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WHAT GOES UP MAY COME DOWN

The Texas Supreme Court heard argument on September 16, 2010, on an important case from Angelina County and the 12th District Court of Appeals, out of Tyler, Texas. The issue in *Aaron Glenn Haygood v. Margarita Garza de Escabedo, 09-3077,* is whether Section 41.0105 of the Texas Civil Practice and Remedies Code Section abolishes the collateral-source rule, either as (1) an evidentiary rule or (2) a damages rule when an injured person's initial medical expenses differ from those "actually paid or incurred" by that person or on his behalf.

TRIAL COURT BACKGROUND

Haygood filed a lawsuit against Escabedo for injuries he (Haygood) sustained in an automobile accident caused by Escabedo. Before trial, Escabedo filed a motion to exclude any evidence or testimony of any amount of medical or healthcare bills in excess of the amount actually paid or incurred by or on behalf of Haygood. She argued that such exclusion was required by Section 41.0105 of the Texas Civil Practice and Remedies Code.

Specifically, she argued that evidence relating to an improper measure of damages was irrelevant and constituted no evidence. She also argued that the only evidence Haygood had concerning medical care expenses was the testimony of his treating physicians, and the medical billing records affidavits. One of the treating physicians (and several of the medical billing records affidavits) readily admitted that the bills had been adjusted downward and that the medical providers had written off portions of those bills. Thus, Escabedo argued that any testimony or record regarding the ***total*** amount billed addressed an incorrect measure of damages, to the point that such testimony or record was irrelevant and inadmissible. Escabedo's motion was denied by the trial court.

At trial, Haygood was allowed to present evidence to the jury that his medical providers billed him a total of $110,069.12 for his medical care. No evidence of any reductions in these bills was allowed. This was so ***despite*** it being uncontested that portions of these bills paid by Medicare was only $14,482.02 and that the total amount for which Haygood was still liable was only $13,292.41. The remaining $82,294.69 had been written off by Haygood's providers as adjustments required by Medicare.

The jury returned a verdict finding Escabedo negligent and assessed Haygood's past medical care expenses at $110,069.12. The trial court signed a judgment awarding past medical care expenses in the full amount presented at trial.

COURT OF APPEALS REVIEW

The 12th District Court of Appeals, out of Tyler, Texas, took a hard look at the legal sufficiency of the evidence of past medical expense damages presented by Haygood at trial. This review was prompted by Escabedo arguing that "evidence relating to an improper measure of damages is irrelevant and constitutes no evidence of damages." She further argued "because the evidence admitted and considered by the jury related to the incorrect measure of damages, there was no evidence supporting the jury verdict (or the trial court's Judgment) with respect to past medical care expenses."

The court noted that the amount of damages to which a Plaintiff is entitled is a question of fact for the jury to decide. The proper *measure* used to determine this amount is a question of law for the trial court. The court noted that it is the role of the trial court to allow the admission of evidence related to the proper measure of damages, and to exclude, upon objection, evidence unrelated to this measure.

The court also cited case law indicating that where damages evidence does not relate to the amount of damages sustained under the proper measure of damages, that evidence is both irrelevant and legally insufficient to support a judgment.[1]

The court noted that the legislature enacted Section 41.0105 in 2003 as a part of tort reform legislation. By its express terms, it limits the recovery of medical care expenses incurred "to the amount *actually* paid or incurred by or on behalf of the claimant." The court felt that Section 41.0105 did not simply provide for the recovery of amounts initially incurred by the claimant. Specifically, amounts that a healthcare provider subsequently "writes off" its bill did not constitute amounts actually incurred by the claimant, or on his behalf, because neither the claimant (nor anyone acting on his behalf) will ultimately be liable for paying these amounts.

The court held that Section 41.0105, as a measure of damages, (1) not only limits the amount of damages recoverable, but also (2) affects the relevance of evidence offered to prove damages. As such, medical bills reflecting only the amount "initially incurred" and understood by the trial court and the parties to omit evidence of the amount "actually incurred," are *irrelevant* and should be excluded at trial. The court further held that the total medical bills were improperly admitted, and such evidence was legally insufficient in relation to the correct measure of damages, which is the amount actually paid or incurred by or on behalf of the claimant.

The court had a hard time swallowing the fact that there was no direct evidence before the jury of the amount actually paid or actually incurred by or on behalf of Haygood. Instead, the evidence showed only the amount initially incurred by Haygood. Thus, the court held that such evidence was legally insufficient to support the entire award of past medical care expense damages.

WHAT DOES THIS MEAN AND WHERE DO WE GO FROM HERE?

The Texas Supreme Court now has the opportunity to solidify the position that Section 41.0105 of the Texas Civil Practice and Remedies Code, as a measure of damages, (1) not only limits the amount of damages recoverable, but also (2) *affects the relevance of evidence offered to prove damages.* Should the Texas Supreme Court adopt this position, it will give the defense bar another avenue to attack the Plaintiff's past medical care expenses.

[1] *See Porras v. Craig,* 675 S.W.2d 503, 504-05 (Tex. 1984); *Matheus v. Sasser,* 164 S.W.3d 453, 463 (Tex. App.- Fort Worth 2005, no pet.).

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