

PETITION No. _____

TO THE SUPREME COURT OF TEXAS

IRVING HOLDINGS, INC.
AND ISAIAS TEWELDE

Petitioners

Vs.

HERMAN BROWN AND EMPLOYERS
INSURANCE OF WAUSAU

Respondents

PETITION FOR REVIEW

**A Petition For Review of the Decision
of the
Fifth Court of Appeal, Dallas
in
Case no. 05-06-01654-CV**

Submitted by:

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A. IDENTITY OF PARTIES AND COUNSEL

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D. STATEMENT OF THE CASE

This is a suit by Herman Brown for personal injuries sustained in a collision with a vehicle owned and operated by Petitioners (hereinafter collectively referred to as “Irving Holdings”). Employers Insurance of Wasau (hereinafter referred to as “Intervener”) brought a subrogation action to recover workers’ compensation insurance benefits which it paid to or for the benefit of Herman Brown. After the conclusion of the evidence, the jury returned a verdict, finding Brown 50% at fault in causing the accident in question and awarding total damages of \$119,000.00, including \$89,000.00 for medical expenses incurred in the past. Evidence presented to the Court established that the amount of medical expenses actually paid or incurred in the past was the amount of \$45,429.95. Following the verdict, Irving Holdings requested that the trial court reduce the award for past medical expenses to \$45,429.95 - the dollar amount actually paid or incurred by or on behalf of the Plaintiff - pursuant to Section 41.0105, Texas Civil Practice & Remedies Code, and then to make a further reduction of fifty (50%) percent for Brown’s negligence pursuant to Section 33.012, Texas Civil Practice & Remedies Code. The trial court declined to do this, and awarded judgment for Brown and the Intervener for 50% of the damages found by the jury, including \$44,500.00, or roughly 100%, of his actual past medical expenses. (See Appendix, Tab A). The Court of Appeals affirmed.

Judge Catherina Haynes, sitting as the Presiding Judge of the 191st Judicial District Court, Dallas County, Texas , signed the Judgment complained of. (Appendix, Tab A). The case was appealed to the Court of Appeals, Fifth District of Dallas. The panel in the Court of Appeals consisted of Justices Moseley, Francis, and Lang. Justice Moseley authored the unanimous opinion of the Court.(Appendix, Tab D). The opinion has been designated for publication, but the citation is not yet available. The Westlaw citation is 2009 WL 18713.

E. STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case pursuant to Section 22.001(a)(3), Texas Government Code, in that it involves the construction of statutes necessary to a determination of the case. The statutes involved are Sections 33.012 and 41.0105 of the Texas Civil Practice & Remedies Code. In addition, the Court has jurisdiction pursuant to Section 22.001(a)(6), in that it appears that an error of law has been committed by the Court of Appeals which is of such importance to the jurisprudence of the state that it requires correction.

F. ISSUE PRESENTED

_____ Whether the courts below erred in failing to reduce the jury's award of \$89,000.00 in past medical expenses to \$45,429.95 - the amount actually paid or incurred by or on behalf of the Plaintiff - pursuant to Section 41.0105, TX. CIVIL PRACTICE & REMEDIES CODE prior to application of the comparative negligence provisions of Section 33.012, TX. CIVIL PRACTICE & REMEDIES CODE, which would further reduce Plaintiff's recovery by Fifty (50%) percent due to the negligence attributed to the Plaintiff by the jury.

G. STATEMENT OF FACTS

The Court of Appeals correctly stated the nature of the case, except for its statement that Irving Holdings has not challenged the jury's finding for reasonable and necessary past medical expenses. While Irving Holdings did not controvert the affidavits of the Plaintiff establishing the reasonableness of the charges for medical care and the necessity of the services rendered, Irving Holdings disputes the finding of the jury on the ground that the sum of money which would fairly and reasonably compensate Herman Brown for his health care expenses cannot exceed the amount actually paid or incurred.

This is a personal injury case arising out of a collision between two vehicles. (Plaintiff's Original Petition, Clerk's Record, p. 7). The jury found the Plaintiff, Herman Brown, to be 50% responsible for the negligence which proximately caused the collision in question. Further, the jury made the following factual findings as to damages:

Medical Expenses in the Past	\$89,000.00
Lost Wages in the Past	20,000.00
Pain and Suffering in the Past	10,000.00

(Charge of the Court, Clerk's Record, pp. 45-49) (Tab E). The award of past medical expenses by the jury was based upon affidavits of reasonable and necessary charges filed by the Plaintiff pursuant to Section 18.001, Civil Practice & Remedies Code. (Plaintiff's Exhibits 1,3,5,7,8,9,10,11 and 12 in Exhibits, Volume 2; Plaintiff's Exhibits 15, 16,18,22,23 and 25 in Exhibits, Volume 3; and Plaintiff's Exhibits 28,29,30, and 32 in Exhibits, Volume 5). It is undisputed that these affidavits totaled approximately \$89,000.00.

