No. 09-0157

In the
SUPREME COURT OF TEXAS

Isaias Tewelde and Irving Holdings, Inc.,

Petitioners,

v.

Herman Brown and Employers Insurance of Wausau,

Respondents.

Petition from the Court of Appeals, Fifth District of Texas
Dallas, Texas

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Herman Brown sued Isaias Tewelde and his employer, Irving Holdings, Inc. for injuries received when Tewelde's van rear-ended an airport shuttle driven by Brown. The jury found Brown fifty percent liable and Tewelde and Irving Holdings, collectively, fifty percent liable. The jury awarded Brown $89,000 for past medical expenses but also found Brown fifty percent liable for the occurrence. The Defendants did not challenge the sufficiency of the evidence of this award in the trial court but instead contended that Texas Civil Practice and Remedies Code § 33.012 should be applied after applying a purported cap pursuant to § 41.0105. The Honorable Catharina Haynes, presiding over the 191st Judicial District Court in Dallas, Texas, disagreed and applied § 33.012 first, reducing the damages award pursuant to the jury's finding of proportionate responsibility. After determining that the amount of Respondents' recovery ($44,500) was below the amount actually paid by Respondents ($45,429.95), the trial court awarded $44,500 for past medical expenses. Defendants appealed.

The Dallas Court of Appeals affirmed the trial court in a published opinion written by Justice Moseley, *Irving Holdings, Inc. v. Brown,* 274 S.W.3d 926 (Tex. App. -- Dallas 2009, pet. filed). [Resp. Pet. Rev. App. 1] In *Irving Holdings*, the Dallas Court of Appeals held that the trial court did not err by reducing the jury's total damage award to the amount to be recovered by Brown under Chapter 33 before comparing the amount to be recovered to any limitation that might be imposed by Texas Civil Practice and Remedies Code § 41.0105.

ISSUE PRESENTED IN RESPONSE

Petitioners admit that the only issue presented is whether the court of appeals erred by failing to apply Texas Civil Practice and Remedies Code § 41.0105 (paid or incurred) before reducing Brown's recovery by his fifty percent fault.

Standard of Review

This Court reviews a question of statutory interpretation de novo. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Court of Appeals correctly summarized the facts underlying this law suit, the jury's findings, and the trial court's rulings. Tewelde, a cab driver for Irving Holdings, ran into the back of an airport shuttle Brown was driving in front of Terminal C at D/FW International Airport. (1 CR 8-9) This collision injured Brown and Brown sued both Tewelde and Irving Holdings. (1 CR 1-13) Brown's employer, Parking Company of America, had workers' compensation insurance coverage through Employers Insurance of Wausau ("Wausau"). (1 CR 18-20) Wausau paid for the majority of Brown's medical expenses. (1 CR 18) Wausau paid $45,429.95, an amount less than the $89,000 proven as reasonable and necessary medical expenses at trial. (1 CR 18, 48; DX 6)

After a trial, the jury found Brown fifty percent liable for the collision and Defendants, collectively, fifty percent liable. (1 CR 48) The jury then awarded $89,000 for past reasonable and necessary medical expenses proximately caused by the collision.[1] (*Id.*) The Court properly reduced the entire verdict, including past medical expenses, by the amount of proportionate responsibility attributed to Brown. (1 CR 63) Thus, the court awarded $44,500 for past medical expenses. (1 CR 63)

Tewelde and Irving Holdings filed a Motion to Modify Judgment. (1 CR 64) In the Motion to Modify, the defendants argued that Brown is entitled only to the medical expenses Wasau actually paid and that TEX. CIV. PRAC. & REM. CODE § 41.0105 should be applied before medical expenses are reduced by the plaintiff's proportionate

[1] The jury also awarded damages for pain and suffering and lost wages. (1 CR 49)

responsibility. (1 CR 65-72) Importantly, the defendants did not challenge the sufficiency of the evidence supporting the jury's award of damages. The court denied the defendants' motion. (1 CR 83) Tewelde and Irving Holdings appealed. (1 CR 86)

SUMMARY OF THE ARGUMENT

Petitioners do not challenge the jury's finding that they were negligent and proximately caused Herman Brown's injuries. Instead, Petitioners seek to further reduce the damages the jury awarded to Brown for his medical expenses. These undisputed expenses totaled $89,000 and were reduced to $44,500 pursuant to the proportionate responsibility statute -- a reduction below the amount of medical expenses paid ($45,429.95) and the amount of medical expenses incurred ($89,000). Thus, any potential cap on medical expenses prescribed by TEX. CIV. PRAC. & REM. CODE § 41.0105 does not apply in this case because the damages awarded in the judgment were below the statute's lowest possible cap.

To make an end-run around the fact that the amount of damages ultimately awarded to Brown is below any statutory cap, Petitioners ask this Court to apply § 41.0105 to the jury's total damages award first -- ignoring the reduction for Brown's contributory negligence. Then, Petitioners ask this Court to apply the proportionate responsibility statute, in the wrong order, to the capped damages, thus reducing Brown's medical expense award by approximately $22,250.00 more. Petitioners' request must be denied because the language of both the proportionate responsibility statute and TEX. CIV. PRAC. & REM. CODE § 41.0105 require that proportionate responsibility be applied before considering any cap on medical expenses. In other analogous contexts, the

proportionate responsibility statute is applied before damage caps. Significantly and consistent with these statutes, the Court will not provide a windfall to Brown because his workers' compensation lien exceeds the total verdict. Moreover, Wausau will not receive a windfall because the amount if the judgment is less ($44,500) than the amount Wausau paid ($45,429.95).

