

# NO. 20-0923

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## IN THE SUPREME COURT OF TEXAS

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**JESUS VIRLAR, M.D. AND GMG HEALTH SYSTEMS ASSOCIATES, P.A., A/K/A  
AND D/B/A GONZABA MEDICAL GROUP, INC.,  
Defendant Petitioners**

**v.**

**JO ANN PUENTE,  
Plaintiff – Respondent**

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**On Petition for Review from the 4<sup>th</sup> Court of Appeals, San Antonio, Texas  
Case No. 04-18-00118-CV**

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### RESPONDENT'S RESPONSE TO PETITION FOR REVIEW

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## **IDENTITY OF PARTIES AND COUNSEL**

The following supplements Petitioners' list of all parties to the trial court's final judgment, as well as the names and addresses of all the trial and appellant counsel.

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## STATEMENT OF THE CASE

<i>Nature of the Case and Parties:</i>	This is an action for purely economic loss arising from the medical negligence of Petitioners that caused Respondent Jo Ann Puente permanent brain damage and severe neurological deficits. The only issues raised and briefed by Petitioners deal with an alleged settlement credit and with periodic payment of future damages.
<i>Pretrial Settlements:</i>	Two settlements were made with defendants other than Petitioners. The only one germane to the Petition involved Ms. Puente's minor daughter (C.P.) <sup>1</sup> , with ad litem and court approval, making a confidential settlement of her separate loss of consortium claims against Metropolitan Methodist Hospital where Ms. Puente was treated. All but \$434,000 of that settlement (a \$310,000 loan for ongoing litigation expenses plus 40% of that amount in attorney fees) was used to purchase an annuity for the exclusive benefit of the minor C.P., deposited in a court supervised trust for the sole and exclusive benefit of C.P., or else represented 40% attorney's fees calculated and allocable to the same. (21 RR 50; 72 RR 21-Plaintiff's Exhibit 2; 21 RR 11: 3 -21 RR 12:25; 21 RR 13:3- 21 RR 14:25). Jo Ann Puente dismissed her claims against the hospital and others but received

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<sup>1</sup> Initials are substituted for the daughter's name in accordance with law.



	<p>from them no payment, and the minor's claims were severed and final judgment rendered upon them. (21 RR 13-14; 21 RR 50: 7-13; CR 5087-5119). The remainder of the case involved Jo Ann Puente as plaintiff and Petitioners as defendants along with her treating surgeon, Dr. Patel.<sup>2</sup> Ms. Puente made a settlement shortly before trial with the surgeon, Dr. Patel, which is not at issue in the Petition.</p>
<p><i>Trial Court disposition:</i></p>	<p>The trial proceeded between Ms. Puente and Petitioners. The relative fault of Petitioners and Dr. Patel was submitted to the jury. The jury found Petitioners negligent and 60% responsible for (and therefore jointly and severally liable for) Ms. Puente's actual damages and they found Dr. Patel 40% responsible. (CR 4906-4915). Petitioners did not request that the negligence of Ms. Puente, Methodist Hospital, or any third party other than Dr. Patel be submitted to the jury. (18 RR 163-173). The damages found by the jury, which were submitted without objection in the usual "what sum if paid now in cash" form, included \$133,202.00 in past loss earnings, \$888,429.000 in loss of future earning capacity, and \$13,263,874.86 in future medical care expenses. There was no award requested by Ms. Puente, nor was one made, for any non-economic or intangible elements of damages. (CR</p>

<sup>2</sup> Another of Petitioner Gonzaba's employees, Dr. Manuel Martinez, was also a defendant, but the jury exonerated him of any liability.

4906-4913). Ms. Puente agreed to Petitioners' receiving a credit for the Patel settlement, and they received one in the judgment. (21 RR 12; CR 5192-5205).

After the jury verdict was accepted and the jury was discharged, Petitioners filed motions seeking to have an undisclosed amount (above and beyond the Patel settlement) credited against the judgment from the settlement made two years before by Methodist Hospital of Ms. Puente's daughter's consortium claim. (CR 4946-5121). They also moved to convert the jury's damage verdict into "future periodic payments." (CR 5137-5143; *See* Appendix Tab A).

Both Petitioners' motions were heard by the trial court on November 2, 2017. No evidence was introduced either of the amount of any claimed settlement credit or in support of the request for periodic payments. Petitioners' motion for periodic payments asked the trial court to divide the total amount of Ms. Puente's future damages awarded by the jury into thirty-one equal annual payments into the future (Puente's life expectancy), without accounting for the fact that the jury's award was discounted to present value. (CR 5140; *Virlar*, p. 62).<sup>3</sup> These and other

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<sup>3</sup> As the Court of Appeals opinion unanimously pointed out, Petitioners now admit that the trial court had no discretion to grant their motion because it would involve a "double discount," i.e., a

defects in the motions were raised in writing by Puente (CR 5149-5163), and the trial court denied both motions on November 9, 2017, setting Puente's motion for judgment on the verdict for hearing November 28, 2017 (CR 5164).

At the hearing on the motion for judgment, no evidence was introduced of the amount of any claimed settlement credit. (CR 5165-5182; RR 22:1-32). Petitioners called one witness and offered one document in evidence regarding periodic payments (RR 22:10-23), but there was no evidence of how the trial court could, consistent with the verdict, unwind the present value calculations made by the jury, and no new periodic payment proposal was made. (*Id.*).

At the conclusion of the hearing on November 28, 2017, the court signed a lump-sum judgment based on the verdict and allowing an undisputed credit for the settlement with Dr. Patel. (CR 5192-5205). Petitioners filed a motion for new trial and other post-trial motions which were denied. (CR 5240-5321).

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further discount of the jury's already discounted award for future economic losses. (*Virlar*, p. 62, n. 34).

<p><i>Disposition in the Court of Appeals:</i></p>	<p>Chief Justice Marion and five other justices of The Court of Appeals, <i>en banc</i>, unanimously rejected Petitioners’ argument on future periodic payments.<sup>4</sup> <i>Virlar</i> Final Opinion, pp. 67- 72 (citing <i>Regent Care of San Antonio, L.P. v. Detrick</i>, 610 S.W.3d. 830 (Tex. 2020)).<sup>5</sup></p> <p>The <i>en banc</i> court also unanimously rejected Petitioners’ unbriefed evidentiary points.</p> <p>The only disagreement among the six members of the <i>en banc</i> court was on the sole question of the constitutionality of crediting the minor’s settlement against Ms. Puente’s recovery under the circumstances of this case where only economic damages were sought and awarded. The majority found that, under the One-Satisfaction Rule, under <i>Utts</i><sup>6</sup> and its progeny, and under the Open Courts Provision of the Texas Constitution<sup>7</sup> as interpreted</p>
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<sup>4</sup> At the time of this appeal, the Court of Appeals was composed of Chief Justice Sandee Bryan Marion, and Justices Rebeca Martinez, Patricia Alvarez, Luz Elena Chapa, Irene Rios, Beth Watkins, and Liza Rodriguez. The *en banc* court was composed of only six members because Justice Martinez recused herself from any matter in connection with this appeal.

