

Cause No. D-1-GN-14-000322

DR. PAUL DUNN, DDS, § IN THE DISTRICT COURT
Plaintiff, §
v. § OF TRAVIS COUNTY, TEXAS
ACS STATE HEALTHCARE, LLC. §
Defendant. § 200TH JUDICIAL DISTRICT

ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Plaintiff Dr. Paul Dunn, DDS, complaining of the defendant ACS State Healthcare, LLC, and alleges the following:

I. Nature of Case and Discovery

- 1. Plaintiff intends to conduct discovery under Level 2 of TEXAS RULE OF CIVIL PROCEDURE 190.3 and affirmatively pleads that this suit is not governed by the expedited-actions process in TEXAS RULE OF CIVIL PROCEDURE 169 because plaintiff seeks monetary relief over \$100,000.
- 2. Plaintiff seeks monetary relief over \$1,000,000. TEX. R. CIV. P. 47(C)(5).

II. The Parties

- 3. Dr. Paul Dunn, DDS is a licensed Texas dentist and an approved Medicaid provider. Dr. Dunn can be served through his undersigned counsel.
- 4. ACS State Healthcare, LLC (hereinafter ACS) and the Texas Medicaid Healthcare Partnership (hereinafter TMHP) are d/b/as for Xerox State Healthcare, LLC, a Delaware corporation. ACS is authorized to do business in Texas and may be served with process by serving its registered agent for service of process: CSC-Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

5. In the event any parties are misnamed or not included herein, such was a "misnomer" and such parties are "alter egos" of parties named herein. In the event that the true parties are misidentified, plaintiff hereby asserts reliance upon the doctrine of misidentification.

6. Pursuant to Rule 28 of the TEXAS RULES OF CIVIL PROCEDURE, plaintiff hereby brings suit against all partnerships, unincorporated associations, individuals, entities, and private corporations doing business under the assumed names that the particular defendant may have used or are using.

III. Venue and Jurisdiction

7. This court has jurisdiction over defendant ACS because ACS engaged in business by contracting with the plaintiff. The contract was to be performed in whole or in part in Texas by all parties. From 2004 through the present, ACS contracted with plaintiff to be a Medicaid provider, and ACS operated under that contract.

8. This court has jurisdiction over defendant ACS because ACS engaged in business by contracting with the State of Texas, and that contract was for the benefit of the plaintiff as well as Texas Medicaid recipients. The contract was performed in whole or in part in Texas by both parties. *Inter alia*, ACS contracted with the State of Texas to perform prior authorization reviews of requested orthodontic services submitted by Dr. Dunn.

9. This court has jurisdiction over defendant ACS because ACS committed a tort and breached a contract, which is the subject of this lawsuit, in whole or in part in Texas. ACS broke Texas law by employing unlicensed, unqualified, and inexperienced personnel to render diagnoses regarding the medical necessity of orthodontic services.

10. Venue is proper under TEXAS CIVIL PRACTICE AND REMEDIES CODE section 15.020 because this lawsuit involves a "major transaction" as defined by that section, and this is the

county designated in writing as the county for suit. Venue is permissive in Travis County under TEXAS CIVIL PRACTICE AND REMEDIES CODE section 15.035(a) because plaintiff asserts claims for breach of a written contract, and ACS/Xerox submitted to jurisdiction in Travis County for any action brought under the contract. Venue is proper in Travis County under TEXAS CIVIL PRACTICE AND REMEDIES CODE section 15.002 because all or a substantial part of the events or omissions giving rise to the claim occurred in Travis County.

11. All conditions precedent have occurred.

IV. Facts

What is Prior Authorization?

12. Texas Medicaid requires that orthodontic services be independently and objectively scrutinized before the State consents to treatment and payment. Prior authorization is the mechanism the State uses to determine the medical necessity of non-emergency orthodontic items/services prior to delivery of those items/services. Pursuant to Texas Health and Human Services Commission (hereinafter “HHSC”) rules, Texas Medicaid greatly restricts when it will pay for orthodontic services:

Orthodontic services for cosmetic reasons only are not a covered Medicaid service. **Orthodontic services must be prior authorized** and are limited to treatment of severe handicapping malocclusion and other related conditions as described and measured by the procedures and standards published in the [TMPPM¹].