Even if this Court reverses the court of appeals on the sole issue presented in the Petition -- *i.e.* whether § 41.0105 should have been applied before reducing Brown's recovery by his 50 percent fault -- the case should be remanded for consideration of the meaning of § 41.0105. If, however, the Court disagrees and reaches the § 41.0105 issue, Brown should still recover the amount of medical expenses awarded in the judgment ($44,500).

The plain language of § 41.0105 supports the trial court's award of medical expenses. The judgment awarded Brown 50% of medical expenses he "incurred." Importantly, § 41.0105 allows recovery of medical expenses paid or *incurred*. Brown "incurred" his medical expenses at the time he received treatment and was charged.

This Court has also held that medical expenses are incurred at the time services are provided and the claimant is charged. And the legislative history underlying § 41.0105 demonstrates that medical expenses are incurred when they are "charged" for and that the Collateral Source Rule, a rule that prevents a defendant from escaping liability due to the payments of a third party, is alive and well. If this Court reverses and reduces the jury's award for medical expenses, the burden of Petitioners' wrongdoing will be impermissibly shifted to Brown and Wausau -- the parties injured by Petitioners' conduct in the first

place. Beyond the damage potentially done to Wausau in this case, the rule Petitioners propose would also impermissibly shift the cost of past medical expenses in tort litigation from wrongdoers to all Texas workers compensation carriers, county hospitals and other hospitals with statutory liens, health insurance companies, and health care providers.

ARGUMENT

I. Standards of Review.

An appellate court reviews a pure question of law *de novo*. *El Paso Nat. Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 2002). Statutory interpretation is a question of law. *See Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). When construing a statute a court should start with the plain and ordinary meaning of the statute's words. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). The Court may also look to legislative history to discern the legislature's intent. *Id.*

II. The Trial Court Properly Applied the Proportionate Responsibility Statute Before Applying Texas Civil Practice & Remedies Code § 41.0105.

The trial court properly applied the proportionate responsibility statute before applying any cap imposed by § 41.0105. This action reduced the original award of $89,000 by Brown's 50% responsibility to $44,500 (1 CR 63) -- an amount below the $45,429.95 that was paid by Wausau on behalf of Brown. Thus, even if § 41.0105 capped the recovery at the amount actually paid on behalf of Brown, his total recovery was under any purported cap, and the judgment of the trial court should therefore be affirmed.

A. Consistent with the Plain Language of the Statutes, The Trial Court Properly Applied the Proportionate Responsibility Statute Before Considering Any Additional Limitation Imposed by § 41.0105.

The plain language of Texas Civil Practice and Remedies Code § 41.0105 reads:

> 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 (emphasis added).

The applicable language of Texas Civil Practice and Remedies Code § 33.012 reads:

> "[T]he court shall further 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." *Id*. § 33.012 (emphasis added).

The plain language of § 41.0105 specifies that any limitation imposed by the section applies to the *recovery* of medical or health care expenses. *Id*. § 41.0105. At the same time, § 33.012 determines the *amount to be recovered* (i.e. the "recovery") for any particular cause of action. *Id*. § 33.012. Thus, before a limitation on a recovery can be applied, a court should first determine what the recovery is pursuant to § 33.012. This can only be done by applying the proportionate responsibility reductions to the jury's damages findings. Then the amount of the *recovery* under § 33.012 may be compared to any potential limitations imposed on the *recovery* under § 41.0105.[2] Thus, a jury's

[2] Petitioners cite *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003) for the proposition that, "section 33.012 controls the claimant's total **recovery.**" (Pet. Br. at p. 26) And 41.0105 limits the "*recovery* of medical and health care expenses" after the amount of the recovery has been determined under § 33.012. Thus, *Roberts v. Williamson* further supports Respondents' argument that the trial court applied the statutes in the proper order.

damages award must be reduced by the claimant's percentage fault first and, only then, does any subsequent limit imposed by § 41.0105 potentially become applicable.

Consistent with this analysis, § 41.0105 requires that the statute only be considered "in addition to any other limitation under law." TEX. CIV. PRAC. & REM. CODE § 41.0105. This language expressly mandates that any cap be applied after other limitations. The proportionate responsibility statute is another "limitation under law." *Id.*; *see* TEX. CIV. PRAC. & REM. CODE § 33.012(a) ("the court shall reduce the amount of damages"); *Pilgrims Pride v. Cernat*, 205 S.W.3d 110, 117 (Tex. App. — Texarkana 2006, pet. denied) (discussing the "limitations" imposed by § 33.012). Only after reducing the amount of medical expenses by Brown's proportionate responsibility could the court consider the additional limitation imposed by § 41.0105. Because the amount of medical expenses, reduced by Brown's 50% responsibility, is below the $45,429.95 that Wausau undisputedly paid, application of any additional limitation imposed by § 41.0105 does not further reduce the amount awarded in the judgment.

B. The Proportionate Responsibility Statute Is Applied Before Caps Analogous to § 41.0105.

Damages are reduced by the plaintiff's proportionate share of liability before application of damage caps that are analogous to § 41.0105. For instance, in the medical malpractice context, the amount of damages to be recovered has been capped by various Texas laws. TEX. CIV. PRAC. & REM. CODE § 74.301; *see also* TEX. REV. CIV. STAT. ANN. ART. 4590i § 11.02 (repealed). Texas Civil Practice and Remedies Code § 33.012 (proportionate responsibility) is applied before the application of caps on damages.

