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CAUSE NO. DC-20-03836

SYDNEY CLEMMONS,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
v.	§	**162ND JUDICIAL DISTRICT**
	§	
GEICO COUNTY MUTUAL INSURANCE	§	
COMPANY and	§	
CEONDRIA HOBBS,	§	
***Defendants*.**	§	**DALLAS COUNTY, TEXAS**

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE COUNTER AFFIDAVITS OF ROBERT NOCERINI, M.D AND JANA SCHIEBER, RN

TO THE HONORABLE COURT:

Defendant GEICO County Mutual Insurance Company[1] (hereinafter "Defendant"), files its Response to *Plaintiff's Motion to Strike the Counter Affidavit of Robert Nocerini, M.D. and Jana Schieber, RN*, and in support thereof would respectfully show as follows:

I. BACKGROUND

Plaintiff Sydney Clemmons ("Plaintiff") was involved in a motor vehicle accident with an alleged underinsured motorist on April 18, 2019. Plaintiff sought treatment four days after the accident complaining of pain and based on documents produced to date, Plaintiff continues to seek medical treatment allegedly resulting from the April 2019 motor vehicle accident.

On May 11, 2020, Plaintiff filed 18.001 medical and billing affidavits from six separate medical providers.[2] On June 10, 2020, Defendant timely filed controverting affidavits from Dr. Robert Nocerini and Jana Schieber. On October 5, 2020, Plaintiff filed a Motion to Strike

[1] On May 22, 2020 Ceondria Hobbs filed a Motion to Dismiss pursuant to TEX. R. CIV. PROC. 91a. The motion was granted, and Hobbs was dismissed via order signed on June 23, 2020.

[2] Plaintiff also filed one additional 18.001 affidavit on September 18, 2020, however Defendant did not file a controverting affidavit, therefore that affidavit is not at issue.

Defendant's Counter Affidavits conceding that both experts were qualified, but arguing Plaintiff was not given reasonable notice of the bases Defendant intended to controvert at trial. Plaintiff's Motion should be denied because her arguments are misplaced, and her own motion demonstrates she was provided with the reasonable notice required by the statute.

II.
APPLICABLE LAW

Texas Civil Practice and Remedies Code 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 counter-affidavit. TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b), (e)–(f); *Castillo v. Am. Garment Finishers Corp.,* 965 S.W.2d 646, 654 (Tex. App.—El Paso 1998, no pet.); *Beauchamp v. Hambrick,* 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ).

Plaintiff motion places a much larger burden on Defendant than exists. Section 18.001(f) sets forth the requirements of a counter-affidavit, which are relatively simple:

> 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.

TEX. CIV. PRAC. & REM. CODE ANN. §18.001(f).

Defendant can force the offering party to prove reasonableness and necessity by expert testimony at trial by serving a proper counter affidavit. *Castillo,* 965 S.W.2d at 654. In other words, the only

effect of a valid counter-affidavit is that it prevents the plaintiff from relying solely on her own Chapter 18 affidavits at trial as to those specific expenses properly challenged by counter-affidavit.

III.
DR. NOCERINI'S COUNTER AFFIDAVIT SHOULD NOT BE STRICKEN

Notably, Plaintiff does not challenge Dr. Nocerini's qualifications. Instead, she alleges Dr. Nocerini's counter affidavit should be struck because in her opinion he fails to provide an adequate basis for his opinion, depriving her of the reasonable notice delineated in the statute. First, a full reading of Dr. Nocerini's counter affidavit and report (which is incorporated by reference into the affidavit) clearly establishes his opinion that an epidural steroid injection was not appropriate because

> [e]pidural steroid injections treat radiculopathy. There was no potential source of radiculopathy on cervical MRI such as nerve root compression, displacement or neuroforaminal stenosis. The EMG/NCV of the upper extremities did not reveal evidence of a cervical radiculopathy.

Exhibit A to Plaintiff's Motion to Strike, p. 3-4. Although Plaintiff claims Dr. Nocerini fails to provide support for his assertion that radiculopathy must be found to justify an epidural steroid injection, in reality no such assertion was made. Nowhere in his counter affidavit does Dr. Nocerini state radiculopathy *must* be found before an epidural steroid injection is appropriate. He simply states epidural steroid injections treat radiculopathy and an epidural steroid injection was not appropriate in this case because Plaintiff had no potential source of radiculopathy.

Plaintiff also seeks to strike Dr. Nocerini's counter affidavit because he "does not discuss whether radiculopathy can exist despite a clear MRI or whether other aspects of Plaintiff's condition indicated radiculopathy existed or that an epidural steroid injection would be helpful." Plaintiff's Motion, 3-4. Plaintiff's basis is flawed because it is inappropriate for Dr. Nocerini to address issues not raised in Plaintiff's medical records. Neither Plaintiff's medical providers nor

Dr. Nocerini state that Plaintiff had a "clear MRI." Likewise, Plaintiff does not cite to any of her medical records that explain what "other aspects" she is referring to. Dr. Nocerini's review and opinions are limited to the medical care rendered to Plaintiff, not to potential treatments or options that may have been available under similar circumstances. Plaintiff essentially faults Dr. Nocerini for failing to speculate in his counter affidavit which is inappropriate under the statute. If Plaintiff wishes to get Dr. Nocerini's opinions on hypothetical situations she can do so at his deposition or at trial, but it is not appropriate for a counter affidavit.

Plaintiff next cites to *Turner v. Peril* in support of her argument that Dr. Nocerini's counter affidavit should be struck. Plaintiff's reliance is misplaced. The *Turner v. Peril* decision addressed an affidavit that did not contain any basis at all for the affiant's opinions, stating nothing more than a conclusory opinion without any underlying factual support. The entirety of the affiant's opinion in *Turner* read as follows:

> Such Affidavit [filed by the plaintiff] 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.

