MOTION TO STRIKE MEDICAL COUNTER-AFFIDAVITS SIGNED BY LAWYER

CAUSE NO.

XXXXXX	§	**IN THE DISTRICTCOURT**
Plaintiffs,	§	
	§	
VS.	§	**th JUDICIAL DISTRICT**
	§	
XXXXXX,	§	
Defendant.	§	**XXXXXX COUNTY, TEXAS**

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S COUNTER-AFFIDAVITS, AND PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANT'S COUNSEL OF RECORD

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PLAINTIFF XXXXXX, who files this his Motion to Strike Defendant's Counter Affidavit, and his Motion to Disqualify Defendant's Counsel of Record, and in support to the same would respectfully show the Court as follows:

I.

Introduction and Underlying Facts

This is a Automobile Accident case in which Plaintiff alleges that Defendant XXXXXX, negligently caused an accident in which Defendant drove his automobile into and collided with Plaintiff in a construction zone. Specifically, Defendant was under the influence of alcohol at the time of this collision which took place. As a result of such negligence and gross negligence by Defendant, Plaintiff was severely injured and thus will require Plaintiff to undergo surgical intervention to repair his injuries.

On XXXXXX, plaintiff produced to Defendant, the following Affidavits compliant with Tex. Civ. Prac. & Rem. Code §18.001, Regarding Cost and Necessity of

Services establishing the reasonableness and necessity of certain relevant medical expenses incurred by plaintiff as a consequence of defendant's negligence:

XXXXX

On XXXXXX, Defendant XXXXXX filed his Counter-Affidavits and implied Objection Concerning Cost and Necessity of services which was signed by Defendant's attorney of record in this case, XXXXXX. These purported counter-affidavits (attached as "Exhibit B"), asserting counsel's unsupported opinions and legal conclusion to the effect that the billing records and prove-up affidavits previously produced by Plaintiff as listed above are "defective" and "lack proper predicate" allegedly because *"the affidavit fails to clearly state the amount actually paid or incurred by or on behalf of Plaintiff,"* and allegedly because the affiant in the original affidavits (the various custodians of records for plaintiff's health care providers) has *"no qualifications whatsoever and therefore is defective on its face."*

Plaintiff hereby objects to the Counter-Affidavits of defendant's lawyer, and moves to strike defendant's Counter-Affidavit for the following reasons:

1. Defendant's "objections" are not the proper method or vehicle by which to controvert Plaintiff's Affidavit Regarding Cost and Necessity of Services.

2. Plaintiff has or will properly file his Affidavits Concerning Cost and Necessity of services pursuant to §18.001 of the Texas Civil Practice and Remedies Code.

3. Defendant has failed to properly controvert Plaintiff's Affidavits Concerning Cost and Necessity of services because defense counsel is not qualified to testify in contravention of all or part of the matter contained in the original affidavits pursuant to §18.001(f) of the Texas Civil Practice and Remedies Code, thus rendering defense counsel's affidavit a complete nullity.

4. The purported Counter-Affidavits of defense counsel has failed to give reasonable notice to plaintiff regarding the legal and factual basis upon which

defendant intends to controvert the claim reflected in the initial affidavits, as mandated by §18.001(f) of the Texas Civil Practice and Remedies Code.

5. Defendant has failed to make proper disclosure of XXXXXX as either a fact or expert witness in this case, has failed to provide copy of the expert's file regarding this matter, and has failed to comply with the discovery rules regarding disclosure of persons intended to testify.

6. Defense counsel has now interjected herself into this case as both a purported fact and expert witness making disqualification of counsel, XXXXXX, a mandatory requirement under the Rules of Professional Conduct, TEX. GOV'T CODE ANN. App. § 9, Rule 3.08 (Vernon 2007).

II.

