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Texas Civil Practice & Remedies Code Sec. 41.0105: A Time for Clarification Comment.

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COMMENT

TEXAS CIVIL PRACTICE & REMEDIES CODE § 41.0105: A TIME FOR CLARIFICATION

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I. INTRODUCTION

A. *The Confusion Surrounding Civil Practice & Remedies Code Section 41.0105*

"The language of the statute . . . is [by no means] a model of clarity . . . ."[1] No other words could more accurately describe Texas Civil Practice and Remedies Code section 41.0105. Texas practitioners often refer to this particular section as the "paid-or-incurred statute."[2] Enacted by the 78th Texas Legislature, section 41.0105 (entitled: "Evidence Relating to Amount of Economic Damages") states, "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."[3]

The problems that have manifested from these words are very real and need to be addressed. Texas trial lawyers and district court judges are perplexed as to what the statute means, and equally disconcerting, how it should be applied.[4] With all its confusion, many questions have arisen regarding how a lawyer must try a personal injury case in Texas. Despite the few cases that address the issue, there still remain more unsettled questions than settled answers.[5] This Comment explores those cases which appear to have done more harm than good in staying in line with legislative intent, precedential case history, and common law.

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1. Mills v. Fletcher, 229 S.W.3d 765, 771 (Tex. App.—San Antonio 2007, no pet.) (Stone, J., dissenting).

2. *E.g.*, Price L. Johnson et al., *Personal Torts*, 61 SMU L. REV. 1013, 1018 (2008) (commenting that the *Mills v. Fletcher* opinion was the first to address the "paid-or-incurred" statute).

3. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008), *enacted by* Act of June 1, 2003, 78th Leg., R.S., ch. 204, § 13.08, 2003, Tex. Gen. Laws 847. This Comment refers to this piece of legislation as "House Bill 4."

4. Randy Wilson, *Paid or Incurred: An Enigma Shrouded in a Puzzle*, 71 TEX. B.J. 812, 812–13 (2008). When referring to the plain language of the statute, District Judge Randy Wilson acknowledges, "This single sentence has thrown Texas tort law into chaos as lawyers and courts struggle to apply it." *Id.* at 813.

5. One Texas practitioner went so far as to publicly state, "The law is so poorly written that no one really knows what it means." Allen Rogers, *Mr. Brown Dodges a Bullet*, (Feb. 8, 2009, 17:20 CST), http://www.texascaraccidentinjury.com/tags/410105/.

B. *The Statute Is in Dire Need of Reform or a More Accurate Construction*

Arguments from both sides of the bar ring loud and clear. "At the center of the interpretive debate is the [common law] 'collateral source rule,' and whether or not it survived the enactment of section 41.0105."[6] Personal injury plaintiffs argue that section 41.0105 simply codified the longstanding collateral-source rule,[7] which does not allow a tortfeasor defendant to claim or offset his liability from a plaintiff's collateral source.[8] Defendants argue that the legislature abrogated the rule when it enacted the statute.[9] Another take on this debate suggests that while the common law rule may not have been completely codified or abrogated, the statute does have an adverse affect on it in some way.[10] As such,

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6. Andrew S. Peveto, *Texas Legislature Bars Recovery of Amounts "Written-Off" by Medicare, Medicaid, and Other Third-Party Payors*, HARRISON & HULL, LLP, http://www.hlaw.us/Breaking%20legal%20news/bln2.htm (last visited Jan. 24, 2011).

7. Randy Wilson, *Paid or Incurred: An Enigma Shrouded in a Puzzle*, 71 TEX. B.J. 812, 813 (2008); *see also* R. Talmadge Hammock, *The Changing World of Medical Malpractice/Personal Injury Law*, 70 TEX. B.J. 51, 51 (2007) (acknowledging that plaintiffs' attorneys sometimes argue that their clients incur gross medical bills under the statute, making the initially charged bill recoverable).

8. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979) (restating the common law concept that a tortfeasor's liability should not be credited or offset by any payments or benefits made on behalf of the injured plaintiff, even though such payments or benefits covered all or part of the harm caused by the defendant).

9. *See* R. Talmadge Hammock, *The Changing World of Medical Malpractice/Personal Injury Law*, 70 TEX. B.J. 51, 51 (2007) (explaining that defendants read the statute as eliminating the common law rule). In a situation where a portion of plaintiff's bill has been adjusted or written off under the policy of plaintiff's private health insurance, defendants argue that the adjusted or written-off amount is not recoverable. *See* Randy Wilson, *Paid or Incurred: An Enigma Shrouded in a Puzzle*, 71 TEX. B.J. 812, 813 (2008) (indicating that some defendants believe the most a plaintiff should recover is any co-pay paid by the plaintiff, along with the amount the plaintiff's insurance company paid). Consequently, the debate surrounding House Bill 4 (the piece of legislation that contained the paid-or-incurred statute) and its provisions has little middle ground. *See* R. Talmadge Hammock, *The Changing World of Medical Malpractice/Personal Injury Law*, 70 TEX. B.J. 51, 51 (2007) (identifying the debate surrounding the intended effect of Civil Practice and Remedies Code section 41.0105); *see also* A. Craig Eiland, *A Word from the Opponents*, ADVOC. (TEX.), Fall 2008, at 22, 22, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf (describing the two main perspectives on House Bill 4). Texas trial lawyer Craig Eiland, while an opponent of the legislation, accurately summed up the legal community's reaction to House Bill 4: "[It] was either the greatest legislative development for you and your clients or the bane of you and your clients' claims." *Id.*

10. *See* Chip Brooker, *Clarifying Texas Civil Practice & Remedies Code § 41.0105 and Its Effect on the Collateral Source Rule*, DICTA, June 2007, at 4, 4, *available at*

this Comment stands for the proposition that Civil Practice and Remedies Code section 41.0105 is in dire need of either reform by the Texas legislature or a more accurate construction by the Texas Supreme Court. In conjunction with the rules on construing statutes, legislative intent, and existing common law, such clarification of the statute should embrace, rather than ignore, the plain meaning of the statute. An analytical look at the statute in question with the foregoing considerations is the goal of this Comment.

II. BACKGROUND OF CIVIL PRACTICE & REMEDIES CODE SECTION 41.0105: HOUSE BILL 4

By 2003, the "issue of tort reform ha[d] been at the forefront of the media as well as the legislature."[11] An excess of litigation flooded Texas courts,[12] and a crisis had developed in the state.[13] Numerous commentators and organizations referred to Texas as the "'lawsuit mecca'" and "judicial hell hole."[14] In response, the 78th Legislature enacted House Bill 4 to reform "certain procedures and remedies in civil actions" brought in Texas courts.[15]

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http://www.haynesboone.com/files/Publication/c33b684d-aa73-48fe-b807-8aa23230fe39/Presentation/PublicationAttachment/ffa8baa5-6924-46ef-a24b-da39a905844f/CPRC%2041%200105%20and%20the%20Collateral%20Source%20Rule.pdf (suggesting that while the collateral-source rule is still in existence, the implementation of section 41.0105 harmed it in some way); Kent C. Krause, *Understanding the Law of Damages*, 37937 NBI-CLE 31, 48–49 (2007) (announcing that the collateral-source doctrine is beginning to wear away).

11. R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY'S L.J. 751, 754 (2009).

12. *See* H. COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 1 (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf (outlining the effects of excessive litigation).

13. *Id.* For instance, an influx of litigation against medical and health care providers caused them to relocate their practices outside of Texas or to quit the medical profession altogether. *Id.* Patients were also feeling the effects because insurance companies and medical providers were forced to mitigate the costs of expensive litigation by raising their rates. *See, e.g.*, *id.* (highlighting the impact that non-meritorious litigation had on health care providers and patients).

14. Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform in Texas*, ADVOC. (TEX.), Fall 2008, at 9, 10, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf.

15. Tex. H.B. 4, 78th Leg., R.S. (2003) (enrolled), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004F.pdf.

It was the intent of the drafters of House Bill 4 "to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society."[16] One thing cannot be denied: the Bill was huge; it addressed an array of issues.[17] To name a few, Texas tort law changed in the areas of class action lawsuits, medical liability claims, settlements, and products liability claims.[18] With such an expansive reach, the enactment of House Bill 4 is widely known as "one of the most sweeping sets of changes to civil practice [seen in] this state."[19] One of the most significant changes was in the area of medical malpractice law.[20]

Article 13 of House Bill 4 contained amendments regarding

16. S. COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 1 (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004S.pdf.

17. *See generally* Tex. H.B. 4, 78th Leg., R.S. (2003) (enrolled), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004F.pdf (containing twenty-three articles that revised or amended Texas statutes).

18. *See id.* (providing various changes in civil practice and remedies in the State of Texas). Article 1 of House Bill 4 sets out several new requirements in class action suits. *Id.* art. 1. In part, article 1 mandates the Supreme Court to implement rules that promote resourceful and impartial resolutions of class action suits and also specifies guidelines on petitions for review and interlocutory appeals. *Id.*; *see also* Tex. H.B. 4, 78th Leg., R.S. art. 1 (2003) (enrolled bill summary), *available at* http://www.capitol.state.tx.us/BillLookup/BillSummary.aspx?LegSess=78R&Bill=HB4 (summarizing the provisions of article 1). Furthermore, article 2 of House Bill 4 created rules related to settlement offers and awarding litigation costs, while article 5 outlined rebuttable presumptions available to defendants only in certain product liability claims, along with the criteria that plaintiffs must establish to rebut said presumptions. Tex. H.B. 4, 78th Leg., R.S. arts. 2, 5 (2003) (enrolled), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004F.pdf. *See generally* Tex. H.B. 4, 78th Leg., R.S. (2003) (enrolled bill summary), *available at* http://www.capitol.state.tx.us/BillLookup/BillSummary.aspx?LegSess=78R& Bill=HB4 (providing a synopsis of the legislative actions in House Bill 4). The statutory provisions promulgated in article 5 applied to cases "filed on or after July 1, 2003." Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB 4*, 67 TEX. B.J. 276, 282 (2004).

19. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 242 (2006); *see also* A. Craig Eiland, *A Word from the Opponents*, ADVOC. (TEX.), Fall 2008, at 22, 22, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf (outlining some of the topics that the voluminous bill addressed); Chris C. Miller, *Reduction of Medical Expense Damage Award*, HOUS. LAW., Aug. 2007, at 50, 50, *available at* http://www.thehoustonlawyer.com/aa_july07/page50.htm (declaring the bill contained sweeping tort reform provisions).

20. *See* D. Michael Wallach & J. Wade Birdwell, *House Bill 4 After Five Years—A Defense Perspective*, ADVOC. (TEX.), Fall 2008, at 53, 53, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf (describing House Bill 4's significant overhaul to health care liability claims).

damages awarded in civil cases.[21] Specifically, the legislature altered Texas Civil Practice and Remedies Code chapter 41 by deleting and adding various provisions.[22] Embedded in article 13, section 13.08 of House Bill 4 was the addition of section 41.0105 to the Texas Civil Practice and Remedies Code.[23] Such amendments to the Code took effect on September 1, 2003.[24]

III. BACKGROUND OF THE COLLATERAL-SOURCE RULE

The collateral-source rule has been a long-standing fixture in Texas jurisprudence and throughout the nation in civil tort cases.[25] More than 150 years ago, American courts started implementing this equitable rule.[26] However, the collateral-source rule actually

21. Tex. H.B. 4, 78th Leg., R.S. art. 13 (2003) (enrolled), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004F.pdf.

22. *Id.*

23. *Id.* § 13.08.

24. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

25. *See* Tex. & Pac. Ry. Co. v. Levi Bros., 59 Tex. 674, 676 (1883) (holding that a defendant's damages cannot be offset by a plaintiff's insurance compensation). This was the first Texas Supreme Court case to recognize the collateral-source rule. *Id.* It can be said that it took a while for Texas to catch up to other states that had already adopted the doctrine. *Id.* For example, in 1869, and again in 1870, the Massachusetts Supreme Judicial Court recognized the common law concept. *See* Hayward v. Cain, 105 Mass. 213, 213 (1870) (concluding that "neither the defendant's liability, nor the measure of it, is affected by the payment of a loss to the plaintiff by insurers of the building"); Clark v. Wilson, 103 Mass. 219, 220–21 (1869) (claiming that where a mortgagee of real estate independently obtains fire insurance separate from the mortgagor, the mortgagor is precluded from sharing in any amount recovered by the mortgagee in the event of loss). Furthermore, in 1871, Vermont chose to adhere to the equitable doctrine as its high court stated:

> There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff . . . [from his] insurance company should operate . . . to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debtors . . . . Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral . . . .

