimately, because of the lack of blood flow to Fritzgerald's extremities, he developed gangrene of the arms and legs, and he was transferred from RHD to Parkland Hospital in Dallas, Texas, for amputation of both arms below the elbow and both legs below the knee.

Fritzgerald sued RHD and most of the doctors who treated him for negligence. He settled with RHD, the pulmonary critical care physician, and the hospitalist before trial, leaving only Holmes and Prabhakar at trial. The jury found that Holmes's negligence, if any, did not proximately cause Fritzgerald's injuries. Fritzgerald and Prabhakar do not challenge the jury's finding with regard to Holmes and Holmes is not a party to this appeal.

Fritzgerald contended at trial that Prabhakar was negligent by failing to prescribe Vancomycin, the "drug of choice" to treat hospital-acquired MRSA pneumonia, on September 1. Fritzgerald's expert witnesses testified that pneumonia was the second most common cause of infection in a hospital setting and if Prabhakar had administered Vancomycin on September 1, Fritzgerald's condition would have stabilized over the next couple of days, he would not have needed the exploratory surgery, the Xigris would not have been discontinued, and Fritzgerald would not have lost his limbs.

***3** Prabhakar contended that the use of Vancomycin was not indicated on September 1, 2, or 3 because Fritzgerald did not have any of the symptoms associated with pneumonia, the chest x-rays did not indicate that Fritzgerald had pneumonia, and none of the physicians treating Fritzgerald thought he had pneumonia. Prabhakar also contended that he treated Fritzgerald for all possible pathogens based on Fritzgerald's clinical evaluation. He contended that the cause of Fritzgerald's limb loss could not have been prevented and that he did not violate the standard of care by not prescribing Vancomycin.

The jury found that Prabhakar was 100% responsible for Fritzgerald's injuries. The jury awarded Fritzgerald $5 million for past and future physical pain and mental anguish; $144,350 for loss of earning capacity in the past; $300,300 for loss of earning capacity in the future; $3 million for past and future disfigurement; $3 million for past and future physical impairment; $1.28 million for medical expenses paid or incurred; and $5 million for future medical expenses. The trial court modified the damages to reflect the statutory damages cap, the credits from settling defendants, and the medical expenses actually paid. The court then rendered judgment in favor of Fritzgerald for $5,240,182.16.

SUFFICIENCY OF THE EVIDENCE

In two issues, appellants challenge the sufficiency of the evidence to support the jury's findings with respect to Prabhakar's and the settling defendants' liability.

Preservation of Error

[1] As a preliminary matter, Fritzgerald contends that appellants did not preserve the sufficiency challenges with regard to the settling defendants for our review. We disagree.

[2] A party may preserve a legal sufficiency challenge for appellate review following a jury trial by filing a motion for judgment notwithstanding the verdict (jnov) or a motion for new trial. *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 337 (Tex.App.-Dallas 2011, pet. denied). To preserve a factual sufficiency challenge for appellate review following a jury trial, a party must file a motion for new trial complaining that the evidence is factually insufficient to support the jury finding. *See id.; see also* TEX.R. CIV. P. 324(b)(2).

Appellants filed two post-verdict motions: a motion for jnov and a motion for new trial in which they challenged the sufficiency of the evidence to support the jury's answers to the liability questions. They quoted the questions and the answers in their entirety. Fritzgerald contends that those motions are not sufficient to preserve error concerning the settling defendants' liability, however, because the argument sections of the motions addressed only Prabhakar's liability. Fritzgerald cites two cases from this Court which he contends support his argument. But those cases are distinguishable because in those cases the appellants did not raise the issue on appeal in a post-judgment motion. *See DFW Aero Mechanix, Inc.*

v. Airshares Inc., 366 S.W.3d 204, 205 (Tex.App.-Dallas 2010, no pet.) (appellant did not file motion for new trial raising factual sufficiency and did not challenge sufficiency of evidence regarding two of the jury's findings in jnov motion); *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 383 (Tex.App.-Dallas 2009, no pet.) (no record that appellant raised legal sufficiency of evidence in any motion).

