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Reasonable Medical Expenses: *The trial court abused its discretion in quashing discovery requests for the negotiated rates of plaintiff's medical providers when the requests were narrowly tailored, there was no evidence the requests were unduly burdensome, and the trial court did not consider whether a protective order would reasonably protect any confidential information or trade secrets.*

In re N. Cypress Med. Ctr. Operating Co., 559 S.W.3d 128, 129 (Tex. 2018) (orig. proceeding), held a trial court may allow discovery about a medical provider's negotiated rates with private insurers and public-entity payors when the plaintiff challenges the reasonableness of the rates charged when secured by a medical lien. Several federal courts ruled the *North Cypress* decision did not apply when the reasonableness of the charge was a questioned by the personal injury *defendant* instead of the plaintiff-patient. *In re K&L Auto Crushers* decided that *North Cypress's* ruling also applied so defendants in personal injury litigation were entitled to discovery about the rates charged the plaintiff relative to those charged insurers and public entities.

1. *The discrepancy between "list" and discounted prices for medical procedures is relevant to the reasonableness of the amount charged.*

The issue arose when a defendant served subpoenas to the plaintiff's medical providers who sought to quash the subpoenas, urging that seeking information about their billing rates and practices was "not reasonably calculated to lead to the discovery of admissible evidence" and was protected as "confidential, proprietary, and [a] trade secret." In an opinion by Justice Boyd, a six-judge majority ruled that, once pared down to matters germane to the plaintiff's treatment, denying the discovery was an abuse of the trial court's discretion. The "reasonableness of the provider's rates in [the patient's suit challenging the reasonableness of the provider's charges] is equally relevant" when it is the personal injury defendant doing the questioning.

The opinion begins its analysis with the observation that discovery is subject to a "proportionality overlay" that disallows discovery if its burden or expense outweighs its likely benefit." *North Cyress* determined the discrepancy between the full "list price" charged to, but frequently uncollected from, individual patients and the discounted rates charged insurers was relevant to reasonableness. The majority rejected the providers' entreaty to deem reasonableness irrelevant on the basis that the amount recoverable is statutorily limited to the amount "actually paid or incurred." Although the negotiated rate would necessarily be less than "list price," the majority found the negotiated rates relevant because the paid and incurred amount allowed under Texas Civil Practice & Remedies Code §41.0105 was still limited by reasonableness. Tex. Civ. Prac. & Rem. Code § 18.001. Regardless of whether the claimant might be "undercompensated" if required to pay more than a reasonable amount, the court reasoned the tortfeasor is not liable for the excess because that obligation is not the "'necessary and usual result of the tortious act."

2. *Overbreadth is measured prospectively based on whether the request is limited so that the response provides information likely to be relevant to the disputed issues in the case.*

The majority also expounded on the oft-invoked and seldom explained complaint about overly broad discovery requests. Discovery is not overly broad because of the volume or doubtful relevance of some of the responsive information. Instead, overbreadth is measured by whether the request is properly tailored with regard to time, place, and subject matter to be reasonably calculated to the discovery of admissible evidence. Under this standard, overbreadth is a *prospective*, not retrospective, test. In this case, K&L's subpoena initially requested "all communications and all documents" concerning billing practices. While this initial demand was probably overly broad, the court ruled that K&L's agreement at the hearing to narrow the requested discovery to the time period, devices, and services provided the plaintiff was enough to save it from overbreadth. The lesson here is that discovery request drafters should avoid broad boilerplate language. Instead, the inquiry should be thoughtfully drafted to focus on information germane to the disputed issues in the case.