25 TEX. ADMIN. CODE §33.71 (emphasis added). Prior authorization is a statement of assurance to the orthodontic provider that, absent an intervening disqualifying factor, the delivery of the requested orthodontic service has been deemed by ACS to be medically necessary, and therefore approved by the State.

¹ “TMPPM” is the Texas Medicaid Provider Procedures Manual, which is issued yearly by the HHSC and provides valuable guidance to Medicaid providers.

13. The prior authorization process is straightforward. Texas Medicaid requires that a dental provider send documentation (x-rays, cephalographs, photos, etc.) regarding the patient's orthodontic condition to ACS for review. In addition, the orthodontic provider submits his professional opinion of the patient on a Handicapping Labio-lingual Deviation index (HLD) score sheet. ACS knew providers relied entirely on the prior authorization process because approval was a mandatory prerequisite to providing orthodontic services and being paid. Once ACS issued its prior authorization decision, the decision was not appealable by the provider.

14. The HLD scoring system combines a number of treatable orthodontic conditions into an index. HLD score sheets use a mix of objective and subjective conditions to determine whether a Medicaid patient qualifies for orthodontic services. The fact that the HLD score sheet requires both objective and subjective findings highlights the importance of ACS performing a thorough prior authorization review.

The History of Orthodontic Prior Authorization.

15. The process for reviewing and approving orthodontic prior authorization requests predates the defendant ACS. The National Heritage Insurance Corporation (NHIC) was responsible for reviewing prior authorization requests before ACS assumed the contract in January 2004. Since January 1, 2004, ACS acted as an independent contractor, and was a contracted agent of the State, under the contract with HHSC. ACS was responsible for reviewing each orthodontic service request, and ACS was further charged with the responsibility to grant or deny each prior authorization request as provided by the program requirements. The result was that ACS had the final say in determining the medical necessity of each request for orthodontic services.

16. Prior to assuming the NHIC contract, and for a period of time after assuming the contract from NHIC, ACS received training from NHIC personnel regarding the proper method for

receiving and processing orthodontic prior authorization requests. NHIC personnel explained how and why the review of each prior authorization submission was important, and walked ACS through the process. Despite its training from NHIC, ACS had no intention of following the prior authorization system that had been in place for years, nor did ACS intend to otherwise meet the prior authorization requirements set out in its contract, the TMPPM and required by state law.

ACS rejects its contractual responsibilities.

17. When ACS took over the contract in 2004, it immediately abandoned the prior authorization review process that had been setup by NHIC. ACS never intended to fulfill its orthodontic prior authorization responsibilities to HHSC. From 2004 to 2011, ACS continually misrepresented that it was acting in compliance with its contractual duties.

18. It is now known that ACS failed to employ adequate medical professionals for staffing and managing the orthodontic prior authorization responsibilities. ACS employed only one licensed dentist from 2004 through 2011, which was far short of the manpower necessary to handle the review of tens of thousands of orthodontic prior authorization requests every year. ACS could not reasonably have expected to handle such a workload by employing only one dentist.

ACS potentially commits thousands of violations.

19. It is believed ACS allowed “dental specialists”—unlicensed, unqualified individuals—to render prior authorization opinions regarding the medical necessity of requested orthodontic services. The “dental specialist” approvals were not reviewed or ratified by ACS’ licensed dental director or another qualified dental professional. These actions not only violated ACS’ contractual obligations, they may have also violated other Texas law such as the Dental Practice

Act.² It is believed these unlicensed ACS “specialists” rendered tens of thousands of prior authorization approvals/medical opinions in violation of Texas law.

20. ACS was paid by the state for each prior authorization decision that was made. It is believed that ACS employed unlicensed “specialists,” rather than licensed Texas dentists, as a profit generating measure.

21. From May 2007 through February 2012, Dr. Dunn submitted prior authorization requests to ACS for a determination of medical necessity. Unbeknownst to Dr. Dunn, ACS’ dental specialists—not the dental director—approved almost all of Dr. Dunn’s requests. ACS’ prior authorization approvals were promises that:

a) the requested orthodontic services were medically necessary, and/or

b) the approval had been issued by a licensed dentist, and/or

c) the approval was an actual and legitimate dental diagnosis, and/or

d) the requested orthodontic services were allowable under Texas law and as permitted by Medicaid policy, the TMPPM, and HHSC rules, and/or

e) a proper, thorough and legal review had been made, and/or

f) future orthodontic services would be properly reimburseable to Dr. Dunn, absent some intervening disqualification such as the patient’s ineligibility.

