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Supreme Court of Texas.
Aaron Glenn Haygood
v.
Margarita Garza De Escabedo.
No. 09-0377.

September 16, 2010.

Appearances:

Peter M. Kelly, Law Office of Peter M. Kelly, P.C., for petitioner.
Frank G. Cawley, Whitehurst & Cawley, LLP, Addison, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva Guzman, and Debra Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear arguments in 09-0377, Aaron Glenn Haygood v. Margarita Garza De Escabedo.

MARSHAL: May it please the Court, Mr. Kelly will present argument for Petitioner. Petitioner has reserved four minutes for rebuttal.

ORAL ARGUMENT OF PETER M. KELLY ON BEHALF OF THE PETITIONER

ATTORNEY PETER M. KELLY: May it please the Court, Peter Kelly here on behalf of the underlying plaintiff, Aaron Haygood. The issue today before this Court is a narrow question of statutory interpretation. And like most questions of statutory interpretation, it can be resolved by looking at the plain language of the statute.

JUSTICE DAVID M. MEDINA: Mr. Kelly, do you agree that if the tortfeasor injures an individual then that tortfeasor's required to make that individual whole?

ATTORNEY PETER M. KELLY: That is one of the underlying premises of tort law going back thousands of years.

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JUSTICE DAVID M. MEDINA: What does that mean to you?

ATTORNEY PETER M. KELLY: What does that mean? Is that the plaintiff, the injured party, the claimant, should be made whole for the damages that he has suffered at the hands of the tortfeasor.

JUSTICE DAVID M. MEDINA: So he suffered or would that be damages he incurred?

ATTORNEY PETER M. KELLY: Those would be the damages that he incurred. Historically, this Court has defined as that the plaintiff's entitled to his actual damages. That's going back to 1980 in the Kish case in 1985 and the Brown case in 1980. Actual damages or those damages that are allowable at common law and those are the damages that are suffered as a direct result of or producing cause, however you want to define it, of the defendant's acts. There has to be approximate causation in the tort realm.

JUSTICE DAVID M. MEDINA: But if an injured party has a bill for $1 and then is reimbursed $0.90, shouldn't he only be mad whole the difference from what he is out of pocket?

ATTORNEY PETER M. KELLY: Well, this Court has also held in going back to 1972 in the Black case, which was recently referred to in the Aviles case last year that how we determine what actual damages have been suffered is you look at what the expenses have been incurred. And as this Court said, incurred is defined as the obligation pursuant to the implied contract between the provider and the patient incurred in the firs instance. So when a patient shows up at a hospital there is an implied contract between the healthcare provider and the patient that the patient will be liable for all the expenses that have been charged or incurred on his behalf. Now how that's ultimately resolved, whether it's by a cash payment, whether it's a payment by you know but patient itself, or a payment by an insurance company, or some sort of write-off or reduction in fees doesn't ultimately matter. What we have is at the first instance the incurrence of that obligation. And that what is what historically a common law and statutorily has been defined as reasonable and necessary damages.

JUSTICE DAVID M. MEDINA: Why does it matter? I mean if we're going to make the plaintiff or the other party owe, it seems like there's a windfall. If there's a bill for $1 and the parties are responsible for $0.10 and he gets reimbursed the entire dollar.

ATTORNEY PETER M. KELLY: It's not necessarily a windfall because you have to look at how the reduction occurred. If you look at the collateral source rule, which rewards the plaintiff's for his foresight in having insurance, if that reduction occurs because of the plaintiff's foresight then it's not a windfall to him. He had been paying his insurance premiums for years; he has taken a lower paying job so he can have insurance coverage through his employer, all these things. Is it the status of the patient of the claimant at the time of the injury, at the time that services are rendered?

JUSTICE DAVID M. MEDINA: Does it matter if it's that type of insurance policy that's been secured or if it's a Medicare benefit that the injured party receives?

ATTORNEY PETER M. KELLY: I don't think ultimately it does because you still have the implied contract. The implied contract entered into at the time of the services are rendered between the healthcare provider. And this Court said in Black in 1972 and the statutes haven't changed since then that there is that that is incurred at the time, no matter who pays it.

JUSTICE DEBRA H. LEHRMANN: Can I, what about Linnstaedter that just came out last year in 2007 where the plaintiff sought the full medical charges billed by the hospital rather than the reduced amount paid by the carrier, and we stated that we agree that a full recovery of medical expenses would about to a windfall. And then in a footnote we stated that that rule has since been codified, referring to 41.0105. What's your response to that?

