"What in the 18 Double-01 is Going on Here?"

Tex. Civ. Prac. & Rem. C. 18.001

by
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Dr. Doe, if you will please raise your right hand…….

Q. Doctor, tell me, how much do you charge for a rotator cuff surgery?

A. You know, I have no idea. You will need to ask my billing manager, Martha.

Q. Well, do you think that $175,000 is a reasonable and customary charge for a surgery facility in Abilene?

A. I really do not know.

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Q. Well, is $100 a visit a normal charge for post-surgery physical therapy?

A. Again, quit pestering me. I have no idea.

Q. Doctor, how do you even run a business?

A. I don't. I run a profession. I hire others to run the business.

How many times have you asked a doctor during a deposition about medical expenses, only to get befuddled by the absolute total inability to have any idea of his own billing practices, much less those of other medical professionals and subject areas?

I. HISTORY

In order to recover medical expenses as a plaintiff, the plaintiff must not only establish the amount of the medical expense, but that the amount is reasonable, necessary, and was proximately caused by the injury-causing event.

Proof of amounts charged or paid is not proof of reasonableness, and recovery of such expenses should be denied in the absence of evidence showing the charges were reasonable and necessary. *Dallas Railway & Terminal Company v. Gossett,* 156 Tex. 252, 259, 294 S.W.2d 377, 382-83 (1956). Medical expenses must be comparable to the usual and customary charges for

such services at the time and place the service was rendered in order to be "reasonable." *Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App.–Fort Worth 1958, writ ref'd n.r.e.). Moreover, courts have interpreted the term "necessary" to mean treatment was required as a result of the injury. *Gossett*, 294 S.W.2d at 382.

Without evidence supporting the reasonableness and necessity of the medical bills, such bills are not admitted to the jury. *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758 (Tex. App.–Fort Worth 1988, no writ).

Historically, this meant a medical professional should testify to not only causation, but that the amount charged was reasonable and necessary for that geographic area. However, as our deposition vignette above demonstrates, that was often easier said than done.

In an effort to reduce the length of trials, provide an inexpensive means to prove expenses without the burden to call experts live, and perhaps to ease the burden on certain individuals who would otherwise have to testify, the legislature enacted article Texas Revised Civil Statute 3737h in 1979, which allowed the parties, by way of affidavit from a records custodian, to prove the amount and reasonableness of charges for services rendered by other persons and institutions.

The 1979 House Committee on the Judiciary reported the following in its bill analysis:

Background Information

Under existing Texas law, proof of the amount of expenses incurred or contracted for is not sufficient proof to support a finding that such expenses were either reasonable or necessary. As a result of this rule, an injured party in a civil action must offer testimony that any expenses incurred have been reasonable and necessary, *even if the opposing party offers no testimony to the contrary*. Because of this requirement, parties incur additional expense by calling expert witnesses to prove the necessity and reasonableness of charges made, *particularly in the field of medicine*. This also makes law suits more expensive.

In 1985 the legislature repealed 3737h and codified it as Section 18.001 of the Texas Civil Practice and Remedies Code ("18.001"). The statute had been amended in various years to account for paid/incurred and in various changed as to notice and filing requirements.

"Section 18.001 is an evidentiary statute that accomplishes three things:

(1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay;

(2) it permits the use of otherwise inadmissible hearsay

to support findings of fact by the trier of fact; and

(3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed controverting affidavit."

Hong v. Bennett, 209 S.W.3d 795, 800 (Tex. App.—Fort Worth 2006, no pet.).

Unless a controverting affidavit is served as provided by section 18.001, the initial affidavit is sufficient evidence to support a jury's finding that past medical expenses were reasonable and necessary. *Liang v. Edwards*, No. 05-15-01038-CV, 2016 Tex. App. LEXIS 12554, 2016 WL 7163841, at *2 (Tex. App.—Dallas Nov. 23, 2016, no pet.) (mem. op.) ("The jury is not required to award a plaintiff the amount of damages established in the affidavit, but if it chooses to do so, the affidavit is sufficient evidence to support the jury's finding that past medical expenses were reasonable and necessary.").

By filing a counteraffidavit compliant with section 18.001, the defendant can preclude the plaintiff's affidavit from being used as evidence of the reasonableness and necessity of medical expenses, and instead require the plaintiff to prove reasonableness and necessity by expert testimony at trial. *Liang*, 2016 Tex. App. LEXIS 12554, 2016 WL 7163841, at *2; *see also Rountree v. Cavazos*, No. 05-16-00512-CV, 2017 Tex. App. LEXIS 5888, 2017 WL 2730422, at *1 (Tex. App.—Dallas June 26, 2017,

no pet.) (mem. op.) (medical provider's section 18.001 affidavit saves plaintiff expense of hiring expert to testify medical expenses were reasonable and necessary).

In practice, though, 18.001 led to various issues for trial attorneys, particularly defense lawyers. Some plaintiff lawyers would serve and file the cost affidavits immediately when filing the case, catching the defense lawyer flat-footed and not able to get a grasp and hire an expert to give a counteraffidavit in time. Other plaintiff attorneys could wait until 30 days before trial, limiting the time a defense lawyer could get counteraffidavits together to 14 days before trial.

Further, how did 18.001 interact with Texas Civil Practice and Remedies Code Section 41.0105 (paid/incurred) and Chapter 146 (timely billing of health insurance)?

In the 2019 Session, the Texas Civil Justice League pushed and Representative John Smithee (R-Amarillo) filed House Bill 1693 which was filed as an overhaul of 18.001 "to ensure fair treatment for all parties." HB 1693, *House Committee Report, Bill Analysis* (2019).

II. THE 2019 AMENDMENT

As originally filed, Rep. Smithee's bill would have changed the deadlines to 90 days before trial for the 18.001 affidavit and 60 days for a counteraffidavit.

However, through compromise, the enacted bill created a litany of different possible deadlines, which had led to much confusion and concern of litigants. Be aware, though, the 2019 amendment only applies to cases filed on or after September 1, 2019. A copy of the new statute is attached as Appendix 1.

