

# The Appellate Advocate

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## ARTICLES

- INHERENT JUDICIAL POWER AND THE PRINCIPLES OF APPELLATE REVIEW**  
*Stacy R. Obenhaus*.....368
- MOHAWK: LIMITED INTERLOCUTORY REVIEW OF FEDERAL COURT ORDERS TO DISCLOSE POTENTIALLY PRIVILEGED ATTORNEY-CLIENT INFORMATION**  
*Karen S. Precella and Ryan Paulsen* .....383
- RECURRING THEMES IN PRESERVING ERROR IN CIVIL CASES**  
*Sean M. Reagan*.....392
- SECTION 41.0105—DEALING WITH THE EMERGING MAJORITY RULE IN THE REAL WORLD**  
*Byron Henry and Hilaree Casada*.....406
- “YOU CAN’T HANDLE THE TRUTH!”—APPELLATE COURTS’ AUTHORITY TO DISPOSE OF CASES WITHOUT WRITTEN OPINIONS**  
*David F. Johnson*.....419
- YOU SAY YES, I SAY NO: FEDERAL CIRCUIT SPLITS THAT IMPACT TEXAS LAWYERS**  
*Cynthia K. Timms and Kirsten M. Castañeda*.....423

## SPECIAL FEATURES

- AN INTERVIEW WITH CHIEF JUSTICE (RET.) LINDA THOMAS**  
*Russ Hollenbeck*.....356

## REGULAR FEATURES

- THE CHAIR’S REPORT**  
*Marcy Hogan Greer* .....353
- UNITED STATES SUPREME COURT UPDATE**  
*Ed Dawson, Sharon Finegan, Sean O’Neill, and Ryan Paulsen*.....438
- TEXAS SUPREME COURT UPDATE**  
*Judge Renée F. McElhaney and Patrice Pujol* .....477
- TEXAS COURTS OF APPEAL UPDATE—SUBSTANTIVE**  
*Jerry D. Bullard and David F. Johnson*.....513
- TEXAS COURTS OF APPEAL UPDATE—PROCEDURAL**  
*Derek Montgomery* .....527
- FIFTH CIRCUIT CIVIL APPELLATE UPDATE**  
*Christopher D. Kratovil, Stephen Dacus, and J. Matthew Sikes* .....539
- TEXAS CRIMINAL APPELLATE UPDATE**  
*Alan Curry*.....554
- FEDERAL WHITE COLLAR CRIME UPDATE**  
*Sarah M. Frazier, Rachel L. Grier, and Robin K. Weinburgh*.....569

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## **Section 41.0105—Dealing with the Emerging Majority Rule in the Real World**

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### **INTRODUCTION**

In 2003, as part of tort reform, the Texas Legislature enacted section 41.0105 of the Civil Practice and Remedies Code. At that time, the Legislature likely had no idea that this thirty-two-word, one-sentence-provision would generate so much debate in the Bar, or that nearly seven years later that debate would rage on, often sparking emotionally-charged discussions on how to apply the statute in real world litigation.<sup>1</sup> After all, the statute plainly states it is a limit on the amount of damages a claimant can recover for medical or health care expenses. Pretty simple, right? Unfortunately, no. The statute also plainly indicates it is an evidentiary provision. So, litigants and courts have struggled with how to apply the statute at trial. Should a plaintiff be required to present its medical bills, including all write-offs or reductions from insurance, Medicare, or the like, to the jury? Or should the plaintiff present the total amount billed without write-offs so the jury can determine if the billed expenses were reasonable and necessary, and the trial court can reduce the award to account for write-offs, if any, post-trial?

**FN1:** See, e.g., Judge Randy Wilson, *An Enigma Shrouded in a Puzzle*, 71 TEX. BAR J. 812, 813, 816 (Nov. 2008); Judge Gisela D. Triana-Doyal, *Another Take on “Actually Paid or Incurred,”* 72 TEX. BAR J 16, 17 (Jan. 2009).