Welch v. McClean, 191 S.W.3d 147, 172 (Tex. App. — Fort Worth 2005, no pet.) (recognizing that the "amount of damages to be recovered" under § 33.012 is the award for "the entire cause of action" and applying § 33.012 before cap on damages). This is because the statute requires trial courts to reduce the "amount to be recovered" by the plaintiff's percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.012. The "amount of damages to be recovered" under TEX. CIV. PRAC. & REM. CODE § 33.012 is the amount of damages awarded by the jury.[3] *Id.*

Thus, like the other damage caps in the Texas Civil Practice and Remedies Code, any cap prescribed by § 41.0105 should be applied in this case only after the jury's award is reduced by the plaintiff's percentage fault. *Id.* If the plaintiff's recovery, after such a reduction is less than the amount of the cap, the cap becomes moot. Here, Brown recovered $44,500 -- less than the $45,429.95 paid by Wausau. (1 CR 62-63) The defendants admit that $45,429.95 was paid on behalf of Brown and thus, $45,429.95 is the lowest possible cap amount. (Pet. Br. at 11) Because the $44,500.00 medical expenses awarded in the judgment is less than $45,429.95, the judgment should be affirmed.[4]

[3] Petitioners imply or argue through several case citations that a plaintiff may not recover more than the amount of a defendant's statutory liability under various responsibility schemes. *Edinburgh Hosp. Auth. v. Trevino*, 941 S.W.2d (Tex. 1997); *Rose v. Doctor's Hosp.*, 801 S.W.2d 841 (Tex. 1990). (Pet. Br. at p. 32-33) This is consistent with Respondents' arguments because the Respondents' total recovery was not greater than the Petitioners' liability under chapter 33 or any other limitation. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.012, 33.013.

[4] Petitioners argue that Brown lacks standing to seek damages in excess of $45,429.94. (Pet. Br. at pp. 14-15) The issue of Herman Brown's "standing" was not properly raised or briefed below and is therefore waived. And Brown undeniably had standing to pursue his claims

C. Applying the Proportionate Responsibility Statute Before Texas Civil Practice & Remedies Code § 41.0105 Does Not Create a Windfall for Respondents.

Petitioners argue that the trial court's ruling resulted in a windfall to Brown.[5] (Pet. Br. at pp. 18-19) This argument is incorrect because Brown's total workers compensation lien of $65,461.95 substantially exceeded his damages award after application of proportionate responsibility. (DX D-2 at p. 3) There can be no windfall when the plaintiff receives nothing and because of this lien, Brown received nothing. The real attack here is on the workers compensation carrier that paid benefits on behalf of Brown -- Wausau. Wausau has undisputedly paid more on behalf of Brown than it was awarded in the judgment and thus there is no windfall. Indeed, following the Petitioners' reasoning would result in a windfall to wrongdoers at the expense of the Texas workers compensation insurers and system, county hospitals, hospitals and hospital providers with statutory liens, health insurers, and health care providers. To further reduce Wausau's

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against Petitioners. Moreover, Brown was not awarded "damages in excess of $45,429.94." Indeed, the judgment awarded Brown a lesser amount -- $44,500.

[5] In a related argument, Petitioners contend that awarding Brown 50% of the medical expenses found by the jury would violate the "one recovery rule." (Pet. Br. at p. 18) But all the cases cited by Petitioners involve multiple damage awards for a single indivisible injury. *See Stewart Title Guaranty Co. v. Sterling*, 822, S.W.2d 1 (Tex. 1992); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). In this case, the jury awarded a single damage award -- $89,000 -- for Brown's injuries. Thus, the cases are distinguishable. In any event, Petitioners' newly expanded argument based on the one recovery rule was not properly raised below and is therefore waived. Petitioners also cite *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005) for the general proposition that no party should receive an impermissible windfall. (Pet. Br. at p. 20) As discussed above, Brown received nothing in this case because of a workers compensation lien. The lien holder, Wausau, received less than it actually paid on behalf of Brown. Thus, there is no windfall in this case.

recovery would impermissibly shift the risk of loss from the tortfeasors to the innocent carrier.

III. Respondents "Paid" or "Incurred" $89,000 in Past Medical Expenses.

If this court affirms on the first issue, there is no reason to reach the meaning of § 41.0105 because the amount of Brown's recovery is less than the amount Petitioners admit Wausau "actually paid" on behalf of Brown. (*See, e.g.*, Pet. Br. at 36-37) Indeed, because § 33.012 should be applied before § 41.0105, any question of the meaning of § 41.0105 is moot, and this is consistent with Petitioners' choice to frame this as a single issue appeal at the outset. (*See* Petitioners Statement of Issues, Pet. Br. at pp. 10) But even if the Court disagrees with the court of appeals on the question of whether to first reduce Brown's recovery by his 50 percent fault before considering § 41.0105, the Respondents respectfully request that the Court remand for consideration of any other questions. TEX. R. APP. P. 53.4. The court of appeals has never had an opportunity to decide the meaning of the paid or incurred statute, and Petitioner has conceded that the sole issue before this Court is the order of application of §§ 33.012 and 41.0105. (Pet. Br. at p. 10) Thus, the court of appeals should be given the opportunity to decide any other issues not presented here.

