IN THE SUPREME COURT OF TEXAS

NO. 09-0377

AARON GLENN HAYGOOD, PETITIONER,

v.

MARGARITA GARZA DE ESCABEDO, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS

Argued September 16, 2010

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting

Today, the Court holds that a claimant may neither recover amounts written off and never paid, nor introduce evidence of such amounts during trial. I agree with the Court that section 41.0105 reflects the Legislature's intent to restrict the amount of past medical expenses that may be recovered. However, I disagree with the Court's conclusion that the Legislature intended to prohibit the introduction of evidence of amounts that are written off and never paid, as they represent collateral source benefits. Neither the "express terms" of the statute, which speak only to a claimant's *recovery* of past medical expenses, "[n]or [any] necessary implications" support such a conclusion. *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (citation omitted). Furthermore, one consequence of the Court's decision is that juries may deliver insupportably

divergent results as between those plaintiffs who are insured and those who are not, resulting in inconsistent appellate review of damages awards in some tort cases. I would hold that the court of appeals erred to the extent it held that section 41.0105 affects the admissibility of evidence of past medical expenses. It suggested a remittitur, but based on improper grounds. Therefore, I would reverse the court of appeals' judgment and remand to that court.

I. ANALYSIS

I agree with the Court that section 41.0105 abrogates the collateral source rule as a rule of recovery by proscribing damages awards for amounts written off and never paid. While the precise issue was not before us, we implied as much in *Daughters of Charity Health Services of Waco v. Linnstaedter*, 226 S.W.3d 409, 410 (Tex. 2007). However, while the Court's reasoning as to recovery is solidly grounded, its holding as to the admissibility of evidence of adjusted charges finds scant support in the statute's language, is contradicted by the statute's legislative history, and runs counter to long-standing common law.

It is not the prerogative of the Court to second-guess the Legislature's policy choices. Rather, it is the Court's duty to discern and implement the law in accordance with, not in contravention of, the Legislature's intent. Here, the Court ignores the obvious conflict between section 41.0105's title and its text. In doing so, the Court reaches its conclusion without utilizing either the statute's legislative history or any one of the enumerated statutory construction aids. *See* TEX. GOV'T CODE § 311.023. When a statute's text is only amenable to one reasonable interpretation we eschew extrinsic sources. When a statute is subject to more than one reasonable interpretation, however, its history provides valuable insight. The Court's unwillingness to consult

the drafting history of section 41.0105—even in the face of two competing, yet reasonable, interpretations—shakes the foundations of its decision. It is clear, in my opinion, that section 41.0105 was intended to limit a claimant's recovery of past medical expenses without disturbing the long-standing prohibition on introducing evidence of collateral source benefits such as medical charges that are written off and never paid. The legislative history of section 41.0105 supports this conclusion.

A. Evidence of Past Medical Expenses

The collateral source rule has applied in Texas since 1883. *Tex. & Pac. Ry. Co. v. Levi & Bro.*, 59 Tex. 674, 676 (1883). Under the common law, a tortfeasor was not entitled to a liability offset for proceeds procured as a result of the injured party's independently bargained-for agreement with an insurance company or other source of benefits. *See Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *see also Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980). The rule was predicated on the notion that a tortfeasor should not benefit from an agreement to which the tortfeasor is not privy. *Brown*, 601 S.W.2d at 934. The collateral source rule has been applied to all manner of benefits, including payments received under a worker's compensation policy, *see Exxon Corp. v. Shuttlesworth*, 800 S.W.2d 902, 907–08 (Tex. App.—Houston [14th Dist.] 1990, no writ), income received as part of veterans' benefits, *see Montandon v. Colehour*, 469 S.W.2d 222, 229–30 (Tex. Civ. App.—Fort Worth 1971, no writ), and Social Security disability payments, *see Traders and Gen. Ins. Co. v. Reed*, 376 S.W.2d 591, 593–94 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.). In this sense, the collateral source rule was a rule of recovery.