During the trial, Irving Holdings tendered evidence, in a Bill of Exceptions, as to the dollar amount of health care expenses actually paid or incurred by Brown in the past. (Excerpt of Jury Trial, pp.30-37). The evidence established that: (1) Brown was acting within the course and scope of his employment at the time of the accident in question (Excerpt of Jury Trial, p. 33); (2) Brown made a workers' compensation claim for payment of his medical expenses(Excerpt from Jury Trial, p. 33), (3) the claim was not denied or disputed by his employer or the insurance carrier (Excerpt of Jury Trial, pp. 34-35); and (4) the amount of health care expenses actually paid by the workers' compensation insurance carrier for the health care expenses in question was \$45,429.95 (Defendant's Exhibits 2 and 6, Exhibits, Volume 5). No health care provider has ever requested that Brown pay any sums over and above what was paid by the Intervener (Excerpt of Jury Trial. p. 35). Irving Holdings requested that this evidence be submitted to the jury. Judge Haynes denied this request, indicating that she would consider this evidence post verdict if it became relevant. (Excerpt of Jury Trial, pp. 32, 34, and 37)

Following the verdict, Irving Holdings requested the trial court to disregard the jury's finding as to the dollar amount of health care expenses incurred by Brown in the past and to base the judgment upon sums actually paid or incurred by Brown in the amount of \$45,429.95. (Clerk's Record, p. 56). The Court did not grant the relief requested, but granted the motions for judgment filed by Brown and Intervener. The resulting judgment included damages for past health care expenses in the amount of \$44,500.00 (one-half of the \$89,000.00 established by the affidavits). (Final Judgment, Clerk's Record, pp. 62-63 and Appendix, Tab A).

Thereafter, Irving Holdings filed its Motion to Modify Judgment, again urging to the trial court that the past medical expenses should have been reduced to the amounts actually paid or incurred by or on behalf of Brown before a further reduction of recovery of such damages by 50% due to the negligence of Brown. This motion was denied by the trial court on October 27, 2006(Clerk's Record, p. 83).

The judgement of the trial court was affirmed by the Court of Appeals. The Court found that Section 41.0105, Texas Civil Practice & Remedies Code (Appendix, Tab C), placed a cap on Plaintiff's recovery of health care expenses and that, after the past medical expenses found by the jury in the amount of \$89,000.00 are reduced to \$44,500.00 due to the negligence of Brown, his recovery of medical expenses does not exceed the amounts actually paid or incurred in the amount of \$45,429.94. Petitioner believes that the \$89,000.00 award of past medical expenses should be reduced to the actual paid or incurred sum of \$45,429.94 before it is further reduced by 50% due to the negligence of Brown. This would result in an award of \$22,714.98 for medical expenses incurred in the past.

H. SUMMARY OF THE ARGUMENT

In this case, due to erroneous construction of applicable statutes by the courts below, Herman Brown has recovered judgment for 100% of his past medical expenses even though he was 50% at fault in causing his injuries and resulting damages. Conversely, Petitioner, Irving Holdings, Inc. has been found responsible for payment of 100% of the past medical expenses of Herman Brown, even though it was only 50% at fault in causing his injuries and resulting damages. In reaching this result, the courts below misconstrued the comparative fault provisions in our statutes and misapplied Section 41.0105 of the Texas Civil Practice & Remedies Code.

The comparative fault provision at Section 33.012(a), Civil Practice & Remedies Code (Appendix, Tab B) requires a trial court to first determine “the amount of damages to be recovered by the Claimant,” and then to reduce that by the percentage of negligence attributable to the Claimant. Under a plain reading of that statute, the trial court must first apply other principles of law to determine the correct “*amount of damages to be recovered by the Claimant.*”

Section 41.0105, Civil Practice & Remedies Code, limits recovery of medical and health care expenses to the amount actually paid or incurred by or on behalf of a Claimant.(Appendix, Tab C). Here, Herman Brown was covered by workers’ compensation insurance. The amount actually paid or incurred was \$45,429.94. With respect to health care expenses in the past, this would be “the amount of damages to be recovered by the Claimant” referred to in the first sentence of 33.012(a), Civil Practice & Remedies Code.

Applying Section 33.012(a), the trial court should have then reduced “the amount of damages to be recovered by the Claimant” by 50% for the negligence attributable to Brown. His resulting award for past medical expenses would then be \$22,714.97 rather than the \$44,500.00 awarded in the Judgment.