Harding v. Town of Townshend, 43 Vt. 536, 538 (1871). In 1860, in an action involving goods lost in transport brought against towboat owners, New York's highest court declared that the defendants could not claim a deduction for any of the damages covered by the insurance company. Merrick v. Brainard, 38 Barb. 574 (N.Y. Gen. Term 1860). However, several years earlier in 1854, the United States Supreme Court deprived defendants from taking advantage of a plaintiff's collateral source. *See* Propeller Monticello v. Mollison, 58 U.S. 152, 155 (1854) (declaring that the fact that the "libellants [had] received satisfaction from the insurers" was not a viable defense for the tortfeasor).

26. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009).

originated in England with the breakthrough of commercial insurance.[27] The crux of the rule provides that "[p]ayments made to or benefits conferred on the injured party from [collateral] sources are not credited against the tortfeasor's liability, although the [collateral source] cover[s] all or a part of the harm for which the tortfeasor is liable."[28]

Collateral-source payments are made gratuitously or as a result of some pre-existing agreement between the plaintiff and a third-party to which the defendant was not a party.[29] Because the defendant was not a party to and did not gain privileges from a pre-existing collateral source, evidence of such is irrelevant to the lawsuit, and therefore, should be excluded.[30] The rule endorses the equitable principal that if anyone should receive the benefit of a windfall from the existence of a collateral source, it should be the injured plaintiff, not the guilty defendant.[31]

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27. *Id.*

28. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).

29. *See, e.g.*, Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009) (reviewing the background of the common law collateral-source rule).

30. *See, e.g.*, Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 581–82 (Tex. App.—Houston [1st Dist.] 1992, no writ) (describing the concerns associated with the common law collateral-source rule).

31. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009). Comment (b) of the *Restatement (Second) of Torts* elaborates on the "windfall" principal:

> "The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount[,] there may be a double compensation for a part of the plaintiff's injury. But it is 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 for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance . . . , the law allows him to keep it for himself. If the benefit was . . . established for him by law, he should not be deprived of the advantage that it confers."

Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 254 (2006) (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1977)). As Mr. Perdue points out, Texas courts have adopted the view of the *Restatement (Second) of Torts*. *Id.* at 253 (citing Taylor v. Am. Fabritech, Inc., 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)); *see also* Nationwide Mut. Ins. Co. v. Gerlich, 982 S.W.2d 456, 459 (Tex. App.—San Antonio 1998) (holding that personal injury protection insurance must "be treated as a collateral source"), *rev'd on other grounds*, 997 S.W.2d 265 (Tex. 1999).

A. *The Scope of the Collateral-Source Rule*

The scope of the collateral-source rule is expansive. Texas courts have determined that the following areas fall within the ambit of the collateral-source rule: free medical services provided to a plaintiff,[32] freight insurance obtained by a plaintiff,[33] relative fringe benefits received by a plaintiff,[34] an employer's payment of voluntary wages to a plaintiff,[35] a veteran's income and care benefits,[36] a plaintiff's social security disability benefits,[37] workers' compensation benefits received by a plaintiff,[38] and private health insurance purchased by a plaintiff.[39] Texas practitioners are well aware of the foregoing collateral-source benefits.[40]

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32. *Cf. Lee-Wright, Inc.*, 840 S.W.2d at 582 ("Medical insurance, disability insurance, and other forms of protection purchased by a plaintiff, as well as gifts a plaintiff receives are easily identifiable as 'independent' sources of income that are subject to the collateral-source rule.").

33. *See* Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 934 (Tex. 1980) (holding the collateral-source rule prevented the defendant from benefiting from payments made to a customer under an insurance policy).

34. *See* McLemore v. Broussard, 670 S.W.2d 301, 303 (Tex. App.—Houston [1st Dist.] 1983, no writ) ("A defendant will not be permitted to introduce into evidence fringe benefits received by the survivor to diminish the survivor's damages.").

35. *See* Houston Belt & Terminal Ry. Co. v. Johansen, 107 Tex. 336, 179 S.W. 853, 853 (1915) (declaring that even a gratuitous payment by the plaintiff's employer to the plaintiff as a salary that is the same or greater than one the plaintiff was receiving at the time of injury, could not be claimed as a benefit by the defendant railway company).

36. *See* Montandon v. Colehour, 469 S.W.2d 222, 229–30 (Tex. Civ. App.—Fort Worth 1971, no writ) (ruling that the trial court erred in allowing the defendant to admit evidence of a certificate of eligibility from the Veterans Administration that would allow the plaintiff to receive free schooling as a result of his prior service in the military).

37. *See* Traders & Gen. Ins. Co. v. Reed, 376 S.W.2d 591, 593–94 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.) (rejecting the defendant's argument that collateral-source evidence of payments made to the plaintiff under a social security benefits claim was admissible for the limited purpose of showing the plaintiff's state of mind and duration of the plaintiff's mental disease).

38. *See* Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 582 (Tex. App.—Houston [1st Dist.] 1992, no writ) (finding no basis for the defendant's argument that, with worker's compensation benefits, the plaintiff would be receiving a double recovery, and also stating that the admission of such evidence would only distract the jury from the relevant issue of the case: whether or not the plaintiff was wrongfully discharged).

39. *See id.* at 582 ("Medical insurance [and] disability insurance . . . are easily identifiable as 'independent' sources of income that are subject to the collateral source rule.").

40. *See, e.g.*, Chip Brooker, *Clarifying Texas Civil Practice & Remedies Code § 41.0105 and Its Effect on the Collateral Source Rule*, DICTA, June 2007, at 4, 4, *available at* http://www.haynesboone.com/files/Publication/c33b684d-aa73-48fe-b807-8aa23230fe39/Presentation/PublicationAttachment/ffa8baa5-6924-46ef-a24b-da39a905844f/CPRC%2041

While the collateral source is typically held by a third party for the benefit of the plaintiff, when determining the application of the rule, one must consider the character of the benefits received rather than the source of the funds.[41] For example, in a situation where a defendant is a claimant's employer that has retained an employee benefit plan, "[i]f the benefit plan is characterized [as] a fringe benefit of the employee[,] then it is classified a collateral source as to the employer."[42] However, "if the employer purchased the plan primarily for its protection, then the plan is not a collateral source as to the employer."[43]

B. *A Rule of Evidence and Damages*

Texas case law has recognized the collateral-source rule as both a rule of evidence and one of damages.[44] In his concurring opinion in *Tate v. Hernandez*,[45] Justice Campbell described the collateral-source rule as one with a "dual nature."[46] On one hand, the substantive component prevents a reduction of the plaintiff's compensatory damages by payments or benefits from a collateral source.[47] On the other hand, the rule contains an evidentiary

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%200105%20and%20the%20Collateral%20Source%20Rule.pdf (listing the most commonly known benefits of the collateral-source rule).

41. Tate v. Hernandez, 280 S.W.3d 534, 543 (Tex. App.—Amarillo 2009, no pet.) (Campbell, J., concurring).

42. *Id.* at 543 n.2.

43. *Id.*

44. *See* Gore v. Faye, 253 S.W.3d 785, 789 n.6 (Tex. App.—Amarillo 2008, no pet.) (citing Taylor v. Am. Fabritech, Inc., 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)) (summarizing the precedents related to the collateral-source rule); LMC Complete Auto., Inc. v. Burke, 229 S.W.3d 469, 480 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (restating the background of the common law rule but also acknowledging that "[a] claim of financial hardship . . . may open the door to collateral-source evidence to impeach the credibility of [a] witness" (citing Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 423 (Tex. App.—Eastland 2006, no pet.))). The Eastland court of appeals noted, "The collateral source rule is a rule of *evidence* that prevents testimony that the injured party has received payments from insurance or other sources." Matbon, Inc. v. Gries, 288 S.W.3d 471, 481 n.5 (Tex. App.—Eastland 2009, no pet.) (emphasis added).

45. Tate v. Hernandez, 280 S.W.3d 534 (Tex. App.—Amarillo 2009, no pet.).

46. *See id.* at 542 n.2 (Campbell, J., concurring) (explaining the underlying notion behind the equitable rule is that any windfall should apply to the injured party rather than to a wrongdoer).

47. *See id.* at 542 n.1 ("'The substantive component is a rule of damages . . . [that] bars a defendant from reducing the plaintiff's compensatory award . . . .'" (quoting Arthur v. Catour, 833 N.E.2d 847, 852 (Ill. 2005))).

component that thwarts a defendant's attempt to admit the evidence or even mention the existence of a collateral benefit during trial.[48] Justice Campbell conceded that "'[t]he concern [behind the rule] is that the trier of fact may use [the] evidence improperly to deny the plaintiff the full recovery to which he is entitled.'"[49]

IV. TEXAS COURTS AND THE STATUTE

Studies have revealed a marked decline of civil cases that actually proceed to trial.[50] In his essay, Judge Royal Furgeson observed a study conducted by Professor Marc Galanter regarding this trend, occurring in the realm of both state and federal courts.[51] Since the mid 1980s, there has been a staggering "'[sixty] percent decline in the absolute number of trials.'"[52] Given this sharp decline, it should be no surprise that there are few appellate courts that have actually addressed section 41.0105.[53] As such, trial lawyers and judges must conduct civil trials with a proper understanding of exactly how much a plaintiff is entitled to with regard to economic damages. However, given the current case law, plaintiffs' entitlements are still unclear.

A. *The Texas Supreme Court Has Not Weighed In*

To date, the Texas Supreme Court has not weighed in on the meaning of the section 41.0105. In *Daughters of Charity Health Services of Waco v. Linnstaedter*,[54] the court made a footnote reference to the statute, but declined to provide an interpretation.[55]

48. *See id.* (describing each component of the collateral-source rule).

49. *Id.* (quoting Arthur v. Catour, 833 N.E.2d 847, 852 (Ill. 2005)).

50. *See* Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 811–12 (2009) (noting and concurring with separate studies conducted by Professor Marc Galanter and Judge Patrick E. Higginbotham).

51. *See id.* at 811–12 (summarizing the statistics reported by Galanter).

52. *Id.* at 812 (quoting Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004)).

53. *See, e.g.*, Tate v. Hernandez, 280 S.W.3d 534, 536 (Tex. App.—Amarillo 2009, no pet.) (recognizing there are few appellate court opinions interpreting the paid-or-incurred statute in the context of an insurance adjustment or write-off, and also acknowledging there were no cases discussing the statute in the context of medical bills that were discharged in bankruptcy).

54. Daughters of Charity Health Servs. v. Linnstaedter, 226 S.W.3d 409 (Tex. 2007).

55. *See id.* at 412 n.22 (quoting but not elaborating on section 41.0105); *see also*

Some courts have incorrectly attempted to give meaning to the supreme court's footnote reference.[56] However, as several practitioners have pointed out, the issue of interpretation of the paid-or-incurred statute was not before the court. Therefore, the court's reference to the statute was "merely obiter dictum."[57] "Dictum is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case."[58] Because the supreme court did not provide any type of holding related to section 41.0105, it is purely dicta.[59] As such, the *Linnstaedter* case does not create binding nor persuasive authority as related to the interpretation of section 41.0105.[60]

Irving Holdings, Inc. v. Brown, 274 S.W.3d 926, 930 (Tex. App.—Dallas 2009, pet. denied) (admitting that "[t]he supreme court has only briefly mentioned section 41.0105 and has never discussed it in detail").

56. *See Tate*, 280 S.W.3d at 541 (alleging that the court in *Linnstaedter*, by its reference to section 41.0105, "support[s] the position that *compensation* is the ultimate purpose of our system of jurisprudence"); Matbon, Inc. v. Gries, 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.) (stating that its holding is supported by the Texas Supreme Court's view of the statute). The fallacy in these courts utilizing *Linnstaedter*'s passing reference of the statute as support is in the fact that section 41.0105 was not at issue before the Linnstaedter court. Rather, the issue properly before the court was "whether a hospital paid by a workers' compensation carrier [could] recover the discount from its full charges by filing a lien against a patient's tort recovery." *Linnstaedter*, 226 S.W.3d at 410. Notably, the paid-or-incurred statute was not enacted until 2003, which was years after the plaintiffs in *Linnstaedter* filed their lawsuit. Price L. Johnson et al., *Personal Torts*, 61 SMU L. REV. 1013, 1017 (2008).

