SECTION 18.001 TEX. CIV. PRAC. & REM. CODE – A Legislative Shortcut

Since the inception of Section 18.001 of the Tex. Civ. Prac. & Rem. Code in 1987, there has been much discussion and some confusion as to its significance. While a procedural rule, it is inextricably intertwined with the substantive right of recovery for a claimant. The following discussion is not meant to be exhaustive but only illustrative of common issues that arise.

SECTION 18.001(b)

18.001(b) states as follows:

> "[U]nless a controverting affidavit is filed as provided by this Section, an affidavit that the amount a person charged for 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 a judge or jury that the amount charged was reasonable or that the service was necessary."

While this Section has been utilized in non-injury cases[1], its predominant use is to prove the reasonableness and necessity of medical expenses.

In practice, Section 18.001 provides a procedural shortcut, which accomplishes three things, to wit:

1. It allows for the admissibility (by affidavit) of evidence of reasonableness and necessity of charges;
2. It allows for use of hearsay to support findings of fact; and
3. It provides for exclusion of evidence to the contrary unless a counter-affidavit is filed (if proper objection is made to the contrary evidence).

Beauchamp v. Hambrick, 901 S.W.2d 747 (Tex. Civ. App. – Eastland 1995, no writ).

Ordinarily, expert testimony would be required to prove the reasonableness and necessity of any charges. Castillo v. American Garment Finishers, 965 S.W.2d 646 (Tex. Civ. App. – El Paso 1998, writ den'd).

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[1] See e.g.; City of El Paso v. Public Utility Commission of Texas, 916 S.W.2d 515 (Tex. Civ. App. – Austin 1995, writ dism'd agreement).

The confusion lies in the effect of an affidavit filed pursuant to this Section in terms of its evidentiary value. An affidavit filed pursuant to Section 18.001 Tex. Civ. Prac. Rem. Code does not render the evidence conclusive or address the issue of causation. Rather, it simply provides that, if uncontroverted, it will support the jury's finding of fact for the cost of services rendered. Beauchamp v. Hambrick at 749.

Where causation is contested, however, a jury is free to award an amount less than the amount established by the affidavit.

In Beauchamp v. Hambrick, the plaintiff had established, through affidavit, past medical expenses in the amount of $6,370.54. In its verdict, the jury only awarded $1,014.25 for past medical. The plaintiff moved for judgment non obstante verdicto, which was granted. In modifying the trial court's judgment to award only the damages found by the jury, the El Paso court noted as follows:

> "[T]he matter of causation was contested by Beauchamp. There was a dispute over the seriousness of the impact. There was also evidence that Hambrick's medical expenses were incurred in two different times periods, that she was treated for a brief time following the collision, and that the treatment ceased for a period of time before she received any further treatment. The jury awarded damages equal to the amount shown by the affidavits relative to the first period of treatment. We hold that appellee has failed to conclusively establish past medical expenses of $6,370.54 which was awarded by the Court."

In Hilland v. Arnold, 856 S.W.2d 240 (Tex. Civ. App. – Texarkana 1993, no writ), plaintiff offered evidence of the reasonableness and necessity of medical bills by affidavit in the amount of $13,060.81.

The jury found favorably to plaintiff on liability but only awarded $659.00. This sum represented the amount charged by the first two physicians Hilland visited after the accident and none other. The Court entered judgment based on the jury verdict and Hilland appealed contending the trial court erred in failing to grant his Motion for New Trial[2]. In

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[2] In Hilland, the plaintiff submitted that the case of Hill v. Clayton (citation infra.) as a "white horse" case. The Court, in footnote 1, gave this historical note on the concept of a "white horse case".

