TEXAS CIVIL JUSTICE LEAGUE

Court Watch

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To: TCJL Board of Directors

From: George Christian

Date: June 19, 2018

Re: *Debra C. Gunn, M.D. v. Andre McCoy* (No. 16-0125; decided June, 15, 2018)

By a 7-2 majority, the Texas Supreme Court has upheld a significant plaintiff's verdict against a treating physician in a medical malpractice case. The decision contains a number of important procedural holdings pertaining to the legal sufficiency of the evidence, the exclusion of a defense expert's deposition at trial, and, most importantly, the sufficiency of medical affidavits filed under §18.001, CPRC.

The case arose from injuries sustained by the plaintiff when she suffered complications from a placental abruption, which occurred when she was 37 weeks pregnant. The plaintiff lost a substantial amount of blood and developed hypoxic encephalopathy, or loss of oxygen to the brain. She subsequently required twenty-four-care, suffered another seizure a year following the original injury, and later died, never having recovered significant brain function. The plaintiff's husband, acting as her guardian, sued the treating obstetrician-gynecologist, the treating physician's practice, the hospital, and two on-call physicians at the hospital, an OB-GYN and a cardiologist. The hospital and the on-call OB-GYN settled with the plaintiff, and the plaintiff dropped the cardiologist from the pleadings. At trial the jury found the treating physician liable for the plaintiff's injuries and awarded more than $10.6 million in damages, including more than $7.2 million for future damages. The trial court applied a dollar-for-dollar settlement credit that reduced the verdict by $1.2 million, ruled that the practice was vicariously liable for the treating physician's negligence, and found the two defendants jointly and severally liable. The trial court eventually signed a final judgment that entitled the practice to indemnity from the treating physician. The defendants appealed on multiple grounds. The 14th Court of Appeals [Houston] affirmed the judgment, modified to reflect a voluntary remittitur of about $160,000 in the award of future medical expenses. SCOTX accepted review.

For our purposes, the central issue in the case involves the legal sufficiency of the plaintiff's medical expense affidavits submitted before trial under §18.001, CPRC. This statute permits a plaintiff to provide affidavits of a health care provider or a person in charge of medical records to provide medical expenses actually paid or incurred. These affidavits may constitute sufficient evidence of the reasonableness of the charges and the necessity of the services, though they are not conclusive and may be controverted by the defendant (though, in practice, trial judges often strike the defendant's controverting affidavits, a situation the court's opinion does not acknowledge).

In this case, the plaintiff initially filed 14 affidavits showing amounts billed, but withdrew the affidavits following SCOTX's decision in *Haygood v. Escobedo* (holding that the amounts listed on the affidavits are limited to expenses paid or incurred, not the billed amounts). The plaintiff

subsequently refiled affidavits showing about $700,000 in past medical expenses actually paid. The defendants objected to the plaintiff's §18.001 affidavits on the basis that they were attested not by the person who provided the services or the records custodian of the provider, but by insurance company subrogation agents located in Kentucky, Wisconsin, and Illinois. The defendants argued that the affidavits could not be legally sufficient to show the reasonableness and necessity of the charges because out-of-state subrogation agents are unqualified to render opinions about the cost of services provided in Houston.

Like the trial court and the court of appeals, SCOTX rejected the defendants' argument and held that the affidavits were legally sufficient, regardless of their origin, as long as they were made by a custodian of the records. In the opinion by Justice Green, the Court reasoned that the plain language of §18.001 does not specify that affidavits must be made by a records custodian *of the provider* or by a person with expert knowledge of the services provided or their costs, just by a person in possession in the records. If the Court disallowed affidavits by subrogation agents, Justice Green argued, it would "frustrate the Legislature's intent" to create a streamlined method of proving medical expenses in §18.001. In his discussion, Justice Green recognized that the complexities of modern health care, "what is 'necessary' is often heavily influenced by insurance companies and by what treatments and procedures they are willing to cover . . . and the reality of our health care system does not mandate" limiting "the proper affiants to medical providers and medical providers' record custodians."

The upshot of the Court's opinion, however, is that virtually *anyone* who happens to be in possession of medical billing records can attest to the reasonableness and necessity of charges rendered by a Texas medical provider. To make matters worse, §18.001(f) requires a defendant seeking to controvert an affidavit to hire an expert "qualified, by knowledge, skill, experience, training, education, or other expertise to testify in contravention to all or part of any of the matters contained in the initial affidavit." In other words, the statute prescribes a double standard whereby the plaintiff can establish medical expenses by affidavit of a person with no knowledge whatsoever but the defendant has to retain an expert to contest those same charges.

This result cannot be what the Legislature intended when it first enacted §19.001 in 1985. Justice Johnson's dissent, joined by Justice Boyd, points out this discrepancy and reasons that a records custodian must be "sufficiently trained or experienced in medicine to give competent testimony as to the necessity of treatment and sufficiently familiar with reasonableness of charges in the region or locale in which services were rendered to give competent testimony as to the reasonableness of amounts paid by insurance companies." Justice Johnson also contends that the records custodian should have at least some "reasonable" connection to the patient or "first-hand knowledge of the services rendered." The majority clearly felt constrained by the language of the statute in rejecting Justice Johnson's position.

This opinion illustrates the growing necessity of revising §18.001 in the next legislative session. It stands to reason, for example, that if a plaintiff can use a subrogation agent unrelated to and remote from the patient's actual care to prove medical bills, then a defendant should be able to do the same to disprove them. This result would, of course, make a mockery of the system and defeat the purpose of §18.001. Recognizing this possibility, Justice Johnson raised the specter of a constitutional challenge to the statute on the basis that it deprives a defendant of basic due process. Unquestionably, the outcome of *Gunn v. McCoy* ratchets up the stakes in the medical expense affidavit controversy.

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