57. *See* Price L. Johnson et al., *Personal Torts*, 61 SMU L. REV. 1013, 1017 (2008) (pointing out that "section 41.0105 was [neither] briefed nor argued before the Texas Supreme Court"). Johnson, Burke, and Benham pull the definition of obiter dictum from case law as "'an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case.'" *Id.* at 1017 n.31 (quoting Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)). Furthermore, the Texas Supreme Court has stated that it will not address issues not properly before it, including issues that courts below did not fully develop in the record. Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996).

58. Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (citing BLACK'S LAW DICTIONARY 409 (5th ed. 1979)).

59. *See* Nichols v. Catalano, 216 S.W.3d 413, 416 (Tex. App.—San Antonio 2006, no pet.) (emphasizing that appellant's cited authority did not properly address the relevant issue).

60. *See* BFI Waste Sys. of N. Am., Inc. v. N. Alamo Water Supply Corp., 251 S.W.3d 30, 31 (Tex. 2007) (stating a mere footnote reference that was not a proper issue before the court does "not prejudice any future litigation").

B. Mills v. Fletcher—*The Collateral-Source Rule Is Dead and Insurance Write-Offs and Adjustments Are Not Recoverable*

Mills v. Fletcher[61] was "the first opinion from a Texas court of appeals [that] interpret[ed]" section 41.0105.[62] At trial, Kevin Fletcher brought a personal injury lawsuit against Alisa Mills.[63] Fletcher used his private health insurance to cover the medical expenses incurred from his resulting injuries.[64]

A Bexar County jury awarded Appellee "Fletcher $1,551.00 in past medical expenses"—the amount charged by Fletcher's health care providers.[65] Mills filed a bill of exceptions at trial, introducing Fletcher's medical bills that outlined the adjustments made as a result of Fletcher utilizing his private health insurance.[66]

Citing section 41.0105, Mills argued on appeal that the "written-off or adjusted" medical expenses were never "actually paid nor *actually incurred* by or on behalf of Fletcher" since he would no longer be held liable for such expenses.[67] Mills supported her argument by referring to definitions of "incur" found in common dictionaries.[68]

The Fourth Court of Appeals agreed with Mills's interpretation of the statute and concluded that the term "actually" modified both "paid" and "incurred."[69] In construing the statute with the

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61. Mills v. Fletcher, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.).

62. Chris C. Miller, *Reduction of Medical Expense Damage Award*, HOUS. LAW., Aug. 2007, at 50, 50, *available at* http://www.thehoustonlawyer.com/aa_july07/page50.htm; *see also Mills*, 229 S.W.3d at 771 (Stone, J., dissenting) (admitting that the statute before the court was unclear and ambiguous). Justice Stone drew this conclusion from the fact that the statute "underwent numerous revisions before it was finalized." *Id.* (citing Kirk L. Pittard, *Dead or Alive: The Collateral Source Rule After HB4*, ADVOC. (TEX.), Winter 2006, at 76, 76–77, *available at* http://www.litigationsection.com/downloads/37_Ins_Lit_Winter06.pdf).

63. *Id.* at 767 (plurality opinion).

64. *See id.* (pointing out that Fletcher's "medical providers accepted lesser amounts for their services from his health insurance company").

65. *Mills*, 229 S.W.3d at 767.

66. *Id.* at 767 n.1.

67. Mills v. Fletcher, 229 S.W.3d 765, 767 (Tex. App.—San Antonio 2007, no pet.) (emphasis omitted) (arguing that the jury "award for past medical expenses should have been reduced because [the] medical providers accepted lesser amounts for their services" by writing off the balance due).

68. *See id.* at 768 (concluding "the word incur, in legal parlance, means simply to become liable to pay" (internal quotation marks omitted)).

69. *See id.* (rejecting Fletcher's argument that "'actually incurred' refers to those expenses that have been charged but not paid," while concurring with Mills' argument that the terms equate to some kind of a limitation on expenses).

belief that the legislature intended to limit medical expenses "incurred," the appellate court stated:

> [T]he statute uses the word "incurred" twice .... In referring to "incurred" the second time, the Legislature chose to modify "incurred" with the word "actually." As such, "incurred" must mean something different than "actually incurred." And, the word "actually" modifying "incurred," as well as the phrase "[i]n addition to any other *limitation* under law," shows an intent by the Legislature to limit expenses simply "incurred." Thus, in construing this statute, we believe that "medical or healthcare expenses incurred" refers to the "big circle" of medical or healthcare expenses incurred at the time of the initial visit with the healthcare provider, while, as applied to the facts presented here, "actually incurred" refers to the "smaller circle" of expenses incurred after an adjustment of the healthcare provider's bill.[70]

Reversing the judgment of the trial court, the court of appeals held that section 41.0105 effectively bars "a plaintiff from recovering medical or health care expenses" that health care providers subsequently adjusted or wrote off pursuant to an agreement with the plaintiff's insurance carrier.[71] The Fourth Court of Appeals acknowledged that its holding "clearly ... violate[d] the collateral source rule," but it nevertheless concluded that, given the plain language of section 41.0105 and the legislature's power to abolish the long-standing common law rule, that is exactly what the legislature did.[72]

C. Gore v. Faye—*The Collateral-Source Rule Is, in Some Sense, Still Intact, and Section 41.0105 Should Be Applied Post-Verdict*

In *Gore v. Faye*,[73] the Seventh Court of Appeals was the next court to deal with an issue regarding section 41.0105.[74] The plaintiff, Jainaba Faye, used her private insurance to pay some of the health providers after an automobile accident with Karen Gore.[75]

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70. *Id.*

71. *Id.* at 769.

72. *Mills*, 229 S.W.3d at 769 n.3.

73. Gore v. Faye, 253 S.W.3d 785 (Tex. App.—Amarillo 2008, no pet.).

74. *See generally id.* (considering the procedural application of Civil Practice and Remedies Code section 41.0105).

75. *See id.* at 787 ("Faye's charges were discounted pursuant to a contract between the provider and Faye's health insurance company ....").

Faye entered evidence, through statutory affidavits, that her medical services and charges were necessary and reasonable. Two of the four affidavits contained itemized statements that were redacted to conceal discounts and adjustments made under agreements between the providers and Faye's health insurance carrier.[76]

Gore argued that the unredacted versions of the affidavits should be within the jury's purview under section 41.0105, but the trial judge disagreed.[77] Gore then made an offer of proof of the unredacted affidavits.[78] Because the jury awarded the plaintiff a lesser amount than that which was presented in the affidavits, the court determined that it was not reasonable to apply the offset offered by the defendant's section 41.0105 evidence.[79]

On appeal, Gore did not challenge the trial court's refusal to apply the offset post-verdict.[80] Gore's argument was that the "trial court abused its discretion by not allowing her to present the section 41.0105 evidence for the jury's consideration in answering the past medical expense damages question."[81]

The Amarillo court of appeals held that it was within the discretion of the trial court to refuse to admit the evidence of discounts applied to the plaintiff's medical expenses.[82] The court reasoned that allowing the defendant to show such evidence to the jury would have been a "departure from existing trial practice in Texas."[83] The "existing trial practice" that the court refers to is governed by the scope of the collateral-source rule, which prohibits a party during a personal injury trial from even mentioning that the other party maintains insurance coverage.[84]

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76. *Id.*

77. *Id.* at 787–88.

78. *Gore*, 253 S.W.3d at 787–88.

79. *Id.* at 788.

80. *Id.* at 788 n.5.

81. *Id.* at 789.

82. *See id.* at 790 (finding that the trial court did not abuse its discretion by applying section 41.0105 *after* the verdict).

83. Gore v. Faye, 253 S.W.3d 785, 790 (Tex. App.—Amarillo 2008, no pet.).

84. *See id.* (citing Taylor v. Am. Fabritech, Inc., 132 S.W.3d 613, 625 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)) (finding no abuse of discretion in applying section 41.0105 post-verdict).

D. Matbon, Inc. v. Gries—*Citing to the* Mills *Opinion, but Determining that the Statute Does Not Eviscerate the Collateral-Source Rule and Should Be Applied Post-Verdict*

In *Matbon, Inc. v. Gries*,[85] the Eastland court of appeals also reviewed a trial court's ruling that allowed plaintiffs to recover the gross amount of their medical expenses.[86] In the end, the appellate court adopted the same statutory interpretation as the Fourth Court of Appeals did in the *Mills* opinion.[87] The court also concluded that the trial court erred by not offsetting the plaintiffs' damages award with the adjustments that their providers subsequently wrote off.[88]

The court further held that the statute did not require the admission of the collateral-source evidence before the factfinder, but that the judge could consider it after the jury had reached its verdict.[89] The court noted that the billing records on file with the trial court were confusing and that it could not decipher an approximate amount with which it could modify the plaintiffs' awards of past medical expenses.[90] As such, it had no other choice but to reverse and remand the case back to the trial court to reduce the award so that it was consistent with its holding.[91]

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85. Matbon, Inc. v. Gries, 288 S.W.3d 471 (Tex. App.—Eastland 2009, no pet.).

86. *See id.* at 480 (noting the trial court's rejection of the defendant's arguments pursuant to section 41.0105).

87. *See id.* at 480–81 (acknowledging and accepting the *Mills* interpretation of section 41.0105).

88. *See id.* at 481–82 (overruling the trial court's interpretation and application of the statute).

89. *See id.* at 481 (justifying its holding by acknowledging that allowing the factfinder to consider evidence of a party's collateral source would have the effect of "prejudic[ing] the amount of the claimant's recovery"). Similar to the holdings in *Gore* and *Matbon*, two different federal courts in Texas have concluded that trial courts should apply section 41.0105 after the jury verdict but before the rendition of judgment. Goryews v. Murphy Exploration & Prod. Co., No. V-06-01, 2007 WL 2274400, at *4 (S.D. Tex. Aug. 8, 2007); Coppedge v. K.B.I., Inc., No. 9:05-CV-162, 2007 WL 1989840, at *3 (E.D. Tex. July 3, 2007).

90. *See Matbon, Inc.*, 288 S.W.3d at 482 (basing its disposition of the case on the fact that the court could not determine what expenses were actually paid or incurred). In anticipation of a possible disagreement by a reviewing court, "[t]he trial court encouraged the parties to" stipulate to an amount that would accurately represent what was written off the plaintiffs' medical bills. *Id.* (indicating the trial court was aware of the possibility that its interpretation of the statute may be overturned). However, the parties never reached an agreement. *Id.*

91. *See id.* (suggesting that on remand, the parties consider proving the written-off medical expenses through detailed testimony from the custodian of records). The court

E. Garza de Escabedo v. Haygood—*The Collateral-Source Rule Is Completely Dead: Section 41.0105 Is the Proper Measure of Damages and Such Evidence Should Be Presented to the Jury*

The Twelfth Court of Appeals in *Garza de Escabedo v. Haygood*[92] had yet another take on the statute. Haygood and Garza de Escabedo were involved in a motor vehicle accident, after which Haygood filed suit.[93] Instead of using private health insurance, Haygood's providers accepted payments from Medicare and wrote off a substantial portion of their bills—those amounts were uncontested by the parties.[94] The trial court granted the the plaintiff's motion to exclude evidence of payments made by Medicare or the written-off amounts.[95] The jury returned a verdict in favor of the plaintiff and awarded him the full amount of past medical expenses presented at trial.[96] Over Escabedo's objection, the trial judge entered a judgment affirming the jury's award.[97]

On appeal, Escabedo argued that section 41.0105 "created a new measure of damages" and that the evidence admitted by the trial court was, therefore, legally insufficient.[98] The appellate court agreed with Escabedo.[99] After citing to the interpretation of the statute adopted by the Eastland court of appeals in *Matbon, Inc. v. Gries*, the Tyler appellate court took its analysis a step further.[100] The court reasoned: "As its title reflects, section 41.0105, as a measure of damages, not only limits the amount of damages re-

sought guidance from the appellant's argument in *Gore v. Faye. Matbon, Inc.*, 288 S.W.3d at 482.