Argument and Authorities

A. Plaintiff's Affidavits Regarding Cost and Necessity of Services are proper and admissible pursuant to § 18.001 of the Texas Civil Practice and Remedies Code

Section 18.001 of the Texas Civil Practice & Remedies Code is an evidentiary statute which accomplishes three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counter-affidavit. *Hong v. Bennett,* 209 S.W.3d 795,800 (Tex. App. – Ft. Worth 2006); *Beauchamp v. Hambrick,* 901 S.W.2d 747, 749 (Tex. App. – Eastland 1995, no writ). Essentially, Section 18.001 affords to litigants a significant savings of time and cost by providing a method to establish reasonableness of the cost of medical care and the treatment without expert testimony. *See Turner v. Peril*, 50 S.W.3d 742, 746 (Tex. App. –Dallas 2001, pet. denied). Thus, the § 18.001 Affidavit Regarding Cost and Necessity of services functions

as a limited exception to the general rule that would otherwise require expert testimony to establish the reasonableness and necessity of the services in issue. See *Hong v. Bennett*, 209 S.W. 3d 795, 800 (Tex. App. Ft. Worth 2006).

Section 18.001 is uncomplicated and specifically states that:

> Unless a controverting affidavit is filed as provided by that section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evident to *support a finding of fact* by judge or jury that the amount charged was reasonable or that the service was necessary. *See* Tex. Civ. Prac. & Rem. Code § 18.001 (b).
> …
>
> A party intending to controvert a claim reflected by the affidavit *must* file a counter-affidavit with the clerk of the court and serve a copy of the counter-affidavit on each other party or the party's attorney of record 30 after the day he receives a copy of the affidavit; and at least 14 days before the day on which evidence is first presented at the trial of the case; or with leave of the court, at any time before the commencement of evidence at trial. Tex. Civ. Prac. & Rem. Code § 18.001(e).
>
> The 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 *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. Tex. Civ. Prac. & Rem. Code § 18.001 (f).

In the present case, plaintiff has properly produced affidavits concerning costs of medical care and necessity of treatment by complying with Sections 18.001 (c) and 18.001 (d). In fact, plaintiff's affidavits conform verbatim to the example affidavits detailed in Section 18.002 of the Tex. Civ. Prac. & Rem. Code, although such preciseness of form is not required by the statute. Section 18.002(b) states, "[a]n affidavit concerning cost and necessity of services by the person who is in charge of records showing the service provided and the charge made is *sufficient* if it follows the following form…"

(emphasis added). Section 18.002(c) states, " The form of an affidavit provided by this section is not exclusive and an affidavit that substantially complies with Section 18.001 is sufficient. Because plaintiff has timely produced the affidavits and has fully complied with § 18.001 and § 18.002(b) of the Tex. Civ. Prac. & Rem. Code, Plaintiff has appropriately established reasonableness of the cost of his medical services and the necessity of the treatment rendered for his care.

Defendant's asserted substantive objections to these affidavits are improper and misplaced. Defendant first objects that the affidavits "should be stricken" because *"the affidavit fails to clearly state the amount actually paid or incurred by or on behalf of Plaintiff as is public policy of this state* (*See* Def.'s Counter Affidavit at p.1 ¶4 of both Counter affidavits). Interestingly, no such requirement is found anywhere in § 18.001 Tex. Civ. Prac. & Rem. Code, which is the only statute which defines the requirement for Affidavits Regarding Cost and Necessity of Services. In fact, Tex. Civ. Prac. & Rem. Code § 41.0105 is not even an evidently statute at all. It imposes no requirements which would change the otherwise well established methods of proof, but merely purports to limit a plaintiff's ultimate recovery of medical or health care expenses to *either* those which were paid by or on behalf of the claimant, or those which were incurred by or on behalf of the claimant. Notwithstanding all of this, however, defendant's Counter Affidavits are misplaced and are incorrect in that a careful reading of each of the challenged affidavits reveals that, in each case, the affidavit does, in fact, state the precise amount of the charges which were incurred by or on behalf of XXXXXX. For these reasons, defendant's first point should be overruled.

