

Cause No. 202378470

CARLOS RAFAEL HANDY AND § In The District Court of
MARIBEL HANDY §
§
v. § Harris County, Texas
§
HOUSTON METHODIST HOSPITAL, §
TMH PHYSICIAN ORGANIZATION, §
SHELLAISE DALISAY ALTRE, RN, §
BETHUNE EUSEBIO ESCALANTE, M.D., §
HOUSTON RADIOLOGY ASSOCIATED, §
THE BELCHMAN GROUP, LLC DBA §
AMITY HOME HEALTH, AND PEARL §
FORTUNE GALVEZ RN §
189TH Judicial District

**DEFENDANTS BETHUNE EUSEBIO ESCALANTE, M.D. AND HOUSTON
RADIOLOGY ASSOCIATED'S ORIGINAL ANSWER AND JURY DEMAND**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW BETHUNE EUSEBIO ESCALANTE, M.D. and HOUSTON
RADIOLOGY ASSOCIATED, two of the Defendants herein, and file this their Original
Answer and Jury Demand to Plaintiffs' Petition, and would respectfully show unto the
Court as follows:

I.

GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendants generally
deny all of Plaintiffs' allegations and will require strict proof thereof at the time of trial,
pursuant to the laws and Constitution of the State of Texas.

II.

Defendants specifically deny each allegation as it may pertain to them. Defendants committed no negligent act or omission, and, in any event, Defendants' conduct did not proximately result in the alleged injuries to Plaintiffs.

III.

In the unlikely event any party is found at fault, Defendants assert the defenses of comparative responsibility and contribution pursuant to Chapter 33, et seq. of the Texas Civil Practice and Remedies Code. Defendants ask that the trier of fact compare the responsibility of the parties and assign percentages of responsibility to the parties, and that any judgment rendered be done so pursuant to the rights of the contribution accorded Defendants in §33.011 et seq., subchapter B, Chapter 33 of the Texas Civil Practice and Remedies Code. Defendants furthermore reserve their right to make an election under §33.012 of the Texas Civil Practice and Remedies Code. Defendants specifically reserve this right with respect to settlements made by parties to this lawsuit as well as any non-parties to this lawsuit.

IV.

Pleading to the Court only, Defendants assert applicable limits in Texas Civil Practice and Remedies Code §74.301, limitation on non-economic damages. In the event TEX. CIV. PRAC. & REM. CODE §74.301 is stricken from Chapter 74 of the TEX. CIV. PRAC. & REM. CODE or invalidated by a method other than through legislative means, Defendants assert TEX. CIV. PRAC. & REM. CODE §74.302, alternative limitation on non-economic damages.

V.

Plaintiffs' claims are health care liability claims as defined by TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). Defendants are entitled to the instructions as set forth in TEX. CIV. PRAC. & REM. CODE § 74.303(e).

VI.

Pleading to the Court only, in the event applicable, Defendants reserve the right to seek periodic future payment of any medical, healthcare, custodial services, and other future damages including, but not limited to, those for physical pain, mental anguish, disfigurement, physical impairment, loss of consortium, and loss of earnings. TEX. CIV. PRAC. & REM. CODE §74.503.

VII.

Pleading further, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of pecuniary value, or loss of inheritance, the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law. TEX. CIV. PRAC. & REM. CODE § 18.091(a). If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the jury should be instructed as to whether any recovery for compensatory damages sought is subject to federal or state income taxes. TEX. CIV. PRAC. & REM. CODE § 18.091(b).

VIII.

Defendants specifically assert that to the extent that medical care for the Plaintiffs in connection with the injuries made the basis of this suit have been written off, in the

unlikely event that Plaintiffs obtain a judgment against Defendants, Defendants are entitled to a credit and/or offset for the total amount of such write-offs. Defendants assert that the measure of damages, if any, for medical expenses is limited to only those expenses actually paid or incurred by or on behalf of the Plaintiffs pursuant to TEX. CIV. PRAC. & REM. CODE § 41.0105. It is further asserted that TEX. CIV. PRAC. & REM. CODE § 41.0105 applies and precludes evidence or recovery of expenses neither Plaintiffs nor anyone else acting on their behalf will ever be liable for paying. *Haygood v. De Escobedo*, 356 S.W.3d 390 (Tex. 2011).

IX.

Pleading to the Court only, any claims for pre-judgment interest and/or any judgment for same are improper and unenforceable because, in a typical Texas jury charge, the jury is asked what sum of money, if paid now in cash, would fairly and reasonably compensate the Plaintiffs for the Plaintiffs' damages. Since the damages were incurred at some time prior to trial, but the jury is asked to assess the damages in present day dollars as of the date of trial, the jury has already presumptively factored in the time value of the money from the date of the injury to the date of the verdict. That is true because the jury's award is defined to include, by clear and unmistakable implication, the accrued interest on the damage amount up through the date of trial. Thus:

1. in awarding pre-judgment interest on top of the jury award, the court would be awarding Plaintiffs a double recovery on damages, if any;
2. the award of pre-judgment interest as a double recovery to Plaintiffs for alleged damages is violative of the Eighth Amendment to the

Constitution of the United States (as applied through the Fourteenth Amendment), as a potentially excessive fine;

3. the award of pre-judgment interest as a double recovery to Plaintiffs for alleged damages constitutes a taking of property from the defendants without due process of law or in due course of law, in violation of the equal protection rights of defendants and in contravention of the protections of same as contained in the Fourteenth Amendment to the Constitution of the United States, as well as the Texas Constitution.

