



Passion. Preparation. Persistence.

Volume 8, Issue 13

THE BASSETT BULLETIN™

“PAID OR INCURRED” IS THE LAW: PLAINTIFFS CANNOT PUT ON EVIDENCE OF FACE AMOUNT OF MEDICAL BILLS

In a much anticipated decision the Texas Supreme recently resolved a huge question that has vexed Texas Courts ever since the statute limiting medical expenses to those actually paid or incurred went into effect. The Court ruled that claimants seeking damages for medical expense are limited by statute to the amounts *actually* paid or incurred by or for the claimant. More importantly, the *evidence* the claimant can introduce at trial is similarly limited.

The case is *Aaron Glenn Haygood v. Margarita Garza De Escabedo*, Dkt. 09-0377, (Tex. July 1, 2011), affirming *De Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App. Tyler 2009).

FACTS OF THE CASE

Aaron Glenn Haygood sued Margarita Garza De Escabedo for injuries he sustained when the car he was driving collided with Escabedo’s minivan as she was pulling out of a grocery store parking lot. Haygood’s injuries required surgeries on his neck and shoulder.

Haygood’s medical *bills* totaled \$110,069.12, but he was covered by Medicare Part B, which generally “pays no more for . . . medical and other health services than the ‘reasonable charge’ for such service.” 42 C.F.R. § 405.501(a). Because federal law prohibits health care providers who agree to treat Medicare patients from charging more than Medicare has determined to be reasonable, Haygood’s health care providers adjusted their bills with credits of \$82,329.69, leaving a total of \$27,739.43 that was either paid or incurred. At the time of trial, \$13,257.41 had actually been paid, and \$14,482.02 was due, still incurred. The Court noted that virtually all of what had been paid was by insurance.

Escabedo moved to exclude evidence of medical expenses other than those paid or owed, pursuant to section 41.0105. Haygood claimed that the “collateral source rule” (discussed below) means that he was entitled to evidence of the full amounts billed. The trial court agreed with Haygood, allowing evidence of the full amount of the bills. The jury awarded Haygood \$110,069.12 for past medical expenses and *also* awarded him lesser amounts for future medical expenses, past pain and mental anguish, and future pain and mental anguish.

The Tyler Court of Appeals reversed, holding that section 41.0105 limited not only the Plaintiff’s recovery of damages, as some other Courts have said, but also precluded *evidence* of expenses that neither the claimant nor anyone acting on his behalf paid or is actually liable for paying. Haygood appealed it to the Texas Supreme Court. The Supreme Court *affirmed* the reversal.

THE SUPREME COURT’S DECISION

A. The Expenses are Limited to Those Actually Paid or Incurred

The Court explained that charges for health care services are no longer tied to the provider’s costs or to a bargain between the provider and patient. They are now driven by government regulation and contracts with private insurers. This results in a two-tiered price structure. There is the full amount, sometimes charged to uninsured patients, but rarely ever collected. Then there is the reduced rate for patients covered by either government or private insurance. Either way, the service provider generally accepts much less than the face amount of the bill, writing off the balance.

The Court noted that providers generally bill insured patients at the full rate, reducing the amount actually accepted to the mandated or negotiated lower rate, leaving the uncollected balance as an adjustment or credit. Bills showing only the full, face amount of the bills have been, under pre-*Haygood* practice, admitted in evidence, with proof of reasonableness of the charges coming from testimony by the provider, or more often, by affidavit of the provider’s records custodian as permitted by section 18.001 of the Texas Civil Practice and Remedies Code.

The Court explained that compensatory damages, including medical expenses, “are intended to make the plaintiff ‘whole’ for any losses resulting from the defendant’s interference with the plaintiff’s rights.” Citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994). The *collateral source rule*, the Court said, is an exception to this rule. Citing RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1977). The collateral source rule allows a Plaintiff to be over compensated, beyond being merely made whole, due to other policy considerations.

The collateral source rule has long been a part of the common law of Texas. It has forbade any reduction in a tortfeasor’s liability because of benefits received by the plaintiff from someone else — a collateral source. Thus, for example, insurance payments to or for a plaintiff would not be credited to damages awarded against the defendant.

“The theory behind the collateral source rule is that a wrongdoer should not have the benefit of insurance independently procured by the injured party, and to which the wrongdoer was not privy.” Citing *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980).

While not outright doing away with the collateral source rule, the Court held that that an adjustment in billed medical charges required by an insurer is not covered by the rule. The Court defined the “benefit of insurance to the insured” as the “payment of charges owed to the health care provider.” The Court explains that the adjustment in the amount of those charges is a benefit *to the insurer* that it “obtains from the provider for itself, not for the insured.”

The Court added that the collateral source rule reflects “the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.” To impose liability on the Defendant for medical expenses that a health care provider is not entitled to charge – or will not be entitled collect, does not prevent a windfall to the tortfeasor; it creates one for a claimant. The common-law collateral source rule, the Court concludes, “does not allow recovery as damages of medical expenses a healthcare provider is not entitled to charge [to the claimant].”

The statute says: “In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” TEX. CIV. PRAC. & REM. CODE § 41.0105. The Court said the statute means exactly what it says.