3. *Burdensomeness is evaluated according to "proportionality" of the burden imposed compared to the benefit of the information in the context of the particular case. Mere assertion of the conclusion discovery is unduly burdensome without supporting details will not suffice.*

Just like the overbreadth analysis, complaints that discovery is unduly burdensome involves consideration of proportionality; that is, whether the light shed by the requested information on a relevant issue is worth the trouble of producing it. The party resisting discovery is must do more than merely say the discovery is "burdensome." The objection must be accompanied with evidence that the burden of production is disproportionate to the value of the information to resolving a disputed issue. Moreover, burdensomeness cannot be a self-fulfilling prophecy. When "a responding party's own conscious, discretionary decision [about] how it … store[s] and organize[s] its materials, causes discovery to be burdensome, th[at] burden is not considered 'undue.'"

Without further details, respondent's conclusory objection the discovery request, once narrowed down from the original "kitchen sink" inquiry, was unduly burdensome and harassing because its software was not designed to permit searching the records electronically did not justify disallowing the discovery. Although the respondents were not parties, the majority justified imposing this burden because "invested themselves in the outcome of this case" because they treated the plaintiff pursuant to letters of protection. Consequently, they forfeited some of the protection the discovery rules afford disinterested third parties. Availability of the requested information from another source may justify limiting the information that must be produced, but it does not warrant blanket denial of all the requested information.

On the issue of the duty to assure that discovery is not burdensome, Justice Huddle's concurring opinion, partially joined by Justices Bland and Guzman, departed from Justice Boyd's majority opinion by pointing out in the case of discovery from non-parties rule 176.7 imposes on the requesting party the initial responsibility of assuring the request is not unduly burdensome or costly. The concurring justices would have concluded the discovery requests, even after being narrowed, were so broad and compliance so time consuming the trial court would have been within its discretion to have decided the burden imposed by the narrowed requests were disproportionate to the needs of the case.

The majority also considered proportionality in weighing whether discovery was unduly burdensome. Though the requesting party contested liability, the magnitude of the claimed medical expenses and the need for expert testimony about reasonableness of "list prices" meant that a narrowed version of an overly broad request should have been considered when balancing burdensomeness of the discovery against its likely benefit. The blanket denial of discovery about an issue that could define the majority of any damage award effectively denied the defendant a meaningful trial based on objective facts, and not just the general conclusions of experts about the fairness and reasonableness of the amounts charged. Denying discovery on this crucial issue was deemed an abuse of the trial court's discretion.

4. *Proposed protective orders should be considered when evaluating trade secret objections.*

The majority ventured out to reject the provider's claims the discovery about their billing rates were confidential trade secrets, even though it was not clear the trial court relied on that objection to deny the requested discovery. Nevertheless, the majority opined that when the requesting party asserts a confidentiality objection, the

trial court should consider whether a protective order would address the objecting party's legitimate concerns before denying the discovery outright. In this case, the requesting party agreed that a protective order would be appropriate and provided assurances that it was not seeking private information or protected patient information. The denial of the requested discovery under these circumstances was also deemed an abuse of discretion.

Considering these rulings on discoverability and the importance of the issue of the reasonableness of medical expenses to the defense of the case, the majority ruled that appeal from the final judgment would not be an adequate remedy. Without the requested information in the record, it would be impossible for the requesting defendant to show that denying discovery of the missing information was harmful error.

> **Administrative Procedure:** *Failure to meet locally enacted timeliness requirements does not divest state agency of* jurisdiction *when the statute authorizing the administrative appeal does not adopt the time limit. Failure to comply with local time limits restrict, however, the relief on the merits that may be available in an administrative appeal.*
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> *Deadlines for administrative appeals that run from the later date of an "action or decision" do not commence expiration with the "decision" when the decision must be implemented in some "action" to affect the complaining party. Absent some alleged harm, the person is not "aggrieved" as required by the statute conferring administrative appellate jurisdiction*

In a unanimous opinion by Justice Blacklock, the court in *Davis v. Morath* addressed the jurisdiction of the Commissioner of Education to entertain a teachers' group's appeal from the Dallas Independent School District's performance appraisal "scorecards." Education Code §7.057 gives the Commissioner jurisdiction to hear appeals by a

> person is aggrieved by … the school laws of this state; or … actions or decisions of any school district board of trustees that violate [those laws] … or … a provision of a written contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee.

