CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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JOAQUIN OCHOA v. JESUS FELIPE DORADO 7/22/14

Expert Witnesses; Reasonable and Necessary Medical Expenses; Evidence of Unpaid Bills

Joaquin Ochoa was driving and Imelda Moreno was a passenger in a big-rig tractor without a trailer when the vehicle was struck from behind by a tractor-trailer being driven by Jesus Felipe Dorado, a driver for Trimac Transportation Services Western, Inc. Both plaintiffs, Ochoa and Moreno, eventually underwent back surgery.

Plaintiffs filed a complaint in July 2010 alleging counts against Defendants for negligence and loss of consortium. Plaintiffs named numerous treating physicians as expert witnesses in their expert witness designation, but they designated no retained expert to testify specifically on the reasonableness of their medical expenses.

Defendants filed a motion *in limine* No. 1 to exclude testimony by Plaintiffs' nonretained treating physicians on any expert opinions that were not formed at the time of and for purposes of treatment, but instead were formed for purposes of litigation. Defendants argued that Plaintiffs had listed 25 individual, nonretained treating physicians or other health care

providers in their expert witness designation and stated in the designation that each would testify on "plaintiff's condition, diagnosis, prognosis and related issues." Defendants argued that this description "does not include opinions on the reasonable value of medical services or the non-medical causation issues relating to the injuries," and that the treating physicians for whom no expert witness declaration was provided should be precluded from testifying on such matters.

Defendants also filed a motion *in limine* No. 5 to exclude any evidence of the reasonable amount of Plaintiffs' medical expenses, arguing that Plaintiffs' failure to produce such evidence in response to discovery and failure to designate an expert witness to testify on the reasonableness of their medical expenses precluded the presentation of such evidence at trial. Defendants cited *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, for the proposition that a plaintiff can recover no more than the reasonable value of the medical services provided.

The trial court granted Defendants' motions *in limine* Nos. 1 and 5 in part, ruling that Plaintiffs' treating physicians not designated as retained experts could testify only on their medical services provided, their medical diagnoses, and the fees charged for their services. The court ruled that Plaintiffs' nonretained treating physicians could not testify on other matters such as whether their fees represented the reasonable value of the services provided.

A jury trial commenced in November 2011. Defendants objected at trial to questioning of one of the treating physicians on the reasonableness of the amounts billed for medical treatment that he provided. The trial court sustained the objection, "based on the motion *in limine*." Thus, the

orthopedic surgeon, Dr. Schiffman, could not testify on the reasonable value of the services he provided because, according to the trial court, "that's above and beyond his responsibilities as a treating physician." Defendants then stipulated to the amounts billed for Plaintiffs' past medical treatment. Plaintiffs presented no testimony at trial on the reasonableness of their past medical expenses. The court admitted evidence of the amounts of Plaintiffs' medical bills at the conclusion of trial.

The jury returned a special verdict on December 6, 2011, finding that Defendants' negligence was a substantial factor in causing Plaintiffs harm. It found that Ochoa had suffered $345,539 in damages for past medical expenses and $26,000 in past noneconomic damages, and that he would suffer $200,000 in damages for lost future earning capacity, $125,000 in damages for future medical expenses, and $26,000 in future noneconomic damages. The jury found that Moreno had suffered $465,536 in damages for past medical expenses and $35,000 in past noneconomic damages, and that she would suffer $200,000 in damages for lost future earning capacity, $145,000 in damages for future medical expenses, $40,800 in damages for future household services, and $36,000 in future noneconomic damages. The court ordered Plaintiffs to prepare a proposed judgment, but Plaintiffs failed to do so, and no judgment was entered.

Defendants filed a motion for JNOV on December 19, 2011, arguing that there was no evidence to support any item of damages awarded by the jury. They argued with respect to past medical expenses that Plaintiffs' medical bills were not evidence of the reasonable value of the services provided, and that Plaintiffs had failed to prove the reasonable value of past medical services and therefore were entitled to no damages for past

medical expenses. In addition, defendants argued that Plaintiffs had failed to prove the reasonable value of future medical services and therefore were entitled to no damages for future medical expenses. Defendants also filed a Motion for New Trial.

