CAUSE NO. 09-0367-CC4

MARY DOE,	§	**IN THE COUNTY COURT**
	§	
Plaintiff,	§	
	§	
V.	§	
	§	**AT LAW NUMBER FOUR**
RAUNEL ARROYO AVILA and CHRISTIANSON AIR CONDITIONING & PLUMBING, L.L.C. d/b/a CHRISTIANSON AIR CONDITIONING,	§	
	§	
Defendants.	§	**WILLIAMSON COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO EXCLUDE EVIDENCE OF MEDICAL EXPENSES NOT ACTUALLY PAID OR INCURRED

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, MARY DOE, Plaintiff in the above-styled cause, and hereby files her Response to Defendants' Motion to Exclude Evidence of Medical Expenses Not Actually Paid or Incurred, and in doing so would respectfully show the Court as follows:

I.
FACTUAL BACKGROUND

Plaintiff brought this cause of action for property damage and personal injuries arising out of a motor vehicle collision caused by Defendants' negligence on November 8, 2007.

Plaintiff sustained injuries as a result of that collision, and incurred medical expenses for treatment of those injuries. She is therefore asserting past medical expenses as one category of her damages in this cause.

Defendants have filed, on July 29, 2010, a motion seeking the exclusion of evidence of the total reasonable and necessary medical expenses incurred by Plaintiff, and in doing so have misstated Texas law and given a much more expansive, overreaching interpretation of the

applicable statute than has been given to it by either this Court or any other trial courts in the surrounding areas. For the reasons set forth in more detail below, Plaintiff respectfully urges the Court to deny Defendants' motion.

II.
ARGUMENT & AUTHORITIES

A. The Applicable Statute

In 2003, the Texas Legislature enacted House Bill 4, which included an amendment to the Texas Civil Practice & Remedies Code, adding Section 41.0105, which states: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." Tex. Civ. Prac. & Rem. Code § 41.0105.

By its very language, the statute says nothing whatsoever about what evidence is admissible in court, but rather discusses only damages that may be ultimately recovered. Counsel for Plaintiff can represent to the Court that in all the jury trials he has done in the various Travis County and District courts since the effective date of this statute, the practice of those trial courts is to accordingly treat this statute as a post-verdict adjustment of the past medical expense award made by the jury. It has <u>not</u> been treated as a rule of evidence requiring exclusion of certain medical expenses when presenting the case to the jury. Counsel for Plaintiff has information and reason to believe that this Court, also, has in the past applied Tex. Civ. Prac. & Rem. Code § 41.0105 as a post-verdict issue and not as an evidentiary rule to be applied during trial.

In fact, it would seem that the Civil Practice & Remedies Code itself gives the same guidance on this issue, in Section 41.012: "In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011." Tex. Civ. Prac. & Rem. Code §

41.012. Conspicuously absent from this list of statutory provisions is Section 41.0105, which is codified amongst those very provisions. Had it been the intention of the Legislature to make Section 41.0105 an evidentiary matter for trial, it could have easily expressed that intention by amending Section 41.012 to include the new statute, yet it did not.

Although there are relatively very few appellate decisions addressing the application of this statute, it is quite interesting that the two cases that Defendants choose to cite in their motion, in fact, completely fail to support Defendants' position and fully stand for the application of the statute in the manner that Plaintiff is asserting.

B. *Mills v. Fletcher* – the San Antonio Court of Appeals Decision

As a preliminary matter, Plaintiff would point out to the Court that the appellate opinion of *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.) is a plurality opinion, because Justice Stone dissented and Justice Hilbig concurred only in the judgment but not the opinion / analysis. This is important because it is well established in Texas jurisprudence that plurality opinions are not considered binding precedent. *See, e.g.*, *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996) (holding that plurality opinions are not binding precedent); *University of Texas Med. Branch at Galveston v. York*, 871 S.W.2d 175, 176-77 (Tex. 1994) (holding same); *City of Fort Worth v. Crockett*, 142 S.W.3d 550, 554 n.23 (Tex. App.—Fort Worth 2004, pet. denied) (holding same); *D.M. Diamond Corp. v. Dunbar Armored, Inc.*, 124 S.W.3d 655, 659 n.6 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding same); *Toubaniaris v. American Bureau of Shipping*, 916 S.W.2d 21, 24 n.3 (Tex. App.—Houston [1st Dist.] 1995, pet. denied) (holding that plurality opinions are merely dicta).