The 2019 Amendment effects the ability of any party to use an affidavit or counteraffidavit as evidence of causation, tightens deadlines for the submission of affidavits and counteraffidavits, allows for supplementation of affidavits and counteraffidavits to account for additional medical procedures and costs, requires parties serving an affidavit to file notice of service with the court clerk, requires parties serving counteraffidavits to provide written notice of the service to the court clerk, and eliminates the requirement of parties to file their affidavit.

III. DEADLINES

The deadlines are harsh. "[I]f a party fails to comply with Section 18.001(d) by timely serving the affidavit on the parties, a trial court does not abuse its discretion in sanctioning a party by excluding the affidavits." *Singleton v. Bowman* 557 S.W. 711, 714 (Tex. App.—Texarkana 2018, pet. denied). This is because "[t]he Legislature set out the deadline for service of cost affidavits in mandatory language." *Nye v. Buntin*, No. 03-05-00214-CV, 2006 Tex. App. LEXIS 7067, 2006 WL 2309051, at *3 (Tex. App.—Austin Aug. 11, 2006, pet. denied) (mem. op.) ("While exclusion is not expressly the only potential consequence of

noncompliance, it is a reasonable sanction.”).

There are three different type of timelines to consider in the new 18.001:

A. Past Medical - 18.001(d)

1. Proponent

The party offering the initial affidavit must serve a copy on the other parties **by the earlier of**:

1) 90 days after the date the defendant files and answer;

2) the date the offering party must designate any expert witness under a court order (Scheduling Order under Level 3); or
3) the date the offering party must designate expert witness as required by the Texas Rules of Civil Procedure (Levels 1 and 2)

Tex. Civ. Prac. & Rem. C. §18.001(d)(1-3).

2. Controverter

Any party intending to controvert a claim reflected by plaintiff's affidavit must serve a proper counteraffidavit on each other party by the earlier of:

1) 120 days after the date the defendant files its answer;

2) the date the party offering the counteraffidavit must designate an expert witness under a court order (Scheduling Order under Level 3); or

3) the date the party offering the counteraffidavit must designate an expert witness pursuant to the Texas Rules of Civil Procedure (Levels 1 and 2).

Id. at (e)(1-3).

B. New Treatment after Answer- 18.001(d-1)

1. Proponent

If the plaintiff received services for the first-time by a provider after the date the defendant files an answer, the party offering the initial affidavit must serve a copy on the other parties **by the earlier of**:

1) the date the offering party must designate any expert witness under a court order (Scheduling Order under Level 3); or

2) the date the offering party must designate expert witness as required by the Texas Rules of Civil Procedure (Levels 1 and 2).

Id. at (d-1)(1-2).

2. Controverter

Any party intending to controvert a claim for these providers must serve a proper counteraffidavit on each other party by the later of:

4) 30 days after service of the affidavit on the party offering the counteraffidavit in evidence;

5) the date the party offering the counteraffidavit must designate an expert witness under a court order (Scheduling Order under Level 3); or

6) the date the party offering the counteraffidavit must designate an expert witness pursuant to the Texas Rules of Civil Procedure (Levels 1 and 2).

Id. at (e-1)(1-3).

C. Continuing Treatment - 18.001(h)

1. Proponent

If the plaintiff continues to receive treatment after a deadline, the party may supplement the affidavit by serving a copy on the other parties on or before:

1) the 60th day before the date the trial commences,

Id. at (h)(1).

2. Controverter

Any party intending to controvert a claim for these continued care providers must supplement the counteraffidavit on or before

1) the 30th day before the date the trial commences.

Id. at (h(2).

D. Suggested Common Sense Approach to Deadlines

Do not despair. The most important and anxiety-saving language of the new statute is found in subpart (i) which provides:

> Notwithstanding Subsections (d), (d-1), (d-2), (e), (e-1), (g), and (h), a deadline under this section may be altered by all parties to an action by agreement or with leave of the court.

Id. at (i).

Thus, in order to prevent frantic calendaring and calculating, this author humbly suggests that the parties enter into a Rule 11 Agreement or a Level 3 Discovery Control Plan when an answer

is filed which dictate the deadlines that best fits your particular case.

A common sense approach would seem to be that affidavits be filed at the same time as the testifying experts are designated, with an exception for continued or new care. Attached as Appendix 2 is proposed DCO language.

IV. 'REASONABLE AND NECESSARY' AND CAUSATION

Under the 18.001 process, a plaintiff does not need to have an expert to testify that the amount charged was "reasonable and necessary." Unless controverted, a properly served affidavit with properly filed notice establishes that the amount "was reasonable at the time and place that the service was provided and that the service was necessary." TEX. CIV. PRAC. & REM. C. §18.001(b).

As an evidentiary statute, 18.001 is basically an exception to the hearsay rule and expert requirement and:

(1) allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay that can support findings of fact by the trier of fact; *Castillo v. American Garment Finishers Corp.*, 965 S.W.2d 646, 654 (Tex. App.-El Paso 1998, no pet.); and

(2) allows a records custodian to give expert opinions that a charge is reasonable and necessary. TEX. CIV. PRAC. & REM. C. §18.001(b).

Unless controverted, an 18.001 affidavit will support findings of fact and bar conflicting evidence. *Hong v. Bennett,* 209 S.W.3d 795, 800 (Tex. App.–Fort Worth 2006, no pet.); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex.App.–Eastland 1995, no writ).

But, an affidavit submitted under §18.001 does not conclusively establish the amount of damages as a matter of law. *Barrajas v. VIA Metro. Transit Auth.*, 945 S.W.2d 207, 209 (Tex. App.–San Antonio 1997, no writ); *Beauchamp*, 901 S.W.2d at 749. *But see Allright, Inc. v. Strawder*, 679 S.W.2d 81, 83 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) (in bailment suit applying predecessor statute to §18.001, trial court rendered damages as a matter of law based on affidavit).

Even though the initial affidavit does not establish damages as a matter of law, the fact-finder cannot ignore the undisputed facts and award an arbitrary amount of damages. *Hill v. Clayton*, 827 S.W.2d 570, 574 (Tex.App.–Corpus Christi 1992, no writ) (case reversed and remanded for new trial because jury awarded less than one-third of medical damages set out in uncontroverted affidavits). *But see, Hilland v. Arnold*, 856 S.W.2d 240, 242-43 (Tex. App.–Texarkana 1993, no writ) (jury could award damages lower than amount proved by affidavit because causal link was

put in doubt when doctor testified accident may not have caused bulging disc or spinal deterioration).