92. Garza de Escabedo v. Haygood, 283 S.W.3d 3 (Tex. App.—Tyler 2009, pet. granted).

93. *Id.* at 4–5.

94. *See id.* at 5 (outlining the plaintiff's medical expenses). The total amount billed by Haygood's medical providers was $110,069.12. *Id.* The court noted that the portion paid by Medicare totaled only $14,482.02 and that the plaintiff, Haygood, was still responsible for $13,292.41. *Id.* However, as required by Medicare, the providers wrote off considerable portions of their bills, which totaled $82,294.69. *Garza de Escabedo*, 283 S.W.3d at 5.

95. *See id.* (granting the plaintiff's motion to exclude evidence).

96. *Id.*

97. *See id.* at 5–6 (overruling the defendant's objection to the jury's verdict).

98. *Id.* at 6.

99. *See* Garza de Escabedo v. Haygood, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009, pet. granted) (determining that it was the role of the trial court to allow the admission of evidence related to the proper measure of damages).

100. *See id.* (approving the *Matbon* court's conclusion that the legislature intended to limit a plaintiff's recovery of medical expenses by the enactment of section 41.0105).

coverable, but also affects the relevance of evidence offered to prove damages."[101] In other words, the court reasoned that the jury should have been privy to all of the evidence of Medicare payments and adjustments in reaching its conclusion.[102]

Practicing lawyers and sitting judges now have conflicting decisions by appellate courts regarding whether section 41.0105 mandates that evidence of a plaintiff's medical expenses must reflect the use of a collateral source, along with any adjustments made as a result of its use.[103] More importantly, the *Garza de Escabedo* court held that such evidence is admissible before a jury.[104] This newly adopted interpretation stands for the proposition that the collateral-source rule is completely dead. However, it is noteworthy that since this ruling by the Twelfth Court of Appeals, appellee Haygood's Petition for Review with the Texas Supreme Court has been granted.[105]

F. Irving Holdings, Inc. v. Brown—*Reduce Recovery Under Comparative Fault Statute, Then Apply Limitation Pursuant to Section 41.0105*

When the legislature crafted the language, "[i]n addition to any other limitation under law,"[106] it was likely referring to Texas

101. *Id.* A federal court in Texas reached an identical conclusion as the appellate court in *Garza de Escabedo*. *See* Tello v. United States, 608 F. Supp. 2d 805, 809 (W.D. Tex. 2009) (expressing that Texas's current statutory scheme mandates the submission of evidence of actual payment to the trier of fact).

102. *See Garza de Escabedo*, 283 S.W.3d at 7 (emphasizing that "there was no direct evidence before the jury of the amount actually paid or actually incurred," but only of the "amount initially incurred"). For another detailed summary on *Garza de Escabedo v. Haygood*, refer to Byron Henry's posting on the *Reverse & Render* website. *See* Byron Henry, *Medical Bills Are No Evidence of Proper Measure of Damages*, REVERSE & RENDER (Mar. 11, 2009, 08:31 CST), http://www.reverseandrender.com/ 2009/03/articles/ opinions-judgments/medical-bills-are-no-evidence-of-proper-measure-of-damages/ (summarizing the facts of the Garza de Escabedo case and the points made by the court).

103. *See Garza de Escabedo*, 283 S.W.3d at 7 (concluding that "the evidence was legally insufficient to support the jury's verdict awarding past medical care expense damages").

104. *Id.*

105. *See* Haygood v. Garza de Escabedo, No. 09-0377, http://www.supreme.courts .state.tx.us/opinions/Case.asp?FilingID=30424 (last visited Jan. 24, 2011) (granting a petition for review of the Twelfth Court of Appeals' ruling). It will surely be a move forward in the legal community if the Texas Supreme Court provides statewide guidance on the confusing statute. *Id.*

106. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

Civil Practice and Remedies Code section 33.012(a).[107] The Fifth Court of Appeals, in *Irving Holdings, Inc. v. Brown*,[108] had to consider both statutes.[109] It was the first case to distinguish itself from *Mills v. Fletcher*.[110] Specifically, the issue before the court was: "when both sections apply, which section does the trial court apply first?"[111]

Mr. Herman Brown sued Irving Holdings, Inc. and its employee, taxicab driver Isaias Tewelde, as a result of a motor vehicle accident.[112] At trial, Brown presented affidavits to the jury of his medical expenses, which totaled $89,000.[113] At no time did the defendants dispute this amount.[114] From the $89,000 medical bill, it was established, outside the presence of the jury, that Brown's workers' compensation insurance paid $45,429.95—the amount the defendants argued was "actually incurred" pursuant to section 41.0105.[115]

Ultimately, the jury awarded the plaintiff $89,000 for his past medical expenses but also found that Brown was comparatively negligent by fifty percent.[116] Post-verdict, the trial judge first applied section 33.012(a), and reduced the damages by the percentage of the plaintiff's negligence, which resulted in damages of

107. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (West 2008). This section of the Civil Practice and Remedies Code deals with the amount a claimant may recover. *Id.* It states, "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." *Id.*

108. Irving Holdings, Inc. v. Brown, 274 S.W.3d 926 (Tex. App.—Dallas 2009, pet. denied).

109. *See id.* at 927–28 (analyzing sections 33.012(a) and 41.0105).

110. *See id.* at 930–31 (determining there was a distinction between *Mills* and the *Irving Holdings* case, because "Brown's recovery of past medical expenses . . . under the trial court's judgment did not exceed the amount of such expenses that was actually paid or incurred by Brown or on his behalf"). In fact, the Dallas court of appeals in *Irving Holdings, Inc.* distinguished the case from other previously decided cases, such as the Amarillo court of appeals decision in *Gore v. Faye*. *See Irving Holdings*, 274 S.W.3d at 930–31, 931 n.4 (stressing that application of the paid-or-incurred statute was not an issue before the court in *Irving Holdings*).

111. *Id.* at 928.

112. *See Irving Holdings, Inc.*, 274 S.W.3d at 928 (providing the facts of the case).

113. *Id.*

114. *See id.* (noting that neither Irving Holdings, Inc. nor Tewelde filed counter-affidavits, nor did they challenge the "reasonableness or necessity of the amounts of medical expenses stated in the [plaintiff's] affidavits").

115. *Id.* at 928–29.

116. *Id.* at 928.

$44,500.[117] Furthermore, the trial court determined that since this amount was less than the medical expenses *actually incurred* ($45,429.95), section 41.0105 did not apply and awarded Mr. Brown $44,500.[118]

Defendants appealed, arguing that "the trial court erred by failing to reduce the jury's award of $89,000 . . . [to] the amount actually paid or incurred by or on behalf of [the] plaintiff, pursuant to section 41.0105[,] *before* reducing Brown's recovery by his 50 percent responsibility . . . [assessed] by the jury."[119] However, the Dallas court of appeals rejected this argument[120] and affirmed the order of the trial court's application of the two statutes.[121]

Attorney Byron Henry best summarized the court's reasoning in *Irving Holdings, Inc.*, stating:

> [T]he [c]ourt reasoned that because section 33.012(a) applies to the assessment of damages by the jury, and section 41.0105 applies to recovery of damages by the claimant, section 33.012(a) should be applied first. In addition to the distinction between *damages* and *recovery*, the [c]ourt relied on section 41.0105's introductory phrase, "in addition to any other limitation under law" to support its holding that section 41.0105 gets applied last.[122]

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117. *See* Irving Holdings, Inc. v. Brown, 274 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied) (reporting that the trial court denied the defendants' motion and based its final judgment on the jury verdict and the plaintiff's motion for judgment).

118. *See id.* (awarding the amount of damages minus contributory negligence with no further deductions).

119. *Id.*

120. *See id.* at 931 (considering the plain language of both statutes in question).

121. *Id.* at 933.

122. Byron Henry, *Reduce Damages Under CPRC 33.012 Before Applying Recovery Limitation in CPRC 41.0105*, REVERSE & RENDER (Jan. 5, 2009, 17:46 CST), http://www.reverseandrender.com/2009/01/articles/opinions-judgments/reduce-damages-under-cprc-33012-before-applying-recovery-limitation-in-cprc-410105/. After determining that a trial court should apply section 33.012(a) before section 41.0105, the court put forth the following possibilities that judges face after they obtain a "resulting damage amount" from a reduction by the plaintiff's percentage of responsibility:

> If the resulting damage amount based on reasonable and necessary medical expenses is greater than the amount of medical expenses "actually paid or incurred," section 41.0105 further limits the claimant's recovery to the lesser amount. [However, i]f 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.

Whether a court applies section 33.012(a) before section 41.0105 can have a significant impact on resulting damages.[123] Considering the specific facts in *Irving Holdings, Inc.*, had the trial court applied the paid-or-incurred statute first, the parties could have expected a considerably different outcome. Namely, the court would have first reduced Brown's damages to $45,429.95—the amount argued to have been "actually paid or incurred".[124] Then, under section 33.012(a), the court would have reduced this amount by fifty percent.[125] Had that been the case, Brown would have been awarded with a judgment of $22,714.97 instead of $44,500.[126]

However, the Dallas court of appeals concluded that following this type of process would violate the collateral-source rule, as the defendants would then receive the benefit of the plaintiff's workers' compensation insurance.[127] Stressing that section 33.012(a) was a limitation on damages, while section 41.0105 was a limitation on recovery,[128] the appellate court held that courts should apply the reduction of recovery under the comparative negligence statute before any application of the paid-or-incurred statute.[129]

Not satisfied with this ruling, Irving Holdings, Inc. and Isaias Tewelde filed a petition for review with the Texas Supreme Court.[130] On November 20, 2009, the Texas Supreme Court denied their Petition for Review.[131] In doing so, the court deter-

123. *See, e.g.*, *id.* at 928 (acknowledging the difference of the award had the trial court applied section 41.0105 before section 33.012(a)).

124. *See id.* at 929 (pointing out Irving Holdings' assertion of the amount "actually paid by [the insurance provider]" on behalf of Mr. Brown).

125. *See id.* (describing the defendants' argument on appeal).

126. *See id.* (restating the defendants' interpretation of the way the trial court should have ruled and the award it should have given the plaintiff for "past medical expenses").

127. *See* Irving Holdings, Inc. v. Brown, 274 S.W.3d 926, 932 (Tex. App.—Dallas 2009, pet. denied) (implying that if a defendant received a benefit from a plaintiff's workers' compensation policy, the resulting effect would essentially violate the collateral-source rule).

128. *See id.* at 931 (comparing the two statutes in question).

129. *See id.* at 933 (overruling the defendants' sole issue on appeal).

130. *See* Petition for Review, Irving Holdings, Inc. v. Brown, 274 S.W.3d 926 (Tex. App.—Dallas 2009, pet. denied) (No. 09-0157), *available at* http://www.supreme.courts.state.tx.us/ebriefs/09/09015701.pdf (filing their petition for review on February 23, 2009).

131. Petition for Review, *Irving Holdings*, No. 09-0157, http://www.supreme.courts.state.tx.us/opinions/case.asp?FilingID=30207 (last visited Jan. 24, 2011). Petitioners filed a motion for rehearing that was denied on January 8, 2010. Supreme Court of Texas, Orders Pronounced January 8, 2010, *available at* http://www.supreme.courts.state.tx.us/historical/2010/jan/010810.htm (last visited Jan. 24, 2011).

mined that there was no error present as to require reversal.[132]

G. Tate v. Hernandez—*Medical Bills Discharged in Bankruptcy Are Neither Paid nor Incurred*

Finally, the most recently published opinion addressing the statute is *Tate v. Hernandez*.[133] As noted above, the Amarillo court of appeals previously dealt with section 41.0105,[134] but this time it answered a question that had yet to be addressed by another court: "[Was] a debt which ha[d] been discharged in bankruptcy 'paid or incurred' for purposes of section 41.0105 of the Texas Civil Practice[] and Remedies Code?"[135]

The plaintiff, Miguel Hernandez, filed a Chapter 13 bankruptcy petition and, six months later, was involved in a car accident with the defendant, Gailia Tate.[136] Hernandez incurred medical bills from six different health care providers as a result of the injuries he sustained in the accident.[137] The bankruptcy court converted Hernandez's Chapter 13 bankruptcy proceeding into a Chapter 7 bankruptcy proceeding, at which time Hernandez filed a debtor's statement that listed medical bills "as debts incurred after confirmation but before conversion."[138] Each medical bill listed arose out of the accident with the defendant, Tate.[139] In his personal injury suit for damages against Tate, Hernandez sought to recover medical bills that the bankruptcy court eventually discharged.[140] The jury found the plaintiff comparatively negligent by thirty percent and awarded him full recovery of his medical expenses—even those discharged in the bankruptcy

132. *See* TEX. R. APP. P. 56.1(b)(1) (providing the meaning behind a denial of a petition for review by the Texas Supreme Court). The Rule states that a petition for review is denied when the court "is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction . . . ." *Id.*

133. Tate v. Hernandez, 280 S.W.3d 534 (Tex. App.—Amarillo 2009, no pet.).

134. *See* Gore v. Faye, 253 S.W.3d 785, 789 (Tex. App.—Amarillo 2008, no pet.) (addressing the procedural aspects of section 41.0105).