Applying the statutes in this way, harmonizes Section 41.0105 and Section 33.012(a), and gives effect to both. Further, applying the statutes in this way prevents Brown from obtaining a windfall by recovering 100% of his health care expenses when he was 50% at fault in causing his injuries. This was the result intended by the Legislature in adopting Section 41.0105.

I. ARGUMENT

1. . **The maximum amount of damages recoverable by Herman Brown for past health care expenses is \$45,429.94.**

a.. **Herman Brown lacks standing to seek damages in excess of \$45,429.94.**

Section 41.0105 of the Texas Civil Practice and Remedies Code (Appendix, Tab C) provides:

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.”

This statute is at the heart of this case.

In *Forth v. Allstate Indemnity Company*, 151 S.W.3d 732 (TX. App. Texarkana, 2004) reversed 204 S.W.3d 795 (April 21, 2006), Forth had brought a claim against her automobile insurance company under the *PIP* provisions of the policy. She had been billed for certain medical charges. Her insurance company had gone to the health care providers and negotiated an amount below the amount billed.

The insurance policy in question provided:

“Insuring Agreement

A. We will pay Personal Injury Protection Benefits because of bodily injury:

1. resulting from a motor vehicle accident; and
2. sustained by a covered person.

Our payment will only be for losses or expenses *incurred* within three years from the date of the accident.

B. Personal Injury Protection benefits consist of *reasonable expenses incurred* for necessary medical and funeral expenses.”*Id. at 737.*

Forth sued Allstate for recovery of the difference between the negotiated amount paid by Allstate to the providers and what Forth claimed to be the reasonable expenses incurred, i.e. the billed amount. Allstate challenged her standing to pursue the claim on the ground that Forth could not demonstrate actual or even threatened injury. *Id.* The Court of Appeals held that Forth had standing to pursue the claim, even though there was no possibility that Forth would ever have to pay anything in excess of the amounts paid by Allstate to the providers. *Id. at 738.* Specifically,

the Court of Appeals in *Forth* noted that the Supreme Court in *Black v. American Bankers Ins. Co.*, 478 S.W.2d 434 (Tex., 1972) had held that a charge was “incurred” at the time the medical services were rendered, even though a reduced amount is paid by Medicare at a later date. *Supra* 151 S.W.3d at 738.

Allstate appealed the decision to the Supreme Court and, in *Allstate Indemnity Company v. Forth*, 204 S.W.3d 795 (TX., 2006), this Court reversed the decision of the Court of Appeals. This Court distinguished *Black* and held that Forth lacked standing to make a claim for the unpaid medical expenses because there was no possibility that she would ever have to pay the medical charges in question.

It should be noted that Section 41.0105, Texas Civil Practice & Remedies Code, was not applicable at the time the *Allstate Indemnity Company* case was decided. However, this Court has since stated that Section 41.0105, limiting recovery of health care expenses to sums actually paid or incurred, was a “codification” of its decision in the *Allstate Indemnity Company* case. See *Daughters of Charity HealthServices vs. Linnstaedter*, 226 S.W.3d 409 (Tx., 2007) at p. 412, FN22.

Daughters of Charity HealthServices vs. Linnstaedter, 226 S.W.3d 409 (TX., 2007) was a case in which a hospital accepted payment from a worker’s compensation insurance carrier and then, after Linnstaedter, the injured worker, obtained a settlement on his third party injury claim, sought to enforce its hospital lien against the recovery from the third party for payment of charges that had not been paid by the worker’s compensation insurance carrier. It was held that the hospital was not entitled to enforce its lien against the settlement, stating: “To ensure full coverage for employees protected by workers’ compensation, the Texas Labor Code provides that hospitals ‘may not pursue a private claim against a workers’ compensation claimant’ for all or part of the costs of treatment. For several reasons, this provision bars not only lawsuits against such patients, but also liens against their assets.” 226 S.W.3d at 411 (citing Section 413,042(a), Texas Labor Code).

Therefore, it is clear that, under Texas law, Herman Brown does not owe, and can never be called upon to pay, any sums for past health care expenses in excess of the sums actually paid in the amount of \$45,429.94. Under both the *Allstate Indemnity Company* case and Section 41.0105, Brown wholly lacks standing to pursue a claim for past medical expenses in excess of that amount.

