

No. 20-0923

In the Supreme Court of Texas

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

Petitioners,

v.

JO ANN PUENTE,

Respondent.

**ON PETITION FOR REVIEW FROM THE
FOURTH COURT OF APPEALS AT SAN ANTONIO, TEXAS
CASE No. 04-18-00118-CV**

**BRIEF OF AMICI CURIAE TEXAS ASSOCIATION OF
DEFENSE COUNSEL, TEXAS ALLIANCE FOR PATIENT ACCESS, THE
TEXAS MEDICAL ASSOCIATION, THE TEXAS OSTEOPATHIC
MEDICAL ASSOCIATION, AND THE TEXAS HOSPITAL ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW**

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IDENTITY OF PARTIES AND COUNSEL

Amici Curiae supplement the parties' identification of parties and counsel with the following information:

1. *Amici Curiae* are Texas Association of Defense Counsel ("TADC"), Texas Alliance for Patient Access ("TAPA"), the Texas Medical Association ("TMA"), the Texas Osteopathic Medical Association ("TOMA"), and the Texas Hospital Association ("THA").

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STATEMENT OF INTEREST AND FEE DISCLOSURE

The Texas Association of Defense Counsel (“TADC”) is an association of Texas attorneys whose practices concentrate on the defense of civil tort lawsuits. The TADC advocates a system of tort reparations in which (1) plaintiffs are fairly compensated for genuine injuries; (2) non-responsible defendants are exonerated without unreasonable cost; and (3) responsible defendants are held liable only for appropriate damages. The undersigned counsel for TADC has not been paid and there is no fee to be paid for the preparation and filing of this amicus brief in support of the petition for review.

The Texas Alliance for Patient Access (“TAPA”) is an association of over 250 health care interests providing medical care to Texas residents. Its members include physicians, hospitals, nursing homes, physician groups, physician liability carriers, and charity clinics, as well as other entities having an interest in assuring timely and affordable access to health care. TAPA supports meaningful and sustainable health care liability reforms and seeks to assure that reforms find their proper interpretation and application in any and all jurisprudence affecting health care liability and liability insurance procurement and costs in the State of Texas.

The Texas Medical Association (“TMA”) is a private, voluntary, nonprofit association of over 55,000 Texas physicians, residents, and medical students, in all fields of medical specialization. TMA was founded in 1853 to serve the people of

Texas in matters of medical care, prevention and cure of disease, and the improvement of public health. Today, its mission is to stand up for Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients. Consistent with its mission, TMA seeks clarification of the proper application of settlement credits and the periodic payment statute.

The Texas Osteopathic Medical Association (“TOMA”) is a private, voluntary, non-profit association founded in 1900 to serve and represent the professional interests of more than 5,000 licensed osteopathic physicians in Texas. TOMA’s mission is to promote health care excellence for the people of Texas, advance the philosophy and principles of osteopathic medicine, and to loyally embrace the family of the osteopathic profession and serve their unique needs.

The Texas Hospital Association (“THA”) is a non-profit trade association that represents 459 hospitals across the state. THA advocates for state and national legislative, regulatory, and judicial actions in support of accessible, cost-effective, high-quality health care. As a representative of its member hospitals, the THA is vitally interested in and concerned about the matters before this Court, which will affect the liability of hospitals.

The undersigned counsel for TAPA, TMA, TOMA, and THA is being paid an hourly fee of \$250.00 per hour for the preparation and filing of this brief of amici curiae in support of the petition for review.

SUMMARY OF THE ARGUMENT

The one-satisfaction rule provides an important limit on recovery *in narrow situations*. Here, the Majority ignores the legislative intent behind Chapter 33 and this Court's *Drilex* decision and holds Chapter 33 subservient to this common law rule. This is yet another attempt to undo the legislative effect of settlement credits in cases involving multiple family members—it must be corrected.

Also, despite having the necessary evidence to correctly apply the Periodic Payment Statute, the Majority created loopholes, depriving courts of the discretion afforded by *Detrick* in making findings regarding future medical damages subject to periodic payments as well as how and when the installments should be made. This too must be corrected.

TADC, TAPA, TMA, TOMA, and THA join Petitioners in urging this Court to grant review, reverse and reform the judgment of the court of appeals to award a settlement credit for the entire sum of C.P.'s settlement, and remand the cause to the trial court for additional proceedings to consider and resolve the proper amount of periodic payments.

ARGUMENT AND AUTHORITIES

I. Chapter 33 Provides the Rule of Law on Settlement Credits

The facts relevant to the settlement credit issue are simple. Jo Ann Puente filed the underlying medical malpractice action. Her daughter, C.P., a derivative claimant, joined the lawsuit seeking loss of parental consortium damages. Before trial, C.P.'s guardian settled C.P.'s claims for \$3.3 million. *See* 1CR1447, 1527–28, 1533–35; 2RR21–22; *see also* 2CR2446–56. At issue is whether Petitioners are entitled to a settlement credit in an amount equal to C.P.'s settlement.

Civil Practice and Remedies Code section 33.012 provides “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 . . .” Section 33.011(1) defines “claimant” to include not only the injured party (Puente), but also all derivative claimants (C.P.). Thus, both Puente and C.P. were a single “claimant,” and C.P.'s settlement amount reduced the amount of the indebtedness owed to Puente. The statute dictates this result.

However, the Majority discards this analysis, stating that the reduction violates the open courts provision, denying Puente “full recovery.” No case, until now, has so held.

A. The Majority's Open Courts Analysis Is Wrong

To begin, this Court presumes “that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.” *Methodist Healthcare Sys. of San Antonio, Ltd v. Rankin*, 307 S.W.3d 283 (Tex. 2010). And when the text is clear, it is determinative of the Legislature’s intent. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Under the section 33.011(1)’s unambiguous definition, C.P. and Puente are a single “claimant.” The Legislature defined a “claimant” to include *all persons* seeking recovery of the same original injury.