But the collateral source rule also has an evidentiary aspect; the defendant may not introduce evidence at trial of collateral sources of compensation for a plaintiff's injuries. *See, e.g.*, *Taylor v. Am. Fabritech*, 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (holding that governmental assistance payments made to plaintiff were a collateral source and that trial court erred when it allowed evidence of such payments); *Exxon Corp.*, 800 S.W.2d at 907–08 (excluding evidence of worker's compensation benefits). As a rule of evidence, the collateral source rule has excluded such things as evidence of payments and downward adjustments in accordance with Medicare guidelines. *See Matbon, Inc. v. Gries*, 288 S.W.3d 471, 480–82 (Tex. App.—Eastland 2009, no pet.); *Wong v. Graham*, No. 03-00-00440-CV, 2001 WL 123932, at *11 (Tex. App.—Austin Feb. 15, 2001, no pet.) (not designated for publication); *see also Briese v. Tilley*, No. C 08-4233 MEJ, 2010 WL 3749442 slip op. at 7–10 (N.D. Cal. Sept. 23, 2010).

1. Is the rule implicated?

The Court concludes that the collateral source rule is not implicated by statutory or contractual adjustments to medical charges because the discounted amounts are "a benefit to the insurer," not the insured. ___ S.W.3d ___, ___. While I agree the discounting of medical charges benefits insurers, I disagree that the rule is not otherwise implicated. Although medical expenses that are discounted and written off are not direct, out-of-pocket payments made on the plaintiff's behalf, the discount would not have occurred but for the claimant's efforts.[1] That is to say, if Haygood had not been covered by Medicare or some private insurer, he would have been

[1] Medicare recipients become eligible for benefits either by contributing to Social Security for a specified period or by paying premiums. *See* 42 U.S.C. §§ 402(a), 426, 426–1, 1395c, 1395j, 1395o (2010).

responsible for the full charges that were billed, and Margarita Garza de Escabedo would have become liable for them as the result of her negligence. *See* George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L. J. 101, 104 (2005–06). Even if Haygood had private insurance coverage, he might have been liable for the full charges if his insurer disputed the charges or the medical providers did not have a contractual relationship with Haygood's insurers.[2] The same rationale undergirding the collateral source rule's application to payments made by third-party providers applies equally to write-offs secured as a result of a contractual relationship with an insurance provider or rules governing programs like Medicare. The collateral source rule is clearly implicated when a tortfeasor would otherwise obtain a windfall from the injured party's efforts. *See Brown*, 601 S.W.2d at 934–35; *see also* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979). I would therefore hold that amounts written off and never paid pursuant to an insurance contract, Medicare, or Medicaid guidelines are collateral benefits.

2. Legislature's intent

I agree with the Court to the extent it concludes that the Legislature did not intend to abrogate the rule as it relates to *payments* made by collateral sources. Consequently, my analysis is confined to whether the Legislature intended to abrogate the common law prohibition of evidence of amounts written off and never paid that may be ascribed to collateral sources. In construing a

[2] In some cases, a covered patient will receive medical services from an out-of-network medical provider. The insurance company will make payment to the provider for less than the full charges; however, the provider is not obligated to accept the insurer's payment as satisfaction of the entire amount. In what is known as "balance billing," the provider seeks the balance of the charges from the patient. *See Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 282–83 (5th Cir. 2008) (applying Louisiana law).

statute, we always strive to give effect to the Legislature's stated intent. TEX. GOV'T CODE § 311.021; *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631–32 (Tex. 2008). "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, ___ S.W.3d ___, ___ (Tex. 2011) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008)). When the Legislature's intent is not apparent from the plain meaning of a statute's language, we may resort to other construction aids, including legislative history. TEX. GOV'T CODE § 311.023(3); *see also Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867–68 (Tex. 2009). We further presume that the Legislature is aware of existing law when it enacts legislation. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001).