Further, the affidavit was never sufficient to prove causation. *Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007). The 2019 amendment clarified, for anyone in doubt, by adding the language:

> The affidavit is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action.

Tex. Civ. Prac. & Rem. C. §18.001(b).

Nonetheless, if a plaintiff does not use the 18.001 process, she would, arguably, need to have expert testimony to prove that the charges sought are both "Reasonable and Necessary" in addition to causation.

Establishing causation in a personal injury case requires a plaintiff to "prove that the conduct of the defendant caused an event and that this event caused the plaintiff to suffer compensable injuries." *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 162 (Tex. 2015)

Thus, "when an accident victim seeks to recover medical expenses, she must show both 'what all the conditions were' that generated the expenses and 'that all the conditions were caused

by the accident.'" *Id*. (quoting *Guevara v. Ferrer*, 247 S.W.3d 662, 669 (Tex. 2007)).

Expert testimony is generally necessary to establish causation of medical conditions that are "outside the common knowledge and experience of jurors." *Guevara* 247 S.W.3d at 665. In limited cases, however, lay testimony may support a causation finding that links an event with a person's physical condition. *Id*. at 666. "This exception applies only in those cases in which general experience and common sense enable a layperson to determine the causal relationship with reasonable probability." *Kelley v. Aldine Indep. Sch. Dist*., No. 14-15-00899-CV, 2017 Tex. App. LEXIS 829, 2017 WL 421980, at *2 (Tex. App.–Houston [14th Dist.] Jan. 31, 2017, pet. denied).

In such cases, "lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation." *Id*. (quoting *Morgan v. Compugraphic Corp*., 675 S.W.2d 729, 733 (Tex. 1984)).

The Houston Court of Appeals recently overturned a verdict for medical expenses when causation was based on lay testimony in *Hills v. Donis*, NO. 14-18-00566-CV, 2020 Tex. App. LEXIS 303, 2020 WL 206187 (Tex. App.–Houston [14th Dist.] January 14, 2020, no. pet. history). In *Donis*, the plaintiffs argued that their lay testimony regarding the pain they experienced due to the accident was sufficient to support a causation finding that linked

the automobile accident on July 6, 2014, with their diagnosed conditions. The Court held that the plaintiffs' injuries did does not fall within the kinds of "basic" injuries identified in *Guevara* in which expert testimony regarding the causal connection between an occurrence and a physical condition is unnecessary. *Id*. 247 S.W.3d at 667. The plaintiffs "were not pulled from a damaged vehicle with "overt injuries" such as broken bones or lacerations, nor did they experience objective physical symptoms, such as crumbling teeth, shortly after the accident. Rather, the types of injuries for which the Donis Parties sought compensation–i.e., cervical radiculitis, lumbar radiculitis, thoracalgia, cervical IVD displacement, lumbar IVD displacement, thoracic IVD displacement, cervical discogenic pain, lumbar discogenic pain, disc herniation, cervical disc disorder, lumbar disc disorder, thoracic disc disorder, and lumbalgia–are neither common nor basic." *Id.* at *8 (Citing *Guevara*, 247 S.W.3d at 669-70 and *City of Laredo v. Garza*, 293 S.W.3d 625, 632-33 (Tex. App.–San Antonio 2009, no pet.) (determining that lay testimony alone was not sufficient to prove medical causation of disc herniations and radiculopathy)).

Thus, the Court held that the plaintiffs' injuries were not the type which general experience and common sense would enable a layperson to determine the causal relationship with reasonable probability. The plaintiffs needed expert testimony to establish a causal connection between the accident and their claimed injuries. *Id.*

V. WHO CAN SIGN THE AFFIDAVIT?

An 18.001 affidavit **must** be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made.

Id. at (c)(2)(A-B) (emphasis added).

In June 2018, the Texas Supreme Court affirmed Fourteenth Court of Appeals' decision in *Gunn v. McCoy* wherein Plaintiff was allowed to submit 18.001 affidavits sworn to by subrogation agents for insurance carriers that had paid the plaintiff's medical expenses. 554 S.W.3d 645, 672.

In *Gunn*, a medical malpractice case, the plaintiff initially served fourteen (14) 18.001 affidavits from his medical providers' records custodians. However, after the *Escabedo v. Haygood* case held that only the incurred amount was admissible, the plaintiff withdrew the provider affidavits and filed affidavits from subrogation agents for health insurance carriers that had paid the medical expenses, reflecting instead the amounts actually paid under Section 41.0105. After verdict, the defense appealed, in pertinent part, claiming 18.001 limits the proper affiants to medical providers or record custodians for those medical providers.

The Texas Supreme Court took on this issue and held the subrogation agent's affidavits were sufficient. *Id.* The Court concluded that Section 18.001 was designed "to streamline proof of the reasonableness and necessity of medical expenses" and noted that "the plain language of section 18.001(c)(2)(B) does not require that affidavits be made by a records custodian *for a medical provider*." *Id*. at 672.

The Court further explained that "insurance companies keep records and databases of both the list prices and the actual prices of specific treatments and procedures." Id. at 673. As a result, "with national and regional bases on which to compare prices actually paid, insurance agents are generally well-suited to determine the reasonableness of medical expenses." *Id*. at 673.

VI. AFFIDAVITS VS. DECLARATIONS

Texas Civil Practice and Remedies Code Section 132.001 was adopted in 1987 to allow inmates to use an unsown declaration in lieu of an affidavit.

The statute was amended in 2011 to open up the possibility of unsworn declarations in lieu of affidavits in many new situations. Acts 2011, 82nd Leg., ch. 847 (H.B. 3674), § 1.

Specifically, the statue provides that "an unsworn declaration may be used in lieu of a written sworn declaration, verification,

certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law", except "as to liens required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public." Tex. Civ. Prac. & Rem. C. § 132.001(a-b).

The statute allows an unsworn declaration if the declaration is in writing and is "subscribed by the person making the declaration as true under penalty of perjury." *Id*. at (c). A form Declaration as suggested by the statute is included in Appendix 3.

Many times, especially in rural Texas, the medical provider will not have a notary available. So, could a plaintiff have the records custodian for the medical provider simply do a written declaration in lieu of an affidavit under 18.001?

