IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

ANTHONY ALLEN JORDAN,

Plaintiff, Case Number: 2017-CA-001913

v.

GAUDENCIA HERNANDEZ, TRINITY SERVICES GROUP, INC. a Florida Profit Corporation, and RYDER TRUCK RENTAL LT, a Florida Trust d/b/a RYDER TRUCK RENTAL, INC., a Florida Profit Corporation,

Defendants.
_____/

PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE OR LIMIT THE TESTIMONY OF DEFENDANTS' "BILLING AND CODING" EXPERT VICKI SCHWEITZER

Plaintiff, ANTHONY ALLEN JORDAN, moves this Honorable Court for an order in limine to exclude or limit the testimony of Defendants, TRINITY SERVICES GROUP, INC. and GAUDENCIA HERNANDEZ's ("Defendants") "billing and coding" expert, Vicki Schweitzer. In support thereof, Plaintiff states as follows:

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. This action pertains to injuries suffered by Plaintiff ANTHONY ALLEN JORDAN ("Mr. Jordan") as the result of a motor vehicle crash which occurred on October 7, 2015 ("Crash") when the vehicle driven by Defendant TRINITY SERVICES GROUP, INC.'s ("Trinity") employee, Defendant GAUDENCIA HERNANDEZ ("Hernandez"), rear-ended Mr. Jordan's vehicle.

2. As a result of the Crash, Mr. Jordan suffered from serious injuries and incurred

various medical and hospital expenses.

3. In Defendants initial Witness and Exhibit List, they named eight specially retained experts, including Vicki Schweitzer, as a purported expert in medical billing codes and standards. See Ms. Schweitzer's curriculum vitae, attached hereto as **Exhibit A**.

4. In response to Plaintiff's expert interrogatories requesting the substance of the facts and the opinions in which Ms. Schweitzer is expected to testify and a summary of grounds for each of her opinions, Defendants answered, *in pertinent part*:

> **Vicki J. Schweitzer, RN, BSN, CHCQM, CPC (billing and coding expert – expected to testify on the subject matter of damages within her specialty, including but not limited to the reasonableness of medical charges and amounts charged by Mr. Jordan's treaters and/or rebuttal of Plaintiff's experts addressing these issues)**
>
> **Ms. Schwetizer based her opinions on her education, background, training, knowledge, and experience as well as her review of the materials, medical records, and billing records produced to you herewith, as well as the database information she produced along with her report.**

5. Ms. Schweitzer prepared an updated report, bearing a date of November 5, 2018, this report indicates:

> In my opinion, the usual and customary value of the services reviewed does not exceed $227,161.62.
>
> The reasonable value of services is based on the documents received to date. If additional treatment is provided for review, my opinion will be updated as those records and bills are made available. My analysis does not include any analysis of causation in relation to medical treatment or medical bills. If future medical treatment is being proposed an analysis of the reasonable value of that treatment will be completed when the specifics of the treatment are available.

See Ms. Schweitzer's Summary Amended Report, attached hereto as **Exhibit B.**

6. Ms. Schweitzer's deposition was taken on October 18, 2018. This deposition and Ms. Schweitzer's CV reveal:

a. Ms. Schweitzer received her Certified Professional Coder License in 2011. See Deposition Transcript of Vicki Schweitzer, dated October 18, 2018, p. 26:19-22, attached hereto as **Exhibit C**.
b. Ms. Schweitzer receiver her Bachelor of Science degree in nursing at San Diego State University and is a registered nurse. See **Exhibit C** at p. 26:2-16.
c. Ms. Schweitzer has never worked in a medical billing office where she would determine the amount a doctor should charge. See **Exhibit C** at p. 31:3-6.

7. Vicki Schweitzer's report indicates she will testify that she uncovered numerous bills that exceed the "usual and customary value" of service and that certain billing codes and invoices violated standards purportedly used by professional coders in analyzing bills.