Turner, 50 S.W.3d 742, 746 (Tex. App.—Dallas 2001, pet. denied). The only basis was the doctor's "education, training, and experience . . . and a review of the medical records of [the doctor] which fail to show any objective finding of a significant injury." *Id*. The affiant determined in conclusory fashion that none of the treatment after the date of the accident was reasonable. *Id*. The appellate court stated that the affiant made only "a conclusory statement" that none of the treatment was necessary, failing to state that the "examination did not justify the treatment [the plaintiff] received" or identifying the basis that the treatment was excessive. *Id*. at 748.

By contrast, in this case, Dr. Nocerini has provided reasonable notice of the basis for his opinion that the Plaintiff's epidural steroid injection was not reasonable or necessary. Dr. Nocerini's affidavit sets forth detailed factual support for this conclusion: (1) the Plaintiff had an EMG/NCV of the bilateral upper extremities on May 29, 2019 which found no electrodiagnostic evidence for a neuropathy or left cervical radiculopathy; (2) A cervical MRI of the cervical spine found no potential source of radiculopathy such as nerve root compression, displacement or neuroforaminal stenosis. *See* Exhibit A to Plaintiff's Motion to Strike, 2-3. Based on this detailed factual information, as set forth in his affidavit, Dr. Nocerini determined that the epidural steroid injection was not necessary because epidural steroid injections treat radiculopathy and Plaintiff had no objective findings of radiculopathy. *Id.*

IV.
JANA SCHIEBER'S COUNTER AFFIDAVIT SHOULD NOT BE STRICKEN

Regarding Jana Schieber, Plaintiff does not argue Schieber is unqualified. She merely argues she wasn't provided reasonable notice of what Defendant intends to controvert. Specifically, Plaintiff complains that Schieber does not detail how she determined reasonable charges, did not attach any data she relied upon or any authority to support her contention that a database can be relied upon to determine reasonable charges. Plaintiff again attempts to place a much larger burden on Defendant than is required.

First, in her controverting affidavit, Schieber explains the database (the data she relies upon)[3] she uses and how the usual, customary and reasonable component is derived as well as how the geographical region is determined. For each provider, Schieber provides a detailed list of the data from each of Plaintiff's medical visits, the code and description associated with the visits as

[3] Plaintiff offers no authority for her contention that Schieber must attach an entire database to her counter affidavit for it to be valid.

well as the amount billed by Plaintiff's medical provider and the amount allowed by the database used in her medical bill review. The end result is a comparison between the amount billed by Plaintiff's medical providers and the amount considered usual, reasonable and customary in the region which has been found by at least one Texas Court of Appeals to be reasonable notice. *See In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler, 2019) ("When the amount 'allowed' is less than the amount included in the affidavit, Schieber controverted the affidavit. As a result, Schieber's affidavit gave reasonable notice of the claims she controverts and why." *See* TEX. CIV. PRAC. & REM. CODE § 18.001(f).) Schieber's counter-affidavit provided an item-by-item, day-by-day, to-the-penny breakdown for each provider. Plaintiff's claim that a counter affidavit with such an extreme level of detail is not sufficient notice is mind boggling.

Plaintiff also asserts that there is no authority allowing for the use of a database to determine reasonable charges, however Plaintiff is incorrect. First, Schieber explains how it is an accepted practice in the medical community to rely on commercially available databases to determine the reasonableness of charges. In addition, in *Gunn v. McCoy*, the Texas Supreme Court held that "insurance companies keep records and databases of both the list prices and the actual prices of specific treatments and procedures." 554 S.W.3d 645, 673 (Tex. 2018). 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*; *see also In re Brown*, 2019 WL 1032458 at *3. Clearly, the Texas Supreme Court has provided the authority Plaintiff claims was lacking.

Lastly, Plaintiff complains that Schieber "fails to consider anything beyond the raw data," and whether they were circumstances would "justify the departure from the usual cost of any of the treatments Plaintiff received." Plaintiff's Motion, 6. Again, Plaintiff is asking Defendant's

expert to speculate by considering information not contained in Plaintiff's medical records. Furthermore, an entire coding system exists for the express purpose of allowing doctors to assess the needs of their patients and document appropriate care. Plaintiff's request would have a nurse recoding records written by physicians which would be patently improper.

Contrary to Plaintiff's unsubstantiated allegations, Dr. Nocerini and Nurse Schieber's counter-affidavits give more than reasonable notice as to the basis on which Defendant intends to controvert Plaintiff's care which is all that is required. Plaintiff is apparently seeking or expecting information more appropriate for depositions rather than simple counter-affidavits. If Plaintiff's counsel wishes to ask Dr. Nocerini or Nurse Schieber about their thought processes or hypothetical scenarios she is more than welcome to ask them at trial or a deposition if desired, but any further detail is not required in a counter-affidavit.

V.
CONCLUSION

Defendant undeniably complied with Section 18.001. The counter-affidavits should not be struck due to any alleged lack of providing reasonable notice of the basis for Defendant's challenge to the reasonableness and necessity of treatment. Despite Plaintiff's assertions, Dr. Nocerini and Nurse Schieber's counter-affidavits provided reasonable notice of the basis upon which Defendant intends to controvert some of her care, giving detailed factual support for the opinions set forth in the counter-affidavit. Therefore, Plaintiff's Motion to Strike should be denied.

Respectfully submitted,

By: */s/ Stacy Thompson*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on the following counsel of record on this 24th day of November 2020 in accordance with the TEXAS RULES OF CIVIL PROCEDURE:

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