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ATTORNEY PETER M. KELLY: Well in that footnote, it refers to 41.0105, but you said the rule has been codified. The rule you're referring to is Allstate v. Forth. Now what's curious about Allstate v. Forth is a standing case, whether there was standing to pursue these medical charges for which they would not be liable. Well Allstate v. Forth and it's a key thing that's often overlooked. In those cases and in that case, the statute of limitations had already passed. There never could be a legal obligation to pay for those charges. So what Allstate and Forth was it's a standing case. You can't sue to recover something that you don't have an underlying right to recover. Now as we all know and this goes back to your first year of contract law and statutes and limitations, or I guess civil procedures, statutes and limitations. Just because the limitations is passed does not mean the debt is discharged. The obligation is still existent. The other thing that Forth doesn't address and Linnstaedter doesn't address is we have sort of a moving target a lot of times in terms of whether things are written off. And it happens all the time that a patient gets a letter from the healthcare provider that says zero. Well they can change their mind; that's not a binding contract or a formal waiver or an accordance satisfaction. In Forth you had a different creature because there was no further legal right to recover. And so what's happened is sort of this narrow class of obligations discussed in Allstate v. Forth has through, has somehow grown to include all obligations. And it's sort of a false line of authority for the Court to be relying on Forth in saying that was codified in 41.0105.

JUSTICE DAVID M. MEDINA: Is this issue really any different from the Court's decision in the Avilaes case involving attorney's fees when they're incurred?

ATTORNEY PETER M. KELLY: Well I think this particular issue right now that we have right now is actually two separate issues. One is does paid incurred create the new measure of damages replacing hundreds of years of jurisprudence and the statutory prescriptions in 18.001? Is there a new measure of damages? And that goes with the preservation whether a no evidence challenge will suffice here. And secondly, what is the definition of incur? And I think incurred has been defined in 1972 in Black and in Avileas and in Gomez. And we first started looking at this issue and found Black hadn't been cited in years, but then it's been cited twice in the past year by this very Court. And if incurred means incurred in the first instance, the obligation to pay is incurred no matter who pays it, you recall in Avileas, the insurance company paid it. It should mean the same thing here.

JUSTICE EVA M. GUZMAN: What does the modifier actually though, before the word incurred, what does that do to your argument, or what should we do with the word actually?

ATTORNEY PETER M. KELLY: This is almost like it reminds me of Lewis Carroll. If it's incurred shall mean actually incurred, but when you think about it if it's not actually incurred then it hasn't been incurred in the first instance. And part of this is sort of you have to follow the legislative process, track through the various changes of the statute. Initially, it was incurred shall mean actually paid. Then later incurred got stuck in after actually paid. So you sort of have to read it as an expansion of what incurred is. Originally incurred was just actually paid. It's actually now actually paid and incurred. So I don't think there's any fundamental difference between incurred and actually incurred. I mean it's sort of an unfortunate use of a colloquial intensifier that doesn't really have any legal meaning.

JUSTICE DALE WAINWRIGHT: So you don't think it--

JUSTICE EVA M. GUZMAN: Okay, so it had-- go ahead.

JUSTICE DALE WAINWRIGHT: Thanks. So you don't think it matters whether in 41.0105 actually modifies paid or whether it modifies both paid and incurred?

ATTORNEY PETER M. KELLY: It's unclear from the legislative history whether it modifies both. Like I said, it started off as actually paid, which sort of implies some sort of cash payment, and now you have incurred tacked onto it. And there are two ways grammatically to read it as in actually paid or incurred. But then you have incurred shall be incurred, which seems a little bit redundant but it's redundant anyway. I don't think ac-

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tually means anything, has a specific legal meaning in this particular context.

CHIEF JUSTICE WALLACE B. JEFFERSON: What role does the jury really play in these if post verdict the trial court is supposed to look at the liens paid and paid off and you know the money that actually changes hands? It just seems to me that I mean the jury's not told right about the amounts that are paid by Medicare or whether liens have been waived or not, right? They're just asked to determine the amount of medical expenses.

