IN RE NORTH CYPRESS MEDICAL OPERATING CO., INC

R. Brent Cooper
Diana Faust
900 Jackson Street, Suite 100
Dallas, TX 75202
214-712-9500
Email: brent.cooper@cooperscully.com
Diana.faust@cooperscully.com

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FACTS

- 6/9/15 AUTO ACCIDENT
- CRYSTAL ROBERTS TAKEN BY AMBULANCE TO NORTH CYPRESS
- RELEASED AFTER X-RAYS, CT SCANS AND LAB TESTS
- BILLED $11,037.35 FOR THE FULL “CHARGEMASTER” RATE

FACTS

- ROBERTS SENDS DEMAND LETTER LISTING 11,037.35 AS REASONABLE MEDICAL BILLS
- NORTH CYPRESS FILES A MEDICAL LIEN UNDER CH 55.002(A) TEX. PROP. CODE
- ROBERTS SETTLES WITH OTHER DRIVER
- TRIES TO REACH AN AGREEMENT WITH NORTH CYPRESS REGARDING THE MEDICAL LIEN

FACTS

- ROBERTS SERVES REQUESTS FOR PRODUCTION AND INTERROGATORIES FOR HOSPITALS' NEGOTIATED RATES WITH AETNA, FIRST CARE, UNITED HEALTHCARE, BCBS MEDICARE AND MEDICARE
- NORTH CYPRESS OBJECTS AS IRRELEVANT AND LATER ASSERTS PRIVILEGE
- TRIAL COURT ORDERS PRODUCTION

FACTS

- NORTH CYPRESS FILES MANDAMUS IN HOUSTON COURT OF APPEALS THAT IS DENIED
- NORTH CYPRESS FILES MANDAMUS IN THE TEXAS SUPREME COURT
- COURT ORDERS BRIEFING AND GRANTS ARGUMENT

FACTS

- CASE ARGUED ON NOVEMBER 9, 2017
- AMICUS BRIEFS FILED BY CHRISTUS HEALTH, TEXAS HEALTH RESOURCES, DALLAS COUNTY HOSPITAL DISTRICT, HUNT COUNTY HOSPITAL DISTRICT, HERMAN MEMORIAL, RESEARCH AND PLANNING CONSULTANTS, ALLIANCE OF CLAIMS PROFESSIONALS, AND THE FUENTES FIRM

HOLDING

- SUPREME COURT DENIED MANDAMUS

- HOSPITAL LIEN REQUIREMENT

  "This statute provides hospitals an additional method of securing payment from accident victims, encouraging their prompt and adequate treatment. *McAllen Hosps., L.P. v. State Farm Cty. Mut. Ins. Co. of Tex*., 433 S.W.3d 535, 537 (Tex. 2014). Subject to certain conditions, a hospital has a lien on the cause of action of a patient "who receives hospital services for injuries caused by an accident that is attributed to the negligence of another person." Id. (quoting TEX. PROP. CODE § 55.002(a)). The lien also attaches to the proceeds of a settlement of the patient's cause of action. TEX. PROP. CODE § 55.003(a)(3). We have noted that the statute "is replete with language that the hospital recover the full amount of its lien, subject only to the right to question the reasonableness of the charges comprising the lien." *Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 309 (Tex. 1985); *see also Daughters of Charity Health Servs. v. Linnstaedter*, 226 S.W.3d 409, 411 (Tex. 2007) (noting that the amount of a hospital lien may not exceed "a reasonable and regular rate")."

"Notwithstanding these statements in *Bashara* and *Linnstaedter*, amici curiae Christus Health and Texas Health Resources argue that the hospital's charges for services rendered, as distinguished from physician charges and "charges for other services," need not be "reasonable" to be covered by a valid hospital lien. Compare TEX. PROP. CODE § 55.004(b) ("A hospital lien ... is for the amount of the hospital's charges for services provided ...."), with id. § 55.004(c) ("A hospital lien ... may also include the amount of a physician's reasonable and necessary charges for emergency hospital care services provided ...."), and id. § 55.004(d) ("A hospital lien ... does not cover ... charges for other services that exceed a reasonable and regular rate for the services [.]"). North Cypress does not make this argument and has consistently taken the position that its charges are reasonable. Accordingly, we do not address the statutory-interpretation argument amici present."