It appears the emerging majority rule is for the trial court to apply section 41.0105 as a post-trial damages cap. This article will summarize the current state of Texas law related to section 41.0105, and then examine the pitfalls of following what appears to be the emerging majority rule.

### **I. Section 41.0105—Limit on Evidence, Post-Trial Damages Cap, or Both?**

If you try cases or handle appeals involving medical expenses, then you are probably intimately familiar with section 41.0105, which states:

#### Evidence Relating to Amount of Economic Damages

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

TEX. CIV. PRAC. & REM. CODE § 41.0105. The plain language of the section shows that it is a provision relating to evidence (i.e., “Evidence Relating to Amount of Economic Damages”), and also a limitation on the recovery of damages (i.e., “recovery . . . is limited . . .”). Therein lies the problem addressed in this article.

At trial, there is often a two-part debate. First, parties debate whether a plaintiff is entitled to recover expenses that were written-off, deducted, or otherwise forgiven by the service providers even though Texas courts have consistently held section 41.0105 bars recovery of such expenses because they will never be paid or incurred by—or on behalf of—the plaintiff.<sup>2</sup> The more challenging questions arise in the second part of the debate; namely, should the judge or the jury make the ultimate determination of what expenses are recoverable? The majority of Texas courts are asking the jury to decide whether the total amounts billed, without reference to write-offs, were reasonably and necessarily incurred. The trial court then applies section 41.0105 as a damages cap post-verdict. This dual approach has created challenges for preserving error for both plaintiffs and defendants; has led to odd, windfall judgments; and, in the authors’ opinion, is the wrong way to handle this issue.

**FN2** *E.g., Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.) (“Amounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred by either the claimant or the claimant’s insurer because neither the claimant nor the insurer will ultimately be liable for paying these amounts.”); *Tate v. Hernandez*, 280 S.W.3d 534, 541 (Tex. App.—Amarillo 2009, no pet.) (opining “*compensation* is the ultimate purpose of our system of jurisprudence” and “[b]ecause Hernandez’s medical bills were discharged in bankruptcy, recovery of said sums by Hernandez is not necessary to *compensate* him for his injuries” and are, therefore, barred from recovery by section 41.0105); *see also* cases cited *infra* note 5.

## II. The Emerging Majority Rule

Six of the fourteen intermediate Texas courts of appeal have issued opinions addressing damages under section 41.0105, with the Amarillo court leading at three opinions on the issue.<sup>3</sup> Several federal district courts have also opined on the application of section 41.0105.<sup>4</sup> From these cases, a two-part majority rule has emerged:

1. Medical expenses written-off or otherwise deducted from a claimant’s medical bills are not recoverable, including debts discharged in bankruptcy.<sup>5</sup>

2. Evidence of expenses actually paid or incurred need not be presented to the jury and the trial court should apply the limitation post-trial.<sup>6</sup>

