UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANE WATSON,

Plaintiff,

v.

TOYS 'R' US - DELAWARE,

Defendant.

CASE NO. C09-953MJP

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT: BUSINESS INVITEE STATUS AND PAST MEDICAL DAMAGES

The above-entitled Court, having received and reviewed

1. Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 34)
2. Defendant's Response to Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 40)
3. Plaintiff's Reply in Support of Motion for Partial Summary Judgment (Dkt. No. 47)

and all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that the motion is GRANTED. The Court finds as a matter of law that:

1. Plaintiff was a business invitee;
2. The medical treatment provided to Plaintiff as a result of the injuries sustained at the Toys R Us store in Tukwila, Washington was reasonable and necessary; and
3. The medical charges for Plaintiff's medical treatment were reasonable, usual and customary in the local community.[1]

IT IS FURTHER ORDERED that, pursuant to FRCP 37(c)(2), Defendant will be assessed the costs and fees associated with Plaintiff's preparation and presentation of this motion. Plaintiff's counsel is ordered to submit a sworn declaration documenting those costs and fees within 7 days of the date of this order.

Background

This case was originally filed in state court. Contemporaneous with filing the complaint, Plaintiff's first attorney served interrogatories on Defendant. Among them were Requests for Admissions (RFA's) asking Defendant to admit or deny that Plaintiff came to Defendant's store as a paying customer and admit or deny that she did in fact purchase merchandise on the date of her injury. Defendant admitted that Plaintiff had purchased merchandise on the day she was injured, but denied the RFA regarding whether she entered as a "paying customer" on the grounds that "Toys R Us. . . has no information regarding why Diane Watson came to Toys R Us on April 25, 2008." Miller Decl., Ex. A.

In June 2010, Plaintiff served Defendant with a second set of RFA's, including one which asked Defendant to admit that Plaintiff's medical bill was reasonable and necessary and incurred

[1] Plaintiff sought an additional ruling that "the injuries she sustained are causally related to the incident at the Toys R Us Tukwila, Washington store" (Mtn, p. 1), but presented no evidence on that issue.

for the treatment of her injuries at Defendant's store and another which asked Defendant to admit that Plaintiff's medical bill was "usual and customary for medical providers in the South King area." Defendant admitted the first RFA, but only partially admitted the second:

> Toys "R" Us admits the bill is "usual and customary" as to what is charged by the health care provider, but denies that the bill is "usual and customary" as to what is paid for that care.

Miller Decl., Ex. B.

Discussion

Legal issues on summary judgment

Plaintiff seeks an order of partial summary judgment that:

1. *Plaintiff was a "business invitee" of Defendant at the time of the accident.*

GRANTED. Defendant stipulated to Plaintiff's status in its response. Response, p. 7.

2. *The injuries Plaintiff sustained are "causally related" to the incident at Defendant's Tukwila, Washington store.*

Plaintiff submitted no evidence on this issue, nor did Defendant respond to this portion of Plaintiff's motion. The Court will not rule on this issue.

3. *The medical treatment provided Plaintiff for the injuries sustained in the incident at Defendant's Tukwila, Washington store was reasonable and necessary.*

GRANTED. Defendant does not contest this. *See* Willner Decl., Ex. G.

4. *The medical charges for Plaintiff's treatment were reasonable, usual and customary within the local community.*

GRANTED. Plaintiff in her opening brief asks for summary judgment that her expenses ($55,508.61) are "reasonable, usual and customary" in the local community. She presents a

declaration from Plaintiff's treating physician that the medical expenses are "reasonable and customary" within the local medical community. Dr. Huang Decl., Ex. E.

Defendant's response on this issue presents several difficulties. The first is the nature of its proof. Defendant's contrary proof consists of a declaration and "addendum report" from Dr. Brigham, an orthopedic surgeon who reviewed the medical records and conducted an IME of Plaintiff. Brigham's declaration states that the bills are "'usual and customary' amounts as to what is charged by the healthcare provider. The amounts are not 'usual and customary' as to what is paid for that care." Brigham Decl., pp. 1-2. An attached "addendum report" goes on to state:

> I have reviewed additional medical records. . . regarding Ms. Watson's physical therapy and billing from her various healthcare providers. All the medical treatment appears to have been necessary and all charges billed are "usual and customary." However, as you well know, the charges that are billed are usually not the charges that are paid since there are contracts with insurance companies that lower the usual and customary billing. Id., Ex. A.

First, Dr. Brigham's declaration ("the amounts are not 'usual and customary' as to what is paid for that care") is contradicted by his addendum report ("all charges billed are 'usual and customary'"). It is confusing, to say the least.