***4** The argument sections of appellants' motions were limited to the evidence of Prabhakar's liability, but the language in the motions specifically challenged the legal and factual sufficiency of the evidence to support the jury's findings as to all defendants' liability. We construe post-trial objections liberally so that the right to appeal is not lost unnecessarily. *See Arkoma Basin Exploration Co., Inc. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 387–88 (Tex.2008). We conclude appellants' motions were sufficient to preserve the sufficiency challenges for appellate review. *See id.*

Standard of Review

[3] [4] [5] In reviewing a challenge to the legal sufficiency of the evidence, we consider evidence that supports the verdict if reasonable jurors could have considered it and disregard contrary evidence unless reasonable jurors could not have disregarded it. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex.2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005)). We will sustain a legal sufficiency challenge "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997)). In reviewing a challenge to the factual sufficiency of the evidence, we consider all the evidence in the record, both supporting and contradicting the challenged finding, and will set the finding aside only if we determine that the evidence supporting it is so weak as to make the finding clearly wrong and manifestly unjust. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex.1996) (per curiam); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986).

[6] When we review the evidence we are not free to reweigh the evidence and set aside the jury's finding merely because we feel a different result is more reasonable. *See Pool*, 715 S.W.2d at 634; *Ellis Cnty. State Bank v. Keever*, 936 S.W.2d 683, 685 (Tex.App.-Dallas 1996, no writ). We will reverse only if necessary to prevent a manifestly unjust result. *See Pool*, 715 S.W.2d at 664; *Neller v. Kirschke*, 922 S.W.2d 182, 188 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

The Jury Findings

The jury found as follows (handwritten answers in italics):

Question No. 1

Did the negligence, if any, of the persons named below proximately cause the injuries in question? Answer "Yes" or "No" for each of the following:

(a) Richard B. Holmes, M.D. *No*

(b) Meenakshi S. Prabhakar, M.D. *Yes*

(c) Tenet Health System Hospitals Dallas, Inc. d/b/a RHD Memorial Medical Center *No*

(d) Ephraim T. Keng, M.D. [the hospitalist] *No*

***5** (e) Vivek A. Padegal, M.D. [the pulmonologist] *No*

Question No. 2

For each of those named below that you found caused or contributed to cause the injuries, find the percentage of responsibility attributable to each:

...

(b) Meenakshi S. Prabhakar, M.D. *100*

...

Issue One—Settling Defendants

[7] In issue one, appellants contend that the expert testimony conclusively established that the settling

defendants were negligent. Appellants argue that there is no or insufficient evidence to show the settling defendants acted within the standard of care and, consequently, the evidence does not support the jury's answers that the settling defendants' negligence, if any, was not the proximate cause of Fritzgerald's injuries.

[8] [9] [10] [11] A medical malpractice plaintiff bears the burden to prove two causal nexuses: between the defendant's conduct and the event sued upon, and between the event sued upon and the plaintiff's injuries. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex.2010). Generally, a plaintiff carries this burden by presenting expert testimony explaining why the defendant's negligence caused the plaintiff's injuries based on a reasonable degree of medical probability. *Id.* at 536. The expert must provide a basis for his opinion. *Id.* Uncontroverted expert testimony may be regarded as conclusive if the nature of the subject matter requires the jury to be guided solely by the opinion of experts and the evidence is otherwise credible and free from contradictions and inconsistencies. *Truck Ins. Exch. v. Smetak*, 102 S.W.3d 851, 855 (Tex.App.-Dallas 2003, no pet.). However, an expert's testimony may be contradicted by the testimony of other witnesses or by cross-examination. *Id.*

The experts all agreed that it was not possible to know the source of Fritzgerald's infection on September 1 or 2. Fritzgerald presented two expert witnesses who testified that if Fritzgerald's providers had treated him with Vancomycin on September 1, or even perhaps as late as September 2, Fritzgerald would not have lost his limbs. One of those experts, Dr. John Kress, testified that the most common causes of sepsis in a postoperative patient are infections that involve the lungs, the intraabdominal compartment, the urinary tract, or a catheter placed in a large blood vessel. He testified that he saw an area of concern in Fritzgerald's chest x-rays that, when combined with Fritzgerald's other symptoms, strongly indicated the presence of an infection in the lungs. He said because Fritzgerald had been in the hospital for several days he was at risk for developing a hospital-acquired pneumonia, and the antibiotics given to Fritzgerald on September 1, 2, and 3 covered all the possible sources of infection except hospital-acquired pneumonia. Dr. Charles Stratton, Fritzgerald's infectious disease expert, testified similarly. He criticized all the physicians treating Fritzgerald because they did not prescribe an antibiotic therapy broad enough to cover all the possible pathogens likely to be causing Fritzgerald's sepsis.

