NO. 09-0377

IN THE SUPREME COURT OF TEXAS

AARON GLENN HAYGOOD,
Petitioner

v.

MARGARITA GARZA DE ESCABEDO,
Respondent

FROM THE TWELFTH COURT OF APPEALS,
TYLER, TEXAS
CASE NO. 12-07-00130-CV
THE HONORABLE BRYAN HOYLE, WRITING THE OPINION

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF DEFENSE COUNSEL

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STATEMENT OF INTEREST

The Texas Association of Defense Counsel ("TADC") is an association of Texas attorneys whose practice is concentrated on the defense of civil tort lawsuits. In the defense of such cases, the defendants often have insurance, and TADC members have been retained to represent the insureds. The TADC is devoted to the just and efficient administration of civil justice. To that end, it advocates a system of tort reparations in which (1) plaintiffs are fairly compensated for genuine injuries; (2) non-responsible defendants are exonerated without unreasonable cost; and (3) responsible defendants are held liable for appropriate damages. No person or entity has paid for or will pay for the preparation of this brief.

ARGUMENT

Amicus Curiae, TADC, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, submits this brief. TADC submits that the Tyler Court of Appeals' opinion and reasoning therein, regarding the measure of damages and admissibility of evidence offered to prove damages under Section 41.0105 of the Texas Civil Practice and Remedies Code is correct. The appellate courts' opinion and reasoning therein properly construes the purpose of the statute, supports and follows the legislative intent behind the statute, is supported by the express language of the statute, and most importantly is supported by the traditional and well-settled rules of statutory construction and interpretation. Furthermore, the appellate courts' opinion is directly in line with other Texas court opinions regarding Section 41.0105. However, because the evidence within the case was fully developed with respect to past medical expenses, the Tyler Court of

Appeals' decision to remand the entire case was unnecessary. Instead, the appellate court should have modified the trial court's judgment by excluding $82,294.69 of medical expenses written off as adjustments, and entered judgment thereon.

A. The Tyler Court of Appeals' opinion should be affirmed because the plain language of Section 41.0105 establishes that a claimant cannot recover medical care expenses that have been written off, discounted, or adjusted.

Construction of a statute is a matter of law, not fact. *Johnson v. City of Ft. Worth*, 774 S.W.2d 653, 655 (Tex. 1989). The fundamental rule of statutory construction is to ascertain the intent of the legislature and construe the statute so as to give effect to that intent. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). In discerning that intent, courts must begin with the "plain and common meaning of the statute's words." *Id.* (quoting *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002)). If the legislature's words are unambiguous, they are not only the best evidence of legislative intent, but also the exclusive evidence. *Minton v. Franks*, 545 S.W.2d 442, 445 (Tex. 1976).

Section 41.0105 created a measure of damages with respect to medical care expense damages by prohibiting the recovery of medical care expenses which have been written off, discounted, or adjusted. Section 41.0105 provides:

> 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 (Vernon 2003).

By its express terms, Section 41.0105 limits the recovery of medical care expenses incurred "to the amount *actually* paid or incurred by or on behalf of the claimant." *Escabedo v. Haygood*, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009, pet. filed) (quoting *Matbon, Inc. v. Gries*, No. 11-06-00258-CV, 2009 WL 94310, *5 (Tex. App.—Eastland Jan. 15, 2009, no pet. h.)) (emphasis added). The word "actually" is the operative term of the statute. *See Gries*, 2009 WL 94310 at *5. It is an adverb that modifies both "paid" and "incurred." *See id.* Therefore, the statute limits the recovery of medical care expenses to the amount actually paid or actually incurred by or on behalf of the claimant. *See id.* Amounts that a health care provider subsequently "writes off" its bill do not constitute amounts actually incurred by the claimant or on his behalf because neither the claimant nor anyone acting on his behalf will ultimately be liable for paying these amounts. *See id.*

Applying Section 41.0105 to the facts of this case results in a remittitur to Escabedo ("Respondent") in the amount of $82,294 from the trial court's award of $110,069 to Haygood ("Petitioner"). Inserting the applicable figure from this case into the language of Section 41.0105 demonstrates the following: Recovery of medical or health care expenses incurred ($110,069.12) is limited to the amount actually paid ($13,292.41) or actually incurred ($14,482.02) by or on behalf of the claimant. Accordingly, Petitioner's recovery of medical care expenses is limited to $27,774.43, and Respondent is entitled to a remittitur of $82,294.