However, even if the plurality opinion in *Mills* is treated as binding precedent, it still does not favor Defendants' interpretation of the statute. As Defendants have correctly noted, the case

involved personal injury and past medical expenses introduced into evidence by the plaintiff. *See Mills*, 229 S.W.3d at 767. After the jury awarded a verdict of $1,551.00 for the full past medical expenses, the defense appealed. *See id.* At issue was whether the jury's award should be reduced to reflect only what was paid or incurred, and not include those amounts written off by the plaintiff's health care providers due to his health insurance. *See id.*

After going through an extensive analysis of the genesis of Section 41.0105, and its language construction and application, the *Mills* court determined that, yes, the jury award of past medical expenses should be reduced to conform to only what was paid or incurred, and not include amounts that were "written off." *See id.* at 771. Accordingly, the trial court award was reversed and remanded for entry of judgment consistent with the appellate opinion. *See id*. Therefore, the *Mills* court did exactly what Plaintiff is contending is the well-established and prevailing interpretation of Section 41.0105, i.e., to reduce the jury award, post-verdict. If Defendants' interpretation of the statute is to be believed, the *Mills* court would have reversed and remanded for new trial because it would have found there was fatal error in the evidence presented to the jury, and therefore the case would have to be re-heard only admitting the reduced medical expenses into evidence. It did not do so. Therefore, Defendants can find no support for their overreaching position here.

C. *Gore v. Faye* – the Amarillo Court of Appeals Decision

Defendants next cite the case of *Gore v. Faye*, 253 S.W.3d 785 (Tex. App.—Amarillo 2008, no pet.). Again, the procedural history and reasoning of this case completely supports Plaintiff's position and negates Defendants' position, which makes it all the more curious that it is one of the only two appellate opinions cited by Defendants in support of their motion.

In *Gore*, as Defendants correctly note, the plaintiff sought recovery for past medical

expenses due to injuries caused by the defendant. 253 S.W.3d at 786-87. The defendant pled in her answers to the plaintiff's petitions that Tex. Civ. Prac. & Rem. Code § 41.0105 limited the plaintiff's recovery of medical expenses to only those "actually paid or incurred," rather than the "total charged." *See id.* at 787. Therefore, this issue was raised for the trial court's consideration from the beginning, and not simply on post-verdict appeal as it was in the *Mills* case.

The trial court allowed presentation of the entire medical expenses, specifically and especially with all evidence of adjustments and discounts redacted and hidden from the jury. *See id.* In fact, when the defense counsel sought to offer proof of adjustments and discounts to the jury, there was this exchange between defense counsel and the court, which is exactly on point in this issue, and exactly contrary to what Defendants' asserted position is:

> [The Court]: The court is going to sustain her [note: the plaintiff] objection and overrule you, preventing you from putting this in front of the jury. And the court's of the opinion, at this time, until further guidance is given the court, that it is a post-verdict pre-judgment matter. And so the offer of proof will stand but I will not allow that testimony in front of the jury.
> …
> [Gore's counsel]: Okay. And, Your Honor, in the alternative then, we would ask the court to consider the testimony post-verdict pre-judgment.
>
> [The Court]: Yes, we will do that.

Id. at 788.

Accordingly, the trial court in *Gore* did exactly what Plaintiff is asserting is the proper application of the statute, and exactly the opposite of what Defendants are asserting.

The defendant then appealed and the issue was brought before the appellate court in Amarillo; and in this case, the defendant moved for an entirely new trial, not simply for reduction of the jury verdict. *See id.* This makes the *Gore* opinion all the more instructive.

In answer to the defense's argument that only the adjusted medical expenses should have been presented to the jury, the *Gore* court held as follows:

> The correctness of Gore's position that the trial court was required to admit her section 41.0105 evidence before the jury is not apparent from the language of section 41.0105. The legislature enacted the section as an addition to chapter 41 of the Civil Practice and Remedies Code, which chapter "establishes the maximum damages that may be awarded in an action" subject to its provisions. Tex. Civ. Prac. & Rem. Code § 41.002(b). By its language the limitation on damages prescribed by section 41.0105 is mandatory. **But unlike other provisions of chapter 41, section 41.0105 contains no procedural direction for its application at trial**. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 41.008(a), (e) (prescribing separate determinations of economic and other compensatory damages, and prohibiting making provisions known to jury); Tex. Civ. Prac. & Rem. Code § 41.009 (requiring bifurcated trial on motion); Tex. Civ. Prac. & Rem. Code §§ 41.003(e), 41.012 (mandating jury instructions in cases involving claims for exemplary damages).

Id. at 789 (emphasis added).

Accordingly, the appellate court held that the trial court did not abuse its discretion in overruling the defendant's objections and allowing the plaintiff to present evidence of the total and complete medical expenses to the jury: "Gore's single issue is overruled, and the trial court's judgment is affirmed." *See id.* at 790.