- b. **The recovery by Herman Brown of 100% of his past medical expenses when he was 50% at fault for causing his injuries and resulting damages violates the “one recovery rule” and provides him with a windfall recovery.**

Allstate Indemnity Company is similar to and consistent with cases discussing the “one recovery rule.” The “one recovery rule” was first espoused in *Bradshaw v. Baylor University*, 84 S.W.2d 703 (TX., 1935). In that case, Bradshaw sustained personal injuries when a Baylor University bus on which he was riding collided with a train. He settled for \$6,500.00 with the railroad company and continued his suit against Baylor. At trial, the jury found that \$6,500.00 would compensate him for his injuries. Since he had already received that amount in settlement, he was not entitled to any further recovery. The Court said: “It is a rule of general acceptance that an injured party is entitled to but one satisfaction for the injuries sustained by him.” 84 S.W.2d at 705.

In *Stewart Title Guaranty Company vs. Sterling*, 822 S.W.2d 1 (TX., 1992) this Court again addressed the “one recovery rule.” There, it was contended that this Court’s decision in *Duncan vs. Cessna Aircraft Co.*, 665 S.W.2d 414 (TX., 1984) (which adopted a common law comparative causation scheme for cases involving strict products liability and breach of warranty) rejected the “one recovery rule” set forth in *Bradshaw*. The Court in *Stewart Title* said that *Duncan* did not abolish the one recovery rule but merely modified the method in which the rule would apply to specific cases. The Court said:

In *Duncan*, we did not authorize double recovery. Rather, we observed that the problem of double recovery can be avoided when comparative fault issues are submitted against a nonsettling Defendant. Because there is no comparative fault allocation for intentional torts, the problem of double recovery remains, and thus principles of equity demand some form of damage adjustment mechanism. There is no reason we would allow a windfall recovery in cases involving multiple Defendants when double recovery is clearly prohibited against a single Defendant. (citing *Mayo vs. John Hancock Mutual Life Insurance Co.*, 711 S.W.2d 5,7 (Tex., 1986) and *American Baler Co. v. SRS Systems, Inc.*, 748 S.W.2d 243,246 (Tex. App - Houston, 1988, writ denied)(explaining *Mayo*).

Id. at 6. The Court held that the one satisfaction rule applies to prevent a plaintiff from obtaining more than one recovery for the same injury.

This Court has frowned upon any effort by any Plaintiff to recover a windfall. In *Battaglia vs. Alexander*, 177 S.W.3d 893 (TX., 2005), Plaintiffs’ brought suit against multiple health care

providers. A number of the providers settled before trial. The jury awarded total damages in the amount of \$1,440,000 for past damages and the parties stipulated to \$57,113.05 additional past damages, for total past damages of \$1,497,113. Following the return of a verdict, the non-settling Defendants claimed that the entire amount of settlement credits should be applied to the jury award of past damages before calculating pre-judgment interest. If that had been done, there would have been no pre-judgment interest because the settlement amount exceeded the past damages found by the jury. However, the trial court calculated pre-judgment interest on the entire award before applying the settlement credits. The resulting award of pre-judgment interest was \$367,498.05. The Supreme Court reversed this decision.

In reaching this conclusion, the Court, citing a number of its prior cases, reasoned that “interest” is compensation allowed by law as additional damages for loss of use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment. **Id.** at 907. Compensation other than for loss of use of the money would be a windfall (from the Plaintiff’s perspective) or a penalty or fine (from the Defendant’s perspective), but would not be “interest” **Id.** at 907. Therefore, to award interest, no more and no less, it was necessary to reduce Plaintiff’s recovery by settlement credits before calculating prejudgment interest on the balance.

Likewise, in the case at bar, compensation of Plaintiff for medical expenses in excess of the amount actually paid or incurred by Herman Brown, would be a windfall from his perspective and a penalty or fine from the Defendant’s perspective. In *Battaglia*, this Court said:

Our examination of (the statute relating to pre-judgment interest) reveals other incongruous results if we were to accept the (Plaintiffs’) ... construction of that provision. A claimant’s proportionate responsibility would have no effect on the amount of prejudgment interest a defendant owed. The (Plaintiffs’) reading of Section 16.02 would mean that even when a claimant is comparatively negligent, the judgment must still award the claimant prejudgment interest on 100% of “the past damages found by the trier of fact” even though the claimant is barred from recovering a portion of those damages. For example, if a jury found past damages of \$1,000,000 but also found the claimant 20% responsible, the claimant would recover prejudgment interest on \$1,000,000 even though her recovery of past damages would be limited to \$800,000 under former section 33-012(a) of the Civil Practice and Remedies Code.

177 S.W.3d at 909-910. The Supreme Court rejected the Plaintiff's attempt to gain a windfall, and its rationale is equally applicable to the case at bar. Any other construction of the applicable statutes results in a windfall to the Plaintiff, and should not be permitted. The Legislative intent in passing **Section 41.0105** of the Civil Practice and Remedies Code was to limit recovery of past medical expenses to amounts actually paid or incurred - no more and no less. This intent should not be frustrated by such a construction of this provision. A claimant who is 50% at fault in causing his injuries should not recover 100% of his actual medical expenses.