The court conducted a hearing on February 23, 2012, and filed an order ruling on the posttrial motions on March 8, 2012. It denied the motion for JNOV, stating that Plaintiffs had suffered damages and the only question was the proper calculation of damages, which would be addressed in the new trial motion. The order initially stated that the new trial motion was granted as to "1. The medical damages, 2. Lost earnings of Mr. Ochoa, 3. Household expenses awarded to Mrs. Ochoa." After explaining the reasons for granting the motion, the order concluded, "On the above grounds, a new trial is granted as to medical damages, lost earnings damages and household expenses damages."

The order explained that there was "no evidence [of the] 'reasonable value' of the medical services provided," and that the medical bills were not evidence of the reasonableness of the amounts charged. It stated that Plaintiffs clearly had incurred medical expenses and that the only question was the reasonable value of the services provided. The trial court concluded, "Thus a new trial on the reasonable value of the services provided is in order."

Plaintiffs timely appealed the order granting a new trial. Defendants timely appealed the denial of their motion for JNOV and also appealed "the judgment." Plaintiffs contend (1) their unpaid medical bills are evidence of the reasonableness of their past medical expenses, and the trial court erred by concluding otherwise; (2) the trial court erred by excluding

testimony by their treating physicians on the reasonable value of the services provided. Defendants challenge the order denying their motion for JNOV. They contend (1) the trial court found a complete absence of evidence to support the verdict as to damages for past and future medical expenses, lost future earning capacity, and future household expenses, so they are entitled to a JNOV rather than a new trial.

The Second District Court of Appeal explained that a plaintiff may recover as damages for past medical expenses no more than the reasonable value of the services provided. (*Howell*, at p. 555.) Such damages are limited to the lesser of (1) the amount paid or incurred for past medical services, and (2) the reasonable value of the services. *Howell* held that an injured plaintiff whose medical expenses are paid by private insurance can recover damages for past medical expenses in an amount no greater than the amount that the plaintiff's medical providers, pursuant to prior agreement, accepted as full payment for the services. *Howell* rejected the argument that limiting the plaintiff's recovery in this manner would result in a windfall to the tortfeasor, stating that the full amount billed by medical providers is not an accurate measure of the value of the services provided. *Howell* stated that there can be significant disparities between the amounts charged by medical providers and the costs of providing services, the price of a particular service can "vary tremendously . . . from hospital to hospital in California", and "a medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value". Although *Howell* did not expressly hold that unpaid medical bills are not evidence of the reasonable value of the services provided, it strongly suggested such a conclusion.

The Justices then noted that they held in *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, that the full amount billed for a plaintiff's medical care is not relevant to the determination of damages for past or future medical expenses, and therefore is inadmissible for those purposes, if the plaintiff's medical providers had agreed to accept a lesser amount as full payment for the services provided. They also held that the full amount billed cannot support an expert opinion on the reasonable value of future medical expenses and is inadmissible for the purpose of proving noneconomic damages. The Second DCA stated that the observations in *Howell*, compelled the conclusion that the full amount billed for past medical services was not relevant to the reasonable value of the services provided. (*Corenbaum* at pp. 1330–1331.)

Thus, the full amount billed, but unpaid, for past medical services is not relevant to the reasonable value of the services provided. In the Court's view, this rule is not limited to the circumstance where the medical providers had previously agreed to accept a lesser amount as full payment for the services provided. Instead, the observations in *Howell*, and the reasoning in *Corenbaum*, summarized above compel the conclusion that the same rule applies equally in circumstances where there was no such prior agreement. *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1471-1472 (*State Farm*) reached this same conclusion.

State Farm, stated that the amount of a medical provider's lien pursuant to the Hospital Lien Act (Civ. Code, § 3045.1 et seq.) could not exceed the " 'reasonable and necessary' " charges for the services provided. *State Farm* concluded that an unpaid hospital bill based on the provider's standard medical charges was not evidence of the reasonable value of the services provided. Unlike the medical providers in *Howell* and

Corenbaum, the medical provider had not previously agreed with the patient's health insurer to accept a lesser amount as full payment for the services provided. The patient in *State Farm* was uninsured. The *State Farm* decision stated that the hospital bill itself was not an accurate measure of the reasonable value of the services provided, and the medical provider failed to present any evidence of reasonable value. *State Farm* therefore concluded that the evidence was insufficient to support a judgment in favor of the medical provider and reversed the judgment.