The plain language of section 41.0105 does not support the Court's conclusion that the Legislature intended to alter the status quo with regard to the admissibility of evidence. The statute's unambiguous text, which states that "*recovery* of medical or health care expenses incurred," refers only to a limitation on recovery, and makes no mention of evidence. TEX. CIV. PRAC. & REM. CODE § 41.0105 (emphasis added). The collateral source rule's prohibition on the introduction of evidence of payments by insurers as well as other collateral benefits, *e.g.*, written off medical charges, has long been firmly embedded in our common law. The Legislature was undoubtedly aware of the collateral source rule when it passed section 41.0105. *See Palacios*, 46 S.W.3d at 877–78. Therefore, had the Legislature intended to abrogate even a portion of the rule's evidentiary component, it would have explicitly done so in the text of the statute. Two provisions in chapter 41,

which expressly limit the evidence that the trier of fact may consider in determining the amount of exemplary damages, stand as further proof that when the Legislature intends to alter the admissibility of evidence it unequivocally does so. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.008(e), .011(b).[3] Haygood contends that the Legislature would not have included the word "evidence" in the title unless it intended to limit the evidence that can be introduced during trial. While I disagree with Haygood's proposed interpretation of section 41.0105, at a minimum, the conflict between section 41.0105's text and its title renders the statute susceptible to more than one reasonable interpretation. Thus, the use of statutory construction aids, including legislative history, is warranted. *Id*. at § 311.023(3). The lengthy and complicated legislative history of section 41.0105 clearly militates against Haygood's and, ultimately, the Court's characterization of the Legislature's intent in passing section 41.0105. The Legislature worked through several iterations of draft bills before settling on the current statute. The first iteration of section 41.0105, which was included as part of a broader effort to reform medical malpractice laws, would have allowed "a defendant physician or health care provider [to] introduce evidence in a health care liability claim of any amount payable to the claimant as a collateral benefit." Tex. H.B. 3, 78th Leg., R.S. (2003). The proposed legislation would have defined "collateral source benefit[s]" as "benefit[s] paid or payable to or on behalf of a claimant under [] the Social Security Act . . .; [] a state or federal income replacement, disability, workers' compensation, or other law that provides partial or full income

[3] Section 41.008(e) states that "[t]he provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction"; section 41.011(b) states that "[e]vidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial."

replacement; or [] any insurance policy, other than a life insurance policy, including an accident, health, or sickness insurance policy; and [] a disability insurance policy." *Id.* There was no question at all that the bill would have abrogated the collateral source rule as a rule of evidence, but its application was limited to health care liability claims under former article 4590i. This proposed language survived the merging of House Bill 3, whose application was limited to medical malpractice claims, and House Bill 4, an omnibus civil justice reform bill. Tex. H.B. 4, 78th Leg., R.S. (2003). However, an amendment to House Bill 4 stripped from it the language abrogating the evidentiary aspect of the collateral source rule.

When House Bill 4 reached the Senate State Affairs Committee, it expanded section 41.0105's application beyond health care liability claims. The Senate further renamed the proposed statute "Evidence Relating to Amount of Economic Damages," and included the following language: "[a] defendant may introduce evidence of any amount payable to the claimant as a collateral benefit arising from the event in the cause of action." Tex. C.S.H.B. 4, 78th Leg., R.S. (2003). Just like the initial version of section 41.0105 proposed in the House, the State Affairs Committee's proposed statute would have undoubtedly abrogated the collateral source rule both as a rule of recovery *and* a rule of evidence. But the final enrolled version of the bill amended the proposed statute once more, this time deleting the provisions concerning evidence of collateral sources. Despite the language of the bill being expressly limited to recovery of past medical expenses, it retained its title from the State Affairs Committee: "Evidence Relating to Amount of Economic Damages." Tex. H.B. 4, 78th Leg., R.S. (2003). The legislative history of section 41.0105 clearly illustrates that its title is nothing more than a remnant from proposed versions that failed to pass.

