

NO MEDICAL INSURANCE? HEY THAT'S GOOD FOR PLAINTIFFS: A
DEFENDANT'S ANALYSIS OF *HAYGOOD V. ESCABEDO*

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Consider Johnny College, an average college freshman. Johnny does not have health insurance because he deems it unnecessary. Johnny is currently dating Sarah Prepared, also a college freshman at the same college. Sarah, however, is covered by medical insurance. One day while Sarah was driving Johnny to a football game, they were rear-ended by Lori Law. The accident was wholly Lori's fault. Unfortunately, both Johnny and Sarah were severely injured in the accident. The same doctors at the only hospital in town treated Johnny and Sarah at essentially the same time. Additionally, Johnny and Sarah had similar follow-up appointments to treat their injuries. Each amassed many similar medical bills from similar providers. At the end of treatment, each owed \$50,000. On the surface, the situation could not be more similar between Johnny and Sarah. Yet, the current application of section 41.0105 of the Texas Civil Practice and Remedies Code creates a great disparity between the two potential plaintiffs. If ever sued, Lori might pay Johnny significantly more for his medical bills than Sarah because Johnny does not have insurance.

First, this article briefly backgrounds the history that leads up to *Haygood v. Escabedo*. Second, this article explores this drastic disparity in the recovery of medial damages because of *Haygood v. Escabedo*, the Texas Supreme Court's interpretation of section 41.0105. Finally, this article offers a solution to combat the potentially unreasonable medical bills assessed to individuals without health insurance.

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I. A BRIEF HISTORY OF SECTION 41.0105 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

Though it looks benign and dull, the language of section 41.0105 of the Texas Civil Practice and Remedies Code is complicated and confounding.¹ The statute reads: “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.”² It is short; but Judge Randy Wilson wrote, “This single sentence [threw] Texas tort law into chaos as lawyers and courts struggle[d] to apply it.”³

Since several articles have addressed the in-depth legislative history of section 41.0105, a brief discussion will suffice for the purposes of this article.⁴ State leaders believed there was a major concern in Texas healthcare: drastically rising costs for patients, increasing medical malpractice insurance costs, doctors fleeing the state, and an “inordinate” increase in both the number of healthcare liability claims and amounts paid in judgments and settlements.⁵ These concerns were linked directly to the increasingly litigious society Texas had developed.⁶ In a 2002 press release, Governor Perry wrote, “I am firmly committed to doing whatever it takes to end this crisis—including reigning in abusive lawsuits, improving patient protections and reforming insurance regulations—to ensure patients have

¹ See, e.g., 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). A simple citation check of this one-sentence statute will reveal over thirty-five law review articles discussing it.

² TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2008).

³ Randy Wilson, *Paid or Incurred: An Enigma Shrouded in a Puzzle*, 71 TEX. B.J. 812, 813 (2008).

⁴ See, e.g., Michael Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History*, 36 TEX. TECH L. REV. 1 (2005); Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform in Texas*, 44 THE ADVOC. (Texas) 9 (2008) (discussing the legislative history of House Bill 4 passed in 2003, which contained § 41.0105 of the Texas Civil Practice and Remedies Code). See also Perdue, *supra* note 1, at 254–61; April Y. Quiñones, Comment, *Texas Civil Practice & Remedies Code § 41.0105: A Time for Clarification*, 42 ST. MARY’S L.J. 551, 579–84 (2011); Blake Hamm, Comment, *A Dysfunctional Statute and Its “Plain Meaning” Kill Off the Collateral Source Rule in Texas*, 51 S. TEX. L. REV. 229, 231–34 (2009) (discussing specifically § 41.0105).

⁵ See D. Michael Wallach & J. Wade Birdwell, *House Bill 4 After Five Years—A Defense Perspective*, 44 THE ADVOC. (Texas) 53, 53 (2008); Nixon, *supra* note 4, at 10; Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a)–(b), 2003 Tex. Gen. Laws 847, 884–85.

⁶ See Wallach & Birdwell, *supra* note 5, at 53.

access to the best care possible.”⁷ Appreciating the clear mandate for reform, the Texas Legislature sought to solve the problem.⁸

Seeking comprehensive tort reform, House Bill 4 was introduced in 2003 to address many litigation issues in Texas, including the healthcare crisis.⁹ Section 41.0105 was not initially included in this reform-driven bill.¹⁰ Section 41.0105 found its genesis in House Bill 3, a bill solely concerned with limiting the recovery in medical malpractice lawsuits.¹¹ Eventually, House Bill 3 was subsumed into House Bill 4.¹² Even with this joinder, however, the relevant language of section 41.0105 continued to only apply to medical malpractice lawsuits.¹³ After the combination, House Bill 4 passed the House of Representatives and was submitted to the Senate for consideration.¹⁴ When the Senate debated the bill, section 41.0105 became much more expansive.¹⁵ Instead of strictly limiting recovery of medical expenses in medical malpractice litigation, it was drastically broadened to apply to all civil actions involving medical expenses.¹⁶ The Senate achieved this broadening goal in two ways: (1) by removing the language restricting the section to medical malpractice, and (2) by placing the newly broadened section into a Chapter broadly applicable to the Texas Civil Practice and Remedies Code.¹⁷ After a conference committee and the

⁷Rick Perry Says Texas Must Address Medical Lawsuit Abuse Crisis, OFFICE OF THE GOVERNOR RICK PERRY (Apr. 4, 2012), available at <http://governor.state.tx.us/news/press-release/4287/>. Former Texas Representative Joseph Nixon (author of House Bill 3 and House Bill 4) described the situation perilously: “Away from the large urban areas, people were literally dying because there were not enough emergency personnel to provide care in the critical hours immediately following an accident.” Nixon, *supra* note 4, at 10.

⁸Nixon, *supra* note 4, at 14.

⁹See Hull et. al., *supra* note 4, at 2–3; Perdue, *supra* note 1, at 254–55.

¹⁰Tex. H.B. 4, 78th Leg., R.S. (2003) (introduced version).

¹¹See Perdue, *supra* note 1, at 255.

¹²A. Craig Eiland, *A Word From the Opponents*, 44 THE ADVOC. (Texas) 22, 23 (2008); Perdue, *supra* note 1, at 257–58; Tex. H.B. 4, 78th Leg., R.S., § 10.07 (2003) (House committee version).

¹³Perdue, *supra* note 1, at 258; Tex. H.B. 4, 78th Leg., R.S., § 10.07 (2003) (House committee version).

¹⁴See H.J. of Tex., 78th Leg., R.S. 1046 (2003).

¹⁵Tex. H.B. 4, 78th Leg., R.S., § 13.08 (2003) (Senate committee version).

¹⁶Perdue, *supra* note 1, at 258; Tex. H.B. 4, 78th Leg., R.S., § 13.08 (2003) (Senate committee version).