If, however, the Court should reach the issue on the meaning of § 41.0105, the judgment should still be affirmed because Respondents paid or incurred $89,000 in medical expenses.[6] The jury awarded $89,000 for reasonable and necessary medical

[6] Petitioners contend that the uncontroverted Texas Civil Practice and Remedies Code § 18.001 affidavits filed in support of Brown's medical expenses do "not conclusively establish

expenses incurred in the past. (1 CR 48) This verdict is supported by undisputed evidence -- medical bills (PX 1-32; DX 1) totaling approximately $89,000. (App. Br. at 6) The Petitioners did not properly complain below about the admissibility or inadmissibility of evidence; any potential jury charge error; the sufficiency of the evidence; or any other complaint aside from the meaning of the statutes and have thus waived all such complaints. Thus, the only remaining dispute in this case is how § 41.0105 applies to the recovery of medical expenses where the plaintiff was billed for one amount, but a workers compensation company paid a lesser amount. Both the plain language of TEX. CIV. PRAC. & REM. CODE § 41.0105 and the legislative history entitle Respondents to medical expenses they "incurred," and not just medical expenses that were "actually…paid." TEX. CIV. PRAC & REM. CODE § 41.0105.

A. Under the Plain Language of the Statute and the Relevant Legislative History, Brown's Medical Expenses Were "Incurred" at the Time the Medical Services Were Provided.

This Court should first look to the plain language of the language of § 41.0105 to determine its meaning. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). Additionally, the Court should construe the statute to give effect to each of its words and parts. *See, e.g., Nabors Corp. Servs. Inc. v. Northfield Ins. Co.*, 132

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the amount of his damages for past medical expenses." (Pet. at p. 18) This argument was not properly raised below and is therefore waived. Moreover, the argument is a red herring because the question is not whether the medical expenses have been conclusively established but, rather, whether Petitioners lodged a proper sufficiency challenge below. Petitioners did not challenge the sufficiency of the affidavits or the sufficiency of the evidence at the trial court, the court of appeals, and have still not properly challenged them in their Petition for Review before this Court. Thus, any question about the sufficiency of the affidavits was not preserved and is not properly before this Court. TEX. R. APP. P. 33.1.

S.W.3d 90, 96 (Tex. App. -- Houston [14th Dist.] 2004, no pet.). The legislature has also prescribed certain "Statutory Construction Aids," including:

(1) object[s] sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.

TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005).

Furthermore, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage, [and] [w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." TEX. GOV'T CODE ANN. § 311.011 (Vernon 2005). Thus, the entire text of § 41.0105 should be given effect pursuant to the applicable rules of usage and grammar. Such a construction supports the trial court's judgment.

1. The word "or" is disjunctive and supports a distinct meaning for both the word "paid" and the word "incurred."

The legislature's multiple use of the word "or" in § 41.0105 is significant. Because the word "or" is disjunctive, the words "paid" and "incurred" are two different things, both of which are included in the realm of potential recovery. *See Board of Ins.*

Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex., 142 Tex. 630, 635, 180 S.W.2d 906, 908 (Tex. 1944) ("Ordinarily the words 'and' and 'or,' are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter, of a disjunctive, nature"). Thus, the plain language of the statute -- the word "or" -- indicates that "incurred" means something distinct from "paid."[7] The legislature's understanding of the statute supports this interpretation.

Transcripts of the legislatures debates and discussions of HB 4 indicate that "incurred" has a separate and distinct meaning from the word paid.[8] During the Senate's debate of HB 4, an exchange between Senators Hinojosa and Ratliff were transcribed for the purpose of establishing certain legislative intent. This exchange specifically concerned § 41.0105:

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[7] *See also* Jim Perdue, *Maybe It Depends on What Your Definition of "OR" IS? A Holistic Approach to Texas Civil Practice & Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241 (2006).

[8] In the 2007 legislative session, legislators aware of the confusion and misapplication of § 41.0105 passed a bill to repeal the section. Hearing on Tex. H.B. 3281 Before the House Comm. on Civil Practices, 80th Leg., R.S. (March 28, 2007) In particular, legislators involved in the passage of § 41.0105 were concerned that courts were erroneously limiting the recovery of medical expenses to only amounts actually paid. *Id*. Governor Perry vetoed the bill and issued a veto statement that attempted to interpret the meaning of the statute. The governor's veto statement does not constitute legislative history of § 41.0105 because it is not a statement of the legislature and was issued *years after* the bill was originally passed. Veto Message of Gov. Perry – June 15, 2007. Moreover, it is for this Court, and not the executive branch to interpret statutes. Allowing the governor to interpret the meaning of a law through a veto statement related to subsequent legislation violates separation of powers principles. Thus, this court should ignore the governor's veto statement.

Senator Hinojosa:	Governor, on page 106, lines 6-8, does this provision mean that a patient can't recover future damages?
Senator Ratliff:	No, it just means that economic damages are limited to those actually incurred. [Plaintiffs] can't recover more than [plaintiffs] actually *paid or been charged* for [their] health care expenses in the past or what the evidence shows [they] will probably *be charged* in the future.

This exchange is also significant because Senator Ratliff was the chairman of the State Affairs Committee and was responsible for drafting a prior version of § 41.0105. Based on the language in the statute and Senator Ratliff's statement, it is evident that there is a distinction between "paid" and "incurred" as the terms are used disjunctively. Therefore, if a plaintiff has been charged for health care expenses, the individual cannot recover more than he or she was charged. There is no legislative intent, however, suggesting that a plaintiff should recover less than amounts paid, incurred, or charged. There is also no legislative history to suggest that the plaintiff should recover the lesser of these amounts or that a plaintiff's recovery is limited to what was paid even if the plaintiff incurred a greater amount in medical bills.