1. *Drilex* provides the rule of law.

This is not the first case applying Chapter 33 settlement credit provisions to multiple family members, all of whom the Legislature deemed to be one “claimant.” *See Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999). In *Drilex* Jorge Flores’ hand was severely injured during a well-drilling operation for Amoco Production. He, his wife, and children sued Amoco, Drilex, and one other defendant. The claims of Flores’ wife and children were derivative claims, just like C.P.’s claims. Before trial, all settled with Amoco. Unlike here, all remained plaintiffs through trial.

There, this Court addressed the same “family” settlement credit question:

Drilex further contends that the court of appeals erred by treating the family members as separate claimants for

purposes of deducting the settlement credit, and urges that the dissent below reached the correct result. We agree.

Id. at 122. This echoes Petitioners’ argument and rejects Puente’s argument that she and C.P. should be treated as separate “claimants.” The Legislature chose the term “claimant,” not “plaintiff,” and defined the term precisely: “under the plain language of section 33.011(1), the term ‘claimant’ in section 33.012(b)(1) includes all of the family members.” *Id.* at 123. Further, as this Court explained, “We are bound to apply the Legislature’s chosen definition” and “[b]ecause we must view the entire Flores family as *one claimant* for section 33.012(b)(1) purposes, the total of all damages to be recovered by the family must be reduced by the total of all settlements received by the family.” *Id.* (emphasis added).

Notably, this Court did not hold that “as applied” the settlement credit violated the open courts provision.

a. The one-satisfaction rule provides no basis to ignore Chapter 33’s language.

The Majority never addresses *Drilex*. Instead, it begins with the proposition that Chapter 33 merely codifies the one-satisfaction rule—though not implicated here since “a child’s claim for loss of consortium, like the one brought by C.P. in this case, is a ‘separate and independent claim[] distinct from the underlying action.’” *Virlar v. Puente*, 613 S.W.3d 652, 694 (Tex. App.—San Antonio 2020, pet filed) (quoting *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009)). According

to the Majority, a family settlement credit does not further the common law purpose and is therefore arbitrary:

This purpose of making the plaintiff whole, but not more than whole, is not consistent with restricting a plaintiff from recovering less than the full amount of her economic damages.

Virlar, 613 S.W.3d at 693.

The flaw here is two-fold. First, the Majority’s legal authority is lacking. The Majority relies on *In re Xerox Corp.*, however, that case questioned whether Chapter 33’s proportionate-responsibility scheme encompassed a civil-remedy action under the TMFPA. Answering the question using well-established statutory interpretation principles, this Court held the one-satisfaction concept is incorporated in Chapter 33, *along with much more*:

Chapter 33’s proportionate-responsibility scheme *also incorporates the one-satisfaction rule—a tort concept that limits a plaintiff to only one recovery for any damages suffered because of an injury*. This rule provides that when a claimant seeks recovery for the same injury from multiple parties, the claimant is entitled to only one recovery on that injury.

In re Xerox Corp., 555 S.W.3d 518, 523 (Tex. 2018) (emphasis added).

Second, this Court’s analysis never addresses settlement credits or the definition of “claimant.” Chapter 33 presents a comprehensive scheme of modified comparative responsibility, limits on joint and several liability, and application of settlement credits—all limiting “full recovery of economic damages” in some form.

2. The Legislature’s definition of “claimant” does not violate the open courts provision.

The Majority rejected Petitioners’ argument that Puento and C.P. are one “claimant” under Chapter 33, holding instead that “the legislature cannot circumvent the Open Courts Provision by simply statutorily changing the definition of ‘claimant’ and thereby *restricting a common law cause of action protected by the Open Courts Provision.*” *Virlar*, 613 S.W.3d at 694 (emphasis in original). The Majority’s reasoning fails. First, the open courts provision does not protect the right to “full recovery” of economic damages. Second, as Petitioners correctly argued, many other provisions of Chapter 33 also limit “full recovery” of economic damages without violating the open courts provision.

3. The open courts language only requires a remedy.

The open courts provision provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13. Nothing is mentioned about a constitutionally protected “full recovery,” and this Court has never interpreted as such. To the contrary, the Legislature may restrict even a well-established common law cause of action so long as the restriction is not unreasonable or arbitrary when balanced against the purpose and basis of the statute.

4. Striking a statute requires meeting a two-part test.

Whether legislation violates the open courts provision is a two-pronged analysis, requiring a litigant to show (1) “a cognizable common law cause of action that is being restricted” and (2) “the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.” *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994).

Here, the Majority relies exclusively on *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988). *Lucas* held as unreasonable and/or arbitrary the medical malpractice damages caps when balanced against their alleged purpose to reduce malpractice premiums for doctors and hospitals. But *Lucas* and subsequent cases never recognized a constitutionally protected right of “full recovery to economic damages” to which the Legislature could *never* restrict or diminish. Again, common law causes of actions may be restricted, provided the restriction is neither unreasonable nor arbitrary.

5. The Legislature can—and has—restricted common law causes of action and recoveries.

This Court can and has upheld restrictions to common law causes of action and recoveries. *See, e.g., Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 710 (Tex. 2014) (upholding the Medical Liability Act’s ten-year statute of repose); *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) (holding statute setting forth 120-day deadline for claimant to serve expert report on physician did not violate open courts

provision); *Yancy v. United Surgical Partners Intern., Inc.*, 236 S.W.3d 778, 786 (Tex. 2007) (holding the Medical Liability Insurance Improvement Act’s two-year limitations provision for medical malpractice complaints did not violate open courts guarantee); *Trinity River*, 889 S.W.2d at 263 (holding statute of repose for negligence actions against architects and engineers constitutional).