To paraphrase the Court in *Duncan*, principles of equity demand some form of adjustment mechanism to prevent the injustice of permitting Brown to recover 100% of his medical expenses when he was 50% responsible for his injuries. The Legislature has provided that mechanism with Section 41.0105, Civil Practice and Remedies Code, combined with the comparative fault provision set forth in Section 33.012. The medical expenses need to be reduced to the amount actually paid or incurred, and then further reduced for Brown's 50% comparative fault under Section 33.012.

The Courts of Appeals that have dealt with Section 41.0105, have unanimously agreed that Section 41.0105 sets forth the maximum amount a Plaintiff can recover for past health care expenses. In *Mills v. Fletcher*, 229 S.W.3d 765 (TX. App. - San Antonio, 2007), the Court of Appeals directly addressed Section 41.0105 of the Civil Practice and Remedies Code. There, the personal injury Plaintiff contended that he "incurred" the medical charges at the time of his doctor visit. The Defendant contended however, that these expenses were not "incurred" within the meaning of Section 41.0105 because the doctor had written off or adjusted his charges. The Court of Appeals held that the charges which had been written off had not been "actually incurred" within the meaning of Section 41.0105. The Eastland Court of Appeals reached the same result in *Matbon, Inc. vs. Gries*, 2009 WL 94310 (decided January 15, 2009) (not yet released for publication). There, the Court held that Section 41.0105 precluded a Plaintiff from recovering for charges that have been written off by a health care provider. *Id.* at 5. The Court noted that its interpretation of the statute comports with the policy that tort damages are designed to make the victim whole. (citing *Transp. Ins. Co. vs. Morial*, 879 S.W.2d 10 (TX., 1994))

It is clear, under Texas law, that Brown did not "actually incur" any medical charges in excess of the amounts actually paid by the Intervener, and that was the sum of \$45,429.94. That was the maximum amount Brown could recover for medical expenses and is the amount that

would have been recoverable had Brown not also been found to be 50% responsible for this accident.

2. **A plain reading of the comparative fault statute Section 33.012 indicates that the amount of damages to be recovered by the Claimant must be determined before that figure is adjusted for the percentage of negligence of the Claimant.**
 - a. **A court must look to Section 41.0105 to determine maximum amount to be recovered by Herman Brown for past medical expenses because Section 33.012 does not define what is meant by “the amount of damages to be recovered by the Claimant.**

Generally speaking, the amount to be recovered by the Claimant and the amount for which the Defendant is liable are determined by application of the provisions of Sections 33.012 and 33.013, respectively, of the Texas Civil Practice & Remedies Code.(Appendix, Tab B).

In *Roberts vs. Williamson*, 111 S.W.3d 113 (TX., 2003), the Supreme Court noted that **Section 33.012** refers to “the amount of damages to be recovered by the claimant”, while **Section 33.013** refers to the “damages found by the trier of fact.” *Id.* at 123. The Court said:

The amount of damages to be recovered by the claimant under section 33.012 must be reduced by the Claimant’s proportionate responsibility and by settlements. No corresponding reduction is prescribed under Section 33.013 because the “damages found by the trier of fact” are not affected by settlement or the claimant’s shared responsibility. Thus damages under these two sections are the same only when the claimant has not settled and shares no responsibility. And although related, *the two sections pose separate inquiries*. Section 33.012 controls the Claimant’s total recovery, while Section 33.013 governs the Defendant’s separate liability.

Id. at 123.

Irving Holdings believes that the result of this case is controlled by the application of Section 33.012, since the amount of Plaintiff’s recovery for past medical expenses under that section, after reduction for Plaintiff’s comparative negligence, are less than Irving Holdings’ maximum liability under Section 33.013.

Section 33.012(a), Texas Civil Practice & Remedies Code, reads in full as follows:

If the Claimant is not barred from recovery under Section 33.001, the court shall reduce

the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the Claimant's percentage of responsibility."

(Appendix, Tab B)

Thus, it seem apparent from a plain reading of this provision that the court must first determine the "amount of damages to be recovered by the Claimant" before it goes on to reduce the amount based upon the Plaintiff's percentage of responsibility. So, the starting point is to determine the amount recoverable by the Plaintiff if he had no comparative fault. The "amount of damages to be recovered by the Claimant" is not defined in Section 33.012. As in other contexts, the Court must look to other statutory provisions to determine "the amount to be recovered by the Claimant" before it goes on to adjust the Claimant's recovery for his 50% comparative fault in causing his damages. And, the answer, with respect to medical expenses incurred in the past, is found in Section 41.0105, Civil Practice & Remedies Code.

b. Uncontroverted Affidavits filed by Herman Brown pursuant to Section 18.001, Civil Practice & Remedies Code, did not conclusively establish the amount of his damages for past medical expenses.