ATTORNEY PETER M. KELLY: Well not just the amount of medical expenses. It's not a rubber stamp by the jury. They are supposed to make the determination of what is reasonable and necessary. And historically and you know throughout the practice of law you have anytime your see reasonable, determining what a reasonable man is, that's a question for the jury to determine. So they're determining what is the reasonable and necessary medical expenses. After they have determine the reasonable and necessary medical expenses and returned their verdict, awarded the damages, the Court then decides what's going to be recovered and recovery comes in post verdict. And it is a legal determination made by the Court because if you go back to Black when you're talking about the implied contract between the healthcare provider and the recipient, and the patient, what the Court is doing at that point is interpreting the implied contract, looking at the medical bills, and you know whatever purported write-offs there are of other payments. So what they're doing is interpreting the implied contract and applying to the written documents it has. It's not a function for the jury to do; the Court is making the legal determination. So the jury determines what juries always determine, what is reasonable; what is reasonable in terms of the medical expenses. The Court then applies what is to be recovered by interpreting the implied contract. And that's consistent with any other limitations we have on recovery. For instance, in Chapter 32 and Chapter 33 where the settlement percentages are applied. That is done after the verdict. And in Chapter 33 it specifically talks about shall recover. Chapter 74 doesn't talk about recovery, but it is a limitation on liability; a $250,000 cap and you can stack the caps. But the Court applies that cap, applies that limitation after the jury has spoken. And what's interesting about that is to bootstrap that, to say well it's not relevant evidence or to sustain a no evidence challenge. It's not like in a med mal case the plaintiff puts on medical expenses or evidence of economic damages and then just stops at $250,000. I mean he can put on millions of dollars and show that he's suffered millions of dollars of damages. That doesn't' mean that the evidence of the damages beyond $250,000 is irrelevant or not part of the measure of damages. The measure of damages remains reasonable and necessary, remains actually damages which is historically recovered common law. There is a post verdict judicial application of this statute.

JUSTICE DEBRA H. LEHRMANN: As I understand it, you differentiate between a limit on recovery and a limitation on damages, right? Can you explain that to me?

ATTORNEY PETER M. KELLY: The damages that the plaintiff is entitled to, it's not just a limit on damages; it's a limit on the evidence of damage is what we're really looking at here.

JUSTICE DEBRA H. LEHRMANN: Well there's evidence and then there's the remedy and then there's the damages. You seem to differentiate between the three, correct?

ATTORNEY PETER M. KELLY: Well I don't differentiate; the law more or less differentiates that the plaintiff is entitled to damages; he's entitled to put on proof of his measure of damages.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY PETER M. KELLY: Which for these purposes is reasonable and necessary medical expenses. The jury determines that. At the end of the day what the plaintiff, the claimant actually recovers, what money he actually puts in his pocket is determined by operation of statute and other laws. So, yes, there is a difference between the damages that have been suffered and there are lots of limitations on it. I mean we're talking about Chapter 74 caps, contribution indemnity, Texas tort claim act limitations. And all those, the jury's not informed about those.

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JUSTICE DEBRA H. LEHRMANN: Sure.

ATTORNEY PETER M. KELLY: It doesn't affect the quality or the admissibility of the evidence. And the statute does not talk about the quality or admissibility of evidence. The argument is made that the title--

JUSTICE DEBRA H. LEHRMANN: I was going to say, the title says evidence.

ATTORNEY PETER M. KELLY: Well the title says evidence, but you only look at the title if the statute is not clear. And the statute clearly says recover and you look at the legislature's other uses of recover for instance in Chapter 33 and Chapter 32, we know what they're talking about.

JUSTICE DEBRA H. LEHRMANN: Well and if you look at the history it actually looks like they were intending to take out evidence from the substance of that statute. Do you think that's relevant?

ATTORNEY PETER M. KELLY: This has very convoluted history.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY PETER M. KELLY: Yes, initially they were talking about it had a direct inexplicit abrogation of the collateral source rule.

JUSTICE DEBRA H. LEHRMANN: Exactly.

ATTORNEY PETER M. KELLY: That was taken out.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY PETER M. KELLY: And it had the title at the time. Actually, when it first started off it was talking about recovery of medical expenses. Then you had to add in the abrogation of the collateral source rule and the title changed to evidence.

JUSTICE DEBRA H. LERHHMANN: Right.