Moreover, because the word "or" is used in relation to the words "by or on behalf of the claimant," once again significance must be given to both "by the claimant" and "on behalf of the claimant." In light of the double use of the word "or" in the statute, a plain reading of the statute, according to the rules of grammar and common usage means that recovery of medical or health care expenses is limited to the amount:

(1) actually paid by the claimant;

(2) actually paid on behalf of the claimant;

(3) incurred by the claimant; or

(4) incurred on behalf of the claimant.

2. Brown "Incurred" Medical Expenses When his Medical Services Were Provided.

It is undisputed that the amount "actually paid" in this case is $45,429.95. (App. Br. at 6; DX D-6) Thus, the question is whether the remaining $43,570.05 of the jury's verdict was "incurred by or on behalf of" Brown. *Id.* Under a reading of the statute that gives all the words in the statute their ordinary meaning, Brown did incur the full $89,000 in medical expenses.

This Court has previously addressed the meaning of the term "actually incurred," and this Court rejected the argument that payment by a third-party -- Medicare -- meant the patient had not actually incurred the hospital charges. *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434, 436 (Tex. 1972). Despite the fact that the hospital in *Black* entered into an agreement and was subject to the law that it could not charge an individual for services who is entitled to have payment made under the Medicare Act, the court noted "(1) that a Medicare patient must originally incur the hospital expense and a legal obligation to pay them before the Social Security Administration can pay any portion thereof to the hospital 'on his behalf." *Id.* at 437. This Court recently reiterated this standard in *Black* noting that a "plaintiff 'actually incurred' hospital expenses even though they were eventually paid by Medicare." *Aviles v. Aguirre*, No. 08-0240, 2009 WL 1901637, *1 (Tex. July 3, 2009) (citing *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434, 438 (Tex. 1972)). Thus, applying the law that statutes are to be read consistent with existing case

precedent, recovery of charges "incurred by or on behalf of the patient" means the full amount of the hospital charge, even when it is paid by Medicare. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Furthermore, Senator Ratliff's statement above, where he substituted the phrase "been charged" for the word "incurred" in discussing the meaning of § 41.0105, is consistent with how the this Court has interpreted the word "incurred" in the context of medical expenses.

Likewise, in *Texarkana Mem'l Hosp., Inc. v. Murdock*, 903 S.W.2d 868 (Tex. App. -- Texarkana 1995), *rev'd on other grounds*, 946 S.W.2d 836 (Tex. 1997), the Texarkana Court of Appeals was asked to review a $500,000 jury award for medical expenses. The underlying case involved a claim for medical malpractice against a hospital for an infant that died shortly after birth. *Id*. at 871. The mother brought the claim, and the Arkansas Department of Human Services ("ADHS"), which provided Medicaid benefits to the mother, intervened. *Id.* Much like the Texas Medicaid statute, on any third-party recovery for expenses, there is a statutory assignment for amounts paid back to the Medicaid program. *Id*. at 872; *see* TEX. HUM. RES. CODE ANN. § 32.033 (Vernon 2001).

The court of appeals held that the plaintiff "assigned her right to collect medical expenses to ADHS 'to the full extent of any amount which may be paid by Medicaid.'" *Murdock*, 903 S.W.2d at 873. The Medicaid payment was $352,784. *Id.* Nevertheless, "[t]he jury made a determination that Kathy Murdock was entitled to $500,000 for the medical expenses which were incurred because of [the hospital's] negligence." *Id.* The court distinguished between the amount paid by Medicaid and the amount that was

determined to be reasonable and necessary medical expenses incurred by Murdock, stating "[t]he assignment, however, applied only to any amount which was paid by Medicaid. Thus, the $352,784 did not cover the entire jury award of $500,000." *Id.* (footnote omitted).

The trial court in *Murdock* granted a judgment notwithstanding the verdict ("j.n.o.v.") that Murdock take nothing, but awarded Medicaid $352,784. *Id.* at 874. Thus, the balance of $147,216 was erased from the jury verdict by the trial court. *Id.* The court of appeals reversed the j.n.o.v. and held that Murdock was entitled to the $147,216 "not assigned to [Medicaid], being the balance of the amount found by the jury." *Id.* The defendant argued that the j.n.o.v. was granted because "Murdock was not personally liable." *Id.* But the court of appeals pointed out that while Medicaid had not paid the expenses, the plaintiff "would be liable for all necessary medical expenses incurred by her child." *Id.*

In light of the holdings in both *Black* and *Murdock*, it is apparent that the write-offs that Medicare or Medicaid may garner through regulatory arrangements with health care providers do not mean that medical expenses are not incurred. *See Black*, 478 S.W.2d at 437-38; *Murdock*, 903 S.W.2d at 874; *see also Aviles v. Aguirre*, No. 08-0240, 2009 WL 1901637, *1 (Tex. July 3, 2009). Otherwise, the *Black* and *Murdock* courts could never have concluded that the plaintiffs were entitled to recover the balance of the charges found by the jury. *See Black*, 478 S.W.2d at 438; *Murdock*, 903 S.W.2d at 874.