22. Because ACS was charged with determining medical necessity, and because prior authorization approval was a mandatory prerequisite to furnishing services, the promises were material. Dr. Dunn expected performance of these promises. Dr. Dunn relied on ACS. Dr. Dunn expected that, once approved, no further inquiry into the medical necessity of the services would

² Texas Occupations Code §251.003 prevents unlicensed individuals from diagnosing conditions of the human teeth and mouth. Section 256.001 states that a person may not practice dentistry without a license. Thus, state law requires that opinions regarding medical necessity of orthodontic treatment must be made by licensed dentists. Section 264.151 prescribes criminal penalties for certain violations of the Dental Practice Act.

be required. Further, ACS promised that its subsequent payments to Dr. Dunn (after the services had actually been delivered) were made because the services had been, in fact, properly approved as medically necessary. Even though Dr. Dunn believes that all of his requests reflected medically necessary services, and therefore should have been approved by ACS, each prior authorization approval represents a separate violation of the law if ACS' approval was issued illegally and/or in violation of its contractual obligations.

ACS actively concealed its potentially illegal activity.

23. ACS withheld the truth regarding its prior authorization program. In an attempt to publicly appear consistent with NHIC's prior authorization process, ACS continued to require that dental providers (such as Dr. Dunn) submit all supporting documentation for each HLD score sheet. Incredibly, now it is believed that ACS did nothing with that documentation, other than assure that it had been submitted by the provider. It is believed that, privately, ACS' specialists were instructed to forward to its dental director only those requests that had scored below the threshold for orthodontic services (i.e. below 26 points), or had some provider justification attached. As a result, only 10%-20% of the orthodontic prior authorization requests were actually forwarded to ACS' one licensed dentist. ACS' actions were calculated to make ACS appear compliant with its contract and HHSC policies, while ACS knew that its actions were entirely inconsistent with the letter and spirit of its obligations. Effectively, then, ACS' actions not only damaged the Medicaid program directly by approving services without determining their medical necessity, but ACS' deception also exacerbated the problem by failing to give providers notice regarding the proper standard for medical necessity and caused these providers substantial damages.

24. For the past ten years, ACS has continued to publicly represent to the world that it was fulfilling its contractual and legal responsibilities. Based on ACS' representations that it was fulfilling its duties to the State, ACS repeatedly renewed its contract with HHSC from 2004 through the present. Each year that ACS renewed its contract, it represented that it would fulfill its contractual obligations and abide by Texas law requiring that decisions about medical necessity be rendered only by licensed dentists. ACS made those representations knowing that it had not done so in the past, and had no intention of changing its procedures to do so in the future.

The *Frew* decision magnifies ACS' acts.

25. In September 2007, after fifteen years of litigation on the subject, Texas was ordered to implement a corrective action plan that increased the Medicaid reimbursement rates to all dental providers. That plan was required pursuant to the *Frew* case³, which was a 1993 class-action lawsuit against the HHSC alleging that Texas' Medicaid reimbursement rates were so low that they prevented indigent children from receiving timely, comprehensive health care.

26. The increase in reimbursement rates was intended to entice dental providers to become Medicaid providers. It worked. The state raised payment rates for dental services, and, as a result, the number of dentists participating in Medicaid increased from 45.4% in 2007 to 63.4% in 2010. As expected, spending on Texas's dental services increased dramatically.

27. Although the number of prior approval requests increased by 240% between 2007 and 2010, ACS continued to employ only one dentist. That dentist was neither tasked with nor responsible for supervising the clerical specialists that were issuing the approvals.