8. Perhaps most importantly, Ms. Schweitzer clearly intends to testify that numerous medical bills are excessive or unreasonable based upon her own definition of "usual, customary, and reasonable" (UCR) amounts, which are derived solely from national databases of medical billing data gathered by "Context 4 Healthcare" and "Redbook."[1] See **Exhibit C** at p. 41:24-25; 42:1-19.

9. Ms. Schweitzer does not work for these databases, does not know the particular healthcare providers or third party companies who submit medical bills to these databases, and is specifically unaware if Mr. Jordan's healthcare providers' bills were ever submitted to the Context 4 Healthcare database. See **Exhibit C** at p. 60:2-25. To determine the amount Ms. Schweitzer feels is reasonable and customary, she inputs the code in this database, and it provides her with an array of numbers where she arbitrarily chose the 80th percentile as an amount she deemed to be "reasonable." See **Exhibit C** at pp. 62:18-25; 63:1-9.

10. Ms. Schweitzer simply cites "her experience" as the reason for using the 80th percentile. See **Exhibit C** at pp. 62:18-25; 63:1-9.

[1] Ms. Schweitzer used Redbook for one prescription she saw in the file and uses Context 4 Healthcare for all other bills.

11. Ms. Schweitzer also uses "Redbook," a third party company for prescriptions.[2] Instead of the arbitrary 80th percentile she uses to form her "opinions" in relation to medical bills, Ms. Schweitzer increased the amount to 130% to 150% of the anticipated retail value for prescriptions, again with no support or basis for this increase.[3] See **Exhibit C** at pp. 68:11-70:2. Moreover, Ms. Schweitzer indicated the cost for medication is not adjusted based on location or region, thus it is not representative of the cost Mr. Jordan had to pay for his medications. See **Exhibit C** at p. 76:15-19.

12. Ms. Schweitzer has done no surveys of health care providers in Florida pertaining to medical billing rates and simply obtains the 80th percentile from the numbers contained in the Context 4 Health database to perform an "analysis." Apparently, everything she needs to know about healthcare provider charges anywhere in the United States is enclosed in that Context 4 Healthcare database.

13. In relying upon this 80th percentile, Vicki Schweitzer stated that "The industry has long since used between the 70th and the 80th percentile for being the numerical equivalent of the word "usual"…And so when I started up at Examworks, ***I picked the 80th percentile*** to be on the high end of an industry standard norm…" See **Exhibit C** at pp. 62:20-25;63:1-2. (emphasis added).

14. Ms. Schweitzer acknowledged that there is no way to determine which providers are actually providing medical bills in the alleged regions because all providers are "confidential." See **Exhibit C** at p. 53:5-18. Ms. Schweitzer also admits that the data in which the pool of medical bills are obtained could be skewed in that "It's possible if the first provider…is producing volumes

[2] Ms. Schweitzer indicated that Redbook was given their prices through the FDA. In looking at their website, there is no support for this assertion. Redbook is owned by IBM and receives its information through submissions.

[3] Ms. Schweitzer opined that a reasonable amount for two Tylenol should only be $.28. She indicated that is the reasonable amount that would be charged by CVS or Walgreens for the medication, i.e. the 130%-150% over the manufacturer price, making the "reasonable" amount for 100 Tylenol tabs to be $2.00 at a retailer. Id. pp. 75:1-25.

and volumes and the second one is not." See **Exhibit C** at p. 53:19-24.

15. The "methodology" Ms. Schweitzer uses to reach her opinion as to the propriety of the medical bills in this case includes the following two-step procedure: (1) determine whether the health care provider complied with the CPT codes and standards she relies on, and (2) apply those bills that she determines to be "allowable" (based upon the database Context 4 Healthcare that will provide her with the 80th percentile of the CPT code in the applicable "region"). See **Exhibit C** at p. 41-42:1-6.