"Commentators lament the increasingly arbitrary nature of chargemaster prices, noting that, over time, they have "lost any direct connection to costs or to the amount the hospital actually expect[s] to receive in exchange for its goods and services." George A. Nation III, Hospital Chargemaster Insanity: Heeling the Healers, 43 PEPP. L. REV. 745, 755 (2016) (*citing* Christopher P. Tompkins et al., The Precarious Pricing System for Hospital Services, 25 HEALTH AFF. 45, 48 (2006)). Yet hospitals have incentive to continue raising chargemaster prices because of the positive correlation between those prices and hospital revenue. Id. at 755–56; *see also* George A. Nation III, Determining the Fair and Reasonable Value of Medical Services: The Affordable Care Act, Government Insurers, Private Insurers and Uninsured Patients, 65 BAYLOR L. REV. 425, 454 (2013) ("In one form or another, a hospital's billed (chargemaster) charges are used indirectly to determine the ultimate dollar level of reimbursement payments."). This trend continues notwithstanding the fact that hospitals generally expect to recover far less than they officially "charge." E.g., Tompkins, 25 HEALTH AFF. at 48 ("The gap between charges and actual payments (net patient revenues) now averages about 255 percent and is growing rapidly.")."

“However, the issue is not whether Roberts may take advantage of insurance she did not have. Rather, because a valid hospital lien may not secure charges that exceed a reasonable and regular rate, the central issue in a case challenging such a lien is what a reasonable and regular rate would be. And because of the way chargemaster pricing has evolved, the charges themselves are not dispositive of what is reasonable, irrespective of whether the patient being charged has insurance. By contrast, a hospital’s reimbursements from private insurers and public payers comprise the vast majority of its payments for services rendered. We fail to see how the amounts a hospital accepts as payment from most of its patients are wholly irrelevant to the reasonableness of its charges to other patients for the same services.”

– “North Cypress accuses Roberts of utilizing the full amount of the billed charges to negotiate a favorable settlement with the liability insurer and then seeking a windfall by challenging those charges as unreasonable. To the extent North Cypress asserts some sort of estoppel defense in the underlying suit, we fail to see how it forecloses discovery on a central issue.”

In *Children's Hospital Central California v. Blue Cross of California*, the noncontracting insurer was required by statute to pay the hospital "the reasonable and customary value" of its services, which "embodies the concept of quantum meruit." 226 Cal.App.4th 1260, 172 Cal.Rptr.3d 861, 872 (2014).

Colomar v. Mercy Hosp., Inc., 461 F.Supp.2d 1265, 1267–68 (S.D. Fla. 2006). The hospital urged that an unreasonable-pricing claim required allegations—which the plaintiff did not make—that the hospital's chargemaster prices "grossly exceed" those of other hospitals in the same market.

Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alts., Inc., 832 A.2d 501, 508 (Pa. Super. Ct. 2003) (holding that the amounts the hospital actually received for its services were relevant to the reasonable value of those services, particularly in light of the fact that the hospital "rarely recovers its published rates").

But the fact that explanations exist for disparate reimbursement rates does not render them wholly immaterial. As noted, considered together, reimbursements from insurers and government payers comprise the bulk of a hospital's income for services rendered. It defies logic to conclude that those payments have nothing to do with the reasonableness of charges to the small number of patients who pay directly. See id. at 461 (suggesting that a good starting point for measuring the fair and reasonable value of medical services is the average of the negotiated private-insurer reimbursement amounts, with adjustments to reflect the value such insurers provide).

The crux of Roberts' lien claim is whether the amount secured by North Cypress's hospital lien exceeds a reasonable and regular rate for the services provided. The amounts North Cypress accepts as payment for those services from other patients, including those covered by private insurance and government benefits, are relevant to whether the charges to Roberts were reasonable and are thus discoverable. We hold that the trial court did not abuse its discretion in compelling production of this information. Accordingly, we deny North Cypress's petition for writ of mandamus.

DISSENT

It is unreasonable to limit a hospital to charging an uninsured patient insurer-negotiated reimbursement rates. The patient cannot confer on the hospital benefits of a predictable volume of business or ease of payment as an insurer can. As we explained in Haygood, the benefit of an insurer's discounted rate belongs to the insurer, not the insured. It certainly does not belong to an uninsured patient. Nor can reimbursement rates, which vary from insurer to insurer, be used to determine reasonable charges for uninsured patients. The Court cannot suggest a formula for doing so. And because governmental reimbursement rates are often below a hospital's costs, they can provide no basis for gauging the reasonableness of charges to uninsured patients. In sum, none of the information at issue that North Cypress has been ordered to produce in discovery can be used to determine whether its charges to Roberts were reasonable.

