NO. 01-12-387-CV

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

SHARON HUSTON

V.

UNITED PARCEL SERVICE, INC.

APPEAL FROM THE 270TH JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS
CAUSE NO. 2009-59257
THE HONORABLE BRENT GAMBLE PRESIDING

BRIEF OF APPELLEE
UNITED PARCEL SERVICE, INC.

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For clarity, the parties to this appeal will be called:

Appellant Sharon Huston – "HUSTON"; and

Appellee United Parcel Service, Inc. – "UPS".

An example of citations in this brief to the record are as follows:

1. Citation to the clerk's record: CR (Page #) (e.g., CR 1-3 or Supp.CR 1-3)

2. Citation to the court reporter's record: (Vol. #) RR (Page #) (e.g., 3 RR 1-3)

STATEMENT REGARDING ORAL ARGUMENT

United Parcel Service, Inc. does not request oral argument. United Parcel Service, Inc. suggests that oral argument is not necessary and would not benefit the Court and that the issues presented can be determined upon the briefs and the record. If the Court believes oral argument would be helpful, however, United Parcel Service, Inc. is happy to present oral argument upon the Court's request.

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STATEMENT OF THE CASE

On September 16, 2009, Appellant Sharon Huston ("Huston") filed suit against Appellee United Parcel Service, Inc. ("UPS") seeking to recover damages for personal injuries she alleged to have sustained in an automobile accident with a UPS employee.[1] This case was tried to a jury between November 14, 2011 and November 21, 2011. On November 21, 2011, the jury returned a verdict for Huston awarding her $96,000.00 in personal injury damages.[2] On March 23, 2012,

[1] CR 2
[2] Supp.CR 911-916

the trial court entered a final judgment against UPS. Huston filed her notice of appeal on April 11, 2012.[3]

STATEMENT OF FACTS

On January 8, 2009, Huston was stopped at a red light.[4] Gabriel Haskin ("Haskin"), a UPS employee driving a UPS package car, was stopped for the red light behind Huston.[5] When the light turned green, Haskin began to move. A horn sounded to his driver's side and Haskin turned his head momentarily. When he looked forward again, Haskin realized that Huston was still stopped in front of him. He applied his brakes but was unable to stop before hitting the rear of Huston's vehicle.[6]

Huston contended that she suffered serious personal injuries as a result of the accident. She and her attorney entered into an agreement with a third-party funding company, AR/Net, to pay the medical bills of some of the doctors that treated her.[7] AR/Net negotiated contractual discounts with some of Huston's medical providers and paid them a predetermined percentage of their gross bills.[8] Those medical providers no longer had a right to collect any additional amounts

[3] CR 144
[4] 4 RR 106-107
[5] 4 RR 108
[6] 4 RR 110-11
[7] 5 RR 112
[8] 4 RR 149-55

from Huston for their services.[9] Based upon the Texas Supreme Court's decision in *Haygood v. De Escobedo*, the trial court ruled that, for the purposes of §41.0105 of the Texas Civil Practice and Remedies Code, Huston's actual "paid or incurred" medical expenses were limited to those her medical providers had a legal right to collect.[10]

One of the injuries alleged by Huston was a traumatic brain injury. UPS retained a neuropsychologist, Francisco Perez, Ph.D., to evaluate Huston and provide opinions regarding that injury. Dr. Perez and an assistant, William Guerrero, examined Huston on March 14, 2011.[11] Unbeknownst to Dr. Perez and UPS, Huston secretly tape recorded her examination session.[12] Dr. Perez authored a report detailing his findings and opinions.[13] Dr. Perez was deposed by Appellant four months later on July 14, 2011. At that time, Huston's counsel disclosed the existence of the audiotape for the first time when he attempted to impeach Dr. Perez's testimony with the audiotape.[14] Though Dr. Perez adamantly disagreed, Huston's counsel contended the audiotape contradicted a single statement in Dr. Perez's report regarding the manner in which Huston's examination session

[9] 4 RR 154-55
[10] 1 RR 24-27
[11] 5 RR 43-44
[12] Supp.CR 640
[13] Supp.CR 609
[14] Supp.CR 639-41

ended.[15] Huston filed a motion to strike Dr. Perez's testimony.[16] The motion was denied. Contrary to Appellant's representation and unsupported by any written record, UPS is unaware of any trial court ruling that "severely restricted the scope of Huston's cross-examination of Dr. Perez and only allowed her to present testimony regarding his fees to the jury," as she now contends.

On March 23, 2012, after hearing multiple post-trial motions, the trial court entered a final judgment in favor of Huston and against UPS.[17] It is from this judgment that Appellant appeals.

SUMMARY OF THE ARGUMENT

Appellant did not preserve her complaint regarding the alleged denial by the trial court of her right to cross-examine Appellee's retained neuropsychology expert, Francisco Perez, Ph.D. There is no evidence in the record of any ruling by the trial court affecting her ability to cross-examine Dr. Perez. Even if the complaint had been preserved, however, the trial court did not deny Appellant the opportunity to fully cross-examine Dr. Perez. Appellant could have called Dr. Perez to testify live at trial and question him about anything she desired. She alone chose not to do so. While Appellant may regret that decision now, her inability to cross-examine Dr. Perez was not the result of any error by the trial court.