The language of Section 132.001 certainly seems to say so and 18.001 is not excluded under 132.001(b). But the language of 18.001 specifically states that "[t]he affidavit must be taken before an officer with authority to administer oaths." Tex. Civ. Prac. & Rem. C. § 18.001(c)(1).

VII. TO SERVE OR FILE OR WHAT?

As referenced above, Section 18.001 has gone through

various iterations mandating that they be filed or just served. So, what is status of this for cases filed after September 1, 2019?

A copy of 18.001 affidavits must be served "on each party to the case" by the deadlines discussed above.

Also, "[t]he party offering the affidavit in evidence or the party's attorney must file notice with the clerk of the court when serving the affidavit that the party or the attorney served a copy of the affidavit in accordance with this section. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk of the court before the trial commences." Tex. Civ. Prac. & Rem. C. § 18.001(d-2).

Thus, you must serve the affidavits with the attached itemizations on all parties and file with the Clerk a Notice of filing, without the attached records at the same time. A suggested form Notice is attached as Appendix 4.

VIII. DEFENSE OPTIONS

If a defendant receives a properly served and timely affidavit under 18.001, what are the options? If she does nothing, and the affidavit is admitted, *but see In re Parks,* No. 05-19-00375-CV, 2020 Tex. App. LEXIS 1329, at *40 (Tex. App.—Dallas Feb. 18, 2020) (Schenck, J., dissenting), the opposing party:

1) is not prevented from making arguments contesting

the affidavits during opening statements and closing arguments,

2) may cross-examine the offering parties about their injuries and prior medical conditions, and
3) may introduce corresponding medical records.

In re Flores, No. 01-19-00484-CV, 2020 LEXIS 742, at *3, 2020 WL 425297 (Tex. App.—Houston [1st Dist.] Jan. 28, 2020).

However, a purpose of the statute is to spare the expense of hiring an expert witness to testify at trial if the issue of the reasonableness and necessity of medical expenses. This author believes that if an 18.001 affidavit is not controverted, an expert that wants to controvert the necessity of the treatment, may be excluded. For example, in *Wal-Mart Stores Tex., LLC v. Bishop*, 553 S.W.3d 648 (Tex. App.—Dallas 2018, pet. granted, aff'd as modified w.r.m.), the Dallas Court affirmed the exclusion of a defense expert's ability to testify as to reasonableness and necessity of treatment when the expert was designated past the 18.001 deadlines.

Nonetheless, the defendant may choose to controvert the affidavit by filing a counteraffidavit. "The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths." Tex. Civ. Prac. & Rem. C. §18.001(f).

Like the 18.001 affidavits, the controverting affidavits must be served within the deadlines discussed above and the controverter must "file written notice with the clerk of the court when serving the counteraffidavit that the party or attorney served a copy of the counteraffidavit in accordance with this section." *Id.* at (g).

Again, in restating the obvious, the statute also sets out that "[t]he counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action." *Id.* at (f).

IX. CONTROVERTING AFFIDAVITS

So, you want to controvert the Plaintiff's 18.001 affidavit? Who do you get to controvert?

First, let's go back. A plaintiff can present evidence concerning the reasonableness and necessity of past medical expenses through (1) expert testimony, or (2) an affidavit from the plaintiff's medical provider made pursuant to Section 18.001. *Whitaker v. Rose*, 218 S.W.3d 216, 223 (Tex. App.–Houston [14th Dist.] 2007, no pet.); see also Tex. Civ. Prac. & Rem. Code Ann. § 18.001

In other words, a medical provider's Section 18.001 affidavit can save the plaintiffs the expense of having to hire an expert to testify that their medical expenses were reasonable and

necessary. *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied).

"[S]ection 18.001(b) provides a limited exception to the general rule that expert testimony is required to prove reasonableness and necessity of medical expenses." *Hong v. Bennett,* 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006, no pet.).

The affiant need only be the provider or the provider's records custodian (not an expert, but just an expert's custodian). But, what about counteraffidavits? Need they be experts? The answer is – Yes.

There are two main requirements for a counteraffidavit: (1) it must give reasonable notice of which claims the opponent intends to controvert and why, and (2) it must be made by a person who is qualified to testify about all or part of any of the matters contained in the initial affidavit. Tex. Civ. Prac. & Rem. Code § 18.001(f).

So, for counteraffidavits, Section 18.001(f) requires that it be made by a person qualified to testify in contravention about matters contained in the initial affidavit. *Id*. § 18.001(f).

Section 18.002 sets out a form for an affidavit regarding cost and necessity of services but provides no form for a counteraffidavit. *Id*. § 18.002. It has been held that the statute

places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings. *Turner*, 50 S.W.3d at 747.

18.001 affidavits though address two things: (1) reasonableness and (2) necessity. Thus, a counter-affiant must be qualified to testify about one or the other or, potentially, both, if they are so qualified.

Thus, a counteraffidavit may need two different experts. For reasonableness, the affiant must be qualified to give an opinion as to the reasonableness of the medical services. General experience in a specialized field does not qualify a witness as an expert. *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 526 (Tex. App.—Fort Worth, 2006, pet. denied); *Pack v. Crossroads, Inc.*, 53 S.W.3d 492, 506 (Tex. App.—Fort Worth 2001, pet. denied). "What is required is that the offering party establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Broders v. Heise*, 924 S.W.2d 148, 153-54 (Tex.1996). If "a party can show that a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields." *Id*. at 154.

For instance, in *Gunn* the Supreme Court held that insurance subrogation agents are qualified to use their databases to create affidavits regarding the reasonableness of a plaintiff's medical

expenses. *Gunn*, 554 S.W.3d at 674-75. As a result, "with national and regional bases on which to compare prices actually paid, insurance agents are generally well-suited to determine the reasonableness of medical expenses." *Id.*

The expert signing the counteraffidavit should be knowledgeable of the reasonable and customary charge for the particular medical procedure in question. For example, a chiropractor cannot testify to the reasonable and customary charges for a surgeon. *Hong*, 209 S.W.3d at 803.

