APPORTIONMENT OF DAMAGES BASED ON INSURED/PAID EXPENSES AND SETTLEMENT CREDIT

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I. *STRICKLIN V. PARKER*

(A) Background Facts of Case

FACTS

This lawsuit arises from a trip and fall accident occurring on December 10, 2004. Plaintiff, Donald Stricklin, had driven his wife to the Tangles Beauty Salon at the Centre Place Building for her regular hair appointment. Tangles Beauty Salon is part of one of several businesses in a strip shopping center that is owned by the insured. Mr. Stricklin parked his vehicle in a parking space near the salon. While Mrs. Stricklin was in the hair salon, Mr. Stricklin went to transact business at American National Bank which is next door. The parking lot at the bank sits up a little higher than the insured's property. There is a set of four stairs that connects the two properties. After Mr. Stricklin completed his business at the bank, he was walking back to his car when he tripped and fell.

In his deposition, the Plaintiff testified that although he felt there was nothing wrong with the steps prior to his accident, in the back of his mind he felt they were a hazard because there were no handrails.

In the approximate 150 trips prior to the accident in question, he had never encountered a problem or close call or ever lost his balance. On the date of this incident, he has no memory of anything past putting his left foot on the first step and having the feeling that he was leaning over too far. He does not recall catching his right foot on the curb as he stepped. The next thing he recalls is crashing into the asphalt parking lot portion at the bottom of the steps with his face. One of his legs was still on the steps. He recalls the impact but then lost consciousness for a period of time. When he came to he was concerned that his wife, who was already in the car and finished with her hair appointment, needed to get home. He states that he jumped up and starting driving her home. When the pain got so severe that he became concerned that he might not be able to make it home, he then went to his private physician's office since he knew the personnel there could take care of his wife if he needed treatment. While he was at the doctor's office they called an ambulance to take him to the hospital.

INJURIES AND DAMAGES

As mentioned, the Plaintiff originally drove himself to his physician's office since the pain was increasing. Due to the severity, the physician called 911. The Plaintiff was then transported to Baylor Medical Center in Garland. At Baylor, he underwent CT Scans of his head. The CT revealed that he had suffered a fracture of orbital floor of his left eye as well as a fracture of the left maxillary bone. X-rays were also taken of his neck and his left knee. He was kept at Baylor for two days. During his stay at Baylor, Dr. Harrington, an eye specialist, performed a cantholysis (slicing the eyelids in order to create more room for swelling of the eye) to relieve pressure from the bleeding. At the time of his discharge, his discharge diagnosis included (1) orbital fracture; (2) ocular hypertension, left; (3) loss of vision, left eye; (4) pseudophakia; (5) arteriosclerotic vascular disease; and (6) hypertension. The doctors at Baylor felt the loss of his vision was due to the swelling and hemorrhaging he suffered. They discussed whether to perform surgery at that time, but felt it was too soon to operate safely so he was discharged with topical eye medications.

Dr. John Harrington was the eye specialist who saw the Plaintiff in the emergency room. In his deposition, Dr. Harrington noted severe trauma to the left orbital area and that his eye was swollen and protruding out of its socket. By the time Dr. Harrington saw him, the Plaintiff had lost most of the vision in his eye. Dr. Harrington saw the Plaintiff a few days after his release from Baylor. He had planned on doing surgery on the left eye to repair the fracture, but the swelling was too bad to do so. A second series of CT scans to the face and head was conducted and a second fracture of the cheekbone was noted. A subdural hematoma was also discovered at that time so he was readmitted to the hospital where he remained for two days.

On December 28, 2004, the swelling had subsided sufficiently to allow Dr. Harrington to perform surgery. Dr. Harrington testified that basically, the eye socket floor was rebuilt. The Plaintiff handled the surgery well.

The Plaintiff returned to Dr. Harrington periodically over the next couple of months with continued complaints of pain and inflammation around the eye as well as numbness on the left side of his nose. He also claimed to have a disfigurement of his left upper and lower eyelids. He also complained of drooping of the upper and lower eyelid. According to Dr. Harrington's records, they planned on scheduling further eye surgery to repair the eyelid for March 22, 2005. However, during February of 2005, the Plaintiff began to develop a painful skin rash and lesion on the left side of his nose. It continued to get worse, so Dr. Harrington decided to postpone the March surgery for fear of spreading the infection to the eye. Plaintiff was initially diagnosed with herpes simplex but was later diagnosed with herpes zoster.

