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THE “PAID OR INCURRED” BATTLE

In Texas, recoverable medical expenses were addressed in the 2003 “tort reform” legislation. Section 41.0105 of the Texas Civil Practice and Remedies Code changed the way in which courts and juries were to evaluate this element of damages.

Prior to the implementation of Section 41.0105, in the event of a verdict in favor of a Plaintiff, juries were asked to determine the amount of reasonable expenses for necessary medical care that the Plaintiff required as a result of the injury or occurrence in question. Under this scheme, Plaintiffs would generally file a copy of the billing records from their treating health care providers. They would also attach an affidavit from each health care provider stating the total amount of charges for the services provided and indicating that the medical services provided and the charges for such services were reasonable and necessary. The actual amount that the health care providers were paid for the services was not an issue.

Under Section 41.0105, Plaintiffs are entitled to recover only medical expenses “actually paid or incurred.” Thus, while the fees at issue must still be reasonable and necessary, the focus shifted, not on the total amount of the charges, but on the amount of those charges that were “actually paid or incurred” by the Plaintiff. In determining what expenses were “incurred,” the issue is whether or not “discounts” such as “write-offs” and/or contractual “adjustments” constitute medical expenses “incurred” by the Plaintiff.

MILLS V. FLETCHER

A recent San Antonio Court of Appeals case addressed this “paid or incurred” issue. In *Mills v. Fletcher*, the San Antonio Court of Appeals reversed a trial court’s ruling and ordered reduction of a jury award for past medical expenses to the amount actually paid by the Plaintiff’s insurance company, excluding any charges that had been “written off” by the provider. 229 S.W.3d 765 (Tex. App.--San Antonio 2007). This is the first opinion from a Texas Court of Appeals interpreting Tex. Civ. Prac. & Rem. Code 41.0105.

This case involved a personal injury lawsuit brought by Appellee, Kevin Fletcher, against Appellant, Alisa Mills. At trial, the jury awarded Fletcher \$ 1,551.00 in past medical expenses. On appeal, Mills argued that pursuant to Section 41.0105 of the Texas Civil Practice and Remedies Code, the amount of Fletcher’s award for past medical expenses should have been reduced. Mills stated that Fletcher’s medical providers accepted lesser amounts for their services from his health insurance company, thereby “writing off” the balance due from Fletcher. The Court agreed with Mills that Section 41.0105 requires such a reduction and reversed the trial court’s judgment.

DECISION OF THE SAN ANTONIO COURT OF APPEALS

The issue on appeal, and resolved by the opinion, involved the definition of the word “incurred.” Specifically, the issue presented was whether medical expenses which are written off by a provider are ever “actually incurred” for purposes of the statute. Mills cited common dictionary definitions of the word “incur,” which was defined by Black’s Law Dictionary to mean “to suffer or bring on oneself (a liability or expense).” Mills, therefore, argued that because Fletcher was no longer liable for the amount “written off,” this lesser figure should be what is “actually incurred,” for purposes of limiting his recovery and not the amount charged. The Court accepted this definition and this argument, and ordered the trial court to reduce the award accordingly.

The Court of Appeals acknowledged that its ruling was in direct violation of the collateral source rule, since it necessarily required evidence of insurance and other forms of recovery that reduced a Plaintiff’s expenses to the benefit of a Defendant. The theory behind the collateral source rule is that a wrongdoer should not receive the benefit of payments made by insurance independently procured by the injured party and to which the wrongdoer was not privy. The collateral source rule prevents a Defendant from presenting evidence about, or obtaining an offset for, funds received by the Plaintiff from someone other than the Defendant

The Court of Appeals explained that the legislature was the only one who had the power to abolish the collateral source rule and, by the plain language of the statute, had done just that. The Court of Appeals dismissed the legislative history relating to House Bill 4, and the legislature’s deletion or revision of previous versions of Sec. 41.0105, because the legislature found them to violate the collateral source rule. Fletcher argued this history was evidence of the legislature’s intent that the statute not violate the rule and should prevent the Court of Appeals from holding otherwise. The Court of Appeals, however, was adamant that the language in the section was clear and unambiguous; therefore, it was not required to even consider legislative history and intent.

HOW WILL THIS AFFECT CURRENT CASES?

If the trial courts are inclined to follow the *Mills* decision, and allow evidence of collateral sources, they will be forced to determine procedurally the best way to deal with this evidence. The three ways that this could be done are as follows:

1. The trial courts could rule that the collateral source rule has been completely abolished and allow a Defendant to present evidence about collateral sources or obtaining an offset for funds received by the Plaintiff from a collateral source to the jury;
2. The trial courts could allow the jury to only hear evidence of write offs; or
3. The trial courts could rule that the jury cannot hear any evidence of collateral sources or “write offs,” and give the Defendant a credit after the jury comes back with a verdict.

CONCLUSION

The decision of the San Antonio Court of Appeals in *Mills* is a good ruling for Defendants. It now gives Defendants some backing when trying to limit the Plaintiff's recovery for medical bills in personal injury cases. Trial judges now have case law to look at when making decisions on how to apply Section 41.0105. It appears that after this decision, Defendants will be able to argue to the Courts that they should not be liable for Plaintiff's medical bills that have been written off or contractually adjusted down.

It is important to note that the decision in *Mills* was a plurality decision. This means that a majority has concurred in the result but not in the reasoning. When this occurs, the reasoning of the plurality might not be binding in future cases. It is also important to note that the Court of Appeals did not consider legislative intent when making this decision. These are two arguments that Plaintiffs' attorneys will likely make in the future with respect to the *Mills* decision. That being said, the *Mills* decision is still an important decision for Defense attorneys arguing that the Defendants should not be liable for the amount of medical bills that have been or will be "written off."

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