Again, Defendants can find no support for their position here.

D. The Collateral Source Rule as a Rule of Evidence is Alive and Well

The above-cited decisions make clear that if Tex. Civ. Prac. & Rem. Code § 41.0105 amends or abrogates the collateral source rule at all, it does so only as to damages recovery, and not as to admissible evidence.

Additionally, there is no legislative history whatsoever to support the suggestion that Section 41.0105 was intended to legislatively overrule Texas common law relating to the collateral source evidentiary rule. In fact, the legislative history of Section 41.0105 instead fully evidences an intent to support and preserve the collateral source rule as a rule of evidence. In order to ascertain this, it is important to chronicle the genesis and metamorphosis of the statute throughout the legislative process, because the final language of Section 41.0105 is not the same

language that was originally introduced at the beginning of the 78th Legislative Session, nor is it the language that was referred to the conference committee; it was constantly changing throughout the legislative session.

1. Version 1 of the Bill

Initially, at the beginning of the 78th Legislative Session, House Bill 3 (H.B. 3) and House Bill 4 (H.B. 4) were introduced as comprehensive efforts to implement "tort reform," with H.B. 3 rewriting the relevant medical malpractice law, amending Article 4590i. H.B. 3 included a section that would have added Subchapter Q to Article 4590i. This subchapter, entitled "Collateral Source Benefits," would have effectively repealed the evidentiary exclusion of most collateral sources. *See* Exhibit A. This language would have repealed the collateral source rule for Medicare, Medicaid, workers' compensation, state or federal disability benefits (including Social Security benefits), and any private accident, health, or disability insurance benefits. *See id.* Under this proposal, evidence regarding collateral benefits from these various sources would have been admissible. *See id.*

2. Version 2 of the Bill

After two public hearings, H.B. 3 and H.B. 4 were merged into the committee substitute for H.B. 4 (C.S.H.B. 4). C.S.H.B. 4 also contained clear language that would have repealed the collateral source rule. *See* Exhibit B.

3. Version 3 of the Bill

C.S.H.B. 4 was then presented to the Texas House of Representatives for debate, floor amendments, and a final vote. During this process, an amendment was proposed and passed that removed subchapter Q. Thus, when the House reported the engrossed version of H.B. 4 on March 31, 2003, the provisions allowing admissibility of collateral source evidence in health

care liability claims were deleted. *See* Exhibit C.

4. Version 4 of the Bill

H.B. 4 was then referred to the Senate State Affairs Committee for consideration. The Senate committee substitute was reported on May 14, 2003 and expressly contained a limited repeal of the collateral source rule with regard to governmental health, income, disability, and workers' compensation payments. *See* Exhibit D. The Senate version provided that a defendant could introduce evidence of such collateral source amounts payable to the claimant and that a plaintiff could then introduce evidence of any legal obligation to reimburse any subrogation entity. *See id.*

5. The Final Version (Section 41.0105)

The Senate State Affairs Committee's approach ultimately did not survive the final legislative debate in conference. The final version that was issued by the conference committee and passed by both the House and the Senate, as set forth above as Section 41.0105 of the Civil Practice & Remedies Code, deleted all provisions relating to subrogation interests and collateral source evidence.

By reviewing each version of the bill, one can ascertain the different approaches considered and, more importantly, rejected by the Legislature. Some (such as Defendants) suggest that Section 41.0105 is an effort to modify or repeal the evidentiary collateral source rule in Texas. However, the final version of the bill, by omission, rejected any language that would have modified the collateral source rule.

In summary, there is neither any legislative, statutory, nor judicial precedent whatsoever to support Defendants' absurd and overreaching interpretation of Tex. Civ. Prac. & Rem. Code § 41.0105. Accordingly, Plaintiff urges the Court to deny Defendants' motion and proceed with

trial of this cause as the overwhelming majority (if not the entirety) of Texas trial courts do, in allowing evidence of full reasonable and necessary medical expenses to be presented to the jury, leaving any application of Tex. Civ. Prac. & Rem. Code § 41.0105 to be handled by the Court as a post-verdict matter.

III.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendants' Motion to Exclude Evidence of Medical Expenses Not Actually Paid or Incurred be denied, that trial of this cause proceed forward with Plaintiff's full presentation of medical expenses, and that the Court grant such other and further relief to which it finds Plaintiff justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this instrument has been served upon the following counsel of record, via facsimile, on this 30th day of July, 2010, pursuant to the Texas Rules of Civil Procedure:

Via Facsimile: (512) 708-8777

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