Just last Term, in *In re National Lloyds Insurance Co.*, insured homeowners suing their insurer for underpaying property-damage claims sought discovery of the insurer's attorney fees to show the reasonableness of their own attorney fees. The trial court ordered production. We held that one party's attorney fees are generally irrelevant in determining the reasonableness of an opposing party's attorney fees. What a lawyer of particular experience and position would charge a client to advance its position in litigation is ordinarily irrelevant in determining what another lawyer would charge a different client to advance the opposing position.

- In last Term’s National Lloyds opinion, the Court added that “[e]ven if a party’s attorney-billing information were marginally relevant to an opposing party’s fee claim, discovery of such information should ordinarily be denied because the ‘probative value is substantially outweighed by the danger of ... unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.’ ” The court must limit discovery when its burden outweighs its likely benefit.

- North Cypress contends that the information Roberts seeks is proprietary and confidential and should be subject to a protective order. That will add to the expense of the case. Further, amici raise the concern that hospitals, faced with this kind of litigation and concerned that the confidentiality of their negotiations with insurers cannot be protected, will simply cave in to demands of uninsured patients and attempt to shift the costs of their treatment to insured patients or suffer the loss of income. If the confidential information were directly relevant to Roberts' claim, the concerns the amici raise might be unavoidable. But when neither Roberts nor the Court can state how reimbursement rates can be used to show that charges to self-payers are unreasonable, the discovery should not more be allowed than in the National Lloyds cases.

Cost and delay are the prevalent criticisms of the American civil justice system, and the main contributor to both is discovery. “ ‘Discovery is often the most significant cost of litigation’ and a potential ‘weapon capable of imposing large and unjustifiable costs on one’s adversary.’ ” Discovery is an essential tool in our system for ascertaining the truth in civil cases. But it can also be an abusive weapon to thwart justice. Which one depends entirely on court supervision.

Motion for Rehearing

- Issues
  - Material Factual Errors
  - Failure to Consider NC's Other Objections
  - Protective Order Unavailable
  - Chargemaster List Rates Not Arbitrarily Set
  - Far-Reaching Consequences
  - Dramatically Increase Costs for Hospitals
  - Impact on *Haygood v. Escobedo*
  - How is this Information Relevant?

Motion for Rehearing

- Requests Court to Address Criteria to Show How Contracts with 3rd Party Payors Should Be Used to Determine Reasonableness of Medical Charges
- Far-Reaching Impact
  - Opens the Door to Ancillary Litigation Re Discoverability in Any Case Involving Personal Injury Damages or Any Case in Which Medical Charges are Involved in Any Way

Motion for Rehearing

- How Can Confidentiality be Monitored?
  - Hundreds of Cases Addressing Reasonableness of Rates
  - How to Prove Violation of Confidentiality Order When Hundreds Will Be Required?

Motion for Rehearing

- Consequences Suggested by NC
  – All Hospitals Will Know Reimbursement Rates Negotiated by Other Hospitals, Weakening Bargaining Power
  – All Insurers Will Know Reimbursement Rates Negotiated by Other Insurers by Hospital
  – All Patients Will Know Reimbursement Rates, Discouraging Purchase of Health Insurance by Demanding Adjustments to "Reasonable Rates"

Motion for Rehearing

- Amici Curiae Support
  - Shannon Medical Center
  - Americans for Patient Access
- Interpretations of North Cypress
  - Appellate Courts: Discoverable and Relevant
  - *In re East Tex. Med. Ctr. Athens v. Hernandez*, No. 12-17-00333-CV, 2018 WL 2440508 (Tex. App.—Tyler May 31, 2018)

- IN RE TRAVIS COUNTY, NO. 03-17-000619-CV

- *In re Debra Gunn* (Tex. June 15, 2018)
  - 18.001 Affidavits from Subrogation Agents for Health Insurance Carriers that Paid P's Medical Expenses, Reflecting Amounts Actually Paid
  - Held: Affiant for 18.001 Need Not Be Health Care Provider or Records Custodian to Attest to Reasonableness and Necessity of Medical Expenses
  - Agent May Utilize National and Regional Information to Compare Prices Paid for Care to Determine Reasonableness
  - Plain Language of 18.001 Does Not Require Affiant Be Sufficiently Trained or Experienced in Medicine to Give Competent Testimony about Necessity of Treatment
  - Dissent: Affiants (from KY and WI) Failed to Show Qualified re Reasonableness or Necessity or Personal Knowledge Regarding Charges for Care in Houston; Affidavits Legally Insufficient Re Itemized Charges

Thank you.