6. The Legislature’s definition of “claimant” does not violate the open courts provision.

The inclusion of all family unit claims, both of the injured party and derivative claimants, into the definition of a single “claimant” was enacted against a background of litigation exploiting a loophole allowing individual claimants to structure their settlements in multi-party cases in a manner to lessen—if not altogether eliminate—any settlement credit, thereby defeating legislative intent. Both *Drilex* and *Utts* are exemplars, as is this case. Far from the non-existent link between caps on damages and malpractice premiums in *Lucas*, here the loophole was real, and the definition of “claimant” closed it.

As Justice Owen noted, “[t]he definition of ‘claimant’ dictates that each family member becomes connected with the injured or deceased person.” *Utts v. Short*, 81 S.W.3d 822, 841 (Tex. 2002). “The words ‘the claimant’ as used in Chapter 33, mean ‘the claimant’ for all purposes. When one family member settles, it is a settlement by ‘the claimant’ even if only that one family member receives payment.” *Id.* at 843.

The practical effect troubled Justice Baker, causing him to note:

Drilex's troubling effect is that a settlement with any one derivative plaintiff can deprive all other possible derivative plaintiffs of their full recovery for their independent injuries when they did not receive any proceeds from the settlement. Accordingly, to apply Chapter 33 in a manner that is consistent with its purposes and our law, the Court should overrule Drilex to the extent that it concludes that "claimant," for purposes of applying settlement credits under section 33.012(b), means all family members suing for damages arising from another family member's injury or death.

Id. at 836 (emphasis added).

Although the Majority does not do so expressly (again, the opinion never addresses *Drilex*), it essentially accepts Justice Baker's interpretation, relying upon an unbriefed open courts challenge.¹

Though Justice Baker believed that application of the settlement credit in a multiple-plaintiff case would override the one satisfaction rule, no justice thought it violated the open courts provision. Both Justice Baker and Justice Owen agreed that the Legislature had the right to combine the injured party and all derivative claimants into the definition of a single "claimant." Justice Baker remarked, "I do not disagree with the dissent's position that the Legislature, in enacting Chapter 33, had the

¹ The Majority acknowledges this shortcoming, "Although there is no lengthy legal argument in Puente's response, an open courts challenge is plainly there. Her response refers to the Open Courts Provision and provides the factual basis upon which her constitutional challenge is based. Her constitutional challenge stated the nature of the basic issue she was raising." *Virlar*, 613 S.W.3d at 695 (internal citations omitted).

authority to change common law.” *Id.* And Justice Owen wrote, “‘Texas law’ is what the Legislature decides it is, even if it overrides the common law. A court cannot refuse to give effect to a statute simply because it alters the common law.” *Id.* at 849. Neither opinion hinted that “as applied” the settlement credit could violate the open courts provision. Justice Owen correctly summed up both sides: “the Legislature may change the common law by statute if it so chooses, as long as the state and federal constitutions are not violated. No one has suggested that the settlement credit scheme devised by the Legislature is unconstitutional.” *Id.*

B. Drilex Held that the Legislature Had a Reasonable and Non-Arbitrary Purpose for Broadly Defining “Claimant”

This Court has for all practical purposes already held that the Legislature’s use of the term “claimant” is neither arbitrary nor unreasonable when balanced against its purpose. That purpose was identified in *Drilex*:

Moreover, this method of allocation, which is not affected by the actual disbursement of the settlement money among the plaintiffs, *is necessary to protect defendants from plaintiffs who “would manipulate settlements among those ‘seek(ing) recovery of damages for injury to another person.’” . . . nonsettling defendants should not be penalized for the way in which the plaintiffs distribute the money among themselves . . .* Using a method of allocation that is not dependent on the distribution of the settlement money chosen by the plaintiffs is the best method of ensuring that nonsettling defendants are not penalized.

1 S.W.3d at 124–25 (internal citations omitted) (emphasis added).

There was good reason why Justice Owen wrote that no one contended the Legislature’s use of the term “claimant” was unconstitutional—the analysis for upholding its constitutionality had already been performed in *Drilex*.

II. The Fourth Court’s Interpretation of Section 74.503 Is Wrong

Regent Care of San Antonio, L.P. v. Detrick, 610 S.W.3d 830 (Tex. 2020), provides guidance to health care liability litigants on the operation of the periodic payment of future damages for medical, health care, or custodial services (“Future Medical Damages”) under Texas Civil Practice and Remedies Code section 74.502.² Despite this guidance, *Detrick’s* harm analysis has created uncertainty. And here, the Majority faulty analysis erroneously deprives Petitioners of their right to have part of the Future Medical Damages paid in periodic payments under the Periodic Payment Statute. TEX. CIV. PRAC. & REM. CODE § 74.501–07.

Where Future Medical Damages exceed \$100,000, a health care provider makes a periodic payment request, and the trial court has the necessary evidence to make the section 74.503(c) and (d) findings, a trial court “*shall* order that medical, health care or custodial services in a health care liability claim be paid in whole or

² This guidance includes: (1) clarifying that the trial court has discretion to allocate Future Medical Damages between the lump sum payment and the periodic payments; (2) in exercising this discretion the trial court must (a) accept the jury findings on future damages; and (b) have evidence which supports allocating Future Medical Damages between the lump sum payment and the amount of the periodic payments; and (3) the defendant health care provider requesting the periodic payment of Future Medical Damages has the burden of providing the evidence needed for the trial court to exercise its discretion which evidence may be contained in the trial record or which may be tendered after trial.

in part in periodic payments rather than a lump sum.” TEX. CIV. PRAC. & REM. CODE § 74.503(a) (emphasis added).

In *Detrick*, this court found that error occurred but concluded the error was harmless as the trial court only had present value evidence “without detailing how those damages were discounted.” *Detrick*, 610 S.W.3d at 838. Here, the trial court had much more—an extensive report with not only how the costs of future medical care were discounted to present value but also the annual amounts of those medical costs, in *both* present value and future costs for each year of Puente’s projected life expectancy. Unlike *Detrick*, the report contains the discount rate used in bringing the future values to present values.

