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MAXIMIZING AND MINIMIZING DAMAGES: THE DEFENSE PERSPECTIVE

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I. INTRODUCTION♦

Economic damages, those compensatory damages intended to compensate a claimant for actual economic or pecuniary loss,[1] are an important part of personal injury litigation. In light of the sweeping changes introduced by the Texas Legislature in recent years and continuing discussions in the United States Congress regarding tort reform, the role of economic damages is becoming an increasingly important component of the personal injury case. Previous caps on exemplary damages that are tied to a multiple of the amount of economic damages likewise make economic damages important.

This paper will survey the current law on the most common elements of economic damages in personal injury and wrongful death litigation and provide a practical approach to attacking damages.

II. RECOVERING MEDICAL EXPENSES

A. Generally

In order to recover medical expenses, the plaintiff must present evidence that the damages claimed resulted from the defendant's conduct. *Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997) (citing *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995)). The plaintiff meets this burden by proving a direct causal connection between the damages awarded, the defendant's actions, and the injuries suffered. *Murdock*, 946 S.W.2d at 838. Generally, a medical expert is required to assist a jury in determining which treatment expenses are associated with the complained-of injuries. *Id.* at 841 (a lay jury cannot be expected to ascertain without guidance from a medical expert which treatment was for meconium aspiration and its effects).

In addition to showing a causal relationship, the plaintiff must also show that the medical expenses claimed were reasonable and necessary. *Rivas v. Garibay*, 974 S.W.2d 93, 95 (Tex. App.—San Antonio 1998, pet. denied). Proof of payments charged or paid does not constitute proof of reasonableness. *Id.* at 96. Testimony of the plaintiff concerning medical expenses incurred or paid is admissible; however, this testimony alone does not establish that the expense is reasonable and necessary. *Home Indem. Co. v. Eason*, 635 S.W.2d 593, 595 (Tex. App.—Houston [14th Dist.] 1982, no writ). A plaintiff has two primary methods for proving that medical expenses are reasonable and necessary: expert testimony and medical expense affidavits.

To prove the reasonableness of medical expenses by expert testimony, the expert must be shown to be qualified. For example, a physician in Plainview, Texas who did not give cystoscopic treatments and who did not state that he had any information from any source as to what charges for such procedures were usual and customary, and did not state that he knew what a reasonable charge for the services would be in Hot Springs, Arkansas or any other place, was not qualified to testify as to the reasonable charge for a cystoscopic treatment in Hot Springs, Arkansas. *Salyer v. Shropshire*, 144 S.W.2d 618, 620 (Tex. App.—Amarillo 1940, no writ). In some cases, it might be worthwhile to take plaintiff's expert on voir dire with respect to certain charges that the expert purports to testify are "reasonable."

B. Future Medical Expenses

An award for future medical expenses is within the discretion of the jury provided there is a reasonable probability the plaintiff will incur the expenses in the future. *Columbia Med. Ctr. v. Bush ex. rel. Bush*, 122 S.W.3d 835, 862-63 (Tex. App.—Fort Worth 2003, pet. denied); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 681 (Tex. App.—Texarkana 1991, writ denied); *City of San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex. App.—San Antonio 1988, writ denied). The reasonable probability standard requires the plaintiff to show more than the mere possibility that future medical expenses will be incurred as a result of the injury. The plaintiff need not prove, however, that medical expenses are "reasonably certain" to be incurred. *Fibreboard*, 813 S.W.2d at 681. "Probability" has been defined as "more than a 50 percent chance." *Id.* The jury may make its award based on the nature of the injuries, the medical care rendered prior to trial, and the plaintiff's condition at trial. *Vela*, 762 S.W.2d at 321. Testimony that merely shows that any additional medical procedures in the future were "possibilities" does not meet the requirements for a judgment for future medical expenses. *Pilgrims Pride Corp. v. Smoak*, 134 S.W.3d 880, 905-06 (Tex. App.—Texarkana 2004, pet. denied). To sustain an award of future medical

♦ The authors wish to acknowledge and thank Thomas C. Riney who previously wrote on this topic. This paper is an update of his prior work. In updating this paper, I have relied upon an excellent paper by Lee Ann Reno and Alex Yarbrough of Sprouse Shrader Smith P.C. entitled "Paid and Incurred Post-Escabedo" presented at the State Bar of Texas 5th Annual Damages in Civil Litigation Seminar on March 7-8, 2013.