[15] Supp.CR 639-41; Supp.CR 646-47
[16] Supp.CR 667
[17] CR 127

Appellant alleged she sustained serious personal injuries as a result of the subject accident. A portion of Appellant's medical expenses were paid for by AR/Net, a third-party funding company. AR/Net negotiated discounts of the medical providers' bills and then entered into contracts with the medical providers whereby AR/Net agreed to pay the providers a predetermined percentage of their gross billings. After payment, the medical providers had no further right to collect any additional money for their services provided to Appellant. Based upon the Texas Supreme Court's holding in *Haygood v. De Escobedo*, the trial court correctly ruled that, under §41.0105 of the Texas Civil Practice and Remedies Code, Appellant could only recover (and show evidence to the jury of) the amounts that her medical providers had a legal right to be paid. In the case of the medical providers that contracted with AR/Net, the amount they were legally entitled to be paid was what they agreed to accept pursuant to their contract with AR/Net. The trial court did not commit error, therefore, in excluding evidence of those providers' gross bills.

Alternatively, if the trial did commit error by excluding evidence of the gross bills for the medical providers that contracted with AR/Net, that error was harmless and does not require a reversal of the judgment. Appellant presented evidence at trial of $206,146.62 in alleged past medical expenses. After hearing the evidence, the jury awarded her only $50,000.00 for past medical expenses -

less than twenty-five percent of the amount she requested. There is no evidence in the record that suggests the jury would have awarded her any additional amounts for past medical expenses had they seen evidence of the medical providers' gross billings instead of the amounts actually paid.

The jury awarded Appellant damages for past and future physical pain and mental anguish, loss of earning capacity sustained in the past, physical impairment sustained in the past and medical expenses incurred in the past. The jury did not award any damages for loss of future earning capacity, past or future disfigurement, future impairment or future medical expenses. At trial, Appellee presented substantial amounts of evidence contradicting Appellant's claims regarding the nature of the accident, her injuries and the necessity of the medical treatment she received in the past and claimed to need in the future. Contrary to Appellant's contention, ***all*** of the evidence she presented at trial regarding her injuries and the cause of them was disputed by Appellee. It was within the sole discretion of the jury to believe or disbelieve Appellant's claims. The jury's decision not to award some of the damages sought by Appellant is clearly supported by the evidence in the record and Appellant's "greater weight of the evidence" complaint is without merit.

ARGUMENT AND AUTHORITIES

ISSUE 1:

DID THE TRIAL COURT DENY APPELLANT THE OPPORTUNITY TO CROSS-EXAMINE APPELLEE'S RETAINED NEUROPSYCHOLOGY EXPERT, DR. PEREZ?

A. APPELLANT HAS NOT PRESERVED THIS COMPLAINT FOR APPEAL

To preserve a complaint for review on appeal, the complaining party must make a record showing that: (a) the complaint was made to the trial court by a timely request, objection or motion; and (b) the trial court either ruled or refused to rule on the request, objection or motion.[18] In her first appellate issue, Appellant Sharon Huston complains that she was denied the opportunity to cross-examine Francisco Perez, Ph.D. ("Perez"), a neuropsychology expert retained by Appellee United Parcel Service, Inc. to opine on Huston's alleged mental illness and/or brain injuries. Interestingly, however, Appellant only cites portions of the appellate record which contain her objections to *Appellee's* page/line designations for Perez's deposition testimony and a copy of Perez's deposition transcript (attached as an exhibit to a motion filed with the trial court), neither of which have bearing on her complaint that she was denied the opportunity to cross-examine Perez at trial.

For Appellant to have preserved this issue for appeal, it would be necessary for the appellate record to show that: 1) Appellant offered specific portions of

[18] TRAP 33.1(a).

Perez's deposition testimony at trial and/or Appellant attempted to call Perez to testify live at trial; and, 2) the trial court refused to allow the testimony.[19] The appellate record does not reflect either. Appellant has not cited, and Appellee has been unable to find, anything in the appellate record reflecting any ruling by the trial court affecting Appellant's ability to cross-examine Perez. Consequently, the complaint raised by Appellant in her first appellate issue should be dismissed.

B. THE TRIAL COURT DID NOT DENY APPELLANT THE OPPORTUNITY TO CROSS-EXAMINE DR. PEREZ AT TRIAL

Much of the following discussion, while factually accurate, is not reflected in the appellate record because Appellant failed to have a record made of the events described. Since Appellant has raised this issue in her brief, however, Appellee will respond out of an abundance of caution so that the Court may have a better understanding of what transpired and be assured that no error occurred.