Defendant next objects to plaintiff's affidavits asserting as a basis the affiant's apparent lack of "qualifications" to render an expert opinion relating to reasonableness of the charges and necessity of services. (*See* Def.'s Counter Affidavit at p.2 ¶2 of both Counter affidavits) However, the statute clearly provides that the affidavit may be completed by the custodian of records, and clearly represents the legislature's intent to allow such evidence to be provided by a non-expert so long as the other requirements of the statute are met. *See* § 18.001 (c)(2)(B) (The affidavit must be made by…the person in charge of records showing the service provided and charge made); *see Turner*, 50 S.W.3d at 747 (holding that § 18.001(c) (2) (B) "permits charges to be proved by non-expert custodian"). Defendant's objection regarding "lack of proper predicate" is an attempt to distort the well established purpose of § 18.001. Although an affidavit produced pursuant to section 18.001 does not alone constitute sufficient evidence of causation, *Ferrer v. Guevara,* 192 S.W.3d 39, 47 (Tex. App. – El Paso 2005, pet. granted); *Beauchamp*, 901 S.W.2d at 749; *Barrajas v. Via Metro. Transit Auth.,* 945 S.W.2d 207, 208 (Tex. App. – San Antonio 1997*,* no pet.), the statute provides that the affidavit, if uncontroverted, will support the jury's finding of *fact* as to the cost of services rendered and the necessity of the treatment. *See* § 18.001 (b); *Beauchamp*, 901 S.W.2d at 749. Thus, Defendant's second point regarding the qualifications for the affiant witness for the affidavit is unsupportable.

B. Defense counsel is not qualified by knowledge, skill, experience, training or otherwise to testify in contravention of all or part of any matter contained in any of Plaintiff's Affidavits Regarding Cost and Necessity of Services

Section 18.001(f) specifically requires that *"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."* The term "must" as used in section 18.001 creates a condition precedent. *See* Tex. Gov't. Code Ann. § 311.016(3)(Vernon 2007); *See also Bituminous,* 223 S.W.3d at 492. The Defendant's counter-affidavit does not comply with the requirements of section 18.001(f) because it does not demonstrate, as a matter of foundation, that defense counsel has the requisite knowledge, skill, experience, training, or education to render an expert opinion about the necessity of the services provided to plaintiffs or the reasonableness of the charge for those services. *See Turner,* 50 S.W.3d at 747 (holding that "section 18.001 places a greater burden of proof on counter-affidavits to discourage their misuse in a manner that frustrates the intended savings").

Defendant has the burden in proving that defense counsel "possesses special knowledge as to the very matter on which he proposes to give an opinion." *See Broders v. Heise*, 924 S.W.2d 148, 152-53 (Tex. 1996). Defense counsel is an attorney licensed to practice law in the State of Texas and provides no evidence that she possesses any type of medical knowledge in order to testify and controvert claims regarding the reasonableness and necessity of Plaintiff's medical expenses. *See id.* at 152 (holding that "there is no validity… to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question'); *see also Whiting v. Boston Edison Co.,* 891 F. Supp. 12, 24 (D. Mass. 1995), *cited with approval in Broders v.*

Heise, 924 S.W.2d at 153 (holding that " [j]ust as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.") Presumably, if a medical doctor is not automatically qualified by virtue of a medical degree to supply expert medical testimony, then an attorney, with no medical training or licensure whatsoever, surely cannot be qualified to supply expert medical testimony either. Therefore, since defendant has failed to establish that defense counsel is qualified to testify regarding the reasonableness or necessity of services provided to XXXXXX (the subject of the initial affidavits) by knowledge, skill, experience, training, education, or other expertise, the counter-affidavit of defense counsel is a nullity and should be stricken as incompetent.