ATTORNEY PETER M. KELLY: Then in the final version after it finally came out of the Senate and was ultimately signed, the title had remained the same even though this explicit abrogation of the collateral source rule had been removed.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY PETER M. KELLY: So it's almost accidental that we have this title appended to it. Well it is accidental. But we still have to take that as an act of legislature, but we could look at what evidence actually is. Evidence does not necessarily mean jury evidence. In all the rules of civil procedure you talk about evidence in the summary judgment context and in several other contexts. That's not jury evidence and when the legislature has wanted to effect what evidence goes before the jury, for instance in the 41.011 about evidence relating to exemplary damages, it is titled Evidence, it's in the title, but in the actual text it talks about what evidence is going to go to the jury very explicitly and very clearly. So in this instance in 41.0105 we don't have that explicit rendition of what's going to be going before the jury. What you have is a stray reference in the title that says evidence and it does not say jury evidence, it does not say admissible evidence. But you do have the plain language which refers to recover, and we know what recover means. And this is very straightforward syllogism that we're just, the legislature used words recover and incurred that we actually know the meaning of by comparison to other legislative acts and to the writings of this Court.

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JUSTICE DALE WAINWRIGHT: Counsel, let me just ask very briefly and then I'll probably follow-up on rebuttal. Do you believe in the statute just so I can be clear that actually is a, refers to incurred or not in the statutory language?

ATTORNEY PETER M. KELLY: I think it has its most significant meaning in relation to paid. And sort of as an accident of grammatical construction, it does not affect the meaning of the word incurred.

JUSTICE DALE WAINWRIGHT: That partially answers my question. Does actually reference or define or limit incurred or not?

ATTORNEY PETER M. KELLY: I don't think it grammatically modifies it, but I don't think it affects the legal meaning because if it's not actually incurred it hasn't been incurred to begin with.

JUSTICE DALE WAINWRIGHT: Okay, so actually modifies paid and actually modifies incurred in the statutory language?

ATTORNEY PETER M. KELLY: Yes, but I don't think it limits what's incurred because we have to look at what that would actually mean.

JUSTICE DALE WAINWRIGHT: Okay, thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Kelly. The Court is not ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Cawley will present argument for the Respondent.

ORAL ARGUMENT OF FRANK G. CAWLEY ON BEHALF OF THE RESPONDENT

ATTORNEY FRANK G. CAWLEY: May it please the Court, absent proof that past medical care expenses have been actually paid or actually incurred, evidence of the reasonable and necessary value of medical care is not legally sufficient to support a verdict. And absent proof that past medical care expenses have been actually paid or actually incurred, evidence simply of the reasonable and necessary value of medical expenses is irrelevant and inadmissible.

JUSTICE DAVID M. MEDINA: Now if we agree with you do we have to retract the Avilaes case and the Gomez case and?

ATTORNEY FRANK G. CAWLEY: No, Your Honor, because I don't think Avilaes or Gomez addresses the specific issue in this case.

JUSTICE DAVID M. MEDINA: It talks about fees incurred.

ATTORNEY FRANK G. CAWLEY: Sure it does. Again, I want to get back to a point that Justice Wainwright just established. The operative term here is actually. It modifies incurred. So what we're dealing with is a statute that uses incurred once unmodified and then uses it again with the modifier actually. Those two must mean something different. I disagree with Counsel when he says that incurred is the same thing as actually incurred because that violates the cardinal rule of construction that we don't consider any words meaningless. We don't consider the word actually meaningless. And so to get back to your question about Avilaes dealt with the word incurred not the phrase actually incurred. The second differentiation between the issue in this case and the issue in Avilaes is what this Court held in Avilaes was that the defendant doctor incurred expenses that were actually

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paid on his behalf. It did not deal with a situation in which the third party payer paid a certain amount to get rid of or extinguish another amount. So it doesn't, and the same issue with Black. In Black all of the plaintiff's medical expenses were actually paid by Medicare and his carrier. There was no issue in that case of write-offs, discounts, or adjustments. Same as in Avilaes; there was no issue of write-offs, discounts, or adjustments. Another way of stating that is Avilaes doesn't tell us what happens when a third part payer comes along later, pays a portion of the incurred amount, and the provider of that service forgives the rest. Neither Avilaes nor Black addressed that issue.

JUSTICE EVA M. GUZMAN: The decent in the Court blow was concerned that the interpretation by the majority failed to give meaning to the term incurred as used I guess in the statute in the beginning.

ATTORNEY FRANK G. CAWLEY: The dissent in which court?

JUSTICE EVA M. GUZMAN: In the court below.

ATTORNEY FRANK G. CAWLEY: In this case?

JUSTICE EVA M. GUZMAN: Yes.

ATTORNEY FRANK G. CAWLEY: We didn't have a dissent in this case.