¹⁷Perdue, *supra* note 1, at 258–59; Tex. H.B. 4, 78th Leg., R.S., § 13.08 (2003) (Senate committee version).

removal of other inconsequential language added by the Senate, the House adopted the applicable changes,¹⁸ and Governor Perry signed the massive reform bill.¹⁹

A few things must be noted from the legislature's passing of House Bill 4 and inclusively the new section 41.0105 of Texas Civil Practice and Remedies Code. Texas leaders had a great desire to reform the perceived litigation-friendly statutes.²⁰ A major way to change the plaintiff-friendly forum was to limit and cap recovery.²¹ This limit included recovery of past medical expenses.²² Though the legislature initially sought to limit this type of recovery in medical malpractice litigation only, the legislature achieved its broader goal by expanding this limitation to all actions involving past medical damages.²³ After passage of this short statute, however, litigants and lawyers scrambled to decipher what type of limitation the legislature actually passed.²⁴ The Texas Supreme Court did not provide an answer until eight years later.²⁵

II. *HAYGOOD v. DE ESCABEDO*: THE FACTS, HOLDING, AND SUBSEQUENT APPLICATION

The Texas Supreme Court decided to clear the confusion when it granted Haygood's petition for review from the Tyler Court of Appeals.²⁶ When leaving the grocery store parking lot, Margarita Garza De Escabedo negligently pulled in front of Aaron Haygood.²⁷ As a result of the collision,

¹⁸ See H.J. of Tex., 78th Leg., R.S. 5971, 6041 (2003).

¹⁹ See *Gov. Perry Speaks at Med Mal Bill Signing*, OFFICE OF THE GOVERNOR RICK PERRY (Jul. 11, 2003), available at <http://governor.state.tx.us/news/speech/10637/>.

²⁰ See *id.*

²¹ *Id.*

²² Tex. H.B. 4, 78th Leg., R.S., § 13.08 (2003) (Senate committee version).

²³ *Id.*

²⁴ *E.g.*, *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485 (Tex. App.—Amarillo 2006, no pet.); *Bilbao v. Trejo*, No. 2007-12525, 2007 WL 933026 (Dist. Ct., Harris County, Tex. Feb. 28, 2007) (defendant's motion and order in limine); *Lafond v. Richardson Ready Electric, Inc.*, No. 04-09340-D, 2006 WL 4012873 (95th Dist. Ct. Dallas County, Tex. Nov. 30, 2006) (final judgment); *Norwood v. G.W. Imps., Inc.*, No. DC-05-06004, 2006 WL 4661049 (193rd Dist. Ct., Dall. County, Tex. May 23, 2006) (partial order on defendant's motion to compel).

²⁵ See *Haygood v. De Escabedo*, 356 S.W.3d 390, 392 (Tex. 2011).

²⁶ *De Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App.—Tyler 2009), *aff'd*, 356 S.W.3d 390 (Tex. 2011).

²⁷ See *Haygood*, 356 S.W.3d at 392.

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Haygood sustained many injuries.²⁸ Haygood underwent multiple successful surgeries, though some impairment remained.²⁹ Twelve health care providers treated Haygood. In total, Haygood was billed \$110,069.12.³⁰ These amounts were adjusted down because Haygood was covered by Medicare Part B,³¹ and as the court stated, “Medicare Part B . . . ‘pays no more for . . . medical and other health services than the “reasonable charge” for such service.’”³² Additionally, federal law forbids providers to charge Medicare patients more than what Medicare has determined to be reasonable.³³ As a result, the adjusted bill equaled \$27,739.43.³⁴ At the time of trial, Medicare had paid \$13,292.41 and Haygood was still liable for \$14,482.02.³⁵

At trial, De Escabedo attempted to exclude any evidence of amounts owed above \$27,739.43, pursuant to section 41.0105 of the Texas Civil Practice and Remedies Code.³⁶ Haygood, however, asserted the collateral source rule and moved to exclude any evidence of adjustments and payments to lower the amount owed.³⁷ The trial court granted Haygood’s motion and proceeded to trial barring any evidence of adjusted or paid medical bills.³⁸ The jury awarded Haygood the entire \$110,069.12 for past medical expenses.³⁹ Over De Escabedo’s post-verdict objection, the court rendered judgment on the verdict.⁴⁰ The court of appeals, however, disagreed with the trial court.⁴¹ As the Texas Supreme Court noted, “The

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (quoting 42 C.F.R. § 405.501(a) (2013)).

³³ *Id.* (citing 42 U.S.C. § 1395cc(a)(1)–(2) (2006)).

³⁴ *Id.*

³⁵ *Id.* Though the specific numbers are not important, the appellate court confused the amounts owed and actually paid. *De Escabedo v. Haygood*, 283 S.W.3d 3, 5 (Tex App.—Tyler 2009), *aff’d*, 356 S.W.3d 390 (Tex. 2012). Additionally, the Supreme Court of Texas noted the appellate court’s calculation was incorrect by \$35. *Haygood*, 356 S.W.3d at 392 n.9.

³⁶ *Haygood*, 356 S.W.3d at 392.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Though not pertinent to the scope of this article, the jury additionally awarded Haygood \$7,000 for future medical expenses, \$24,500 for past pain and mental anguish, and \$3,000 for future pain and mental anguish. *Id.*

⁴⁰ *Id.*

⁴¹ *See id.*

court of appeals . . . [held] that section 41.0105 precluded evidence or recovery of expenses that ‘neither the claimant nor anyone acting on his behalf will ultimately be liable for paying.’”⁴²

After the adverse ruling, Haygood sought review by the Texas Supreme Court.⁴³ Since this was the first Texas Supreme Court case to address section 41.0105, the court sought to construe the statute.⁴⁴ Rejecting Haygood’s construction, the majority informed the legal world that the word “actually” modified both “paid” and “incurred.”⁴⁵ The language “actually paid and incurred” should be read actually paid and actually incurred.⁴⁶ Then, in two quick sentences, the court told us what this “actually” actually means.⁴⁷ Since “actually” modifies “incurred,” the court stated:

[It refers] to expenses that are to be paid, not merely included in an invoice and then adjusted by required credits. Thus “actually paid and incurred” means expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid.⁴⁸

The court focuses the attention on the amount the provider has a right to collect.⁴⁹ Since Medicare Part B regulations required the reduction of the collectable amount, the providers would only have a right to be paid this reduced amount.⁵⁰ According to the court, this holding was not groundbreaking: “All the courts of appeals that have addressed the issues have reached the same conclusion”⁵¹ Despite the court’s belief that its

⁴² *Id.* at 392 (quoting *De Escabedo v. Haygood*, 283 S.W.3d 3, 7 (Tex. 2009)).

⁴³ *De Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App.—Tyler 2009), *aff’d*, 356 S.W.3d 390 (Tex. 2011).

⁴⁴ *Haygood*, 356 S.W.3d at 396.

⁴⁵ *Id.* (Examining the language of section 41.0105: “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.”).

⁴⁶ *Id.* For support of this reading, the court cited to a case before the court in 2003 construing similar language. *Id.* at 396 n.42 (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 746 (Tex. 2003)).

⁴⁷ *Haygood*, 356 S.W.3d at 396–97.

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ *See id.* at 392.

⁵¹ *Id.* at 398. (citing *Arango v. Davila*, No. 13–09–00470–CV, 2011 WL 1900189, at *9 (Tex. App.—Corpus Christi May 19, 2011, pet. denied); *Frontera Sanitation, L.L.C. v. Cervantes*, 342

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holding was fairly commonplace, litigation continues over the one-sentence statute.