To assist in forming opinions regarding Appellant's alleged injuries, Perez and his assistant, William Guerrero ("Guerrero"), conducted an evaluation of Appellant on March 14, 2011.[20] The evaluation consisted of a series of tests which Perez and Guerrero were unable to complete due to lack of cooperation by Appellant.[21] Perez subsequently authored a report detailing the evaluation and his opinions. In his report Perez stated that, "…testing was resumed at 12:35. Within

[19] Id.
[20] Supp.CR 621.
[21] Supp.CR 622-23.

a minute of the initiation of the testing [Appellant] became uncooperative and refused any more testing. She stood up and left the office and that was the end of the evaluation."[22] Unbeknownst to Perez and Appellee, Appellant had secretly recorded her session with Perez and Guerrero using a tape recorder hidden in her clothing.[23]

On July 14, 2011, four months after his evaluation of Appellant, Perez was deposed. At Perez's deposition, Appellant's counsel confronted Perez with a short portion of the previously unproduced audio recording and attempted to portray Perez as dishonest because Appellant's counsel believed the audio clip showed that it was Guerrero that ended the evaluation session and not Appellant, as was stated in Perez's report.[24]

Appellant produced the entire audio recording after Perez's deposition. When one listens to the entire recording, Plaintiff's lack of cooperation during the evaluation is abundantly clear. While it is true that Guerrero did ultimately end the session and tell Appellant she could leave, there is little doubt that he ended the session early because Appellant's lack of cooperation made it pointless to proceed.

Though the manner in which the evaluation session ended was not a basis for any of Perez's opinions, Appellant continued to attack Perez on the related

[22] Supp.CR 611
[23] Supp.CR 640
[24] Supp.CR 639-41

statement made in his report. Appellant filed a motion with the trial court to exclude his testimony on the grounds of alleged perjury.[25] That motion was denied. Appellant then filed a separate lawsuit against Perez and Guerrero, *Sharon Huston v. Francisco Perez and William Guerrero*, Cause No. 2011-42426, in the 55th Judicial District Court of Harris County, Texas. In that lawsuit Appellant asserted causes of action against Perez and Guerrero for conspiracy, defamation, fraud and intentional infliction of emotional distress, contending that their actions were designed to impede her recovery in this lawsuit. Those claims were summarily dismissed.

While it does not appear in the record, prior to trial Appellee objected to the use by Plaintiff of any portion of Perez's deposition testimony at trial that related to the audio recording. Appellee objected to the use of those portions of the deposition because: 1) Appellant failed to produce the recording timely, instead keeping it secret for four months so that she could attempt to ambush the witness with it at his deposition; and, 2) Appellant only allowed Perez, at his deposition, to listen to approximately one to two minutes out of several hours of recorded audio, and Appellee did not believe it was fair for Perez to have to answer questions without having the opportunity to first listen to the entire recording.

[25] Supp.CR 667

In her appellate brief, Huston argues she did produce the audio timely, because she "had no way to know the recording would be necessary, or even relevant, until Dr. Perez testified in a manner so clearly inconsistent with the truth as evidenced by the recording."[26] Contrary to Plaintiff's contention, Appellee argued that audiotape was a witness statement pursuant to Rule 192.3(h) of the Texas Rules of Civil Procedure, which required Appellant to supplement her discovery responses and produce the recording as soon as practical, not four months later at the deposition.[27]

As a result of Appellant's failure to timely produce the audio recording, the trial court, pursuant to Rule 215 of the Texas Rules of Civil Procedure, refused to allow Appellant to offer any deposition testimony of Perez at trial ***that related to the manner in which the session ended.*** The trial court's ruling applied to deposition testimony offered by Appellee as well. The end result was that Appellant could not offer deposition testimony of Perez suggesting that Guerrero ended the session, and Appellee could not offer deposition testimony suggesting that Appellant ended the session. The trial court's ruling, however, only applied to deposition testimony, and it was made clear by the trial court that Appellant could call Perez as a live witness at trial and ask him those questions then since Perez now had had the opportunity to review the entire recording.

[26] Appellant's Brief, Pgs. 6-7.
[27] See Tex. R. Civ. Pro. 192.3(h) and 193.5.

Based on the ruling of the trial court, Appellant could have offered any portions of Perez's deposition testimony that did not address the manner in which the evaluation session ended. Appellant's cross-examination of Perez at his deposition spanned approximately sixty-five pages.[28] Appellant's cross-examination of Perez related to the manner in which the evaluation session ended spanned approximately fourteen pages.[29] Of the remaining fifty-one pages of cross-examination testimony, Appellant chose to offer only one page of questions related to Perez's hourly rate and fees.

If Appellant felt her cross-examination of Perez at his deposition was inadequate, she could have called him to testify live at trial. In fact, Plaintiff did serve Perez with a trial subpoena. Perez was served with a trial subpoena on the evening of November 16, 2011 commanding him to appear the following morning, November 17, 2011. Perez, however, had a previously scheduled out-of-town speaking engagement on that date. The trial court was informed of such conflict and Dr. Perez agreed to appear on November 21, 2011, the following trial day. At that time, Appellant's counsel announced that he did not want to wait to call Perez and decided he would play his limited deposition offer instead.