A. The Trial Court Needs Only Present Value of Future Medical Damages and Relevant Evidence to Exercise and Order Periodic Payments

The Periodic Payment Statute does not create a new or different recovery of future economic damages. It merely allows a health care defendant to elect how and when that recovery will be paid. The Majority turned a simple process into a complicated maze. When a jury finds Future Medical Damages have a present value amount exceeding \$100,000 and a health care defendant has made both a request for periodic payments and provided evidence of financial responsibility, these three steps should be followed:

Step 1: Determine the amount of the lump sum payment consistent with the language of the Periodic Payment Statute and *Detrick* through

evidence of attorney fees, litigation expenses, and health care expenses to be incurred soon after trial.

Step 2: If the jury finding of Future Medical Damages is supported by sufficient evidence, *Detrick* mandates acceptance. Thus, the periodic payment amount under section 74.503(c) consists of the jury's present value finding of Future Medical Damages less the lump sum amount.

Step 3: Make the section 74.503(d) findings applicable to the section 74.503(c) amount to include 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. While the section 74.503(c) amount is in present value terms, the dollar amounts of the periodic payments over the applicable intervals are to be returned to a future value with a proper discount rate.

B. The Trial Court Had the Requisite Evidence to Make 74.503(c) and (d) Findings

Again, in *Detrick*, the parties presented only present value amounts without detailing the discount calculations. *Detrick*, 610 S.W.3d at 838. The trial record here—unlike *Detrick*—contains all the evidence the trial court needed to exercise its discretion under Step 3. *See* Petition for Review Tab E (Report of Keith Wm. Fairchild, Ph.D.).

Relying on *Detrick*, the Majority erroneously reasoned that “with this record, *it was impossible* for the trial court to order periodic payments that was *consistent with the jury’s award.*” *Virlar*, 613S.W.3d at 704 (emphasis added). The failure of the jury to award the precise amount of Future Medical Damages advocated by Dr. Fairchild along with Fairchild’s use of differing inflation factors for the specific

categories of care does not—as the Majority posits—make it “impossible” to order periodic payments consistent with the \$13,263,874.86 amount of Future Medical Damages found by the jury.³ If that were the case, the Periodic Payment Statute would be rendered *meaningless* except for one instance—when a jury awards the precise amount opined by an expert.

C. *The Majority’s Reasoning Is Unrealistic and Inconsistent*

Awards of future damages in a personal injury case are always speculative. *Pipgras v. Hart*, 832 S.W.2d 360, 365 (Tex. App.—Fort Worth 1992, writ denied). Recovery of Future Medical Damages elevates this speculation as matters of life expectancy, medical advances, and future costs are uncertain. *Id.* For these reasons “an award of future medical expenses lies largely within the discretion of the jury.” *Id.* It is unrealistic to expect that a jury award of Future Medical Damages comport with the amount opined by an expert in order for a health care defendant to meet the Periodic Payment Statute requirements.

Further, when making section 74.503(c) and (d) findings, the trial court has discretion. *Detrick*, 610 S.W.3d at 837. Neither the statute nor *Detrick* preclude a

³ Fairchild opines that the present value number of Future Medical Damages is \$16,054,975 which exceeds the jury’s \$13,263,874.86 by almost \$3 million. His report exhibits reference differing inflation rates for the differing categories of future care. Those categories consist of: (1) Outpatient Physician Services; (2) Therapeutic Services; (3) Supported Life Care; (4) Medication; (5) Diagnostics; (6) Equipment & Supplies; and (7) Acute/Inpatient Care. *See* Petition for Review Tab E.

trial court from exercising its discretion when a jury's finding of Future Medical Damages differs from an expert's opinion or when an expert uses differing inflation factors for the categories of future costs. To the contrary, the trial court remains within the latitude of its discretion when the section 74.503(c) and (d) findings do not conflict with jury findings and are supported by the relevant trial or the post-trial evidence. The Majority deprives trial courts of this discretion.

Moreover, the Majority's reasoning places health care defendants between the horns of a dilemma. In cases where Future Medical Damages could exceed the \$100,000 statutory threshold they may: (a) elect to challenge the inherently speculative future damages while running the risk that a jury verdict does not match the expert's opinion which, in the event of adverse verdict, might prevent seeking relief under the Period Payment Statute; or (b) make no challenge to Future Medical Damages potentially resulting in higher jury award. Neither option is consistent with the purpose of the Periodic Payment Statute.

D. Fashioning a Periodic Payment Award of Future Medical Damages Consistent with the Jury's Award Is Possible

A simple example, using the facts here, proves that the record contains the needed evidence and the ease by which a periodic payment order could have been crafted under the Periodic Payment Statute and *Detrick*. This example assumes: (a) no settlement credit applies to the jury finding on Future Medical Damages; (b) the trial court under Step 1 above arrived at a \$5 million lump sum payment to pay

attorney fees, litigation expenses and health care costs to be incurred soon after trial; and (c) the trial court under Step 2 reduces the \$13,263,874.86 jury award by the \$5 million lump sum amount to arrive at a \$8,263,874.86 section 74.503(c) periodic payment amount.

The information contained in Fairchild's report contains *more than enough evidence* to allow the trial court to exercise its discretion under Step 3 to craft a section 74.503(d) periodic payment schedule of the \$8,263,874.86 amount.

First, the report's schedules contemplate projected expenses for each of the 32 years between 2017 and 2048 of Puente's life expectancy. This provides the basis to order 32 annual payments to meet the section 74.503(d)(3) and (4) requirements.