[1] Non-economic damages are damages awarded for physical pain and suffering, mental anguish and suffering, and the loss of consortium, loss of companionship and society, disfigurement, or physical impairment. *See, e.g.,* TEX. CONST. art. III, § 66; TEX. CIV. PRAC. REM. CODE ANN. § 41.001(4).

expenses, the plaintiff must present evidence to establish that, in all reasonable probability, future medical care will be required and the reasonable cost of that care. *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

III. PAID OR INCURRED

HB4 added Section 41.0105 to the Texas Civil Practice and Remedies Code. It reads as follows:

> **Evidence Relating to Amount of Economic Damages**
>
> In addition to any other limitation under law, recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

Currently, the law regarding paid and incurred was established by the Texas Supreme Court in *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011). In *Haygood*, plaintiff Haygood sued defendant De Escabedo for injuries sustained in an automobile collision. The plaintiff's healthcare providers billed $110,069.12 for treatment, including multiple surgeries to his neck and shoulder. Because he was a Medicare patient, the plaintiff's healthcare bills were discounted $82,329.69 due to adjustments or credits. Of the remaining balance of $27,739.43, $13,257.41 was paid and $14,482.02 was owed to the plaintiff's healthcare providers. *Id*. at 392.

At trial, the plaintiff moved to exclude evidence of any amounts other than the amounts billed. The defendant sought to exclude evidence of any medical expenses over the $27,739.43 either paid by Medicare or owed by plaintiff. The court found that the evidence at trial and the plaintiff's recovery must be limited to those expenses that the healthcare provider has a legal right to be paid. *Id.* at 391. The court rejected the common practice of admitting evidence of the full bill charges and reducing the amount recoverable by a post-trial, post-verdict evidentiary hearing to determine what portion of the amount billed was actually paid or incurred. As explained in *Haygood*, plaintiffs often seek to introduce evidence of the full amount of medical expenses billed in order to increase non-economic damages. A common belief is a larger overall verdict will result if the complete amount billed is admitted before the jury, even if this amount is later reduced or adjusted post-verdict.

> A few courts in other jurisdictions have expressed concern that limiting the evidence to amounts that have been paid or must be paid provides the jury an unfairly low benchmark with which to gauge the seriousness of the plaintiff's injuries in awarding non-economic damages, such as for physical pain and mental anguish.

Haygood, 356 S.W.3d at 398; *see also Henderson v. Spann*, 367 S.W.3d 301, 303 (Tex. App.—Amarillo 2012, pet. denied).

Haygood shows that the Supreme Court disapproves of the process whereby a plaintiff introduces evidence of the full bill only to subsequently engage in post-verdict reduction or adjustment to the amounts actually paid or incurred. *See Haygood*, 356 S.W.3d at 399; *see also Henderson*, 367 S.W.3d at 303. *Haygood* explains:

> If the jury awards less than the total of all charges, the trial court may have no way of knowing which charges the jury found reasonable and which it did not. In all of these situations, a requirement that the trial court resolve disputed facts in determining the damages to be awarded violates the constitutional right to trial by jury.

Haygood, 356 S.W.3d at 399. In short, a trial court violates the constitutional right to trial by jury if it adjusts recoverable medical expenses post-verdict.

The plaintiff's evidence should be limited to the amount actually paid or incurred by the plaintiff or on his behalf. Under *Haygood*, only the evidence of recoverable medical expenses is admissible at trial. *Haygood*, 356 S.W.3d at 399. Admitting the full bill with a post-trial reduction constitutes reversible error. *See, e.g., Henderson*, 367 S.W.3d at 304.

A. Medical Expense Affidavits

In light of *Haygood*, recent amendments have been made to TEX. R. EVID. 902 and Chapter 18 of the Texas Civil Practice and Remedies Code. It has long been the law in Texas that a plaintiff is not required to present a witness at trial in order to show medical expenses related to alleged damages are reasonable and necessary. More often than not, the reasonableness and necessity of medical expenses are proved up by affidavit, thus eliminating the need for expert testimony with respect to this issue.

Effective March 1, 2013, the Texas Supreme Court amended TEX. R. EVID. 902 dealing with self-authentication of business records. In light of the Legislature's amendment of Chapter 18 of the Texas Civil Practice and Remedies Code, the Texas Supreme Court was requested to amend Rule 902(10) to comport with the new provisions of Chapter 18 and the Supreme Court's decision in *Haygood*. The new amendments to Chapter 18 of the Texas Civil Practice

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