Appellant now attempts to convince this Court not only that her failure to cross-examine Perez on issues other than his fees was the consequence of an

[28] Supp.CR 617-49.
[29] Supp.CR 639-41; and 646-48

erroneous ruling by the trial court, but also that the jury relied exclusively on Perez's unchecked testimony in determining that her injuries were either exaggerated or unrelated to the subject accident. Appellee believes that Appellant grossly over-estimates what weight, if any, the jury gave to Perez's testimony in finding her injury claims to be suspect. The following non-exhaustive list illustrates other significant evidence the jury had to consider related to Appellant's alleged injuries:

- Dr. Thomas Greider, Appellee's orthopedic expert witness, testified that Appellant's injury claims were inconsistent with the nature of the accident itself and with the results of objective tests performed by Appellant's doctors after the accident[30];

- Medical records from Dr. Sophia Banu, Appellant's treating psychiatrist, reflected that when Appellant appeared for her appointments, she would often talk like a child, her clothes were buttoned improperly and she generally was in an unkempt state.[31] Dr. Banu testified that she would expect others to observe these psychotic symptoms as well, and that it would be odd and unusual if she only exhibited them during her appointments with Dr. Banu.[32] Appellant's mother, Norma King, subsequently testified she never observed any such psychotic behavior.[33] Appellant's daughter also testified she never observed that type of behavior.[34] Further, no such behavior was noted in the medical records of any other Appellant's other treating doctors.

- Dr. Banu testified she had formed her opinions regarding Appellant's brain injury based upon the history of the accident provided to her by Appellant and her mother. After considering other evidence presented

[30] See, generally, Dr. Greider's testimony, 33 RR 43-104.
[31] 9 RR 200, 203, 206, 209-10
[32] 3 RR 139-40
[33] 4 RR 212-13
[34] 6 RR 25

to Dr. Banu during her trial testimony, she changed her opinion and testified that it appeared to her that the some of the history, including the severity of the accident, had been exaggerated[35]; and

- Surveillance video of Appellant depicted her working at a car dealership after she claimed she was unable to work and depicted her walking and moving in ways that were inconsistent with her alleged injuries.[36]

Despite Appellant's contention, the record is replete with evidence suggesting her injuries were exaggerated or unrelated to the accident.[37] There is absolutely no support for Appellant's argument that Perez was the primary witness the jury relied upon in refusing to award her the millions of dollars in damages she sought. Even if that had been the case, however, Appellant was not denied the right to fully cross-examine Perez. Her failure to conduct a more thorough cross-examination was solely her decision. Consequently, should the Court not dismiss Appellant's first appellate issue for failure to preserve her complaint, the Court should overrule that issue.

[35] 3 RR 141-45

[36] The surveillance video is marked in the record as RPT REC EXHIBIT (Surveillance Tape) FLD 020413-Dx19 and RPT REC EXHIBIT (Surveillance Tape) FLD 020413-Dx20.

[37] Additional related evidence is cited and discussed below in response to Appellant's third appellate issue.

ISSUE 2:

WHEN A THIRD-PARTY NEGOTIATES AND PAYS A DISCOUNTED PRICE TO A CLAIMANT'S MEDICAL PROVIDER FOR HIS BILLS, CAN THE CLAIMANT STILL RECOVER THE GROSS AMOUNT OF THE BILLS EVEN THOUGH THE MEDICAL PROVIDER DOES NOT HAVE RIGHT TO COLLECT THAT FULL AMOUNT?

A. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF MEDICAL BILLS NOT "PAID OR INCURRED" BY APPELLANT

In her second appellate issue, Huston complains that the trial court improperly excluded evidence of amounts charged by some of her medical providers. Even though those providers contractually agreed to discount their bills, accepted a fraction of the billed amount as payment in full, and had no legal right to collect any additional amounts, Appellant nonetheless contends she was entitled to show the jury, and recover, the gross amounts billed because she claims to have contractually obligated herself to pay the full, undiscounted amount to an unrelated third-party funding company.

At the heart of Appellant's argument is a company called AR/Net. Working with plaintiff personal injury attorneys, AR/Net negotiates discounts with the claimant's treating doctors and then enters into contracts with the medical providers to pay them only a percentage of the gross billings. Once paid, the doctors no longer have a legal right to recover any additional money from the claimant.[38] AR/Net claims that it obtains the claimant's signature on a document purporting to obligate the claimant to pay AR/Net the total gross billed amounts

[38] 4 RR 154-55

(not the discounted amount with interest), at the conclusion of the litigation, regardless of the outcome, and regardless of whether the claimant actually recovers any money.[39]

In Appellant's case, AR/Net entered into contracts with some, but not all of Appellant's medical providers. For example, AR/Net entered into a contract with Dr. Jose Rodriguez, one of Appellant's orthopedic doctors, to pay thirty-five percent of his gross bills.[40] While Dr. Rodriguez billed $59,329.00, he was only paid $20,782.65.[41] The gross billings of the medical providers that contracted with AR/Net were $240,849.44. The amounts paid to these providers by AR/Net totaled $81,859.[42] Additionally, Appellant had $135,158.36 in outstanding medical bills with providers that did not contract with AR/Net.[43] As discussed in more detail below, the trial court held, pursuant to the Texas Supreme Court's decision in *Haygood v. De Escobedo*, that what was "actually paid or incurred" for the purposes of §41.0105 of the Texas Civil Practice and Remedies Code, were the amounts her medical providers were legally entitled to collect.[44] As to those providers that contracted with AR/Net, therefore, Appellant could only present evidence of the amounts they were paid or were entitled to collect under their