Second, the report contains annual totals for each of the seven categories of costs.⁴ With this the trial court had evidence to arrive at the total annual present value cost for each of the 32 years of Puente's life expectancy.⁵

Third, the inherently speculative nature of future damages coupled with the discretion afforded trial courts allowed for adjustment of the numbers to account for the jury verdict of about \$3 million less. After subtracting the \$5 million lump sum

⁴ Plaintiffs' trial exhibit 23 is attached at Tab F of the Appendix to Petition for Review and is attached hereto as Tab A of the Appendix. This contains annual amounts for each year between 2017 and 2048 for (1) Physician Services; (2) Therapeutic Services; (3) Supported Life Costs; (4) Medication; (5) Diagnostic Costs; (6) Equipment and Supplies; and (7) Other Acute Services.

⁵ The schedule attached as Tab B contains the annual costs of each of the seven categories of expenses for each year in the columns with headers highlighted in yellow. The column entitled "Annual Totals of 7 Categories of Care" contains the annual total, in present value, for these seven categories of costs.

payment from the jury verdict, the periodic payment amount is \$8,263,876.86. This is 51.4723621% of the \$16,054,975 present value amount in the report. The trial court’s discretion allowed it to arrive at 32 annual payments between 2017 and 2048 by multiplying each of the Annual Totals of 7 Categories of Care by 51.4723621% to arrive at the present value for the 32 periodic payments—as shown in the column entitled “Periodic Payments – 51.47236% of Fairchild Annual Totals” on Tab B.⁶

Fourth, the report contains the discount rate absent in *Detrick*. See Petition for Review Tab E at 2) (“The projected medical care costs were then discounted at a 2.03% rate of interest . . .”). With the discount rate, the annual present value numbers can easily be placed into future value with the 2.03% discount rate—as shown in the final column of Tab B entitled “Periodic Payments in Future Value.” This avoids the “double discount” concern raised in *Detrick*.⁷

Finally, this accounts for and gives weight to the specific amount of each of the seven categories of costs during Puente’s life. The Majority’s concern over Fairchild’s differing inflation rates is “much ado about nothing.” His report states that he took each category of cost and increased it by a 2.29% change in the Consumer Price Index and inflation factors to arrive at what he calls “projected

⁶ Rounding resulted in a slight difference. The column total of \$8,263,876.72 is \$0.14 less than the periodic payment amount.

⁷ The total of 32 future value payments is \$11,311,837.60 which is over \$3 million more than the \$8,263,874.86 periodic payment amount.

future medical care costs.” He then states that these projected costs were reduced to present value. Thus, the differing inflation factors are built-in present value numbers which were then adjusted to future value.

This example comports not only with the Periodic Payment Statute but also *Detrick*: (1) it accepts and is consistent with the jury’s \$13,263,874.86 finding of Future Medical Damages; (2) it arrives at a lump sum amount consistent with factors stated in *Detrick*; (3) it allocates the Future Medical Damages between the lump sum amount and the periodic payment amount; (4) it is based on evidence in the record—Fairchild’s report which was admitted in evidence; and (5) it insures no double discount by arriving at future values of the periodic payments based on the same discount rate used by Fairchild. Hence, section 74.503(a) required a periodic payment order and the trial court’s failure to make such an order was an abuse of discretion.

CONCLUSION AND PRAYER

Sections 31.012 and 74.503(a) required both a settlement credit equal to C.P.’s settlement *and* a periodic payment order. The evidence to fashion the latter is in the record and the statute accords the trial court discretion to do so. The trial court’s failures to credit C.P.’s settlement against the judgment and to make a periodic payment order was error requiring correction.

Respectfully submitted,

By: /s/ Michael W. Eady

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Rules 28.3(g) and 9.4(i)(2)(D) because it contains 4,457 words, excluding any parts exempted by Rule 9.4(i)(1).

/s/ Michael W. Eady
Michael W. Eady

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served on all parties in accordance with the Texas Rules of Civil Procedure and the local rules on this the 18th day of June, 2021.

/s/ Michael W. Eady
Michael W. Eady

APPENDIX TAB A

Plaintiffs' Trial Exhibit 23

**SUPPLEMENTAL ASSESSMENT OF THE
FUTURE LIFE CARE PLAN COSTS OF
JO ANN PUENTE**

PENGAD 600-631-6999

**PLAINTIFF'S
EXHIBIT**

23

**ANNUAL TOTALS OF ROUTINE OUTPATIENT PHYSICIAN SERVICES COSTS
JO ANN PUENTE**

<u>Year</u>	<u>Projected Costs</u>	<u>Present Value</u>	<u>Cumulative Present Value</u>
2017	721	721	721
2018	2,614	2,573	3,294
2019	2,699	2,604	5,898
2020	2,787	2,636	8,534
2021	2,878	2,667	11,201
2022	2,972	2,700	13,901
2023	3,069	2,732	16,633
2024	3,169	2,765	19,398
2025	3,272	2,799	22,197
2026	3,379	2,833	25,030
2027	3,489	2,867	27,897
2028	3,603	2,902	30,798
2029	3,720	2,937	33,735
2030	3,842	2,972	36,707
2031	3,967	3,008	39,715
2032	4,096	3,045	42,760
2033	4,230	3,081	45,841
2034	4,368	3,119	48,960
2035	4,510	3,156	52,116
2036	4,658	3,195	55,311
2037	4,810	3,233	58,544
2038	4,966	3,272	61,816
2039	5,128	3,312	65,128
2040	5,296	3,352	68,480
2041	5,469	3,392	71,872
2042	5,647	3,433	75,306
2043	5,831	3,475	78,781
2044	6,021	3,517	82,298
2045	6,218	3,560	85,858
2046	6,421	3,603	89,460
2047	6,630	3,646	93,106
2048	2,645	1,426	94,532
Total = \$	133,122	\$ 94,532	