**FN3.** *Matbon, Inc.*, 288 S.W.3d at 481(holding section 41.0105 does not allow recovery of amounts initially incurred but ultimately written-off); *Escabedo v. Haygood*, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009, pet. granted) (holding evidence of expenses initially incurred constitutes no evidence of expenses recoverable under section 41.0105 as actually paid or incurred and noting medical bills reflecting only charges initially billed should be excluded from evidence at trial as irrelevant to the proper measure of damages); *Tate*, 280 S.W.3d at 540 n.7, 541 (holding debts discharged in bankruptcy are not actually incurred and are, therefore, not recoverable and confirming that the 41.0105 should be applied post-verdict as a damages cap); *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931, 932 (Tex. App.—Dallas 2009, pet. denied) (holding damages must be reduced post-trial by the percentage of the claimant’s responsibility under section 33.012 and then may be reduced further pursuant to section 41.0105 if the damages still exceed the amount actually paid or incurred); *Mills v. Fletcher*, 229 S.W.3d 765, 769, n.3 (Tex. App.—San Antonio 2007, no pet.) (plurality opinion holding expenses written off are not recoverable per section 41.0105, and noting the Legislature intended to abrogate the collateral source rule when it enacted section 41.0105); *see also Wackenhut Corr. Corp. v. De la Rosa*, 305 S.W.3d 594, 646-47 (Tex. App.—Corpus Christi 2009, no pet.) (holding uncontradicted evidence that EMS charges were billed without evidence the bill was actually paid “conclusively established” the claimant incurred the charges in accordance with section 41.0105); *Fuentes v. Schooling*, No. 07-07-00118-CV, 2008 Tex. App. LEXIS 9001, at \*2 (Tex. App.—Amarillo Dec. 3, 2008, no pet.) (mem. op.) (holding the trial court erred by reducing amount of medical expenses found by the jury under section 41.0105 because the amount found by the jury was less than the amount actually paid or incurred); *Gore v. Faye*, 253 S.W.3d 785, 790 (Tex. App.—Amarillo 2008, no pet.) (holding section 41.0105 should be applied post-verdict, and determining the trial court did not abuse its discretion by denying defendant’s request to present evidence of amounts written off).

**FN4.** *Tello v. United States*, 608 F. Supp. 2d 805, 809 (W.D. Tex. 2009) (applying legislative history of section 41.0105 to hold damages for lost household services are not pecuniary or economic in nature unless there is evidence of actual payments to replace the lost services, and thus,

evidence of the loss of service “resulted in direct financial loss to the survivors”); *see also* *Tholcken v. United States*, No. 4:07CV139, 2008 U.S. Dist. LEXIS 47947, at \*2 (E.D. Tex. June 19, 2008) (reducing total amount of medical expenses found to be reasonable and customary by the amounts written-off per section 41.0105); *Contreras v. KV Trucking, Inc.*, No. 4:04-CV-398, 2007 U.S. Dist. LEXIS 70140, at \*5-6 (E.D. Tex. Sept. 21, 2007) (denying defendant’s motion to exclude evidence of medical expenses not actually paid); *Goryews v. Murphy Exploration & Prod. Co.*, No. V-06-01, 2007 U.S. Dist. Lexis 57719, at \*12-13 (S.D. Tex. Aug. 8, 2007) (reducing amount of medical expenses to the amount actually paid on the plaintiff’s behalf); *Coppedge v. K.B.I., Inc.*, No. 9:05-CV-162, 2007 U.S. Dist. LEXIS 48407, at \*8-9 (E.D. Tex. July 3, 2007) (granting plaintiff motion in limine to exclude evidence of write-offs and holding section 41.0105 should be applied post-verdict); *Self v. Wal-Mart Stores, Inc.*, No. 2:05-CV-301, 2007 U.S. Dist. Lexis 49662, at \*3-4 (E.D. Tex. Apr. 5, 2007) (granting plaintiff’s motion in limine as to evidence of expenses written-off or otherwise deducted from medical bills).

**FN5.** *Matbon, Inc.*, 288 S.W.3d at 481; *Haygood*, 283 S.W.3d at 7; *Tate*, 280 S.W.3d at 541; *Mills*, 229 S.W.3d at 769; *see also* *Tholcken*, 2008 U.S. Dist LEXIS 47947, at \*2; *Goryews*, 2007 U.S. Dist. LEXIS 57719, at \*12-13. *But see* *Wackenhut*, 305 S.W.3d at 646-47.

**FN6.** *Irving Holdings*, 274 S.W.3d at 931, 932; *Tate*, 280 S.W.3d at 540, n.7 (re-confirming section 41.0105 should be applied “post-verdict, as a cap to recoverable damages”); *Gore*, 253 S.W.3d at 790; *see also* *Contreras*, 2007 U.S. Dist. LEXIS 70140, at \*5-6; *Coppedge*, 2007 U.S. Dist. LEXIS 48407, at \*8-9; *Self*, 2007 U.S. Dist. LEXIS 49662, at \*3-4.