> The term *white horse case* has appeared in twenty-six published appellate cases in Texas. According to Bryan A. Garner, *A Dictionary of Modern Legal Usage* 577 (1987), this term (along with the terms *horse case, gray mule case, goose case, spotted pony case,* and *pony case*) means a reported case with virtually identical facts, which therefore should determine the disposition of the instant case. At least one source reports that this term was coined in Dallas, Texas.

affirming the Court's denial of plaintiff's Motion for New Trial, the appellate court reviewed the language of the affidavits. Thereafter it stated:

> "[A]lthough this language states that Hilland had a medical condition that necessitated the treatment, the language does not link the treatment to the accident involving Arnold. Texas law requires an injured party who receives medical treatment to recover only those reasonable medical expenses which were necessarily incurred as a result of the injuries suffered in the collision or occurrence involved in the litigation." Id. at 242.

The Court further noted that there was evidence from which the jury could conclude that medical treatment was initially necessary to address pain stemming from an arthritic deterioration in his spinal column (presumably an aggravation) and that subsequent deterioration requiring treatment was not necessarily the result of the accident. To compound matters, the treating physician refused to testify affirmatively as to the cause of the deterioration inasmuch as he had not seen x-rays taken before the accident.

The plaintiff had testified that his neck became numb immediately after the collision and the next morning he felt intense pain in his neck. Nonetheless, the Court noted that the jury was free to disbelieve Hilland's testimony regarding the cause of the continuing pain.

The Court further observed that the language of the affidavits did not link the treatment to the accident involving Arnold. The San Antonio Court in Barrajas v. Via Metropolitan Transit Authority, 945 S.W.2d 207 (Tex. Civ. App. – San Antonio 1997, no writ), however, has held that an affidavit (filed pursuant to Section 18.001) that does, in fact, link the services to the occurrence in question, nonetheless, does not establish medical causation as a matter of law. In Barrajas, the affidavit stated that the "services [were] rendered as a result of the injuries sustained by Juan Barrajas on June 1, 1993". Id. at 208[3].

> According to what is probably an apocryphal story, around the turn of the century a Texas law firm had a case in which a white horse owned by the client's taxi service reared in the street, causing an elderly woman to fall and injure herself. The partner handling the case asked a young associate to find a case on point. The associate came back several hours later with a case involving an elderly lady who had fallen in the street after a taxi company's black horse had reared in front of her. When the associate took this case to the partner, the partner said, 'Nice try, son. Now, go find me a white horse case.'"

[3] At least one other unpublished opinion has likewise held that language in affidavits specifically linking the treatment to the occurrence are insufficient to conclusively establish causation. See; John Lee Sanders and City of Dallas v. Cutberto R. Perez, 1999 Tex. App. LEXIS 3800 (Dallas 1999) (services provided were necessary as the result of the occurrence in question).

There appear to be some instances, however, where an appellate court may find a jury's reduced award for medical expenses as against the great weight and preponderance of the evidence if the reasonableness/necessity as well as causal connection are shown by uncontroverted testimony as opposed to affidavit. See e.g.; Hill v. Clayton, 827 S.W.2d 570 (Tex. Civ. App. – Corpus Christi 1992, no writ); Clark v. Brewer, 471 S.W.2d 639 (Tex. Civ. App. – Corpus Christi 1971, no writ). Likewise, in at least one instance, where a jury awarded medical expenses for a surgeon's fee but not the anesthesiologist for the same surgery, a new trial was warranted. Gray v. Floyd, 783 S.W.2d 214 (Tex. Civ. App. – Hou. [1st Dist.] 1989, no writ).

For other cases dealing with the substantive effect of the affidavit, see; Nat'l Union Fire Ins. Co. v. Wyar, 821 S.W.2d 291 (Tex. Civ. App. – Hou. [1st Dist.] 1991, no writ); Six Flags Over Texas v. Parker, 759 S.W.2d 758 (Tex. Civ. App. – Fort Worth 1988, no writ).