Several of the courts of appeals have interpreted the meaning of § 41.0105 or rendered decisions that relate to the interpretation of the statute. Among those decisions,

several courts have disregarded this court's decision in *Black* and ascribed a meaning to the word "incurred" that is inconsistent with that opinion. This series of decisions stems from a mistake made by a plurality (the opinion of a single justice) of the San Antonio court of appeals in the first decision to interpret § 41.0105. *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App. -- San Antonio 2007, no pet.) After *Mills*, several courts of appeals have cited the decision and fallen, like a row of dominoes, into its faulty reasoning. The common thread between all of these decisions, discussed in detail below, is that they are inconsistent with this Court's holding in *Black* and inconsistent with the plain meaning of the words in the statute.

Mills v. Fletcher

Mills v. Fletcher, 229 S.W.3d 765 (Tex. App. — San Antonio 2007, no pet.) incorrectly interprets § 41.0105 and violates the Collateral Source Rule.[9] In *Mills*, a jury awarded damages for past medical expenses. *Id*. at 767. The defendant argued that an award for medical expenses should have been reduced under § 41.0105 because the medical providers wrote-off a portion of the balance due from the plaintiff. *Id.* The court reasoned that the term "incurred" was modified by the word "actually" in the statute and that "actually incurred" must mean something different than "incurred." *Id.* at 768. The court concluded that while a person may incur a medical expense at the time of the initial visit, the expense is not "actually incurred" until after adjustment of a health care

[9] The *Mills* opinion is a plurality opinion. Because the second justice in the majority concurred only with the judgment, it is the opinion of a single justice on the San Antonio Court of Appeals.

provider's bill. This reasoning is erroneous because it ignores this Court's holding in *Black*, that a person "actually incur[s]" medical expenses at the time of the initial visit. *Black*, 478 S.W.2d at 434. And, unlike *Mills*, there is evidence that some of Brown's medical bills significantly exceeded the amount paid and were not written off. (PX 1-32; 1 RR 35-36) Moreover, the decision ignores the long-standing Collateral Source Rule, a rule of both evidence and damages, that militates against reducing a plaintiffs' award because of a payment from a collateral source -- like workers compensation insurance. *Taylor v. American Fabritech*, 132 S.W.3d 613 (Tex. App. -- Houston [14th Dist.] 2004, pet. denied).[10] Thus, the *Mills* plurality opinion is erroneous, inapplicable, and not controlling. The dissent (also the opinion of a single justice), however, is persuasive because it exposes the gaps in the reasoning of the plurality and is consistent with the binding precedent the plurality ignores.

***Mills* Dissent**

In her dissent, Justice Stone notes that "[t]he language of [§ 41.0105] is not a model of clarity, perhaps because it underwent numerous revisions before it was finalized." *Id.* at *4. Justice Stone further noted that, regardless of whether § 41.0105 is ambiguous, the court was entitled to consider various factors in an attempt to discern the meaning of the statute. *Id.* at *4. Justice Stone further noted that the Code Construction Act informs that when the legislature enacts a statute "it is presumed that the entire

[10] The legislature considered five versions of § 41.0105 before ultimately passing the text that now appears in the Texas Civil Practice and Remedies Code. These versions evidence an intent to maintain the Collateral Source Rule because all versions that would have altered the rule were rejected by the legislature. *See* Pittard, Kirk, *Dead or Alive: The Collateral Source Rule After HB4*, The Advocate (Winter 2006).

statute is meant to be effective; a just and reasonable result is intended; feasible execution of the statute is contemplated; and public interest is favored over any private interest." *Id.* at *4 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 311.021 (Vernon 2005)). As Justice Stone concludes, the plurality opinion's interpretation of § 41.0105 fails to comply with any of these presumed statutorily intended outcomes. *Id.* at *4.

Furthermore, Justice Stone noted that the plurality's opinion failed to give meaning to the term "incurred" as that term has been interpreted in Texas case law for many years. *Id.* at *5. Justice Stone referred to Black's Law Dictionary which demonstrates that one incurs a liability when one suffers or brings on oneself a liability or expense. *Id.* at *5 (citing *Black's Law Dictionary* 782 (8th ed. 2004)). Furthermore, Justice Stone gave effect to the longstanding and uncontroverted case law which stands for the proposition that medical charges are incurred at the time the services are rendered to the patient. *Id.* (citing *Black v. American Bankers Ins. Co.*, 478 S.W.2d 434 (Tex. 1972)). Noting that there are situations in which medical expenses are not paid, but are nonetheless incurred, Justice Stone acknowledged that there are certain situations in which the terms "paid" and "incurred" must take on different meanings. *Id.* at *5.

Justice Stone further rejected the plurality's conclusion because it failed to produce a just or reasonable result. *Id.* According to the plurality's opinion, a wrongdoer is *rewarded* by the injured party's foresight to obtain medical insurance, and in many instances it will likely be the wrongdoer's liability insurance carrier that actually benefits from the injured party's foresight. *Id.* As Justice Stone points out, "insult is added to injury when the injured party pays premiums for medial insurance coverage and then

watches the benefits of that coverage lower the accountability of the tortfeasor for her negligent conduct." *Id.*

Justice Stone further depicted the impracticality of the plurality's opinion noting that medical bills can often take months to be generated by the providers, and even longer periods to be processed by insurance carriers. *Id.* Therefore, at what point is a court to determine when the bills have been incurred? *Id.* Justice Stone questioned what happens when there is a dispute regarding the amounts due or the extent of coverage. *Id.* Furthermore, what if adjustments are made after litigation is initiated or concluded? *Id.* Justice Stone noted that § 41.0105 does not provide answers to such questions concluding that the reason the statute is silent on these issues is because the statute was not intended to spawn these issues. *Id.* Justice Stone finally concluded that "[t]here is simply no indication that the collateral source rule was eliminated by § 41.0105, thus there is no need for these questions to arise." *Id.*