The Court then tied the conclusion that section 41.0105 limits evidence of medical bills to another statute making introduction of medical bills simpler.

Section 18.001 of the Civil Practice and Remedies Code allows a Plaintiff to establish the reasonableness of medical charges by affidavit of the provider or records custodian, subject to objection by the Defendant. But, the Court countered, this statute is “purely procedural,” intended only to streamline proof of the reasonableness of medical expenses where these are not disputed. The statute does not establish that *billed* charges are actually reasonable.

B. Evidence is Similarly Limited

The thornier question the Court addressed was what evidence is actually admissible.

The rules of evidence state that “evidence which is not relevant is inadmissible.” The Court noted that this “includes evidence of a claim of damages that are not compensable.” Because a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is *irrelevant* to the issue of damages.

But the issue does not stop there. Even if irrelevant to past medical damages, might the face amount of the bill be otherwise relevant to something else? Does it provide an appropriate benchmark with which to gauge the seriousness of the plaintiff's injuries for other damages? If so, limiting the evidence of medical expenses unfairly limits those other damages. "But there is no unfairness if reimbursable amounts are reasonable for the services provided."

Haygood argued that this was still unfair because, if he were uninsured, his medical expenses would not be subject to adjustments or credits. This treats insured and uninsured claimants differently. But, concluded the Court, "any relevance of such evidence is substantially outweighed by the confusion it is likely to generate, and therefore the evidence must be excluded."

Haygood finally contended that the Legislature cannot have intended to limit evidence because it did not amend other portions of Chapter 41 dealing the charge to the jury. Had it intended this result, goes the argument, it would have required that the jury be instructed on this, too. But, as the Court decided, the jury is to receive only evidence relevant to damages; therefore no *further* instruction is needed.

The Court also addressed an issue raised by the dissenting opinion, which argued that evidence of expenses that were actually paid or are to be paid should be presented to the *court* post-verdict by the defendant. In other words, the limitation on recovery would be treated as another credit to be applied, much like settlements or damage caps are applied.

But, the Court explains, it is fundamental that "[t]o recover damages, the burden is on the *plaintiff* to produce evidence [of] the damages claimed resulted from the defendant's conduct." Citation omitted, emphasis added. Thus any rule that requires the *Defendant* to put on evidence of the amounts actually paid or incurred gets the burden backwards. It would mix together issues that cannot be meaningfully separated on appeal. This would deprive a Defendant of a fair opportunity to appeal.

The Court added finally that this result does not do away with the collateral source rule. The rule continues to apply, "and the jury should not be told that [medical expenses] will be covered in whole or in part by insurance. Nor should the jury be told that a health care provider adjusted its charges because of insurance."

WHAT DOES THIS MEAN?

The opinion alters the course of many injury trials, in which the common practice, even after the passage of section 41.0105, was to allow the jury to hear evidence of the full face amount of the bills. Even if the trial court later reduced the amounts awarded to a winning Plaintiff to the "paid or incurred" amount, the jury heard evidence of enormous amounts of damage, often offered by the affidavit of a doctor's office manager, that the Plaintiff would never recover.

This practice will now stop, leaving the jury to consider only what is actually paid (or incurred) as an index or benchmark of the Plaintiff's damages.

A concern for Plaintiffs not relevant to the Court's decision here is that an insurer charges a premium for its service and generally retains a contractual right of reimbursement. See, e.g., *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007). The Plaintiff remains on the hook for that. But this works no injustice.

It may be the case now that *nearly all* of the damages for medical expenses are owed by the Plaintiff to an insurer. In prohibiting any damages beyond that actually paid or incurred, the Court does not diminish the Plaintiff's ability to recover the amount he owes to the insurer, but prevents his being compensated for those damages *beyond* what was actually paid or still legitimately owed.

Haygood argued that this treats the insured unfairly. But the truly uninsured are in fact rare, and about to become even more rare if federal healthcare reforms stand up in court. Because the healthcare market is so closely tied to insurance and government compensation schemes, it makes little sense to pretend otherwise. In the vast majority of cases the actual price for medical care is what the provider is obligated, whether by law or contract, to accept, not the aspirational amount on the bill, that serves only as a marker for what is to be written off. The *Haygood* opinion recognizes this reality.



The Bassett Firm

**Two Turtle Creek Village
3838 Oak Lawn Avenue
Suite 1300
Dallas, Texas 75219
(214) 219-9900 Telephone
(214) 219-9456 Facsimile
Toll Free: 1-800-310-9769
www.thebassettfirm.com**

ATTORNEYS

- **MIKE H. BASSETT**
- **JENNIFER R. ASHMORE**
- **ROBERT L. MCGEE, JR.**
- **WILLIAM A. NEWMAN**
- **MICHAEL J. NOORDSY**
- **J. DANIEL OLIPHANT**
- **JOHN J. ROBERTS**
- **J. ANDREW ROBERTSON**
- **MATHEW SAMUEL**

Information regarding *The Bassett Bulletin* TM is available from Annie C. (acopeland@thebassettfirm.com) at (214) 219-9900. ©2004 The Bassett Firm. All rights reserved.

The Bassett Bulletin TM is published twenty-six times a year, and is a complimentary publication of The Bassett Firm.