[39] 4 RR 150-51
[40] Supp.CR 813-14
[41] 7 CR 13 (under heading "Orthopedic Institute").
[42] 4 RR 146
[43] See 9 RR 51 and cross-reference with 7 RR 13.
[44] *Haygood v. De Escobedo*, 356 S.W.3d 390 (Tex. 2011),

contract. Based on the trial court's ruling, the parties stipulated that amount of Appellant's paid or incurred medical expenses was $206,146.62.[45]

Under §41.0105 of the Texas Civil Practice and Remedies Code, a claimant's recovery for medical expenses is limited to those amounts that have been "actually paid or incurred."[46] Prior to *Haygood v. De Escobedo*, Texas courts were inconsistent in their application of the "paid or incurred" limitation on recovery required by §41.0105. Third-party funding companies came into existence attempting to profit off of the paid or incurred limitations on personal injury plaintiffs' recoveries for medical expenses in Texas and other states around the country. Their scheme is to negotiate the medical bills down and pay pennies on the dollar to the doctors who accept the lower fee as being payment for their services and release their legal right to collect any additional money for their services. The payments are oftentimes made by companies with unassuming names who are difficult to track, and sometimes are not even reflected in the medical provider's billing records.

The scheme continues at trial when the patient/claimant seeks to recover the full amount of the medical bills in question, claiming that they have "incurred" the

[45] 7 RR 15. While Appellant had $81,859 in paid or incurred medical expenses for doctors paid by AR/Net and $135,158.36 in paid or incurred medical expenses for doctors not paid by AR/Net, the total stipulated amount is less than the sum of these numbers because, for reasons unknown to Appellee, Appellant did not seek to introduce evidence of medical expenses for several of the medical providers paid by AR/Net.
[46] Tex. Civ. Prac. & Rem. Code §41.0105.

full amount of the bills because they must reimburse the third-party payor. While these third-party funding companies are certainly in business to make a profit, it is doubtful any ever expect to be reimbursed for the full amount of the bills. In fact, it is difficult to imagine an attorney allowing their client to enter into an agreement obligating them to reimburse the third-party payor for 100% of the gross medical bills (when the third-party payor only paid a fraction of that amount), regardless of the outcome of the litigation. Furthermore, such a contract would likely be usurious and unenforceable.

For those trying to determine how to correctly apply §41.0105, the Supreme Court provided a clear answer in *Haygood v. De Escobedo.* That court was confronted with interpreting the meaning of "paid or incurred" under section 41.0105 of the Texas Civil Practice and Remedies Code, and determining what evidence of medical bills could be presented to a jury by a personal injury plaintiff. Recognizing that damages for personal injury include reasonable expenses for necessary medical care, the court noted that medical providers oftentimes charge far in excess of the amounts they are actually paid. This is because medical providers often have contractual agreements with insurers and other parties limiting the amount they can collect to a specified percentage of the total bills, providing an incentive to set their "full charges" as high as possible. In Haygood's case, for example, his medical providers had billed a total of $110,069.12, but had

made adjustments to their bills to bring the total amount owed to only $27,739.43.[47]

Haygood argued that evidence of the adjustments made by his medical providers was barred by the collateral source rule. He further argued that under §41.0105 he had "incurred" the full amount of the medical bills even though a lesser amount had been "paid."[48] Consequently, Haygood argued that the jury should see the full amount of the medical bills and that his recovery should not be limited to the amounts paid to the medical providers. The Texas Supreme Court disagreed, holding that "the common-law collateral source rule does not allow recovery as damages of medical expenses a healthcare provider is not entitled to charge."[49] Further, the Court held that under §41.0105, "'actually paid or 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."*[50] Therefore, "[41.0105] limits recovery, and consequently the evidence at trial, to expenses *that the provider has a legal right to be paid."*[51]

Appellant in this case tries to divorce herself from *Haygood's* clear proscription by arguing that AR/Net is simply a factoring company which bought her medical providers' accounts receivable and now stands in their shoes to collect

[47] Id. at 392.
[48] Id. at 395.
[49] Id. at 396.
[50] Id. at 396-97 (emphasis added).
[51] Id. at 391.

the full amount from her. Labeling AR/Net as a factoring company is anything but accurate. In a true factoring scenario, the factor purchases another company's accounts receivable by making an advance payment of a percentage of the value of the accounts. The factor then attempts to collect the debts. Typically the factor and the debtors are strangers to one another, and the purchase transactions are completed without involvement from the debtors. AR/Net, however, does not independently reach out to medical providers to purchase their accounts receivable with the goal of tracking down the debtors to secure payments. AR/Net already knows exactly who the debtors are because, before buying any account, it has entered into a contract with the debtor/claimant and their attorney to fund that individual's medical care. AR/Net's transactions are more similar to loans than to factoring transactions. Before lending the money, AR/Net requires the claimant to sign an agreement giving AR/Net a security interest in their personal injury claim.[52] For the mutual benefit of both AR/Net and the claimant, AR/Net then negotiates with the medical providers for discounts on their bills. Then, instead of lending the money to the claimant to pay the medical provider, AR/Net pays the provider directly.