³ *Frew v. Gilbert*, 109 F. Supp. 2d 579 (E.D. Tex. 2000) *vacated sub nom. Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002) *rev'd sub nom. Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004) and *aff'd in part, appeal dismissed in part sub nom. Frazar v. Hawkins*, 376 F.3d 444 (5th Cir. 2004); *Frew v. Hawkins*, 401 F. Supp. 2d 619 (E.D. Tex. 2005) *aff'd sub nom. Frazar v. Ladd*, 457 F.3d 432 (5th Cir. 2006); *Hawkins v. Frew*, 549 U.S. 1118, 127 S. Ct. 1039, 166 L. Ed. 2d 714 (2007).

28. By 2010, Texas's Medicaid program orthodontic spending had skyrocketed. ACS was the sole entity responsible for this increase, because it was the sole gatekeeper for the approval and payment of orthodontic services.

The Office of Inspector General seeks recovery from Medicaid providers.

29. In an attempt to limit the high cost of Medicaid orthodontia, the Texas Office of Inspector General (hereinafter "OIG") took a drastic step. In 2011, the OIG generated a list of the top Medicaid orthodontic billers and placed them on "payment hold." Dr. Dunn was one of those providers. To date, the OIG has not taken action against ACS, the real responsible party.

30. In 2011, Dr. Dunn operated a single dental office. However, given the office's proximity to some of the state's poorest children, it served a large Medicaid patient population. Because it served a large Medicaid population, it submitted a large number of prior authorization requests to ACS from 2007 through 2012.

31. Dr. Dunn did not know that ACS was failing to perform a true and accurate review for medical necessity. Dr. Dunn relied on ACS' prior authorization approvals to confirm that its dentists' analysis was proper and consistent with Medicaid standards and requirements.

32. Again unbeknownst to Dr. Dunn, OIG audits in 2008 and 2012 concluded that most, if not almost all, of the prior authorization requests for patients with HLD scores of 26 or greater (indicating medical necessity) had not been actually "evaluated" at all by ACS. Thus, the OIG concluded that a true finding of medical necessity had in reality not occurred. Billing for services that are not necessary is fraud. Therefore, the OIG opened fraud investigations against each of the top 25 providers, including Dr. Dunn, which has caused more injury and damages to him. Stated differently, ACS issued its approvals through a process that gutted the State's belief in the accuracy of ACS' decision, and the OIG punished the providers instead of ACS.

33. On or about January 2013 the OIG instituted a “payment hold” against Dr. Dunn. A payment hold temporarily freezes future Medicaid payments to a provider, despite the provider’s ongoing participation in the Medicaid program. The payment hold against Dr. Dunn was issued pursuant to what the OIG called a “credible allegation of fraud” regarding Dr. Dunn’s past Medicaid billings. The OIG placed a 100% payment hold against Dr. Dunn’s orthodontic billings.

34. As a result of the payment hold, Dr. Dunn was required to make significant financial concessions and changes to his business. Dr. Dunn also engaged legal counsel to defend himself from the OIG’s claims, at a significant expense that continues today.

35. Dr. Dunn requested a hearing on the question of whether any of his submitted charges were erroneous. The OIG’s allegations against Dr. Dunn are rooted in two assumptions. First, the OIG assumes his prior authorization requests were not been properly vetted by ACS; that is, ACS approved his requests without knowing whether approval was actually proper. Because ACS is not a party to that administrative case, Dr. Dunn is prevented from determining whether ACS did, in fact, perform a proper review of his prior authorization requests. This lawsuit seeks to address that question, and finally determine whether ACS reviewed his requests as required by its contract and the law.

36. Regarding the OIG’s second assumption, the OIG alleged Dr. Dunn’s requests were approved when, in fact, they should have been denied. Dr. Dunn denies that assertion in the administrative case, and he continues to deny that claim here. All services provided to his patients were actually medically necessary, regardless of what ACS decided.

37. The OIG continues to aggressively fight any allegation or affirmative defense that could result in ACS being held accountable for its part in these HLD scoring cases. Damages continue to accrue.

V. Causes of Action

Common Law Fraud (Fraudulent Misrepresentation and Fraudulent Inducement)

38. Dr. Dunn re-alleges and incorporates the above facts and allegations as if fully set out herein. ACS' prior authorization approvals were false representations made to Dr. Dunn. It is believed ACS knowingly issued these prior authorizations to Dr. Dunn because ACS knew that it was approving requests without a proper medical review, and/or because it approved the prior authorization requests without any knowledge of their truth. It is believed ACS intended for Dr. Dunn to rely on the approvals as a prerequisite for providing the requested services. Approval was material because it was a prerequisite for payment. Dr. Dunn actually and justifiably relied on ACS' fraudulent approvals.