#### **A. The emerging majority rule in practice—*Gore* and *Irving Holdings***

Two cases illustrate the potential for inequitable and downright odd results when the jury decides the gross amount of medical expenses that are reasonable and necessary, and the court applies section 41.0105 post-verdict.

##### **1. *Gore v. Faye***

First, the opinion in *Gore v. Faye* provides some support for litigants to completely avoid the application of section 41.0105. There, the Amarillo Court of Appeals determined trial courts are not required to present section 41.0105 evidence to the jury and held the trial court did not abuse its discretion by excluding such evidence. *Gore*, 253 S.W.3d at 790. Although the appellant did not appeal the trial court’s failure

to apply an off-set post-verdict, that decision necessarily impacts whether the initial decision to exclude the evidence constitutes an abuse of discretion. Yet, the Amarillo court did not address that connection, instead opting to affirm on narrow grounds.

In *Gore*, the trial court denied the defendant's requests to present evidence of medical write-offs to the jury, but assured the defendant that its offer of proof would be considered and applied post-verdict. *Id.* at 787-788. The trial court affirmatively stated that the application of section 41.0105 was "a post-verdict pre-judgment matter," and that the court would consider the testimony post-verdict and pre-judgment. *Id.* at 788. The plaintiff presented evidence that she incurred \$8,086.10 in gross medical expenses, and defendant's offer of proof showed that approximately \$5,749.00 of that amount was actually paid or incurred. *Id.* But the jury awarded only \$6,391.10. *Id.*

Despite its prior assurances, the trial court refused to apply the section 41.0105 evidence post-verdict because the amount awarded by the jury was less than the total requested by the plaintiff. *Id.* The trial court decided that "it was not feasible to accurately offset the past medical charges according to *Gore's* section 41.0105 evidence," and, instead, awarded the plaintiff \$6,391.10 less the plaintiff's percentage of fault. *Id.* In other words, the plaintiff recovered more than she could have recovered had the court applied section 41.0105 or had the jury been provided section 41.0105 evidence.

The plaintiff was essentially allowed to have her cake and eat it too while the defendant was led astray by the court's assurance that the Section 41.0105 evidence would be applied post-verdict. Although the Amarillo Court of Appeals affirmed the judgment solely based on its determination that trial courts are permitted to exclude evidence of offsets to the plaintiff's past medical expenses from the jury's purview, the potential impact of the opinion is much further reaching because it potentially allows courts to exclude section 41.0105 evidence both during trial and post-verdict. Such a result is inequitable and leaves litigants without any sense of security regarding how these issues will be handled.

## **2. *Irving Holdings v. Brown*<sup>7</sup>**

*Irving Holdings* is also troubling. There, the Dallas Court of Appeals determined any reduction of damages based on a plaintiff's proportionate responsibility should be calculated *before* the court applies section 41.0105. *Irving Holdings*, 274 S.W.3d at 931, 932. The jury found that the plaintiff and the defendant were each negligent and the percentage of responsibility for each was fifty percent. *Id.* at 928. The jury also found the Plaintiff's past medical expenses totaled \$89,000. *Id.* Defendant's insurer

established outside of the jury's presence that only \$45,429.95 of the total expenses were actually paid. *Id.*

**FN7.** The Texas Supreme Court's denial of the petition for review in this case does not reflect that the Court agrees with this opinion. By denying, rather than refusing, the petition, the Texas Supreme Court indicates that it "is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects." TEXAS RULES OF FORM, App. B (Texas Law Review Ass'n et al. eds., 10th ed. 2003).

