ESCABEDO DECISION: NAVIGATING THE RECOVERY OF MEDICAL DAMAGES IN A PERSONAL INJURY LAWSUIT

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CHAPTER 3.1

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A. INTRODUCTION

Section 41.0105 of the Texas Civil Practice & Remedies Code was enacted as part of the "tort reform" legislation known as House Bill 4 ("HB4") to clarify what medical expenses a jury may consider when making an award to a plaintiff. The statute, known as the "paid/incurred" provision, is awkwardly drafted, defining a term, "incurred," with itself:

> "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. Since the passage of the § 41.0105 in 2003, trial courts around the state have applied it in numerous different ways. An informal survey of rulings around the state demonstrate that most trial judges had adopted a fairly simple procedure that they thought properly implemented the intent of the legislature in passing § 41.0105 while maintaining the integrity of the collateral source rule. Generally, judges admitted evidence of charged medical expenses to the jury and later conducted a post-trial evidentiary proceeding to determine whether the plaintiff's recovery for past medical expenses would be reduced.

This rather simple, efficient procedure had been used with very little confusion all over the state. However, that changed when the Texas Supreme Court issued its ruling in *Escabedo* on July 1, 2011. *Haygood v. Escabedo*, 356 S.W.3d 390 (Tex. 2011). Since then, practitioners and trial judges around the state have expressed utter confusion as to how to procedurally implement § 41.0105. The court's opinion creates so many complexities for practitioners, parties -- plaintiffs and defendants -- are now finding it incredibly difficult to determine how to go about discovering, proving up, and recovering past medical expenses. This article enumerates some of the practical implications of the court's opinion and judgment.

B. MEDICAL BILLS FOR PAST MEDICAL EXPENSES ARE OFTEN NOT FINALIZED AT THE TIME OF TRIAL AND ARE SUBJECT TO FURTHER ADJUSTMENTS AFTER JUDGMENT.

A personal injury plaintiff's health care is never precisely coeval with the discovery period or the end of trial. Moreover, not all payments of medical expenses take place prior to the end of the discovery period or prior to the resolution of the case.

It is not uncommon in the real world for medical bills to be unsettled at the time of trial and for health care providers and insurers to continue to adjust and modify medical bills even after the underlying personal injury litigation has concluded. *See Progressive County Mut. Ins. Co. v. Delgado*, 335 S.W.3d 689 (Tex. App.—Amarillo 2011, pet. denied); *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.)(Stone, J., dissenting). This is particularly common when health care providers and insurers discover that a personal injury plaintiff has litigated and recovered for their personal injuries. The provider and insurer often seek post judgment adjustments, frequently in the term of balance billing[1] in an effort to recover for the full amount of the billed medical expenses or their full subrogation interests. In this scenario, it is very difficult for a personal injury plaintiff to prove to a jury what the health care provider has "a legal right to be paid"[2] because the amount is a moving target that changes over time, even after the personal injury litigation is resolved.

These situations are further complicated by the fact that health care providers and insurers are not parties to the litigation and they are not legally bound by the verdict or judgment as to what the provider has a legal right to be paid. Unless plaintiffs bring separate declaratory judgment actions against each provider or insurer to fix the amount they are "legally entitled" to recover, the practice of post-judgment adjustments to medical bills and balance billing will continue, the plaintiff will be left with only a recovery of paid amounts, but having to pay the health care providers and subrogation entities for the full charged amounts. Because the medical billing process does not neatly fit within litigation schedules, there are considerable problems related to proving the recoverable

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[1] Balance billing occurs when a health care provider seeks to recover from the patient amounts for services rendered over and above what an insurer paid. While a health care provider is arguably prohibited by statute from balance billing in the context of Medicare, health care providers are not so prohibited in the context of private insurance.

[2] In *Escabedo*, the Texas Supreme Court determined that § 41.0105 limits recovery and evidence at trial to expenses "the provider has a legal right to be paid." *Escabedo*, 356 S.W.3d at 391.

amount of medical expenses at the time of trial. In such situations, the plaintiff's recovery of the reduced amounts which were paid will then be insufficient to reimburse the health care provider for the full amount sought by the health care provider.