135. *Tate*, 280 S.W.3d at 536–37.

136. *See id.* at 537 (outlining the background of the case).

137. *See id.* at 537–38 (detailing the plaintiff's past medical expenses awarded by the jury).

138. *Id.* at 537.

139. *Id.*

140. *See Tate*, 280 S.W.3d at 537–38 (explaining that Hernandez sought to recover for medical bills listed as dischargeable debt in the bankruptcy court).

proceeding.[141] The trial court affirmed these findings in a judgment against Tate and ordered the funds placed in a constructive trust.[142] As such, Tate appealed.

On appeal, the court addressed only two of the five issues raised by the appellant.[143] Specifically, Tate first argued that the "trial court erred . . . in awarding medical bills that had been discharged in bankruptcy" because they were not recoverable.[144] In her second issue, Tate stated that the trial court erred by "not limiting Hernandez's recovery of medical or health care expenses to amounts actually paid or incurred" pursuant to section 41.0105.[145]

Referencing the collateral-source rule, the appellate court determined that reasonable and necessary medical expenses subsequently discharged in bankruptcy were nevertheless, recoverable as compensatory damages.[146] However, the court evaluated the purpose of section 41.0105 and concluded that because Hernandez's medical bills were dischargeable in bankruptcy, recovery of those amounts were not necessary to compensate the plaintiff for his injuries.[147] The court concluded that Hernandez "neither paid nor actually incurred" those expenses.[148]

V. PLAIN LANGUAGE OF THE STATUTE

Texas Civil Practice and Remedies Code section 41.0105 states: "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."[149] The legis-

141. *See id.* at 538 ("Each medical provider for which damages were awarded, [with the exception of one], was listed on Hernandez's bankruptcy filing.").

142. *See id.* (describing how the trial court decided and entered the judgment in the case).

143. *See id.* at 538–41 (restating the five issues before the court but ultimately concluding that the disposition of the appellant's second issue dispensed with the remaining issues).

144. Tate v. Hernandez, 280 S.W.3d 534, 536 (Tex. App.—Amarillo 2009, no pet.).

145. *Id.*

146. *See id.* at 538–39 (distinguishing "the concept of recovery of *damages* from the concept of discharge of *debts*"). *But see id.* 541–42 (Campbell, J., concurring) (disagreeing with the court's holding on Tate's first issue and believing that "a discharge in bankruptcy of personal liability for medical expenses is not a collateral benefit for application of the collateral source rule").

147. *See id.* at 540–41 (majority opinion) (reviewing Texas cases that dealt with section 41.0105 and sustaining Tate's second issue on appeal).

148. *Tate*, 280 S.W.3d at 541 (emphasis omitted).

149. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

lature, however, left the courts to decipher the true meaning of the statute.

The legislature defined "[e]conomic damages," as "compensatory damages intended to compensate a claimant for actual economic or pecuniary loss."[150] However, this provides little, if any, guidance as to what the paid-or-incurred statute actually means.

Trial lawyer Jim M. Perdue, Jr. provides a comprehensive breakdown of the individual components of the statute.[151] The breakdown includes five working parts.[152] According to Perdue, the first portion of the statute, "[i]n addition to any other limitation under law,"[153] refers to the possibility of other statutory caps that are placed on damages.[154] For example, the very same legislature placed an "absolute cap" on damages in medical malpractice cases.[155] In addition to statutory caps, the legislature likely considered other statutory limitations, such as the limitation on a claimant's recovery in a comparative negligence situation under Civil Practice and Remedies Code section 33.012(a).[156]

Second, "recovery of medical or health care expenses incurred"[157] not only provides the reader with the subject matter of section 41.0105, but also alleviates a big concern pondered by potential claimants and lawyers—the potential effect of the statute barring a plaintiff from recovering future damages.[158] By

150. *Id.* § 41.001(4).

151. *See generally* Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241 (2006) (evaluating section 41.0105 phrase by phrase and giving meaning to each word).

152. *Id.* at 243–44.

153. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

154. *See* Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 243 (2006) (discussing the several existing caps on recovery).

155. *Id.*

156. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (West 2008). Like the legislature, the Dallas court of Appeals faced the issue of the applicability of section 33.012(a) in light of section 41.0105. Irving Holdings, Inc. v. Brown, 274 S.W.3d 926 (Tex. App.—Dallas 2009, pet. denied).

157. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

158. *See* Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 243 (2006) ("The word ['incurred'] was added after the initial version of the bill was released to address concerns that the effect could be an unintended bar of recovery on future

providing "incurred" in past tense form, it is clear that the statute applies solely to recovery of medical expenses in the past.[159]

The third working component of the statute—"limited to the amount"[160]—refers to "the verb and object of the sentence structure."[161] While Perdue acknowledges this component creates vagueness and that some have suggested it results in some type of a "cap" on damages, he refers to the section's title, "Evidence Relating to Amount of Economic Damages,"[162] to point out that such a limitation on recovery would not correspond with the title.[163]

Fourth, "actually paid or incurred"[164] stands out as the phrase that modifies "amount" disjunctively.[165] "[O]r" is defined as a term "used as a function word to indicate an alternative."[166] Simply put, "paid" and "incurred" are two different things.[167]

Finally, "by or on behalf of the claimant"[168] is also a disjunctive modifier.[169] Consequently, "by the claimant" and "on behalf of the claimant" are both meaningful and yet, independent from each other.[170]

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damages.").

159. *Id.*

160. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

161. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 243 (2006).

162. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

163. *See* Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 243 (2006) (pointing out the rhetorical flaw in the argument that the language, "is limited to the amount," equates to a cap on recovery).

164. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

165. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 244 (2006).

166. *Id.* at 244 n.20 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 829 (9th ed. 1985)).

167. *See id.* at 244 (explaining that the distinction between "paid" and "incurred" is not meaningless).

168. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

169. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 244 (2006).

170. *Id.*

VI. WHY THE CURRENT INTERPRETATION OF THE PAID OR INCURRED STATUTE IS WRONG

A. *Confusion Created by the Appellate Court Opinions—Pre-Verdict or Post-Verdict?*

Another reason that meaningful interpretation of the statute is necessary is that the rationales and holdings of current Texas courts of appeals are in conflict with each other. It was almost four years after Civil Practice and Remedies Code section 41.0105 went into effect before the Texas court of appeals in *Mills v. Fletcher* attempted to interpret its meaning.[171] Currently, the San Antonio court of appeals' opinion stands alone as the only decision that has construed the meaning of the statute.[172] The decisions that followed *Mills* only created more confusion. To illustrate this confusion, a comparison of the current Texas case law is necessary.

The court in *Mills v. Fletcher* concluded that the legislature had completely annihilated the collateral-source rule when it enacted section 41.0105.[173] The Tyler court of appeals, in *Garza de Escabedo v. Haygood*, seemed to agree with this conclusion when it determined that the trial court should have allowed the defendant to submit the collateral-source evidence of payments and adjustments made by Medicare on behalf of Haygood to the jury.[174]

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171. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008) (taking effect on September 1, 2003), *with* Mills v. Fletcher, 229 S.W.3d 765, 765 (Tex. App.—San Antonio 2007, no pet.) (rendering its decision on May 16, 2007).

172. *Compare Mills*, 229 S.W.3d at 769 (holding that section 41.0105 abrogates the collateral-source rule), *with* Garza de Escabedo v. Haygood, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009, pet. granted) (adopting an interpretation of the statute identical to *Mills*), Tate v. Hernandez, 280 S.W.3d 534, 540–41 (Tex. App.—Amarillo 2009, no pet.) (justifying its holding with the *Mills* court's interpretation of the paid-or-incurred statute), Matbon, Inc. v. Gries, 288 S.W.3d 471, 480–81 (Tex. App.—Eastland 2009, no pet.) (citing to the court's conclusion in *Mills* as support), Irving Holdings, Inc. v. Brown, 274 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied) (ruling on an issue completely different than the one in *Mills*), *and* Gore v. Faye, 253 S.W.3d 785, 789 (Tex. App.—Amarillo 2008, no pet.) (deciding an issue regarding the procedural aspect of section 41.0105, not its meaning).

173. *See Mills*, 229 S.W.3d at 769 n.3 ("The Legislature . . . has the power to enact a statute that abrogates the collateral-source rule, and we believe that the plain language of section 41.0105 shows the Legislature's intent to do so here.").

174. *See Garza de Escabedo*, 283 S.W.3d at 7 (sustaining appellant's fourth point of error).

On the other hand, the courts in *Gore v. Faye* and *Matbon, Inc. v. Gries* believe that the legislature did not intend to eviscerate the collateral-source rule, and therefore, section 41.0105 prescribes that the trial court should consider any collateral-source evidence post-verdict.[175] However, the court of appeals in *Matbon, Inc.*, cited to the court in *Mills* as support.[176] Therefore, agreeing with Justice Angelini's opinion,[177] it is difficult to ascertain how the court held that the collateral-source rule is still intact. Had the *Matbon, Inc.* court truly adopted the reasoning behind Justice Angelini's opinion, it should have held that, given the extermination of the collateral-source rule, the jury could consider the evidence.

Adding more fuel to the confusion, the court in *Irving Holdings, Inc. v. Brown* lends support to the notion that the collateral-source rule *is* still viable.[178] The Dallas court of appeals in *Irving Holdings, Inc.* determined that, pursuant to its plain language, section 41.0105 was a limitation on recovery (what the judge determines post-verdict) and not a limitation on damages (what the jury determines pre-verdict).[179]

As these cases exemplify, the current, relevant case law remains inconsistent as to what the legislature meant when it enacted 41.0105. With the benefit of hindsight, Justice Stone (the dissenting opinion in *Mills*) predicted that the statutory interpretation set forth by the majority did not create a result feasible of

175. *See Matbon, Inc.*, 288 S.W.3d at 481–82 (pointing out that section 41.0105 does not provide procedural guidance for its application at trial). However, the lack of procedural direction is contrary to other provisions in chapter 41 of the Civil Practice and Remedies Code. *See Gore*, 253 S.W.3d at 789 (noting there are numerous other provisions contained within the same chapter as the statute in question on which the legislature has shed procedural light). For example, sections 41.008(a) and (e) call for separate determinations of economic and other compensatory damages, and prohibit the jury from knowing the provisions. *Id.* Additionally, section 41.009 mandates a bifurcated trial upon a motion, while sections 41.003(e) and 41.012 require jury instructions in situations involving exemplary damages claims. *Id.*

176. *See Matbon, Inc.*, 288 S.W.3d at 480 (agreeing with the justifications set forth by the court in *Mills*).

177. *Id.*

178. *See generally* Irving Holdings, Inc. v. Brown, 274 S.W.3d 926 (Tex. App.—Dallas 2009, pet. denied) (harmonizing section 41.0105 with the common law rule).

179. *Id.* at 931 (holding that section 41.0105 is a limit on "the *recovery* of medical or health care expenses incurred," not on the "amount a fact[]finder may determine—based on the evidence—constitutes 'fair and reasonable compensation'" (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008))).

execution.[180] The dissension among the Texas courts regarding the application of section 41.0105 is evidence of this.

What does the "plain language" of Civil Practice and Remedies Code section 41.0105 say? Are health care expenses that have been adjusted or written-off pursuant to the existence of a collateral source barred from recovery by the paid-or-incurred statute? Are they barred from damages? Are they barred at all?

