

TRIAL TECHNIQUES AND TACTICS

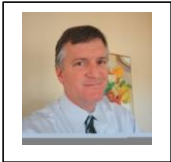
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IN THIS ISSUE

There has been a recent trend among plaintiff's counsel to not proffer medical bills in personal injury cases. This newsletter article discusses the legal authority for admission of a plaintiff's medical bills, and our argument for admission.

A NEW PARADIGM FOR DAMAGE CALCULATIONS: PLAINTIFFS NOT OFFERING MEDICAL BILLS

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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Forty years ago, it would be unthinkable for a plaintiff's attorney to not proffer medical bills and lost wages as part of the damages for a personal injury case. In the last several years, however, we have seen a trend among plaintiffs' counsel to not proffer medical bills, or any conventional monetary calculations for that matter. This article will briefly discuss the legal authority for admission of a plaintiff's medical bills, and our argument for admission.

Plaintiffs understand the importance of damage "anchors" – and where bills are modest, they will fight defense counsel from referencing any "real" numbers associated with their care and treatment. The thinking, then, allows plaintiffs' counsel the freedom to suggest pain and suffering damage amounts untethered by the cost of the actual care provided.

Federal Rule of Evidence 401 defines evidence as relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. A plaintiff's medical expenses, while irrelevant to past medical damages which a plaintiff does not seek, are nonetheless relevant to show the extent of the care and treatment received by a plaintiff as well as the severity of the alleged injuries. Further, the cost of medical treatment is relevant to other issues within a case, including future damages and pain and suffering.

Several federal district courts that have examined this issue opine that past medical expenses are relevant to a plaintiff's care and treatment and the severity of the alleged

injuries. In *Chapman v. Mazda Motor of Am., Inc.*, the District Court for Montana found that past medical bills that were not relevant to prove past medical expenses were alternatively admissible because they were relevant to the plaintiff's care and treatment. 7 F. Supp. 2d 1123, 1125 (D. Mont. 1998). The *Chapman* court held:

While the amounts of disallowed medical expenses are not relevant to prove damages for past medical loss, it does not follow that the evidence of medical expenses is irrelevant for all purposes. For instance, *Chapman* says evidence of total medical bills is admissible "to show the jury the severity and the extent of her injuries." Br. in Opp. at 3. I agree. Even if medical expenses were disallowed by medicaid, the documentation for such expenses presumably lists the medical procedures and treatments dispensed. They may bear on the necessity of future needs and provide a foundation for a life care plan. They are relevant to prove the nature and extent of *Chapman's* injuries. Evidence of cost for the complete range of treatment and care dispensed in past medical treatment may be relevant to future medical care and expenses required.

Id.

In another case, the District Court for Maryland held that "[t]he amount of medical expenses incurred by plaintiff as a result of the incident involved in this case is relevant to the determination of the full extent and nature of plaintiff's injuries." *Brice v. Nat'l R.R. Passenger Corp.*, 664 F. Supp. 220, 224 (D. Md.

1987). Likewise, the Supreme Court of Mississippi has said that “the entire medical bill may be relevant to aid the jury in assessing the seriousness and the extent of the injury.” *McGee v. River Region Med. Ctr.*, 59 So. 3d 575, 581 (Miss. 2011).

Other courts have held that medical bills that are irrelevant to past medical damages may still be relevant to a claim for pain and suffering. *See Barkley v. Wallace*, 595 S.E.2d 271, 274 (Va. 2004) (holding it was reversible error to exclude plaintiff’s medical bills “because they tended to establish the probability of Barkley’s claim that she experienced pain and suffering as a result of the accident.”); *Melaver v. Garis*, 138 S.E.2d 435, 436 (Ga. App. 1964) (holding that, in a case involving only pain and suffering, medical bills were “relevant to show not only the amount of medical expense incurred but the number and duration of plaintiff’s treatment as illustrative of pain allegedly suffered by plaintiff.”).

Despite this authority, our experience has found many trial court judges are inclined to defer to plaintiff’s counsel’s wishes on this topic. The “default” thinking of some judges is to sustain objections of the plaintiff since, after all, medical bills are normally the domain of the plaintiff’s case and, if not offered by plaintiff, would not otherwise be relevant.

Our experience with this new paradigm informs us that plaintiff’s counsel’s failure to offer medical bills may not be an oversight, but rather a calculated effort to inflate the damage deliberations. Defense counsel should anticipate this strategy and plan accordingly.

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