In the case of Appellant Sharon Huston, AR/Net paid approximately thirty-five percent of the billed amounts to her medical providers. If Appellant were

[52] Supp.CR 760-62, Section 5

actually to repay the full undiscounted amount to AR/Net, that would be the equivalent of AR/Net having made a loan at a nearly 300% interest rate. While Appellant claims she is contractually bound to pay this entire amount, the only contract that either she or AR/Net ever produced was a contract signed by AR/Net, Appellant and her counsel on May 6, 2011.[53] Interestingly, that date is *after* Appellant finished receiving medical treatment from AR/Net paid doctors and *after* the medical bills had already been paid. Appellee can think of no reason why Appellant would sign such a contract after her bills had already been paid other than to attempt to circumvent the recovery limitations of Tex. Civ. Prac. & Rem. Code. §41.0105. This scheme makes one wonder what the true agreement is between Appellant and AR/Net.

Ultimately, the language of the true agreement is of no consequence because the Supreme Court's holding in *Haygood v. De Escobedo* is clear – "actually paid or incurred" means what the medical provider, not an insurance company or a third-party funding company, has a legal right to be paid. In the case of Appellant's medical providers that contracted with AR/Net, they had only a legal right to be paid the percentage of their bills agreed to in their contracts and the trial court correctly excluded evidence of any amounts other than what the medical providers had a right to be paid. To find otherwise would essentially render

[53] Supp.CR 760

§41.0105 meaningless. Savvy Plaintiff's lawyers would always arrange for third-party funding companies to pay for their personal injury clients' medical expenses, whether those clients had medical insurance or not. The funding companies would first negotiate substantial discounts with the medical providers. Then, while shaking hands with the claimant under the table and secretly agreeing to some sharing of the ultimate recovery, they would sign self-serving written agreements (while crossing their fingers) that stated the claimants still owed the funding companies the full amount of the bills. By doing so the claimant would then seek to recover the full amount of the medical bills at trial, and, if successful, share the recovery with the funding company, resulting in a windfall to both. Such windfalls are exactly what §41.0105 and *Haygood* attempt to prevent.[54]

Since *Haygood v. De Escobedo* prohibits the recovery of medical expenses the medical provider does not have a legal right to collect, the trial court did not commit error in limiting evidence at trial to those amounts. Consequently, Appellant's second appellate issue should be overruled.

B. ALTERNATIVELY, IF THE TRIAL COURT COMMITTED ERROR, THAT ERROR WAS HARMLESS AND APPELLANT HAS NOT MET HER BURDEN OF PROOF

Though Appellee believes that the trial court's evidentiary ruling on Appellant's "paid or incurred" medical bills was correct, to the extent this Court may find otherwise, any error was harmless error. To reverse a judgment based on

[54] See *Haygood*, 356 S.W.3d at 395-96.

evidentiary error, the party seeking the reversal must show that the error probably resulted in an improper judgment.[55] Appellant here has made absolutely no showing that the trial court's alleged error in excluding evidence of the gross medical bills from providers paid by AR/Net probably resulted in an improper judgment, nor can she.

Even with evidence of those amounts excluded, Appellant still presented evidence to the jury of $206,146.62 in past medical expenses that she alleged were related to and made necessary by the subject accident.[56] Considering that evidence, the jury awarded Appellant only $50,000.00 for her past medical expenses, less than twenty-five percent of what she sought.[57] Since the jury did not award Appellant even close to the full amount of her alleged past medical expenses, there is nothing in the record, nor anything in Appellant's arguments, that suggests the jury probably would have awarded her a larger amount had they seen evidence of the undiscounted amounts. Consequently, even if this Court finds the trial court committed error, that error was harmless and does not require a reversal of the judgment.

[55] See *Walker v. Hitchcock Independent School Dist.*, 2013 WL 3771302 (Tex.App.—Houston [1st Dist] 2013)(citing *City of Brownsville v. Alvarado,* 897 S.W.2d 750, 753-54 (Tex. 1995)).
[56] 7 RR 15.
[57] Supp.CR 915

ISSUE 3:

WERE THE DAMAGES AWARDED BY THE JURY AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE AS TO BE MANIFESTLY UNJUST?

In her third and final appellate issue, Appellant complains that the amount of the jury's award was so against the great weight and preponderance of the evidence as to be manifestly unjust. Specifically, Appellant complains of the jury's failure to award her any damages for future loss of earning capacity, disfigurement, impairment and future medical expenses. The essence of Appellant's argument is that the evidence was undisputed as to these elements of damages and the jury was not at liberty to award her nothing for them. The flaw with Appellant's argument is that it ignores important and substantial evidence offered by Appellee in defending Appellant's claims at trial.

