RECOVERY OF MEDICAL EXPENSES UNDER TEXAS CIVIL PRACTICE AND REMEDIES CODE § 41.0105 – THE PAID OR INCURRED STATUTE

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Since the Texas Legislature passed House Bill 4 (H.B. 4) in 2003, questions have arisen related to the recovery of medical expenses in personal injury cases. The initial question concerned what amounts were recoverable in light of different methods for paying medical bills.[1] It took fourteen years of litigation and appeals to obtain clarification on this issue.[2] Now, the question concerns what information is discoverable for purposes of proving up or defending against recoverable medical expenses.[3] This Article will discuss how the relevant statute evolved as it relates to the recovery of past and future medical expenses, how factoring transactions impact the analysis, how the statute is currently being used in the context of discovery, and how such discovery is adversely affecting the medical community.

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1. *See infra* Part II (discussing the interpretation of the Paid or Incurred Statute).

2. *See infra* Part II (discussing the caselaw regarding the interpretation of the Paid or Incurred Statute).

3. *See infra* Part V (discussing the discovery related to medical expenses).

I. BACKGROUND

A. Recovery of Past and Future Medical Expenses

In personal injury cases, past and future medical expenses are recoverable and often constitute a significant portion of the recoverable damages. In order to recover past medical expenses, a plaintiff must prove that the medical expenses were reasonable and necessary.[4] Generally, a plaintiff can prove up the reasonableness of the medical expenses and the necessity of health care provided by expert testimony or an uncontroverted 18.001 affidavit.[5]

In order to recover future medical expenses, a plaintiff must demonstrate there is a reasonable probability that expenses resulting from the injury will be necessary in the future and the reasonably probable amount of those future medical expenses.[6] There is no particular evidence required to support an award for future medical expenses, and an award of future damages in a personal injury case is always speculative.[7] Juries must often extrapolate an award of future medical expenses based upon the nature of the injuries together with past medical treatment and the plaintiff's condition at the time of trial.[8] The amount of future medical expenses to be awarded is within the discretion of the jury.[9]

B. Enactment of the Paid or Incurred Statute

In 2003, § 41.0105 of the Texas Civil Practice and Remedies Code was enacted as part of the "tort reform" legislation known as H.B. 4 to clarify what medical expenses a jury may consider when making an award to a plaintiff.[10] The provision, known as the Paid or Incurred Statute, was awkwardly drafted, defining the term "incurred" with itself: **"Evidence Relating to Amount of Economic Damages**[:] In addition to any other

4. Dall. Ry. & Terminal Co. v. Gossett, 294 S.W.2d 377, 382–83 (Tex. 1956); State *ex rel.* Tex. Dep't of Transp. v. Esquivel, 92 S.W.3d 17, 21–22 (Tex. App.—El Paso 2002, no pet.); Jackson v. Gutierrez, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

5. TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b) (West 2017); Ibrahim v. Young, 253 S.W.3d 790, 808 (Tex. App.—Eastland 2008, pet. denied); Bituminous Cas. Corp. v. Cleveland, 223 S.W.3d 485, 492 (Tex. App.—Amarillo 2006, no pet.). The form affidavit prescribed by the legislature for proving up the reasonableness and necessity of medical services and expenses can be found at Texas Civil Practice and Remedies Code § 18.002(b-1). CIV. PRAC. & REM. § 18.002(b-1); *see id.* § 18.001(b) (describing reasonableness). An affidavit concerning proof of medical expenses is sufficient if it substantially complies with this form affidavit. *Ibrahim*, 253 S.W.3d at 808; *Cleveland*, 223 S.W.3d at 492.

6. N.F. v. A.S., No. 05-16-00254-CV, 2017 WL 3276452, at *4 (Tex. App.—Dallas Aug. 2, 2017, pet. filed); *Ibrahim*, 253 S.W.3d at 808; *Cleveland*, 223 S.W.3d at 490.

7. *N.F.*, 2017 WL 3276452, at *4.

8. *Id.*

9. *Id.*; Matbon, Inc. v. Gries, 288 S.W.3d 471, 484 (Tex. App.—Eastland 2009, no pet.); *Cleveland*, 223 S.W.3d at 490.

10. CIV. PRAC. & REM. § 41.0105.

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."[11] After the enactment of the Paid or Incurred Statute, many questions arose as to the practical implementation of the statute during trial. Questions also arose regarding the legal meaning of these terms in light of various scenarios involving payments of medical expenses, particularly comparing patients with insurance, under government assistance programs, receiving charitable care, and who are uninsured.