Furthermore, reading section 41.0105 in context with other laws concerning the proof and presentation of damages evidence supports my conclusion that section 41.0105 did not abrogate the collateral source rule's application as a rule of evidence. At the time section 41.0105 was enacted, section 41.012 directed that a court should instruct the jury with regard to several other provisions of chapter 41 establishing criteria and evidence to be considered in awarding exemplary damages. TEX CIV. PRAC. & REM. CODE § 41.012. For instance, section 41.012 requires the jury to be instructed with regard to section 41.011, which limits the evidence that the trier of fact can consider in determining the amount of exemplary damages. Section 41.012 also requires that the jury be instructed with regard to section 41.003, under which exemplary damages may be awarded only if the claimant establishes by clear and convincing evidence that the claimant's harm resulted from fraud, malice, gross negligence, or as otherwise specified by statute. If the Legislature intended to limit the evidence placed in front of the jury, as opposed to a plaintiff's recovery, it likely would have amended section 41.012 and also expressly directed that the jury be instructed with regard to section 41.0105. *See id.*

Significantly, the Legislature also chose not to amend section 18.001 of the Code, which has long governed procedures for proving damages in personal injury cases. Under that section, an uncontroverted affidavit in proper form attesting

> that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

TEX. CIV. PRAC. & REM. CODE § 18.001. If the Legislature intended that evidence of reasonable and necessary damages would no longer be admissible, it likely would have excluded medical services from section 18.001. The Legislature's decision to leave these sections unaltered, thus maintaining the status quo regarding evidence to a substantial degree, is telling. Furthermore, "a statute may be interpreted as abrogating a common-law principle only when its express terms or necessary implications clearly indicate the Legislature's intent to do so." *Cash Am.*, 35 S.W.3d at 16 (citation omitted). Here, neither the statute's words nor its context express clear legislative intent to modify the collateral source rule's evidentiary aspect. The legislative history of section 41.0105 likewise nullifies any argument that abrogation is necessarily implicit in the statute's language.

Finally, the Court's approach, which permits evidence of adjusted charges pursuant to an insurance agreement or Medicare and Medicaid requirements, will likely cause untenable and unjust results. *See* TEX. GOV'T CODE § 311.021(3) ("[I]t is presumed that [the Legislature intended] a just and reasonable result"). An uninsured plaintiff who receives medical care or an insured plaintiff who received medical care out-of-network is liable for the full amount billed. Under the Court's interpretation of section 41.0105, both plaintiffs would be entitled to recover the full amounts billed—assuming the jury finds them reasonable and necessary. However, insured plaintiffs would only be entitled to recover the aggregate of their payments plus the payments made by their insurance providers. Because the extent of the plaintiff's medical charges may affect the jury's calculation of non-economic damages, an uninsured plaintiff or an insured plaintiff who receives care out-of-network may be awarded significantly higher non-economic damages than an insured

plaintiff. This would be the case even though they were billed the exact same amount for the exact same medical care to treat the exact same injuries.

Moreover, the severity of the plaintiff's injury is a factor that enters into the review of the legal and factual sufficiency of evidence supporting mental anguish damages. *See Fifth Club, Inc. v. Ramirez,* 196 S.W.3d 788, 797–798 (Tex. 2006); *D. Burch, Inc. v. Catchings*, 2009 WL 2481862, at *4 (Tex. App.—Dallas 2009, pet. denied). In *Burch*, for example, the court considered the amounts billed by various medical providers in evaluating the factual sufficiency of the evidence supporting the amount of mental anguish damages awarded. Consequently, insured plaintiffs whose medical charges are written off and never paid may find it more difficult to establish the sufficiency of evidence supporting the amount of any mental anguish damages awarded.

B. Application of Section 41.0105

Having determined that Section 41.0105 precludes a plaintiff from recovering past medical expenses that are discounted and written off, but does not abrogate the collateral source rule as it applies to the admissibility of evidence of such amounts, I now turn to the statute's application. The Legislature's limitation of a plaintiff's recovery for past medical expenses through section 41.0105 is not novel. The Civil Practice and Remedies Code contains several similar examples of limitations on a plaintiff's recovery. *See* TEX. CIV. PRAC. & REM. CODE § 74.303 (limiting total recovery for wrongful death or survival action on a healthcare liability claim to $500,000, not including past and future medical expenses); *id.* § 75.004 (limiting liability in certain premises liability suits to $500,000 per person and $1 million in the aggregate); *id.* § 108.002 (limiting personal liability in suits against public servants to $100,000 where act or omission occurs during the course and scope