<sup>5</sup> Ms. Puente will refer to the Court of Appeals’ final opinion henceforward as “*Virlar*.” The complete cite is *Virlar v. Puente*, 613 S.W.3d 652 (Tex. App. – San Antonio Oct. 14, 2020, pet. filed).

<sup>6</sup> *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002).

<sup>7</sup> TEX CONST. art. I, Section 13

by *Sax*,<sup>8</sup> *Lucas*,<sup>9</sup> and their progeny, only amounts from the minor's settlement that actually benefited Ms. Puente could be credited against her separate recovery. The court therefore remanded the case for the trial court to make such a determination and enter judgement in accordance therewith. Chief Justice Marion and Justice Alvarez dissented only on this point, with both feeling bound by the language of TEX. CIV. PRAC. & REM. CODE Section 33.012 to credit the entire minor's settlement against Ms. Puente's lump sum recovery even if she received no benefit from the settlement. Justice Alvarez wrote separately, however, to invite "the Texas Legislature to revisit the statute's construction to avoid punitive consequences in tragic circumstances like the one this case raises." (*Virlar*, Concurring and Dissenting Opinion of Alvarez, j., p. 2).

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<sup>8</sup> *Sax v. Voteller*, 648 S.W.2d 661 (Tex. 1983).

<sup>9</sup> *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

## STATEMENT REGARDING JURISDICTION

Ms. Puente disagrees with Petitioners' jurisdictional statement. Petitioners' only basis for jurisdiction is that the settlement credit issue and periodic payments issue present "questions of law that are important to the jurisprudence of this state" that "deserve resolution by this Court." However, that statement incorrectly assumes that the Court of Appeals created a conflict in the law requiring resolution. It did not. The Court of Appeals merely followed clear existing precedent from this Court.

Contrary to the Petition, this Court's holding in *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020) was not a novel innovation but a simple interpretation of a statute. No "new standards" were announced, which is why *Detrick* was not remanded. In this case, the Court of Appeals merely correctly - and unanimously - followed the plain meaning of the relevant statute, just as this Court did in *Detrick*, and just as Ms. Puente argued repeatedly below even before *Detrick*.

The settlement credit issue is no different. The Court of Appeals opinion announced no new law. It merely applied longstanding precedent to a rare fact pattern that had not previously arisen and is not likely to arise again: a case where a party seeks to credit a child's separate loss of consortium recovery against a parent's judgment involving only economic damages. The Open Courts Provision

upon which the court's opinion was based remained unchanged for over 150 years through Texas's five state constitutions from 1845 until the adoption of TEX. CONST. art III, Section 66 in 2003. And that recent amendment, which only dealt with restricting *non-economic* damages, is irrelevant to this case. Meanwhile, this Court's interpretation of the Open Courts Provision has been clear and consistent at least since *Sax* and *Lucas* in the 1980s.<sup>10</sup>

The Petition asserts that the "still-followed test articulated in Justice Calvert's opinion in...1955" and repeated in *Methodist Healthcare Sys. Of San Antonio v. Rankin*, 307 S.W.3d 283, 286 (Tex. 2010), is that the Open Courts Provision only bars legislative impingements on common law remedies that are "arbitrary **and** unreasonable." (Petition, p. 6). The remainder of the Petition then discusses the history of Chapter 33 in attempt to show it was not passed arbitrarily. However, as the Court of Appeals correctly quoted them, all the relevant authorities, including Justice Calvert's 1955 *Lebohm* opinion<sup>11</sup> and the Court's 2010 *Rankin* opinion, say no such thing. They say that such an impingement is improper if it is "arbitrary **or** unreasonable," unreasonable being defined as not reasonably "substituting other remedies," or not "a reasonable exercise of the police power..." when balanced against "the purpose and basis of the statute." *Virlar*, pp. 46-49; *Rankin*, 307 S.W.3d at 286 ; *Lucas*, 757 S.W.2d at 688 (quoting

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<sup>10</sup> *Sax*; *Lucas*, supra.

<sup>11</sup> *Lebohm v. City of Galveston*, 275 S.W.2d 951 (Tex. 1955).

*Sax*. 648 S.W.2d at 666). And since *Lucas* in 1988, this Court has consistently ruled that hoping to provide an economic boon to health care providers, their insurers, or even the general public is not a sufficient “purpose and basis” to restrict common law causes of action.

Moreover, since *Mobil Oil Corp. v. Ellender*<sup>12</sup> in 1998, the Court has consistently looked to the One-Satisfaction Rule in construing Chapter 33, ultimately concluding in *In re Xerox*, 555 S.W.3d 518, 523 (Tex. 2018) (orig. proceeding) that the statute incorporates the rule. As the Court of Appeals held, there is nothing novel or controversial in finding unreasonable a statutory settlement credit scheme that goes far beyond the One-Satisfaction Rule in restricting a long-established common law cause of action.

This case presents no open legal questions that require the Court’s attention.

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<sup>12</sup> *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998).



## **ISSUES PRESENTED**

### **Issue One**

The Court of Appeals correctly held that Petitioners were not entitled to full credit for the settlement made by Ms. Puente's minor daughter for her loss of consortium claim.

### **Issue Two**

The Court of Appeals correctly found no error in entry of a lump-sum judgement.

### **Issue Three (Unbriefed by Petitioners)**

The Court of Appeals correctly concluded that there was no reversible error regarding Petitioners' unbriefed evidentiary complaints.

## STATEMENT OF FACTS

The following facts are pertinent to the Petition. JoAnn Puente suffered permanent brain damage and severe neurological injury as a result of the negligence of Petitioner Virlar, who was employed by Petitioner Gonzaba Medical Group. (CR 5192-5205; 12 RR 75, lines 3-6; 19 RR 29; 21 RR 51; 22 RR 28-29). In November of 2011, Ms. Puente had bariatric surgery performed by Dr. Patel, a settling party in this litigation. Six weeks later, she presented at Metropolitan Methodist Hospital in San Antonio with intractable nausea and vomiting and restricted food intake as a result of that surgery. Upon admission on January 14, 2012, Ms. Puente was under the care of her original surgeon Dr. Patel, and of Dr. Manuel Martinez, a hospitalist also working for Petitioner Gonzaba. Two days later, Petitioner Virlar of Gonzaba took over for his colleague Dr. Martinez, who did not care for Ms. Puente further and was therefore exonerated of fault by the jury. At the hospital, Virlar's negligent care caused Ms. Puente to develop an untreated thiamine deficiency. This culminated in Wernicke's encephalopathy, a condition that caused brain damage and other severe neurological deficits.