***6** Prabhakar presented evidence that even if Fritzgerald had been given Vancomycin on September 1 or 2 it would not have prevented the loss of his limbs. Prabhakar's expert witness, Dr. David Tweardy, testified that he "thought that the physicians taking care of Mr. Fritzgerald did a very fine job of caring for him." He said he did not believe Fritzgerald's condition called for the empiric use of Vancomycin on September 1, 2, or 3 and he would not have used Vancomycin. He also explained that even if Vancomycin had been administered on September 1 or 2 it would not have changed the outcome because the process that led to the loss of limbs had already begun and he did not believe Vancomycin could have stopped it. He also testified that, in his opinion, the organism causing Fritzgerald's infection on September 1 was not the MRSA that was subsequently found on September 5; he believed Fritzgerald had two infections and that the MRSA infection developed later, after the infection on September 1 which led to septic shock and the loss of limbs.

Prabhakar also testified that it would have been wrong to give Vancomycin to Fritzgerald on September 1 or 2 because it was not indicated and could have killed him, caused his kidneys to shut down and require dialysis for life, made his low blood pressure worse, or caused the tissue to die faster. He also did not believe that administering Vancomycin during this time period would have saved Fritzgerald's limbs because the limb loss was due to "an ongoing microvascularization thrombotic process," "extremely low life-threatening blood pressure," and vasopressors. Prabhakar explained that Fritzgerald had "developed millions of very micro blood clots which interfered with the circulation to his extremities" and the use of blood pressure medication further compromised the blood flow. This, not the failure to control the infection, in his opinion caused Fritzgerald to develop "symmetry peripheral gangrene," which he described as "a very bad complication in sepsis" resulting in the loss of Fritzgerald's limbs.

In summary, the expert testimony was disputed about whether the settling defendants' alleged negligence proximately caused Fritzgerald's injuries. The jury was at liberty to resolve the conflict and did so in Fritzgerald's favor. *See Smetak*, 102 S.W.3d at 856. We conclude that the evidence is legally sufficient to support the jury's answers with regard to the settling defendants' liability. Additionally, we conclude that the evidence contrary to the finding is not so overwhelming as to render the finding clearly wrong and manifestly unjust. *See id.* at 855–56. Consequently, we conclude that the evidence is factually sufficient to support the jury's answers with regard to the settling defendants' liability. We resolve issue one against appellants.

Issue Two—Dr. Prabhakar

[12] In issue two, appellants challenge the factual sufficiency of the evidence to support the jury's finding that Prabhakar's negligence proximately caused the loss of Fritzgerald's limbs.

***7** Fritzgerald presented expert testimony that Prabhakar was in the best position to diagnose Fritzgerald's condition and to identify the appropriate antibiotic therapy. Dr. Stratton testified that the two main concerns in a post-abdominal surgery patient are intraabdominal infection and pneumonia. He testified that the antibiotic therapy must cover the most likely bacteria that would cause an infection. He testified that a reasonable and prudent infectious disease doctor should have known that MRSA was recognized in medical literature as an increasing problem in postoperative infections and that Fritzgerald had risk factors for a MRSA infection. Dr. Stratton testified that based on reasonable medical probability Prabhakar's negligence proximately caused Fritzgerald's injuries. He said if Prabhakar had ordered Vancomycin on September 1, Fritzgerald would have stabilized on September 2 and would not have required exploratory surgery on September 3 for which the Xigris had to be discontinued. If the Xigris had not been discontinued, necrosis of the limbs would not have occurred, and Fritzgerald would not have lost his limbs. Dr. Kress offered similar expert testimony.

In contrast, Prabhakar presented evidence that Fritzgerald had no symptoms to indicate he had pneumonia. And he testified that Fritzgerald lost his limbs as a complication of septic shock and because his body shifted blood from his extremities to his vital organs. He said the vasopressors Fritzgerald was given to treat the septic shock and life-threatening low blood pressure saved Fritzgerald's life, but compressed his vasculature. Prabhakar testified that this process had already begun when he consulted on September 1 and that even if he had given Vancomycin that evening it would not have made a difference. He said the limb loss was not caused by the failure to treat infection, but from the vasopressors.

Prabhakar presented expert testimony from Dr. Tweardy to support his claim that he did not proximately cause Fritzgerald's injuries by failing to prescribe Vancomycin on September 1. Dr. Tweardy also testified that the process which led to the limb loss had already begun on September 1 and that giving Vancomycin on September 1 would not have made a difference in the outcome.

Having reviewed the record, we cannot conclude that the evidence supporting the jury's finding that Prabhakar's negligence proximately caused Fritzgerald's injuries is so weak as to make the finding clearly wrong and manifestly unjust. *See Ortiz*, 917 S.W.2d at 772; *Pool*, 715 S.W.2d at 635. We conclude that the evidence is factually sufficient to support the jury's answers with regard to Prabhakar's liability. We resolve issue two against appellants.