JUSTICE EVA M. GUZMAN: Sorry, let me look.

ATTORNEY FRANK G. CAWLEY: You're talking about the dissent in Mills.

JUSTICE EVA M. GUZMAN: I am. Sorry.

ATTORNEY FRANK G. CAWLEY: Yes.

JUSTICE EVA M. GUZMAN: Mills v. Fletcher, yes.

ATTORNEY FRANK G. CAWLEY: Yeah, that was a plurality opinion and the dissent in Mills is primarily a policy-based dissent arguing that the statute as interpreted by the majority was unfair and unreasonable. My response to that is whether this statute is unfair, whether it's unreasonable, whether it's unwise is a matter for the legislature to determine; it's not a matter for the courts to determine. The Court's job is to interpret the statute as written. But to get back to the dissent in Mills, I think the dissent in Mills was incorrect in that the phraseology in this statute starts with in addition to any other limitation under law. We know right there that they're changing the law. They're not; the legislature is not intending to maintain the status quo when they say that. Then they say the recovery of expenses incurred. That defines the universe of expenses that could potentially be incurred, that could potentially be recoverable. Then they go on to say is limited to. So right there we know that that's a signpost that what we're about to see coming up next is a limitation is limited to the amount actually paid or incurred. Again, actually modifies both paid and incurred.

JUSTICE EVA M. GUZMAN: And if doesn't modify both is the argument different?

ATTORNEY FRANK G. CAWLEY: Well then if it doesn't modify both the sentence makes no sense because if it doesn't modify both then what we're reading is the recovery of expenses incurred is limited to the expenses incurred, and that doesn't really make any sense. So actually has to modify it and actually has to change the meaning of the second use of the word incurred. Otherwise, actually can be read out of the statute and it's meaningless and that violates the rules of, the cardinal rules of statutory construction in Texas. So we know that incurred and actually incurred, you look like you want to ask a question, so go ahead.

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JUSTICE DEBRA H. LEHRMANN: I was just going to ask you, now one approach that has been suggested and adopted and I think is used to a certain extent is to admit all evidence of payments and reductions or payments at trial and then for the determination of what's reasonable and necessary, and then send it back to the judge afterwards to adjust according to the language of the statute. Do you agree with that? Is that how you think that it should be handled?

ATTORNEY FRANK G. CAWLEY: Absolutely not. And I think it cannot, absolutely cannot be handled that way for a number of reasons.

JUSTICE DEBRA H. LEHRMANN: Could you explain that please?

ATTORNEY FRANK G. CAWLEY: Yes. I've got a number of reasons why that can't be.

JUSTICE DAVID M. MEDINA: Well just kind of limit them because I want to know how that would affect the collateral source rule if you are correct.

ATTORNEY FRANK G. CAWLEY: Okay, okay. The first issue is under Section 41.008; the statute says in an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from other compensatory damages. That's important because it's saying that the trier of fact determines economic damages. Now, remember that the title of this statute is Evidence Relating to Amount of Economic Damages. So it is the jury that is supposed to determine the economic damages subject to the limitations set forth in Section 41.0105. So it is the jury that is supposed to determine what the amount actually paid and actually incurred is.

JUSTICE DEBRA H. LEHRMANN: But what's the effect of that subject to?

ATTORNEY FRANK G. CAWLEY: Pardon, what do you mean subject?

JUSTICE DEBRA H. LEHRMANN: Under 41.0105. Because they make that determination but then I mean how do we get around--

ATTORNEY FRANK G. CAWLEY: Oh, I see what you mean. What do I mean by subject to?

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY FRANK G. CAWLEY: What I mean is the jury is determining what, by virtue of 41.008 the jury determines economic damages. With respect to medical care expenses, Section 41.0105 defines what those economic damages are. And so that definition must be used to guide the jury in making their determination with respect to the recoverability of medical care expenses. So it has to be the jury that does that, not the Court after the fact. Secondly, the title as you noticed the title says Evidence and Mr. Kelly said that the only time we ever look at the title is if the statute's ambiguous. But the code construction act, Section 31.1023 says whether or not a statute is ambiguous we can look at the title of the statute to determine its meaning. So the title is further proof that it's to be applied in evidence. And if it's to be applied at the evidentiary stage as the title suggests, then by necessity it cannot be applied post verdict. The jury's got to hear about it.

JUSTICE DEBRA H. LEHRMANN: And even if you look at the history of that I think the substance of that statute really did have to do with evidence and that was taken out.