The Tyler Court of Appeals recently addressed this issue in granting a writ of mandamus in *In re Larry Brown and JBS Carriers*, No. 12-18-00295-CV, 2019 WL 1032458 2019 Tex. App. LEXIS 1666 (Tex. App.—Tyler, Mar. 5, 2019, orig. proceeding). In *In re Brown*, the plaintiff timely filed 18.001 affidavits and the defendants subsequently filed a controverting affidavit from Registered Nurse, Jana Schieber. The plaintiff filed a motion to strike the controverting affidavit on several grounds, alleging Schieber's opinions lacked reliability or factual basis; Schieber was unqualified as an expert and relied on a database for her opinions rather than her own training, expertise or experience; Schieber had been struck in other matters; and that Schieber offered no facts, treaties, or medical studies to show the reliability or acceptance by the medical community of the database she relied upon. *Id. at *1-2.*

The defendants responded with a declaration from Schieber

which included attachments from the database she relied, however the trial court granted the plaintiff's motion to strike. The trial court found that Schieber was unqualified to provide expert testimony and that the opinions in the controverting affidavit were not reliable. *Id.*

The defendants filed a petition for a writ of mandamus alleging that the trial court abused its discretion by striking Schieber.

The Tyler Court of Appeals noted that Section 18.001 permits the reasonableness and necessity of charges be proved by a nonexpert custodian—however the controverting affidavit must be made by a person qualified to testify in contravention of the matters contained in the initial affidavit. *Id*. at 7.

Citing *Gunn*, the Tyler Court noted that insurance companies keep records and databases of both the list and actual prices for specific medical treatments and procedures—thereby agents are well-suited to determine the reasonableness of medical expense. *Id. at *7-8.*

Based on this reasoning, the Tyler Court held that Schieber was qualified and her opinion reliable despite the facts she was not a practicing nurse and that she relied upon a database. *Id.*

The second category to examine is if the treatment is 'necessary.' This would seem to mandate a more medical-related

expert opinion. For example, the plaintiff received a back surgery, but was that back surgery necessary? That is a different analysis than the issue of was the injury caused by the event in question.

A. Procedure after Counteraffidavit

So what happens when a counteraffidavit is timely served and notice filed? Does the jury consider both affidavits? Does the trial court make a decision?

The answer catches many plaintiff lawyers by surprise. By filing a controverting affidavit under section 18.001(f), a nonoffering party prevents the use of an offering party's affidavit as evidence. *Hong* 209 S.W.3d at 801 (Tex. App.–Fort Worth 2006, no pet.). Neither the affidavit nor the counteraffidavit are admissible in trial.

Defendants argue that once a counteraffidavit is filed, the expert exception allowed in 18.001 is voided and the plaintiff must present expert testimony as to reasonableness and necessity of the charges. *Id*. at 804. The 18.001 affidavit is no longer admissible. *Id.* Thus, without the 18.001 affidavit averring that medical expenses are reasonable and necessary, a plaintiff must prove the reasonableness and necessity of such expenses by expert testimony. *Turner v. Peril,* 50 S.W.3d 742, 746-47 (Tex. App.–Dallas 2001, pet. denied); *but see City of El Paso v. Pub. Util. Comm'n of Tex.*, 916 S.W.2d 515, 524 (Tex. App.–Austin 1995, writ dism'd by agr.) (holding that "[s]ection 18.001 does not

address the admissibility of an affidavit concerning cost and necessity of services but only the sufficiency of the affidavit to support a finding of fact that a charge was reasonable or a service was necessary"); *Ozlat v. Priddy*, No. 11-96-00240-CV, 1997 WL 33798173, at *2-4 (Tex. App.–Eastland May 29, 1997, pet. denied) (not designated for publication) (holding that trial court did not abuse its discretion by admitting both section 18.001(b) affidavits and controverting affidavit as evidence at trial and that "[s]ection 18.001 provides a procedure allowing parties to prove and controvert by affidavit the costs and necessity of services without calling a witness at trial").

X. STRIKING THE CONTROVERTING AFFIDAVITS

If timely served with counteraffidavits, the best step is often that the plaintiff's attorney will closely examine the affidavit and will move to strike the counteraffidavit.

There are two basic reasons to strike the counteraffidavit. First, if it does not give "reasonable notice of the basis on which the party serving it intends at trial to controvert" the initial affidavit. TEX. CIV. PRAC. & REM. CODE § 18.001(f).

In *Turner v. Peril*, 50 S.W.3d 742 (Tex. App. –Dallas 2001, pet. denied), the Dallas Court of Appeals held that a physician's counteraffidavits in an auto wreck case were insufficient to controvert the plaintiff's 18.001 affidavits because the counteraffidavits failed to provide reasonable notice of the basis

on which the defendant intended to controvert the plaintiff's claims.

The trial court judge in the *Turner* case had excluded the plaintiff's affidavits due to the filing of counteraffidavits by Dr. George Sibley. Dr. Sibley's affidavit countering an affidavit filed by the plaintiff to prove the reasonableness and necessity of two drug prescriptions that cost $20.00 stating:

> My name is Dr. George W. Sibley. I am a licensed physician in the County of Dallas, State of Texas. I am above the age of 18 years, of sound mind, and make this Affidavit upon my best information and belief. I am a board-certified orthopedic surgeon, a member of the American Academy of Orthopedic Surgery and have practiced orthopedic surgery in Dallas for 35 years. I am fully competent to testify thereto. This Counter Affidavit is made in response to the affidavit of Derek A. Schenk, custodian of records for Sack-N-Save Pharmacy No. 218 pursuant to Section 18.001 of the Texas Civil Practices [sic] and Remedies Code. Such affidavit states a purported fact that the services outlined on attachments hereto were necessary and the charges reasonable. In my opinion, the health care treatment, numerous procedures and charges were not reasonable or necessary or justified by the condition as described in the medical reports filed by such medical service provider in connection with the alleged incident. In addition, this Counter-Affidavit is made on the basis of the following: (1) my education, training

and experience, and (2) a review of the medical records of Charles C. Turner regarding a rear end collision on 2/18/94 fail [sic] to show any objective finding of a significant injury. All treatment after 2/18/94 was not reasonable and necessary as a result of the 2/18/94 accident.

Dr. Sibley filed multiple counteraffidavits which were identical to this example except for the designation of the affiant and service provider named in the initial affidavit filed by the plaintiff.