In rendering judgment, the trial court first reduced the gross medical expenses found by the jury (i.e., \$89,000) by the plaintiff's fifty percent responsibility and determined that the plaintiff was entitled to recover, at most, \$44,500 in medical expenses. *Id.* at 929. Because that amount was less than the expenses actually paid, the trial court did not apply section 41.0105 to further reduce the amount of medical expenses. *Id.*

The court of appeals affirmed:

[S]ection 41.0105 must be applied after all other calculations limiting or reducing the amount of recoverable damages to determine whether the damages attributable to medical or health care expenses that are otherwise recoverable—without regard to section 41.0105—fall above or below that section's limitation . . . . If the resulting damage amount is not greater than the amount "actually paid or incurred," then section 41.0105's limitation is satisfied and no further reduction in the amount of those damages recoverable is necessary.

*Irving Holdings*, 274 S.W.3d at 931. To reach this conclusion, the court opined applying section 41.0105 first would treat that provision as a limit on damages rather than a limit on recovery, and would allow a tortfeasor that is fifty percent responsible for the accident to pay only 25% of the medical expenses found by the jury. *Id.*

It is the latter determination that turns the statute on its head and leads to an improper windfall for the plaintiff. In this case, section 41.0105 limited the plaintiff's recovery of medical expenses to no more than \$45,429.95, the expenses actually paid on his behalf. The \$89,000 found by the jury could not be recovered by plaintiff and should have been treated as a fictitious number showing simply that the jury determined that all of the care received by plaintiff were reasonably and necessarily incurred as a result of the accident. By applying section 33.012 first, the court of appeals ignores the fictitious nature of the jury finding. Contrary to its analysis, the resulting judgment leaves the defendant paying nearly 100% of the plaintiff's

recoverable medical expenses even though the defendant is only fifty percent responsible for the accident. That result is certainly not what the Legislature had in mind when it enacted section 41.0105. *See, e.g., Tate*, 280 S.W.3d at 536 (noting section 41.0105 and similar statutes were intended to limit the recovery of personal injury plaintiffs).

**B. The current minority view—*Escabedo v. Haygood***

The Tyler Court of Appeals took the opposite approach in *Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App.—Tyler 2009, pet. granted) (“*Haygood*”). Following a car wreck, Haygood sought, among other damages, his past medical expenses. *Haygood*, 283 S.W.3d at 4-5. Before trial, Escabedo moved to exclude any evidence of medical or health care expenses that were written-off and were, thus, “in excess of the amount actually paid or incurred by or on behalf of [Haygood].” *Id.* She based this request on section 41.0105 and argued evidence of the total amount billed would address an incorrect measure of damages and would constitute no evidence of the medical expenses actually paid or incurred by Haygood or on his behalf. *Id.* at 5. The trial court denied Escabedo’s motions, granted Haygood’s request that evidence of reductions in the total billed be excluded, and allowed Haygood to present evidence of the total amount billed without regard to any offsets. *Id.*

It was undisputed the total billed was \$110,069.12 and that \$82,294.69 had been written off by Haygood’s providers as required by Medicare. *Id.* In other words, Haygood and Medicare had actually paid or incurred only \$27,774.43. *Id.* The jury assessed the full amount of \$110,069.12 as past medical care expenses, and the trial court rendered judgment on that amount. *Id.* Escabedo sought judgment notwithstanding the verdict, arguing the evidence of the full amount billed related to an improper measure of damages and, therefore, constituted no evidence of the expenses actually paid or incurred. *Id.* at 5-6. The trial court denied that motion. *Id.* at 6.

The Tyler Court of Appeals reversed, holding section 41.0105 is “a measure of damages [that] not only limits the amount of damages recoverable, but also affects the relevance of evidence offered to prove damages.” *Id.* at 7. The court determined bills showing only the amounts “initially incurred” (i.e., initially billed prior to any deductions) “are irrelevant and should be excluded at trial.” *Id.* The court also held such evidence is legally insufficient as to the correct measure of damages (i.e., “the amount actually paid or incurred by or on behalf of the claimant.”). *Id.* The court sustained Escabedo’s legal sufficiency point, reversed the judgment as to the amount of medical expenses, and suggested a voluntary remittitur to reflect the amount actually paid or incurred. *Id.* at 8.