ATTORNEY FRANK G. CAWLEY: And I want to address the legislative history issue because I don't think we even need to be consulting legislative history. This is a situation much like Entergy where the only basis for the plaintiff's argument on that point is the deletion of words during the drafting process. And in Entergy this Court says that the deletion of words in the drafting process does not tell us what the statute means. In fact, the

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quote is from Antonin Scalia in which he says it's always perilous to try to derive meaning from words deleted in the drafting process. And the Entergy Court specifically rejected because that was the deletion of words in the drafting process was the primary argument that the plaintiff's were making in that case, and the Court flat out rejected it and said no, we're not going to look at what words were deleted in the process, in a drafting process and try to determine what was meant by what was actually inactive. We're going to look at what the legislature actually wrote in the law that actually passed and not anything else.

JUSTICE DALE WAINWRIGHT: Counsel, what about the statute's use of the word recovery? In tried cases as you apparently have done a lot, you know recovery has to go through the screen of the judge before you determine what the recovery is as opposed to the jury verdicts or the jury award. Why doesn't that have some meaning in this provision?

ATTORNEY FRANK G. CAWLEY: Well I want to get back to the issue of a measure of damages. To me the components or elements necessary to a recovery is the measure of damages. That's the guide post. Juries have to be guided in terms of awarding damages by some standard or measure. This statute adds a component to the old measure of damage which was reasonable and necessary. Now, getting to your question specifically about the word recovery, I don't think that the use of the word recovery precludes a jury finding of the economic damages. And in 41.008a specifically says in an action in which a claimant seeks recovery of damages, and then it goes on to say the trier of fact shall determine the amount of economic damages. So what that means is the simple use of the word recovery does not preclude the trier of fact from considering the elements that are necessary to prove that, to establish that recovery. Let me, I also want to give an example that points out exactly why Justice Lehrmann we can't do this post verdict. Let's assume that a person is injured in an accident and he receives treatment from two treaters. We'll call them Treater A and Treater B. Treater A's bills are $50,000 and Treater B's bills are $50,000. Treater A accepts $25,000 in full satisfaction of its bills through a contractual agreement with a third party health insurer. Treater B is out of network or for whatever reason does not agree to reduce its bills in full satisfaction and the plaintiff remains responsible for the entire $50,000 bill. Now if we do as the petitioners ask us to do, let the jury hear about both sets of $50,000, all $100,000 worth of bills, what happens if the jury comes back with an award of $50,000? Did the jury award the $50,000 as a representation of what Treater A billed or did it award the $50,000 that Treater B billed? And the difference is significant because if the judge sign, this is what I call the danger of an incurably reversible judgment because if the judge signs a $50,000 judgment that is automatically reversible under this Court's teachings in Crown Life Insurance v. Casteelo and in Harris County v. Smith. Those cases say that if we, if you combine invalid and valid theories of recovery or recoverable with unrecoverable damages and we can't tell as the Supreme Court, we can't tell whether the jury awarded damages that are not recoverable, then we've got to reverse the case and we've got to remand it back for a new trial. And so in every situation in which the jury awards some amount less than the full amount of billed expenses, the trial judge isn't going to have any way of knowing what the jury did, what bills it intended to allow recovery for.

CHIEF JUSTICE WALLACE B. JEFFERSON: There are some cases that say that the only reason the plaintiff in your hypothetical was able to afford any of that $50,000 or $75, 000 what have you, is because they had the foresight to obtain insurance. And that it would not be reasonable or equitable to give the tortfeasor the benefit of that plaintiff's foresight paying premiums all these years or what have you. And that seems to be at least one of the bases for permitting recovery of the entire amount in you know a couple states. What's your reaction to that?

ATTORNEY FRANK G. CAWLEY: Okay, well there's a couple of points there Your Honor. First of all, as the premise of your question suggests, that's an argument of equity and fairness. Presumably the legislature took into account all of those issues of equity and fairness and public policy when they decided to enact the statute and they enacted it nonetheless. So I don't think we should concern ourselves with those types of issues. But getting to your, directly to your question what we know, well first of all, this case is not a foresight of obtaining insurance case. This is a Medicare case. Secondly, even in those cases we don't know, we don't have in the record what percentage of people actually had the foresight to go out and buy their insurance or what percentage of

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people get it through their employer or through a union or through other sources. So the premise may be faulty there that they had the foresight to go out and buy it and they spent premiums out of their own pocket and blah, blah, blah.