ISSUE THREE—PERIODIC PAYMENTS

[13] In issue three, appellants argue that the trial court erred by not ordering periodic payments for some portion of future medical expenses in the final judgment.

The Statute

Section 74.503(a) of the Texas Civil Practice and Remedies Code states that upon request by a defendant physician a court shall order that payments for medical, health care, and custodial services awarded in the judgment be paid in whole or in part through periodic payments rather than one lump-sum payment. TEX. CIV. PRAC. & REM.CODE ANN. § 74.503(a) (West 2011). As a condition to authorizing periodic payments, "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." *Id.* § 74.505(a).

Standard of Review

***8 [14]** The trial court conducted a hearing pursuant to section 74.505(a) because Prabhakar was not adequately insured to pay the $5,240,182.16 judgment. The court did not include an order for periodic payments in the judgment. The parties contend and we agree that we review the trial court's determination of this issue under an abuse of discretion standard. The trial court abuses its discretion when it acts arbitrarily and unreasonably, that is, without reference to guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.1985). In our review, we consider the evidence in the light most favorable to the trial court's ruling and indulge every reasonable inference in favor of the ruling. *See Daniels v. Indem. Ins. Co. of N. Am.*, 345 S.W.3d 736, 741 (Tex.App.-Dallas 2011, no pet.). A trial court does not abuse its discretion when it bases its decision on conflicting evidence or when some evidence exists to support its decision. *See RSR Corp. v. Siegmund*, 309 S.W.3d 686, 709 (Tex.App.-Dallas 2010, no pet.).

[15] To the extent our determination of this issue involves statutory construction, we review a trial court's interpretation of a statute de novo. *See Tex. W. Oaks Hosp., LP v. Williams*, No. 10–0603, 2012 WL 2476807, at *3 (Tex. June 29, 2012).

Prabhakar's Burden of Proof

The question on appeal is whether Prabhakar "provide[d] evidence of financial responsibility in an amount adequate to assure full payment of the damages awarded by the judgment." *See* TEX. CIV. PRAC. & REM.CODE ANN. § 74.505(a). Prabhakar contends he did; Fritzgerald contends Prabhakar did not. The parties do not cite any authority addressing the factors we must consider in determining whether a defendant satisfied his burden under section 74.505(a) and we have not found any. The issue is one of first impression.

[16] To determine whether Prabhakar satisfied his burden we look to the language of the statute. When we construe a term in a statute, we strive to determine and give effect to the legislature's intent as expressed by the language used in the statute. *Key v. Muse*, 352 S.W.3d 857, 860 (Tex.App.-Dallas 2011, no pet.) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex.2008)). If a term is defined, we use that definition. *Id.*

[17] The statute states that the court shall require the defendant to "provide evidence of" financial responsibility. Because "provide" is not defined, we follow the mandate in Chapter 74 that instructs that undefined terms "shall have such meaning as is consistent with the common law." *Id.* (quoting TEX. CIV. PRAC. & REM.CODE ANN. § 74.001(b) (West 2011)). We construe undefined terms "according to their plain and common meaning ... unless such a construction leads to absurd results." *Jose Carerras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex.2011).

The parties use several different words, other than "provide," to describe Prabhakar's burden under the statute, variously stating that he must "demonstrate," "establish," or "prove" financial responsibility. Those words have different meanings. "Demonstrate" means "to manifest clearly, certainly, or unmistakably: show clearly the existence of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 600 (1981). "Prove" means "[t]o establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence." *Id.* at 1826. And "establish" means "to prove or make acceptable beyond a reasonable doubt" or "to provide strong evidence for." *Id.* at 778. But, as we noted, the statute uses the word "provide." The plain meaning of "provide" is "to supply" or "to furnish." *Id.* at 1827. Consequently, we follow a cardinal rule of statutory construction that requires us to assume the legislature said what it meant. *See Muse*, 352 S.W.3d at 860. Because the legislature, rather than using some other term, said the defendant must "provide" evidence, we analyze the record based on that language to determine whether Prabhakar provided, meaning supplied or furnished, evidence of financial responsibility.