The court should have clarified how unsettled bills are treated at the time of trial and how a plaintiff can ensure that he or she will not be subject to payment of the full medical bills after litigation. Arguably, because of the impracticability of applying § 41.0105 to bills that are unsettled at the time of trial, the statute should not apple to such bills.

C. WHAT NOW OF THE USE AND EFFECTIVENESS OF § 18.001 AFFIDAVITS?

Texas Civil Practice and Remedies Code § 18.001 provides that an affidavit stating 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 (emphasis added). The legislature even prescribed the form of the affidavit to be used to effectuate these proof requirements. TEX. CIV. PRAC. & REM. CODE § 18.002. Even though the legislature did not alter the language in §§ 18.001 or 18.002 in 2003 when it enacted § 41.0105, or since that time, if a practitioner complies with § 18.001 and 18.002, under the court's opinion, evidence of the reasonableness and necessity of the charged amounts may constitute no evidence in support of the plaintiff's recovery of past medical expenses.

On the other hand, if the plaintiff attempts to comply with the court's opinion and offers affidavit evidence proving what the health care provider has a legal right to be paid, the plaintiff may have failed to comply with §§ 18.001 and 18.002. It would have been helpful for the court to have provided some guidance as to how to prepare an affidavit that both complies with the express language of §§ 18.001 and 18.002 and with the *Escabedo* opinion.

Many practitioners are adding language to the § 18.001 affidavits to reflect the amounts which have been paid by the insurer and amounts the health care provider is legally entitled to recover by law or contract. Whether a billing records custodian, who traditionally fills out an § 18.001 affidavit, is qualified to provide this new information is another issue altogether.

D. THE OPINION APPEARS TO CREATE A NEW EVIDENTIARY RULE REGARDING THE CLAIMANT'S ABILITY TO OFFER EVIDENCE OF HIS OR HER OWN HEALTH INSURANCE.

The only rule of evidence related to insurance is Texas Rule of Evidence 411. Rule 411 prohibits the admissibility of *liability insurance* for purposes of proving that a party acted negligently or otherwise wrongfully. TEX. R. EVID. 411. Nevertheless, the rule allows the admissibility of liability insurance for other purposes. *Id.* Apparently relying upon the collateral source rule, the court has created a new rule of evidence preventing the jury from hearing evidence that the plaintiff's injuries will be covered in whole or in part by insurance or that a health care provider adjusted its charges because of insurance. *Escabedo*, 356 S.W.3d at 400.

However, this new rule conflates Rule 411 with the collateral source rule. While the collateral source rule precludes any reduction in a tortfeasor's liability because of benefits received by the plaintiff from a collateral source because the wrongdoer should not have the benefit of insurance independently procured by the injured party, the rule benefits the personal injury plaintiff, and is the plaintiff's rule to waive. If the plaintiff wants to offer evidence of collateral source insurance payments and partially or completely waives the collateral source rule, neither the Texas Rules of Evidence nor any other rule prohibits the introduction of such evidence.

E. THE *ESCABEDO* OPINION MAY REQUIRE HEALTH CARE PROVIDERS TO PROVIDE ORAL TESTIMONY TO ADDRESS ISSUES FORMERLY ADDRESSED MORE EFFICIENTLY BY § 18.001 AFFIDAVITS.

Traditionally, a record custodian could sign a § 18.001 affidavit to prove up the reasonableness and necessity of health care as reflected in medical bills. The *Escabedo* opinion undermines the continued viability of these prescribed affidavits. If the standard for the collectability of past medical expenses is now based on what a health care provider has been paid or has a legal right to be paid, a record custodian may not be competent to testify as to the legal conclusion concerning what a health care provider has a legal right to be paid. Record custodians rarely if ever have the knowledge concerning the agreements between the health care provider and the insurer as to what the insurer will actually pay the health care provider. It may now be necessary to depose the actual health care providers (or have them testify live at trial) regarding the agreements reached between them and the insurer as to what the insurer will actually pay. To the chagrin of most health care providers and insurers, the necessity for such testimony will now likely open up discovery to the contracts and pay schedules reached between the health care provider and the insurer.