II. CASES INTERPRETING THE PAID OR INCURRED STATUTE

A. Private Health Insurance

In *Mills v. Fletcher*, a court of appeals addressed the issue of whether, under § 41.0105, a plaintiff was entitled to recover the amounts originally billed from a health care provider or the amounts paid by the insurance company to the health care provider.[12] In *Mills*, the health care provider had accepted payment from the insurance company in full satisfaction of the plaintiff's medical bills, and the health care provider wrote-off the billed balance over and above what the insurance paid.[13] The court concluded that, under § 41.0105, the plaintiff was limited to recovering the amounts the insurance had paid on behalf of the plaintiff and that the plaintiff could not recover the amounts written-off by the health care provider after accepting the insurance payments.[14] Although the court of appeals acknowledged its interpretation violated the collateral source rule, the court determined that the legislature had, in fact, abrogated the collateral source rule by enacting § 41.0105.[15]

B. Government Assistance Programs

In *Haygood v. De Escabedo*, the Texas Supreme Court interpreted the Paid or Incurred Statute when the plaintiff was covered under Medicare.[16] In *De Escabedo*, the plaintiff's medical expenses were partially covered by Medicare.[17] Federal law prohibits health care providers who agree to treat Medicare patients from charging more than Medicare has determined to be reasonable.[18] Accordingly, of the $110,069.12 in past medical expenses originally billed, $13,257.41 was paid, $82,329.69 was adjusted-off by the

11. *Id.*
12. *See generally* Mills v. Fletcher, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.).
13. *Id.* at 767 n.1.
14. *Id.* at 769.
15. *Id.* at 769 n.3. *But see* Haygood v. De Escabedo, 356 S.W.3d 390, 399–400 (Tex. 2011).
16. *De Escabedo*, 356 S.W.3d at 392.
17. *Id.*
18. *Id.*

medical providers, and $14,482.02 was still owed at the time of trial.[19] The Texas Supreme Court found that § 41.0105 limited the presentation of evidence, as well as the plaintiff's recovery, of past medical expenses to only those "expenses that have been or will be paid" by or on behalf of the plaintiff.[20] The Court held that "actually paid" means expenses that have been or will be paid and excludes the difference between such amounts and charges the health care provider bills but has no right to be paid.[21] The Court ultimately held that the medical expenses, which a medical provider is required to write-off by law and will never be paid by anyone, do not constitute recoverable damages.[22] Accordingly, the amount of past medical expenses that is recoverable by a plaintiff and admissible at trial is the amount that has been, or will be, paid by or on behalf of the plaintiff.[23]

The Court also discussed the interaction between the collateral source rule and § 41.0105. The collateral source rule is not a rule of evidence, but it nevertheless precludes any reduction in a tortfeasor's liability due to benefits received by the plaintiff from a collateral source because the wrongdoer should not have the benefit of insurance independently procured by the injured party.[24] The Court stated: "Of course, the collateral source rule continues to apply to [recoverable medical] expenses, and the jury should not be told that they will be covered in whole or in part by insurance. Nor should the jury be told that a health care provider adjusted its charges because of insurance."[25]

C. Charitable Care

In *Big Bird Tree Service v. Gallegos*, the plaintiff sustained injuries while working in the defendant's workshop that required multiple surgeries.[26] In proving up his past medical expenses, the plaintiff relied upon medical expense affidavits with attached billing records from UT Southwestern and Parkland Hospital, which stated that the services rendered were reasonable and necessary, and that the amounts charged were $67,699.41 and $16,659.50, respectively.[27] The jury awarded the plaintiff these amounts for past medical expenses.[28]

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19. *Id.* at 392 n.7. The record reflected that almost all of what had been paid was paid by insurance. *Id.*
20. *Id.* at 397.
21. *Id.* at 396–97 (quotations omitted).
22. *Id.*
23. *Id.* at 399.
24. *Id.* at 394–95.
25. *Id.* at 400.
26. Big Bird Tree Serv. v. Gallegos, 365 S.W.3d 173, 175 (Tex. App.—Dallas 2012, pet. denied).
27. *Id.*
28. *Id.*