The Evidence & Arguments

***9** Prabhakar argues that he satisfied his burden. At the hearing, Prabhakar offered evidence of financial responsibility through the testimony of his wife, who is also his office administrator. She testified that she was familiar with their personal assets and the assets of her husband's professional association. In addition to the insurance policy providing for $200,000 in coverage, Mrs. Prabhakar identified a Chase bank account statement showing a balance of $638,035.19. She testified that the Chase account is owned by their family limited partnership and that she could withdraw those funds if needed to pay a judgment. She said she is the general manager of the family limited partnership and if her husband asked to use the money in the account as payment on the judgment she would agree to do so. Mrs. Prabhakar also identified a statement from Bank of America showing a line of credit for $2.5 million. She testified that the entire amount is available to pay toward the judgment. Finally, she identified a statement from a Wells Fargo account for Prabhakar's professional association showing a balance of $2,577,118.21. She said the account is not used for the professional association's operating expenses and would be available to satisfy the judgment. She testified that if the trial court ordered Prabhakar to put $5 million into the registry of the court for purposes of periodic payments that he would be able to do so.[1]

Mrs. Prabhakar testified that the security for the line of credit at Bank of America was "our relationship with them and previous business that we had had with them. There is also real estate that they have funded in the past, and that we have paid off." She said the real estate she referred to is held by different entities within the family limited partnership to, among other things, protect the assets from creditors. She said some of the properties that secure the line of credit have liens and some do not. She did not have the information about the liens with her and could not testify about any properties with liens. She

thought she and her husband had to provide a personal guaranty with respect to some of the properties purchased by the family limited partnership, but she did not recall which ones or the amount, and she did not have any of those records with her. Mrs. Prabhakar also testified that she and her husband are current on their property taxes and that her husband's professional association is current on its taxes. She said there are no restrictions on the use of the $2.5 million line of credit with Bank of America and that they have never used it.

Fritzgerald argues that the evidence Prabhakar presented at the hearing supports the trial court's implied finding that Prabhakar did not provide evidence of financial responsibility as required under the statute. He argues that Prabhakar did not offer any evidence of his liabilities or that the assets were reserved solely to satisfy Fritzgerald's judgment. Fritzgerald does not explain how the possibility that Prabhakar might have other liabilities refutes the evidence he provided of financial responsibility. And the uncontradicted testimony was that all of the described assets would be used to satisfy the judgment.

***10** Fritzgerald also contends that Prabhakar's only assets were, at best, the $200,000 liability insurance policy and the $2,570,000 in the Wells Fargo account. He argues that the family limited partnership account is not owned by Prabhakar and is subject to his wife's exclusive authority and discretion to determine how the partnership's assets are used. The uncontradicted testimony, however, was that the wife had authority to determine how the assets in the family limited partnership were used and that she would use them to pay the judgment if Prabhakar asked.

Fritzgerald additionally argues that the Bank of America line of credit is not an "unencumbered asset," it is "a theoretical source of funds that might have been available ... at the time of the ... hearing. But a line of credit is not an asset; to the contrary, it becomes a liability once the line of credit is drawn upon ... [T]here is no functional difference between an unused line of credit and a basic credit card with an available credit limit." He contends that "one cannot demonstrate his financial responsibility merely by obtaining more credit cards or securing a line of credit."

Analysis

We do not agree that the line of credit could not be considered as evidence of financial responsibility under these facts. A "line of credit" is "[t]he maximum amount of borrowing power extended to a borrower by a given lender, to be drawn upon by the borrower as needed." BLACK'S LAW DICTIONARY 949 (8th ed.2004). Once the line of credit is drawn upon, the borrower owes the lender for the borrowed funds. Using Fritzgerald's credit card analogy, when someone makes a purchase with a credit card, he becomes a borrower and owes the lender (the credit card company) for the amount of the charge. The credit card company pays the vendor. If the borrower does not pay the lender and defaults on the loan, in this case the line of credit, the lender's remedies are against the borrower according to the terms of their agreement. Whether that loan is secured and how and whether it will be repaid are issues between the lender and the borrower. The issue for the court in this case was whether Prabhakar provided evidence of financial responsibility. Fritzgerald's argument that Prabhakar may have had other possible liabilities does not refute the evidence that the line of credit represented funds available to Prabhakar to allow him to satisfy the judgment. We conclude that under these facts, the line of credit was evidence of financial responsibility. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 74.505(a).

Even if we disregard the funds in the family limited partnership account, Prabhakar provided evidence of a $2,500,000 line of credit, over $2,570,000 in a savings account, and a $200,000 insurance policy, totaling approximately $5,270,000; the judgment was for $5,240,182.16. Fritzgerald did not offer any evidence to refute Mrs. Prabhakar's testimony that these funds are available to satisfy the judgment. And at the hearing, Fritzgerald conceded that "the testimony was that she could put 5 million into the Registry [of] the Court today, if the Court were to order that." Instead, he argued that "there is no guarantee with the testimony that was offered today that this money will be available 30 days from now, 60 days from now, a year from now, two years from now." But speculation that the funds might not be available in the future is not evidence and does not refute the testimony that the funds were available and will be used to pay the judgment.