A. *The Subsequent Application of Haygood*

Since the Supreme Court decided *Haygood*, eighteen cases have cited to its authority.⁵² Only five cases involve the scope of this article.⁵³ Reviewing

S.W.3d 135, 140 (Tex. App.—El Paso 2011, no pet.); *Progressive Cnty. Mut. Ins. Co. v. Delgado*, 335 S.W.3d 689, 692 (Tex. App.—Amarillo 2011, pet. denied); *Pierre v. Swearingen*, 331 S.W.3d 150, 155–56 (Tex. App.—Dallas 2011, no pet.); *Tate v. Hernandez*, 280 S.W.3d 534, 540–41 (Tex. App.—Amarillo 2009, no pet.); *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481–82 (Tex. App.—Eastland 2009, no pet.).

⁵²See e.g., *Henderson v. Spann*, 367 S.W.3d 301, 303–05 (Tex. App.—Amarillo 2012, pet. denied); *Huston v. United Parcel Serv., Inc.*, 01-12-00387-CV, 2014 WL 1691046, at *6, *7 (Tex. App.—Houston [1st Dist.] Apr. 29, 2014, no pet. h.); *In re Jarvis*, 14-13-00224-CV, 2013 WL 4759648, at *6, *7 (Tex. App.—Houston [14th Dist.] Aug. 30, 2013, no pet.).

⁵³See e.g., *In re Jarvis*, No. 14-13-00224-CV, 2013 WL 4759648 (Tex. App.—Houston [14th Dist.] Aug. 30, 2013, no pet.); *Big Bird Tree Servs. v. Gallegos*, 365 S.W.3d 173 (Tex. App.—Dallas 2012, pet. filed); *Prabhakar v. Fitzgerald*, 05-10-00126-CV, 2012 WL 3667400 (Tex. App.—Dallas Aug. 24, 2012, no pet.); *Cutler v. Louisville Ladder, Inc.*, CIV. 4:10–4684, 2012 WL 2605908 (S.D. Tex. July 5, 2012); *Cavazos v. Pay & Save, Inc.*, 357 S.W.3d 86 (Tex. App.—Amarillo 2011, no pet.). The other thirteen cases deal with other areas not directly pertinent to this article. *Hunter v. Transamerica Life Ins. Co.*, No. 11–20735, 2012 WL 5936047 (5th Cir. Nov. 28, 2012) (citing *Haygood* when examining the language “actual charges” in a provision of the Insurance Code); *GE Capital Commercial, Inc. v. Worthington Nat. Bank*, 3:09–CV–572–L, 2012 WL 2159185 (N.D. Tex. June 13, 2012) (dealing with the collateral source rule, but not considering § 41.0105); *May v. Apache Corp.*, CIV.A. C-12-64, 2012 WL 1565474 (S.D. Tex. May 1, 2012) (citing *Haygood* in a string cite concerning the right to a jury trial); *Tri-Cnty. Equip. & Leasing v. Klinke*, 286 P.3d 593 (Nev. 2012) (referencing the interplay between the collateral source rule and workers’ compensation payments to medical providers); *Lanier v. E. Found., Inc.*, 401 S.W.3d 445 (Tex. App.—Dallas 2013, no pet.) (though the plaintiffs were appealing the trial court’s failure to follow *Haygood*’s language regarding medical bills, the appellate court help the plaintiffs did not preserve error); *Vill. Place, Ltd. v. VP Shopping, LLC*, 404 S.W.3d 115 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing *Haygood* during a discussion of construing the word “incurred” in a contract); *Berryman’s S. Fork, Inc. v. J. Baxter Brinkmann Int’l Corp.*, No. 05-12-00492-CV, 2013 WL 6097965 (Tex. App.—Dallas Nov. 20, 2013, no pet. h.) (quoting the Tyler appellate court for *Haygood* for the proposition that evidence related to an improper measure of damages is irrelevant and no evidence at all); *Sutton v. Helwig*, No. 02-12-00525-CV, 2013 WL 6046533 (Tex. App.—Fort Worth Nov. 14, 2013, no pet. h.) (citing *Haygood* in a lengthy string cite regarding not proving up damages); *Chesapeake Operating, Inc. v. Hopel*, No. 07-11-00403-CV, 2013 WL 5782916 (Tex. App.—Amarillo Oct. 24, 2013, no pet. h.) (decided before *Haygood* and instructing the lower court to consider the implications of *Haygood* on remand); *Cabot Oil & Gas Corp. v. Healey, L.P.*, No. 12-11-00236-CV, 2013 WL 1282007 (Tex. App.—Tyler Mar. 28, 2013, pet. denied) (citing the Tyler appellate court for *Haygood* for the

these cases will give a better picture of how the courts have treated *Haygood* and will demonstrate the emergence of the disparity between plaintiffs.

1. *Big Bird Tree Services v. Gallegos*

In *Big Bird Tree Services*, a worker was injured on the job due to an employer's negligence.⁵⁴ The worker accrued significant medical expenses amounting to over \$80,000.⁵⁵ Due to the worker's financial situation, the worker qualified for a charity program and was required only to pay small co-pays.⁵⁶ However, if the providers discovered the worker no longer qualified for the charity program, the providers retained the right to bill the injured worker.⁵⁷ Unlike in *Haygood*, there was no evidence of a contract between the providers and the worker (or a third party representing the worker) that would limit the amount the providers could collect from the worker.⁵⁸ As a result, the court was hesitant to say the hospital did not have a right to collect the full \$80,000 pursuant to *Haygood's* authority.⁵⁹ Since the court determined the providers retained a right to collect the full amount, the expenses were actually incurred under the language of section 41.0105.⁶⁰ Consequently, the judgment for the \$80,000 in past medical expenses was affirmed.⁶¹

proposition that evidence related to an improper measure of damages is irrelevant and no evidence at all); *Henderson v. Spann*, 367 S.W.3d 301 (Tex. App.—Amarillo 2012, pet. denied) (concerning the evidentiary component of *Haygood*); *Kosaka v. Hook & Anchor Marine & Watersport, LLC*, No. 03-11-00134-CV, 2012 WL 4576844 (Tex. App.—Austin Nov. 8, 2012, no pet.) (mem. op.) (citing *Haygood* in the discussion, but resolving the matter based on settlement credits and rendering the § 41.0105 irrelevant for the case); *Miller v. Carter*, 05-11-00193-CV, 2012 WL 3679200 (Tex. App.—Dallas Aug. 28, 2012, no pet.) (citing *Haygood* regarding the collateral source rule applied to a claim for conversion).

In re Jarvis, No. 14-13-00224-CV, 2013 WL 4759648 (Tex. App.—Houston [14th Dist.] Aug. 30, 2013, no pet.) is addressed later in this article in Part IV.A.

⁵⁴ 365 S.W.3d at 175.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 176.

⁵⁸ *Id.* at 177. Though the providers reserved the right to bill the worker, no evidence of a formal contract was given during trial. *See id.* at 176, 177.

⁵⁹ *Id.* at 177.

