August 2018

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Mike Shipman

July is behind us and hopefully so are the 108 degree days!!! I just checked the 15 day forecast on my Weather Channel app and it is predicting NO days above 100 degrees and at least some chance of rain. Hopefully some of that forecast will come true, although I'm not going to hold my breath on weather predictions. I would also consider mentioning the Texas Rangers but that would just be too sad. It's just about time for school to start back up and school zone signs to start flashing again. Please, please be cautious when driving through these school zones. Not just because of the very expensive ticket you will get if exceeding the speed limit but also because of the young kids walking through most of them. I hope all of you have had an opportunity to take some time off and enjoy the summer with family and friends. We have some exciting things coming up this Fall. We take our Texas Law Update on the road to Chicago on Friday, October 26th. If you know of anyone who might be interested in attending you can reach out to our Marketing Director, Dwanna Gassaway or me and we will be happy to assist. Back in January I concluded my greeting with our resolve to "do better" than 2017 in providing cost effective and quality legal services. I hope you believe we have done so. We are so grateful to have the opportunity to work with each of you and for the support you continue to provide us.

Challenging the Reasonableness of Medical Expenses

Kristi Kautz and Ashley MacNamara

In the typical personal injury lawsuit, one of the most significant damage claims is for paid and incurred medical expenses. Almost ten years ago, the Texas Supreme Court, in *Haygood v. De Escabedo* defined actually paid or incurred medical expenses as those which had been paid either by the plaintiff or a third-party, such

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Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

Contact:

Doug Fletcher
Firm Managing Partner
214-987-9600
doug.fletcher@fletcherfarley.com

Joanna Salinas
Austin Office Managing Partner
512-476-5300
joanna.salinas@fletcherfarley.com

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as health insurance, on the plaintiff's behalf. This decision ended the practice of a plaintiff being able to submit the entire amount charged by the medical provider and therefore collecting a windfall if lesser amounts had actually been paid, or expected to be paid to a healthcare provider.

Kristi Kautz

As always, when a damages item is limited or capped by either the courts or the legislature, tactics begin to emerge in response to avoid the application of the limitation. In the personal injury context, more and more attorneys are advising their clients not to submit their medical expenses to their health insurance or are negotiating with the providers themselves to obtain services for their clients via letters of protection instead of the providers submitting claims to health insurance. The result of this tactic is the ability of the plaintiff to submit the full charges to the jury since nothing has been paid and therefore the full charges have been incurred.

Ashley MacNamara

Countering this new tactic has been assisted by two new opinions from the Texas Supreme Court. In a past newsletter, we advised you that the Supreme Court in *In Re North Cypress Medical Center* had authorized a party disputing the past medical charges to obtain discovery as to the reasonableness of those charges via review of the hospital's agreements with health insurers for lower rates for the same services.

Subsequent to *In Re North Cypress Medical Center,* in *Gunn v. McCoy*, the Texas Supreme Court was asked to determine whether affidavits from the subrogation firm for plaintiff's health insurance carrier met the requirements of section 18.001 billing affidavits. In ruling that the affidavits were proper, reasoning that health insurance companies have a great deal of knowledge about the reasonableness of the charges for medical expenses, the Court also emphasized what section 18.001 affidavits actually do. The Court issued a reminder that section 18.001 affidavits are not conclusive proof that the medical expenses are reasonable or that the treatment was medically necessary. These affidavits only act as sufficient minimum proof to support a jury finding on such matters. A defendant may still cross-examine plaintiff's treatment providers or offer other proof that the bills are for treatment that was unnecessary or unrelated.

This is true even if a controverting affidavit is not filed. Filing a controverting affidavit means the plaintiff may not use the section 18.001 affidavit as the minimum proof to support a jury finding on the amount of past medical expenses. Not filing a controverting affidavit merely means the jury may hear competing evidence about the issue and will have to weigh the evidence, just like it does for other issues in a trial. However it should be pointed out that there are some trial courts that, without the filing of a controverting affidavit, will not allow a defendant to put on any evidence regarding the reasonableness and necessity of the medical charges. It will be interesting to see what these trial courts do with the language in the *Gunn* opinion.

Welcome Lauren Lopez

We welcome Lauren Lopez to the firm's Dallas office. She focuses her practice on the defense of personal injury, premises liability, transportation and general tort liability matters.

Supporting our Community

School Supplies Donated

Table FULL of school supplies!

The Dallas office donated school supplies to the staff of a local nursing home to help ensure that their children start the school year with the tools they need to succeed.

Based on the Court's opinion in *In Re North Cypress Medical Center*, competing evidence may include what plaintiff's health insurance would have paid, even if they were not billed. *In Re North Cypress Medical Center* and *Gunn v. McCoy* give defendants excellent ammunition to continue challenging the reasonableness of medical expenses claimed by plaintiffs.

Conflicts Resolved

Fletcher Farley Gets Defense Verdict in Hot Coffee Case

Do you remember the McDonald's coffee spill case? The jury in Scott Mayo's recent trial apparently did, quickly arriving at a unanimous defense verdict. The plaintiff alleged that she suffered severe and continuing injuries and damage as a result of a spilled cup of coffee served by our restaurant client. The plaintiff made allegations regarding extreme coffee temperature and a negligent "hand off" from an employee who was working in the drive through window. The plaintiff alleged that our client's actions in training employees and service of the coffee rose to the level of gross negligence.

Ultimately, at the close of the plaintiff's case in chief, the court granted a directed verdict on the issue of gross negligence. At the conclusion of the trial, the jury returned a unanimous verdict of no negligence on the part of our client.

Fletcher Farley Successfully Defends Claims Against City and Recovers Damages as Well

On July 26, 2018, the District Court of Llano County, Texas dismissed by summary judgment the claims of a trust and its trustee who claimed that Fletcher Farley's clients, a small lake-front city in the Hill Country and its municipal court clerk, had abused their official process and maliciously prosecuted the trust for violations of the City's property ordinance. The trust had been ticketed on multiple occasions for ordinance violations and had been fined for each violation. Well after the prosecution of the ordinance violations had ended, the City sought to collect the related fines by writ of execution. At that point, the trust filed suit not only in an attempt to avoid having to pay the fines (by a temporary restraining order and injunction), but also sought damages for the claims identified above. Before the District Court, the trust, now acting through its trustee (who was also its counsel), contended that the ordinance constituted an unconstitutional taking and therefore it should not have to pay the fines. The trust further argued that both the City and the City's municipal court clerk had abused their process in seeking to prosecute the trust under the ordinance and in attempting to collect the fines. The Motion to Set Aside the Temporary Injunction and the subsequent Motion for Summary Judgment were briefed by Joanna Salinas and Lorin Subar. Ms. Salinas also argued each Motion before the Court. In addition to obtaining a dismissal for their clients of all claims, Fletcher Farley also obtained an order from the District Court for the funds owed by the trust to the City, $16,150.

Dwanna Gassaway
Fletcher Farley Shipman & Salinas LLP
214-987-9600