***11** The purpose of requiring the defendant to provide evidence of financial responsibility is for the court to determine whether some periodic payments rather than a lump sum payment should be awarded. When the defendant provided evidence that he could and would provide funds adequate to assure full payment of damages, and the evidence was not refuted, the condition to authorizing periodic payments was satisfied and, according to the statute, 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 a lump-sum payment." *Id.* § 74.503. Because the trial court did not order that

medical, health care, or custodial services awarded in the judgment be paid in whole or in part in periodic payments rather than by a lump-sum payment, we conclude the trial court erred. We resolve issue three in appellants' favor.

FRITZGERALD'S CROSS–APPEAL

In a cross-appeal, Fritzgerald contends that the Texas statute capping noneconomic damages in a medical malpractice lawsuit is unconstitutional and that the trial court erred by reducing the damages for past medical expenses.

Cross–Appeal Issue One—Constitutionality of Statutory Damages Cap

Section 74.301(a) of the civil practice and remedies code states that in a health care liability claim where final judgment is rendered against a physician the limit of civil liability for noneconomic damages shall not exceed $250,000 for each claimant. *Id.* § 74.301(a). The statute became effective September 1, 2003, the same date that Fritzgerald alleges his injury occurred. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 864, 873. Pursuant to the statute, the trial court reduced the jury's award for noneconomic damages from $11,000,000 to $250,000.

In his first cross-appeal issue, Fritzgerald argues that the cap on noneconomic damages in section 74.301(a) violates the state and federal constitutions.

State Constitution

[18] In 2003, Texas voters approved a constitutional amendment giving the Texas Legislature authority to "determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care ... that is or is claimed to be a cause of ... disease, injury, or death of a person." TEX. CONST. art. III, § 66(b). Fritzgerald argues in his reply brief that the legislative history of section 66 does not indicate any intent "to override any other constitutional protection available to persons affected by the statutory cap." We disagree.

Section 66 begins with the following phrase: "Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages ..., other than economic damages...." The plain language of the constitutional amendment evidenced an intent of the voters of Texas to authorize the legislature to limit noneconomic damages despite any other constitutional provision to the contrary. *See id.; see also Rivera v. United States*, No. SA–05–CV–0101–WRF, 2007 WL 1113034, at *3–5 (W.D.Tex. Mar.7, 2007) (concluding that section 66 manifests intent for legislature to set damages caps in health care liability claims and Chapter 74 does not violate Texas constitution). Fritzgerald does not argue that section 66 is unconstitutional.

***12** We conclude that Fritzgerald has not shown that section 74.301 violates the Texas constitution.

Federal Constitution

Fritzgerald also contends that section 74.301 violates the federal constitution. He contends that section 74.301 violates his right to a jury trial, his right to equal protection, and the takings clause. We did not find any Texas state court authority addressing this issue and the parties cited none. However, a Texas federal district court has considered the constitutionality of Chapter 74 in *Watson v. Hortman*, 844 F.Supp.2d 795 (E.D.Tex.2012).

In the *Watson* case, the plaintiffs filed a lawsuit in 2008 seeking a declaratory judgment that the Medical Malpractice and Tort Reform Act of 2003, which includes section 74.301, violates the United States constitution. *Id.* at 799. The plaintiffs argued, among other things, that the statute violated their rights under the Seventh Amendment, the Equal Protection Clause, and constituted a taking. The matter was referred to a magistrate judge.

[19] The magistrate judge issued a Report and Recommendation in 2009 addressing the Seventh Amendment and equal protection claims. In the Report, the magistrate judge issued a recommendation to the district court to dismiss many of the plaintiffs' claims, including claims under the Seventh Amendment and Equal Protection Clause. *Watson v. Hortman*, No. 2:08–CV–81, slip op. at 12–13 (Dkt. No. 66) (N.D.Tex. Mar. 12, 2009). The magistrate judge recommended dismissal of the Seventh Amendment right-to-jury-trial claims because "the Seventh Amendment has not been incorporated by the Fourteenth Amendment to apply to state court proceedings." *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 324, 58 S.Ct. 149, 82 L.Ed. 288 (1937), *overruled on other grounds by Benton v. Maryland*, 395

U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)). The magistrate judge also stated that even if the Seventh Amendment applied to the case, "federal courts routinely hold that statutory damage caps do not violate the Seventh Amendment, largely because a court does not 'reexamine' a jury's verdict or impose its own factual determination regarding what a proper award might be." *Id.* (citations omitted).