39. ACS' approvals induced Dr. Dunn to continue to grade subsequent HLD requests in the same or similar manner, and led Dr. Dunn to believe that his requests were consistent with Medicaid standards and requirements.

40. ACS's fraudulent approvals caused injury to Dr. Dunn. As a result of ACS' actions, Dr. Dunn submitted requests for payment and ACS actually paid for those services, Dr. Dunn was placed on payment hold, Dr. Dunn is forced to defend himself in an administrative payment hold hearing, and Dr. Dunn is facing administrative claims by HHSC for repayment (including claims for damages and attorney fees). Dr. Dunn's reputation and business have suffered severe injury. Dr. Dunn seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Breach of the ACS-State of Texas Contract

41. Dr. Dunn re-alleges and incorporates the above facts and allegations as if fully set out herein. In the alternative, ACS' actions constitute a breach of ACS' contract with the State for the benefit of Dr. Dunn. ACS' contract with the state required that it conduct a proper, thorough and legal review of prior authorization requests for the purpose of determining medical necessity. To that end, ACS should have employed a licensed dentist.

42. ACS was an agent of the State of Texas engaged specifically for the purpose of determining medical necessity. The third party beneficiaries of that ACS-State of Texas contract were Medicaid patients and Dr. Dunn. The patients were entitled to receive orthodontic services that were medically necessary. Dr. Dunn was responsible for actually delivering the orthodontic services that ACS had deemed medically necessary. Thus, Dr. Dunn was a third party beneficiary that relied on ACS' approvals.

43. ACS breached its contract by, *inter alia*, failing to provide qualified staff; possibly violating Texas law; permitting non-dentists to make determinations of medical necessity; and issuing medical opinions without conducting a reasonable and prudent examination of evidence. The breaches were material, and recurred across many different Medicaid patients and for many years.

44. ACS' actions proximately caused Dr. Dunn's injury. Dr. Dunn's injuries were caused-in-fact by ACS' actions, and they were foreseeable. Because ACS' prior authorization was a necessary prerequisite to providing services, Dr. Dunn relied entirely on ACS' determinations regarding medical necessity; thus, ACS' actions were the direct factual cause of Dr. Dunn's injuries. ACS' actions were foreseeable in that a person of ordinary intelligence should have anticipated that issuing a decision without actually reviewing or considering the evidence (x-

rays, photos, models, etc.) would eviscerate the credibility and reliability of the decision. Once the State assumed that ACS' approvals were not trustworthy, it was foreseeable that the State would demand repayment, and/or would require Dr. Dunn to independently do ACS' job after the fact by proving that payment was proper because the services were medically necessary and reimbursable under Texas Medicaid law.

45. Dr. Dunn suffered and continues to suffer significant damage. Dr. Dunn seeks damages that would have given him the benefit of the bargain by putting them in as good a position as they would have been in if the contract had been performed. Dr. Dunn seeks reliance interest damages to restore the expenditures Dr. Dunn made in reliance on ACS' contract with the state and the approvals that ACS made under that contract. Dr. Dunn also seeks damages for his restitution interest to restore money sought by the Office of the Inspector General from Dr. Dunn. Such damages would put him in as good a position as it would have been in if the contract had been properly fulfilled. In addition, Dr. Dunn seeks liquidated damages as set out in the ACS-State of Texas contract. Dr. Dunn has engaged legal counsel to defend himself from the OIG's charges, and those legal expenses continue today. Dr. Dunn has incurred benefit of the bargain damages, out-of-pocket damages, lost profits, lost future profits, loss of credit, and loss of goodwill. Dr. Dunn seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Breach of Contract (Promissory Estoppel)

46. Dr. Dunn re-alleges and incorporates the above facts and allegations as if fully set out herein. In the alternative, ACS' actions constitute promissory estoppel.

47. ACS' prior authorizations constitute promises to Dr. Dunn in numerous ways. Because prior authorization was a prerequisite to furnishing services, and because ACS was the entity

charged with discharging prior authorization duties, Dr. Dunn reasonably, substantially, and foreseeably relied on ACS' promises.