X.

Pleading to the Court only, it is asserted that the applicable limits on exemplary damages imposed by TEX. CIV. PRAC. & REM. CODE § 41, et. seq. apply, specifically including the applicable limits imposed by § 41.008(a) & (b).

XI.

Defendants further invokes their rights under the Due Process Clause of the Fifth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment of the United States Constitution. Defendants affirmatively plead that the Plaintiffs' pleadings of punitive and/or exemplary damages are violative of the Due Process Clauses of the Fifth and Fourteenth Amendments inasmuch as punitive and/or exemplary damages can be assessed:

- a. in an amount left to the discretion of the jury and Judge;
- b. in assessing such sums the decision of the jury need only be based on a vote of ten jurors and does not require a unanimous verdict;
- c. in assessing such penalty or exemplary awards Plaintiff need only prove the theory of gross negligence on a preponderance of the evidence standard and not on a "beyond a reasonable doubt" standard as should be required in assessing a punishment award;

- d. further, the Defendants who are subject to the award does not have the right to refuse to testify against themselves but must in fact take the stand and/or give deposition testimony or subject themselves to the consequences of a default judgment;
- e. the assessment of such a punishment and/or exemplary award is not based upon a clearly defined statutory enactment setting forth a specific mens rea requirement and/or other prerequisites of a criminal fine and in effect allows the assessment of such awards even though there are no specific standards, limits or other statutory requirements set forth which define the mens rea and scope and limit of such awards. Therefore, the awards are unduly vague and do not meet the requirements of due process;
- f. in essence, the Defendants herein are subjected to all the hazards and risks of what amounts to a fine, and in fact such awards often exceed normal criminal fines, but the Defendants receive none of the basic rights accorded to a criminal defendant when being subjected to possible criminal penalties.

XII.

Further, if such be necessary, the Defendants affirmatively plead that the assessment and award of punitive and/or exemplary damages is violative of the Eighth Amendment of the United States Constitution as it is applied through the States through the Fourteenth Amendment of the United States Constitution in that such awards potentially constitute an excessive fine imposed without the protection of fundamental due process.

Accordingly, Defendants herein invoke their rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and respectfully request that this Court disallow the award of punitive and/or exemplary damages inasmuch as an award in this case would be violative of Defendants' United States Constitutional rights.

XIII.

Further, pleading to the court only, Defendants plead TEX. FIN. CODE §304.003 with regard to the proper statutory computation of post-judgment interest for health care liability claims. The pre-judgment interest rate is the same as the post-judgment interest rate pursuant to TEX. FIN. CODE §304.103. Pursuant to TEX. FIN. CODE §304.1045, pre-judgment interest is not recoverable on a finding, if any, of future damages found by the trier of fact.

XIV.

Defendants respectfully reserve the right to file an Amended Answer in this cause in the manner authorized by the Texas Rules of Civil Procedure, or by leave of the Court.

XV.

JURY DEMAND

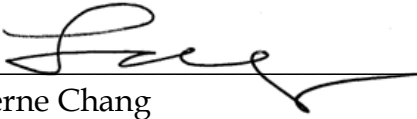
Defendants hereby request a jury trial, request that this matter be placed on the jury docket, and the requisite fee for same is tendered herewith.

PRAYER

WHEREFORE, PREMISES CONSIDERED, BETHUNE EUSEBIO ESCALANTE, M.D. and HOUSTON RADIOLOGY ASSOCIATED, two of the Defendants herein, respectfully pray that Plaintiffs take nothing from Defendants, that Defendants be discharged with their costs, and for such other and further relief both at law and in equity, to which they may be justly entitled.

Respectfully submitted,

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HOUSTON RADIOLOGY ASSOCIATED

CERTIFICATE OF SERVICE

This is to certify that on this 7 December 2023, a true and correct copy of the foregoing instrument was served upon Plaintiffs via ProDoc e-Filing and properly addressed to the individuals listed below and a true copy of said instrument has been promptly filed with the Court together with this proof of service. I further certify that I have complied with the provisions of Rules 21 and 21a of the Texas Rules of Civil Procedure.

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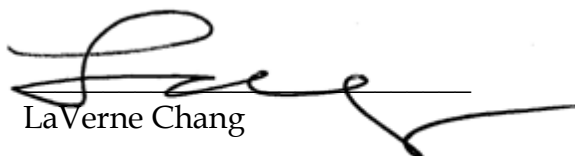
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LaVerne Chang on behalf of LaVerne Chang

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Filing Description: Answer of Bethune Escalante and Houston Radiology

Status as of 12/7/2023 12:24 PM CST

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