Reverting back to the pre-§ 18.001 days, when medical expenses had to be proved up with testimony from the actual health care providers, discovering and proving medical expenses obviously and necessarily will require untold time and expense on behalf of numerous

health care providers to take time away from their practices to now testify in personal injury cases as to the amounts the insurer still owes pursuant to insurance agreements. Such testimony will necessarily require discussions regarding health insurance which appears to be inconsistent with the court's statement that the jury should not be told that the plaintiff will be covered in whole or in part by insurance. Additionally, such inefficiencies appear contrary to the Texas Legislature's intent in enacting § 18.001, which was meant to streamline the evidentiary process so as to alleviate the need for testimony by health care providers.

F. WHAT ABOUT MEDICAL EXPENSES WHICH ARE DISPUTED BY THE INSURER AS BEING UNREASONABLE OR NOT CAUSALLY RELATED TO THE PLAINTIFF'S INJURIES?

While record custodians may be aware of the amounts which have been paid on a medical bill and what an insurance company has agreed to pay, if the insurance company disputes the reasonableness of a medical bill, how will the record custodian have any knowledge of the amount the insured still owes on a medical bill? It may now be necessary for a personal injury plaintiff to obtain discovery from the insurer to determine what amounts are disputed and what the insured may still owe the health care provider.

Such matters may be reflected in an Explanation of Benefits ("EOB") received from the insurer. However, there is no provision in the rules of evidence to allow the admissibility of otherwise hearsay EOBs. Furthermore, EOBs as evidence would inject health insurance into the case contrary to the court's pronouncement regarding the inadmissibility of evidence related to insurance.

Sometimes insurers dispute claims for injuries it does not believe to be causally related to the injuries for which the plaintiff is seeking recovery. Nevertheless,even though an insurer may dispute the causal relationship, an insurer may not usurp the jury's duty to determine fact issues including causation. There will arise situations in which the jury determines a causal connection while the insurer still disputes it. *Escabedo* does not provide guidance as to how such disputed claims should be handled at trial.

G. MUST TESTIMONY FROM HEALTH CARE PROVIDERS NOW ADDRESS THE REASONABLENESS OF AMOUNTS PAID BY MEDICARE, MEDICAID, OR THE CLAIMANT'S INSURANCE COMPANY?

Under *Escabedo*, only reasonable amounts of medical expenses that can be awarded by a jury are those that have been paid by Medicare, Medicaid, or by the plaintiff's insurance company. Will it now become necessary for a health care provider to testify as to the reasonableness of such payments despite the fact that the same health care provider would also testify as to the reasonableness of the greater charged amount if the plaintiff was uninsured or not covered by insurance, Medicare, or Medicaid? The discrepancies in such testimony will create problems for health care providers and potentially lead to liability for charging amounts to uninsured patients that the court has determined are not reasonable. For instance, how is it possible for a health care provider to testify to the reasonableness of a bill reduced due to the health insurance payments, while at the same time testifying to the reasonableness of a much larger amount for the exact same procedure if the plaintiff was uninsured? Can both the higher amount and the lower amount be reasonable for the same services provided? Or can reasonableness be a range that includes both the paid and the initially charged amounts? The insurability of the patient does not determine the reasonableness of the costs of the services provided; the value of the services determine the reasonableness of the charges.

H. HOW ARE THE ADMISSIBLE PAST MEDICAL EXPENSES NOW USED TO CALCULATE THE EXEMPLARY DAMAGES CAP?

Section 41.008 of the Texas Civil Practice and Remedies Code caps exemplary damages using a formula which includes a calculation based on the economic damages. The calculation of this cap will now vary widely if for instance the personal injury plaintiff is a veteran whose medical bills are paid by the government versus an uninsured plaintiff who would be entitled to recover the entire amount of medical expenses charged. In such situations, given the exact same conduct, a veteran's recovery of punitive damages could be substantially less than an uninsured plaintiff. *Escabedo* does not answer the question of how such widely varying recoverable medical expenses are to be considered in determining the culpability of the arguably exact same punishable conduct.

I. HOW CAN A QUALIFIED MEDICAL EXPERT, WHO TRADITIONALLY COULD TESTIFY AS TO THE REASONABLENESS OF CHARGES FOR MEDICAL SERVICES, NOW TESTIFY AS TO THE REASONABLENESS OF CHARGES BY OTHER HEALTH CARE PROVIDERS PARTICULARLY IF THE EXPERT IS NOT PRIVY TO OTHER HEALTH CARE PROVIDER'S ARRANGEMENTS WITH INSURERS?

