

May 10, 2021



## Texas Supreme Court Clarifies Standard for 18.001 Counteraffidavits

Pursuant to Section 18.001 of the Texas Civil Practice and Remedies Code a plaintiff may introduce evidence that his or her past medical expenses are reasonable and necessary by filing an affidavit from the medical provider. Section 18.001(f) allows the defendant to refute these affidavits by submitting a counteraffidavit “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 recent years it has become increasingly common for plaintiffs to file motions seeking to strike counteraffidavits. These motions typically assert that the expert preparing the counteraffidavit does not meet the qualification standard for expert testimony under Texas Rule of Evidence 702 and the *Daubert/Robinson* factors. We have seen these arguments most frequently in response to counteraffidavits by Certified Professional Coders as to the reasonableness of medical charges.

On May 7, 2021, the Texas Supreme Court issued its opinion in *In re Allstate Indemnity Company*. This case concerned a counteraffidavit as to the reasonableness of medical charges prepared by a registered nurse who is also a Certified Professional Coder. The counteraffidavit set out that the nurse/coder determined whether multiple medical providers had used the correct CPT codes for the treatment provided and uses a database to determine the median charges for services associated with those CPT codes in the zip code where the services were provided. The plaintiff filed a motion to strike this counteraffidavit on the basis that the registered nurse/certified professional coder was not qualified under Rule 702 to controvert the reasonableness of charges for a hospital, doctors, physical therapists, and pharmacies and that her opinions and data were unreliable under Rule 702 and *Daubert/Robinson*. The trial court granted the motion to strike on these Rule 702 grounds and the Corpus Christi Court of Appeals denied the defendant’s petition for writ of mandamus. In granting the petition for writ of mandamus and finding that the trial court abused its discretion in striking the counteraffidavit, the Supreme Court issued two significant holdings:

1. A counteraffidavit challenging the reasonableness of medical charges by a hospital or medical provider does not have to be made by someone in the same field of medicine. An experienced professional coder may be qualified to testify about the reasonableness of medical expenses from multiple providers and may utilize national databases to reach their opinions.
2. Rule 702 and the *Daubert/Robinson* factors as to reliability of expert opinions relate to admissibility of testimony and are not a proper basis for striking a section 18.001 counteraffidavit.

In this opinion, the Texas Supreme Court confirms that the purpose of a counteraffidavit is to provide reasonable notice to the plaintiffs of the basis on which the reasonableness and/or necessity of his or her medical expenses will be challenged. A counteraffidavit which provides such reasonable notice cannot be struck on the basis that it is not made by an expert in the same field of medicine or on the basis that the opinions do not meet the reliability standards of Rule 702 and *Daubert/Robinson*. This opinion will likely reduce the number of motions to strike counteraffidavits and will assist in responding to any such motions which are filed.

#### [ABOUT THE AUTHOR:](#)

[Kristi Kautz](#) has been called an “excellent advocate for her client” by opposing counsel and she considers this to be one of the best compliments any attorney can receive. She is an experienced litigator who thrives on representing clients in cases ranging from simple to complex, from single-party to multi-party, and from pre-suit to post-judgment litigation. She has achieved excellent results in numerous fields including transportation, construction defect, product liability, premises liability, insurance coverage, and personal injury. Her practice extends to jurisdictions across Texas and you’ll find her equally at home advocating for her client in the courtroom and at the bargaining table.

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