

CAUSE NO. CL-42,189-A

PEDRO J. KOWALYSZYN, MD.

Plaintiff

vs.

ARMANDO MONCADA, M.D. and
VALLEY HAND & PLASTIC
SURGERY, P.A.

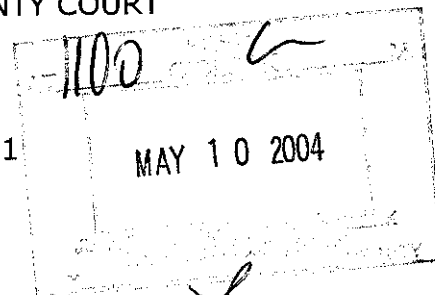
Defendants

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IN THE COUNTY COURT

AT LAW NO. 1

HIDALGO COUNTY, TEXAS



**DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER TO
PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ARMANDO MONCADA, M.D. AND VALLEY HAND & PLASTIC SURGERY, P.A., Defendants in the above-styled and numbered cause of action and files this their First Amended Original Answer to Plaintiff's, **PEDRO J. KOWALYSZYN, M.D.**, First Amended Original Petition, as filed in said cause, and for such Answer, would respectfully show unto the Court the following:

I.

General Denial

Defendants, **ARMANDO MONCADA, M.D., AND VALLEY HAND AND PLASTIC SURGERY, P.A.**, generally deny the allegations contained in Plaintiffs' First Amended Original Petition, each and every, all and singular, general and specific, and upon this denial demands a strict trial of the issues before the Court and to the jury.

II.

Affirmative Defenses

2.01 Defendants would show affirmatively that Plaintiff's recovery, if any, should be reduced pursuant to the comparative negligence, fault, responsibility, or causation of others pursuant to Section 33.001, et seq., of the Texas Civil Practice and Remedies Code.

2.02 For further answer, if such be necessary, Defendants further affirmatively allege that the acts or omissions of Plaintiff or other third parties were the sole proximate cause or a new and independent cause of the incident and injuries complained of in this lawsuit.

2.03 For further answer, if such be necessary, Defendants further affirmatively allege that Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to mitigate the effect of his injuries and damages as required by law.

2.04 Pleading in the alternative these Defendants would show the Court that Plaintiff suffered from pre-existing ailments, diseases, infirmities, medical, allergic, mental and psychological conditions, impairments, genetic and familial traits, factors, anxieties and stresses; and that his injuries, disabilities, infirmities and problems, if any, were caused by said pre-existing conditions.

2.05 Pleading further in the alternative, these Defendants plead the limitations of Texas Civil Practice and Remedies Code, Section 41.007 on any award of prejudgment interest on exemplary damages in this case.

2.06 Pleading further in the alternative, these Defendants would further show unto the Court that the claims for exemplary damages asserted by the Plaintiff herein

are in direct contravention of and are in violation of the Constitution of the United States and the Constitution of the State of Texas and the imposition of punitive damages against these Defendants would be fundamentally unfair for the following reasons:

- a. Any award of punitive damages will be arbitrary, unreasonable, excessive and in violation of Defendants' rights to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article 1 Section 13 and 19 of the Texas Constitution.
- b. This requires proof of gross negligence and punitive damages by a standard greater than "a preponderance of the evidence". Due process requires that punitive damages should be proved beyond a reasonable doubt, or in the alternative, be proved by a clear and convincing standard of proof.
- c. The assessment of punitive damages, a remedy that is essentially criminal in nature, without the safeguards greater than that afforded by Texas Rules of Civil Procedure in the law constitutes infliction of a criminal penalty without the safeguards guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States.
- d. Punitive damages under Texas Procedures and Law constitutes excessive fines in violation of the Eighth Amendment of the Constitution of the United States.
- e. It constitutes an attempt to take property of Defendant without due process of law and constitutes cruel and unusual punishment.

2.07 These Defendants further plead the limitations of Texas Civil Practice and Remedies Code, Section 41.008 which limits the amount of recovery of exemplary damages.

2.08 These Defendants further plead the limitations of Vernon's Annotated Civil Statute, Article 4590i, Sections 11.02, 11.03, and 11.04.

2.09 For further answer, if such be necessary, Defendants further affirmatively allege that if Plaintiff was injured as alleged, which is not admitted but is expressly

denied, such injuries were the result of an unavoidable accident.

2.10 For further answer, if such be necessary, Defendants further affirmatively allege that the act or omission of a person other than these Defendants were the sole proximate cause of the incident in question.

2.11 For further answer, if such be necessary, Defendants further affirmatively allege that if Plaintiff was injured as alleged, which is not admitted but is expressly denied, such injuries were caused or contributed to, in whole or in part, by a party through which these Defendants are not responsible.