[20] In recommending dismissal of the plaintiffs' equal protection claims, the magistrate judge relied on *Lucas v. United States*, 807 F.2d 414, 421 (5th Cir.1986), which considered whether the predecessor statute (article 4590i) violated the equal protection clause. In the *Lucas* case, the Fifth Circuit applied the rational basis test and said it was "at a loss to see how [the statute] violates equal protection notions. *Every* malpractice victim is limited by the statute.... [T]he cap applies to all. All malpractice victims receive equal protection." *Id.* The court concluded that the "federal equal protection argument fails" because "we find that there is a rational basis for [the statute] and that the legislature enacted the statute in an attempt to accomplish a legitimate purpose." *Id.* at 422. The magistrate judge concluded that similar legislative findings were present in the *Watson* case and that *Lucas* "forecloses the plaintiff's equal protection claim." *Watson,* slip op. at 15 (Dkt. No. 66). The district court overruled the parties' objections to the magistrate judge's Report and Recommendation and adopted its findings and conclusions. *See Watson*, 844 F.Supp.2d at 797.

***13** The magistrate judge next considered the plaintiffs' claims that the statute violated their right of access to the courts and constituted a taking under the Fifth Amendment. The magistrate judge issued a second Report and Recommendation dated September 13, 2010, addressing those issues. In that Report, the magistrate judge stated, "[t]he Supreme Court has stated that 'statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.' " *Watson*, 844 F.Supp.2d at 800 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978)).
In recommending dismissal of the plaintiffs' right-of-access claim, the magistrate judge was "not persuaded that [the statutory] cap on recovery denies medical malpractice victims an 'adequate, effective, and meaningful' legal remedy." *Id.* In addition, the magistrate judge concluded that the statute "meets the rational basis test because the plaintiffs have not shown that the damages cap is clearly arbitrary and irrational" and "[t]he cap on noneconomic damages is reasonably related to the State of Texas's goals of reducing malpractice insurance premiums and improving access of care." *Id.* at 800–01.

[21] The magistrate judge also considered whether the statute was a taking under the United States constitution. *Id.* at 801–04. The magistrate judge concluded it was not because anyone injured on or after the effective date of the statute did not have a vested property right in "the full, uncapped value of the noneconomic damages resulting from medical malpractice." *Id.* at 801–02. The magistrate judge again relied on the *Lucas* case to conclude that "a person has no property, no vested interest, in any rule of the common law." *Id.* at 802 (quoting *Duke Power*, 438 U.S. at 88). Consequently, the magistrate judge concluded that the plaintiffs who were injured on or after the effective date of the statute "have no takings claim" under the United States constitution. *Id.* The district court adopted the magistrate judge's "Report and Recommendation in accordance with the reasons set forth in the same" and dismissed the plaintiffs' claims. *Id.* at 798.

Although we are not bound by a federal district court's interpretation of federal law, its decisions may be persuasive. *See Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 803–04 (Tex.App.-Dallas 2008, pet. denied). We conclude that the magistrate judge's two Reports and Recommendations and the district court's adoption of those Reports and Recommendations on the federal constitutional questions are persuasive. *See id.*

We resolve Fritzgerald's first cross-appeal issue against him.

Cross–Appeal Issue Two—Past Medical Expenses

[22] In his second cross-appeal issue, Fritzgerald argues that the trial court erred by reducing the jury's award of $1,280,000 for past medical expenses. At trial, the parties stipulated to the jury that "the amount of David Fritzgerald's medical bills is [$]1,280,041.32, and that this amount was reasonable and necessary for his medical care." The jury's award of $1,280,000 appears to be based on this stipulation. The judgment awarded damages in the full amount of the jury's finding for past medical expenses. Prabhakar argued that the damages for past medical expenses should be reduced to the amount the parties had stipulated as the "actual amount paid." The trial court modified the judgment and reduced the damages amount by $347,391.84. Fritzgerald contends this was error. We disagree.