Furthermore, in a thoughtful analysis regarding the public and private interests associated with § 41.0105, Justice Stone notes that the public interests demonstrate that "(1) citizens should be responsible and purchase medical insurance to the extent they are financially able to do so; (2) responsible citizens should reap the full benefit of insurance coverage they have purchased; (3) tortfeasors should be held accountable for their actions; and (4) tortfeasors should not be fortuitous beneficiaries of an injured party's foresight to purchase medical insurance." *Id.* at *6. Justice Stone further noted that the private interest appears to be that of liability insurance carriers seeking to minimize their expenses in resolving liability claims. *Id.* However, Justice Stone concluded that there

was nothing in the statute indicating that the Legislature sought to elevate the private interests at stake over the public interests involved. *Id.* In fact, all the evidence was to the contrary. That is to say, "the public benefit of the collateral source rule was continued by the Legislature when it rejected earlier proposed versions of § 41.0105 that would have eliminated the collateral source rule." *Id.*

Matbon, Inc. v. Gries

In *Matbon, Inc. v. Gries*, No. 11-06-00258-CV, 2009 WL 94310 (Tex. App.—Eastland Jan. 15, 2009, no pet. h.), the issue was "[w]hether a plaintiff may still recover the gross amount of his medical bills in a personal injury action even though the medical provider may have reduced a portion of the medical bills as a result of its contractual arrangements with the plaintiff's insurer." *Id.* at *4. The court of appeals ultimately concluded that the plaintiff could not recover such gross amounts. *Id.* at *6.

In reaching its conclusion, the Eastland Court of Appeals' analysis contains the same flaws as the plurality opinion in *Mills v. Fletcher*, upon which the *Matbon* court based its conclusion. *Matbon*, 2009 WL 94310 at *5 (agreeing with the plurality opinion in *Mills*). For instance, without any reference to the legislative history of § 41.0105, which, as described above, demonstrates that § 41.0105 did not affect the collateral source rule, the *Matbon* court agreed with the *Mills* plurality that § 41.0105 violates the collateral source rule to some extent. *Matbon*, 2009 WL 94310 at *6. The fallacy of this conclusion is also set forth in detail above and in the dissenting opinion in the *Mills* case.

The *Matbon* court also failed to recognize that the collateral source rule is a rule of damages as well as a rule of evidence. *Matbon*, 2009 WL 94310 at *6, n. 5 (only

recognizing that the collateral source rule as a rule of evidence). As the Fourteenth Court of Appeals noted in *Taylor v. American Fabritech*, 132 S.W.3d 613 (Tex. App. -- Houston [14th Dist.] 2004, pet. denied), the collateral source rule prevents a defendant from offering evidence of, or obtaining an offset for, funds received by the plaintiff from a collateral source. *Taylor*, 132 S.W.3d at 626.

Finally, the *Matbon* court's interpretation of when medical expenses are incurred is inconsistent with the long standing law that medical charges are incurred at the time services are rendered to the patient irrespective of any subsequent write-offs. *See Black v. American Bankers Ins. Co.,* 478 S.W.2d 434, 437-38 (Tex.1972) (concluding that patient incurs hospital expenses at the time he enters the hospital and receives medical services); *Texarkana Mem'l Hosp., Inc. v. Murdock*, 903 S.W.2d 868 (Tex. App. -- Texarkana 1995), *rev'd on other grounds*, 946 S.W.2d 836 (Tex. 1997); *American Indemnity Co. v. Olesijuk,* 353 S.W.2d 71, 72-72 (Tex. Civ. App. -- San Antonio 1961, writ dism'd) (holding that insured incurred medical expenses when he entered hospital and received medical services); *see also Aviles v. Aguirre*, No. 08-0240, 2009 WL 1901637, *1 (Tex. July 3, 2009).

Escabedo v. Haygood

In *Escobedo*, before trial, the defendant sought to exclude evidence or testimony of any amount of medical bills in excess of the amount actually paid or incurred by or on behalf of the plaintiff. *Escabedo v. Haygood*, No. 12-07-00130-CV, 2009 WL 387153, *1 (Tex. App.—Tyler Feb. 18, 2009, pet. filed). The trial court denied the defendant's

motion. *Id.* at *1. However, the trial court granted the plaintiff's motion seeking to exclude evidence of, and offsets for, collateral sources. *Id.* at *1.

At trial the court allowed the plaintiff to present evidence of the total amount billed by his health care providers. *Id.* at *1. The trial court did not admit evidence of any reductions to the bills which were adjustments made by the health care providers as required by Medicare. *Id.* at *1. In its verdict, the jury awarded the plaintiff the full amount of the medical bills from the health care providers. *Id.* at *1. The defendant challenged the verdict by filing a motion JNOV arguing that the plaintiff had offered evidence relating to an improper measure of damages and, thus, the evidence offered was irrelevant and constituted no evidence. *Id.* at *1. The trial court entered a judgment awarding the entire amount of the medical bills. *Id.* at *1.