Timely administration of thiamine would have prevented Ms. Puente's Wernicke's encephalopathy and brain damage. The window within which the thiamine deficiency and encephalopathy were reversible was from the time of her admission on January 14, 2012 until her discharge on January 26, 2012. (9 RR

140:18- 9 RR 143:1). After January 26<sup>th</sup>, the damage was irreversible. From January 16<sup>th</sup> until January 26<sup>th</sup>, Dr. Virlar failed to diagnose or treat the thiamine deficiency or Wernicke's encephalopathy. During the trial, Virlar admitted not reading the patient's chart where indications of these disorders were recorded by others. He defended this lapse by claiming to have had conversations with the surgeon Patel where Patel relieved him of any responsibility for patient nutrition. Ultimately, Virlar's counsel had to acknowledge to the jury that they "could conclude that...Dr. Virlar made up some" conversations not reflected in the chart, but that they should still exonerate him because "the overriding issue...is...did she have Wernicke's encephalopathy? Because if she did not, the rest of it doesn't matter." (19 RR 48:14- 19 RR 51:1).

Petitioners' defense from voir dire to closing argument was that Ms. Puente never had Wernicke's encephalopathy at all, and thus no health care provider could have foreseen, prevented, or caused her brain damage. Respondent Puente's argument, on the other hand, was that the standard of care required treating for and preventing Wernicke's by safe, simple, and inexpensive means and that the Petitioners, as those charged with the responsibility for her care during the crucial period from January 14<sup>th</sup> through the 26<sup>th</sup>, had not done so, with devastating results. The jury agreed.

## SUMMARY OF THE ARGUMENT

In the rare circumstances of this case, where only economic damages were sought, Petitioners are not entitled to any credit from the minor's settlement *beyond any amount that "benefited" Ms. Puente*. The Court of Appeals was correct that applying Chapter 33 to require Ms. Puente to accept more credit than this violates the One-Satisfaction rule and the Open Courts Provision of the Constitution.<sup>13</sup> Moreover, Petitioners did not preserve their complaint for appellate review.

Any complaint about periodic payments was also waived and not preserved for appellate review. Petitioners' dilatory litigation strategy prevented the trial court from being able to craft a periodic payment scheme consistent with the jury's lump sum verdict. The Court of Appeals correctly ruled that given the lack of any proper and specific request and the lack of evidence on the issue, the trial court did not abuse its discretion by following the jury verdict and framing its judgment to be "paid now in cash." The Court of Appeals correctly disposed of Petitioners' evidentiary complaints, which are unbriefed in the Petition and do not confer jurisdiction on the Court in any event.

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<sup>13</sup> . TEX. CONST. art I, Section 13

## ARGUMENT AND AUTHORITIES

### I. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS WERE NOT ENTITLED TO FULL CREDIT FOR THE SETTLEMENT MADE BY MS. PUENTE’S MINOR DAUGHTER FOR HER LOSS OF CONSORTIUM CLAIM.

Petitioners are not entitled to reduce Ms. Puente’s judgment by a settlement from which she received no benefit. There was no double-recovery in this case, nor was there any double-payment required of Petitioners, so such a credit would unreasonably or arbitrarily burden Puente’s established common law claim. Petitioners did not prove entitlement to such a credit; any credit beyond any benefit conferred upon Puente would violate the Texas Constitution in the unique circumstances of this case; and in any event, Petitioners cannot possibly be entitled to a credit greater than the amount Puente has offered to remit.

#### A. Settlement Unproved—Review Waived.

“A non-settling defendant seeking a settlement credit under the one-satisfaction rule has the burden *to prove* its right to such a credit.” *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 108 (Tex. 2018) (emphasis added).

The Court of Appeals correctly held that the burden of proof is the same under Chapter 33 and the common law One-Satisfaction Rule. Even were this Court to grant review, which Puente denies as unnecessary and improvident, the

Court should conclude that the Court of Appeals' only error was deciding that "proof" did not require actual "proof." *Virlar* 43-44 (citing *Ellender*).

Petitioners never introduced the daughter's settlement agreement or the amount of the settlement into evidence, even though the Court has recommended "placing the settlement agreement or some other *evidence* of the settlement amount in the record." *Sky View*, 555 S.W.3d 101, 108 (citing *Ellender*, 968 S.W.2d 917, 927) (emphasis added).

In this case, the Court of Appeals ignored this evidentiary gap solely because Petitioners' counsel mentioned a putative settlement amount to the trial judge in passing and "Puente's counsel... did not dispute the amount was accurate." (*Virlar*, p. 44). Petitioners never proved the amount of the settlement; the record does not reflect anything other than this assertion by Petitioners' counsel; and the record indicates no stipulation of its amount by Puente. Lawyer assertions are insufficient to substitute for evidence and are "inherently unreliable" and generally incompetent to establish a fact. *Salais v. Tex. Dept. of Aging and Disability*, 323 S.W.3d 527, 537 (Tex. App. – Waco 2010, pet. denied); *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 795 (Tex. App. – Dallas 2012, no pet.); *Amco Mesh & Wire Co. v. Stewart*, 474 S.W.2d 740, 741–42 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1971, no writ); *Escamilla v. Estate of Escamilla by Escamilla*, 921 S.W.2d 723, 726 (Tex. App. – Corpus Christi 1996, writ denied).

Puente was not required to contest matters that are not proven by evidence. To hold otherwise violates TEX. CONST. art I, Section 3 (equal rights), 17 (special privileges), 19 (due course of law). There is no rational basis for requiring plaintiffs to discharge their burdens of proof with evidence and not requiring defendants to do the same. Petitioners had repeated opportunities in the trial court to prove the amount of the settlement and offer the relevant documents into evidence and did not do so. (21 RR 5-62; 22 RR 5-32).

Further, Petitioners are required to provide this Court with a record sufficient to enable it to conduct a meaningful review of the trial court's findings. *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 151 (Tex. 2015) (citing *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991); *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965)). Petitioners had the burden of proof and waived this issue by not offering any evidence of the amount of the claimed settlement.

## **B. Unconstitutionality**

The Court of Appeals correctly held that the Open Courts Provision prohibits crediting the minor's settlement against her mother's recovery of purely *economic* damages, *except* to the extent that the mother *received a benefit* from that settlement. A loss of consortium claim that a minor child owns because of a severe disabling injury to a parent is a separate and independent cause of action. *In*

*re Labatt Food Service, L.P.*, 279 S.W.3d 640, 646-7 (Tex. 2009); *Whittlesey v. Miller*, 572 S.W.2d 665, 667-669 (Tex. 1978).

The Petition claims that Chapter 33 mandates otherwise, arguing that its legislative history shows a reasonable or non-arbitrary intent to protect defendants from “manipulating” settlements. But the Petition ignores two interrelated things: 1. the relevance of the One-Satisfaction Rule in determining reasonableness; and 2. under that rule, it is arbitrary and unreasonable to credit one person’s settlement against another person’s recovery *beyond the extent of any benefit to the non-settler*. Chapter 33’s statutory contribution/credit regime “incorporates the one-satisfaction rule...” *In re Xerox*, 555 S.W.3d at 523. And the One-Satisfaction Rule’s purpose is simply to ensure that “a plaintiff is entitled to only one recovery for any damages suffered.” *Sky View*, 555 S.W.3d at 107. Therefore, 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 to the extent it goes beyond ensuring that she receives “only one recovery for any damages suffered.” Anything more is an unreasonable and gratuitous benefit to defendants long prohibited by *Sax*, *Lucas* and their progeny. Since 2003, The Constitution has authorized such legislative boons if associated with limiting *non-economic* damages, but not where only *economic damages* are sought.<sup>14</sup>

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<sup>14</sup> TEX. CONST., art III, Section 66.