Moreover, due to an extreme chance at prejudicially impacting the jury, the Texas Supreme Court has held that an expert witness must be (1) qualified as an expert by knowledge, skill, experience, training, or education; (2) expert's testimony must be relevant to the issues in the case; and (3) based upon reliable foundation. *See E.I. du Pont de Nemours &Co, Inc. v. Robinson,* 923 S.W.2d 549,556 (Tex.1995). The counter-affidavit of defense counsel fails to affirmatively show that her opinions regarding the necessity of services provided by the medical providers that have treated Plaintiff, as well as, the reasonableness of their charges, are based upon any foundation at all, much less the required <u>reliable</u> foundation. The counter-affidavit of Defense Counsel should therefore be stricken.

C. The counter-affidavit of defense counsel does not give reasonable notice of any allowable basis by which defendant may properly controvert the claim reflected by the initial affidavit as mandated by Section 18.001(f) of the Tex. Civ. Prac. & Rem. Code.

Section 18.001(f) requires that a proper counter-affidavit *"must give reasonable notice of the basis"* on which the reasonableness and necessity of medical expenses are controverted. Defendant's counter-affidavits containing the testimony of his lawyer asserts only two purported "deficiencies" in Plaintiff's Affidavits Regarding Cost and Necessity of Services, to wit: (1) that the affidavit does no specify the amount paid or incurred by or on behalf of plaintiff (which information is not required by § 18.001, but which information is nonetheless contained in the affidavits in question), and (2) that the affiant is not qualified to testify regarding the matters stated in the affidavit (although the "qualifications" of the affiant are specified in § 18.001, and plaintiff's affidavits comply in every respect.) Conclusory and vague statements cannot provide a "reasonable notice of the basis" for controverting the reasonableness and necessity of plaintiffs' medical expenses. *See Turner,* 50 S.W.3d at 747-48 (holding that the counter-affidavit failed to give reasonable notice where the doctor simply "made only a conclusory statement that Turner's medical records failed to show any objective finding of a significant injury"); *see also Burrow v. Arce,* 997 S.W.2d 299-36 (Tex. 1999) (holding that an expert's opinion must contain more than mere conclusory statements, the opinion must be supported by a "reasoned basis which the expert because of his knowledge, skill, experience, training, or education, is qualified to state."). Because defendant's counter-affidavits state only spurious objections which the Court can and should overrule as a matter of law, and because the purported counter-affidavit failed to properly provide information or notice regarding any other reasonable basis on which defendant intends to

controvert plaintiff's affidavits, defendant's counter-affidavit should be stricken as insufficient.

D. Defendant's Counter-Affidavit should be stricken because defendant has failed to disclose his lawyer, XXXXXX, as a retained testifying expert witness and further failed to produce his retained testifying expert's complete file.

Rule 194 of the Texas Rules of Civil Procedure requires the defendant to produce the entire file of any retained experts in response to the Plaintiff's Request for Rule 194 Disclosures. Defense counsel, by filing the Counter-Affidavit containing her own opinion testimony, has injected herself into the lawsuit as an expert and has voluntarily subjected herself to being deposed as a retained expert witness of defendant. *See Hilliard v. Heard,* 666 S.W.2d 584, 585(Tex. App. – Houston [1st Dist.] 1984, orig. proceeding); *Lummus v. Dean,* 750 S.W. 2d 312, 313 (Tex. App. – Beaumont 1988, orig. proceeding). Additionally, defendant, by voluntarily offering as substantive evidence (as opposed to mere argument) in her Counter-Affidavit a disclosure of the mental impressions and opinions of defense counsel, defendant has waived any privileges that may otherwise have applied as to any matters contained in the counter-affidavit, or the foundation or basis for such opinions, or the documents and other materials relating thereto. *See, e.g., In Re Mendez,* 2007 WL 1378617, at *5 (Tex. App. – El Paso May 10, 2007, no pet. h.) To the extent that defense counsel has become a retained expert in this case, and to the extent that defendant has relied upon the testimony of his counsel is support of substantive issues which are disputed in this litigation, then defendant is obligated to disclose and produce any portion of defense counsel's file which bears upon the substance of the testimony, or the basis or foundation thereof, as required by Tex. R. Civ. P. 194. Unless such materials have been previously provided in the course of discovery, which they most

certainly have not been, the defendant's proffered counter-affidavit by his lawyer should be stricken.

