

THOUGHT LEADERSHIP

News

## A NEW PERSPECTIVE: TEXAS COURT OF APPEALS UPHOLDS SUFFICIENCY OF AFFIANT'S RELIANCE ON INSURANCE COMPANY DATABASE FIGURES FOR SECTION 18.001 CONTROVERTING AFFIDAVIT

Newsbrief

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This week, the Texas Court of Appeals in Tyler granted a writ of mandamus in *In re: Larry Brown and JBS Carriers*, No. 12-18-00295-CV, 2019 WL 1032458 (Tex. App.—Tyler, Mar. 5, 2019, orig. proceeding) vacating the trial court's order striking Defendant's counter-affidavit challenging the reasonableness and necessity of Plaintiff's medical expenses.

The underlying action arose from a personal injury matter where Plaintiff Saucedo alleged a vehicle owned by Defendant JBS Carriers and driven by Defendant Brown, struck Plaintiff's vehicle. During the litigation, Saucedo filed affidavits supporting the reasonableness and necessity of his medical treatment pursuant to Section 18.001 of the Texas Civil Practice and Remedies Code. Defendants subsequently filed a controverting affidavit from Registered Nurse, Jana Schieber. 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. Defendants responded with a declaration from Schieber which included attachments from the database she relied, however the trial court granted 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. Defendants filed a petition for a writ of mandamus alleging that the trial court abused its discretion by striking Schieber.

Considering the writ, the appellate court 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. However, the Texas Supreme Court recently clarified 18.001 qualifications in *Gunn v. McCoy* where it held that insurance subrogation agents are qualified to use their databases to create affidavits regarding the reasonableness and necessity of a plaintiff's medical expenses. The *McCoy* court further 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.

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Based on this reasoning, the appellate court rejected Saucedo's argument that Schieber was unqualified and her opinion unreliable because she was not a practicing nurse and relied upon a database. Since the stricken affidavit rendered the Defendants unable to represent evidence concerning the reasonableness of Plaintiff's expenses, the Court found striking the affidavit constituted harmful error and entitled Defendants to mandamus review. As a result, the Court ordered the trial court to vacate its order and to deny Plaintiff's motion to strike.

**Editor's Note:** An important statement from *Gunn v. McCoy* helps contextualize the Court's decision to permit Schieber's controverting affidavit in light of the language of Section 18.001: "plain language of [S]ection 18.001(c)(2)(B) does not require that the affidavits be made by a records custodian *for a medical provider*." See *Gunn v. McCoy*, 221 S.W.3d 645, 672 (Tex. 2018). It should be noted however, that the burden for a controverting affidavit is greater than that for the initial affidavit and must be provided by someone "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." This holding seems to broaden the pool and the information a controverting affiant may rely on—including reliable database figures.