Rote application of Chapter 33 to the unique circumstances of this case restricts “a cognizable common law cause of action” in an “unreasonable or arbitrary” way “when balanced against the purpose and basis of the statute.” *Virilar*, pp. 46-48; *Lucas*, 757 S.W.2d at 688 (quoting *Sax*, 648 S.W.2d at 666). Thus, the Court of Appeals correctly held that instead of the statutory credit scheme, the residual common-law One-Satisfaction Rule applies to this case as interpreted by *Utts* and *Sky View*. Under an *Utts-Sky View* regime, a “nonsettling defendant must present evidence to the trial court that demonstrates the nonsettling plaintiff benefited from the settlement.” *Utts v. Short*, 81 S.W.3d 822, 829 (Tex. 2002).

From a One-Satisfaction standpoint, there was no manipulation, or “benefit” to Puente from her daughter’s settlement. Petitioners are not harmed by the fact that the daughter, rather than Puente, recovered a settlement from Methodist Hospital. They produced no evidence of any *Utts* “benefit” to Puente from the minor’s settlement because the term “benefit” in the One-Satisfaction context means only that the plaintiff received a benefit from another person’s settlement *that would create a double recovery*. As the Court recently explained, “the plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits by showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury’s award *would not*

*provide for the plaintiff's double recovery...*" *Sky View*, 555 S.W.3d at 107-8 (emphasis added). This is precisely what the undisputed evidence below did show. (21 RR 6-32; 21 RR 50; 72 RR 21-Plaintiff's Exhibit 2; 21 RR 11: 3 -21 RR 12:25; 21 RR 13:3- 21 RR 14:25). There was no evidence to support any "double recovery" for *Ms. Puente*.

### **C. No Error in Light of Voluntary Remittitur.**

To be clear, Puente's position is that she will accept a credit for any *Utts* "benefit" she received from her daughter's settlement. Petitioners' position, on the other hand, is that Puente should *automatically* have her common law claims reduced by the full amount of any settlement by the daughter *whether or not Puente derived any benefit* from it. In the interest of judicial economy, Puente conditionally and voluntarily offered to remit the \$434,000 that would without question more than cure any error found by any court with respect to settlement credits "without waiving any complaint that the court of appeals erred." *Virlar*, p. 59-60. The evidence below was uniform and conclusive that every penny of the minor's settlement besides \$434,000 was applied to the purchase of an annuity for the sole and exclusive benefit of C.P. or deposited in a court supervised trust for the sole and exclusive benefit of C.P. or else are 40% attorney's fees calculated and allocable to the same. (21 RR 50; 72 RR 21-Plaintiff's Exhibit 2 (with minor's name converted to initials); 21 RR 11: 3 -21 RR 12:25; 21 RR 13:3- 21 RR 14:25).

Even if this petition warranted review, the only necessary remedy would be modification of the judgment to reduce it by \$434,000. TEX. R. APP. P. 46.5, 53 (c)(2), 53 (c)(3).

## **II. THE COURT OF APPEALS CORRECTLY FOUND NO ERROR IN ENTRY OF A LUMP-SUM JUDGEMENT.**

This appeal is, in all salient respects, indistinguishable from *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020). After a lump sum verdict, Regent requested the trial court to order Detrick’s future medical damages to be awarded as periodic payments under Subchapter K.<sup>15</sup> Regent produced no evidence from which the trial court could have done so consistent with the jury’s present-value verdict. The only specific periodic payment request Regent made to the trial court would have “double-discounted,” and thereby done violence to, the jury’s lump-sum award.

The Court agreed with Regent that trial courts must award all or part of future medical expenses *upon proper request* by a medical defendant, but it unanimously rejected Regent’s appeal because granting Regent’s periodic payment request:

would be an abuse of discretion here because it would effectively “double discount” the award... *Detrick* at 11.<sup>16</sup>

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<sup>15</sup> TEX. CIV. PRAC. REM. CODE, Section 74.501, et. seq.

<sup>16</sup> All *Detrick* page citations are to the slip opinion.

In reaching this conclusion, the court explained that:<sup>17</sup>

1. “Subchapter K gives the trial court no discretion to craft its own award of damages inconsistent with the jury’s verdict.”
2. Thus, simply ordering the jury’s present-value damages award to be divided up and paid in periodic payments would be an abuse of discretion and effectively “double discount” the jury’s award.
3. “The party requesting an order for periodic payments has the burden to identify for the trial court evidence regarding each of the findings required by section 74.503,” and “the findings must be supported by sufficient evidence.”
4. The trial court cannot have abused its discretion if the defendant has not provided and pointed out to the court evidence supporting a specific periodic payment scheme that will not be inconsistent with the jury’s verdict.

As in *Detrick*, these Petitioners never made any specific request that the trial court could have granted, and they failed to point the trial court to any evidence justifying a periodic payment regimen *that would not be inconsistent with the jury’s verdict*. As Puente repeatedly argued in the courts below before *Detrick*, the trial judge here committed no error because she was not given any plan by Petitioners for how to award periodic payments other than one that would clearly have been erroneous: to double discount Puente’s lump-sum recovery, just as Regent unsuccessfully attempted to do in *Detrick*.

**A. Petitioners provided no proposal or evidence from which the court could have fashioned a periodic payment plan consistent with the jury verdict.**

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<sup>17</sup> *Detrick* at 10-11 (citing TEX. CIV. PRAC. & REM. CODE §74.501, *et. seq.*).

Petitioners did not produce any evidence of how the trial court should have ordered the jury's future medical expense verdict to be paid periodically. Petitioners only moved for one specific plan of future periodic payments, and it was exactly the type of "double discount" plan the trial court lacked any discretion to approve. Since Petitioners never produced any economic evidence, they took the trial testimony of the Puente's economist, Dr. Fairchild, that Puente had a 31-year life expectancy and asked the court to divide the jury's \$13,263,874.86 lump sum award of future medical needs into 31 equal annual payments with no provision for the fact that the award was already discounted to present value. (CR 5137-5143 (Appendix Tab A; 21 RR 39:19- 21 RR 41:16; 21 RR 53:13- 54:6). Even before this Court's decision in *Detrick*, Petitioners had to admit they would not have been entitled to any such thing. *Virlar*, p. 62, n34.