B. *Statutory Construction Aids*

There is a long list of statutory construction aids that some interpreters of section 41.0105, such as the court in *Mills*, have seemingly failed to acknowledge.[181] Consideration of these factors would have led to a very different interpretation of the paid-or-incurred statute as detailed throughout the remainder of this Comment.

For example, in the Code Construction Act, the Texas legislature provided insightful direction on how courts are to interpret the meaning of new statutes. Texas Government Code section 311.023 states that regardless of whether a statute is ambiguous on its face, a court may consider legislative history,[182] common law,[183] the "consequences of a particular construction,"[184] or the title of the statute.[185]

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180. Mills v. Fletcher, 229 S.W.3d 765, 772 (Tex. App.—San Antonio 2007, no pet.) (Stone, J., dissenting). Justice Stone noted that the generation of medical bills by a health care provider and the subseqent payment of those bills by insurance companies occur by a slow-moving process. *Id.* This reality would spawn many technical questions: "At what point does a court decide the bills have been incurred[—pre-judgment or post-judgment]? What [if] there is a dispute regarding the amounts due or the extent of coverage? What if adjustments are made after litigation is initiated or concluded?" *Id.* As such, under section 311.021 of the Texas Government Code, it is presumed that section 41.0105 was not intended to create these complex issues. TEX. GOV'T CODE ANN. § 311.021(4) (West 2005); *see also Mills*, 229 S.W.3d at 772 (Stone, J., dissenting) (stressing that the statute did not provide direction on how a court was supposed to deal with the issues set forth because "it was not intended to spawn [such] issues").

181. *See* TEX. GOV'T CODE ANN. § 311.011 (West 2005) (considering the construction of words and phrases); TEX. GOV'T CODE ANN. § 311.021 (West 2005) (outlining various factors presumed to have been considered by the legislature when it enacts a statute); TEX. GOV'T CODE ANN. § 311.023 (West 2005) (providing numerous statutory construction aids for Texas courts to consider).

182. TEX. GOV'T CODE ANN. § 311.023(3) (West 2005).

183. *Id.* § 311.023(4).

184. *Id.* § 311.023(5).

185. *Id.* § 311.023(7).

The Texas Supreme Court has established a presumption that the legislature enacts legislation "with complete knowledge of the existing law and with reference to it."[186] Additionally, the court has considered the factors outlined in Texas Government Code section 311.023, including common law, when construing a statute.[187] Accordingly, not only does the Texas legislature believe that consideration of common law is relevant, but so does the highest court of the state.

The most perplexing question remains unanswered: Did the legislature abolish the collateral-source rule? For the following reasons, the author of this Comment thinks not.

C. *Legislative History of Section 41.0105*

The *Mills* court was correct in concluding that the legislature has the authority to abrogate the collateral-source rule if it so chooses.[188] Certainly, while that premise is true, the conclusion the court drew from the enactment of 41.0105 (that the legislature did, indeed, abolish the rule)[189] does not accurately follow. To give proper meaning to the paid-or-incurred statute, one must understand how it originated and progressed in the legislative process. Language to the section was constantly changing.[190] One researcher of the legislative transformation of section 41.0105 accurately stated: "Understanding both the totality of the bill in which the section appeared for its context, as well as the individual changes in the section's language, is imperative to understanding the legislative history and intent."[191]

186. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 246 (2006) (citing Acker v. Tex. Water Comm'n, 790 S.W.2d 299, 301 (Tex. 1990)).

187. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001); *see also* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 652 (Tex. 2006) (noting that when a statute's language is unclear, courts may consult legislative history).

188. Mills v. Fletcher, 229 S.W.3d 765, 769 n.3 (Tex. App.—San Antonio 2007, no pet.); *see also* Utts v. Short, 81 S.W.3d 822, 839 (Tex. 2002) (Owen, J., dissenting) ("Within constitutional confines, the Legislature is free to change the common law if it so chooses.").

189. *Mills*, 229 S.W.3d at 769 n.3.

190. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 254 (2006).

191. *Id.*

1. First Version

Within a week's time, Republican Representative Joseph M. Nixon filed House Bills 3 and 4 at the beginning of the 78th regular legislative session.[192] Nixon was the primary author of both bills, and he headed the House Committee on Civil Practices, which presided over House Bill 4.[193] Initially, House Bill 4 focused on civil justice reform, while House Bill 3 was dedicated to medical malpractice.[194]

The language of the paid-or-incurred statute originally appeared in House Bill 3 section 8. It was intended to amend Article 4590i by adding section 9.01, which provided: "Recovery of medical or health care expenses *in a health care liability claim* shall be limited to the amount actually paid or incurred by or on behalf of the claimant."[195] From this section's language and title ("Recovery of Medical or Health Care Expenses"), it is clear that the section applied only to medical malpractice cases.[196]

Even more telling were the proposed amendments to Article 4590i found in section 21 of House Bill 3. In part, this section included subchapter (Q), entitled "Collateral Source Benefits."[197] This section would have abolished the collateral-source rule in many cases. Proposed section 17.01 defined social security, Medicare, Medicaid, workers' compensation, and any private disability, accident, and health insurance policy as a collateral-source benefit,[198] and proposed section 17.02 would have allowed the defendant physician or health care provider to introduce evidence

192. *See* Texas Legislature Online, Authors, http://www.capitol.state.tx.us/BillLookup/Authors.aspx?LegSess=78R&Bill=HB3 (last visited Jan. 24, 2011) (providing links for information on authors, co-authors, and the Bill's history); Texas Legislature Online, Authors, http://www.capitol.state.tx.us/BillLookup/Authors.aspx?LegSess=78R&Bill=HB4 (last visited Jan. 24, 2011) (listing authors and sponsors, and illustrating the progression and history of the Bill).

193. *See* A. Craig Eiland, *A Word from the Opponents*, ADVOC. (TEX.), Fall 2008, at 22, 22, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf (commenting on the legislative hearings of House Bill 4).

194. *Id.*; *see also* Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 254–55 (2006) (detailing the legislative metamorphosis of section 41.0105).

195. Tex. H.B. 3, 78th Leg., R.S. § 8 (2003) (emphasis added), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00003I.pdf.

196. *Id.*

197. *Id.* § 21.

198. *Id.*

of such collateral-source benefits.[199] Radically, House Bill 3 would have given the defendant the option to pay for a health care liability claimant's private insurance in the event the claimant was no longer able or was unwilling to pay, so that the defendant could continue to secure the benefit of the collateral source.[200] Finally, section 17.04 would have eliminated all subrogation rights from the payor of collateral benefits (excluding the federal government).[201] Under this approach, "[t]he effect was clear—create an evidentiary opportunity in medical malpractice cases such that the medical expense awarded is solely the cost of a health or disability insurance policy."[202]

2. Second Version

Two full days of public hearings were held on House Bills 3 and 4.[203] Both bills made their way to the House Civil Practice Committee, and on March 4, 2008, Chairman Nixon combined the malpractice bill (House Bill 3) and the civil justice reform bill (House Bill 4) into one massive legislative package,[204] thereafter referred to as the Committee Substitute of House Bill 4 (CSHB4).[205]

The house committee merged all the changes from House Bill 3

199. *Id.* ("A defendant physician or health care provider may introduce evidence in a health care liability claim of any amount payable to the claimant as a collateral benefit.").

200. *See* Tex. H.B. 3, 78th Leg., R.S. § 21 (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00003I.pdf ("[T]he defendant physician or health care provider may tender to the claimant the cost of maintaining the insurance coverage.").

201. *Id.*

202. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 256 (2006).

203. *See* A. Craig Eiland, *A Word from the Opponents*, ADVOC. (TEX.), Fall 2008, at 22, 22, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf (reporting that "public testimony was allowed from both sides of the issue and the Bar"). Mr. Eiland, an attorney who attended several hearings on the bills, initially observed a bias in favor of health care providers and insurance companies. *Id.* Lobbyists and supporters of medical malpractice reform were the only guests invited to testify on the issue at the House Committee's first meeting. *See id.* (indicating that the testifying "witnesses were the Commissioner of Insurance, a representative from . . . a medical malpractice insurer, and . . . a lawyer and lobbyist for the physicians and doctors groups").

204. *Id.* at 23.

205. H. CIVIL PRACTICE COMM., COMM. SUBSTITUTE, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004H.pdf.

into Article 10 of CSHB4.[206] At this point in time, all the exclusions related to collateral-source benefits still applied solely to medical malpractice claims.

3. Third Version

The Calendars Committee scheduled the adopted amendments in CSHB4 for floor debate by the entire House of Representatives.[207] After two rounds of spirited House floor debates and numerous amendments, the Bill passed the House on March 28, 2003.[208]

The engrossed version of House Bill 4 "remove[d] the proposed Subchapter Q from [s]ection 10.21[, deleting the] admissibility of collateral source evidence in health care liability claims."[209] The paid-or-incurred section (9.01) was amended slightly to include the term "past," to state: "Recovery of *past* medical or health care expenses *in a health care liability claim* . . . ."[210]

4. Fourth Version

House Bill 4 was now in the hands of the Senate State Affairs Committee, headed by Senator Bill Ratliff.[211] The Senate committee reported its substitute of House Bill 4 on May 14, 2003.[212] The formerly proposed paid-or-incurred section of Article 4590i became section 41.0105 of the Texas Civil Practice and Remedies Code.[213] The committee also amended the title of Chapter 41 of the Civil Practice and Remedies Code from "Exemplary

206. *Id.* art. 10. Section 10.07 of CSHB4 also included the addition of section 9.01 to the Medical Liability and Insurance Improvement Act. *Id.* § 10.07. Additionally, the expansive bill contained all of the amendments from House Bill 3 regarding collateral-source benefits. *Id.* § 10.21.

207. A. Craig Eiland, *A Word from the Opponents*, ADVOC. (TEX.), Fall 2008, at 22, 23, *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf.

208. *See id.* (detailing that public testimony offered on both sides of the issue lasted over eight hours).

209. Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 257 (2006).

210. Tex. H.B. 4, 78th Leg., R.S. 58 (2003) (engrossed version) (emphasis added), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004E.pdf.

211. S. COMM. ON STATE AFFAIRS, COMM. SUBSTITUTE, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004S.pdf.

212. *Id.*

213. *Id.* § 13.08.

Damages" to just "Damages."[214] This took the paid-or-incurred section away from the medical malpractice scheme, and it now applied in a general context. The committee proposed a limited repeal of the collateral-source rule in the areas of governmental health, income, disability, and workers' compensation benefits.[215] As such, private health insurance was not part of the limiting proposal. Furthermore, the committee substitute for House Bill 4 allowed plaintiffs to respond to a defendant's submission of collateral-source benefits with any possible subrogation rights allowed under the law.[216]

5. Current Version

Ultimately, the State of Affairs Committee's approach perished in the final legislative debate. The enrolled version of section 13.08 of House Bill 4 contains the final language of Civil Practice and Remedies Code section 41.0105 as it stands today.[217]

As such, the issue of subrogation interests was no longer related to section 41.0105, but more importantly, the legislature rejected the proposal of repealing the long-standing collateral-source rule.

D. *The Author of House Bill 4 Speaks Out*

If the legislative history is not convincing evidence to support the fact that section 41.0105 did not eviscerate the collateral-source rule, this Comment invites non-believers to consider an article written by the author of House Bill 4 himself, Joseph Nixon.[218] Five years after the enactment of House Bill 4, the now former state representative commented on the purpose and legislative history of the renowned bill.[219] In his article, Nixon expressly states that he rejected the precept for the abolishment of

214. *Id.* § 13.01.

215. *Id.* § 13.08.

216. S. COMM. ON STATE AFFAIRS, COMM. SUBSTITUTE, Tex. H.B. 4, 78th Leg., R.S. § 13.08 (2003), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004S.pdf.

217. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008) (conveying the language of the final version of House Bill 4), *with* Tex. H.B. 4, 78th Leg., R.S. § 13.08 (2003) (enrolled), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004F.pdf (outlining the final changes to the paid-or-incurred statute).

218. Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform in Texas*, ADVOC. (TEX.), Fall 2008, at 9, 9 *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf.

219. *Id.*

the collateral-source rule.[220] As previously explained, the legislature adopted a provision that excluded any proposals that violated the common law rule.