JUSTICE DAVID M. MEDINA: Those premiums aren't free. I mean if you're working for an employer they take some out of your paycheck the last I checked.

ATTORNEY FRANK G. CAWLEY: Well absolutely, they might. But my point there is the record doesn't support an argument on that. We just don't know how much and on average employers take out of paychecks and those kinds of things. But even more importantly though, the tortfeasor's acts and omissions did not cause the plaintiff to sustain insurance premiums. Buy definition they must have had that insurance before the accident, otherwise they wouldn't get the insurance coverage because there would be a preexisting condition. So they were paying premiums before the accident. Whether the accident happened or not presumably they would keep paying premiums. And they paid premiums, I think this is an important too; people pay premiums not with an eye toward a potential investment in litigation. People pay premiums to protect their families from injury and illness. And the point being is that it's not the foresight that the plaintiff had in obtaining evidence such that they could gain windfall in a litigated matter. The incident that injures the plaintiff has nothing to do with the payment of premiums.

JUSTICE DALE WAINWRIGHT: What's the question to the jury on the amount of medical expenses?

ATTORNEY FRANK G. CAWLEY: I'm glad you asked that. The pattern jury charges already changed. The State Bar Committee, the State Bar Pattern Jury Charge Committee has already put in the pattern jury charge. If there's a question about actually paid or actually incurred that the jury charge must read medical care actually paid or incurred.

JUSTICE DALE WAINWRIGHT: Where is reasonable and necessary?

ATTORNEY FRANK G. CAWLEY: It's not in there and it wasn't in the prior jury charge either. But the point there is if the Pattern Jury Charge Committee believes that the jury is supposed to determine what is actually paid or incurred then the jury must be given that evidence. They can't be simply given evidence of the full amount of reasonable and necessary charges.

JUSTICE DALE WAINWRIGHT: Of course the pattern jury charge is not authoritative.

ATTORNEY FRANK G. CAWLEY: Absolutely.

JUSTICE DALE WAINWRIGHT: It doesn't bind us.

ATTORNEY FRANK G. CAWLEY: That's absolutely right. The pattern jury charge is not law.

JUSTICE DALE WAINWRIGHT: But if in a medical case the plaintiff's evidence about the medical expenses don't include any expert opinion that they're reasonable or necessary, you're going to object and you're going to win.

ATTORNEY FRANK G. CAWLEY: Absolutely. And I--

JUSTICE DALE WAINWRIGHT: It has to be part of the proof.

ATTORNEY FRANK G. CAWLEY: It does have to be part of the proof.

JUSTICE DALE WAINWRIGHT: So it has--go ahead.

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ATTORNEY FRANK G. CAWLEY: And so if you'll remember, if you'll go back to the rule was that I announced that I think this Court should adopt, it says absent proof that past medical care expenses have been actually paid or actually incurred, then evidence of reasonable and necessary charges is legally insufficient. Once you establish, once the plaintiff gets on the stand and says, answers the question how much of your medical bills have been paid? X amount. How much do you still owe? Y amount. That's all you got to do. And--

JUSTICE DON R. WILLETT: There's been talk of windfalls this morning, you used the word windfall a few minutes ago as you construed the statutes. And your client had some good fortune too by striking a Medicare patient, a Medicare plaintiff and therefore you don't' have to pay the full cost of the accident. And there's good fortune I guess on both sides here.

ATTORNEY FRANK G. CAWLEY: Well, I don't think you could characterize my client incurring liability as a windfall. Sure, that liability may not be as much as it used to be.

JUSTICE DON R. WILLETT: But your client is not having to pay the full cost of the accident.

ATTORNEY FRANK G. CAWLEY: Absolutely. I don't think that's a windfall. Putting money in your pocket that is supposed to be earmarked for medical care expenses, but will never be used for that purpose is a windfall. I see my time is up. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

MARSHALL: All rise.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, the Court will hear rebuttal first.

REBUTTAL ARGUMENT OF PETER M. KELLY ON BEHALF OF PETITIONER

ATTORNEY PETER M. KELLY: We have traced the meaning of incurred means through the writings of this Court. We go back to Black and define what actually incurred means. As we said talked about earlier, it's an implied contract and it's all the charges that are incurred for which the patient becomes obligated to pay. That definition was used in the legal context in the med mal in the Avilaes case and in Gomez. And now as I say this I'm trying to remember which case I'm referring to where the attorney's testimony was not that he had been paid or that anybody had paid the $12, 500 in the fees.