The Texas Supreme Court granted Haygood’s petition for review but has not yet set an argument date. Haygood argues, in part, that the court of appeals’ decision eliminates the requirement that a claimant prove that the expenses were reasonable and necessary. As amicus curiae National Association of Mutual Insurance Companies aptly noted, that should not be the case:

Section 41.0105 *supplements*—rather than supplants—the “reasonable and necessary” measure of damages. See TEX. CIV. PRAC. & REM. CODE § 41.0105 (“*In addition to any other limitation under law . . .*”) (emphasis added). Claimants still must present evidence that any medical expenses they seek to recover are reasonable and necessary. Nothing in Section 41.0105 states otherwise. Section 41.0105 merely requires that claimants also present evidence that any “reasonable and necessary” expenses were “actually paid or incurred” by or on behalf of the claimants. *Id.*

(Brief at 5, available at <http://www.supreme.courts.state.tx.us/ebriefs/09/09037705.pdf>). Indeed, excluding evidence of amounts “initially incurred” at trial, or removing the question of past medical expenses from the jury altogether, would avoid many of the pitfalls discussed below.

### III. Potential Pitfalls of the Post-Trial Majority Rule

The post-trial application of Section 41.0105 is appealing because it eliminates the apparent conflict between the statute on the one hand, and the collateral-source doctrine and prohibition of evidence of insurance on the other. Despite its surface appeal, however, the post-trial application of section 41.0105 has several pitfalls. These problems arise in three areas: (1) plaintiff’s proof in light of the pattern charge; (2) proportionate responsibility; and (3) pre-existing conditions.

#### A. Plaintiff’s Proof

With respect to plaintiff’s proof, the problem is evident. The trial court is actually resolving a fact issue in a jury trial. In other words, a jury is not allowed to determine the amount of expenses actually paid or incurred and whether these amounts are reasonable or necessary. The idea that disputed evidence of the plaintiff’s recoverable damages would not be presented to the jury is not contained in the statute or legislative history. One would think that had the legislature intended to work such a significant change to trial procedure, it would have said as much. On the contrary, section 41.0105 is entitled “Evidence Relating to Amount of Economic Damages.” If the statute acts as a simple damages cap, this title is meaningless, bordering on ludicrous.

It is true that some remedies such as injunctions, disgorgement, and other equitable remedies are the exclusive province of the trial court. But even in those cases, the jury is allowed to resolve disputed fact questions. It is no answer to assume that, because the jury has decided a higher amount is reasonable, a lower amount must also be reasonable. There may be a legitimate dispute regarding the amount of expenses actually paid or incurred. And as discussed below in more detail, the jury may have determined certain expenses were unreasonable and unnecessary, or simply not caused by the defendant's conduct. By simply applying section 41.0105 mechanically after trial, the trial court cannot excise any rejected or reduced amounts absent a jury finding on each expense.

Additionally, when the parties dispute whether past medical expenses were actually paid or incurred by or on behalf of the plaintiff, the suggested pattern charge advises the jury to find the amount of past medical expenses actually paid or incurred.<sup>8</sup> How can a jury find the correct amount without evidence of the proper measure of damages? Obviously, for this question to be submitted, there must be evidence of the amount actually paid or incurred admitted at trial. If the evidence admitted at trial reflects only the amount billed for past medical expenses, this would be insufficient to answer the question—as the court of appeals held in *Haygood*.<sup>9</sup> Either evidence of the amount of expenses actually paid or incurred should be admitted during trial or the pattern charge should not be used.