E. *The Proper Measure of Damages*

As we have seen, some believe that section 41.0105 allows the fact-finder to consider collateral-source evidence in making its determination to award the plaintiff past medical expenses.[221] Thus, they argue that "the amount actually paid or incurred by or on behalf of the claimant"[222] is the proper measure of damages.[223] While trial courts are required to allow evidence that relates to the proper measure of damages,[224] the paid-or-incurred statute did not become the new measure.

Throughout the history of Texas trial practice, the proper measure of damages in such a case has always been the reasonableness of the value and necessity of the medical goods and services provided. The Texas Supreme Court adopted this standard as far back as 1890 and as recently as 1997.[225]

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220. *Id.* at 9, 14.

221. *See* Tello v. United States, 608 F. Supp. 2d 805, 809 (W.D. Tex. 2009) (interpreting how section 41.0105 affects evidence submitted to the jury); Garza de Escabedo v. Haygood, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009, pet. granted) (concluding that the jury should have received evidence of amounts actually paid on behalf of the plaintiff); Michael S. Hull et al., Commentary, *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 252 (2005) (arguing that the Texas pattern jury-charge instruction, which defines the standard on recovery of past medical expenses, should be changed in light of his interpretation of section 41.0105).

222. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

223. *See Tello*, 608 F. Supp. 2d at 809 (asserting that section 41.1015 limited the plaintiff's recovery to those expenses "actually paid or incurred"); *Garza de Escabedo*, 283 S.W.3d at 7 (stating that the statute limits the recovery of medical expenses incurred to "'the amount *actually* paid or incurred by or on behalf of the claimant'" (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008))); Michael S. Hull et al., Commentary, *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 252 (2005) (claiming that the jury instruction should be modified to reflect the interpretation of the statute).

224. *See* Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (stating that the "court's charge should limit the jury's consideration" to those facts that are related to the proper measure of damages).

225. *See* Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 840 (Tex. 1997) (holding that reasonable medical expenses necessitated by the defendant's negligent conduct were proper); Houston & T. C. R. Co. v. Rowell, 92 Tex. 147, 46 S.W. 630, 630–31 (1898) (concluding that the trial court's charge to the jury was erroneous, because it did not instruct on the proper measure of damages—reasonable and necessary medical

Furthermore, the legislature has provided a means by which plaintiffs can submit their evidence of reasonable and necessary medical expenses to the jury.[226] The language of Civil Practice and Remedies Code section 18.001 is useful in interpreting the meaning of section 41.0105. In pertinent part, section 18.001 provides that an affidavit from a plaintiff's health care provider, which confirms that the health care provider's services charged to the plaintiff were reasonable and necessary, "is sufficient evidence to support a finding of fact by [a] judge or jury."[227]

As stated earlier, there is a presumption that the legislature was aware of section 18.001 when it enacted section 41.0105.[228] The legislature did not repeal section 18.001, and this section is still effective today.[229] Hence, an argument that section 41.0105 became the proper measure of damages ignores not only precedents, but also implies that section 18.001 of the Civil Practice and Remedies Code is ineffective. The Texas Supreme Court has stated, "A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized . . . with its pre-decessor in such a manner as to give effect to both."[230] Therefore, a reading of section 41.0105 that renders its correlating

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expenses); Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S.W. 19, 20 (1890) (pointing out that the plaintiff was entitled to his "reasonable value of medical services rendered [to] him in effecting a cure"). Furthermore, a Texas court of appeals stated:

> The [proper] measure of plaintiff's recovery in respect to the expenses he sustained is not what he obligated himself to pay, but he is limited to the reasonable value of such expenses that it was reasonably necessary for him to sustain as a result of his injuries. The burden is upon the plaintiff to make such allegation and proof, and the defendant was entitled to a charge limiting the consideration of the jury to the reasonable amount of such expenses that were reasonably necessary for the plaintiff to incur. The failure of the [trial] court to frame its charge . . . to conform [with] the foregoing rule requires a reversal of the case . . . .

Tex. & N. O. R. Co. v. Barham, 204 S.W.2d 205, 208 (Tex. Civ. App.—Waco 1947, no writ).

226. TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (West 2008).

227. *Id.* § 18.001(b).

228. *See* Acker v. Tex. Water Comm'n, 790 S.W.2d 299, 301 (Tex. 1990) (considering the legislative presumption available to courts when construing a statute).

229. TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (West 2008).

230. *Acker*, 790 S.W.2d at 301. In 2001, the Texas Supreme Court repeatedly stated that courts "should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone." Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001).

provision (18.001) ineffective is improper.[231]

F. *Case Law and Statutes Provide Meaning to Section 41.0105*

The *Mills* court concluded that its interpretation of the statute was in line with the legislature's purpose "to develop a statutory scheme that would allow neither the injured plaintiff nor the responsible defendant to benefit from the medical provider's writeoff."[232] It is interesting that the court refers to the tortfeasor as "responsible."[233] The plurality opinion could be perceived as being pro-defendant because the plurality's construction of the statute seems to unfairly and inaccurately interpret the statute.[234]

A more accurate interpretation of section 41.0105 should consider the words within the statute that have acquired a particular meaning and construe it accordingly.[235] As such, well-settled case law has defined the meaning of "incurred." In *Black v. American Bankers Insurance Co.*,[236] the Texas Supreme Court held as a matter of law that a plaintiff incurs hospital expenses "when [the] plaintiff enter[s] the hospital and receive[s] its services."[237] The court rejected the proposition that expenses are incurred only when they have been subsequently paid by a collateral source.[238] Furthermore, one incurs an expense when one suffers or brings it upon himself.[239] Additionally, Texas case law has always considered write-offs or discounts as a collateral source,

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231. *Id.*

232. Mills v. Fletcher, 229 S.W.3d 765, 770 (Tex. App.—San Antonio 2007, no pet.).

233. *Id.*

234. *Id.* at 771 (Stone, J., dissenting) (noting "the majority opinion sweeps a little more broadly than the [l]egislature intended"); *see also* Gisela D. Triana-Doyal, Response, *Another Take on "Actually Paid or Incurred,"* 72 TEX. B.J. 16, 20 n.8 (2009) (stating that Justice Angelini, the author of the opinion in *Mills*, "wrote in favor of the defendant"); *cf.* Price L. Johnson et al., *Personal Torts*, 61 SMU L. REV. 1013, 1018 (2008) (pointing out that the court of appeals in *Mills* ignored well-settled case law that defined the term "incurred" in order to reach "its own result-oriented definition").

235. *See* TEX. GOV'T CODE ANN. § 311.011(b) (West 2005) (providing for the construction of words or phrases).

236. Black v. Am. Bankers Ins. Co., 478 S.W.2d 434 (Tex. 1972).

237. *Id.* at 437. Furthermore, the San Antonio court of appeals also stated that a plaintiff incurs medical expenses at the time of service. Am. Indem. Co. v. Olesijuk, 353 S.W.2d 71, 72 (Tex. Civ. App.—San Antonio 1961, writ dism'd).

238. *Black*, 478 S.W.2d at 437. *Contra Mills*, 229 S.W.3d at 771 (preventing the plaintiff from recovering written-off amounts).

239. *See* BLACK'S LAW DICTIONARY 815 (9th ed. 2009) (defining "incur" as: "To suffer or bring on oneself (a liability or expense)").

and therefore, has allowed plaintiffs to recover them.[240]

As Justice Stone suggested, while the language of the statute uses the word "incurred" twice, it does not redefine incurred; nor does it provide a different point in time that one can determine what medical expenses a claimant has incurred.[241] This is possibly because the statute acknowledges that there is a difference between those medical expenses that have been actually paid by or on behalf of the plaintiff, versus those that a plaintiff or someone on behalf of the plaintiff has incurred.[242] Such a reading of the statute does not violate the collateral-source rule, precedents, or any statutorily prescribed presumptions that disfavor a statute being construed in a vacuum.

VII. OTHER CONSIDERATIONS

A. *Discourages Use of Insurance*

If the collateral-source rule was abolished and defendants were allowed to benefit from medical providers' write-offs or adjustments, not only would that transfer the plaintiff's insurance benefits to the defendant, but it could discourage the use of insurance.[243] In other words, as the plaintiff argued in *Mills*, it would give responsible, injured claimants incentive to forego their health insurance or withhold their health insurance information, for fear the defendant will benefit from their coverage.[244] In that regard, Judge Triana-Doyal candidly argued:

240. *See* Jim M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 247 (2006) (outlining Texas case law that has defined payments and adjustments as being barred by the common law rule).

241. *Mills*, 229 S.W.3d at 771 (Stone, J., dissenting).

242. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008); *accord* Jim. M. Perdue, Jr., *Maybe It Depends on What Your Definition of "Or" Is?—A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241, 250 (2006) (recognizing the precedents in Texas that refer to the distinction between "paid by" and "incurred by").

243. *See* Tate v. Hernandez, 280 S.W.3d 534, 543 (Tex. App.—Amarillo 2009, no pet.) (Campbell, J., concurring) (emphasizing that the collateral-source rule encourages the use of insurance coverage); *see also* Gisela D. Triana-Doyal, Response, *Another Take on "Actually Paid or Incurred,"* 72 TEX. B.J. 16, 18 (2009) (stressing the policy reasons behind the collateral-source rule).

244. *See Mills*, 229 S.W.3d at 770 (exemplifying the negative effects of having insurance in certain situations, which could deter people from procuring health insurance).

> An interpretation that does not reward a tortfeasor for the benefit of a bargain achieved by the plaintiff makes for good public policy, especially in an age where the crisis of the uninsured is a bipartisan policy concern. It seems unsound to create a rule where the damage model for responsible citizens who maintain health insurance is substantially less than for those who do not, and the damage exposure for a tortfeasor is substantially less if he or she had the random good fortune to injure someone who maintained health coverage versus one who did not.[245]

As such, in a day and age where health care is a sensitive topic and Americans are encouraged to protect themselves with health insurance,[246] it would seem disingenuous that the government would support legislation abrogating the collateral-source rule.

B. *Fundamental Fairness Argument: Would the Plaintiff Really Be Made Whole?*

Some have forgotten the value of insurance. For example, the court in *Matbon, Inc. v. Gries* pronounced that the "[a]mounts 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."[247]

What the court in *Matbon, Inc.* seems to forget, along with advocates of this belief, is that the claimant's insurance was not free. As many Americans are acutely aware, insurance is procured at a cost paid out in premiums. An argument that parallels the rationale behind the collateral-source rule is the policy that "[c]ompensatory [tort] damages are intended to make the plaintiff whole for any losses" incurred as a result of a defendant's conduct.[248]

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245. Gisela D. Triana-Doyal, Response, *Another Take on "Actually Paid or Incurred,"* 72 TEX. B.J. 16, 18 (2009).

246. *See* Bob Trebilcock, *Is AARP Looking Out for You? Health and Long-Term-Care Insurance*, CBS MONEYWATCH.COM (Oct. 9, 2009), http://moneywatch.bnet.com/retirement-planning/article/health-insurance-is-aarp-looking-out-for-you/351164/#comments (acknowledging the "ferocious debate [that] rages in Washington over the future of health care," while informing readers about the importance of choosing a health insurance policy suitable to their needs).

247. Matbon, Inc. v. Gries, 288 S.W.3d 471, 281 (Tex. App.—Eastland 2009, no pet.).

248. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994) (defining the differences between compensatory and punitive damages).

To put the "make whole" doctrine into perspective, let us take another look at a very real hypothetical where the defendant injures the plaintiff. The plaintiff then seeks reasonable and necessary medical attention and uses his private health insurance to cover the doctor's visit. The tortfeasor defendant does not financially contribute to the health insurance premiums. Rather, the plaintiff pays full freight. Meanwhile, it should come as no surprise to learn that health insurance rates increase with use.[249] Granted, a plaintiff who sustained a minor injury requiring minimal medical care will not likely be affected by a substantial premium spike. However, what about the severely injured plaintiff who becomes disabled as a result of a defendant's conduct? Had it not been for the defendant's conduct, the plaintiff would have never had to seek medical assistance in the first place, and would never have had to use his health insurance.