JUSTICE DAVID M. MEDINA: That would be Gomez.

ATTORNEY PETER M. KELLY: But merely, that was in Gomez.

JUSTICE DAVID M. MEDINA: Don't you forget it.

ATTORNEY PETER M. KELLY: But it was merely reasonable and necessary. And he was entitled; the defendant doctor was entitled to get that $12,500 in reasonable fees. No evidence that it was paid, no evidence he would ever have to pay it. And that's what we have here; the determination of what is the reasonable and necessary medical expenses. And the reasonableness is it comes in factor, comes into play all throughout the tort process. The duties that are ascribed are to a reasonable person; what steps would a reasonably prudent person take? What are the damages that are incurred? It's what the reasonable damages are as found by the jury. And so one example would be say if I bought a car from my brother and because he loves me he let me buy it for $100, but it's a $20,000 car. I get hit the next day, the car gets totaled. I sue the person that hit me. Do I get $100 because that's just what I paid, or do I get the reasonable value of my economic loss, of my loss? The actual dam-

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age I suffered which was a loss of the car. So we have this reasonable overlay that the jury's supposed to determine the reasonable duties and the reasonable damages. And interpreting this statute.

JUSTICE NATHAN L. HECHT: That's the problem I seem to have. As the time passes it's harder and harder to tell what a reasonable medical charge is. I mean is it what the provider asks for, is it what the insurance industry says this is all we're ever going to pay and everybody says well that's alright, is it if there were some patient choice involved would it be some lesser number? It's very hard to tell.

ATTORNEY PETER M. KELLY: Well that is my--

JUSTICE NATHAN L. HECHT: It's like cars, for example, or real estate.

ATTORNEY PETER M. KELLY: Well that's there's, and this is one problem of applying market economics to healthcare; what is the actual market? We don't have market prices for these things, which is why it's more important for the jury to determine what is reasonable and necessary. And one of the Amicus briefs, one that was just filed this week by Univar, they make that point in saying well we don't know what a reasonable charge is. Well that's not for the paid incurred statute. I mean that is a reason to go to the legislature and lobby them to tinker with the definition of reasonable and necessary in 18.001. That will call for some other legislative acts. It doesn't affect what's paid incurred here. I mean we have reasonable and necessary established in common law and established by statute. If you want to tinker with that definition we should go back to the statute.

JUSTICE DON R. WILLETT: But it does seem as a matter of economics as if wrongdoers are sort of externalizing their cost of wrongdoing onto others, mainly non Medicare patients. You know private insurance premiums go up, you know uninsured people who have means pay more because Medicare rates are so low, hospitals try to recoup that cost be jacking up prices on others. So there may be a benefit to a defendant for striking, I have the good fortune to strike a Medicare patient, but those costs are being externalized onto others kind of in the system.

ATTORNEY PETER M. KELLY: And almost randomly. And as you wrote in the Rankin opinion, we need to avoid actuarial uncertainty. And this does nothing but increase actuarial uncertainty. What is the cost of a defendant say not properly landing a stair? Well that's going to vary depending on whether the person who's injured from taking a misstep has private insurance or has Medicare or has some other way, or you know is paying out of pocket. What it does is it like I said; the tort system is based on reasonability and predictability. That's what actors need to know; what are the predictable results of any particular negligence. If we introduce further actuarial uncertainty beyond simple eggshell plaintiff uncertainty but actually where the payments are going to be coming from, it comes even harder for social and economic actors to determine what the results of their negligence are going to be, what cautions they need to take. But I mean there's sort of a deeper fundamental reason that we need to be looking at that's not just the preamble to the statute. The core is we have a statute; it's imperfectly drafted. We can tell what it's meaning, what its meaning is very basic interpretation. And this is where the Court can apply ockham's razor where you're supposed to take the simplest approach to get the meaning. Now we can adapt the defense point of view and say that well the evidence that's referred to in the title, we have to interpolate a word there, while recovery, that's used differently than it's ever used in any other statute and that actually actually means ultimately or further limitation. And what they're asking the Court to do is to completely rewrite the statute. Oh legislature didn't mean that, they meant something else and we're just going to go ahead and say it. But that's not what the legislature said.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Kelly, I see that your time has expired. I don't see any further questions and so the cause is submitted and the Court will take another brief recess.

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