The court of appeals concluded that the language in § 41.0105 does not allow recovery of the amounts *initially* incurred by the claimant. *Id.* at *3. The court of appeals further concluded that amounts that a health care provider subsequently writes off do not constitute amounts actually incurred by or on behalf of the claimant. *Id.* at *3. The court of appeals held that § 41.0105 not only limits the amount of damages recoverable, but also affects the relevance of evidence offered to prove damages. *Id.* at *3. The court of appeals then reasoned that medical bills reflecting only the amount "initially incurred" are irrelevant for proving the amounts that were actually incurred and, therefore, should be excluded at trial. *Id.* at *3. As such, the court of appeals further held that evidence of amounts initially incurred is legally insufficient evidence concerning the correct measure of damages. *Id.* at *3.

Interestingly, in reaching its conclusion, the court of appeals did not cite, nor did it even acknowledge, the precedent from this Court recognizing that medical charges are actually incurred at the time services are rendered to the patient irrespective of any subsequent write-offs. *See Black v. American Bankers Ins. Co.,* 478 S.W.2d 434, 437-38 (Tex.1972). Furthermore, the court of appeals did not consider the legislative history of § 41.0105 which demonstrates the continued viability of the collateral source rule, but instead interpreted § 41.0105 as affecting the evidence which is admissible to prove recoverable medical expenses.

In short, it is inconceivable that, in enacting § 41.0105, the Legislature would have intended to create such confusion and inefficiency in the name of streamlining the tort system. Accordingly, this Court should reject the approach outlined in *Escabedo*.

Tate v. Hernandez

In *Tate v. Hernandez*, No. 07-07-0351-CV, 2009 WL 562981 (Tex. App. -- Amarillo March 5, 2009, no pet.) the issue presented was whether a debt which has been discharged in bankruptcy has been "paid or incurred" for purposes of § 41.0105. *Id.* at *1. Initially, the court of appeals concluded that the discharge of medical expenses through bankruptcy is akin to the discharge of an obligation by a collateral source. *Id.* at *3. Nevertheless, the court of appeals ultimately concluded that because the plaintiff's medical bills were discharged in bankruptcy, the recovery of such sums by the plaintiff was not necessary to compensate him for his injuries. *Id.* at *5. Therefore, the court of appeals held that the medical bills discharged in bankruptcy were not actually incurred for purposes of applying § 41.0105 and, thus, not recoverable by the plaintiff. *Id.* at *5.

The primary error in the court of appeals' analysis is its complete failure to consider whether the Legislature intended to modify the collateral source rule when it enacted § 41.0105. As is demonstrated above, the legislative history demonstrate that the legislature did not intend to modify the collateral source rule. Furthermore, the court of appeals failed to recognize that the collateral source rule is not only a rule of evidence but also a remedial rule preventing a defendant from obtaining an offset for funds received by the plaintiff from a collateral source. *Taylor v. American Fabritech*, 132 S.W.3d 613, 626 (Tex. App. -- Houston [14th Dist.] 2004, pet. denied). If the court of appeals had adhered to the traditional application and long held effect of the collateral source rule, after recognizing that the discharge of medical bills in bankruptcy was a collateral source, the court of appeals should not have allowed the defendant to obtain an offset for such collateral source. However, by completely disregarding these long held legal maxims, the court of appeals reached a result that is inconsistent with the purpose of § 41.0105 and the collateral source rule.

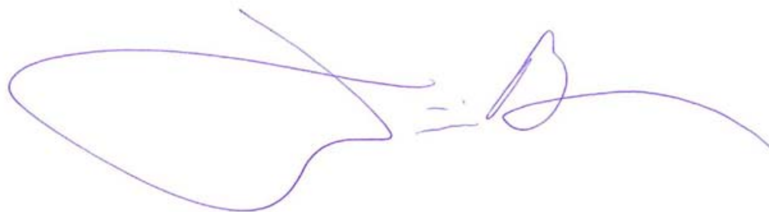
The courts of appeals have mistakenly given a meaning to the terms "incurred" and "actually incurred" that is inconsistent with this Court's opinion in *Black*. Each has followed, to a certain extent, the flawed logic of one plurality opinion from the San Antonio Court of Appeals. Despite the parroting, this approach should be rejected. If it is not rejected, Respondents ask this Court to take note that the Dallas Court of Appeals has never had the opportunity to rule on the question because it affirmed the judgment of the trial court on the independent ground described in Section I. Accordingly, even if this Court disagrees with the Dallas Court of Appeals with respect to the order of application

of §§ 33.012 and 41.0105, the case should be remanded so that the lower court may have an opportunity to decide the meaning of § 41.0105. If, however, this Court chooses to reach the meaning of § 41.0105, it should affirm its holding in *Black* and give the statute its plain meaning -- a meaning that supports the recovery of medical expenses that are paid *or* incurred.

PRAYER

For all these reasons, Respondents pray that this Court affirm the trial court's judgment. In the alternative, Respondents pray that this Court remand the case so that the court of appeals may decide any previously undecided issues in the first instance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Response to Petition for Review was served upon the following counsel for Petitioners on this 15th day of September, 2009:

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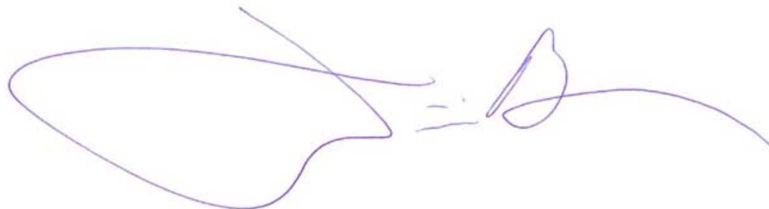

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