***14** Section 41.0105 of the civil practice and remedies code states that "recovery of medical or health care expenses incurred is limited to the amount actually paid

or incurred by or on behalf of the claimant." TEX. CIV. PRAC. & REM.CODE ANN. § 41.0105 (West 2008). The Texas Supreme Court has stated that the language "actually paid or incurred" "means expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid" because of adjustments or credits by insurers. *Haygood v. De Escabedo*, 356 S.W.3d 390, 397 (Tex.2011). The court said section 41.0105 "limits a claimant's recovery of medical expenses to those which have been or must be paid by or for the claimant." *Id.* at 398; *see Rosenbaum v. Dupor*, No. 05–09–00994–CV, 2011 WL 2139138, at *2 (Tex.App.-Dallas June 1, 2011, no pet.) (mem.op.); *Pierre v. Swearingen*, 331 S.W.3d 150, 155–56 (Tex.App.-Dallas 2011, no pet.). In other words, amounts written off by medical providers are not amounts "actually paid or incurred" under the statute. *See Rosenbaum*, 2011 WL 2139138, at *2; *Pierre*, 331 S.W.3d at 155–56.

Under *Haygood*, the trial court was required to reduce Fritzgerald's recovery pursuant to section 41.0105 if the court had the necessary information to do so. *See Rosenbaum*, 2011 WL 2139138, at *2. We conclude that the court had the necessary information to do so based on the parties' Rule 11 agreement.

Fritzgerald's attorneys sent a proposed Rule 11 letter agreement to Prabhakar's attorneys stating:

> **3rd AMENDED RULE 11 AGREEMENT—Medical Bills**
>
> Dear Counsel:
>
> I am writing to seek your agreement pursuant to Texas Rule of Civil Procedure 11 as to the reasonableness and necessity of Mr. Fritzgerald's gross healthcare expenses for the upcoming trial. In addition, we would like to agree that the billed amount was $1,280,041.32. The amount paid was $932,649.42. The amount written off was $347,391.90.[2]
>
> [itemized list of each health care provider's "Billed Charges" and the "Total Payments" to that health care provider]
>
> 1. The parties stipulate that the amount of David Fritzgerald's medical bills is $1,280,041.32, and that this amount was reasonable and necessary for his medical care.
>
> 2. The parties stipulate that [the] actual amount paid for David Fritzgerald's medical bills was $932.649.42.
>
> If this is your agreement, please sign where indicated and return to me for filing with the Court.

The agreement was signed by Fritzgerald's counsel as the author of the letter and by other counsel as "AGREED TO BY[.]" Fritzgerald acknowledges that the parties signed the Rule 11 agreement and stipulated to the actual amount paid. He argues, however, that this stipulation "is ultimately irrelevant to the analysis" because the stipulation was not read to the jury, the jury was asked to find the amount of medical expenses "actually paid *or* incurred," he proved the amount incurred, and no contrary evidence was offered at trial. He argues further that even though the Rule 11 agreement states the amount of past medical expenses written off, "that assertion was not actually included in the parties' stipulation ... and no competent evidence was adduced before, during, or after trial regarding the write-off of any medical bills." We disagree.

***15** The purpose of a Rule 11 agreement is "to remove misunderstandings and controversies that accompany verbal assurances, and the written agreements 'speak for themselves.' " *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 (Tex.2007) (quoting *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex.1995)); *see also Collins v. Collins*, 345 S.W.3d 644, 649–50 (Tex.App.-Dallas 2011, no pet.) (stating Rule 11 agreements are enforceable as contracts). When parties enter into a Rule 11 agreement, they are "bound by the specific language" in the agreement and the trial court has "a duty to enforce its terms." *Fortis Benefits*, 234 S.W.3d at 651.

The attorneys for Fritzgerald and Prabhakar signed the Rule 11 agreement in this case and filed it with the court. It included the parties' agreement that the amount of medical expenses "written off" was $347,391.90 and the amount "actually paid or incurred" was $932,649.42. The trial court's judgment for past medical expenses was consistent with the parties' agreement. As a result, we conclude that the court did not err by reducing the damages for past medical expenses to the amount the parties agreed was "actually paid or incurred." *See Haygood*, 356 S.W.3d at 397. We resolve Fritzgerald's second cross-appeal issue against him.

CONCLUSION

We reverse the trial court's judgment insofar as it did not order that medical, health care, or custodial services awarded in the judgment be paid in whole or in part in periodic payments rather than by a lump-sum payment

and remand the case to the trial court to determine periodic payments pursuant to Chapter 74 subchapter K of the Texas Civil Practice and Remedies Code. We otherwise affirm the trial court's judgment.

Footnotes

1 The record shows that after the trial court declined to order periodic payments in the final judgment, Prabhakar superseded the judgment with cash in lieu of supersedeas bond of almost $6 million.

2 The trial court reduced the judgment by an amount six cents less than this stipulated amount. No one complains about the six cents.

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