Second, the declaration of Defendant's expert is completely deficient as substantive proof. The doctor's opinion, unaccompanied by a single fact concerning what is "usually and customarily" billed anywhere else, is insufficient to create a disputed issue of material fact. ("There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242 (1986)). Summary judgment is the stage of the proceedings where both parties are put to their proof and may no longer rely on unadorned allegations; Dr. Brigham's declaration is an unadorned allegation.

Finally, Defendant's argument and the proof it attempts to present on this issue also highlight the legal insufficiency of its position; specifically, the collateral source rule prohibits it from making the argument it wishes to use to contest Plaintiff's motion.

Defendant wants to argue that Plaintiff's medical expenses are not "'usual and customary' as to what is paid for that [medical] care" based on the fact (as mentioned in Dr. Brigham's addendum report) that the doctor only receives a portion of what is billed for the treatment. Plaintiff argues in her opening brief that Defendant is precluded from making this argument by the collateral source rule: evidence that the Plaintiff has received or is entitled to receive benefits of any kind or character from a collateral source is inadmissible. Stone v. Seattle, 64 Wn.2d 166 (1964). In its response, Defendant contends that, because there is an insurance provider involved, the medical bill represents a payment to the doctor and a payment to the insurance company (because the doctor only receives a portion of what is billed) and therefore is not "usual and customary" for what a doctor not affiliated with a healthcare insurer might charge. In response, Plaintiff protests that the collateral source rule prohibits evidence of benefits received from a third party.

Defendant denies the applicability of the collateral source rule to its evidence, citing a case which says that "[p]laintiffs in negligence cases are permitted to recover the reasonable value of the medical services they receive, not the total of all bills paid." Hayes v. Wieber Enterprises, Inc., 105 Wn.App. 611, 616 (2001). However, that same case holds that "[t]he fact that the doctor accepted the first party insurance carrier's limit for his services does not tend to prove his charge for these services was unreasonable," (Id.) and a close reading of the opinion reveals that evidence of the involvement of an insurance company is not the type of evidence contemplated by the state court as proof of unreasonableness. Even if Defendant's evidence

were of a more substantive nature, Hayes does not support its position. Defendant is precluded from offering the argument it attempts to offer through its expert, and Plaintiff's evidence that the medical charges for her treatment were reasonable, usual and customary in the local community stands uncontradicted.

Award of costs and fees

Plaintiff seeks costs and fees under FRCP 37(c), which provides that a party who fails to admit a fact under an RFA which is later proved to be true may be assessed the costs and fees of establishing the truth of the fact. The Court is required to order that assessment if requested unless the "denying party" is exempted under one or more exceptions to the rule. The exceptions cited by Defendant are:

1. Reasonable grounds to believe that it might prevail on the matter.

2. "Other good reason for the failure to admit"

FRCP 37(c)(2)(C) and (D).

The Court does not find Defendant's refusals to admit supported on either ground. Concerning the "business invitee" RFA, Defendant argues that, at the time Plaintiff first requested an admission concerning why she entered Defendant's store prior to the accident (in an RFA submitted at the time the complaint was first filed), it had no way of knowing her purpose for being in the store. That may be true, but a party has an ongoing obligation under FRCP 26(e) to "supplement or correct its disclosure or response. . . in a timely manner." Once Plaintiff was deposed and Defendant had ample evidence concerning her reason for entering its store, it was required to supplement its initial denial. The Court does not disagree with Defendant that a simple request to stipulate that Plaintiff was a business invitee would likely have resolved this

issue, but that is not how Plaintiff chose to approach the matter and the Court will not second-guess her choice when it is within the procedural framework of the federal rules.

Plaintiff also argues that Defendant was unreasonable in its denial of the RFA concerning the "usual and customary" charges within the local community. The Court agrees. Defendant did not have reasonable grounds to believe that it could prevail in its denial that Plaintiff's expenses were "usual and customary in the local community" on the legal grounds which it cited. The fact that, in the entire history of litigation over insurance-funded medical payments, the only case Defendant could cite did not support its position tends to establish this as an unreasonable defense.

Pursuant to FRCP 37(c)(2), the Court orders an award of reasonable attorney's fees and costs to Plaintiff. Counsel for Plaintiff is ordered to submit a request for those fees and costs, accompanied by a sworn declaration documenting the time spent preparing for this motion, within 7 days of the date of this order.

The clerk is ordered to provide copies of this order to all counsel.

Dated: October _13_, 2010.

Marsha J. Pechman
United States District Judge