On April 1, 2005, the Plaintiff was seen by a dermatology specialist, Dr. Daniel Bennett. Dr. Bennett concluded that the pain the Plaintiff was having on the left side of his face was neuropathic pain. Dr. Bennett surmised that it is possible the Plaintiff had recovered from herpes zoster but had been left with post herpetic neuralgia involving the

left cheek and left side of his nose. He indicated it was also possible that he was having neuralgia associated with the initial trauma or the treatment from his reconstructive surgery. Dr. Bennett prescribed a number of medications to treat the nerve pain as well as the infection.

Plaintiff continued to have eye pain, excessive tearing and redness in the eye. He also complained of having severe facial pain. Had MRI's and subsequent surgery to help drooping eyelid on August 30, 2005. Last treating 12/28/05 with permanent irreversible blindness in left eye, tears and redness in his right eye.

According to a questionnaire he filled out for one of his doctors, the Plaintiff claims to have had prior surgeries involving the hip, heart bypass, kidney stones, arteries, and ankle. He also says that he suffers from high blood pressure, diabetes, and high cholesterol.

The Plaintiff's medical bills totaled $52,350.68.

LOST WAGES

Since the Plaintiff is retired, there was no claim for lost wages.

(B) Issues at Trial

The Plaintiff hired a liability expert who testified that the stairs in question were dangerous due to the fact that they lacked an upper landing as well as handrails. We had an expert examine the stairs too. He indicated that the stairs should have been built flush with the curb so that there is no height difference between the two and that handrails were needed. He indicated that while the City of Wylie did not have a specific building code regarding the stairs when they were built, the default code would have been the Uniform Building Code which would have required an upper landing and handrails. The original investigation had found that there were no Code violations so this was viewed as a summary judgment/cost of defense case.

The Plaintiff denied ever being treated for light-headedness, dizziness, fainting spells, or difficulty walking. However, he was taking approximately 12 prescription medications at the time of the fall, and a common side effect among some of the medications was dizziness. In addition, the Plaintiff had suffered a stroke prior to the accident which could have effected him going down the stairs. There is also a medical record five months before this fall indicating that he was treated at the Fire Wheel Family Practice because he had dizziness when he turned his head or stood up. The medical records at Fire Wheel also indicate a problem with arthritis in his lower leg as well as problems with his knee. They also mention that in 2003, he stumbled and fell forward. Therefore, we have several arguments regarding prior conditions which may have led to the accident as well as contributory negligence on the Plaintiff himself.

The Plaintiff made a very sympathetic witness. He is a nice old man who lost his wife to cancer a couple of years ago, and now he cannot see out of his left eye. We felt the jury would certainly be sympathetic to his physical plight.

II. INCURRED/PAID DAMAGES

(A) § 41.0105

Section 41.0105 of the Civil Practice and Remedies Code is a relatively new statute, which was enacted in 2003. It provides:

> § 41.0105. 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 (Lexis 2007). Although the statute is relatively new, it has been consistently interpreted.

Section 41.0105, enacted as part of House Bill 4 in 2003, has been consistently interpreted by appellate courts. Section 41.0105 is a limit on the damages that are recoverable. The statute means nothing more or less than what it says. Plaintiffs are entitled to recover medical costs that are actually paid or incurred by or on behalf of the claimant. But plaintiffs cannot recover "as charged" medical bills if those costs are never actually paid or incurred. Trial courts simply cannot disregard Section 41.0105 even if they disagree about whether the actual medical bills or only the amount of such bills actual paid or incurred should be introduced into evidence during the trial of the lawsuit.

Section 41.0105 does not conflict with Sections 18.001 and 18.002 of the Texas Civil Practice and Remedies Code. Rather, it simply insures that the "costs" recovered by Plaintiffs are the actual costs paid or incurred. Moreover, Section 41.0105 does not conflict with the collateral source rule. Section 41.0105 specifically allows for recovery of medical costs paid by or "on behalf of" the injured party.