**ANNUAL TOTALS OF THERAPEUTIC SERVICES COSTS
JO ANN PUENTE**

Year	Projected Costs	Present Value	Cumulative Present Value
2017	3,387	3,387	3,387
2018	7,959	7,835	11,222
2019	5,482	5,290	16,511
2020	4,297	4,064	20,575
2021	3,552	3,292	23,868
2022	3,639	3,306	27,174
2023	3,729	3,320	30,494
2024	3,821	3,335	33,829
2025	3,915	3,349	37,178
2026	4,012	3,363	40,541
2027	4,110	3,377	43,918
2028	4,212	3,392	47,310
2029	4,315	3,406	50,717
2030	4,422	3,421	54,138
2031	4,531	3,436	57,573
2032	4,642	3,450	61,023
2033	4,757	3,465	64,488
2034	4,874	3,480	67,968
2035	4,994	3,495	71,462
2036	5,117	3,509	74,972
2037	5,243	3,524	78,496
2038	5,372	3,539	82,036
2039	5,504	3,555	85,590
2040	5,640	3,570	89,160
2041	5,779	3,585	92,745
2042	5,921	3,600	96,345
2043	6,067	3,616	99,961
2044	6,217	3,631	103,592
2045	6,370	3,647	107,239
2046	6,527	3,662	110,901
2047	6,687	3,678	114,579
2048	2,647	1,427	116,005
Total = \$	157,739	\$ 116,005	

**ANNUAL TOTALS OF SUPPORTED LIFE CARE COSTS
JO ANN PUENTE**

<u>Year</u>	<u>Projected Costs</u>	<u>Present Value</u>	<u>Cumulative Present Value</u>
2017	81,714	81,714	81,714
2018	298,542	293,898	375,612
2019	310,782	299,867	675,479
2020	323,524	305,956	981,435
2021	336,788	312,170	1,293,605
2022	350,596	318,509	1,612,114
2023	364,970	324,977	1,937,091
2024	379,934	331,576	2,268,667
2025	395,511	338,310	2,606,977
2026	411,727	345,180	2,952,157
2027	428,607	352,190	3,304,347
2028	446,180	359,342	3,663,689
2029	464,473	366,639	4,030,328
2030	483,516	374,085	4,404,413
2031	503,340	381,682	4,786,095
2032	523,976	389,432	5,175,527
2033	545,459	397,341	5,572,868
2034	567,822	405,410	5,978,278
2035	591,103	413,643	6,391,921
2036	615,338	422,043	6,813,963
2037	640,566	430,613	7,244,577
2038	666,829	439,358	7,683,935
2039	694,168	448,280	8,132,215
2040	722,629	457,384	8,589,599
2041	752,256	466,672	9,056,271
2042	783,098	476,149	9,532,420
2043	815,204	485,818	10,018,238
2044	848,627	495,684	10,513,922
2045	883,420	505,750	11,019,672
2046	919,640	516,021	11,535,693
2047	957,344	526,500	12,062,192
2048	384,986	207,518	12,269,710
Total = \$	<u>17,492,670</u>	<u>\$ 12,269,710</u>	

**ANNUAL TOTALS OF MEDICATION COSTS
JO ANN PUENTE**

<u>Year</u>	<u>Projected Costs</u>	<u>Present Value</u>	<u>Cumulative Present Value</u>
2017	2,949	2,949	2,949
2018	10,731	10,564	13,514
2019	11,126	10,736	24,249
2020	11,536	10,910	35,159
2021	11,962	11,088	46,247
2022	12,404	11,269	57,516
2023	12,863	11,453	68,969
2024	13,339	11,641	80,610
2025	13,834	11,833	92,443
2026	14,347	12,028	104,472
2027	14,880	12,227	116,699
2028	15,433	12,430	129,128
2029	16,008	12,636	141,765
2030	16,605	12,847	154,611
2031	17,224	13,061	167,672
2032	17,867	13,279	180,951
2033	18,535	13,502	194,453
2034	19,228	13,728	208,181
2035	19,948	13,959	222,140
2036	20,695	14,194	236,335
2037	21,471	14,434	250,769
2038	22,277	14,678	265,447
2039	23,114	14,927	280,373
2040	23,983	15,180	295,553
2041	24,886	15,438	310,992
2042	25,823	15,701	326,693
2043	26,796	15,969	342,662
2044	43,027	25,132	367,794
2045	54,622	31,271	399,065
2046	56,714	31,823	430,887
2047	58,887	32,385	463,273
2048	23,620	12,732	476,004
Total =	\$ 696,736	\$ 476,004	

**ANNUAL TOTALS OF DIAGNOSTICS COSTS
JO ANN PUENTE**

<u>Year</u>	<u>Projected Costs</u>	<u>Present Value</u>	<u>Cumulative Present Value</u>
2017	729	729	729
2018	2,623	2,582	3,311
2019	2,687	2,593	5,904
2020	2,753	2,604	8,508
2021	2,821	2,615	11,123
2022	2,891	2,626	13,749
2023	2,962	2,637	16,386
2024	3,035	2,649	19,035
2025	3,110	2,660	21,695
2026	3,186	2,671	24,366
2027	3,265	2,683	27,049
2028	3,345	2,694	29,743
2029	3,428	2,706	32,449
2030	3,512	2,717	35,166
2031	3,599	2,729	37,894
2032	3,687	2,740	40,635
2033	3,778	2,752	43,387
2034	3,871	2,764	46,151
2035	3,966	2,776	48,926
2036	4,064	2,787	51,714
2037	4,164	2,799	54,513
2038	4,267	2,811	57,325
2039	4,372	2,823	60,148
2040	4,480	2,835	62,983
2041	4,590	2,847	65,831
2042	4,703	2,860	68,690
2043	4,819	2,872	71,562
2044	5,394	3,151	74,713
2045	5,822	3,333	78,046
2046	5,965	3,347	81,393
2047	6,112	3,362	84,755
2048	2,419	1,304	86,059
Total = \$	<u>120,420</u>	<u>\$ 86,059</u>	