With millions of Americans unable or struggling to afford costly premiums,[250] it seems unjust to allow a defendant who injures an insured plaintiff to argue that section 41.0105 allows the benefits of a plaintiff's insurance to shift over to a defendant by reducing his liability.[251] Allowing such a practice would not only be inequitable, but would also violate the notion that the enactment of a statute is intended to create "a just and reasonable result."[252]

249. *See, e.g.*, Bob Trebilcock, *Is AARP Looking Out for You? Health and Long-Term-Care Insurance*, CBS MONEYWATCH.COM (Oct. 9, 2009), http://moneywatch.bnet.com/retirement-planning/article/health-insurance-is-aarp-looking-out-for-you/351164/#comments (advising consumers that affording a good insurance policy comes with a price: the condition of your health); *see also*, TEX. DEP'T OF INS., SMALL EMPLOYER HEALTH INSURANCE (Oct. 2010), *available at* http://www.tdi.state.tx.us/pubs/consumer/cb040.html (reporting that rising premiums are attributable to rising "health care costs and employee claim experience").

250. *See Millions in U.S. Can't Afford Health Insurance*, USNEWS.COM (July 21, 2009), http://health.usnews.com/articles/health/healthday/2009/07/21/millions-in-us-cant-afford-health-insurance.html (citing a report that found "roughly three of every four people who tried to buy a policy from the individual health insurance market in the past three years didn't get one[; t]he main reason ... was premium cost"); *cf.* CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU CURRENT POPULATION REP. P60-236, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, 22 (2009), *available at* http://www.census.gov/prod/2009pubs/p60-236.pdf (reporting 46.3 million uninsured Americans in the United States in 2008).

251. *See* Allen Rogers, *Mr. Brown Dodges a Bullet*, TEXAS CAR ACCIDENT INJURY LAW BLOG (Feb. 8, 2009, 17:20 CST), http://www.texascaraccidentinjury.com/tags/410105/ (questioning why the injured person who pays out-of-pocket premiums is the one getting penalized for doing so after a defendant causes the injury).

252. *See* TEX. GOV'T CODE ANN. § 311.021(3) (West 2005) (outlining the

How is a plaintiff "made whole" when his insurance rate subsequently skyrockets as a result of the claims made after injury, while the culprit walks away unscathed?

C. *The Risk of an Improper Application*

An interpretation of the statute that allows defense counsel to submit collateral-source evidence for the jury's consideration would severely prejudice claimants across Texas. The strong policy reason behind the collateral-source rule, preventing the admittance of such evidence to the trier of fact, stems from the high risk that the jury might improperly consider the evidence when determining liability.[253] This could result in a guilty defendant escaping liability,[254] or an improper reduction of damages to which the plaintiff was entitled.[255]

Furthermore, attorneys often argue to juries that they may compute punitive damages in multiples based on a plaintiff's compensatory damage award. Therefore, the risk of an improper assessment of a plaintiff's medical expenses can result in misleading calculations of a claimant's exemplary damages. Allowing such a risk is unjust.

D. *Encourages Circumvention of the Statute Through Letters of Protection*

Attorneys often provide their client's medical providers with an assurance of payment of their bill, so to speak.[256] This is an instance where an attorney and client promise to pay the provider upon the client's receipt of a settlement or a judgment against the

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legislature's intent to provide a just and reasonable result when creating a statute).

253. Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 581–82 (Tex. App.—Houston [1st Dist.] 1992, no writ).

254. *See id.* (describing the theory behind the collateral-source rule).

255. Tate v. Hernandez, 280 S.W.3d 534, 542 n.1 (Tex. App.—Amarillo 2009, no pet.) (Quinn, C.J., concurring). A federal district court in Texas agreed that "[a]ny effort to present evidence of discounts, adjustments, reductions, or write-offs, would inject collateral-source payments into the trial[,] and the relevance of such information would be outweighed by the unfair prejudice it would cause [p]laintiff." Coppedge v. K.B.I., Inc., No. 9:05-CV-162, 2007 WL 1989840, at *3 (E.D. Tex. July 3, 2007).

256. *See* Anonymous, *What is a Letter of Protection?*, SHTEXASLAWYER.COM BLOG (July 3, 2008, 11:30 CST), http://www.shtexaslawyer.com/blog/blog1.php/2008/07/03/what-is-a-letter-of-protection (providing information on the background of letters of protection in personal injury cases).

defendant.[257] This assurance is widely known as a "letter of protection."[258]

If the statute was one-sided and interpreted to afford defendants the benefits of plaintiffs' insurance coverage, it is plausible that an increased number of plaintiffs and their attorneys would implement the practice of using letters of protection rather than allow a defendant the benefit of a plaintiff's collateral source.

E. *Plurality Opinions Are Not Binding Precedent*

Finally, if there was any other reason to disregard the construction of the statute set forth by the court in *Mills v. Fletcher*, it would be because of its lack of precedential value. Despite the few courts that have chosen to favorably cite to the *Mills* case,[259] the fact remains that *Mills*, as a plurality opinion, is not binding authority. Out of the seven justices on the Fourth Court of Appeals, only three actually heard the case.[260] Justice Karen Angelini wrote the opinion and Justice Catherine Stone dissented.[261] Justice Steven C. Hilbig concurred only with the judgment of the case.[262]

In Texas, it is a well-settled principal that "[p]lurality opinions are not binding precedent."[263] Therefore, since *Mills* did not pro-

257. *See id.* (asserting that a letter of protection is essentially a lawyer's request to a client's doctor "to hold the bill for collection, and [a] promis[e] to pay the doctor out of the proceeds of the case").

258. *Id.*

259. *See* Matbon, Inc. v. Gries, 288 S.W.3d 471, 480 (Tex. App.—Eastland 2009, no pet.) (agreeing with "Justice Angelini's interpretation of the statute" in *Mills*); *see also Tate*, 280 S.W.3d at 540 (stating *Mills* was the leading case on the recovery of medical expenses).

260. Mills v. Fletcher, 229 S.W.3d 765, 767 (Tex. App.—San Antonio 2007, no pet.).

261. *Id.* at 771 (Stone, J., dissenting); Gisela D. Triana-Doyal, Response, *Another Take on "Actually Paid or Incurred,"* 72 TEX. B.J. 16, 20 n.8 (2009). Judge Triana-Doyal's article was written in response to Judge Randy Wilson's article: *Paid or Incurred: An Enigma Shrouded in a Puzzle.* Gisela D. Triana-Doyal, Response, *Another Take on "Actually Paid or Incurred,"* 72 TEX. B.J. 16, 16 (2009). While criticizing Judge Wilson's article for its biased nature, Judge Triana-Doyal provides "a more modest reading of the statute . . . that gives every term meaning and effectuates the Legislature's intent." *Id.* at 17. Judge Triana-Doyal was not scared to call a spade a spade. *See id.* at 20 n.8 (analyzing the *Mills* case and blatantly stating that "[Justice Angelini] wrote in favor of the defendant, [Justice Stone] wrote in favor of the plaintiff, and [Justice Hilbig] concurred in the judgment, but not the opinion . . .").

262. *Mills*, 229 S.W.3d at 771 (Hilbig, J., concurring); Gisela D. Triana-Doyal, Response, *Another Take on "Actually Paid or Incurred,"* 72 TEX. B.J. 16, 20 n.8 (2009).

263. Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996) (citing Univ.

vide a coherent majority rationale, it is regarded as pure dicta.[264]

VIII. CONCLUSION

The language of Civil Practice and Remedies Code section 41.0105 is nebulous.[265] As such, we must presume that the legislature "enacted . . . [it] with knowledge of the existing state of the law and with the intent that . . . [it] be subject to the old."[266]

Legislative history tells that the legislature considered repealing the collateral-source rule but ultimately rejected such a measure.[267] Therefore, with precedents and statutory construction aids that enable courts to consider legislative history,[268] it is correct to conclude that the collateral-source rule is still viable.

"[T]he primary justification of the collateral source rule [is] that a wrongdoer not become a third-party beneficiary of insurance benefits purchased by the victim."[269] Therefore, staying in line with Texas common law, section 41.0105 of the Civil Practice and Remedies Code should not prohibit a plaintiff from recovering medical expenses that have been adjusted by a medical provider or written off pursuant to a third-party payor.[270]

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of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 176–77 (Tex. 1994)). Addressing the limited value of a plurality opinion, the Texas Supreme Court declined to follow such a case argued by one of the parties. Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 177 (Tex. 1994). The court ultimately decided that it was not bound by the decision of a plurality opinion and would rather consider anew the issue in question. *Id.*

264. *See* Toubaniaris v. Am. Bureau of Shipping, 916 S.W.2d 21, 24 n.3 (Tex. App.—Houston [1st Dist.] 1995, writ denied) ("[U]ntil a majority of the . . . justices adopt[] . . . [an] opinion, it is merely dicta.").

265. *See, e.g.*, *Mills*, 229 S.W.3d at 771 (Stone, J., dissenting) (recognizing that section 41.0105 is ambiguous). In reaching its decision that trial courts should apply section 41.0105 post-verdict, the appellate court in *Gore v. Faye* noted the fact that the statute could be more explicit. Gore v. Faye, 253 S.W.3d 785, 790 (Tex. App.—Amarillo 2008, no pet.).

266. Twin City Fire Ins. Co. v. Cortez, 576 S.W.2d 786, 789 (Tex. 1978).

267. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008) (representing the enacted version of House Bill 4), *with* Tex. H.B. 4, 78th Leg., R.S. art. 13 (2003) (enrolled), *available at* http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/HB00004F.pdf (outlining the proposed changes by the State of Affairs Committee to the paid-or-incurred statute).

268. TEX. GOV'T CODE ANN. § 311.023(3) (West 2005); Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 652 (Tex. 2006); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001).

269. Mid-Century Ins. Co. of Tex. v. Kidd, 997 S.W.2d 265, 274 (Tex. 1999).

270. *Contra* Mills v. Fletcher, 229 S.W.3d 765, 771 (Tex. App.—San Antonio 2007, no pet.) (prohibiting claimant from recovering amounts written off by his health care

Texas trial practice should remain the same. Plaintiffs should be allowed to submit evidence of their reasonable and necessary medical expenses incurred, which has been the standard in Texas courts for years.[271] Furthermore, they may submit such evidence to the jury through the statutorily prescribed affidavit in section 18.001 of the Civil Practice and Remedies Code, as this statute is still in effect.[272]

Not until the verdict is issued, and before the trial court has rendered judgment, could the defendant argue that section 41.0105 requires a limitation on the plaintiff's recovery. This practice fosters the collateral-source rule[273] and is judicially efficient.[274] The defendant would need to present competent evidence that plaintiff's medical expenses were not "actually paid or incurred by or on behalf of the claimant."[275]

Considering the plain language of the statute, statutory aids, precedents, and the collateral-source rule, the proper construction of section 41.0105 is simple: medical expenses can be "actually paid" by the plaintiff or on behalf of the plaintiff; or incurred by the plaintiff, or on behalf of the plaintiff. The statute simply recognizes the different ways that medical expenses are incurred.

However, the current, limited Texas case law relating to section 41.0105 has not been clear. Rather, it has spawned confusion with its conflicting holdings and rationales. The consequence of these decisions is inequity to claimants across this state. Condoning an erroneous interpretation of a statute is legal fallacy, especially in a country where so many seek justice in the havens of a courtroom.

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providers).

271. *See* Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 840 (Tex. 1997) (reiterating that the reasonable and necessary medical expenses that stemmed from the defendant's negligent conduct were proper); Houston & T. C. R. Co. v. Rowell, 92 Tex. 147, 46 S.W. 630, 630–31 (1898) (concluding that the trial court should have instructed the jury on the proper measure of damages—reasonable and necessary medical expenses).

272. TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (West 2008).

273. *See, e.g.*, Matbon, Inc. v. Gries, 288 S.W.3d 471, 481 n.5 (Tex. App.—Eastland 2009, no pet.) (reporting that the collateral-source rule prohibits evidence that a plaintiff received benefits from a collateral source).

274. *See* Kirk L. Pittard, *Dead or Alive: The Collateral Source Rule After HB4*, ADVOC. (TEX.), Winter 2006, at 76, 78, *available at* http://www.litigationsection.com/downloads/37_Ins_Lit_Winter06.pdf (affirming that judicial efficiency and economy is a concern for courts).

275. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

Many Texas trial lawyers, judges, and injured claimants have long been ready for change. The supreme court or the Texas legislature should address the erroneous interpretations of Civil Practice and Remedies Code section 41.0105 and put Texas trial practice back in line with the collateral-source rule.