⁶⁰ *Id.*

⁶¹ *Id.* at 175, 179. Note that an individual who lacked health insurance was able to recover the full amount of medical expenses.

2. *Cavazos v. Pay & Save, Inc.*

Few facts were given to explain this opinion.⁶² Jesus Cavazos fell at Lowe's Marketplace causing him injury and resulting in medical bills of \$4,810.82.⁶³ The jury awarded Cavazos the entire \$4,810.82 for past medical expenses, but the jury also found him 49% responsible for his injuries.⁶⁴ After applying sections 33.012(a) (a comparative fault provision) and 41.0105 of the Texas Civil Practice and Remedies Code, the trial court reduced Cavazos's recovery and entered judgment for \$1,790.16.⁶⁵ Though the court does not specify why the medical bills were reduced, the court indicated that Cavazos was not the individual who paid the bills.⁶⁶ On appeal, Cavazos argued there was insufficient evidence of medical bills for the trial court to reduce the judgment pursuant to section 41.0105.⁶⁷ Cavazos, however, made a fatal mistake of not providing a sufficient record to the court of appeals for review.⁶⁸ As a result, the court was not able to review whether there was sufficient evidence to support the trial court's decision.⁶⁹

3. *Cutler v. Louisville Ladder, Inc.*

In a case originally filed before *Haygood*, Joshua Cutler was severely and permanently injured when using an allegedly defective ladder built by

⁶² See *Cavazos v. Pay & Save, Inc.*, 357 S.W.3d 86, 87 (Tex. App.—Amarillo 2011, no pet.).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 88.

⁶⁷ *Id.* at 87. *Cavazos*'s other contention dealt with the time of the reduction in connection with the comparative fault reduction of section 33.012. *Id.* at 88. As this is outside the scope of this article, it will not be addressed.

⁶⁸ *Id.* at 87–88.

⁶⁹ *Id.* at 88. *Cavazos* is also intriguing because the trial court applied section 41.0105 after the jury verdict. Though there is limited information regarding the trial court's actions, it appears the court allowed the evidence of full medical bills to be presented to the jury; then, after the jury rendered a verdict, the trial court partially reduced this verdict based on the medical expenses actually paid or incurred pursuant to section 41.0105. *Id.* at 87. *Haygood*, however, would now prohibit evidence of the full medical bills from reaching the jury, unless the providers of the bills have a right to collect the fully-billed amount. *Haygood v. De Escabedo*, 356 S.W.3d 390, 399 (Tex. 2011). In *Prabhakar v. Fitzgerald*, discussed below, the Dallas Court of Appeals indicates that the jury's determination of the evidence is irrelevant if the court has the necessary information to reduce the verdict to an amount that complies with the statute. *Prabhakar v. Fitzgerald*, 05-10-00126-CV, 2012 WL 3667400, at *14 (Tex. App.—Dallas Aug. 24, 2012, no pet.).

Louisville Ladder.⁷⁰ At the inception of the case, Cutler submitted affidavits regarding the reasonableness and necessity of the medical charges from two separate providers totaling over \$100,000.⁷¹ In a motion for partial summary judgment two years later (after *Haygood*), Cutler retracted these valuations and agreed to a drastic reduction due to “contractual obligations” suggested by the defendants.⁷² Cutting the medical damages in half (\$49,851.90), the court granted the partial motion for summary judgment as to the medical expenses of Cutler.⁷³

4. *Prabhakar v. Fitzgerald*

Perhaps one of the most interesting uses of *Haygood* arose in *Prabhakar v. Fitzgerald*.⁷⁴ David Fitzgerald developed a severe infection after surgery.⁷⁵ Due to his doctor’s negligence, Fitzgerald’s infection resulted in amputation of both arms below the elbows and both legs below the knees.⁷⁶ Before the trial, the parties entered into a Rule 11 agreement stipulating that the amount of past medical bills equaled \$1,280,041.32.⁷⁷ Additionally, in the agreement the parties stipulated that the amount actually paid was \$932,649.42 and the amount written off was \$347,391.90.⁷⁸ At trial, both parties represented to the jury that Fitzgerald’s medical bills were \$1,280,041.31, and the jury awarded \$1,280,000.⁷⁹ Post-verdict, however, Prabhakar argued that damages for past medical expenses should be reduced to the amount the parties stipulated to as actually paid in the Rule

⁷⁰ Cutler v. Louisville Ladder, Inc., CIV. 4:10–4684, 2012 WL 2605908, at *1 (S.D. Tex. July 5, 2012).

⁷¹ *Id.* at *3.

⁷² *See id.*

⁷³ *Id.* at *4. In a footnote, the court alludes to other expenses “incurred at, but not paid to” one of the providers. *Id.* at *3 n.28. However, the court expressly states that it does not reach the “propriety of those additional sums.” *Id.*

⁷⁴ 05-10-00126-CV, 2012 WL 3667400, at *1 (Tex. App.—Dallas Aug. 24, 2012, no pet.).

⁷⁵ *Id.* at *1.

⁷⁶ *Id.* at *2.

⁷⁷ *Id.* at *14.

⁷⁸ *Id.*

⁷⁹ *Id.* at *13.

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11 agreement.⁸⁰ The trial court agreed with Prabhakar and reduced the damages amount by \$347,391.84.⁸¹

Not pleased with the trial court's post-verdict reduction after the parties' stipulation, Fitzgerald appealed, complaining the Rule 11 agreement—which was not disclosed or read to the jury—was inapplicable to the analysis.⁸² Fitzgerald attempted to highlight that no evidence was provided to the jury regarding medical bills except the \$1,280,041.31 stipulated by the parties.⁸³ The court of appeals disagreed with Fitzgerald.⁸⁴ The court stated: “Under *Haygood*, the trial court was required to reduce Fitzgerald's recovery pursuant to section 41.0105 if the court had the necessary information to do so.”⁸⁵ The court concluded there was no error in reducing the damages for past medical expenses to an amount the parties agreed was “actually paid or incurred.”⁸⁶

III. THE PROBLEM OF DISPARITY: UNEQUAL RECOVERY

The four above cases begin to illustrate *Haygood*'s logic and the genesis of a disparity. If the hospital has a right to be paid a certain lesser amount by a patient, a potential defendant will limit his or her liability to that lesser amount.⁸⁷ Yet, if no right-to-payment exists, a defendant's potential liability will drastically increase.⁸⁸

Returning to the initial hypothetical will help demonstrate the disparity. If both Johnny and Sarah decide to jointly sue, Lori can utilize a key difference between the two plaintiffs to decrease her liability: insurance coverage. Johnny and Sarah suffered identical injuries, were treated by identical doctors, and received identical bills, but because Sarah's insurance provider had a contract with the providers, Sarah's bill has been drastically reduced to \$10,000. This contract harshly reduced Sarah's potential

⁸⁰ *Id.*

⁸¹ *Id.* As the court noted, the trial court was six cents off in the reduction, but no one complained. *Id.* at *14 n.2.

⁸² *Id.* at *14.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (citing *Rosenbaum v. Dupor*, No. 05-09-00994-CV, 2011 WL 2139138, at *2 (Tex. App.—Dallas June 1, 2011, no pet.) (mem. op.)).