The Court of Appeals in this case seems to conclude that "the amount of damages to be recovered by the Claimant" equates to the jury's "damage finding" of \$89,000.00 as the sum of money, if paid now in cash, would fairly and reasonably compensate Herman Brown for his reasonable and necessary medical expenses that were incurred in the past. (Opinion, pp. 2-3). This assumption seems to be based upon the fact that Plaintiff filed affidavits of reasonable and necessary services relating to his medical expenses under Section 18.001, Civil Practice & Remedies Code, and that Irving Holdings did not file counter-affidavits disputing the reasonableness or necessity of the amounts of medical expenses stated in the affidavits. (Opinion, p. 2). However, evidence presented in accordance with Section 18.001 does not conclusively establish the amount of damages. *Walker v. Ricks*, 101 S.W.3d 740 (Tx. App. - Corpus Christi-Edinburg, 2003); *Beauchamp v. Hambrick*, 901 S.W.2d 747,749(TX. App. - Eastland, 1995, no writ). Section 18.001 provides that evidence of reasonableness and necessity submitted under Section 18.001 will support a finding of fact. The statute does not provide that the evidence is conclusive. *Id.* See also *Barrajas v. VIA Metro Transit Authority*, 945 S.W.2d 207,209 (TX. App. - San Antonio, 1997, no writ).

While the affidavits filed by Brown in the trial court were sufficient to establish that the

medical expenses he incurred were necessary and the charges for them were reasonable, the affidavits did nothing to defeat the undisputed fact that Brown actually paid or incurred only \$45,429.94 for these health care services.

- c. **There is a distinction between statutes which limit the maximum amount of Plaintiff's recovery and statutes which limit the maximum amount of a Defendant's liability and, since Section 41.0105 is one of the former, it must be applied to reduce Plaintiff's maximum recovery under Section 33.012 before a further reduction due to his 50% comparative fault.**

The Courts deal with two types of statutes in determining the nature of limitations on damages to be recovered by Plaintiffs and assessed against Defendants: statutes creating a cap on the amount of damages for which a Defendant is liable and, conversely, statutes creating a cap on the amount of damages a Claimant is entitled to recover. Section 41.0105 is in the latter category, as it limits the dollar amount a Plaintiff may recover for medical expenses to the amount actually paid or incurred. Where statutes which limit the amount of Plaintiff's recovery are involved, the provisions of such statutes are applied first to determine the maximum amount of a Plaintiff's recovery, before any other credit or limitation is placed upon that recovery.

The Court of Appeals in this case correctly stated that Section 41.0105 limits the *recovery* of damages by the Plaintiff (Opinion, p. 7), but then incorrectly treats it as though it were a limitation on Defendant's liability.

Section 17.50(b)(1), Texas Business and Commerce Code is an example of a statute that places a cap on the amount a Plaintiff may recover. It specifies that the dollar amount a Plaintiff may recover for additional damages in a consumer protection claim are limited to not more than three times the amount of economic damages found by the trier of facts. Since it places a limitation on the Plaintiff's recovery, it is comparable to Section 41.0105.

In contrast are statutes creating a cap on the amount of Defendant's liability. Examples are Section 74.301, Texas Civil Practice & Remedies Code, which limit the liability of a health care practitioner for non-economic damages of a Claimant to \$250,000.00; Section 101.023, Civil Practice & Remedies Code, which caps the liability of a governmental entity for damages for personal injury to \$250,000.00 for any one person and \$500,000.00 for any single occurrence; and Section 41.008, Civil Practice & Remedies Code, which creates a cap on the dollar amount of exemplary damages that can be awarded against a Defendant.

In the case at bar, the courts below applied Section 41.0105 as if it were a statute creating a

cap on the Defendant's *liability*, rather than a statute creating a cap on Plaintiff's *recovery*. The cases reflect that the result must turn on the type of statute (a cap on liability or a cap on damages) and the intent of the Legislature.