**FN8.** COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 8.2 cmt. (2008).

**FN9.** *Haygood*, 281 S.W.3d at 7.

## **B. Proportionate Responsibility**

Applying section 41.0105 post-trial also creates a problem with proportionate responsibility under chapter 33 of the Civil Practice and Remedies Code. The problem arises by applying the percentage of responsibility finding to the fictional amount of damages found by the jury based on past medical bills. This problem is demonstrated by the following example.

Assume the jury is presented with medical bills in the amount of \$1,000, of which \$600 was actually paid or incurred. The jury finds the plaintiff 20% responsible. Under the post-trial approach, \$800 is the maximum amount plaintiff can recover under Chapter 33.<sup>10</sup> If one assumes a single defendant, that defendant is liable for \$800. After the court applies section 41.0105, plaintiff recovers \$600, the maximum amount plaintiff could recover regardless of her own negligence. This is the result in *Irving Holdings* described above. This holding is untenable in light of the legislature's clear

intent to reduce plaintiff's recoverable damages by the percentage of plaintiff's responsibility. Whether one considers section 41.0105 an evidentiary rule as in *Haygood*, or a damage cap as in most of the other cases, any application that obviates the plaintiff's percentage of responsibility must be rejected.

**FN10.** TEX. CIV. PRAC. & REM. CODE § 33.012.

### **C. Pre-Existing Conditions**

Finally, even if one ignored the issues discussed above, the pre-existing condition problem dooms the post-trial application of section 41.0105. Consider the following hypothetical. Plaintiff has medical bills totaling \$1,000 of which \$600 were actually paid or incurred. At trial, defendant argues that some of the treatments in the bills were unreasonable or unnecessary because they were the result of pre-existing conditions, or, were at least conditions not caused by the defendant's conduct. The jury finds \$800 in past medical expenses. Assuming no negligence on the plaintiff's part, under the post-trial rule, the plaintiff recovers \$600. But what about the jury's reduction? Did the jury accept the defendant's argument that some of the treatments were unreasonable or unnecessary, not the result of the defendant's conduct, or both? If so, which expenses were rejected? Which amounts were unreasonable? What treated conditions were pre-existing? Without a line-item finding on each disputed expense, there is no way to tell. It is simply unfair for defendants not to receive the benefit of the jury accepting its argument that some of the conditions treated were not caused by the defendant's conduct.

It is no solution to have the trial court simply reduce the recoverable amount by the same proportion as that awarded by the jury. In the hypothetical above, because the jury awarded 80% of the amount billed, the trial court would reduce the amount actually paid or incurred by 20%, thus leaving the plaintiff to recover \$480. But this solution is not fair to the plaintiff because the jury might have reduced some of the expenses by different amounts, and some of the expenses rejected by the jury may have already been significantly reduced in the amount actually paid or incurred. Therefore, a mechanical reduction could disproportionately reduce plaintiff's ultimate award. The bottom line is that, without a jury finding on each disputed expense, it is impossible for the parties or an appellate court to determine what expenses were reduced or rejected.

However, in some cases, submitting a granulated charge regarding medical expenses would be daunting for the parties and the jury. A more straight-forward approach, and one that fits Texas' broad form charge practice, is to allow the jury to determine the amount actually paid or incurred and whether that amount—not a fictional billed amount—was reasonable and necessary. The PJC does not address this scenario, but such a submission would look like this:

- a. Reasonable expenses of necessary medical care actually paid or incurred by or on behalf of Paul Payne in the past.

Answer: \_\_\_\_\_

#### IV. Practical Advice for Preserving Error

Despite the problems discussed above, there are several procedures that plaintiffs and defendants can invoke to protect their rights and preserve error for appeal.