⁸⁶ *Id.* at *15 (citing *Haygood v. De Escabedo*, 356 S.W.3d 390, 397 (Tex. 2011)).

⁸⁷ See *Haygood*, 356 S.W.3d at 396–97.

⁸⁸ See *id.*

recovery by \$40,000. Now, two plaintiffs nearly identical and holding the same bills will recover drastically different amounts of money.

Since *Haygood*'s holding hinged on the amount that the medical provider has a "right to be paid,"⁸⁹ *Haygood* must be understood in the general context of medical billing. This context will help explain the difference between the two parties' bills. A person who lacks medical insurance will be billed the entire amount due to the medical provider. The provider has a right to be paid the amount initially billed to the patient because this amount will not be reduced. It is referred to as the full charge. A person with insurance or government assistance (e.g., Medicaid) will not be required to pay this full amount.⁹⁰ Either the insurance company has negotiated contractual rate with the providers to charge for services or the government sets the appropriate rate to be charged to patients. The patient will be required to pay—and the provider only has a right to be paid—this lesser negotiated amount.

Haygood's reasoning and facts do not contemplate an individual lacking medical insurance.⁹¹ A person who lacks medical insurance, or government medical assistance, does not have a contractual relationship or agreement with a third party that would reduce the amount charged in the medical bill.⁹² An uninsured individual does not have an insurance company that has negotiated a rate with providers and has contractually discounted the medical services.⁹³ Additionally, uninsured without government assistance

⁸⁹ See *infra* Part II.

⁹⁰ See Gerard F. Anderson, *From 'Soak the Rich' To 'Soak the Poor': Recent Trends in Hospital Pricing*, 26 HEALTH AFF. 780, 780 (2007); Glenn A. Melnick & Katya Fonkych, *Hospital Pricing and the Uninsured: Do the Uninsured Pay Higher Prices?*, 27 HEALTH AFF. 116, 116 (2008); Uwe E. Reinhardt, *The Pricing of U.S. Hospital Services: Chaos Behind A Veil of Secrecy*, 25 HEALTH AFF. 57, 58, 62 (2006); Christopher P. Tompkins et al., *The Precarious Pricing System for Hospital Services*, 25 HEALTH AFF. 45, 48 (2006) Greg Groeller, *Hospitals Draw Fire for Bills to Uninsured*, THE ORLANDO SENTINEL, FLA., Mar. 21, 2004; Lucette Lagnado, *Anatomy of a Hospital Bill: Uninsured Patients Often Face Big Markups on Small Items; 'Rules Are Completely Crazy'*, WALL ST. J., Sept. 21, 2004, at B1, available at <http://online.wsj.com/news/articles/SB109571706550822844>. [hereinafter Lagnado, *Hospital Bill*].

⁹¹ See *Haygood*, 356 S.W.3d at 392 (indicating that *Haygood* was covered by Medicare Part B).

⁹² See Anderson, *supra* note 90, at 780; Melnick & Fonkych, *supra* note 90, at 116; Reinhardt, *supra* note 90, at 58, 62; Tompkins et al., *supra* note 90, at 48; Groeller, *supra* note 90; Lagnado, *Hospital Bill*, *supra* note 90.

⁹³ See Anderson, *supra* note 90, at 780; Melnick & Fonkych, *supra* note 90, at 116; George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the*

lack government-regulated prices that are drastically below the initial medical bill for treatment.⁹⁴ Since there is no third-party payer or contract, there will be no offset, no reduction, and no charge-off of the initial medical bill. As a result, the medical provider has a right to be paid the full amount initially billed to a patient who lacks insurance.⁹⁵ This is considerably different from a patient covered by insurance or government assistance whose bill is drastically reduced.

The difference between the amount initially billed to an uninsured patient and the amount finally billed to a patient covered by a third-party is significant. These “full charges” are anywhere from two to eight times the price a provider would accept from a third-party payer (an insurance company or government program).⁹⁶ For example, a hospital would expect to be paid \$37,000.00 from a person lacking insurance for a two-day hospital stay; whereas the hospital would only expect \$16,047.00 from a Medicare reimbursement and a separate figure from a private insurance company.⁹⁷ Ironically, the individuals least likely and least capable to pay are the individuals charged the most.⁹⁸ Providers expect (ideally) individuals without insurance to pay these expensive bills knowing that nationally only five percent of patients without insurance actually pay the full amount.⁹⁹ Additionally, these highly inflated bills initially given to

Uninsured, 94 KY. L.J. 101, 102 n.12, 103 n.13, 118–19 (2006); Reinhardt, *supra* note 90, at 58, 62; Tompkins et al., *supra* note 90, at 48; Groeller, *supra* note 90; Lagnado, *Hospital Bill*, *supra* note 90.

⁹⁴ Anderson, *supra* note 90, at 780; see Melnick & Fonkych, *supra* note 90, at 116; Nation, *supra* note 93, at 102 n.12, 103 n.13, 118–19; Reinhardt, *supra* note 90, at 58, 62; Tompkins et al., *supra* note 90, at 48; Groeller, *supra* note 90; Lagnado, *Hospital Bill*, *supra* note 90.

⁹⁵ See *Haygood*, 356 S.W.3d at 392.

⁹⁶ Nation, *supra* note 93, at 103–04 & n.16. Throughout Nation’s article, Nation recounts numerous stories of uninsured individuals paying vastly different amounts for the exact same procedure.

⁹⁷ *Id.* at 102. See William R. Jones, Jr., *Managed Care and the Tort System: Are We Paying Unnecessary Billions?*, 63 DEF. COUNS. J. 74, 75 (1996) (estimating the amount a person without insurance is 600 to 800 percent greater than an insured’s final obligation).

⁹⁸ Tompkins et al., *supra* note 90, at 52.

⁹⁹ Nation, *supra* note 93, at 104, 120; see *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 508 (Pa. Super. Ct. 2003). Though few sources give a percentage of the amount actually paid, many sources allude to this reduction of bill before the final payment by uninsured patients. See Anderson, *supra* note 90, at 784; Reinhardt, *supra* note 90, at 62; Tompkins et al., *supra* note 90, at 52; James J. Unland, *Two Years into the Storm Over Pricing To and Collecting From the Uninsured—A Hospital Valuation Expert Examines the Risk/Return Dynamics and Asks: Would Fair Pricing and Fair Medical Debt Repayment Plans Increase Yields*

uninsured patients typically are decreased over time and are often settled for a fraction of the original bill.¹⁰⁰ The hospital rarely collects the full amount initially billed—whether because of a third-party payer or by nonpayment from an uninsured individual.

This disparity of payments for past medical expenses becomes a bigger deal when considered against the backdrop of Texas insurance statistics. Historically, Texas holds the crown for the highest number of residents who lack any form of medical coverage whether private insurance or government programs.¹⁰¹ Roughly one-fourth of the Texas population (6.4 million people) lack any form of medical insurance.¹⁰² Due to this gap in coverage, this significant section of the population incurs medical expenses two to eight times greater than patients who have insurance or have governmental assistance.¹⁰³ In this circumstance, there is no third-party contract or regulation to start *Haygood's* actually-paid-or-incurred logic.