The plaintiff was indigent and qualified for a health care charity program.[29] The defendant argued that it should not be required to pay for the reasonable value of the services rendered to the plaintiff because they were provided free of charge under the charity program.[30] Rejecting this argument, the Dallas Court of Appeals noted that if medical services are provided gratuitously to a plaintiff then he may still recover the reasonable value of the medical services from the tortfeasor.[31] Because the *De Escabedo* opinion expressly limits a plaintiff's recovery of past medical expenses to the amount the holder of the accounts is legally entitled to recover by law or contract, charitable or discretionary write-offs do not fall under § 41.0105 because such discretionary write-offs can be reversed if the patient is deemed not to qualify for the charitable program; for instance, if the patient recovers the medical expenses in a lawsuit.[32] In such situations, because the health care provider still retains the legal right to recover the full amount of the billed services, irrespective of any discretionary or charitable write-offs, the plaintiff may offer evidence of and recover for the full-billed amounts.[33] The court further concluded that the collateral source rule reflects the position of the law that a benefit, which is directed to the injured party, should not be shifted so as to become a windfall to the tortfeasor.[34] Thus, under the collateral source rule, the court concluded that the plaintiff could recover for services paid from a charitable source.[35]

The court further explained that the plaintiff received valuable medical services, the cost of which was borne by a charitable program.[36] Moreover, there was no evidence of any contract that would have prohibited Parkland or UT Southwestern from charging the plaintiff for the full value of the services rendered.[37] Therefore, the court could not conclude that the hospital was not entitled to recover for the actual value of the services rendered.[38] In fact, there was testimony suggesting a patient's eligibility for the program can be changed by subsequent events.[39] Specifically, UT Southwestern's custodian of records testified that UT Southwestern expected to be paid if the plaintiff were to recover in a lawsuit.[40] Therefore, the court could not say that the hospital has no right to be paid for the services listed in its billing records.[41]

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29. *Id.*
30. *Id.*
31. *See id.* at 176.
32. *Id.* at 177.
33. *See id.*
34. *Id.* (citing Haygood v. De Escabedo, 356 S.W.3d 390, 395 (Tex. 2011)).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

Finally, the court noted that allowing a negligent tortfeasor to avoid liability for medical expenses borne by a charity program designed to benefit indigent patients not only results in a windfall to the tortfeasor but also rewards the tortfeasor for injuring an indigent plaintiff.[42] The court stated that such a result is particularly contrary to public policy, in this case where the plaintiff was the defendant's employee and was injured in the scope of his employment with the defendant.[43] To adopt the defendant's position, the court said it "would have to conclude no medical expenses were 'actually' incurred by *or on behalf* of" the plaintiff.[44] Because the court concluded that the expenses to treat the plaintiff were borne by the charitable program, such expenses were actually incurred on behalf of the plaintiff. Thus, § 41.0105 did not preclude recovery of the full value of the medical expenses despite the charitable write-off.[45]

D. Interaction Between the Paid or Incurred Statute and the Proportionate Responsibility Statute

In *Cavos v. Pay & Save, Inc.*, the court of appeals considered whether any reductions for a plaintiff's percent of responsibility, pursuant to Texas Civil Practice and Remedies Code § 33.012, should occur before or after any reduction in recoverable medical expenses based on the paid or incurred amounts.[46] Relying upon the Texas Supreme Court's holding in *Haygood v. De Escabedo*, the court of appeals concluded that, because evidence of recoverable medical expenses must be presented in terms of the paid or incurred amounts, a reduction for the plaintiff's percentage of recovery would necessarily come after paid or incurred amounts were awarded by the jury in conjunction with the trial court's entry of judgment.[47] Therefore, "the plaintiff must first prove to the jury what was paid or incurred to arrive at a verdict."[48] "Once that verdict is reached, then the trial court enters [a] judgment applying § 33.012."[49]

E. Uninsured

In *Guzman v. Jones*, the plaintiff was eligible for, but did not utilize, certain health benefits that would have provided discounted pricing for his medical care.[50] Instead, the plaintiff was legally obligated to pay the full

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *See generally* Cavazos v. Pay & Save, Inc., 357 S.W.3d 86 (Tex. App.—Amarillo 2011, no pet.).
47. *Id.* at 88 (citing Haygood v. De Escabedo, 356 S.W.3d 390, 402 (Tex. 2011)).
48. *Id.*
49. *Id.*
50. Guzman v. Jones, 804 F.3d 707, 709 (5th Cir. 2015).