of the public servant's employment). Section 41.0105's limitation on a claimant's recovery is analogous to these and other statutory damages caps. Like other statutory damages caps, Section 41.0105 should be implemented by the trial court post-verdict. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 677–79 (Tex. App.—Dallas 2004) (applying Chapter 74 statutory damages caps), *rev'd on other grounds*, 271 S.W.3d 238 (Tex. 2008); *Signal Peak Enterprs. of Tex., Inc. v. Bettina Invs., Inc.*, 138 S.W.3d 915, 926–29 (Tex. App.—Dallas 2004, pet. struck) (holding that trial court should reform judgment to comply with statutory damages caps on exemplary damages).

Thus, I agree with the courts of appeals that have approved of the implementation of the section 41.0105 cap through a post-verdict modification. *See Matbon*, 288 S.W.3d at 481–82; *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931 (Tex. App.—Dallas 2009, pet. denied); *Gore v Faye*, 253 S.W.3d 785, 789–90 (Tex. App.—Amarillo 2008, no pet.). Under that procedure, the defendant would include with any post-verdict motion any evidence of discounts, credits, and write offs, as well as amounts actually paid by the patient and third parties. The trial court then would have the opportunity to evaluate the evidence, and if need be, reform the jury's verdict to reflect past medical expenses that were billed to the claimant, amounts actually paid, and amounts written off by the provider and never paid.

Escabedo argues that implementing section 41.0105 post-verdict will not work. But the Legislature has adopted a scheme that necessitates the post-verdict adjustment of damages in other provisions of the Civil Practice and Remedies Code. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 41.008 (applying limitation on plaintiff's recovery of exemplary damages post-verdict). When the

Legislature enacted liability caps on a plaintiff's recovery in wrongful death and survival suits in health care liability claims, it also required the following jury instruction: "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law." *Id.* § 74.303(e)(1); *see also id.* § 41.008(e). Thus, in other contexts in which the Legislature has placed a ceiling on a plaintiff's recovery, it has chosen not to apply the cap as a restriction on the amount of damages the jury can award. Instead, the jury determines damages and enters its verdict, then the trial court enforces the limitations when it renders judgment on the verdict.

I likewise am unpersuaded by Escabedo's argument that post-verdict modification could run afoul of our decisions in *Crown Life Insurance, Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Escabedo raised a hypothetical at oral argument in which a claimant receives treatment from two providers, one of whom has a contractual agreement with the hospital and one of whom does not. In the hypothetical, the jury is permitted to hear evidence of the total amount billed by both providers, as I propose, but the jury awards the plaintiff less than that amount. While Escabedo's hypothetical could conceivably lead to a *Casteel*/*Harris County* issue, that likelihood can be accounted for through the submission of carefully tailored jury questions. *See Greer v. Buzgheia*, 46 Cal. Rptr. 3d 780, 785–86 (Cal. Ct. App. 2006) (rejecting defendant's motion for post-verdict reduction in damages awarded by jury because defendant failed to object to failure to segregate damages in verdict form). This post-verdict mechanism, though cumbersome, has been used by a number of California courts for over twenty years, and the case law does not reflect any pervasive problems with the process. *See, e.g., Olsen*

v. Reid, 79 Cal. Rptr. 3d 255, 256–57 (Cal. Ct. App. 2008); *see id.* 263–65 (Moore, Acting P.J., concurring).

II. CONCLUSION

For these reasons, I am compelled to respectfully dissent. I would hold that section 41.0105 does not affect the admissibility at trial of evidence of discounts, credits, adjustments to medical bills, or amounts actually paid but disallows the recovery of the discounted portion as a past medical expense. The court of appeals suggested a remittitur reflecting the discounts, but based on improper grounds. I would therefore remand to the court of appeals.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 1, 2011