In striking Dr. Sibley's counteraffidavits (in addition to the fact that he was testifying outside his range of expertise as an orthopedic surgeon), the Court found his conclusory statement that the plaintiff's medical records failed to show any objective finding of a significant injury did not give reasonable notice of the basis for his conclusion that none of the medical services were necessary. *Id*. at 747-48.

Although the court conceded that Sibley's stated basis for controverting the plaintiff's affidavits – that there was no objective finding of a significant injury – might give reasonable notice "under some circumstances," it did not in the case facing the court because none of Sibley's counteraffidavits "specifically addressed the claims made in the corresponding initial affidavit." *Id*. at 748. Instead, Sibley merely referred to "numerous procedures," even though some of the initial affidavits involved only medication, and stated that his opinion was based upon

unidentified "medical reports filed by such medical service provider." *Id*. Further, Sibley rejected all treatment because of the absence of an "objective finding" of significant injury, even though some of the initial affidavits addressed only the treatment and medication of pain. *Id*. The Court felt that Sibley's counteraffidavits "either obscured his basis for controverting the affidavits filed by [the plaintiff] or concealed the absence of any basis." *Id*.

Second, and what is mostly litigated, is if the affiant is "qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." *Id*.

The *Turner* Court, in striking Dr. Sibley's counteraffidavits, found that his credentials as an orthopedic surgeon and his blanket statement that the counteraffidavits were made on the basis of his "education, training, and experience" did not show that he was qualified to contravene all of the matters contained in each of the plaintiff's affidavits because none of the medical expenses documented by the initial affidavits involved examination or treatment by an orthopedic surgeon. *Id*.

Instead, the initial affidavits related to services provided by a hospital, pharmacies, a chiropractor, a diagnostic center, a nurse anesthetist, and doctors who were not orthopedic surgeons. *Id*. Dr. Sibley's status as a medical doctor did not automatically qualify him to contravene all or some of the plaintiff's affidavits. *Id*.

18.001 places a "greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates" the purpose of the statute, and that an expert's status as a licensed physician does not qualify that expert on every medical question. *Id* at 747.

However, as mentioned above, the Tyler Court in *In re Brown*, relying on *Gunn*, has now said a medical billing individual who relies on a database of charges is qualified to determine what is reasonable. *In re Brown*, 2019 Tex. App. LEXIS 1666 at *8.

Question:

Would the coding individual in *In re Brown*, be allowed to express expert opinions from the witness stand under Texas Rule of Evidence 702? Is so, how can she testify about database and insurance charges? What about the collateral source rule?

If not, why would a counter-affiant be held to a different standard than an expert at trial? Section 18.001(f) states the counter-affiant must be made by a person who is "*qualified*, by knowledge, skill, experience, training, education, or other expertise, to *testify* . . . ." To be qualified to testify they should have to pass the gatekeeper function of the trial court. Tex. R. Evid. 702.

Since *In re Brown*, multiple cases are in the various court of

appeals and we may get an answer soon.

XI. MANDAMUS AVAILABLE

In *In re Brown*, the defendants filed a writ of mandamus concerning the trial court's striking of the counteraffidavit. The Tyler Court granted the mandamus and found that the remedy of appeal is inadequate because the error deprived the defendant of any ability to defend against medical charges, which was a substantial right holding:

> [t]he limited avenues available to a party who has a counter-affidavit struck are a far cry from the rights and protections afforded a party who has filed a proper counter-affidavit.

In re Brown, 2019 WL 10322458 at *5.

However, since *In re Brown*, multiple other Courts of Appeals have held the issue is not ripe for mandamus and that there is an adequate remedy at appeal. The other courts of appeals have noted that the defendants still have the right to open, close, present evidence and cross examine the plaintiff.

- *In re Flores*, No. 01-19-004840-CV, 2020 Tex. App. LEXIS 742, 2020 WL 425297 (Tex. App.–Houston [1st Dist.] Jan. 28, 2020) (orig. proceeding [mand. denied]);

- *In re Allstate Indemnity Co.*, No. 13-19-00346-CV, 2019 Tex.

App. LEXIS 9795, 2019 WL 5866592 (Tex. App.—Corpus Christi Nov. 8, 2019) (orig. proceeding [mand. denied]);

- *In re Chapa*, No. 13-19-00435-CV, 2019 Tex. App. LEXIS 8303, 2019 WL 4315028 (Tex. App.—Corpus Christi Sept. 12, 2019, orig. proceeding [mand. denied]) (mem. op.);

- *In re Parks*, No. 05-19-00375-CV, 2020 Tex. App. LEXIS 1329 (Tex. App.—Dallas Feb. 18, 2020, orig. proceeding [mand. denied]).

XII. DOES 18.001 WORK IN FEDERAL COURT?

This is another open question. Can a plaintiff use the procedure in 18.001 in federal court? In diversity cases, federal courts generally apply state substantive law and federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 466-67, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).

Thus, the question arises: Is the 18.001 procedure procedural or substantive?

At this point there appears to be conflicting federal district court opinions on this matter. The applicability of 18.001 in federal court was addressed for the first time in *Rahimi v. United States*. 474 F. Supp. 2d 825, 829 (N.D. Tex. 2006). There, the court found that 18.001 “is so bound up or intertwined with a litigant’s substantive rights, it is appropriate to apply the state

law to avoid an inequitable administration of the law." *Id.*

However, shortly thereafter, the Texas Supreme Court issued its opinion in *Haygood v. De Escabedo*, where the court described 18.001 as "purely procedural, providing for the use of affidavits to streamline proof of the reasonableness and necessity of medical expenses." *Haywood*, 356 S.W.3d at. 397.