amount of the medical providers' bills.[51] At issue was "whether an uninsured plaintiff who may have been eligible for insurance benefits but did not have insurance at the time of his injury . . . [was] barred from presenting evidence of the list prices he was charged by the hospital and [for which he was] obligated to pay."[52] The Fifth Circuit Court of Appeals noted that the plaintiff "was actually billed the amounts [that were] awarded by the jury for his medical expenses, and he remain[ed] under a legal obligation to pay the billed amounts to his medical providers."[53] In reliance on *De Escabedo*, the court concluded that reduced prices that the plaintiff "may have received had he participated in health benefits or insurance programs for which he may have been eligible are irrelevant [under] Texas law."[54] Therefore, the district court did not abuse its discretion by admitting into evidence the plaintiff's medical bills in support of the plaintiff's damages for past medical expenses.[55]

III. FACTORING OF MEDICAL EXPENSES

De Escabedo did not address situations outside of the insurance or government payment context, such as commercial transactions involving factoring.[56] "Factoring," or selling accounts receivable, is a common practice in many industries, including health care.[57] Medical factoring predates the tort reform movement in Texas and the enactment of § 41.0105.[58] Factoring is the business of buying accounts receivable at a discount.[59] An "account

51. *Id.* at 711–12.
52. *Id.* at 711.
53. *Id.* at 712.
54. *Id.* at 712–13.
55. *Id.* at 713.
56. *See generally* Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2011).
57. *See, e.g.*, Robert Redling, *Factoring It Out*, MOD. MED. NETWORK (Sept. 1, 2004), www.physicianspractice.com/medical-billing-collections/factoring-it-out (explaining medical factoring and its prevalence in the health care industry).
58. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.08, 2003 Tex. Sess. Law 847, 889 (codified at TEX. CIV. PRAC. & REM. CODE § 41.0105) (showing passage of § 41.0105 in 2003); *see also* Redling, *supra* note 57 (explaining the increased prevalence of medical factoring in the early 2000s); *History of Accounts Receivable Factoring*, CATAMOUNT FUNDING, http://www.catamountfunding.com/learn-more/history-factoring/ (last visited Apr. 19, 2019) (explaining the ancient history of factoring).

> Factoring has essentially been in existence since the beginning of trade and commerce. It can be traced back to the period of a Mesopotamian king Hammurabi. However, the first widespread, documented use of factoring occurred in the American colonies before the American Revolution. During this time[,] raw materials like cotton, furs, tobacco and timber were shipped from the colonies to Europe. Merchant bankers in London and other parts of Europe advanced funds to the colonists for these raw materials, before they reached the European Continent. This enabled the colonists to continue to harvest their new land, free from the burden of waiting to be paid by their European customers. The practice was very beneficial to the colonists, as they didn't have to wait for the money to begin their harvesting again.

See History of Accounts Receivable Factoring, *supra*.

59. *History of Accounts Receivable Factoring*, *supra* note 58.

purchase transaction" is "an agreement under which a person engaged in a commercial enterprise sells accounts, instruments, documents, or chattel paper . . . at a discount."[60] The price of the accounts is discounted because the factor who buys them assumes the risk of delay in collection or loss on the accounts receivable if uncollected.[61] "Factoring is a financing tool that reduces the amount of working capital a business needs by reducing the delay between the time of sale and the receipt of payment."[62]

Factoring has become an essential tool for medical providers.[63] Medical providers interested in turning their accounts receivable into immediate cash routinely sell individual or bundles of receivables to factoring companies.[64] Medical providers have frequently used factoring because their services generate significant bills and payment is often delayed, whether a patient is insured or not.[65] Medical providers have also used factoring as an alternative to lending to ensure that patients receive the necessary level of care without concern that the medical provider may not be compensated for their services.[66] Selling accounts receivable can be an effective business strategy for regulating medical providers' cash flow.[67] In the case of bills for medical treatment rendered to plaintiffs with third-party liability claims, factoring is also an effective way for medical providers to provide the necessary care for their patient while avoiding the uncertainty of the underlying case or the cost of delay in payment.[68]

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60. TEX. FIN. CODE ANN. § 306.001(1) (West 2017).