Stewart Title Company vs. Sterling, supra, was a case involving Section 21.21 of the Texas Insurance Code, a statute placing a cap on the amount a Plaintiff could recover. In that case, a purchaser of property brought an action against the Seller, its attorney, and the title insurer, making claims under consumer protection provisions of the Texas Insurance Code for alleged misrepresentations. The Plaintiff settled with the Seller and the Seller's attorney for a combined total of \$400,000.00. The Plaintiff then proceeded to trial against the title company, and the jury awarded \$200,000.00 in actual damages. Thereafter, the title company requested the trial court, and eventually the Supreme Court, to credit the \$400,000.00 settlement amount before trebling the actual damages, which would result in a take nothing judgment. The Supreme Court held, however, that the actual damages of \$200,000.00 should be trebled before application of the credits, resulting in a judgment against the title company in the amount of \$200,000.00. This Court said:

It is self-evident that the treble damages provision of Article 21.21, Section 16 is punitive in nature and designed to deter violations of the Insurance Code. Under the pre-1985 version of Article 21.21, which is applicable to this case, trebling was mandatory based merely upon the determination of liability. (citations omitted). Scienter was not required to trigger the trebling provision. These factors clearly establish the punitive intent of the provision; therefore, application of the credit prior to trebling would frustrate this legislative purpose.

Id. at p. 9.

It is noteworthy that the first thing the Court did in that case was to determine the amount of damages the Plaintiff was entitled to recover by looking to law which controlled the substantive nature of the case - Section 21.21, Section 16 (since repealed) of the Insurance Code. It determined that "the amount the Plaintiff was entitled to recover" included treble damages under the insurance code and, so, trebled the actual damages before applying settlement credits. In addition, the Court looked to the Legislative intent in adopting the substantive statute in question. There, the intent was punitive and a failure to apply the statute as written would frustrate that intent.

By contrast, it is apparent in the case at bar that the intent of the Legislature in adopting Section 41.0105 was to place a limit on the maximum amount a Plaintiff may recover for health care expenses and, specifically, to limit a Plaintiff's maximum recovery of health care expenses to the

amount actually paid or incurred.

The Court in *Stewart Title* went on to say:

An additional rationale supporting a post-trebling credit is found by analyzing the “one satisfaction rule” another way. There are two questions to be addressed. The first is whether there are any actual damages, and the second is whether these damages are recoverable by the Plaintiff. The jury found actual damages of \$200,000.00. *Merely because actual damages are established by the jury does not necessarily mean that the Plaintiff is entitled to recover them.* The Insurance Code provides for the trebling of actual damages, not for the trebling of recoverable damages. Therefore, by allowing a post-trebling credit, the punitive nature of the trebling provision is given full effect and the application of the one satisfaction rule is consistently applied.

Id. at 9. By contrast, in the case at bar, Section 41.0105 specifies its intent to limit *recoverable* damages. So, while the statute there provided for the trebling of actual damages, the statute in the case at bar limits the amount of recovery, and must be used as the starting point of “the amount the Claimant is entitled to recover” under the comparative fault provision set forth in Section 33.012, Civil Practice and Remedies Code.

The cases deal differently with statutes which place a limitation on the amount of the Defendant’s liability. **Edinburgh Hospital Authority vs. Trevino**, 941 S.W.2d (TX., 1997) involved construction of a statute which placed a cap on the dollar amount for which a Defendant could be held liable. That case involved a construction of Section 101.023, Civil Practice & Remedies Code, which specifies the maximum amount of liability of a governmental entity for a tort claim.

There, a hospital authority and an individual doctor were co-Defendants in a negligence action. The doctor settled the case for \$44,000.00 prior to trial. Plaintiff went to trial against the hospital authority and obtained a jury verdict in the amount of \$750,000.00. The trial court offset the verdict amount by the settlement. Because the remaining \$706,000.00 exceeded the \$250,000.00 maximum liability of the hospital authority per statute, the trial court further reduced the Plaintiff’s judgment down to the statutory maximum of \$250,000.00. On appeal, the hospital authority contended that the trial court should have first reduced the amount awarded down to the statutory maximum of \$250,000.00, and then given the credit for the \$44,000.00 settlement, leaving a balance due of \$206,000.00.

The Supreme Court upheld the procedure utilized by the trial court.

The Court said:

Thus, while the dollar amount of a settlement must be reduced from the verdict under the “one satisfaction” rule, **Stewart Title Guaranty Company vs. Sterling**, supra, the settlement does not affect the maximum amount to which the government has agreed to waive its immunity. A settlement with one tortfeasor should thus be offset before the verdict against the government unit is reduced to the statutory maximum. A contrary rule, taken to its logical end, would completely bar recovery against a tort-feasing municipal hospital authority when a Plaintiff settles with another Defendant for more than the hospital authority’s damages cap.