Essentially the Court's holding in *Haygood* unintentionally ignored individuals who lack health insurance. This population was undisturbed in their ability to recover past medical expenses. Though the legislature deliberately sought to limit the recoverability of all past medical expenses to those that are actually reasonable—at least not greatly inflated due to a person's uninsured status—the court construed section 41.0105 in such a way that the limitation doesn't apply to twenty-five percent of the population. This substantial segment of Texans now fall out of the statute creating disparate recoveries and disparate defendant payments when found liable.¹⁰⁴ As explained with Johnny and Sarah, a defendant who caused the

to *Hospitals and Simultaneously Mitigate These Controversies?*, 32 J. HEALTH CARE FIN. 54, 58–59 (2005); Lagnado, *Hospital Bill*, *supra* note 90.

¹⁰⁰ See Anderson, *supra* note 90, at 784; Reinhardt, *supra* note 90, at 62; Tompkins et al., *supra* note 90, at 52; Unland, *supra* note 99, 58–59; Lagnado, *Hospital Bill*, *supra* note 90.

¹⁰¹ Elizabeth Mendes, *Texas Uninsured Rate Drifts Further From Other States: Uninsured Rate Remains Statistically Higher in 2012 vs. 2008 in Half of States*, GALLUP (Mar. 8, 2013), available at <http://www.gallup.com/poll/161153/texas-uninsured-rate-moves-further-away-states.aspx#1>.

¹⁰² LLOYD POTTER, OFFICE OF THE STATE DEMOGRAPHER, TEXAS DEMOGRAPHIC AND HEALTH CHARACTERISTICS AND TRENDS 31 (2012), available at http://txsdc.utsa.edu/Resources/Presentations/OSD/2012_07_13_Texas_Academy_of_Family_Physicians_Austin.pdf.

¹⁰³ See Nation, *supra* note 93, at 103–04 & n.16.

¹⁰⁴ It is not entirely accurate to state the recovery is for the individual. Recoveries for past medical expenses are typically passed to the providers who rendered the services or are to reimburse the patient who has already paid the provider.

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injuries might have to pay \$50,000 for past medical expenses or \$10,000 depending on the injured individual's status.

A. Ensuring the Disparate Recovery

Taking this principal a step further, astute attorneys utilize *Haygood* to guarantee increased recovery for individuals who lack medical insurance.¹⁰⁵

For plaintiffs of this population, a smart lawyer can utilize two separate legal maneuvers to potentially increase recovery: letters of protection and hospital liens.¹⁰⁶

1. Letters of Protection

In the on-going example, an uninsured plaintiff could utilize a letter of protection to increase his or her recovery. After the injury and after the litigation has been initiated, but before payment of the medical expenses—which the uninsured patient doesn't have the money to pay—the plaintiff's attorney initiates a letter of protection with the medical providers.¹⁰⁷ Typically, the lawyer sends a letter informing the medical providers of the pending litigation involving the plaintiff.¹⁰⁸ With the letter, the lawyer ensures payment for past medical expenses after the pending litigation.¹⁰⁹ During this process, the lawyer is able to negotiate the amount of the total medical expenses.¹¹⁰ This results in a contract between the plaintiff, attorney, and medical provider.¹¹¹ The plaintiff (with his lawyer's advice and guidance) can increase the amount a provider would typically collect from an uninsured patient if no litigation occurred.¹¹² This process serves the provider by ensuring higher collection amounts. Additionally, the

¹⁰⁵ See generally Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 HOUS. LAW. 24 (2012).

¹⁰⁶ *Id.* at 27–28.

¹⁰⁷ See *id.* at 27.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* This is the first indication that attorneys know and concede that these medical expenses are inflated, or at the very least are negotiable.

¹¹¹ *Id.*

¹¹² See *id.* As stated before, if there was no litigation, uninsured patients are often able to reduce their medical bills eventually because the hospitals realize the uninsured does not have money to pay the full bill. See *supra* text accompanying note 99.

plaintiff is now guaranteed *Haygood's* logic to apply—the provider has a right to be paid a certain amount.¹¹³

2. Hospital Liens

If a plaintiff is treated by an emergency hospital or emergency medical service, hospital liens can be utilized to increase recovery.¹¹⁴ Chapter 55 of the Texas Property Code grants a lien on a cause of action that belongs to a plaintiff who received medical treatment within 72 hours of an accident.¹¹⁵ Prior to the hospital filing the hospital lien in the county clerk's office,¹¹⁶ the plaintiff is able to negotiate the amount required to release the lien.¹¹⁷ As with other uninsured individuals, the hospital is likely to accept less for payment of the bills if the plaintiff was not involved in litigation.¹¹⁸ Since the plaintiff is involved in litigation and has a potential recovery, the hospital seeks to increase the amount of payment it can receive. Through this hospital lien, the hospital now has a right to receive a certain amount and *Haygood's* analysis applies. The plaintiff can invoke *Haygood* to guarantee higher recovery of medical damages.¹¹⁹

Through the construction of section 41.0105, the Texas Supreme Court created disparate recovery for different groups of Texas citizens. In many cases, the court brought recovery to a realistic level by following the legislature's intent. For a large section of the population, however, defendants need to be aware of the continued increased and inflated recovery for certain plaintiffs—a recovery that does not reflect true amounts to be paid by uninsured plaintiffs. To effectively advocate for clients, lawyers need to address this unbalanced approach to past medical damages.

¹¹³ See Pace, *supra* note 105, at 27.

¹¹⁴ See *id.* at 28.

¹¹⁵ *Id.*; TEX. PROP. CODE ANN. § 55.002(a) (West 2008)).

¹¹⁶ PROP. § 55.005(a).

¹¹⁷ Pace, *supra* note 105, at 27; see Anderson, *supra* note 90, at 784; Reinhardt, *supra* note 90, at 62; Tompkins et al., *supra* note 90, at 52; Unland, *supra* note 99, at 58–59; Lagnado, *Hospital Bill*, *supra* note 90.

¹¹⁸ See Anderson, *supra* note 90, at 784; Pace, *supra* note 105, at 27; Reinhardt, *supra* note 90, at 62; Tompkins et al., *supra* note 90, at 52; Unland, *supra* note 99, at 58–59; Lagnado, *Hospital Bill*, *supra* note 90.

¹¹⁹ See Anderson, *supra* note 90, at 784; Pace, *supra* note 105, at 27; Reinhardt, *supra* note 90, at 62; Tompkins et al., *supra* note 90, at 52; Unland, *supra* note 99, at 58–59; Lagnado, *Hospital Bill*, *supra* note 90.