48. Dr. Dunn suffered and continues to suffer significant damage. Dr. Dunn suffered reliance damages by investing time, labor, equipment, and orthodontic appliances in each Medicaid patient that ACS approved. Dr. Dunn has engaged legal counsel to defend himself from the OIG's charges, and those legal expenses continue today. Dr. Dunn has been required to do ACS' job after the fact—namely, demonstrate that the services were medically necessary and properly reimbursable under Texas Medicaid law. Dr. Dunn has incurred benefit of the bargain damages, out-of-pocket damages, lost profits, lost future profits, loss of credit, and loss of goodwill. All of these damages were directly and/or proximately caused by ACS' promises. Dr. Dunn seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Negligent Hiring/Negligent Supervision

49. Dr. Dunn re-alleges and incorporates the above facts and allegations as if fully set out herein. ACS' actions constitute negligent hiring and/or negligent supervision. ACS was required to render medical diagnoses. To that end, ACS was required by law to employ a licensed dentist to render a diagnosis regarding medical necessity. ACS was also required by law to properly supervise its employees to make sure diagnoses were made only by licensed dentists.

50. ACS knew or should have known that decisions regarding medical necessity can only be rendered by licensed personnel. Texas Occupations Code section 251.003 defines the practice of dentistry to include a diagnosis of the human mouth and/or teeth; section 256.001 states that a person may not practice dentistry without a license; section 264.151 makes it a third-degree felony to practice dentistry without a license.

51. ACS' actions proximately caused Dr. Dunn's injury. Dr. Dunn's injuries were caused-in-fact by ACS' actions, and they were foreseeable. Because ACS' prior authorization was a necessary prerequisite to providing services, Dr. Dunn relied entirely on ACS' determinations regarding medical necessity; thus, ACS' actions were the direct factual cause of Dr. Dunn's injuries. ACS' actions were foreseeable in that any person of ordinary intelligence should have anticipated that paying Dr. Dunn for services that have not properly been determined to be medically necessary would precipitate a demand for repayment, and/or would require Dr. Dunn to independently do ACS' job after the fact by proving that payment was proper because those services were medically necessary and were reimbursable under Texas Medicaid law.

52. Dr. Dunn suffered and continues to suffer significant damage. Dr. Dunn suffered reliance damages by investing the cost of services for each Medicaid patient that ACS approved. Dr. Dunn has engaged legal counsel to defend himself from the OIG's charges, and those legal expenses continue today. Dr. Dunn suffered and continues to suffer significant damage to his reputation, business, referral base, earnings and earning power. Dr. Dunn has suffered inconvenience and loss of enjoyment of life in that he has had to dedicate significant mental and personal capital to doing ACS' job. Dr. Dunn has suffered exemplary damages because ACS' conduct was grossly negligent, outrageous and malicious, and such conduct should be penalized so that it is deterred in the future. Dr. Dunn seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Negligence

53. Dr. Dunn re-alleges and incorporates the above facts and allegations as if fully set out herein. ACS' actions constitute negligence and gross negligence. ACS was required to render medical diagnoses. To that end, ACS had a duty to employ a licensed dentist to render a

diagnosis regarding medical necessity. ACS had a duty to assure that the personnel had appropriate education, training and experience to render such a diagnosis. ACS had a duty to review the supporting prior authorization documentation (such as x-rays and photos) to determine whether the requested services were medically necessary.

54. ACS' actions breached the standard of care because ACS: failed to provide prior authorization staff that were properly licensed, qualified and experienced dental professionals; violated the law, specifically the Dental Practice Act, by permitting non-dentists to make determinations of medical necessity, and; issued medical opinions (prior authorizations) without conducting a reasonable and prudent examination of evidence.

55. ACS' actions proximately caused Dr. Dunn's injury. Dr. Dunn's injuries were caused-in-fact by ACS' actions, and they were foreseeable. Because ACS' prior authorization was a necessary prerequisite to providing services, Dr. Dunn relied entirely on ACS' determinations regarding medical necessity; thus, ACS' actions were the direct factual cause of Dr. Dunn's injuries. ACS' actions were foreseeable in that any person of ordinary intelligence should have anticipated that paying Dr. Dunn for services that have not properly been determined to be medically necessary would precipitate a demand for repayment, and/or would require Dr. Dunn to independently do ACS' job after the fact.