Prior to *Escabedo*, a qualified medical expert could testify to the reasonableness of and customary charges for medical services provided by other health care providers.

However, medical experts are not privy to the contracts and arrangements reached between other health care providers and insurers for the payment of medical expenses. Again, *Escabedo* leaves unanswered whether the law has changed with respect to the ability for a medical expert to testify as to the reasonableness of other health care providers' charges when the expert does not have personal knowledge concerning the payment arrangements between the health care provider and the insurer.

J. WHO IS QUALIFIED TO TESTIFY AS TO REASON FOR REDUCTIONS, ADJUSTMENTS OR WRITE OFFS TO MEDICAL BILLS?

Often medical bills are reduced, adjusted or written off for various reasons. Some reasons may be due to contractual arrangements with insurers. Others may be due to the health care provider's perception of the collectability of the bill from the injured party. It is unclear what witness would be appropriate to testify as to the reasonableness of medical expenses after such adjustments are made, given the variety of reasons for such adjustments.

K. REDUCTIONS AND WRITE-OFFS NOT REQUIRED BY LAW OR CONTRACT.

Many reductions and write-offs to medical bills are not required by statute or by the contractual arrangements reached between the health care provider and the insurer. For instance, some reductions are based on charitable write-offs because a patient qualifies as an indigent. *See Big Bird Tree Serv. v. Gallegos*, No. 05-10-00923-CV, 2012 WL 966063 (Tex. App.—Dallas March 22, 2012, no pet. h.). Other amounts are written off as bad debt for accounting and tax purposes. Nevertheless, such discretionary reductions are quite often adjusted and readjusted even after the plaintiff's litigation is concluded. This is particularly true when a health care provider learns that the plaintiff obtained a recovery in litigation. Suddenly the plaintiff is no longer indigent and the debt is no longer bad debt. At this point, re-adjustments are common in order to recover the full amount of the billed medical expenses. Because the *Escabedo* opinion expressly limits a plaintiff's recovery of past medical expenses only by the amounts of the health care provider is legally entitled to recover by law or contract, it is evident that charitable or discretionary write-offs, do not fall under § 41.0105. Furthermore, because the healthcare provider still retains the legal right to recover for the full amount of the billed services irrespective of any discretionary or charitable write-offs, the plaintiff, likewise, is still entitled to offer evidence of and recover for the full billed amounts.

L. HOW ARE FUTURE MEDICAL EXPENSES NOW CALCULATED?

Because there are no bills to prove up medical expenses that will be incurred in the future, traditionally, a plaintiff could prove up future medical expenses with reference to, among other things, the amount of past medical expenses. *See Matbon, Inc. v. Gries*, 288 S.W.3d 471, 484 (Tex. App.—Eastland 2009, no pet.). The *Escabedo* opinion did not address nor change this rule.

Although a minority of practitioners have attempted to apply the *Escabedo* rationale to the recovery of future medical expenses, the language of § 41.0105 and the impracticalities of applying the statute to future medical expenses demonstrates that the statute does not apply to future medical expenses. First, the statute uses past tense language: "paid or incurred." In order to apply the statute to future medical expenses, a court would have to completely ignore the past tense language used in the statute and superimpose by judicial fiat future tense language such as "to be paid," "will pay," "to be incurred," or "will incur." It is obviously not the role of courts to rewrite statutes in such a manner.

Second, it would require stacking hypothetical upon hypothetical and speculation upon speculation to attempt to apply the statute to future medical expenses. For instance, one would have to speculate that the injured plaintiff would be able to work in the future despite the injuries sustained and that the plaintiff would work for a company that would provide health insurance. One would then have to consider a hypothetical health care provider from whom the plaintiff would receive health care and a hypothetical insurance company with which the health care provider would enter into a hypothetical contract for the payment of health care services. One would then have to hypothesize as to hypothetical compensation arrangements such a health care provider and insurance company would agree to based on speculative market and economic circumstances that might exist at some point in the future. Thus, it is evident, that any attempt to apply the statute to future medical expenses is completely unworkable.

The wholly speculative nature of such application of the statute to future medical expenses would render such evidence inadmissible under a variety of evidentiary rules including rules 402, 403 and 602. In order to recover a viable element of damages, such as future medical expenses, a plaintiff should not be required the herculean task of attempting to apply a completely unworkable statute merely to be compensated for the future medical expenses necessitated by the malfeasance of the defendant. Hence the reason the statute is expressly written in the past tense.