Before a jury awards damages for an injury, it must first determine that the injury was caused by the underlying occurrence. In awarding damages, the jury in this case was specifically instructed to award damages only for Appellant's "injuries, if any, resulting from the occurrence in question."[58] If the jury did not believe that Appellant actually suffered an injury she alleged, it was not required to award damages for that injury. Similarly, if the jury did not believe that an injury alleged by Appellant was caused by the subject accident, it was not required to award damages for that injury. Appellant claimed that the accident injured her low

[58] CR 126-27

back, neck, knee and wrist and that surgery was required for each injury. Appellee disputed each injury and brought forth evidence to prove that there was no injury, or if there was, that it was not caused by the subject accident. The fact that the jury awarded Appellant less than twenty-five percent of the past medical expenses she sought at trial, and nothing for future medical expenses, evidences that the jury did not believe all of Appellant's injuries were real or caused by the accident at issue.[59]

To prove her injury claims, Appellant relied heavily upon her own testimony and the testimony of several doctors who offered causation opinions based upon prior medical histories and details of the accident provided to them by Appellant.[60] Appellant's credibility, therefore, was an important factor for the jury to consider in assessing her injury claims. Substantial evidence presented at trial called her credibility into question. For example, Appellant testified that prior to the accident in question she was engaged to marry a gentleman named Jeffrey.[61] Appellant testified that as a result of the accident Jeffrey ended their engagement and she lost her "future," and that it was very difficult to be alone.[62] When Appellant's only daughter testified later at trial, she testified to how close she was with her mother,

[59] Id.
[60] See, e.g. 4 RR 55-59 (testimony of Appellant's orthopedic expert, Dr. Jose Rodriguez, explaining that in forming opinions regarding Appellant's injuries and their cause he relies upon the accuracy of the history provided to him by Appellant)
[61] 5 RR 126-27
[62] 5 RR 127

yet she had no knowledge of her mother ever having been engaged to Jeffrey.[63] Further, Appellant claimed at trial to have been employed and earning $4,000 per month at the time of accident. Appellee presented medical records to the jury from the emergency room where Appellant was seen after the accident reflecting that Appellant was actually unemployed at that time.[64] Perhaps the most damaging evidence to Appellant's credibility was a surveillance video taken more than a year after the accident. Appellant presented herself to the jury as a woman who could barely walk, and then only with the aid of a walker while in great pain. The twenty minute surveillance video clearly showed her being able to walk normally without a walker and in no apparent distress.[65]

The jury was also presented with substantial evidence directly contradicting Appellant's injury claims and the damages that would necessarily flow from those injuries, such as loss of earning capacity, disfigurement, impairment, and future medical expenses. Appellee presented evidence that the accident in question was a low speed collision that occurred at less than five miles per hour and resulted in minimal vehicle damage.[66] Given the nature of the accident involved, Appellee's defense was that Appellant's injuries were either grossly exaggerated and/or wholly unrelated to the subject accident and Appellee presented a significant

[63] 6 RR 29
[64] 5 RR 16-22
[65] Surveillance video identified in appellate records as RPT REC EXHIBIT (Surveillance Tape) FLD 020413Dx19.mp4
[66] See, e.g., testimony of Gabriel Haskin, 4 RR 113-14.

amount of evidence in support of those defenses. For example, the jury heard Appellant's call to 9-1-1 which was made nearly an hour and a half after the accident, in which Appellant did not request an ambulance or claim she was injured.[67] The jury saw medical records from Ben Taub Hospital reflecting that Appellant went home before going to hospital three hours later, contradicting her testimony that she was taken straight to the hospital after the accident.[68]

The jury heard testimony from Dr. Thomas Greider, an orthopedic expert retained by Appellee, that it was his opinion Appellant did not sustain any significant injuries in the subject accident, and that any injuries she had were unrelated to the accident.[69] Dr. Greider also testified that he believed Appellant's injury claims were driven primarily by secondary gain, or a motivation to recover money in her lawsuit.[70] The jury heard testimony from Dr. Jose Rodriguez, Appellant's own treating orthopedic surgeon, who admitted that even he did not believe that all of Appellant's alleged injuries were caused by the subject accident.[71] The jury also heard testimony from John Laughlin, Appellant's retained biomechanical engineering expert, stating that if the accident happened at

[67] 9-1-1 Call, identified in the appellate record as RPT REC EXHIBIT (911 Call) FLD 020413R-PX1.mp3; see also 5 RR 150-151
[68] 9 RR 199; 5 RR 151-153.
[69] See, generally, Dr. Greider's testimony, 33 RR 43-104.
[70] 3 RR 104-06
[71] 4 RR 69-71

less than ten miles per hour, it was unlikely Appellant would have sustained any neck, back or knee injuries.[72]

Further, while Appellant alleged she sustained a traumatic brain injury as a result of the accident, the jury heard evidence that the only person to whom Appellant exhibited brain injury symptoms was her treating psychiatrist, Dr. Sophia Banu.[73] Appellant's own mother and daughter testified Appellant showed no signs of a brain injury.[74] Additionally, Dr. Francisco Perez, Appellee's retained neuropsychologist, testified that he did not believe Appellant suffered any mental illness or brain injury.[75] Dr. Perez also opined that Appellant's claims were driven by secondary gain.[76]