This conclusion, state the Justices, is entirely consistent with a line of authority holding or suggesting that unpaid medical bills are not evidence of the reasonable value of the services provided. *Latky v. Wolfe* (1927) 85 Cal.App. 332 held that the plaintiffs' unpaid medical bills could not support an award of damages without some evidence that the amounts charged represented the reasonable value of the services rendered.

Gimbel v. Laramie (1960) 181 Cal.App.2d 77 held that the amount of an unpaid hospital bill was properly excluded from a damages award. The defendant in *Gimbel* had stipulated to the amount of the bill, but not its reasonableness. The *Gimbel* court stated, "It has long been the rule that the cost alone of medical treatment and hospitalization does not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary and that the charges for such services were reasonable." *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70 held that the exclusion of the plaintiff's unpaid medical bills was proper because there was no evidence that all of the services provided were made necessary by the incident in question and no evidence that the charges were reasonable.

The California Supreme Court in *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, also suggested that unpaid medical bills are not evidence of the reasonable value of the services provided by stating: "Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony, and *if the charges were paid, the testimony and documents are evidence that the charges were reasonable*. Since there was testimony in the present case that the invoices had been paid, the trial court did not err in admitting them."

Other opinions**,** in contrast, have held or suggested that unpaid medical bills are some evidence of the reasonable value of the services provided. *Malinson v. Black* (1948) 83 Cal.App.2d 375 rejected the defendant's attack on an award of damages for past medical expenses. The defendant argued that the bills were unpaid and that there was no evidence of the reasonable value of the services provided. *Malinson* stated, "It is well settled that the amount paid is some evidence of reasonable value and in the absence of any showing to the contrary such evidence has been held to be sufficient. Likewise, it would seem that evidence of the expense incurred would be some evidence of reasonable value.

Guerra v. Balestrieri (1954) 127 Cal.App.2d 511 rejected the defendant's challenge to an instruction on damages for past medical expenses. *Guerra* agreed that it was error to give the instruction because there was no evidence of the cost of the services provided, but held that the error was not prejudicial because it was unlikely that the verdict included any

amount for past medical services. *Guerra* stated, "The proper measure is the reasonable value of such services, not the amount paid or incurred therefore, although the amount paid or incurred would be some evidence of value.

Katiuzhinsky v. Perry (2007) 152 Cal.App.4th 1288, held that the trial court erred by excluding evidence of the full amounts billed for medical services and limiting the plaintiffs' recovery to the discounted amounts paid by a lien purchaser. The medical providers accepted the discounted amounts as full payment for the accounts, but plaintiffs remained liable to the lien purchaser for the full amounts billed. *Katiuzhinsky* held that the plaintiffs' recovery was not limited to the discounted amounts because the plaintiffs remained liable to the lien purchaser for the full amounts billed, and because the medical providers were not obligated to sell the accounts at a discount and had no prior agreement to do so. *Katiuzhinsky* also held that the exclusion of the unpaid medical bills was error, stating that the bills were evidence of the reasonable value of the services provided. *Katiuzhinsky* stated that regardless of whether the accounts were later sold, "the charges billed to plaintiffs reflected on the reasonable value of the services they received."

Here, the Second DCA indicated it found the reasoning in *Malinson*, *Guerra*, and *Katiuzhinsky*, unpersuasive and declined to follow those opinions on this point. For the reasons stated in *Howell*, and *Corenbaum*, the Justices concluded that an unpaid medical bill is not an accurate measure of the reasonable value of the services provided. Consistent with those opinions and *Latky*, *Gimbel*, *Calhoun*, and *State Farm*, the Court concluded that an unpaid medical bill is not evidence of the reasonable value of the

services provided. The DCA held that evidence of unpaid medical bills cannot support an award of damages for past medical expenses.

Plaintiffs also contended that their nonretained medical experts were improperly barred from testifying to the issue of reasonable and necessary medical expenses. A party must identify its expert witnesses before trial in response to a demand for exchange of expert witness information under Code of Civil Procedure section 2034.210. This requirement applies to both retained and nonretained experts. (§§ 2034.210, subd. (a), 2034.260, subd (b)(1); *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35.) For retained experts and experts who are parties or employees of parties, the exchange must also include an expert witness declaration stating the general substance of the expected testimony and other matters. (§§ 2034.210, subd. (b), 2034.260, subd. (c).) Failure to provide an expert witness declaration or failure to adequately disclose the expert's expected testimony may result in the exclusion of expert opinion. (§ 2034.300; *Bonds v. Roy* (1999) 20 Cal.4th 140, 148-149.) But for a treating physician who is not "retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial" (§ 2034.210, subd. (b)), no expert witness declaration is required (*Schreiber*, at p. 39), and the exclusion sanction is unavailable.