M. CASES SINCE *ESCABEDO*

***Henderson v. Spann*, No. 07-11-00133-CV, 2012 WL 569679 (Tex. App.—Amarillo Feb. 22, 2012, no pet. h.).**

The issue in this case concerned the trial court's admission of evidence of unadjusted medical bills. In assessing damages, the jury awarded $69,583.20 for past medical expenses. The figure represented the amount by unadjusted medical bills introduced into evidence. The admitted medical bills did not reflect $54,379.56 in adjustments and write-offs associated with worker's compensation. After the verdict, the trial court adjusted the award of past medical expenses to reflect only the portion of medical bills that were recoverable: $15,203.64. *Id*. at *1.

Relying upon the Texas Supreme Court's opinion in *Escabedo*, Justice Hancock of theAmarillo Court of Appeals concluded that the evidence of the unadjusted medical bills was irrelevant and inadmissible and thus the trial court abused its discretion in admitting such evidence. *Id*. at *2. Justice Hancock noted that, as a consequence of the trial court's evidentiary ruling, there was no evidence of past medical expenses and, therefore, a judgment awarding past medical damages is improper. Justice Hancock further concluded that a post-verdict adjustment of the recoverable medical expenses cannot cure the harm of admitting irrelevant evidence. *Id*. at *3.

Justice Hancock noted that the post-verdict adjustment method is inadequate to account for or remedy any effect the inadmissible evidence of unadjusted past medical expenses may have had on the jury's assessment of non-economic damages. As a result, the trial court's erroneous evidentiary ruling in conjunction with its post-verdict adjustment of the amount of past medical expenses probably caused the rendition of an improper judgment. Justice Hancock concluded that the evidentiary rulings with the post-verdict adjustment served as a deprivation of the constitutional right to trial by jury and was thus reversible error. *Id*. at *3.

Justice Pirtle concurred agreeing that the case should be reversed and remanded for new trial due to the trial court's erroneous admission of the evidence of unadjusted past medical expenses. *Id*. at *4. Justice Pirtle wrote separately to encourage further examination by the Texas Supreme Court and to opine that, but for the application of *Escabedo*, the trial court did not err in admitting evidence of unadjusted medical bills or in applying the statutory caps because the *Escabedo* opinion was rendered after the trial of the *Henderson* case and therefore the trial court was relying upon applicable case law at that time. *Id*. at *4, 5. Justice Pirtle further noted that a rule of law dictating that "only evidence of *recoverable* medical expenses is admissible at trial" is an illogical construct because the very purpose of the admission of evidence of evidence during trial is to determine what damages are in fact recoverable. *Id*. at *4 n.3.

Justice Pirtle acknowledged that medical bills can be adjusted, discounted, written-off, reduced, or gratuitously forgive for any reason. *Id*. at *4. Therefore, it would be impossible to say that evidence of reasonable and necessary medical bills, albeit discounted or written-off, is always going to be irrelevant to the question of a given claimant's economic damages. For instance, evidence of unadjusted past medical expenses may have probative value as to the extent of reasonable and necessary future medical expenses, unless there is evidence that future medical expenses will be adjusted, discounted or written-off on the same basis as current medical expenses. *Id*. at *4.

Justice Pirtle disagreed with the supreme court's pronouncement that the relevance of non-recoverable economic damages is substantially outweighed by the confusion such evidence is likely to generate and that it therefore must be excluded. *Id*. at *4. For instance, unadjusted medical bills have some tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (citing TEX. R. EVID. 401). Thus, because the evidence of unadjusted medical bills is relevant, the probative value of such evidence and the balancing of Texas Rule of Evidence 403 factors are questions best left to the trial court on a case-by-case basis. Justice Pirtle noted that, in an appropriate case with the use of proper instructions and carefully tailored jury questions, evidence of both adjusted and unadjusted medical bills could be submitted to the jury. Therefore, Justice Pirtle disagreed with the premise that unadjusted medical bills are *per se* irrelevant and therefore inadmissible. *Id*. at *4.