Other than this now-abandoned motion, Petitioners never provided the court with either an explanation for, or any evidence of, "the dollar amount...; interval between payments; and number of payments or the period of time over which payments must be made," so as to "compensate the plaintiff for the future damages." TEX. CIV. PRAC. & REM. CODE §74.503 (c) & (d). Without evidence or a specific plan, they were relegated to trying to recast and bootstrap testimony introduced during the trial from Puente's expert, Dr. Fairchild,

but they simultaneously had to admit that the jury had not awarded all the future damages he testified to, which was the only evidence they placed before the court. (21 RR 39: 19 - 21 RR 41: 16). They never produced evidence from which the court could have, *consistent with the jury's verdict*, made all the findings required by statute.

As the Court of Appeals pointed out, the only evidence Petitioners relied on with respect to future medical expense, Fairchild's report and testimony, totaled almost \$3 million *more than the jury's award*; and it was composed of sub-elements of future costs discounted *with different rates* because the inflation rate used by Fairchild for each was different (*Virlar*, p. 69-71; 21 RR 17:23; 21 RR 22:11; 47 RR Plaintiff Ex. 23, beginning at p. 136 of pdf). Without supplying the trial court more evidence, Petitioners cannot complain now that it should have done the mathematically impossible then: order periodic payments while still maintaining fidelity to the jury's lump sum, present-value verdict. There was no way for the trial court to know what portion of Fairchild's report the jury chose not to award, or to know the appropriate matrix of discount rates to apply to the remainder. This circumstance was a direct result of Petitioners' own failure to provide the trial court with any help in the form of a specific plan supported by additional evidence.

**B. Petitioners did not properly invoke the statute.**

Since they were both underinsured, Petitioners also had the threshold burden to “provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.” TEX. CIV. PRAC. & REM. CODE. §74.505 (a). They did not.

First, Virlar never attempted to prove he could fund anything, and Petitioners never introduced any evidence that Gonzaba would fund Virlar’s obligations under any hypothetical periodic payment regime. There is nothing in the statute excusing a defendant from proof of the requirements necessary to pay a judgment over time. TEX. CIV. PRAC. & REM. CODE. §74.505 (a).<sup>18</sup>

Second, without a specific structure for a *legitimate* periodic payment plan, and without any evidence supporting one, the court could not determine and “make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages” in accordance with the jury’s verdict. TEX. CIV. PRAC. & REM. CODE. Section 74.503 (c). Without such a finding, there was no proposed judgment of periodic payments for Petitioners to prove the financial responsibility to meet. Such a judgment, depending upon the timing, amount, and duration of the payments, would likely have aggregated multiples of the \$14 million lump-sum verdict.

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<sup>18</sup> It is undisputed that both Petitioners were underinsured. They each had \$1 million in coverage, none of which their insurer offered in response to a *Stowers* demand made before verdict. (21 RR 16-17, 22-23).

Petitioners also provided the court with no evidence of their ability to use any of Section 74.505(b)'s methods of funding, and therefore provided the court with no evidence of the ability to make payments as far into the future as any periodic judgment might provide. The only evidence provided to the court at all was a balance sheet testified to by Petitioners' bookkeeper, who was not shown to be an expert and whose testimony was objected to because she had never been designated as an expert witness or even a person with knowledge of relevant facts. (22 RR 12-13; 22 RR 16-19; 22 RR 19: 14-18; 22 RR 23: 12-16). Petitioners never proved good cause or lack of surprise, so the witness should have been excluded and cannot support any complaint on appeal. In any event, Petitioner's evidence did not show the ability to satisfy the requirements of the statute into the future, or by reference to any of the vehicles authorized by the above-referenced Section 74.505(b). It chiefly showed only uncollected accounts receivable.

Neither Petitioner produced evidence that if the trial court ordered *instanter* that \$13.263 million be put "into the registry of the court for purposes of periodic payments that he would be able to do so." (22 RR 14-23). *See Prabhakar v. Fitzgerald*, No.05-10-00126-CV, 2012 WL 3667400 (Tex. App. – Dallas Aug. 24 2012, no pet., judgment vacated Oct. 15, 2016). And neither Petitioner demonstrated how uncollected accounts receivable in an amount far less than the



total of any long-term payments could be used to fund such undiscounted future payments into the distant future.

**C. Petitioners cannot now complain on appeal about their own failure to give the trial court any way to rule in their favor.**

Rule 94 requires a defendant to affirmatively plead any matter “constituting an avoidance or affirmative defense.” TEX. R. CIV. P. 94. Because over one hundred years of Texas common law requires the submission of future damages “if paid now in cash,” a defendant is required to plead that it will seek to “avoid” the usual lump sum award and instead have damages paid in periodic installments that might cease completely if the judgment creditor were to die prematurely.<sup>19</sup> That way the plaintiff and the court know to instruct the jury to determine the damages based on future value as well – a calculation that is necessary to satisfy the Statute’s requirements unless the jury award is entirely congruent with uncontroversial testimony at trial and the court can discern this without any further evidence.

Any matter in “avoidance,” even if not listed by name in Rule 94, must be pleaded and may not first be raised after judgment. *Man Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 135-37 (Tex. 2014). And a “judgment must

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<sup>19</sup> See *Gunn v. McCoy*, 554 S.W.3d 645, 678 (Tex. 2018); *St. Joseph Reg’l Health Ctr. v. Hopkins*, 393 S.W.3d 885, 885-6 (Tex. App. – Waco, 2012, pet. denied); *Galveston, H. & S. A. Ry. Co. v. Harris*, 172 S.W. 1129, 1134 (Tex. Civ. App. – San Antonio 1915, writ ref’d); TEX. R. CIV. P. 156; TEX. R. APP. P. 7.1 (a).

conform to the pleadings and proof.” *Latch v. Gratty*, 107 S.W.3d 543, 546 (Tex. 2003). Puente repeatedly pointed out to the court Petitioners’ failures to timely plead and disclose this matter of avoidance. (22 RR 12-13; 22 RR 16-19; 22 RR 19: 14-18; 22 RR 23: 12-16; CR 5149-5163; CR 5183-5186; CR 5322-5336). To excuse Petitioners from even having to plead such matters violates constitutional guarantees of due process, due course of law, open courts, and the right to jury trial. U.S. CONST., AM. 14; TEX. CONST., art. I, Section 13 and 15; TEX. CONST., art. V, Section 10.

Petitioners also never supplemented their disclosures to identify periodic payments as an issue or to designate any witness to testify about it (CR 2804-2888). Any complaint about periodic future payments was waived and not preserved for appellate review because TEX. R. CIV. P. 194 requires that all testifying expert witnesses and persons with knowledge of relevant facts be timely designated in response to an appropriate request for disclosures. TEX. R. CIV. P. 193.6 automatically excludes evidence from witnesses or experts not timely designated in response to a request for disclosures. The only exception is where a party establishes good cause for failure to timely designate, or the lack of unfair surprise and unfair prejudice.