Courts interpreting Section 41.0105 have held that it means exactly what it says. *See Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.–San Antonio 2007, no pet.); *Goryews v. Murphy Exploration & Prod. Co.*, 2007 U.S. Dist. Lexis 57719 (S.D. Tex. Aug. 8, 2007). The San Antonio Court of Appeals held that a plaintiff's "award for past medical expenses should have been reduced because his medical providers accepted lesser amounts for their services from his health insurance company, thereby 'writing off' the balance due from [the plaintiff]." *Mills*, 229 S.W.3d at 767. The court reversed the case and remanded it to the trial court for entry of a judgment which excluded payments for "written-off" medical charges. *See id*. at 767-768.

In *Goryews*, the district court also applied Section 41.0105 to hold that an award for past medical care should be reduced to the amount which was "actually paid" by the plaintiff's workers' compensation carrier. *Goryews v. Murphy Exploration & Prod. Co.*, 2007 U.S. Dist. Lexis 57719, at *8-*13 (S.D. Tex. Aug. 8, 2007). Following *Mills*, the court rejected the plaintiffs' argument that Section 41.0105 allowed recovery of the amount actually paid or the amount that was initially billed to the plaintiff, although a lower, negotiated rate was ultimately paid and accepted. *Id*. The court concluded: "it is appropriate to reduce the amount of damages the Plaintiff can recover for past medical expenses to the amount actually paid on behalf of the Plaintiff." *Id*. at *12. The court accomplished this reduction at the "post-verdict state of the proceedings." *Id*.

In *Bituminous Casualty Corp. v. Cleveland*, the trial court applied Section 41.0105 and reduced a jury verdict by the amount of medical expenses that were not paid. *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 488-489 (Tex. App.–Amarillo 2006, no pet.). Like *Goryews*, the trial court reduced the damage award at the post-verdict stage of the litigation. *See id.*

The Amarillo Court of Appeals decision in *Gore v. Faye* should also be noted, although it is only a procedural case that addresses the timing of the application of Section 41.0105. 253 S.W.3d 785 (Tex. App.–Amarillo, no pet.) The trial court refused to allow admission of the reduced medical bills before the jury, but agreed to consider the reductions post verdict. *Id*. at 787-789. The sole contention on appeal was whether the trial court abused its discretion in excluding the reduced charges from the jury's consideration, although admitted for the court's consideration, post-verdict. *Id*. at 788-789. The Amarillo Court of Appeals held that there was "no abuse of discretion in the trial court's decision to apply section 41.1015 post-verdict." *Id*. at 789. Although TADC believes it is proper to admit the evidence before the jury (see discussion of amended Pattern Jury Charge below), the *Gore v. Faye* case nevertheless supports the position that Section 41.0105 must be given effect, even where there is a disagreement about what point in the trial the provision should be applied. In fact, the Amarillo Court of Appeals said: "By its language the limitation on damages prescribed by section 41.0105 is mandatory." *Id*.

The Court holdings were echoed in a law review article that analyzed the provision and concluded: "Section 41.0105 limits the recovery of medical or health care expenses to the amount 'actually paid or incurred by or on behalf of the claimant.'" *House Bill 4 and Proposition 12: An Analysis with Legislative History*, 36 TEX. TECH. L. REV. 169, 252 (2005) (citing TEX. CIV. PRAC. & REM. CODE § 41.0105 (Vernon Supp. 2004-2005). The article explained the purpose of the statute, saying:

> This provision is designed to limit the recovery of past medical expenses to what a plaintiff would actually have to repay from any judgment awarded to the claimant. Thus, balance billing by health care providers a claimant will never have to pay is not recoverable. Moreover, if a medical lien can be settled for less than the amount of the lien, only the actual cost is recoverable.