Furthermore, the plain language of Section 41.0105 also comports with the Court's holdings in *Allstate v. Forth*, 204 S.W.3d 795, 796 (Tex. 2006), and *Daughters of*

Charity Heath Servs. of Waco v. Linnstaedter, 226 S.W.3d 409, 412 n.22 (Tex. 2007). In *Forth*, this Court held that an insured sustained no damages resulting from an insurer's payment of less than the full amount of the insured's medical bills. A year later, in *Linnstaedter*, this Court recognized that Section 41.0105 codified the rule announced in *Forth*. Read together, *Forth* and *Linnstaedter* establish that a person who lacks exposure for unreimbursed medical expenses may not recover the unreimbursed portion of those medical expenses. Thus, this Court need not stray from its prior holdings to decide the case in Respondent's favor.

1. Petitioner's interpretation of Section 41.0105 impermissibly renders portions of the statute meaningless.

Petitioner's statutory analysis is limited to the isolated examination of two words—"actually incurred," thereby implying that the remaining 30 words contained in Section 41.0105 are insignificant. However, a court interpreting a statute must examine the statute as a whole and not just one word or phrase therein. *Seay v. Hall*, 667 S.W.2d 19, 25 (Tex. 1984). Petitioner contends that medical bills are "actually incurred" at the moment medical services are rendered, regardless of whether portions of those bills are subsequently written off. Petitioner's interpretation of Section 41.0105 impermissibly renders several portions of the statute meaningless. First, Petitioner's interpretation reads the modifier "actually" out of the statute by equating expenses "incurred" with those "actually incurred." Second, Petitioner's interpretation that plaintiff's recovery of medical care expenses remains unlimited similarly renders the words "limitation" and

"limited" meaningless. Therefore, Petitioner's interpretation is legally incorrect because it does not give effect to the statue as a whole.

2. The Court's holdings in *Black v. American Bankers Insurance Company* and *Aviles v. Aguirre* are inapposite because they do not address the recoverability of amounts written off, discounted, or adjusted.

Petitioner's contention that the phrase "actually incurred" refers to all medical bills initially incurred is based on a misreading of this Court's opinion in *Black v. American Bankers Insurance Company*, 478 S.W.2d 434 (Tex. 1972) and *Aviles v. Aguirre*, 292 S.W.3d 648 (Tex. 2009). *Black* and *Aviles* both involved the recovery of amounts actually paid on behalf of another, not amounts written off, discounted, or adjusted. Respondent does not contend that Petitioner is not entitled to recover that which Medicare actually paid on his behalf. Rather, Respondent argues the opposite—that petitioner is not allowed to recover amounts not paid and which will never be paid by anyone. Because *Black* and *Aviles* are inapposite, this Court is not bound by *stare decisis*, and there is no need to disturb those decisions.

3. Petitioner's policy-based discrimination argument is immaterial.

Petitioner claims that Section 41.0105 should not be interpreted as limiting plaintiff's recovery to the amounts actually paid or incurred by or on his behalf because this would result in discrimination against insured plaintiffs. Petitioner calls this "bad policy." *Petitioner Brief at pg. 21.* However, the fact that Petitioner believes that Section 41.0105 represents bad policy is irrelevant and is an insufficient basis to ignore the language of the statute. It is not the courts' role to determine whether a legislative act is wise or equitable. *McIntyre,* 109 S.W.3d at 748. In fact, it must be presumed that in

enacting Section 41.0105, the legislature intended a just and reasonable result, and that the public interest is favored over any private interest. TEX. GOV'T CODE ANN. § 311.021 (Vernon 2003). The legislature presumably considered these policy issues, and it is not the role of the courts to evaluate the wisdom of its decisions.

B. The Tyler Court of Appeals correctly determined that, as a measure of damages, Section 41.0105 limits the admissibility of evidence of medical care expenses.