What remains uncertain is whether, in all instances, an affidavit executed and filed pursuant to Section 18.001 of the Tex. Civ. Prac. Rem. Code would circumvent traditional concepts that medical causation must be established through expert testimony with few exceptions. Under traditional concepts, to recover damages in a personal injury case, a plaintiff must establish two causal nexuses: (1) a causal nexus between the conduct of the defendant and an event; and (2) a causal nexus between the event and the plaintiff's injuries. Blankenship v. Mirick, 984 S.W.2d 771, 775 (Tex. Civ. App. – Waco 1999, writ den'd) (and cases cited therein).

The Mirick court, in addressing the traditional requirement, noted that a jury may determine the required causal nexus between the event sued upon and the plaintiff's injuries when their general experience and common sense will enable a lay person to fairly determine the causal nexus. Id.

In Mirick, there were no medical affidavits for the Court to consider in its analysis of the sufficiency of evidence of causation. In Beauchamp and Hilland (as well as other cases addressing the issue), although causation was contested, the Court did not explicitly reach the issue of whether an affidavit filed pursuant to Section 18.001satisfies the requisite causation nexus. In Beauchamp, although the defendant, by the Court's recitation, contested causation, and the Court clearly stated that the affidavit does not address causation, the Court simply held the affidavits were not conclusive and a jury could, under those circumstances, award less than amounts contained in the affidavits[4].

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[4] Undoubtedly in more complex cases with significant medical, there will be expert testimony as to causation. If faced with a causation challenge in a case that lacks such, the Mirick causation approach

In order to insure the maximum effectiveness of your affidavit, the proposed affidavit set forth in the Tex. Civ. Prac. Rem. Code should be followed. To the extent that the Court finds that the language employed in an affidavit is insufficient to establish the reasonableness and necessity, the procedural benefits of the provision may be lost. See e.g.; Wal-Mart v. Tinsley, 998 S.W.2d 664 (Tex. Civ. App. – Texarkana 1999, writ den'd) (footnote 4) ("Although Section 18.001 allows a party to prove reasonableness and necessity of medical expenses through an affidavit of a custodian of medical records, the Tinsley's affidavits did not state the medical expenses were reasonable and necessary.")[5]

Interestingly, although a non-expert custodian can execute such an affidavit, as to reasonableness/necessity, that same person may not testify to the same matters live at trial. Castillo v. American Garment Finishers, 965 S.W.2d 646 (Tex. Civ. App. – El Paso 1998, no writ). In Castillo, the plaintiff sought to establish the reasonableness and necessity of his medical bills through the live testimony of the custodian of records. The plaintiff argued that 18.001 allows that person, despite lacking the requisite expertise, to execute such an affidavit and, therefore, the custodian should be allowed to testify live. The Court, in rejecting plaintiff's argument, noted that Section 18.001 is an evidentiary statute, which accomplishes the procedural matters set forth at the beginning of this paper. In conclusion the Court stated:

> "[W]hile the legislature has chosen to provide for the admissibility of an uncontested affidavit of a non-expert custodian of records which establishes the reasonableness and necessity of medical expenses, it has not provided that a custodian of records is competent to offer live testimony of these same facts. Further, allowing a non-expert custodian to testify in this fashion would deprive a party of its ability under Section 18.001 to file a counter-affidavit and force the plaintiff to prove reasonableness and necessity by expert opinion at trial."

Id. at 654.

An interesting distinction arises when the provision for filing medical affidavits is compared to Rule 902 (10)(a) T. R. Evid. Rule 902(10)(a) T. R. Evid. allows business records to be filed fourteen (14) days before trial whereas Section 18.001 Tex. Civ. Prac.

(within the jury's general experience/common sense) should be urged or Beauchamp, Hilland could be used to suggest that the affidavit sufficiently establishes evidence to support an award.

[5] What is perplexing about this passage is that the Court, immediately prior to this observation, noted that the affidavit utilized was that set forth in the statute!!