When Petitioners chose not to submit to the jury the amount and frequency of any periodic award of future damages, they intentionally risked the situation we

have here: it may be impossible for the court to later figure an undiscounted payment scheme *consistent with the jury's lump-sum verdict*. Aspects of Subchapter K illustrate this. Section 74.507 requires the court to determine the present value of any periodic payments, “For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments.” TEX. CIV. PRAC. & REM. CODE §74.507. Thus, the legislature expressly requires that attorney fees be paid in cash and based on the present value of an award of future periodic payments. But if the jury already awarded future damages only as a lump sum, there is nothing for the trial court to reduce to present value. The jury has already done it and the court cannot change it by crafting “its own award of damages inconsistent with the jury’s verdict.” *Detrick* at 11. To do so would not only be an abuse of discretion but an expropriation of the plaintiff’s property without due process and in contravention of law.

Petitioners’ quandary arises from their own litigation strategy, which left the trial court no discretion but to do what it did. They preserved nothing for review.

#### **D. No Equitable Remand.**

Petitioners’ now claim that they should be afforded a remand even if the lower courts correctly decided this case. This is easily answered by *Detrick*, upon which their request is based. *Detrick* was not a novel innovation but a simple interpretation of a statute clear in all relevant respects. No “new standards” were

announced, which is why the Court did not remand *Detrick* to give the parties or lower courts opportunity follow any such “new standards.” And unlike the appellant in *Detrick*, who only had one bite, Petitioners here already had several bites at this apple in the trial court (at least two post-verdict hearings) and repeatedly failed to provide a proper request for relief or sufficient evidence in support of it. Petitioner’s argument is without merit.

**III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THERE WAS NO REVERSIBLE ERROR REGARDING PETITIONERS’ EVIDENTIARY COMPLAINTS.**

The Court of Appeals correctly disposed of the two remaining evidentiary points of error. Since Petitioners did not brief these issues, and they do not form the basis of the Petition, Puente does not waive and does reserve the right to provide additional briefing on this and other issues, should it become necessary.

**CONCLUSION & PRAYER**

The Court of Appeals’ opinion presents no new or important legal issues that have not already been clearly addressed under Texas law. The petition should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

## CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word and contains 4,432 words, as determined by the computer software's word-count function, excluding those sections not required to be counted under Texas Rule of Appellate Procedure 9.4(i)(1). The document is prepared in Times New Roman 14pt. font for the body and 12pt. font for footnotes.

/s/ William J. Chriss /s/

WILLIAM J. CHRISS

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument will be served on this 3rd day of May 2021 to opposing counsel of record via electronic service through Texas.gov:

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## **APPENDIX**

In compliance with Rule 38.1(k) of the Texas Rules of Appellate Procedure, Appellee Jo Ann Puente submits this Appendix to the Response to Petition for Review containing the following items:

Tab A:                   Gonzaba's Motion for Periodic Payments

Tab B:                   Statutory Authorities

Tab C:                   Constitutional Authorities

# TAB A

## Motion for Periodic Payments



CAUSE NO. 2014CI04936

JO ANN PUENTE;	§	IN THE DISTRICT COURT
MARIA ESTHER CARR, INDIVIDUALLY	§	
AND AS GUARDIAN OF [REDACTED]	§	
[REDACTED], A MINOR	§	131ST
	§	
vs.	§	<del>57</del> TH JUDICIAL DISTRICT
	§	
NILESH PATEL, M.D.;	§	
JAMES HOUSTON, P.A.;	§	
NITYA SURGICAL ASSOCIATES, PLLC	§	
D/B/A TEXAS BARIATRIC SPECIALISTS;	§	
TEXAS BARIATRIC SPECIALISTS, LLC;	§	
MANUEL MARTINEZ, M.D.;	§	
JESUS VIRLAR, M.D.;	§	
GONZABA MEDICAL GROUP;	§	
METHODIST HEALTHCARE SYSTEM	§	
OF SOUTH TEXAS, LTD., LLP D/B/A	§	
METROPOLITAN METHODIST HOSPITAL;	§	
ANGELA GARCIA, R.D.; and	§	
"JKD"	§	BEXAR COUNTY, TEXAS

**DEFENDANTS JESUS VIRLAR, M.D.'S  
AND GONZABA MEDICAL GROUP'S MOTION FOR  
ORDER OF PERIODIC PAYMENTS**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW JESUS VIRLAR, M.D., and GONZABA MEDICAL GROUP, Defendants in the above entitled and numbered cause, and file their Motion for the Court to Order Periodic Payments, and would respectfully show unto the Court as follows:

I.

This case was tried to the jury September 11-28, 2017, with a verdict being reached on September 29, 2017. This Court has set a hearing for 3:00

p.m. on October 24, 2017, for the entry of a judgment. The verdict of the jury awarded damages for loss of earning capacity sustained in the past of \$133,202.00; for loss of earn capacity that, in reasonable probability, Jo Ann Puente will sustain in the future of \$888,429.00; and for medical expenses that in reasonable probability Jo Ann Puente will incur in the future of \$13,263,874.86. The jury answered “No” when asked whether the negligence of Manuel Martinez, M.D., proximately caused the occurrence or injury to Jo Ann Puente.

## II. NON-WAIVER OF RIGHTS

Defendants disagree with the findings of the jury against Dr. Virlar and in response to Questions 1, 2, and 3 in the Charge of the Court and believe grounds exist for either a judgment in their favor or a new trial. Defendants disagree with any judgment awarding any recovery to Plaintiffs. By filing these arguments regarding a final judgment to be signed by this Court, Defendants are not waiving any rights to challenge the evidence, the jury’s verdict, the Court’s rulings, the judgment, or any other aspect of this case. Defendants also do not waive any right to file additional motions attacking the evidence, verdict, rulings, judgment, or other aspects of this case, including any post-verdict or post-judgment motions. Defendants contend any judgment is contrary to both the law and evidence at trial. Any positions taken by Defendants in this pleading should not be construed as concurring with the content of any judgment to be rendered by this Court and/or the result in this case.<sup>1</sup>

Without waiving any rights, as set forth above, Defendants assert the following regarding any Final Judgment to be signed herein. Additionally,

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<sup>1</sup> See *First Nat’l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 644 (Tex. 1989).

Defendants received a draft form of judgment from Plaintiff's counsel on Friday evening, October 20, 2017. Defendants reserve the right to object to Plaintiff's calculations, and form of judgment. Asserting any objections or arguments regarding Plaintiff's proposed Final Judgment, do not constitute any waiver of rights to challenge the jury's verdict or complain about the content of any Final Judgment.

In addition Defendants have filed a Motion for Credit against the verdict for settlements previously made by Methodist Hospital and Nilesh Patel, M.D., and in making those arguments, Defendants do not waive their rights to challenge the jury's verdict or complain about the content of any Final Judgment. Defendants further reserve the right to file all post-trial motions available to Defendants, and to appeal this case should Defendants decide to do so. Defendants do not waive any of these rights by filing this motion.

### III.

Pursuant to Section 74.503 Tex. Civ. Prac. & Rem. Code Defendants respectfully request this Court to order that future damages awarded by the jury in this case be paid in periodic payments rather than by a lump sum payment.