The Justices explained that a treating physician is a percipient expert, but that does not mean that his testimony is limited to only personal observations. Rather, like any other expert, he or she may provide both fact and opinion testimony. As the legislative history clarifies, what distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which they becomes familiar with the plaintiff's injuries that were ultimately the subject of litigation,

and which form the factual basis for the medical opinion. The nature of the inquiry is implicit in the language of [former] section 2034, subdivision (a)(2), which describes a **retained** expert as one 'retained by a party *for the purpose* of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action.' (Italics added.) **A treating physician is not consulted for litigation purposes**, but rather learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship." (*Schreiber*, at pp. 35-36.)

The identity and opinions of retained experts generally are privileged unless a party expects to offer their expert opinion at trial, and whether they will testify at trial need not be disclosed until shortly before trial. (*Schreiber*, p. 37.) In contrast, the identity and opinions of treating physicians are not privileged, and they are subject to ordinary discovery with no special restrictions. "Indeed, defendants have a strong incentive to depose treating physicians well prior to the exchange of expert information to ascertain whether their observations and conclusions support the plaintiff's allegations. Accordingly, the Legislature has apparently determined that by the time of the exchange of expert witness information, the information required by the expert witness declaration is unnecessary for treating physicians who remain in their traditional role." (*Schreiber* at p. 38)

"To the extent a physician acquires personal knowledge of the relevant facts independently of the litigation, his identity and opinions based on those facts are not privileged in litigation presenting 'an issue concerning the condition of the patient.' For such a witness, no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his

training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are inherent in a physician's work." (*Schreiber*, at p. 39, quoting Evid. Code, § 996)

Accordingly, no expert witness declaration is required for treating physicians to the extent that their opinion testimony is based on facts acquired independently of the litigation, that is, facts acquired in the course of the physician-patient relationship and any other facts independently acquired. (*Schreiber*, at p. 39; *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1520.) The Justices note that this includes an opinion as to the reasonable value of services that the treating physician either provided to the plaintiff or became familiar with independently of the litigation, assuming that the treating physician is qualified to offer an expert opinion on reasonable value. **A treating physician who has gained special knowledge concerning the market value of medical services through his or her own practice or other means independent of the litigation may testify on the reasonable value of services that he or she provided or became familiar with as a treating physician, rather than as a litigation consultant, without the necessity of an expert witness declaration. To the extent that a treating physician became familiar with services provided to the plaintiff or other facts for the purpose of forming and expressing an opinion in anticipation of litigation or in preparation for trial, however, he or she acts as a retained expert.** An expert witness declaration is required for such a treating physician to the extent that he or she testifies as a retained expert. (§ 2034.210, subd. (b); *Dozier*, at p. 1521.)

The trial court here found that Dr. Schiffman acted as a treating physician at all times and did not act as an expert retained for purposes of this litigation. Yet the court precluded Dr. Schiffman and any other

nonretained treating physician from testifying on the reasonable value of *their* services provided to Plaintiffs. The DCA reasoned that this was error and that Plaintiffs were entitled to present testimony by any nonretained treating physician on the reasonable value of medical services that he or she provided or became familiar with as a treating physician, as long as such testimony is based on facts acquired in the physician-patient relationship or otherwise acquired independently of this litigation, and not acquired for the purpose of forming and expressing an opinion in anticipation of litigation or in preparation for trial.

The order of March 8, 2012, is reversed as to the granting of a partial new trial and the denial of JNOV, and is void in all respects as to the rulings on the new trial and JNOV motions. Plaintiffs' appeal from the order striking the awards of noneconomic damages and Defendants' appeal from "the judgment" are dismissed. The trial court is directed to enter judgment promptly on remand and conduct further proceedings on any postjudgment motions in a manner consistent with the views expressed in this opinion. Each party must bear its own costs on appeal.

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