Id. The article also specifically addressed medical bills paid by Medicare as follows:

> E. Limitation on Medical Expenses: Collateral Source
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> Section 41.0105 of the Civil Practice and Remedies Code was added by H.B. 4 to limit the recovery of medical expenses.[938] In many cases, the medical expenses of a claimant or decedent are paid by Medicare or a third-party payor.[939] Medicare or the third-party payor typically would have contracted with the health care provider, reducing rates of reimbursement from those amounts actually billed or charged.[940] In the course of litigation, the plaintiff would obtain the original bills in admissible form, with the custodian of records having signed that the billing amounts were reasonable and the medical services necessary, even though those were not the amounts reimbursed or the amounts that would be subject to any subrogation interest.[941] Section 41.0105 makes clear that when medical and health care expenses are recovered, they are limited to the amount paid or incurred. Section 41.0105 states that "[i]n 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."[942]
>
> [938] The Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 13.08, sec. 41.0105, 2003 Tex. Gen. Laws 847, 889.
> [939] *See, e.g.*, *Texarkana Mem'l Hosp. v. Murdock*, 946 S.W.2d 836, 837-38 (Tex. 1987).
> [940] *See, e.g.*, *id*.
> [941] *See, e.g.*, *id*.
> [942] *See* TEX. CIV. PRAC. & REM. CODE Ann. § 41.0105 (Vernon Supp. 2004-2005).

Id. at 318. The provision is also applicable to future medical care expenses as noted in he article:

> Another issue arises as to the impact this statute will have on future recovery of damages. From the legislative history, the limitation on recovery apparently is designed to apply to both past and future damages. Senator Ratliff, the sponsor of H.B. 4 in the Senate, explained the following: "[W]hat this means is that economic damages are . . . limited to those . . . actually incurred. You can't recover more than you've actually paid or [have] been charged . . . for health care expenses in the past or what the evidence shows you will probably be charged in the future." [944]
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> [944] Debate on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 6 (June 1, 2003) (adopting the Conference Committee Report) (transcript of

> tape 5 available from the Senate Staff Services Office and the authors of this article).

Id.

In the summer of 2007, House Bill No. 3281 was introduced and would have limited Section 41.0105 to medical malpractice claims. However, House Bill No. 3281 was vetoed. *See* Governor's Veto Message, 2007 Legis Bill Hist. TX H.B. 3281 (June 15, 2007). The veto message explained:

> The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions. It should not be used to artificially inflate the recovery amount by claiming economic damage that were never paid and never required to be paid.

Id.

The Texas Pattern Jury Charge has been modified to comply with the requirements of Section 41.0105. STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES – GENERAL NEGLIGENCE PJC 8.2, p. 114 (2006). The PJC gives a specific question when "there is a question whether medical expenses were actually paid or incurred by or on behalf of the plaintiff." *Id*. The PJC provides:

> **Medical care in actions filed on or after September 1, 2003.** For actions filed on or after September 1, 2003, recovery of medical or health-care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant. TCPRC § 41.0105. If there is a question whether medical expenses were actually paid or incurred by or on behalf of the plaintiff, the following should be substituted for element *i*:
>
> i. Medical care expenses in the past actually paid or incurred by or on behalf of Robert J. Norris.
>
> Answer: _____

Id. These authorities make it clear that plaintiffs cannot recover medical or health care expenses that have not been actually incurred or paid. Moreover, "as charged" medical expenses are not relevant to the ultimate issue when a medical provider has waived or written off fees or has entered a contractual agreement for a lower amount. The inclusion of a specific question in the PJC makes it clear that evidence of "actually paid or incurred" expenses should be admitted before the jury.

(B) Example of paid/incurred arguments in *Stricklin v. Parker*

Provider	**Total Amt.**	**Reduction**	**"Incurred"**
Quest Diagnostics	None Listed	N/A	N/A

Dr. Rajiv Joseph	$500	$143.89	$356.11
John Harrington, MD	$7,000	$5,139.03	$1,860.97
(per EOB)	$6,065	$5,879.80	$185.20
Edic Stephanian, MD	None Listed	N/A	N/A
Cardiology Consultants of North Texas	None Listed	N/A	N/A
Imaging Consultants of Garland	$442.00	N/A	N/A
Baylor Med. Center at Garland	$25,691.96	$23,523.00	$2,168.96
Sache Pharmacy	$2,002.57	N/A	N/A
Metro Anesthesia	$1,302.04	$1,037.78	$264.62
City Garland EMS	$515.68	N/A	N/A
Careflight	$7,435.00	N/A	N/A
TOTALS	$44,889.25	$29,843.70* $30,584.41*	$15,045.00** $13,370.00**