61. *See* Redling, *supra* note 57. The price paid by a factoring company for the right to collect the account is influenced by many different criteria, which include, but are not limited to, the age of the receivable, the factor's need to deploy funds, the type of treatment, the strength of the underlying case, how close the underlying case is to concluding, the amount of liability insurance available, the risk of appeal, the plaintiff's background, the plaintiff's counsel's experience, the defense counsel's record, the defendant's liability carrier, the medical provider's need for immediate cash, the medical provider's collection history, the doctor's experience, and the venue and jurisdiction of the case. *See id.* (explaining, in part, how factor companies value accounts receivable). These factors influence the price for which the medical provider will sell the account, regardless of the value of the care rendered. *See id.*

62. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 601 n.4 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing Hous. Lighting & Power Co. v. City of Wharton, 101 S.W.3d 633, 636 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)).

63. *See Medicaid Factoring*, HEALTHCARE FACTORING, https://www.healthcarefactoring.com/medicaid-factoring.htm (last visited Apr. 19, 2019) (claiming factoring as an essential tool for health care providers).

64. *See* Redling, *supra* note 57.

65. *See Medical Factoring*, FACTORING J., https://factoringjournal.com/factoring-companies/medical-factoring/ (last visited Mar. 10, 2019) (describing the use of factoring to alleviate delayed payments); *see also* Robert Fifer, *Health Care Economics: The Real Source of Reimbursement Problems*, AM. SPEECH-LANGUAGE-HEARING ASS'N (July 2016), https://www.asha.org/Articles/Health-Care-Economics-The-Real-Source-of-Reimbursement-Problems/ (discussing the high costs of health care).

66. *See* Redling, *supra* note 57.

67. *Medical Factoring*, *supra* note 65.

68. *See* Sam Emerick, *Texas Factoring Law – What Is It?*, TEX. COLLECTIONS LAW. (Oct. 5, 2012), https://www.samemerick.com/texas-factoring-law-what-is-it/. Furthermore, medical providers often factor or sell not only their third-party liability accounts receivable but also their private insurance, workers' compensation claims, and other accounts receivable. *See, e.g.*, *Health Care Factoring*, FACTOR

A factoring transaction is very different from a situation in which an insurance company makes payments on behalf of the patient for the health care provided—they are two very distinct commercial transactions. In the case of health insurance, insurers contract with medical providers so that the providers must accept the insurer's reduced payments to completely satisfy the insured's obligations.[69] The insurance company's payment of the patient's medical bills, together with the contracted adjustment, extinguishes the patient's obligation to the health care provider.[70] While the patient may have to reimburse the health insurance carrier the amount it paid the medical provider, no one, including the patient, is obligated to pay the amount written-off by the provider.[71]

In contrast, medical factoring companies pay a discounted rate to obtain the right to collect the full amount the medical provider actually billed.[72] Medical factoring companies do not charge the claimant a premium or require a claimant to provide out-of-pocket expenses for deductibles in exchange for paying the medical providers, as do insurance companies.[73] A factoring company's payment to the health care provider is not a payment toward a patient's balance on the account, but rather the payment is to purchase the provider's rights, title, and interest in the account and to purchase the assignment of that interest.[74] Unlike with health insurance or government insurance programs, the patient remains liable for the full amount of the health care provider's bills, regardless of how much the factoring company paid the medical provider or whether the provider wrote off the balance after selling the account.[75] After the purchase of the medical bills by the factoring company, instead of owing the medical provider, the

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FUNDING CO., https://www.factorfunding.com/healthcare-factoring/ (last visited Apr. 19, 2019).

69. *See How Do Doctors Get Paid for Healthcare Treatment?*, HEALTHCARE AM. (Mar. 7, 2017), https://healthcareinamerica.us/how-do-doctors-get-paid-for-healthcare-treatment-f7538b9e50aa.

70. *Id.*; *see also* Trisha Torrey, *Understanding Healthcare Reimbursement*, VERYWELLHEALTH (Dec. 22, 2018), https://www.verywellhealth.com/reimbursement-2615205 (explaining how insurance company payments extinguish the patient's obligation).

71. *See* Torrey, *supra* note 70 (describing this process as "balance billing," which is normally illegal).

72. Hous. Lighting & Power Co. v. City of Wharton, 101 S.W.3d 633, 636 (Tex. App.— Houston [1st Dist.] 2003, pet. denied).

73. *See How to Use Factoring for Cash Flow*, WALL STREET J., guides.wsj.com/small-business/funding/how-to-use-factoring-for-cash-flow/ (last visited Apr. 19, 2019).