Since *Haywood*, the federal courts in Texas have been split on the issue of whether 18.001 is procedural or substantive:

- *Bagley v. Dollar Tree Stores, Inc.*, No. 1:18-CV-580, 2019 U.S. Dist. LEXIS 207531, 2019 WL 6492585 (E.D. Tex. Dec. 2, 2019) (noting 18.001's creation of a rebuttable presumption and holding that the statute is substantive);

- *Grover v. Gov't Emps. Ins. Co.*, SA-18-CV-00850-FB, 2019 U.S. Dist. LEXIS 91278, 2019 WL 2329321, at *1 (W.D. Tex. May 31, 2019) (observing the split and holding that the statute is substantive);

- *Baird v. Shagdarsuren*, 3:17-CV-2000-B, 2019 U.S. Dist. LEXIS 89522, 2019 WL 2286084, at *2 (N.D. Tex. May 29, 2019) (citing to *Haygood* and holding that the statute is procedural);

- *Akpan v. United States*, CV H-16-2981, 2018 U.S. Dist. LEXIS 5584, 2018 WL 398229, at *3 (S.D. Tex. Jan. 12,

2018) (citing to *Haygood* and holding that the statute is procedural);

- *Gorman v. ESA Mgmt., LLC*, CV 3:17-CV-0792-D, 2018 U.S. Dist. LEXIS 1424, 2018 WL 295793, at *1 (N.D. Tex. Jan. 4, 2018) (substantive);

- *Holland v. United States*, 3:14-CV-3780-L, 2016 U.S. Dist. LEXIS 192388, 2016 WL 11605952, at *1 (N.D. Tex. July 21, 2016) (procedural);

- *Cruzata v. Wal-Mart Stores Tex., LLC*, EP-13-CV-00331-FM, 2015 U.S. Dist. LEXIS 57270, 2015 WL 1980719, at *6 (W.D. Tex. May 1, 2015) (substantive).

Appendices follow on pp. 37-46.

XVI. APPENDIX 1 - TCPRC § 18.001

Tex. Civ. Prac. & Rem. Code § 18.001

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Civil Practice and Remedies Code > Title 2 Trial, Judgment, and Appeal (Subts. A — D) > Subtitle B Trial Matters (Chs. 15 — 30) > Chapter 18 Evidence (Subchs. A — D) > Subchapter A Documentary Evidence (§§ 18.001 — 18.030)

Sec. 18.001. Affidavit Concerning Cost and Necessity of Services.

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is served as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary. The affidavit is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action.

(c) The affidavit must:

(1)be taken before an officer with authority to administer oaths;

(2)be made by:

(A)the person who provided the service; or

(B)the person in charge of records showing the service provided and charge made; and

(3)include an itemized statement of the service and charge.

(d) The party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit on each other party to the case by the earlier of:

(1)90 days after the date the defendant files an answer;

(2)the date the offering party must designate any expert witness under a court order; or

(3)the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.

(d-1) Notwithstanding Subsection (d), if services are provided for the first time by a provider after the date the defendant files an answer, the party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit for services provided by that provider on each other party to the case by the earlier of:

(1)the date the offering party must designate any expert witness under a court order; or

(2)the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.

(d-2) The party offering the affidavit in evidence or the party's attorney must file notice with the clerk of the court when serving the affidavit that the party or the attorney served a copy of the affidavit in

accordance with this section. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk of the court before the trial commences.

(e)A party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record by the earlier of:

(1)120 days after the date the defendant files its answer;

(2)the date the party offering the counteraffidavit must designate expert witnesses under a court order; or

(3)the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure.

(e-1) Notwithstanding Subsection (e), if the party offering the affidavit in evidence serves a copy of the affidavit under Subsection (d-1), the party offering the counteraffidavit in evidence or the party's attorney must serve a copy of the counteraffidavit on each other party to the case by the later of:

(1)30 days after service of the affidavit on the party offering the counteraffidavit in evidence;

(2)the date the party offering the counteraffidavit must designate any expert witness under a court order; or

(3)the date the party offering the counteraffidavit in evidence must designate any expert witness as required by the Texas Rules of Civil Procedure.

(f) The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. The counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action.

(g) The party offering the counteraffidavit in evidence or the party's attorney must file written notice with the clerk of the court when serving the counteraffidavit that the party or attorney served a copy of the counteraffidavit in accordance with this section.

(h) If continuing services are provided after a relevant deadline under this section:

(1)a party may supplement an affidavit served by the party under Subsection (d) or (d-1) on or before the 60th day before the date the trial commences; and

(2)a party that served a counteraffidavit under Subsection (e) or (e-1) may supplement the counteraffidavit on or before the 30th day before the date the trial commences.

(i) Notwithstanding Subsections (d), (d-1), (d-2), (e), (e-1), (g), and (h), a deadline under this section may be altered by all parties to an action by agreement or with leave of the court.

History

Enacted by Acts 1985, 69th Leg., ch. 959 (S.B. 797), § 1, effective September 1, 1985; am. Acts 1987, 70th Leg., ch. 167 (S.B. 892), § 3.04(a), effective September 1, 1987; am. Acts 2007, 80th Leg., ch. 978

(S.B. 763), § 1, effective September 1, 2007; am. Acts 2013, 83rd Leg., ch. 560 (S.B. 679), § 1, effective September 1, 2013; am. Acts 2019, 86th Leg., ch. 779 (H.B. 1693), § 1, effective September 1, 2019.

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XVII. APPENDIX 2 — Proposed DCO Language

Cause No. ___________

********	**§**	**IN THE ****DISTRICT COURT**
	§	
v.	**§**	**IN AND FOR**
	§	
********	**§**	****** COUNTY, TEXAS**

DOCKET CONTROL PLAN

It is ORDERED pursuant to Rule 190.4 that discovery in this case be conducted in accordance with this Plan and that the parties shall meet and adhere to the following deadlines:

1. Deadlines to designate testifying expert witnesses:

   a. Plaintiff shall designate testifying expert witnesses no later than _________________, pursuant to Texas Rule of Civil Procedure 194.2(f).

   b. Defendant(s) shall designate testifying expert witnesses no later than _________________, pursuant to Texas Rule of Civil Procedure 194.2(f).

   c. Plaintiff shall designate any testifying rebuttal expert witness no later than _________________, pursuant to Texas Rule of Civil Procedure 194.2(f).

   d. Any party designating a testifying expert witness is ORDERED to provide, no later than the dates set forth above for designation, the information set forth in Rule 194.2(f) and a written report prepared by any retained expert setting forth the substance of the expert's opinion.

   e. Pursuant to Texas Civil Practice and Remedies Code Section 18.001(i), the parties agree that Plaintiff shall serve affidavits under Section 18.001(d), if any, by the same date Plaintiff shall be required to designate testifying experts. Likewise, Defendant(s) shall serve counteraffidavits under Section 18.001(e), if any, by the same date Defendant shall be required to designate testifying experts.

f. If services are provided for the first time by a provider after Plaintiff's designation date or there is continued treatment after the designation date, Plaintiff shall serve or supplement affidavits under Section 18.001, if any, on or before the 60th day before the date the trial commences. Likewise, Defendant(s) shall serve or supplement counteraffidavits to these affidavits, if any, on or before the 30th day before the date the trial commences.