56. Dr. Dunn suffered and continues to suffer significant damage to his reputation, business, referral base, earnings and earning power. Dr. Dunn has engaged legal counsel to defend himself from the OIG's charges, and those legal expenses continue today. Dr. Dunn has suffered inconvenience and loss of enjoyment of life in that he has had to dedicate significant mental and personal capital to doing ACS' job. Dr. Dunn has suffered exemplary damages because ACS' conduct is grossly negligent, outrageous and malicious, and such conduct should be penalized so

that it is deterred in the future. Dr. Dunn seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Negligent Misrepresentation

57. Dr. Dunn re-alleges and incorporates the above facts and allegations as if fully set out herein. ACS' actions constitute negligent misrepresentation. ACS' actions constitute misrepresentations to Dr. Dunn in numerous ways. Because, *inter alia*, prior authorization approval was a prerequisite to furnishing services, these representations guided and controlled Dr. Dunn's responses. Dr. Dunn justifiably relied on these representations. Further, ACS represented that its prior authorization approvals were dispositive of medical necessity; Dr. Dunn expected that, once approved, no further inquiry into the medical necessity of the services would be required. Further, ACS represented that its subsequent payments to Dr. Dunn (after the services had actually been delivered) were made because services had been, in fact, properly approved as medically necessary.

58. ACS did not exercise reasonable care or competence in making its determinations and representations. ACS knew or should have known that its representation were false.

59. Because prior authorization was a prerequisite to furnishing services, and because ACS was the entity charged with discharging prior authorization duties, Dr. Dunn reasonably, substantially, foreseeably, and justifiably relied on ACS' representations.

60. Dr. Dunn suffered and continues to suffer significant damage. Dr. Dunn suffered reliance damages by investing time, labor, equipment, and orthodontic appliances in each Medicaid patient that ACS approved. Dr. Dunn has engaged legal counsel to defend himself from the OIG's charges, and those legal expenses continue today. Dr. Dunn has been required to do ACS' job after the fact. Dr. Dunn has incurred benefit of the bargain damages, out-of-pocket damages,

lost profits, loss of credit, and loss of goodwill. All of these damages were directly and/or proximately cause by ACS' negligent misrepresentations. Dr. Dunn seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Gross Negligence / Misapplication of Fiduciary Property

61. Plaintiff pleads ACS committed gross negligence and/or the misapplication of fiduciary property which would entitle Plaintiff to unlimited punitive damages.

VI. Damages

62. Plaintiff has suffered and is entitled to recover damages including, but not limited to loss of use of funds sequestered by the State, actual damages, damage to reputation, damage to business, damage to earnings and earning power, inconvenience, loss of enjoyment of life, fees and expenses, interest, punitive/exemplary damages, and attorney fees.

VII. Conclusion

63. ACS' actions have harmed Dr. Dunn because ACS committed fraud, negligent hiring, negligence, and gross negligence. ACS's actions have subjected Dr. Dunn to unnecessary administrative legal action, and that, in turn has caused additional injury. ACS' actions have required Dr. Dunn to perform ACS' job after-the-fact, by proving to the OIG that the orthodontic services rendered were medically necessary and appropriate for reimbursement.

VIII. Jury Demand

64. Plaintiff respectfully requests a trial by jury.

IX. Request for Disclosure

65. Under Texas Rule of Civil Procedure 194, plaintiff requests that defendant disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

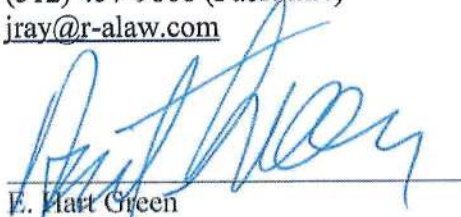
X. Prayer

66. Wherefore, premises considered, Plaintiff Dr. Dunn prays that upon final hearing of the cause, judgment be entered against the Defendant ACS State Healthcare, LLC for damages, together with pre-judgment and post judgment interest at the legal rate, costs of court, and other such relief to which the Plaintiff may be entitled.

Respectfully submitted,



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