74. *Id.* The legal effect of an assignment is to transfer "some right or interest from one person to another." MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 57 (Tex. App.—San Antonio 2005, pet. denied); *accord* Univ. of Tex. Med. Branch at Galveston v. Allan, 777 S.W.2d 450, 452 (Tex. App.—Houston [14th Dist.] 1989, no writ). The right to receive payment for a debt is generally assignable in Texas. *In re* FH Partners, L.L.C., 335 S.W.3d 752, 761 (Tex. App.—Austin 2011, no pet.); Cloughly v. NBC Bank-Seguin, N.A., 773 S.W.2d 652, 655 (Tex. App.—San Antonio 1989, writ denied); Roach v. Schaefer, 214 S.W.2d 128, 130 (Tex. Civ. App.—Fort Worth 1948, no writ); *see also* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 706 (Tex. 1996) (holding that it is usually permissible to assign the legal right to pursue a claim to another).

75. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 601 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

patient owes the factoring company for the balance remaining on the medical bills, irrespective of the outcome of any third-party claim or the amount the factoring company paid the medical providers.[76] In such situations, there has been no payment, adjustment, or write-off of the patient's medical expenses. There is simply a transfer of ownership and substitution of the payee on the account from the health care provider to the factoring company. The patient is now legally obligated to pay the factoring company for the full amount of the medical services provided.

In *Katy Springs & Manufacturing, Inc. v. Favalora*, the Fourteenth Court of Appeals considered these factoring transactions in light of § 41.0105.[77] In *Favalora*, the plaintiff's medical providers sold their accounts receivable to a factoring company at a discount.[78] The plaintiff was still legally obligated to pay the full amount of the medical charges—he simply owed that amount to the factoring company rather than the medical providers.[79] The Fourteenth Court of Appeals held that regardless of what the factoring company paid for the accounts, because the plaintiff was ultimately responsible for paying the full amount of the charges, the full-billed charges was the amount that was "incurred" under § 41.0105 and was admissible at trial.[80]

More recently, the First Court of Appeals in *Amigos Meat Distributors v. Guzman* again confirmed that, when a factoring company purchases the accounts receivable from a health care provider and the plaintiff is still legally liable for the billed medical expenses, the evidence showing the amounts billed by the medical providers is admissible at trial.[81]

IV. FUTURE MEDICAL EXPENSES

Defendants often attempted to assert that a plaintiff's future medical expenses are limited by § 41.0105 to amounts insurance, either private insurance or insurance under the Affordable Care Act (ACA), would pay a

76. *Id.* Once an assignee has been assigned an interest in a debt or claim, he stands in the shoes of the assignor and thus has the same right as the assignor to assert the claim against the defendant. Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417, 424–25 (Tex. 2000); Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex. 1994); Burns v. Bishop, 48 S.W.3d 459, 466 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Texas has had a long history of supporting the strong public policy in favor of assignability of contracts. *See Gandy*, 925 S.W.2d at 706–07.

77. *Favalora*, 476 S.W.3d at 601.

78. *Id.*

79. *Id.* at 603–04.

80. *Id.* at 604.

81. Amigos Meat Distribs., L.P. v. Guzman, 526 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see* Cash v. Celadon Trucking Servs., Inc., No. 4:13-CV-461, 2014 WL 1381394, at *1–2 (S.D. Tex. Apr. 7, 2014). In *Cash*, the federal district court rejected the defense's attempt to limit the plaintiff's past medical expenses to the amounts paid by the medical factoring company. *Cash*, 2014 WL 1381394, at *2. The court held that, regardless of the fact that the medical charges had been sold to a factoring company, the undisputed evidence showed the plaintiffs remained liable for the full amount of the medical providers' bills. *Id.*

health care provider for future medical treatment.[82] However, § 41.0105 does not apply to future medical expenses.

