

PETITION No. 09-0157

IN THE SUPREME COURT OF TEXAS

**IRVING HOLDINGS, INC.
AND ISAIAS TEWELDE**

Petitioners

Vs.

**HERMAN BROWN AND EMPLOYERS
INSURANCE OF WAUSAU**

Respondents

**REPLY TO RESPONSE TO
PETITION FOR REVIEW**

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

Submitted by:

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C. REPLY

1. THE PLAIN LANGUAGE OF SECTION 41.0105 DOES NOT REFLECT AN INTENT THAT THE LIMITATIONS ON RECOVERY OF MEDICAL EXPENSES SET FORTH IN THAT SECTION BE APPLIED AFTER A REDUCTION OF DAMAGES FOR COMPARATIVE FAULT UNDER SECTION 33.012(A).

Respondents argue that Section 41.0105, TEX. CIV. PRAC. & REM. CODE, “mandates” that the cap set forth in that action be applied only after other limitations on recovery of such damages, and that the comparative fault provision set forth in Section 33.012(a), TEX. CIV. PRAC. & REM. CODE, is one of those other limitations. Respondents base their argument on the preface to Section 41.0105, which recites that the limitations on recovery of medical expenses imposed by that section are “in addition to any other limitation under law.”

Petitioners believe this is an inaccurate reading of Section 41.0105, in that it ignores several other existing limitations on the recovery of medical expenses. In fact, it is well known that there have been legal limitations on the recovery of medical expenses for an extended period in the jurisprudence of this state. For example, the expenses for medical care must have been for treatment of injuries or conditions caused by the accident or incident in question, the treatment must have been necessary, and the charges must be reasonable. Now, in light of Section 41.0105, a Plaintiff will recover only medical expenses for treatment of the injuries or conditions caused by the accident which are reasonable and necessary *and which were actually paid or incurred*.

In *Texas & N.O. R. Co. vs. Barham*, 204 S.W.2d 205 (Tx. Civ. App. - Waco, 1947), the Plaintiff sought recovery for damages sustained by him while an employee of the railroad. Medical bills sustained by the Plaintiff were submitted into evidence. The Defendant objected to the charge of the Court on the basis that the issue submitted authorized the jury to include as damages doctor, medical and hospital bills without regard to the necessity or reasonableness thereof. The Court of Appeals agreed, and reversed the judgment of the trial court and remanded the case for a new trial.

In so doing, the Court of Appeals in that case said: “It is well settled law of this state that one who has been injured by the wrongful act of another is entitled to recover reasonable and necessary expenses caused thereby.” *Id.* at 207 (citations omitted). Such expenses must not only be reasonable in amount, but it must be reasonably necessary that they were incurred as a result of the wrongful act of the opposing party.” *Id.* The Court went on to say: “The measure of Plaintiff’s recovery in respect to the expenses he sustained is not what he obligated himself to pay, but he is limited to the reasonable value of such expenses that it was reasonably necessary for him to sustain as a result of his injuries.” *Id.* at 208.

In *Tate vs. Hernandez*, 280 S.W.3d 534 (Tx. App. - Amarillo, 2009), the Court of Appeals dealt with these limitations on recovery in the context of Section 41.0105, TEX. CIV. PRAC. & REM. CODE. In that case, the Plaintiff had filed a bankruptcy case prior to a trial on his personal injury action, and the medical charges he had incurred were discharged in bankruptcy. At the trial of his personal injury action, the jury found the Defendant was 70% negligent and the Plaintiff was 30% negligent, and awarded past medical expenses in the amount of \$9,035.94, all of which had been discharged in the bankruptcy proceeding. The jury awarded no damages other than medical expenses. Following hearings on post-trial motions, the trial court entered judgment against the Defendant in the amount of \$7,017.92 (70% of the \$9,035.94 jury award plus \$692.76 in prejudgment interest). The Court of Appeals held as follows:

Because a debt for medical expenses is merely evidence of Plaintiff’s damages, once incurred, the subsequent discharge of the debt in bankruptcy does not prohibit a Plaintiff from offering proof of those past medical expenses as evidence of a component element of his damages. Therefore, *subject to further limitations provided by law*, we find a Plaintiff may recover, as compensatory damages, the reasonable and necessary cost of medical expenses proximately caused by the tortious conduct of a wrongdoer, even if those expenses were subsequently discharged in bankruptcy. Having determined (Plaintiff’s) reasonable and necessary medical expenses were recoverable, we overrule (Defendant’s) first issue and proceed to address her second issue, the limitation imposed by section 41.0105 of the Texas Civil Practice and Remedies Code.

Id. at 539. The Court of Appeals noted that they begin with the premise that the Legislature intended to accomplish something by the enactment of Section 41.0105. The Court reviewed the decisions of other courts dealing with Section 41.0105, and concluded that “an interpretation of Section 41.0105 that limits an injured party’s recovery of medical or health care expenses to those amounts necessary to compensate the injured party for sums “actually paid or incurred” is consistent not only with the Legislature’s intent, but also with our jurisprudential philosophy and history.” *Id.* at 541. The Court held that, because the Plaintiff’s medical bills were discharged in bankruptcy, recovery of said sums by the Plaintiff was not necessary to compensate him for his injuries. For purposes of section 41.0105, those expenses were neither paid nor actually incurred. *Id.* at 541.

The decision in *Tate* demonstrates and applies the intent of the phrase in Section 41.0105 that the limitations of that section are “in addition to any other limitation under law.” In the era of Section 41.0105, a Plaintiff in a personal injury action may recover his medical expenses only if they were for treatment of injuries caused by the occurrence in question, reasonable and necessary, and “actually paid or incurred.” All of these determinations need to be made in order to determine the “amount to be recovered” by the Plaintiff in Section 33.012(a), TEX. CIV. PRAC. & REM. CODE, which then is to be further reduced by Plaintiff’s percentage of fault.

2. BROWN AND THE INTERVENOR, AN ALIGNED CO-PLAINTIFF, DID RECOVER A WINDFALL UNDER THE JUDGMENT OF THE TRIAL COURT.

Intervenors argue that the application of Section 41.0105, TEX. CIV. PRAC. & REM. CODE, by the trial court in this case does not give a windfall to Brown. However, Intervenor is a workers’ compensation carrier which asserted a right of subrogation in this case. “Subrogation” is the substitution of one person in the place of another with reference to a lawful claim or right. *Cockrell v. Republic Mortgage Insurance Company*, 817 S.W.2d 106, 113 (Tx. App. - Dallas, 1991). A subrogee can have no greater right than its subrogor. *Id.*

Brown and the Intervenor's interests in this case are aligned. It is irrelevant that, due to legal and contractual obligations between the two, Brown will recover nothing from this suit. What is relevant is that they will jointly recover a sum of money equal to 100% of the medical expenses actually paid or incurred, even though Brown was 50% at fault in creating the need for the medical expenses in question.

The Response of the Respondents repeatedly refers to Petitioners as "wrongdoers" who would benefit by not having to pay 100% of the medical expenses Brown incurred. (See Response, p. 7). This is simply not accurate, and at no place in the Response to Respondents cite any legal basis for holding Petitioners responsible for 100% of the medical expenses incurred under these circumstances. Petitioners are 50% at fault in causing Brown's need for the medical expenses in question, and do not object to being held liable for payment of 50% of the medical expenses he incurred. If Brown and/or the Intervenor recover twice that amount, they have received a windfall to the detriment of the Petitioners.

D. 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

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G. Craig Hubble