Questioning the notion that 41.0105 is an evidentiary rule, Justice Pirtle more accurately described it as a statutory cap on recoverable damages which could be handled by post-verdict adjustment just as other statutory caps made by a trial court. *Id*. at *5. Justice Pirtle proposed that, with appropriate instructions and jury questions, a jury should be able to hear all relevant evidence, including both adjusted and unadjusted medical bills, when determining the amount of appropriate damages in a given case and then the legislative caps can be applied post-verdict. *Id*. at *5.

Chief Justice Quinn concurred that error had occurred, but dissented to that aspect of the court's opinion which found the error was harmful. *Id*. at *5. Chief Justice Quinn noted that, after the post-verdict adjustments, the plaintiffs ultimately received only the past medical expenses that the defendant argued the plaintiff was entitled to recover. Chief Justice Quinn questioned how the error could have potentially affected the outcome when nothing of record suggested that the outcome would have been different had the trial court simply admitted only the adjusted bills into evidence. *Id*.

at *5.

***Big Bird Tree Serv. v. Gallegos*, No. 05-10-00923-CV, 2012 WL 966063 (Tex. App.—Dallas March 22, 2012, no pet. h.).**

The plaintiff was injured while working on an addition to the defendant's workshop which required multiple surgeries and the placement of fifteen screws in his foot. *Id.* at *1. In proving up his past medical expenses, the plaintiff relied upon medical expense affidavits with attached billing records from UT Southwestern and Parkland Hospital which stated that the services rendered were reasonable and necessary and that the amounts charged were $67,699.41 and $16,659.50 respectively. The jury awarded the plaintiff these amounts for past medical expenses. *Id.* at *1.

The plaintiff was indigent and qualified for a health care charity program. In an offer of proof, the records custodian of UT Southwestern testified that UT Southwestern had a charity contract with Parkland for indigent patients. The records custodian further testified that after a patient qualifies, if they discover the patient is able to pay, the patient will be billed. She also testified that the plaintiff would be liable to UT Southwestern if he recovered for his medical expenses. Such recovery from the patient had been authorized by the Dallas County Parkland Board for UT Southwestern and Parkland. *Id.* at *1.

The defendant argued that it should not be required to pay for the reasonable value of the services rendered to the plaintiff because they were provided free of charge. *Id.* at *2. Rejecting this argument, the Dallas Court of Appeals noted that if medical services are provided gratuitously to a plaintiff, he may still recover them from the tortfeasor. The court further concluded that the collateral source rule reflects the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall to the tortfeasor. *Id.* at *2 (citing *Escabedo*, 356 S.W.3d at 395). Thus, under the collateral source rule, the court concluded that the plaintiff could recover for services paid from a charitable source. *Id.* at *2.

The court further explained that the plaintiff received valuable medical services, the cost of which was born by a charitable program administered by Parkland. *Id.* at *3. Because the plaintiff was indigent and qualified for the charitable program, Parkland agreed to provide the services free of charge. Moreover, there was no evidence of any contract that would have prohibited Parkland or Southwestern from charging the plaintiff for the full value of the services rendered. Therefore, the court could not conclude that the hospital was not entitled to recover for the actual value of the services rendered. In fact, there was testimony suggesting a patient's eligibility for the program can be changed by subsequent events. Specifically, UT Southwestern's custodian of records testified that UT Southwestern expected to be paid if the plaintiff were to recover. She also testified that this was the policy the Parkland Board had authorized for both Parkland and UT Southwestern. Therefore, the court could not say that Parkland has no right to be paid for the services listed in its billing records. *Id.* at *3.

Finally, the court noted that allowing a negligent tortfeasor to avoid liability for medical expenses born by a charity program designed to benefit indigent patients, not only results in a windfall to the tortfeasor, it rewards the tortfeasor for injuring an indigent plaintiff. *Id.* at *3. The court stated that such a result is particularly contrary to public policy in this case where the plaintiff was the defendant's employee and was injured in the scope of his employment with the defendant. To adopt the defendant's position, the court said it "would have to conclude no medical expenses were 'actually' incurred by *or on behalf* of" the plaintiff. *Id.* at *3. Because the court concluded that the expenses to treat the plaintiff were born by the charitable program, such expenses were actually incurred on behalf of the plaintiff. Thus, § 41.0105 does not preclude recovery under the facts of the case. *Id.* at *3.