The First Court of Appeals in *Glenn v. Leal* concluded that § 41.0105 does not apply to, nor place limits on, a plaintiff's recovery of future medical expenses.[83] The court further concluded that there was no applicable law limiting the amount that the providers could charge for medical expenses incurred in the future.[84] The court stated:

> Because services for future medical expenses have not yet been rendered at the time an award is made, without evidence of future discounts, whether there will [be] laws in place limiting what the providers can charge when the services are, in fact, rendered, or whether the [plaintiffs] will have insurance coverage at all, [the defendant] has not demonstrated that the jury's award for future medical damages is legally insufficient.[85]

Moreover, the existence of the ACA does not limit the amount of future medical expenses recoverable by a plaintiff.[86] The court noted that the ACA does not require an individual to purchase insurance, even though there is a statutory penalty for failing to do so.[87] The court concluded that any assumptions that a plaintiff will have insurance coverage in the future are speculative.[88]

The *Glenn* court's conclusion is consistent with the language of § 41.0105 and the legislative history of the statute, along with the impracticality of applying the statute to future medical expenses. First, the statute uses past-tense language: "paid or incurred."[89] In order to apply the statute to future medical expenses, a court would have to ignore the past-tense language used in the statute and superimpose by judicial fiat future-tense language, such as "to be paid," "will pay," "to be incurred," or "will incur."

Second, it would require stacking hypothetical upon hypothetical and speculation upon speculation to attempt to apply the statute to future medical expenses. For instance, one would have to speculate that the injured plaintiff would be able to work in the future despite the injuries sustained and that the plaintiff would work for a company that would provide health insurance, or that the plaintiff would obtain insurance another way, such as through the ACA. One would then have to consider a hypothetical health care provider, from whom the plaintiff would receive health care, and a hypothetical

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82. *See* Glenn v. Leal, 546 S.W.3d 807, 815 (Tex. App.—Houston [1st Dist.] 2018, pet. filed), *abrogated by* Tex. Health Presbyterian Hosp. of Denton v. D.A., No. 17-0256, 2018 WL 6713207 (Tex. Dec. 21, 2018).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 815–16.

87. *Id.* at 816.

88. *Id.*

89. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2017).

insurance company with whom the health care provider would enter into a hypothetical contract for the payment of health care services. One would then have to guess as to the compensation arrangements the hypothetical health care provider and the hypothetical insurance company might have, based on speculation concerning market conditions and economic circumstances that might exist at some point in the future. And, as the *Glenn* court noted, a patient is not required to obtain health insurance under the ACA. Furthermore, in the current political climate, the continued existence and viability of the ACA in the future is certainly in doubt, particularly in light of actions by President Trump and the United States Congress and statements made by President Trump that such actions have essentially ended the ACA.[90] While the viability of the ACA may be subject to debate, a plaintiff's option to enroll in the ACA in the future is highly speculative. Thus, it is evident that any attempt to apply the Paid or Incurred Statute to future medical expenses is unworkable and evidently unintended.

Because there are no medical bills to prove up future medical expenses, prior to *De Escabedo*, a plaintiff typically proved future medical expenses with reference to, among other things, the amount of past medical expenses.[91] The *De Escabedo* opinion does not specifically address whether a plaintiff may still prove future medical expenses with reference to unadjusted past medical bills. Therefore, there is an open question regarding whether such bills are admissible to prove future medical damages.[92]

V. DISCOVERY RELATED TO MEDICAL EXPENSE REIMBURSEMENT RATES

The Texas Supreme Court's recent opinion in *In re North Cypress Medical Center Operating Co.* has raised questions as to the discoverability and admissibility of evidence in an attempt to challenge the reasonableness of medical expenses in personal injury lawsuits.[93] In *North Cypress*, an uninsured patient who was treated in a hospital's emergency room following an automobile accident brought an action for a declaratory judgment against the hospital, arguing that the hospital's charges were unreasonable and that the hospital's corresponding lien was "invalid to the extent that it exceeded a

90. Jonathan Chait, *Trump Boasts He Has Repealed Obamacare, Does Not Understand How Law Works*, N.Y. MAG. (Dec. 20, 2017), http://nymag.com/daily/intelligencer/2017/12/trump-boasts-hes-repealed-obamacare-doesnt-understand-law.html; Rebecca Savransky, *Trump: There Is No Such Thing as ObamaCare Anymore*, HILL (Oct. 16, 2017, 12:58 PM), http://thehill.com/policy/healthcare/355658-trump-there-is-no-such-thing-as-obamacare-anymore.

91. *See* Matbon, Inc. v. Gries, 288 S.W.3d 471, 484 (Tex. App.—Eastland 2009, no pet.) (providing an example of past expenses that could be used to project future expenses).

92. "For instance, evidence of unadjusted past medical expenses may have probative value as to the extent of reasonable and necessary future medical expenses, unless there is evidence that the future medical expenses will be adjusted, discounted or written-off on the same basis as current medical expenses." Henderson v. Spann, 367 S.W.3d 301, 306 (Tex. App.—Amarillo 2012, pet. denied) (Pirtle, J., concurring).