ARGUMENT

In addressing the admissibility of expert testimony of purported "billing and coding" experts in the context of a liability claim, such as the instant case, it is well-known that such opinions are commonly limited. Consistent with those orders, Ms. Schweitzer's opinions should be excluded for the following reasons: (1) her opinion is not relevant and will not assist the trier of fact; (2) her testimony is prejudicial and will only confuse or mislead the jury; (3) she is parroting hearsay; and (4) her methodology is unreliable.

Case law supports this position. In State Farm Mutual Automobile Insurance Company v. Bowling, 81 So. 3d 538 (Fla. 2d DCA 2012), the billing and coding expert testified that "the bills did not correlate to the treatment in the medical records" and the expert's expertise was that she had "specialized knowledge and training to express an opinion on whether the medical bills were properly coded and whether they correspond[ed] to the medical records documenting the purported treatment." Id. at 540. Nothing in Bowling supports Defendants' contention that Ms. Schweitzer, who will be offering similar testimony, can provide expert opinion on the reasonableness of medical expenses.

In Castellanos v. Target Corporation, 568 Fed. Appx. 886 (11th Cir. 2014), the court stated the following in footnote 2 when interpreting Bowling:

> We do not read State Farm Mut. Auto. Ins. Co. v. Bowling, 81 So. 3d 538 (Fla.Dist.Ct.App.2012) to demand admission of the proposed expert testimony in this case. Bowling seems to decide a materially different case. For example, Bowling seems to be about, to a significant degree, an argument that the medical services billed did not reflect medical services actually delivered according to the treatment records and not about mainly a conflict over the reasonableness of charges for medical services, assumed to have been delivered. (E.S.)

On a more local level, several judges at the trial court level have excluded coding and billing experts from testifying on the reasonableness of the plaintiff's medical expenses. See Orders Limiting or Striking "Billing and Coding" Experts attached hereto as **Composite Exhibit D.** The billing and coding experts in those cases employed a very similar methodology to the one that Ms. Schweitzer uses. In essence, Ms. Schweitzer identifies the CPT codes for the fees charged by the healthcare providers and then looks up the fee amounts listed for those CPT codes in Context 4 Healthcare's output that provides the "80th percentile" of the CPT code in the "region." Ms. Schweitzer's opinions related to medical bills all come from Context 4 Healthcare which takes random data and outputs numbers that are allegedly within the 80th percentile for medical bills within the "region."

There is no case law to support that someone like Ms. Schweitzer, who is only trained in "medical bill coding" is qualified to testify or permitted to testify to the "reasonableness" of medical charges for medical services in the context of a liability tort claims. Although Ms. Schweitzer has a background in nursing, she has never been the one responsible for actually billing a patient for their services. The current case law limits Ms. Schweitzer's testimony to ***only*** opine on whether medical coding was accurate when compared to the medical records of treatment provided. Even then, it must be established that such limited testimony is relevant and that its

probative value is not outweighed by the dangers of confusing the issues, misleading the jury, or unfair prejudice to Plaintiff. Which could not happen here since it would be irrelevant to the actual bill that Mr. Jordan received from his treating medical providers.

A. Schweitzer's Testimony is Not Relevant

Relevant evidence is defined in Section 90.401, Florida Statutes as "evidence tending to prove or disprove a material fact." Ms. Schweitzer's testimony does not tend to prove or disprove any material fact in this case. In a personal injury case, a jury must decide whether an injured plaintiff's medical bills "represent reasonable and necessary medical expenses." See e.g. Garrett v. Morris Kirschman & Co., Inc., 336 So. 2d 566, 571 (Fla. 1976). This inquiry is "from the perspective of the injured party, rather than the perspective of the medical expert." Dungan v. Ford, 632 So. 2d 159, 163 (Fla. 1st DCA 1994); accord Nason v. Shafanski, 33 So. 3d 117, 122 (Fla. 4th DCA 2010). Accordingly, a plaintiff is not required to provide expert testimony to prove that his medical expenses are reasonable and necessary. Garrett, 336 So. 2d at 571. Instead, this "reasonable and necessary" inquiry focuses on: (1) whether a plaintiff's medical bills "are for treatment the plaintiff sought for injuries at issue in a lawsuit, as opposed to treatment for some other condition, and (2) whether the charges are for a reasonable amount." Dungan, 632 So. 2d at 163; accord Nason , 33 So. 3d at 122; see also Fla. Standard Civil Jury Instruction § 501.2(b).