Rem. Code requires the medical affidavits to be filed thirty (30) days before trial. In Rodriguez-Narrea v. Ridinger, 19 S.W.3d 531 (Tex. Civ. App. -- Fort Worth 2000, no writ), the plaintiff filed the custodian's affidavit with attached bills greater than fourteen (14) days before trial but less than thirty (30) days. Inasmuch as the affidavits had not been filed thirty (30) days before trial, the trial court excluded them. On appeal, the appellate court held that the trial court erred in not admitting the bills as business records pursuant to Rule 902(10)(a). The Court noted that the affidavits were not admissible pursuant to 18.001 to establish the reasonableness and necessity (since they were filed late) but only under the evidentiary rule to establish them as business records. Inasmuch as they could not be admitted under Rule 18.001 to establish reasonableness and necessity, however, the Court held it was harmless error to not admit them as business records since the plaintiff failed to establish the reasonableness and necessity of the medical expenses[6].

SECTION 18.001(e)

Section 18.001(e) provides as follows:

"A party intending to controvert a claim reflected by the affidavit must file a counter-affidavit with the clerk of court and serve a copy of the counter-affidavit on each other party or the party's attorney of record:

1. Not later than:
   A. Thirty days after the day he receives a copy of the affidavit; and
   B. At least fourteen days before the day on which evidence is first presented at the trial of the case; or

2. With leave of Court at any time before the commencement of evidence a trial."

SECTION 18.001(f)

Section 18.001(f) provides:

"A counter-affidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and

[6] This was a bad outing for the plaintiff's counsel. In addition to failing to timely file the medical records affidavit, two physicians were not allowed to testify as to the reasonableness and necessity because one had not been designated at all and the other had not been designated to address the issue.

must be taken before a person authorized to administer oaths. The counter-affidavit 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."

In Turner v. Peril, 05-97-00930-CV (Tex. App. 2000 LEXIS 326, Dallas), the trial court excluded plaintiff's affidavit of reasonableness and necessity on the basis of counter-affidavits filed by defendant. The Court of Appeals reversed the trial court's exclusion of plaintiff's affidavit and, without discussing the substance of defendant's counter-affidavit, simply held that it was improper for the trial court to exclude the plaintiff's affidavits inasmuch as the defendant's counter-affidavits did not give reasonable notice of their basis and describe the qualifications of the affiant.

Anyone executing a counter-affidavit is subject to deposition. In Lummus v. Dean, 750 S.W.2d 312 (Tex. Civ. App. – Beaumont 1988, no writ), the defense attorney filed an affidavit controverting the plaintiff's affidavit stating he was knowledgeable in the review and evaluation of injuries, medical treatment and charges for medical care. He further stated that the medical charges addressed by plaintiff's affidavit were not made necessary by the accident.

Plaintiff's counsel immediately noticed the deposition for the attorney who, in response, sought to quash the deposition on the grounds of privilege. The Court of Appeals held that the attorney/affiant became a material witness upon execution of the affidavit and was subject to deposition despite his claims of privilege.

CONCLUSION

1. File Section 18.001 medical costs at least thirty (30) days prior to trial.

2. Make sure they follow the proposed language in the Rule.

3. If no counter-affidavit is filed, object to any offer of evidence to contradict the reasonableness and necessity.

4. If a counter-affidavit is filed, file a Motion to Strike if it does not reasonably apprise you of the basis upon which the defendant seeks to controvert the claim of reasonableness/necessity.

5. If you feel it is warranted, notice/take the deposition of the counter-affiant.

6. If you have it available, always use testimony (vs. affidavit) to prove reasonableness/necessity to increase the possibility of post-verdict relief if the jury's verdict does not award the entire medical proved up.

7. If opposing counsel seeks directed verdict or post-verdict relief on the basis of no expert testimony as to medical causation:

    a. Argue Mirick, i.e. it is not necessary in that the jury can make the causal connection.

    b. Argue Beauchamp, Hilland (among others) that the rule is a legislatively fashioned exception to the rule, which provides that the affidavit will support an award even if causation is disputed and it is simply up to the jury to decide.