Section 74.503 states:

(a) At the request of a defendant physician or healthcare 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 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 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.

Pursuant to 74.053(a) this Court shall order that medical, health care or custodial services awarded in this case be paid in whole or in part in periodic payments. That would encompass the entire \$13,263,874.86 awarded for future medical expenses.

Dr. Altman, Plaintiff's lifecare planner, asserted his report and testified that Jo Ann Puente has a reasonable life expectancy of 31 years. This evidence was not disputed by Defendants. Therefore, Defendants would request that, after applying appropriate credits for settlement amounts previously received by Plaintiffs, this Court determine the appropriate amount of annual payment to be made by dividing the remainder of the amount into periodic payments over 31 years.

Pursuant to section 74.503(b), this Court may also order periodic payments of all other awards for future damages made by the jury. In this case, the \$888,429.00 in future loss of earning capacity should also be structured pursuant to the statute.

Pursuant to section 74.503(c) this Court is obligated to make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages. There was no evidence that Plaintiff has any immediate need for a large sum of money. Therefore, Defendants believe it would be appropriate to structure the entire amount of future damages over 31 years.

Section 74. 503(d) requires that this Court specify in the judgment, who is to receive the payments, the dollar amount of the payments, the interval between the payments, and the number of payments or period of time over which payments must be made. Defendants respectfully requests that this Court enter judgment awarding such payments over the 31 years of Jo Ann Puente's probable life.

#### IV.

Defendants are prepared to prove to this Court evidence of financial responsibility by purchasing an annuity contract pursuant to Section 74.505(b)(1) which will satisfy the judgment awarding future damages in periodic payments. Defendants cannot provide this annuity contract to the Court prior to the time a determination has been made as to the amount of such payments, the interval between payments, and the period of time over which payments are to be made.

#### V.

The order of such periodic payments is compelled by the provisions of Section 74.502, in that this is a health care liability claim against a physician in

which the present value of the award of future damages equals or exceeds \$100,000.00.

WHEREFORE, Defendants JESUS VIRLAR, M.D., and GONZABA MEDICAL GROUP, respectfully request this Court to enter an Order providing that the future damages awarded by the jury in this case be paid by periodic payments over the course of 31 years, rather than by lump-sum payment and for such other and further relief to which Defendants may show themselves justly entitled.

Respectfully submitted,

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ATTORNEY FOR DEFENDANTS  
MANUEL MARTINEZ, M.D.  
JESUS VIRLAR, M.D. AND  
GONZABA MEDICAL GROUP

**CERTIFICATE OF SERVICE**

I do hereby certify that on the 23<sup>rd</sup> of October, 2017, a true and correct copy of the above and foregoing document was furnished to all counsel of record in accordance with the TEX. R. CIV. P.

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BRUCE ANDERSON

# TAB B

## Statutory Authorities

1. Section 33.011, TEX. CIV. PRAC. REM. CODE
2. Section 33.012, TEX. CIV. PRAC. REM. CODE
3. Chapter 74, Subchapter K, TEX. CIV. PRAC. REM. CODE (i.e., Sections 74.501- 74.507.)



# TAB B

1. Section 33.011, TEX. CIV. PRAC. REM. CODE

§ 33.011. Definitions.

**Texas Statutes**

**Civil Practice and Remedies Code**

**Title 2. Trial, Judgment, And Appeal**

**Subtitle C. Judgments**

**Chapter 33. Proportionate Responsibility**

**Subchapter B. Contribution**

*Current with legislation passed in the 2019 Regular Session*

**§ 33.011. Definitions**

In this chapter:

- (1) "Claimant" means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes:
  - (A) the person who was injured, was harmed, or died or whose property was damaged; and
  - (B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.
- (2) "Defendant" includes any person from whom, at the time of the submission of the case to the trier of fact, a claimant seeks recovery of damages.
- (3) "Liable defendant" means a defendant against whom a judgment can be entered for at least a portion of the damages awarded to the claimant.
- (4) "Percentage of responsibility" means that percentage, stated in whole numbers, attributed by the trier of fact to each claimant, each defendant, each settling person, or each responsible third party with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.

- (5) "Settling person" means a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.
- (6) "Responsible third party" means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these. The term "responsible third party" does not include a seller eligible for indemnity under Section 82.002.
- (7) Repealed by Acts 2003, 78th Leg., ch. 204, Sec. 4.10(3).

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 33.011**

**History.** Amended by Acts 2003, 78th Leg., ch. 204, Sec. 4.05, 4.10(3), eff. Sept. 1, 2003.

Amended by Acts 1995, 74th Leg., ch. 136, Sec. 1, eff. Sept. 1, 1995

Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 2.07, eff. Sept. 2, 1987

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

# **TAB B**

2. Section 33.012, TEX. CIV. PRAC. REM. CODE

§ 33.012. Amount Of Recovery.

**Texas Statutes**

**Civil Practice and Remedies Code**

**Title 2. Trial, Judgment, And Appeal**

**Subtitle C. Judgments**

**Chapter 33. Proportionate Responsibility**

**Subchapter B. Contribution**

*Current with legislation passed in the 2019 Regular Session*

**§ 33.012. Amount Of Recovery**

- (a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.
- (b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.
- (c) Notwithstanding Subsection (b), if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:
  - (1) the sum of the dollar amounts of all settlements; or
  - (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.
- (d) An election made under Subsection (c) shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected Subsection (c)(1).
- (e) This section shall not apply to benefits paid by or on behalf of an employer to an employee pursuant to workers' compensation insurance coverage, as defined in Section 401.011(44), Labor Code, in effect at the time of the act, event, or occurrence made the basis of claimant's suit.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 33.012**

**History.** Amended by Acts 2005, 79th Leg., Ch. 728, Sec. 23.001(6), eff. September 1, 2005.

Amended by Acts 2005, 79th Leg., Ch. 277, Sec. 1, eff. June 9, 2005.

Amended by Acts 2003, 78th Leg., ch. 204, Sec. 4.06, 4.10(4), eff. Sept. 1, 2003.

Amended by Acts 1995, 74th Leg., ch. 136, Sec. 1, eff. Sept. 1, 1995

Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 2.08, eff. Sept. 2, 1987

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

# TAB B

3. Chapter 74, Subchapter K, TEX. CIV. PRAC. REM. CODE (i.e., Sections 74.501- 74.507.)

§ 74.501. Definitions.

## **Texas Statutes**

### **Civil Practice and Remedies Code**

#### **Title 4. Liability In Tort**

#### **Chapter 74. Medical Liability**

#### **Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

#### **§ 74.501. Definitions**

In this subchapter:

- (1) "Future damages" means damages that are incurred after the date of judgment for:
  - (A) medical, health care, or custodial care services;
  - (B) physical pain and mental anguish, disfigurement, or physical impairment;
  - (C) loss of consortium, companionship, or society; or
  - (D) loss of earnings.
- (2) "Future loss of earnings" means the following losses incurred after the date of the judgment:
  - (A) loss of income, wages, or earning capacity and other pecuniary losses; and
  - (B) loss of inheritance.
- (3) "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.501**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.