First, the plaintiff should make an effort to get a pre-trial stipulation as to the amount actually paid or incurred. While a stipulation would not necessarily relieve the plaintiff of the burden to establish the expenses were caused by the defendant's conduct, or that they were reasonable and necessary, it would remove the *amount* from the jury's consideration. Of course, if the defendant failed to file an opposing affidavit under chapter 18 of the Civil Practice and Remedies Code, all of the expenses are considered reasonable and necessary leaving only causation for the jury.<sup>11</sup>

**FN11.** TEX. CIV. PRAC. & REM. CODE § 18.001(b).

Second, if the amount of certain expenses is disputed, plaintiffs should consider presenting invoices to the jury describing the treatments at issue without revealing the amount billed. This would nullify a defendant's objection to plaintiff's initial medical bills because the care is relevant even if the gross amount is not. The plaintiff could then present the amount actually incurred for the disputed treatment to the jury without raising the specter of insurance.

Third, if the defendant disputes the amount of expenses, or causation related to certain expenses, the plaintiff should move for partial summary judgment under Rule 166a(g) to establish the amount of past medical expenses actually paid or incurred as a matter of law. Even if the trial court denied the motion, the disputed fact issues would be exposed, and the plaintiff could tailor its evidence at trial and the jury charge accordingly.

On the other side of the case, the defendant should start by filing an opposing affidavit under chapter 18 so as to require plaintiff to prove that past medical expenses are reasonable and necessary. This presents a dilemma for plaintiffs. Plaintiffs must decide whether to present evidence of the amounts actually paid or incurred and risk injecting insurance into the case, or rely solely on medical bills and risk an objection to the charge, or worse, insufficient evidence of the proper measure of damages as in *Haygood*.

Second, if the trial court excludes evidence of expenses actually paid or incurred, defendants should make an offer of proof regarding the proper amounts. Defendants should only proffer the evidence it would have offered, omitting any disputed expenses. This allows a court of appeals to modify the judgment—or, as in *Haygood*—suggest remittitur to the proper amount of damages.

Third, defendants should object to the pattern charge if plaintiffs present no evidence of expenses actually paid or incurred. Defendants should also object to any non-pattern charge that does not require a finding of expenses actually paid or incurred. In either case, plaintiffs are forced to present evidence of expenses actually paid or incurred or risk reversible error requiring a new trial as to liability and damages.<sup>12</sup>

**FN12.** TEX. R. CIV. P. 44 (prohibiting new trial on damages only when liability is contested).

Most of the issues raised herein could be solved by simply requesting separate blanks in the jury charge for disputed expenses. That way, the plaintiff retains the jury's finding on all reasonable and necessary expenses, and defendants obtain the benefit of the jury's finding on the disputed expenses. In the end, the final judgment would accurately reflect the jury's findings while harmonizing section 41.0105 with Chapter 33.

## CONCLUSION

While the overwhelming trend is to treat section 41.0105 as a damages cap and apply it to the jury's award post-trial, this approach presents a myriad of problems. Without evidence at trial of the amount of past medical expenses actually paid or incurred, the plaintiff's proof will not square with the pattern jury charge, proportionality under Chapter 33 will be more difficult to determine, and, in the event the jury awards less than the amount sought by the plaintiff, defendants will not receive the benefit of any successful pre-existing condition argument. For these reasons, and considering its title, section 41.0105 is best viewed as a measure of damages. Therefore, evidence of past medical expenses actually paid or incurred should be presented at trial. This procedure solves the problems discussed herein, and works no prejudice as long as the evidence of past medical expenses does not allow the jury to

ascertain the existence of insurance.<sup>13</sup> While *Haygood* may be an outlier, its reasoning is sound, and any rejection or revision to its holding will require a response to the problems created, yet unaddressed, by the majority rule.

**FN13.** Indeed, it is questionable whether the existence of insurance would be prejudicial at all in light of the fact that medical insurance and discounted bills are a fact of life in America today. See, e.g., *Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 410 (Tex. 2007) (“Few patients today ever pay a hospital's full charges, due to the prevalence of Medicare, Medicaid, HMOs, and private insurers who pay discounted rates.”).