2. Discovery period ends _______________, which may be extended by agreement by the parties.

3. Deadline to amend or supplement pleadings: ___________________.

4. The parties are ordered to exchange with each other by ________________ the following items:

   a. Proposed jury instructions and questions (jury trial).

   b. Motions in Limine.

   c. Exhibit lists.

   d. Labeled and numbered exhibits. The parties are ordered per Rule 192.5 (c)(2) to exchange prior to the pretrial conference all exhibits they intend to introduce at trial and to make good faith efforts to reach agreement on the admissibility of all exhibits. The parties should be prepared to discuss at the pretrial conference objection to exhibits which the parties do not agree are admissible.

   e. Witness list stating each witness' name, address, and phone number and stating whether the witness is a party, a fact witness or an expert witness. The parties should be prepared to discuss at the pretrial conference any scheduling problems relating to witnesses and any objections to improperly designated experts or fact witnesses.

6. Pre-trial Hearing to be set if requested.

7. Trial

   Trial is set for ____________________at 9:00 a.m.

SIGNED on ____________________________, 2020.

____
JUDGE PRESIDING

Agreed to by Counsel:

BROWNING LAW FIRM, PLLC
P. O. Box 1600
Abilene, TX 79604
(325) 437-3737
(325) 437-1799 (fax)

By: ______________________________
Cade W. Browning
State Bar No. 24028748
cade@browningfirm.com

ATTORNEYS FOR PLAINTIFF

TALL BUILDING DEFENSE FIRM, PLLC
Really Tall Building
Dallas, Texas 75002
(214) 555-5555
(214) 555-5555(fax)

By: ______________________________
John Doe
State Bar No. 55555555
defenselawyer@defensefirm.com

ATTORNEYS FOR DEFENDANT

XVIII. APPENDIX 3 — Form Declation and Affidavit

DECLARATION OF COST OF SERVICE BY CUSTODIAN

"My name is ______________________________. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated. My date of birth is _____________________ and my address is _____________________________, _____________, Texas ____________________.

"Attached hereto are billing records that provide an itemized statement of the service and the charge for the services that _____________________provided to_____________________. The attached billing records are incorporated as a part of this declaration.

"The attached records are kept by me in the regular course of business, and it was the regular course of business of _________________________for an employee or representative with knowledge of diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original."

"The total amount paid for the services was $_______________ and the amount currently unpaid but which ____________________________has a right to be paid after any adjustments or credits is $_________________."

"I declare under penalty of perjury that the foregoing is true and correct."

Executed in ________ County, State of _________, on the __________ day of ___________, 2020.

____
Declarant

AFFIDAVIT OF COST OF SERVICE BY CUSTODIAN

STATE OF TEXAS

COUNTY OF ______________

BEFORE ME, the undersigned authority, on this day personally appeared ______________________________, who swore on oath that the following facts are true:

"My name is ______________________________. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

"I am the custodian of the records of______________________. Attached hereto are billing records that provide an itemized statement of the service and the charge for the services that ____________________ ______provided to ______________________on______________________________. The attached billing records are incorporated as a part of this affidavit.

"The attached records are kept by me in the regular course of business, and it was the regular course of business of _______________________for an employee or representative with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original."

"The total amount paid for the services was $_______________ and the amount currently unpaid but which ____________________has a right to be paid after any adjustments or credits is $_________________."

"The service provided was necessary and the amount charged for the service was reasonable at the time and place the service was provided.

____
Affiant

Sworn to and subscribed before me on the _______ day of ________________, 2020.

____
Notary Public, State of _________

____
Notary's Printed Name

XIX. APPENDIX 4 — 18.001 Form Notice

Cause No. ___________

****	§	**IN THE ****DISTRICT COURT**
	§	
v.	§	**IN AND FOR**
	§	
****	§	****** COUNTY, TEXAS**

PLAINTIFF'S NOTICE OF AFFIDAVIT SERVICE IN ACCORDANCE WITH TEXAS CIVIL PRACTICE AND REMEDIES CODE § 18.001

TO: Defendant Big Bad Insurance Company, by and through its attorneys of record, Mr. John Doe, TALL BUILDING DEFENSE FIRM, PLLC, Really Tall Building, Dallas, Texas 75002 .

Now comes **** ("Plaintiff") by and through the undersigned counsel, and confirms the following medical billing record affidavits and medical records affidavits have been produced to all counsel associated with this case in accordance with TEX. CIV. PRAC. & REM. C. §18.001:

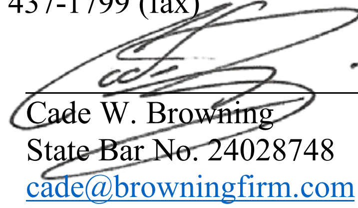
1. Declaration of ________________regarding the billing records from ________________ _________regarding Plaintiff's treatment from January 1, 2020 – March 5, 2020 produced as PLF 9-26;

2. Affidavit of __________________regarding the billing records from ________________ _________regarding Plaintiff's treatment from January 1, 2020 – March 5, 2020 produced as PLF 27-32; and

3. Declaration of ________________regarding the billing records from ________________ _________regarding Plaintiff's treatment from January 1, 2020 – March 5, 2020 produced as PLF 32-86.

Respectfully submitted,

BROWNING LAW FIRM, PLLC
P. O. Box 1600
Abilene, TX 79604
(325) 437-3737
(325) 437-1799 (fax)

By: 

Cade W. Browning
State Bar No. 24028748
cade@browningfirm.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of March, 2020, a true and correct copy of the above and foregoing document has been forwarded to opposing counsel as follows:

SENT VIA HAND DELIVERY
Mr. John Doe
TALL BUILDING DEFENSE FIRM, PLLC
Really Tall Building
Dallas, Texas 75002

____
Cade W. Browning