The Tyler Court of Appeals correctly determined that Section 41.0105, as its title establishes, is a measure of damages which governs the relevance and admissibility of evidence to be submitted to a jury. Petitioner contends that whatever Section 41.0105 means, it does not affect the admissibility of evidence of medical care expenses. However, Petitioner does not attempt to articulate a statutorily-based analysis to support this argument. Rather, Petitioner resorts to implication, contrived logistical and practical problems, and policy arguments in support of his contention that Section 41.0105 should not be interpreted to affect admissibility of evidence. As set forth below, the text of the statute and its title defeat Petitioner's argument.

The title of Section 41.0105 clearly establishes the intent of the legislature with respect to its application. The caption prefacing Section 41.0105 reads as follows: "Evidence Relating To Amount of Economic Damages."

Whether or not a statute is considered ambiguous on its face, a court may consider the title or caption of the statute. TEX. GOV'T CODE ANN. § 311.023(7) (Vernon 2003); *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 249-50 (Tex. App.—Austin 2002, pet. granted, judgm't vacated w.r.m.) (holding that Section 15.011 of the Texas Civil Practice &

Remedies Code applied solely to actions involving land because the title to Section 15.011 is "Land"). Similarly, in this case, the title of Section 41.0105 clearly indicates that the statute applies to "evidence." On its face, Section 41.0105 is a rule of evidence that limits the admissibility of medical care expenses to evidence of the amount actually paid or incurred by or on behalf of a claimant.

1. The Dallas Court of Appeals' holding in *Irving Holdings v. Brown* provides no refuge for Petitioner.

In *Irving Holdings, Inc. v. Brown,* the Dallas Court of Appeals held that because Section 41.0105 limits the recovery of damages, rather than damages awarded, courts must apply comparative responsibility reductions before applying Section 41.0105. 274 S.W.2d 926, 931 (Tex. App.—Dallas 2009, pet. denied). Relying on *Brown*, Petitioner contends that the Tyler Court of Appeals erred in holding that Section 41.0105 affects the relevance and admissibility of evidence offered to prove the amount of medical care expense damages. However, the Dallas Court of Appeals' opinion does not support this contention. Whether Section 41.0105 should be applied in the evidentiary or post-verdict stage was not at issue in *Brown. Id.* at 929. The *Brown* Court specifically stated that it expressed no opinion on whether the trial court correctly interpreted Section 41.0105, or whether the limitation contained in Section 41.0105 should be applied post-verdict or through evidence or instructions to the jury. *Id.* at 929 n. 3. Because the *Brown* Court expressly did not decide this issue, Petitioner's reliance on *Brown* is misplaced. On the other hand, the Tyler Court of Appeals directly analyzed this issue and determined that

Section 41.0105 governs the admissibility and relevance of evidence submitted to the jury.

2. Petitioner's logistical and practical problem arguments are irrelevant.

Petitioner attempts to convince this Court that it should not interpret Section 41.0105 as a measure of damages governing the admissibility of evidence because doing so would create logistical problems in other cases involving other third-party payers. However, Petitioner's argument on this point is irrelevant. Once again, it is not for courts to decide if legislative enactments are wise, or if particular provisions of statutes could be more effectively worded to reach what courts or litigants might believe to be better or more equitable results. *See McIntyre,* 109 S.W.3d at 748 (noting that "Our role ... is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent."). Because Petitioner's logistical and practical problems arguments are nothing more that his view as to the wisdom of the policy underlying Section 41.0105, and they are wholly irrelevant.

CONCLUSION

The specific statutory language and clear purpose found in the statute itself clearly supports the conclusion that Section 41.0105 of the Texas Civil Practice & Remedies Code limits both recovery of medical care expenses and the relevance and admissibility of evidence offered to prove medical care expenses. Petitioner's extra-textual arguments against the enforcement of Section 41.0105 as written do not provide any basis for re-writing the statute. Because the evidence submitted to the jury in the trial court was

legally insufficient to support the award of medical care expenses, the Tyler Court of Appeals' opinion should be affirmed with respect to the interpretation and application of Section 41.0105. However, the Tyler Court of Appeals' decision to remand the entire case should be reversed, and the trial court's judgment should be modified to exclude the award of the $82,294.69 of medical expenses written off as adjustments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 19th day of March, 2010, a copy of this brief was sent to all counsel of record via certified mail, return receipt requested, pursuant to Texas Rule of Appellate Procedure 9.5.

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