**ANNUAL TOTALS OF EQUIPMENT & SUPPLIES COSTS
JO ANN PUENTE**

<u>Year</u>	<u>Projected Costs</u>	<u>Present Value</u>	<u>Cumulative Present Value</u>
2017	2,322	2,322	2,322
2018	8,308	8,179	10,501
2019	8,469	8,172	18,673
2020	8,634	8,165	26,838
2021	8,802	8,159	34,997
2022	8,974	8,152	43,149
2023	9,149	8,146	51,295
2024	9,328	8,140	59,435
2025	9,510	8,135	67,570
2026	9,697	8,129	75,699
2027	9,887	8,124	83,823
2028	10,081	8,119	91,943
2029	10,280	8,114	100,057
2030	10,482	8,110	108,167
2031	10,689	8,106	116,272
2032	10,900	8,101	124,374
2033	11,116	8,098	132,471
2034	11,336	8,094	140,565
2035	11,561	8,090	148,655
2036	11,791	8,087	156,743
2037	12,025	8,084	164,827
2038	12,265	8,081	172,908
2039	12,510	8,078	180,986
2040	12,759	8,076	189,062
2041	13,015	8,074	197,136
2042	13,275	8,072	205,208
2043	13,541	8,070	213,277
2044	13,819	8,072	221,349
2045	14,100	8,072	229,421
2046	14,384	8,071	237,492
2047	14,674	8,070	245,562
2048	5,783	3,117	248,679
Total = \$	<u>343,466</u>	<u>\$ 248,679</u>	

**ANNUAL TOTALS OF INPATIENT/OTHER ACUTE CARE SERVICES COSTS
JO ANN PUENTE**

<u>Year</u>	<u>Projected Costs</u>	<u>Present Value</u>	<u>Cumulative Present Value</u>
2017	15,030	15,030	15,030
2018	55,929	55,059	70,089
2019	38,588	37,233	107,322
2020	27,251	25,771	133,093
2021	28,893	26,781	159,874
2022	30,634	27,831	187,705
2023	32,481	28,922	216,626
2024	34,438	30,055	246,682
2025	36,514	31,233	277,915
2026	38,715	32,457	310,372
2027	41,048	33,730	344,102
2028	43,522	35,052	379,154
2029	46,145	36,426	415,579
2030	48,927	37,853	453,433
2031	51,876	39,337	492,770
2032	55,002	40,879	533,649
2033	58,317	42,481	576,130
2034	61,832	44,146	620,277
2035	65,559	45,877	666,153
2036	69,510	47,675	713,829
2037	73,700	49,544	763,372
2038	78,142	51,486	814,858
2039	82,851	53,504	868,362
2040	87,845	55,601	923,963
2041	93,139	57,780	981,743
2042	98,753	60,045	1,041,788
2043	104,705	62,399	1,104,187
2044	441,817	258,066	1,362,253
2045	689,212	394,568	1,756,820
2046	730,740	410,027	2,166,847
2047	774,770	426,091	2,592,938
2048	317,328	171,048	2,763,986
Total = \$	4,453,214	\$ 2,763,986	