Expert "coding" testimony is, at most, marginally probative of what medical expenses are reasonable. However, any probative value is substantially outweighed by the testimony's unfair prejudice, misleading nature, and confusion of the issues. Whether Plaintiff's treating physicians followed a proper billing code or guideline does not relieve Plaintiff of the debt that he owes for medical treatment of the serious injuries he sustained as a result of the Crash. Even if it did, that dispute is not at issue in this case. It should be obvious, but the fact that a doctor might fail to use

a code required by insurance companies or government agencies does not have anything to do with whether the medical bill for the service rendered is reasonable.

B. Schweitzer's Testimony is Unduly Prejudicial and Confuses the Issues

Ms. Schweitzer's testimony should also be excluded on grounds of prejudice or confusion. Section 90.403, Florida Statutes provides as follows:

> **Exclusion on grounds of prejudice or confusion.**—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

In a personal injury trial, complex "expert coding" testimony on what charges are ***reasonable*** under a limited set of medical billing records that have been received from organizations like a company's healthcare insurance plan will confuse the issues, mislead the jury, and unfairly prejudice the injured plaintiff. In particular, such testimony will unfairly prejudice an injured plaintiff because it will mislead and confuse the jury into believing that a medical provider's negligence, wrongdoing, or failure to follow purportedly applicable billing and coding requirements precludes the injured plaintiff from recovering as damages his "reasonable" medical expenses.

This result cannot be reconciled with Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977) and its progeny. It is well settled that a medical provider's post-accident medical malpractice and wrongdoing in treating a plaintiff will not relieve the initial tortfeasor of his liability for a plaintiff's injuries, including any liability for a plaintiff's reasonable and necessary medical expenses. See Stuart, 351 So. 2d at 706 (Fla. 1977); Dungan, 632 So. 2d at 162.

Stuart prohibited a defendant-tortfeasor in an automobile accident case from impleading the plaintiff's medical provider by way of a third-party claim seeking indemnity based on the

provider's alleged malpractice. Stuart prohibited this because allowing such a third-party claim "would foreclose the [accident] victim's ability to control the nature and course of the suit." Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702, 704 (Fla. 1980). Later, the First District Court of Appeals relied on this rationale from Stuart to hold that evidence of a provider's medical malpractice was inadmissible in an automobile accident case between solely an injured plaintiff and a defendant tortfeasor. See Dungan, 632 So. 2d at 160-63.

The Fourth District Court of Appeals also relied on Stuart and its progeny to prohibit evidence and argument that suggested a plaintiff's medical provider had been "unscrupulous" in treating the injured plaintiff with an "unnecessary" surgery. See Nason, 33 So. 3d at 118-22. The Nason court reasoned that the jury's conclusion that the provider was "unscrupulous" showed that the jury had been confused by the defendant's evidence and assertions that the treatment prescribed by the plaintiff's provider (surgery) had been "unnecessary." Stated another way, if a plaintiff follows the advice of a competent provider - even one who "unscrupulously" orders "unnecessary" treatment - the plaintiff is still entitled to full compensation for the medical expenses charged by that provider. Id. at 121-22. Moreover, the "unnecessary" surgery "unscrupulously" performed by the provider was not "unnecessary" as that term is used in Florida law.