IV. THE SOLUTION

In a world of contracts, charge offs, full charges, discounts, government regulations, and a myriad of other factors, “[o]nly a handful of Americans understand the complex payment system for U.S. Hospitals”¹²⁰ Medical billing is a dense and convoluted creature. Though charges for medical services are supposed to be determined by the cost of providing care,¹²¹ William McGowan, chief financial officer of the University of California, Davis, Health System stated: “There is no method to this madness. As we went through the years, we had these cockamamie formulas. We multiplied our costs to set our chargers.”¹²² As indicated above,¹²³ different articles cite several different inflated figures, but a conservative guess of the “full charge”—the amount initially charged to patients and the amount providers ideally expect uninsured patients to pay—would be 300% above the actual cost to the hospital.¹²⁴ These figures, however, have been stated to be upwards of 800% above costs.¹²⁵ Not only are medical bills somewhat arbitrary (according to McGowan), but also they are vastly different depending on the coverage of the patient, as indicated above.¹²⁶ The variation between patients is profound. One common truth, however, runs through the variations: medical providers always accept less than the initially billed amount.¹²⁷

¹²⁰ Reinhardt, *supra* note 90, at 57.

¹²¹ Keith T. Peters, *What Have We Here? The Need for Transparent Pricing and Quality Information in Health Care: Creation of an SEC for Health Care*, 10 J. HEALTH CARE L. & POL’Y 363, 366 (2007).

¹²² Reinhardt, *supra* note 90, at 57 n.1 (citing Lucette Lagnado, *California Hospitals Open Books, Showing Huge Price Differences; State Law Requires Disclosing Charges for Goods, Services; Big Bills for Uninsured; Why Leech Retails for \$81*, WALL ST. J., Sept. 21, 2004, at A1).

¹²³ See *supra* note 96 and accompanying text.

¹²⁴ Nation, *supra* note 93, at 118 (citing *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 509 (Pa. Super. Ct. 2003)). See Jones, *supra* note 97, at 75; Reinhardt, *supra* note 90, at 57.

¹²⁵ See Jones, *supra* note 97, at 75.

¹²⁶ See *infra* Part III.

¹²⁷ See *Haygood v. De Escabedo*, 356 S.W.3d 390, 390 (Tex. 2011) (“Health care providers set charges they maintain are reasonable while agreeing to reimbursement at much lower rates determined by insurers to be reasonable, resulting in great disparities between amounts billed and payments accepted.”); 20 WILLIAM V. DORSANEO III, *Texas Litigation Guide* § 321.13[1] (2013). Health maintenance organizations are estimated to pay roughly fifty-five percent of the list price while government programs pay less than this amount. Nation, *supra* note 93, at 119. In 2005,

Despite this increasingly convoluted process of medical billing and the limitations of section 41.0105, defendants should find encouragement in a Texas common law rule that dates back to 1897.¹²⁸ In order for a plaintiff to recover medical expenses, a plaintiff must prove the reasonableness of the medical expenses.¹²⁹ This reasonableness requirement is well established.¹³⁰ In 1897, the Texas Supreme Court established the first iteration of the medical-expenses rule in dicta.¹³¹ Less than a year later, the court reiterated the rule and established its permanence.¹³²

In *Wheeler*, the plaintiff was injured in an explosion of a passenger locomotive.¹³³ To treat his injuries, the plaintiff contracted with a doctor to pay \$250 for the doctor's care.¹³⁴ Mere evidence of the contract or the amount paid by the plaintiff to the doctor, however, was insufficient to award \$250 in medical-expense damages.¹³⁵ The court found the plaintiff was required to prove "what would be reasonable compensation to the physician for the services rendered."¹³⁶ Since there was no proof of what was "reasonable compensation" for the services, the court should not have allowed a jury award in this form of damages.¹³⁷

The Texas Supreme Court recently reiterated a version of the rule regarding the proof of reasonable damages. In *McGinty v. Hennen*, the supreme court stated: "[It is] well settled that proof of the amounts *charged* or paid does not raise an issue of reasonableness, and recovery of such expenses will be denied in the absence of evidence showing that the charges are reasonable."¹³⁸ Additionally in *Haygood*, the Texas Supreme Court

hospitals were only paid roughly thirty-eight percent of the initial amount billed. Reinhardt, *supra* note 90, at 57.

¹²⁸ *Mo., K.&T. Ry. Co. of Tex. v. Warren*, 40 S.W. 6, 7 (Tex. 1897).

¹²⁹ *See id.*; *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1956) (citing *Wheeler v. Tyler S.E. Ry. Co.*, 43 S.W. 876 (Tex. 1898)).

¹³⁰ *Dall. Ry. & Terminal Co.*, 294 S.W.2d at 383.

¹³¹ *See Mo., K.&T. Ry. Co. of Tex.*, 40 S.W. at 7 (stating the reasonable rule, but finding that the trial court had already remedied any error the misapplication of this rule caused).

¹³² *Wheeler*, 43 S.W. at 877.

¹³³ *Id.* at 876.

¹³⁴ *Id.* at 877.

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 372 S.W.3d 625, 627 (Tex. 2012) (emphasis added) (quoting *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1965)) (discussing that in order to support a jury award, damages must be proven to be reasonable).

ensured this common law reasonableness standard remained when proving medical expenses.¹³⁹ The court expressly noted that the reasonableness of medical bills could still be controverted.¹⁴⁰ While explaining the procedural workings of a particular statute, the court stated: “[Reasonableness] can be controverted by affidavit, which could aver that only the amount actually paid was reasonable.”¹⁴¹

Knowing that only reasonable medical expenses are recoverable, the Dallas Court of Appeals correctly summarized the concern of convoluted medical billing when attempting to implement *Haygood*'s logic.¹⁴² “[D]etermining what expenses were ‘reasonable’ in a given case has become difficult in modern practice where medical providers accept payments far less than amounts billed based on contracts with insurance carriers and Medicare regulations.”¹⁴³ Yet, the reasonableness determination for the recovery of medical expenses is well settled in Texas law.¹⁴⁴ *Haygood* even acknowledged the reasonableness determination is still required.

The convoluted process of medical billing does not allow a quick and easy determination of a reasonable medical expense. This statement is especially true when understood that the determination is a fact question to be decided by jury.¹⁴⁵ But in practice, only one witness or affidavit from a hospital's billing department can establish the reasonableness of the charges.¹⁴⁶ An uncontroverted affidavit is sufficient to support a finding of fact that the amount charged was reasonable.¹⁴⁷ If an affidavit was not filed or if it was controverted, the custodian of the records reading the total medical charges and making a simple statement that the bills were reasonable and necessary charges for the services rendered would be

¹³⁹ See *Haygood v. De Escabedo*, 356 S.W.3d 390, 397–98 (Tex. 2011).

¹⁴⁰ See *id.*

¹⁴¹ *Id.*

¹⁴² See *Big Bird Tree Service v. Gallegos*, 365 S.W.3d 173, 176 (Tex. App.—Dallas 2012, pet. filed).

¹⁴³ *Id.*

¹⁴⁴ *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1956) (citing *Wheeler v. Tyler S.E. Ry. Co.*, 43 S.W.876 (Tex. 1898)).

¹⁴⁵ See *Rivas v. Garibay*, 974 S.W.2d 93, 95–96 (Tex. App.—San Antonio 1998, pet. denied).

¹⁴⁶ 2 WILLIAM V. DORSANEO III, *Texas Litigation Guide* § 20.02[1][a] (2012). See TEX. CIV. PRAC. & REM. CODE § 18.001(c) (West 2008).