2.12 For further answer, if such be necessary, Defendants further affirmatively allege that the acts or omissions of Plaintiffs or other third parties were the sole proximate cause or a new and independent cause of the incident and injuries complained of in this lawsuit.

2.13 For further answer, if such be necessary, Defendants further affirmatively allege that the damages in this case, if any, were proximately caused by the negligence of third parties and any recovery should be barred or diminished under the applicable provisions of the law.

2.14 For further answer, if such be necessary, Defendants further specifically deny that they are liable for prejudgment interest in this cause of action as pled by Plaintiff.

2.15 For further answer, if such be necessary, Defendants further affirmatively deny that they are liable for exemplary damages and plead affirmatively the provisions of Chapter 41, of the Texas Civil Practice & Remedies Code, including the provisions on applicability, standards for recovery, preclusions, prejudgment interest, and

limitations on amount.

2.16 For further answer, if such be necessary, Defendants further affirmatively allege the limitation on amount of recovery as set forth in §41.007 of the Texas Civil Practice & Remedies Code, limiting exemplary damages to four times the amount of actual damages or \$200,000.00, whichever is greater.

2.17 For further answer, if such be necessary, Defendants invoke the limitations within Sections 11.01 through 11.05 of Article 4590i of the Texas Revised Civil Statutes Ann. (Vernon Supp. 2001).

2.18 For further answer, if such be necessary, Defendants invoke the provisions of Article 4590i, Section 14.01 et. seq. Of the Texas Revised Civil Statutes Ann. (Vernon Supp. 2001).

2.19 For further answer, if such be necessary, Defendants invoke the provisions of Section 13.01 of Article 4590i of the Texas Revised Civil Statutes Ann. (Vernon Supp. 2001) pertaining to qualifications of expert witnesses and posting of a cost bond.

2.20 For further answer, if such be necessary, Defendants invoke the provisions of Section 13.01 of Article 4590i of the Texas Revised Civil Statutes Ann. (Vernon Supp. 2001) which requires Plaintiffs to post a cost bond as to each physician or health care provider; file an expert report that provides a fair summary of the expert's opinions regarding applicable standards of care, the manner in which the care rendered by Defendants failed to meet those standards, and the causal relationship, if any, between the failure alleged and the injury, harm or damages claimed.

2.21 For further answer, if such be necessary, Defendants invoke Section 16.01 et. seq. of Article 4590i of the Texas Revised Civil Statutes Ann. (Vernon Supp. 2001) pertaining to pre- and post judgment interest.

2.22 For further answer, if such be necessary, Defendants would allege that the alleged damages, if any claimed by the Plaintiffs are the result of unavoidable consequences, complications, known risks, and not due to any negligence on the part of the Defendants.

2.23 For further answer, if such be necessary, Defendants further affirmatively allege that Plaintiffs' claims and/or causes of action against Defendants are barred, in whole or in part, by the applicable statute of limitations.

2.24 Plaintiff has failed to satisfy all prerequisites to suit under TEX. REV. CIV. STAT. art. 4590i, Texas' Medical Liability and Insurance Improvement Act.

2.25 Full and proper notice of the substance of Plaintiffs' claims and the specifics of Plaintiffs' alleged loss or claim for damage was not properly or timely given to Defendant.

2.26 For further answer, if such be necessary, Defendants would allege that the alleged damages, if any claimed by the Plaintiffs are the result of unavoidable medical consequences and/or complications and risks of the surgery.


WHEREFORE, PREMISES CONSIDERED, Defendants, **ARMANDO MONCADA, M.D., AND VALLEY HAND AND PLASTIC SURGERY, P.A.**, pray that upon final hearing hereof, Plaintiff, **PEDRO J. KOWALYSZYN, M.D.**, recover nothing from this suit; that Defendants, **ARMANDO MONCADA, M.D., AND VALLEY HAND AND PLASTIC SURGERY, P.A.**, recover costs, expenses and fees; and for such other and further relief, general and

special, both at law and in equity, to which this Defendant may be justly entitled.

Respectfully submitted,

CARLA M. SAENZ & ASSOCIATES, P.L.L.C.

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BY: 
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**ATTORNEYS FOR DEFENDANT,
ARMANDO MONCADA, M.D. AND
VALLEY HAND & PLASTIC SURGERY, P.A.**

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the above and foregoing document has been sent on this 30th day of April, 2004, to all counsel of record, to wit:

Mr. Jaime Pena
Mr. Javier Pena
Clore, Pena & Berry, L.L.P.
Rio Grande Valley Office
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Edinburg, TX 78539

Via CM/RRR 7003 0500 0001 0995 5578

Attorneys for Plaintiff


CARLA SAENZ MARTINEZ