In sum, whether a medical expense is "reasonable and necessary" is judged "from the *perspective of the injured party,"* not from the perspective of the defendant's medical expert. Id. (emphasis added) (quoting Dungan, 632 So. 2d at 163). Accordingly, it is not relevant that a doctor or other healthcare provider might provide unnecessary or even unscrupulous care; if the patient acted reasonably in accepting the recommended medical treatment and it results in additional harm, the initial tortfeasor is legally responsible for the consequences. The same logic would appear to apply to expensive or even excessive medical billing charges. Unless the patient is in a

position to recognize the treatment is inappropriate or the charges are unreasonable, the patient is not at fault and the damage flows back to the initial tortfeasor.

The Stuart principles should equally apply in this case because the alleged wrongdoing - whether it be medical malpractice or unreasonable billing ("billing malpractice") – is wrongdoing committed by plaintiff's *provider,* not by plaintiff himself. The injured party should be spared from having to defend the allegedly improper billing practices of the provider. If the initial tortfeasor genuinely believes that the victim's medical provider has engaged in wrongdoing to the detriment of the tortfeasor (i.e., improper billing, coding, etc.), then the tortfeasor (or the representative insurance carrier) should be required to raise those allegations in a separate suit against the provider; not in the victim's personal injury case. *See* Underwriters at Lloyds, 382 So. 2d at 704. In such a separate suit, the provider, as a party, can fully defend his or her billing practices; that task should not be left to the provider's patient (the injured accident victim).

Admitting Ms. Schweitzer's testimony unnecessarily complicates this already complex personal injury action with virtually no probative value. Permitting the admission of Defendants' expert "coding" testimony transforms a garden-variety personal injury accident case into a complex improper billing case. Ms. Schweitzer's testimony about any improper or inaccurate billing by Plaintiff's treating physicians is similar to the Stuart and Dungan scenarios and should not be admissible because its probative value is far outweighed by the propensity for such testimony to confuse the issues and mislead the jury.

Ms. Schweitzer's testimony about what amounts would be reasonable is based solely upon her "pick" for what the UCR is by virtue of the Context 4 Healthcare database which is collected by random and unverified groups. Requiring Plaintiff's counsel to cross examine this evasive "expert" to establish the immateriality and irrelevance of her testimony unnecessarily confuses the

issues between what health insurers and random unverified providers define as UCR and what Florida tort law defines as Plaintiff's damages, "reasonable and necessary medical expenses" from ***the Plaintiff's perspective.***

Any marginally probative value of Ms. Schweitzer's testimony is plainly and clearly outweighed by the danger of confusion of the issues and misleading of the jury. The issues in this case are whether Plaintiff's medical bills were reasonable and necessary as a result of the accident from the Plaintiff's perspective, not from the perspective of some nonexistent health insurance plans that submit their medical bills to Context 4 Healthcare. Evidence that may be relevant to determining whether medical bills were submitted properly from the perspective of some uninvolved providers or health insurer is not relevant here and confuses and misleads the jury.

C. Ms. Schweitzer's Testimony Parrots Hearsay

An expert's testimony may not be used as a conduit for the introduction of otherwise inadmissible evidence. Linn v. Fossum, 946 So. 2d 1032, 1037-38 (Fla. 2006) (internal quotations omitted); see also Maklakiawicz v. Burton, 652 So. 2d 1208, 1209 (Fla. 3d DCA 1995). A "coding" expert's testimony will often serve as an improper conduit. For example, coding experts may reveal to a jury whether or not an injured plaintiff has private health insurance or government health care benefits *(e.g.,* Medicare, Medicaid, etc.). This testimony should not be allowed under the collateral source rule. See Nationwide Mut. Ins. Co. v. Harrell, 53 So. 3d 1084, 1086 (Fla. 1st DCA 2010).

In addition, coding experts like Ms. Schweitzer often base their opinions on various materials prepared by others, such as what happened in the instant case where Ms. Schweitzer does not perform an "analysis" and instead takes information from the Context 4 Healthcare or Redbook databases. Here, the entirety of Ms. Schweitzer's testimony serves as a conduit for hearsay and

comments and personal opinions on questions of law (regarding what should be a "reasonable" determination of medical bills) and should be excluded.