APPENDIX TAB B

Periodic Payment Table Example

Year	Annual Amounts for 7 Categories of Care							Annual Totals of 7 Categories of Care	Periodic Payments – 51.47236% of Fairchild Annual Totals	Periodic Payments in Future Value With 2.03% Discount Rate
	Outpatient Physician Services	Therapeutic Services	Supported Life Care	Medications	Diagnostics	Equipment & Supplies	Inpatient/Other Acute Care			
2017	\$721.00	\$3,387.00	\$81,714.00	\$2,949.00	\$729.00	\$2,322.00	\$15,030.00	\$106,852.00	\$54,999.25	\$54,999.25
2018	\$2,573.00	\$7,835.00	\$293,898.00	\$10,564.00	\$2,582.00	\$8,179.00	\$55,059.00	\$380,690.00	\$195,950.14	\$199,927.93
2019	\$2,604.00	\$5,290.00	\$299,867.00	\$10,736.00	\$2,593.00	\$8,172.00	\$37,233.00	\$366,495.00	\$188,643.64	\$196,302.57
2020	\$2,636.00	\$4,064.00	\$305,956.00	\$10,910.00	\$2,604.00	\$8,165.00	\$25,771.00	\$360,106.00	\$185,355.07	\$196,643.19
2021	\$2,667.00	\$3,292.00	\$312,170.00	\$11,088.00	\$2,615.00	\$8,159.00	\$26,781.00	\$366,772.00	\$188,786.22	\$204,115.66
2022	\$2,700.00	\$3,306.00	\$318,509.00	\$11,269.00	\$2,626.00	\$8,152.00	\$27,831.00	\$374,393.00	\$192,708.93	\$212,268.88
2023	\$2,732.00	\$3,320.00	\$324,977.00	\$11,453.00	\$2,637.00	\$8,146.00	\$28,922.00	\$382,187.00	\$196,720.68	\$220,681.26
2024	\$2,765.00	\$3,335.00	\$331,576.00	\$11,641.00	\$2,649.00	\$8,140.00	\$30,055.00	\$390,161.00	\$200,825.09	\$229,362.34
2025	\$2,799.00	\$3,349.00	\$338,310.00	\$11,833.00	\$2,660.00	\$8,135.00	\$31,233.00	\$398,319.00	\$205,024.21	\$238,320.14
2026	\$2,833.00	\$3,363.00	\$345,180.00	\$12,028.00	\$2,671.00	\$8,129.00	\$32,457.00	\$406,661.00	\$209,318.03	\$247,560.43
2027	\$2,867.00	\$3,377.00	\$352,190.00	\$12,227.00	\$2,683.00	\$8,124.00	\$33,730.00	\$415,198.00	\$213,712.23	\$257,095.81
2028	\$2,902.00	\$3,392.00	\$359,342.00	\$12,430.00	\$2,694.00	\$8,119.00	\$35,052.00	\$423,931.00	\$218,207.31	\$266,933.00
2029	\$2,937.00	\$3,406.00	\$366,639.00	\$12,636.00	\$2,706.00	\$8,114.00	\$36,426.00	\$432,864.00	\$222,805.33	\$277,080.71
2030	\$2,972.00	\$3,421.00	\$374,085.00	\$12,847.00	\$2,717.00	\$8,110.00	\$37,853.00	\$442,005.00	\$227,510.42	\$287,550.42
2031	\$3,008.00	\$3,436.00	\$381,682.00	\$13,061.00	\$2,729.00	\$8,106.00	\$39,337.00	\$451,359.00	\$232,325.15	\$298,351.95
2032	\$3,045.00	\$3,450.00	\$389,432.00	\$13,279.00	\$2,740.00	\$8,101.00	\$40,879.00	\$460,926.00	\$237,249.51	\$309,491.98
2033	\$3,081.00	\$3,465.00	\$397,341.00	\$13,502.00	\$2,752.00	\$8,098.00	\$42,481.00	\$470,720.00	\$242,290.71	\$320,986.74
2034	\$3,119.00	\$3,480.00	\$405,410.00	\$13,728.00	\$2,764.00	\$8,094.00	\$44,146.00	\$480,741.00	\$247,448.76	\$332,843.32
2035	\$3,156.00	\$3,495.00	\$413,643.00	\$13,959.00	\$2,776.00	\$8,090.00	\$45,877.00	\$490,996.00	\$252,727.25	\$345,073.78
2036	\$3,195.00	\$3,509.00	\$422,043.00	\$14,194.00	\$2,787.00	\$8,087.00	\$47,675.00	\$501,490.00	\$258,128.76	\$357,689.02
2037	\$3,233.00	\$3,524.00	\$430,613.00	\$14,434.00	\$2,799.00	\$8,084.00	\$49,544.00	\$512,231.00	\$263,657.40	\$370,702.31
2038	\$3,272.00	\$3,539.00	\$439,358.00	\$14,678.00	\$2,811.00	\$8,081.00	\$51,486.00	\$523,225.00	\$269,316.28	\$384,125.81
2039	\$3,312.00	\$3,555.00	\$448,280.00	\$14,927.00	\$2,823.00	\$8,078.00	\$53,504.00	\$534,479.00	\$275,108.98	\$397,972.65
2040	\$3,352.00	\$3,570.00	\$457,384.00	\$15,180.00	\$2,835.00	\$8,076.00	\$55,601.00	\$545,998.00	\$281,038.08	\$412,254.76
2041	\$3,392.00	\$3,585.00	\$466,672.00	\$15,438.00	\$2,847.00	\$8,074.00	\$57,780.00	\$557,788.00	\$287,106.67	\$426,985.04
2042	\$3,433.00	\$3,600.00	\$476,149.00	\$15,701.00	\$2,860.00	\$8,072.00	\$60,045.00	\$569,860.00	\$293,320.41	\$442,180.52
2043	\$3,475.00	\$3,616.00	\$485,818.00	\$15,969.00	\$2,872.00	\$8,070.00	\$62,399.00	\$582,219.00	\$299,681.88	\$457,853.98
2044	\$3,517.00	\$3,631.00	\$495,684.00	\$25,132.00	\$3,151.00	\$8,072.00	\$258,066.00	\$797,253.00	\$410,364.97	\$635,286.00
2045	\$3,560.00	\$3,647.00	\$505,750.00	\$31,271.00	\$3,333.00	\$8,072.00	\$394,568.00	\$950,201.00	\$489,090.92	\$767,090.19
2046	\$3,603.00	\$3,662.00	\$516,021.00	\$31,823.00	\$3,347.00	\$8,071.00	\$410,027.00	\$976,554.00	\$502,655.43	\$798,568.68
2047	\$3,646.00	\$3,678.00	\$526,500.00	\$32,385.00	\$3,362.00	\$8,070.00	\$426,091.00	\$1,003,732.00	\$516,644.59	\$831,281.14
2048	\$1,426.00	\$1,427.00	\$207,518.00	\$12,732.00	\$1,304.00	\$3,117.00	\$171,048.00	\$398,572.00	\$205,154.43	\$334,258.11
TOTALS	\$94,532.00	\$116,005.00	\$12,269,710.00	\$476,004.00	\$86,059.00	\$248,679.00	\$2,763,986.00	\$16,054,975.00	\$8,263,876.72	\$11,311,837.60

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Ryan Wills on behalf of Michael Eady
Bar No. 06332400
rwills@thompsoncoe.com
Envelope ID: 54567357
Status as of 6/18/2021 2:30 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Delonda Dean		ddean@yettercoleman.com	6/18/2021 2:26:05 PM	SENT
Yetter Coleman		efile@yettercoleman.com	6/18/2021 2:26:05 PM	SENT
William Chriss	4222100	wjchrisspc@gmail.com	6/18/2021 2:26:05 PM	SENT
Brendan K. McBride	24008900	brendan.mcbride@att.net	6/18/2021 2:26:05 PM	SENT
Terry Thomas		tthomas@snapkalaw.com	6/18/2021 2:26:05 PM	SENT
Linda M. Wariner		linda.wariner@cooperscully.com	6/18/2021 2:26:05 PM	SENT
Elizabeth Brabb		ebrabb@thompsoncoe.com	6/18/2021 2:26:05 PM	SENT

Associated Case Party: Jesus Virlar

Name	BarNumber	Email	TimestampSubmitted	Status
R. Brent Cooper	4783250	brent.cooper@cooperscully.com	6/18/2021 2:26:05 PM	SENT

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

Name	BarNumber	Email	TimestampSubmitted	Status
Reagan Simpson	18404700	rsimpson@yettercoleman.com	6/18/2021 2:26:05 PM	SENT
Thomas R. Phillips	22	tom.phillips@bakerbotts.com	6/18/2021 2:26:05 PM	SENT
Diana L. Faust		diana.faust@cooperscully.com	6/18/2021 2:26:05 PM	SENT