There is ample evidence in the record upon which the jury could reasonably conclude that some or all of Appellant's injuries were not caused by the underlying accident, and, therefore, that Appellant did not suffer damages in the form of loss of earning capacity, disfigurement, impairment and/or future medical expenses as a result thereof. In addition to the evidence discussed above, the record also contains evidence contradicting the specific elements of damages Appellant complains the jury was required to award. For example, Appellant complains of the jury's failure to award her damages for loss of earning capacity. At trial she alleged that

[72] 2 RR 181-82.
[73] 3 RR 139-40
[74] 4 RR 212-13; 6 RR 25
[75] 5 RR 70-71.
[76] 5 RR 71-78

immediately prior to the accident she had taken a contract position as a photographer with a company called D-Mars that paid $4,000 per month and that as a result of the accident she was unable to return to work. While she was conveniently able to produce an employment contract at trial for the benefit of the jury, the jury heard evidence that when Appellee had subpoenaed records from her alleged employer more than a year earlier, they were unable to produce any such contract.[77] The jury also saw medical records from the emergency room Appellant visited after the accident which indicated she was unemployed at that time.[78] The jury was also provided with Appellant's earnings records from the Social Security Administration and IRS tax records which reflected a poor and inconsistent earning history prior to the accident.[79] Further, the jury heard testimony from Appellant's orthopedic surgeon, Dr. Jose Rodriguez, that Appellant should be able to return to work.[80]

Appellant also complains of the jury's failure to award her damages for disfigurement and medical expenses. With respect to her claim for disfigurement from the forehead scar discussed by Appellant in her brief, she admitted at trial that she did not cut her forehead in the accident.[81] Further, medical records generated from her visit to the hospital after the accident made no mention of any

[77] 5 RR 16-22
[78] 5 RR 16-22
[79] 10 RR DX-16 and DX-18
[80] 4 RR 85-86
[81] 5 RR 135-36.

injury to her head.[82] As to future medical expenses, the jury heard testimony from Dr. Rodriguez, Appellant's own doctor, that after he performed the neck and back surgeries, MRI's showed no nerve compression, there was nothing he could see that would be causing Appellant pain and there were no further medical procedures planned for her neck or back.[83]

Ultimately the jury is the sole judge as to the credibility of the witnesses and the weight given to their testimony.[84] In resolving contradiction and conflict, the jury may choose to believe all, a part or none of the testimony of any witness in arriving at their findings and in determining what is most reasonable under the evidence.[85] During this trial, the jury heard evidence that both supported and contradicted each of Appellant's claims for damages. Since the jury failed to award damages for some of Appellant's claims, it can be assumed that the jury tended to find Appellee's evidence more credible. While Appellant is understandably unhappy with the jury's decision, her unhappiness does not warrant a new trial. Appellant may disagree with the jury's answers, but they are nonetheless supported by substantial amounts of evidence directly contradicting Appellant's claims. The jury's failure to award some elements of damages was not

[82] 9 RR 196-99
[83] 4 RR 88-89
[84] See *Kiel v. Texas Employers Insurance Association*, 679 S.W.2d 656, 658 (Tex.App.—Houston [1st Dist] 1984, no writ).
[85] See *Town of South Padre Island v. Jacobs,* 736 S.W.2d 134, 140 (Tex.App.—Corpus Christi 1986, writ denied).

against the greater weight of the evidence, and Appellant's third appellate issue should be overruled.

CONCLUSION

Appellant did not preserve her complaint regarding her cross-examination of Dr. Perez for appeal and Appellant's first appellate issue should be dismissed. Even if Appellant had preserved the complaint for appeal, the trial court did not deny her the opportunity to fully cross-examine Dr. Perez at trial.

Under the Texas Supreme Court's holding in *Haygood v. De Escobedo,* "actually paid or incurred" for the purposes of §41.0105 of the Texas Civil Practice and Remedies Code means the amount the medical provider is legally entitled to be paid. Those medical providers of Appellants that entered into contracts with AR/Net to discount their bills were only legally entitled to be paid the discounted rate they negotiated with AR/Net. The trial court correctly ruled that, with respect to those medical providers, the amount of expenses "actually paid or incurred" was what they agreed to be paid under their contracts. The trial court did not commit error, therefore, by excluding evidence of amounts of their gross billings. Even if it was error to exclude that evidence, however, that error was harmless because the jury only awarded Appellant a small fraction of the expenses she asked for.

The jury did not award Appellant any money for some of the personal injury damages she alleged. Appellee presented evidence at trial to contract all of

Appellant's claims and the jury's decision not to award certain damages to Appellant is supported by the ample evidence in the record. Consequently, the jury's failure to award some elements of damages was not against the great weight and preponderance of the evidence.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee, UNITED PARCEL SERVICE, INC., prays that this Court affirm the trial court's judgment, award it appellate costs, and for such other and further relief, both at law and in equity, to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellee United Parcel Service, Inc. complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 7,078 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1). The word-count was obtained using the word-count function of Microsoft Word, the computer program used to prepare the document.

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By: /s/ C. Creighton Carr, II
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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Brief of Appellee United Parcel Service, Inc. was delivered to counsel for all parties by U.S. Certified Mail Return Receipt Requested on this the 29th day of August, 2013 as follows:

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