¹⁴⁷ 2 DORSANEO, at § 20.02[1][a].

sufficient.¹⁴⁸ With this one-sided evidence, the jury's determination is not complicated; the jury will often just accept the amount provided to them.

A. *The Argument*

Since these initial medical bills are almost always inflated—anywhere from 300% to 800%—and systematically reduced for a majority of patients, the initial charges to uninsured patients fail to meet the reasonableness standard required in Texas common law.¹⁴⁹ In light of this disparity of medical billing and the convoluted process of write-offs, reductions, regulations, and contracts, if a custodian testifies that the initial bill for a person who lacks insurance is reasonable, is the custodian merely propagating a myth? It should not be reasonable to bill and expect payment-in-full of a highly inflated bill from an uninsured patient knowing the hospital would usually accept cents-on-the-dollar for the same service rendered to an individual covered by a third party. Since *Haygood* neglects to limit the recovery of medical expenses intended by the legislature, attorneys need to be armed with information to make the best unreasonableness argument in these specific circumstances.

Reasonableness is ultimately a fact question.¹⁵⁰ Trial courts give the fact-finder latitude when making this determination.¹⁵¹ Defense attorneys need to use this latitude to present all relevant information to the jury. First, a defense attorney should never allow an uncontroverted affidavit establish the reasonableness of medical expenses. By failing to controvert the affidavit, a defense attorney is subjecting a client to past medical expenses damages fifty to eighty percent higher. Texas courts leave open this attack on reasonableness, though controverting a medical records affidavit is rarely attempted.¹⁵²

¹⁴⁸ *Id.*

¹⁴⁹ See *Wheeler*, 43 S.W. at 877; *Big Bird Tree Service v. Gallegos*, 365 S.W.3d 173, 176 (Tex. App.—Dallas 2012, pet. filed); *Jones*, *supra* note 97, at 75; *Nation*, *supra* note 93, at 118 (citing *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 509 (Pa. Super. Ct. 2003)); *Reinhardt*, *supra* note 90, at 57.

¹⁵⁰ See *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 382–83 (Tex. 1956); *Rivas*, 974 S.W.2d at 96; *McGuffin v. Terrell*, 732 S.W.2d 425, 428–29 (Tex. App.—Fort Worth 1987, no writ.); 2 DORSANEO, at § 20.02[1][a].

¹⁵¹ See *Gossett*, 294 S.W.2d at 382–83; *Rivas*, 974 S.W.2d at 96; *McGuffin*, 732 S.W.2d at 428–29; 2 DORSANEO, at § 20.02[1][a].

¹⁵² See *Monsanto Co. v. Johnson*, 675 S.W.2d 305, 312 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (indicating that medical charges are not sufficient and the plaintiff bears the

Once a controverting affidavit is filed, the statute requires a plaintiff to prove the reasonableness and necessity of medical expenses as if the initial affidavit was never filed.¹⁵³ As a result, a plaintiff will have to call the custodian of the records to testify at trial.¹⁵⁴ Having been called by the plaintiff, the defense attorney will be given a wide opportunity to cross-examine and explore the hospital's billing practices in front of the jury.¹⁵⁵ It will be hard for the plaintiff's attorney to object to questions about the medical billing practices of the providers when the jury must make this determination and the plaintiff's attorney has opened the door to this issue in the case.¹⁵⁶ During cross-examination of the record's custodian, the defense attorney should illuminate the disparity and drastic inflation of the medical bills that the defendant is asked to pay. During cross-examination, the attorney can present a more accurate picture of the unreasonable charges asserted and can highlight the decreased amounts providers typically receive from uninsured individuals.

Houston's Fourteenth Court of Appeals' recent decision bolsters this argument. In a dog-bite case, the appellate court dealt with discovery issues decidedly on point with presenting evidence of a hospital's unreasonable billing practices.¹⁵⁷ In his denial, the dog owner—one of many defendants—alleged that the plaintiff was seeking medical bills above and beyond amounts that were actually paid or incurred.¹⁵⁸ As a result, the dog owner sought discovery from this hospital, doctor, and insurer of the billing records, as well as the contracts pertaining to patient billing, payments,

burden of proving the reasonableness of medical expenses); *City of Hous. v. Bullard*, 354 S.W.2d 224, 227–28 (Tex. Civ. App.—Houston 1962, no. writ) (indicating there was no evidence to contradict the unreasonableness of the charges, but leaving room for the possibility of this attack).

¹⁵³TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (West 2008); *Hong v. Bennett*, 209 S.W.3d 795, 804 (Tex. App.—Fort Worth 2006, no pet.); 2 DORSANEO, at § 20.02[1][a].

¹⁵⁴See 2 DORSANEO, at § 20.02[1][a]; see also TEX. CIV. PRAC. & REM. CODE § 18.001(c) (West 2008).

¹⁵⁵See TEX. R. EVID. 401, 403; *Natural Gas Pipeline of Am. v. Pool*, 30 S.W.3d 618, 632 (Tex. App.—Amarillo 2000), *rev'd on other grounds*, 120 S.W.3d 317 (Tex. 2003); *PPC Transp. v. Metcalf*, 254 S.W.3d 636, 642 (Tex. App.—Tyler 2008, no pet.).

¹⁵⁶See *Schwartz v. Forest Pharm., Inc.*, 127 S.W.3d 118, 126 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 612 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Green v. State*, 831 S.W.2d 89, 94–95 (Tex. App.—Corpus Christi 1992, writ denied).

¹⁵⁷*In re Jarvis*, No. 14–13–00224–CV, 2013 WL 4759648 (Tex. App.—Houston [14th Dist.] Aug. 30, 2013, no pet.) (mem. op., not designated for publication).

¹⁵⁸*Id.* at *1.

adjustments, write-offs, and other topics.¹⁵⁹ Though the plaintiff sought to limit or restrict this discovery, the appellate court rejected all of the plaintiff's claims.¹⁶⁰ The court found that the dog owner was entitled to discovery of the contracts to determine whether write-offs or reductions were required with this plaintiff.¹⁶¹ *Jarvis* demonstrates that information from insurers and hospitals regarding billing practices, write-offs, and adjustments are not outside the scope of discoverable material.

With this information placed in front of the fact finder, a defendant could receive a more favorable verdict, not one with artificially inflated numbers. Fact finders should not have to blindly rely on the custodian's biased and uncontroverted opinion. The additional information necessary to make an accurate determination of the reasonableness of the medical expenses should be presented to the fact finder. This information allows a defendant the chance to fairly decrease the amount of past medical expenses a plaintiff has truly incurred.

CONCLUSION

Though the Texas Legislature sought to decrease recovery of past medical expenses, in *Haygood* the Texas Supreme Court failed to apply the statute to one-fourth of the Texas population. *Haygood* held open the door to drastically disparate recoveries among plaintiffs based on his or her insurance coverage. When confronted with an uninsured plaintiff, defendants must be aware of the convoluted and complicated medical billing practices to construct a valid and persuasive unreasonableness argument. Defendants should never let an uncontroverted affidavit or uncontroverted testimony regarding medical expenses come before the jury. The unreasonableness of the inflated figures must be highlight to protect defendants from inflated judgments.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at *9.

¹⁶¹ *See id.* at *7, *8.