§ 74.502. Scope Of Subchapter.

**Texas Statutes**

**Civil Practice and Remedies Code**

**Title 4. Liability In Tort**

**Chapter 74. Medical Liability**

**Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

**§ 74.502. Scope Of Subchapter**

This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds \$100,000.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.502**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

§ 74.503. Court Order For Periodic Payments.

**Texas Statutes**

**Civil Practice and Remedies Code**

**Title 4. Liability In Tort**

**Chapter 74. Medical Liability**

**Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

**§ 74.503. Court Order For Periodic Payments**

- (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.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.503**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

§ 74.504. Release.

**Texas Statutes**

**Civil Practice and Remedies Code**

**Title 4. Liability In Tort**

**Chapter 74. Medical Liability**

**Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

**§ 74.504. Release**

The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by the claimant.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.504**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

§ 74.505. Financial Responsibility.

## **Texas Statutes**

### **Civil Practice and Remedies Code**

#### **Title 4. Liability In Tort**

#### **Chapter 74. Medical Liability**

#### **Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

#### **§ 74.505. Financial Responsibility**

- (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.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.505**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

§ 74.506. Death Of Recipient.

## **Texas Statutes**

### **Civil Practice and Remedies Code**

#### **Title 4. Liability In Tort**

#### **Chapter 74. Medical Liability**

#### **Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

#### **§ 74.506. Death Of Recipient**

- (a) On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction.
- (b) Periodic payments, other than future loss of earnings, terminate on the death of the recipient.
- (c) If the recipient of periodic payments dies before all payments required by the judgment are paid, the court may modify the judgment to award and apportion the unpaid damages for future loss of earnings in an appropriate manner.
- (d) Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant physician or health care provider to make further payments ends and any security given reverts to the defendant.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.506**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

§ 74.507. Award Of Attorney's Fees.

**Texas Statutes**

**Civil Practice and Remedies Code**

**Title 4. Liability In Tort**

**Chapter 74. Medical Liability**

**Subchapter K. Payment For Future Losses**

*Current with legislation passed in the 2019 Regular Session*

**§ 74.507. Award Of Attorney's Fees**

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.

**Cite as (Casemaker) Tex. Civ. Prac. and Rem. Code § 74.507**

**History.** Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.

# TAB C

## Constitutional Authorities

1. TEX. CONST. art I, Section 3
2. TEX. CONST. art. I, Section 13
3. TEX. CONST. art. I, Section 15
4. TEX. CONST. art I, Section 17
5. TEX. CONST. art I, Section 19
6. TEX. CONST. art III, Section 66
7. TEX. CONST. art. V, Section 10
8. U.S. CONST. AM. 14

# TAB C

1. TEX. CONST. art I, Section 3



§ 3. EQUAL RIGHTS.

**THE TEXAS CONSTITUTION**

**Article 1. BILL OF RIGHTS**

*Current through the November 2019 election*

**§ 3. EQUAL RIGHTS**

All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

**Cite as Tex. Const. art. 1 § 3**

# TAB C

2. TEX. CONST. art. I, Section 13

§ 13. EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW.

## **THE TEXAS CONSTITUTION**

### **Article 1. BILL OF RIGHTS**

*Current through the November 2019 election*

### **§ 13. EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

**Cite as Tex. Const. art. 1 § 13**

# TAB C

3. TEX. CONST. art. I, Section 15

§ 15. RIGHT OF TRIAL BY JURY.

**THE TEXAS CONSTITUTION**

**Article 1. BILL OF RIGHTS**

*Current through the November 2019 election*

**§ 15. RIGHT OF TRIAL BY JURY**

The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

**Cite as Tex. Const. art. 1 § 15**

**Source: (Amended Aug. 24, 1935.)**

# TAB C

4. TEX. CONST. art. I, Section 17

§ 17. TAKING, DAMAGING, OR DESTROYING PROPERTY FOR PUBLIC USE; POWER OF LEGISLATURE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES.

## THE TEXAS CONSTITUTION

### Article 1. BILL OF RIGHTS

*Current through the November 2019 election*

#### § 17. TAKING, DAMAGING, OR DESTROYING PROPERTY FOR PUBLIC USE; POWER OF LEGISLATURE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES

- (a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:
  - (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:
    - (A) the State, a political subdivision of the State, or the public at large; or
    - (B) an entity granted the power of eminent domain under law; or
  - (2) the elimination of urban blight on a particular parcel of property.
- (b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.
- (c) On or after January 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house.
- (d) When a person's property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

**Cite as Tex. Const. art. 1 § 17**

**History.** Added by Acts 2007, 80th Leg. - Regular Session, HJR 14, Sec. 1.01.

# TAB C

5. TEX. CONST. art. I, Section 19



§ 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW.

## **THE TEXAS CONSTITUTION**

### **Article 1. BILL OF RIGHTS**

*Current through the November 2019 election*

#### **§ 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW**

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

**Cite as Tex. Const. art. 1 § 19**

# TAB C

6. TEX. CONST. art. III, Section 66

§ 66. LIMITATION ON LIABILITY FOR NONECONOMIC DAMAGES.

**THE TEXAS CONSTITUTION**

**Article 3. LEGISLATIVE DEPARTMENT**

*Current through the November 2019 election*

**§ 66. LIMITATION ON LIABILITY FOR NONECONOMIC DAMAGES**

- (a) In this section "economic damages" means compensatory damages for any pecuniary loss or damage. The term does not include any loss or damage, however characterized, for past, present, and future physical pain and suffering, mental anguish and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment.
- (b) Notwithstanding any other provision of this constitution, the legislature by statute may 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 or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability. The claim or cause of action includes a medical or health care liability claim as defined by the legislature.
- (c) Notwithstanding any other provision of this constitution, after January 1, 2005, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, in a claim or cause of action not covered by Subsection (b) of this section. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability.
- (d) Except as provided by Subsection (c) of this section, this section applies to a law enacted by the 78th Legislature, Regular Session, 2003, and to all subsequent regular or special sessions of the legislature.
- (e) A legislative exercise of authority under Subsection (c) of this section requires a three-fifths vote of all the members elected to each house and must include language citing this section.

**Cite as Tex. Const. art. 3 § 66**

**Source: (Added Sept. 13, 2003.)**

# TAB C

7. TEX. CONST. art. V, Section 10

§ 10. TRIAL BY JURY.

**THE TEXAS CONSTITUTION**

**Article 5. JUDICIAL DEPARTMENT**

*Current through the November 2019 election*

**§ 10. TRIAL BY JURY**

In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

**Cite as Tex. Const. art. 5 § 10**

# TAB C

8. U.S. CONST. AM. 14

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection.

## **CONSTITUTION OF UNITED STATES**

## **CONSTITUTION OF UNITED STATES**

### **AMENDMENTS**

*Current through 2010*

#### **Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay



any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Cite as US. Const. art. AMENDMENTS § Amendment XIV**

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