93. *See In re* N. Cypress Med. Ctr. Operating Co., 559 S.W.3d 128, 129 (Tex. 2018).

reasonable and regular rate for services rendered."[94] Because the patient was uninsured, the hospital billed her for the services at its full "list" prices and filed a hospital lien for that amount.[95] To support her argument that the lien was unreasonable, the patient sought to discover the hospital's contracts with health insurance providers for negotiated or reduced rates for the services that were provided to the patient.[96] The hospital objected to the discovery requests on the basis that they sought irrelevant, proprietary, and confidential information and were overly broad.[97]

The Texas Supreme Court explained that, because of the two-tiered health care billing structure (i.e., list charges billed to uninsured patients versus negotiated reimbursement rates billed to insurance companies), a hospital's "full" or "list" charges "are not dispositive of what is reasonable, irrespective of whether [a] patient . . . has insurance."[98] Similarly, the Court noted that a hospital's negotiated reimbursement rates alone were not dispositive of the question of reasonableness either.[99] Nevertheless, the Court held that a hospital's reimbursement rates were discoverable because they were not "wholly irrelevant to the reasonableness of its charges to other patients for the same services."[100] In a dissenting opinion, Chief Justice Hecht noted that the majority opinion failed to explain "the 'potential connection' between [negotiated] reimbursement rates and reasonable charges to self-payers."[101] Chief Justice Hecht further noted that the Court did not address the concern "that any marginal relevance the requested discovery might have in a particular case is outweighed by the real risks of abuse and confusion of the jury."[102]

As a result of *North Cypress*, defendants in personal injury litigation have argued that they are similarly permitted to discover negotiated reimbursement rates between a plaintiff's medical providers and various third-party health insurers—along with other information regarding those medical providers' internal billing and collections practices—for purposes of challenging the reasonableness of a plaintiff's medical bills. Now, medical providers who treat patients with liability claims are routinely required to retain legal counsel and incur legal expenses to defend against, object to, and seek protection from these discovery requests on the basis that the requests seek irrelevant, proprietary, confidential, and privileged trade secret information, and are overly broad and burdensome. Medical providers often prevail in opposing such discovery requests. Nevertheless, defendants

94. *See id.* at 128.
95. *Id.* at 130.
96. *Id.*
97. *Id.* at 130, 136.
98. *Id.* at 133.
99. *Id.* at 135.
100. *Id.* at 133.
101. *Id.* at 137 (Hecht, C.J., dissenting).
102. *Id.* at 138.

continue to seek such discovery from medical providers, which is causing the medical providers to incur enormous legal expenses in cases in which they are not even a party.

VI. CONCLUSION

After the enactment of the Paid or Incurred Statute in 2003, there was much confusion among trial judges and practitioners regarding the practical implementation of the statute. It took fourteen years of litigation and appeals for the statute to finally take shape. The wisdom of the policy decision to allow tortfeasors to benefit from an injured person's procurement of health insurance under this statute will continue to be a subject for debate. As of now, while the admissibility issues have been pretty well clarified, the lingering issue that will play out over the next few years will concern the interaction of § 41.0105 and discovery. Such discovery issues will likely coalesce around reimbursement rates to medical providers from different payors and how those amounts affect a determination regarding the reasonableness of medical expenses incurred by a claimant. And, as these issues play out, medical providers are already seeing an increase in their own expenses as they retain counsel to represent and defend them against burdensome discovery served on them by defendants.

Because patients are still legally obligated to pay the medical providers the amounts they are billed and that have not been paid by a health insurer, it appears that the relevance of reimbursement rates in other contexts is questionable at best and harassing at worst. Additionally, given the burdensome nature of this discovery to medical providers, and due to the proprietary, confidential, and trade secret concerns of the information sought, defendants' desire to obtain medical records and billing information is on a collision course with the interests of patients, medical providers, and health insurers. Additionally, the confidential nature of other patient information contained in the medical records sought by defendants must also be guarded under both state and federal law. These issues will eventually play out in the appellate courts, but could take years to obtain clarification on these competing interests. In the absence of clarification from the courts, it may become necessary for the Texas Legislature to enact amendments to the Paid or Incurred Statute to clarify what information is discoverable, while balancing policy considerations with the input from the State Bar of Texas and medical and insurance communities.