Plaintiff further objects to defendant's counter-affidavit because defendant has failed to designate defense counsel XXXXXX as either a fact or expert witness in response to discovery, therefore any testimony offered by such an undisclosed witness should be subject to the rule of automatic exclusion found in Tex. R. Civ. P. 193.6(a) which provides, in pertinent part, that "a party who fails to make …a discovery response in a timely manner may not… offer the testimony of a witness (other than a named party) who was not timely identified…"

E. Defendant's counsel of record, XXXXXX (and XXXXXX through association), has interjected herself as both a fact and expert witness, and thus disqualification of Ms. XXXXXX (and Mr. XXXXXX through association) as counsel for defendant is therefore mandatory.

Defense counsel, XXXXXX, by filing counter-affidavits containing her fact and opinion testimony regarding substantive matters in dispute in this litigation, has voluntarily injected herself into the case as a fact and expert witness. This conduct of counsel places the attorney for defendant in the position where she has submitted her sworn testimony as both a fact and expert witness on behalf of her client, while also seeking to actively participate in the case as an advocate at trial by questioning witnesses, addressing the court, and arguing to the jury. Such actions by defense counsel are grounds for disqualification. *See Anderson Producing Inc. v. Koch oil Co.,* 929 S.W.2d 416, 421-22 (Tex. 1996).

It is an abuse of discretion to deny a motion for disqualification of a party's counsel that, by preparing and filing a controverting affidavit on a contested issue of fact, has become a witness necessary to establish an essential fact. *See Mauze v. Curry*, 861

S.W.2d 869, 870 (Tex. 1993) (per curiam). Rule 3.08 of Professional Conduct states the following:

> (a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) The testimony relates to a the nature and value of legal services rendered in the case;
>
> (4) The lawyer is a party to the action and is appearing pro se; or
>
> (5) The lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

TEX. GOV'T CODE ANN. App. § 9, rule 3.08 (Vernon 2007). Where defense counsel effectively "testifies" as an expert witness in the controverting affidavit in order to defeat what would otherwise be an established and non-controvertable fact, such testimony does not come within any of the five exceptions enumerated in Rule of Professional Conduct 3.08(a). Consequently, the trial court abuses its discretion when it denies a motion to disqualify counsel on such grounds. *See Mauze*, 861 S.W.2d at 870.

III.

CONCLUSION

As demonstrated above, plaintiff has adequately established the reasonable cost and necessity of his medical and health services, and there are many reasons to strike the purported Counter-Affidavits of defense counsel, and to overrule any other "objections"

asserted by defendant in response thereto. Because the counter-affidavits filed by defendant are wholly insufficient and violates the requirements of the Texas Civil Practice & Remedies Code it should be stricken, and the reasonable cost and necessity of plaintiff's medical and health care services should be taken as established. Further, defense counsel XXXXXX and her law firm should be hereafter disqualified from appearing on behalf of defendant in any proceeding related to this cause of action.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that this Motion be in all things granted; that this Court enter an order (a) striking the Counter-Affidavits of defense counsel, XXXXXX, purporting to offer the testimony of defendant's lawyer regarding contested matters, (b) declaring the reasonable cost and necessity of plaintiff's medical and health care services in uncontroverted and thus established, (c) disqualifying defense counsel XXXXXX and her law firm from further appearing on behalf of defendant in any proceeding related to this cause of action, and (d) granting to plaintiff such other and further relief to which Plaintiff may show himself justly entitled, whether at law or in equity.

Respectfully submitted,

XXXXXX

Attorney for Plaintiff

CERTIFICATE OF SERVICE

On this the _____th day of _____, , I hereby certify a true and correct copy of the foregoing instrument has been forwarded to all attorneys of record, by facsimile transmission, hand delivery, regular mail, or certified mail, return receipt requested:

_____

XXXXXX