The bottom line of the **Trevino** case was that, under Section 33.012, if the amount of damages otherwise recoverable by a Plaintiff does not exceed the statutory cap of Defendant’s liability, Plaintiff gets judgment for the full amount he is entitled to recover. If the amount does exceed the statutory cap of Defendant’s liability, the damages are reduced to the amount of the Defendant’s cap. This is the application given to Section 41.0105 in the case at bar, and this was error because Section 41.0105 is a statute setting a limit on Plaintiff’s recovery, not a statute setting a limit on Defendant’s liability.

In **Rose v. Doctor’s Hospital**, 801 S.W.2d 841 (TX., 1990), the Supreme Court considered application of Section 11.02 of Article 4590i, Tex. Rev. Civ. Stat. (now repealed). Section 11.02 did provide:

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000.00.

A plain reading of that statute indicated that it set forth a limit of liability of the Defendant, and not, as with Section 41.0105 in our case, a limit of recovery by the Plaintiff. In **Rose**, the Court held that, in a case where there were two Defendants, the Plaintiff could recover an amount in excess of the \$500,000.00 so long as the recovery did not exceed the combined statutory liability of the Defendants. The Court said: “It is clear that the damages cap amounts should be calculated on a “per defendant” basis because the language of § 11.02(a) clearly applies to the recovery against the individual Defendant, not the award to the individual plaintiff. Plaintiffs who recover against more than one defendant may therefore obtain a judgment in excess of the cap, so long as the combined statutory

liability of all defendants is not exceeded.” Id. at 847.

If the Legislature had intended that Section 41.0105 was to be a limitation on the amount of a Defendant’s liability for health care expenses in the past, the statute would instead read:

“In addition to any other limitation under law, a Defendant’s liability for medical expenses may not exceed the amount actually paid or incurred by the Plaintiff for medical expenses.”

This the Legislature did not say. Further, if it was the intent of the Legislature in its adoption of Section 41.0105 to place a limit on Defendant’s liability for health care expenses, the statute “taken to its logical end” (to paraphrase the Court in *Edinburgh Hospital Authority*) would permit a Plaintiff to recover up to the full amount of the health care expenses actually paid or incurred by him from each Defendant in a case involving multiple tortfeasors.

3. Other rules of statutory construction favor a reduction of damages for Brown’s health care expenses before reduction of his recovery based upon comparative fault.

In construing statutes, a widely stated rule of statutory construction is that the more specific statute controls over the more general. *Lufkin v. City of Galveston*, 63 Tex. 437, 439 (1885); *Horizon/MMS Healthcare Corporation vs. Auld*, 34 S.W.3d 887, 901 (TX., 2000). In the case at bar, **Section 41.0105**, Civil Practice and Remedies Code, should prevail over **Section 33.012** - the section that sets the cap of Plaintiff’s recovery. **Section 41.0105** relates specifically to a limitation of recovery of damages for medical expenses, whereas **Section 33.012** relates to all compensatory damages of a Plaintiff in a tort case. Therefore, **Section 41.0105** controls over **Section 33.012**. However, the construction given to the statutes by the courts below, applying the cap of **Section 41.0105** only after calculation of Plaintiff’s damages under **33.012**, gives preference to **33.012** and writes **41.0105** out of existence in this case. **Section 41.0105** should be applied first, reducing the award for medical expenses to the amount actually paid or incurred.

Also, Texas law provides that statutes should be harmonized whenever possible. *Auld*, 34

S.W.3d at 901. Here, the two statutes can be harmonized, giving effect to both. The Court should make the appropriate reduction to Plaintiff's recovery of medical expenses under **Section 41.0105**, then apply the more general statute of **Section 33.012** to adjust the award further for the comparative fault of the Plaintiff.

J. CONCLUSION

To give proper effect to Section 41.0105, Civil Practice & Remedies Code, the trial court should have reduced Brown's recovery of health care expenses to the amount actually paid or incurred. This adjustment must be made first to determine "the amount to be recovered" by Brown for medical expenses under Section 33.012(a), and, under a plain reading of the statute, that amount must then be further reduced by 50% due to the negligence of Brown. By failing to apply the statutes in this manner, the trial court gave Brown and the Intervener a windfall recovery by permitting them to recover 100% for health care expenses which were caused 50% by Brown's own negligence. This result should be reversed, and judgment rendered that Brown recover only 50% of the medical expenses actually paid or incurred in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. Craig Hubble, do certify that I have forwarded a copy of this Petition For Review to:

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by certified mail, return receipt requested, on this ____ day of _____, 2009.

G. Craig Hubble

APPENDIX

TAB A	Final Judgment
TAB B	Sections 33.012 and 33.013, Civil Practice & Remedies Code.
TAB C	Section 41.0105, Civil Practice & Remedies Code.
TAB D	Judgment and Opinion of Court of Appeals
TAB E	Jury Charge and Verdict