D. Ms. Schweitzer's Methodology is Unreliable

Ms. Schweitzer's purported testimony on what the UCR of an array of medical bills is "pure opinion" and is even lacking the foundational principles of any industry. Primarily the source of any of the medical bills are unknown. As Ms. Schweitzer states, they are "confidential" and there is no way to actually validate those bills submitted. As a result, Ms. Schweitzer cannot say whether these numbers are compiled, controlled, or even verified. This makes Ms. Schweitzer's opinion unreliable.

Beyond the use of the Context 4 Healthcare database, Ms. Schweitzer has no independent knowledge of what would constitute a reasonable medical bill. No actual analysis of the medical bills submitted to Context 4 Healthcare has been performed by Ms. Schweitzer. The only analysis performed is regurgitating numbers a computer software gave here. The geographic regions the Context 4 Healthcare database includes is also inconsistent with what other similar databases use. See **Exhibit C** at 42:1-6 contra 25:4-8. Making Ms. Schweitzer's basis not generally accepted within the field of "coding" expertise.

III. CONCLUSION

Defendants attempt to use a "coding expert" to usurp the jury's province in determining Plaintiff's damages should not be allowed. For the reasons stated herein, Plaintiff requests this Court limit or exclude Defendants' billing and coding expert, Vicki Schweitzer from testifying at trial.

WHEREFORE, Plaintiff, ANTHONY ALLEN JORDAN, respectfully requests that this Court enter an Order excluding or limiting Defendants, GAUDENCIA HERNANDEZ and

TRINITY SERVICES GROUP, INC.'s billing and coding expert, Vicki Schweitzer from presenting any testimony on the following topics:

1. Medical Necessity;
2. Medical reasonableness;
3. Reasonableness of medical expenses;
4. UCR (usual, customary and reasonable amounts for medical services or procedures);
5. Appropriateness of medical treatment;
6. Whether Anthony Jordan is or is not legally liable for responsible for any particular billing;
7. Whether any particular bill is not owed by Anthony Jordan;
8. Whether any particular bill is "allowed" or "disallowed"; and
9. The reasonable amount to place on the monetary value of any particular medical service, treatment or procedure provided to Anthony Jordan.

Plaintiff requests the above relief, together with such other and further relief as the Court deems appropriate under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail via the Florida E-filing Portal to: **Michael E. Reed, Esq., Christopher A. Cazin, Esq.,** tpacrtpleadings@wickersmith.com; Wicker Smith O'Hara McCoy & Ford, P.A. (Counsel for the Defendants); **Jeffrey S. Glassman, Esq. and William G.K. Smoak, Esq.**., courtdocuments@flatrialcounsel.com; Smoak, Chistolini & Barnett, PLLC (Co-Counsels for

Trinity Service Group, Inc.); **Lisa Ann Kalo, Esq.**, lkalo@kvpalaw.com, (Co-Counsel for Plaintiff), on this **13th** day of March, 2019.

/s/Marc Matthews
MARC MATTHEWS, ESQ.
Florida Bar No. 0711098
Email: Marc@mcintyrefirm.com
McIntyre Thanasides Bringgold
Elliott Grimaldi Guito & Matthews, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
Telephone: (813) 899-6059
Facsimile: (813) 225-1221

Service of Court Documents:
Marc@mcintyrefirm.com
Eservice-Marc@Mcintyrefirm.com

and

LISHA BOWEN, ESQ.
Florida Bar No. 0169374
Lisha@bowentrials.com
LISHA BOWEN, P.A.
P.O. Box 173442
Tampa Florida 33672
(T :) (813) 995-5580
(F :) (813) 489-4344
Service of Court Documents:
Lisha@bowentrials.com
Attorneys for Plaintiff