*(Smaller figure uses reduction on Dr. Harrington's bill per Affidavit while larger figure uses reduction of Dr. Harrinton's bill per EOB.)
**(Both figures give Plaintiff the benefit of the doubt of the amount of the Affidavit since no reduction was listed. However, both figures include reductions per records contained in the Affidavits an/or EOBs.)

III. SETTLEMENT CREDITS

(A) Statutory Background

§ 33.003. Determination of Percentage of Responsibility

The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

(1) each claimant;
(2) each defendant;
(3) each settling person; and
(4) each responsible third party who has been joined under Section 33.004.

§ 33.011 defines a "Settling person" as "a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

§ 33.012. Amount of Recovery

(a) If the claimant is not barred from recovery under Section 33.001, the court shall 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.

(b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.

B. Verdict from Stricklin v. Parker

Please see attachment "1".

C. Settlement Calculations in Stricklin v. Parker

Apportionment of liability: Plaintiff = 50 %
Am. Nat'l Bank = 25 %
CYPP Properties = 25 %

Co-defendant settled for $25,000.

Past Damages:	Physical Pain & Mental Anguish	$ 9,000
	Physical Impairment	$ 25,000
	Medical ($41,000 reduced to . . .)	$ 15,045
	TOTAL PAST DAMAGES =	$ 49,045

DAMAGES REDUCED BY PLAINTIFF'S 50% = $ 24,522.50

DAMAGES TO INSURED = $49,045 X .25 = $12,261.25

The Texas Office of Consumer Credit Commissioner has the current judgment interest rate set at **5.00%**. *See* www.occc.state.tx.us/pages/int_rates/Index.html; *see also* TEX. FIN. CODE § 304.103.

The prejudgment interest accrues "on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered." *See* TEX. FIN. CODE § 304.104. (emphasis added). "Prejudgment interest is computed as simple interest and does not compound." *Id*.

Date of Notice = Jan. 17, 2005.
180 days after notice = July 16, 2005

Yearly Prejudgment Interest (ypi) = 0.05 X JUDGMENT
= 0.05 X $12,261.25 = $613.0625

Prejudgment interest for 7/16/05 to 12/31/05:
365 days – 197 days = 168 days of 2005
(168 days/365 days) X ypi = (168/365) x $613.0625 = $282.177

Prejudgment Interest for 2006:
ypi = 0.05 X JUDGMENT = $613.0625

Prejudgment Interest for 2007:
ypi = 0.05 X JUDGMENT = $613.0625

Prejudgment Interest from Jan. 1, 2008 to June 20, 2008
(assumes plaintiff received settlement on date mailed)
172 days of 2008 (leap year, 366 days)
(172 days/366 days) X ypi = (172/366) X $613.0625 = $288.106

TOTAL PREJUDGMENT INTEREST THROUGH JUNE 20, 2008 = $1,796.41

APPLICATION OF SETTLEMENT CREDIT $25,000.00
-$ 1,796.41
$23,203.59

(Settlement credit is first applied to "accrued prejudgment interest." *See Battaglia*, 177 S.W.3d at 908.)

Remaining Credit	=	$23,203.59
Damages Owed by Insured	=	$12,261.25
Outstanding Principal	=	$0.00 ($10,942.34 additional credit)

No further interest – no principal

TOTAL DUE = $0.00

TOTAL DUE TO PLAINTIFF = ZERO JUDGMENT
PLAINTIFF TAKE NOTHING

IV. THE WEIRD WAY OF JURIES

(A) Jury deliberations

(1) Reliance on property documents

(2) Jury verdict based in part on disability policy of one of jurors

(3) Testimony of Plaintiff's daughter vs. what jury actually witnessed during trial and at lunch in cafeteria

(a) Plaintiff was getting around well

(b) Plaintiff was eating/smoking with no problem

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