Here, the Teachers in part complained their scorecards for the 2014-15 schoolyear were not distributed until September 2015, during the following school year in violation of Education Code § 21.352(c). The Commissioner dismissed the appeal as untimely because it was filed more than the ten business days required under DISD's Teacher Excellence Initiative, of which the evaluation scorecards were a part. The court reversed the Commissioner's no-jurisdiction decision. It explained that nothing in §7.057 required the Teachers to follow or authorized a local school board to impose additional procedural prerequisites or exceptions to the statutory grant of appellate *jurisdiction* to the Commissioner.

Rejecting untimeliness as a *jurisdictional* defect, the court considered whether failure to comply with the school board's deadline could affect how the Commissioner should resolve the appeal. The Education Code authorizes local school boards to adopt rules and procedures for reviewing teacher complaints. Limits on the school district's ability to reach the merits likewise constrains the Commissioner's discretion. The Commissioner cannot correct an action DISD could not correct under its own rules.

The court then focused on whether the Teachers complied with the DISD's complaint deadline. That deadline was ten business days from the date the Teachers "first knew or, with reasonable diligence, should have known of the decision or action giving rise to the grievance or complaint." For this purpose, the court considered whether the Teachers' complaints about the evaluative criteria's fairness was a separate "decision or action" that triggered an earlier deadline than that for the scorecards. The court concluded the scorecards' alleged illegality was the result of an earlier policy decision did not convert the Teachers' complaint about the scorecards' illegality into one about the earlier policy decision for purposes of triggering the time to file a complaint.

> It makes no difference that the reason the scorecards are legally flawed is [DISD]'s earlier decision to adopt T[eacher's] E[xcellence]I[nitiative]. [DISD]'s ten-day rule looks to the "action" alleged to

> be illegal and asks whether it "g[ave] rise to the grievance." It does not look to the reasons *why* the action is alleged to be illegal ….

(Emphasis added). The Teacher's complaint was about the *action* involved in the use of the evaluation scorecards. As long as the Teachers filed their complaint within ten days of the later of the *action or decision*, their complaint was timely under DISD's rules. The court justified rejecting the earlier date of decision as triggering the time window for complaint because the decision would not harm them unless or until the decisions involved in the evaluation were brought to bear on them. The court explained that harm was essential because Education Code §7.057 only permits appeals by those who are "aggrieved by" the decision.

The court then addressed the Commissioner's contention the Teachers failed in the administrative appeal to preserve the alleged error for judicial review. The Commissioner maintained the Teachers' exceptions did not comply with the TEA's requirement that exceptions be stated "specifically and concisely" and that the supporting "evidence … be stated with particularity" and that any evidence or arguments "be grouped under the exceptions to which they [relate]." 19 Tex. Admin. Code § 157.1059(e). Both the court of appeals and the Texas Supreme Court rejected the Commissioner's contention.

The court noted the Teachers asserted 32 exceptions detailed in 133 paragraphs which "reasonably match[ed]" their contentions before the courts. It was enough, the court ruled, that the exceptions notified the TEA of the arguments the Teachers intended to advance and thereby fulfilled the objective of "ensur[ing] full presentation of all disagreements." 29 Tex. Reg. 6887, 6888 (2004). The court deemed it sufficient if the exceptions "captured the essence" of the Teachers' arguments even if those arguments were not "fully elaborated." The difficulty for practitioners, of course, is that these amorphous standards are a *post hoc* justification for the court's general preference for reaching the merits of an argument rather than deeming it waived. They do not provide a particularized standard or test for sorting the sufficient exception from the insufficient.

Because of its rulings concerning the jurisdictional and preservation issues, the court remanded most of the Teacher's case. The court affirmed only that portion of the judgment that the Teachers take nothing on their complaint that DISD impermissibly reduced a certified teacher's total compensation after time the teacher could resign. The alleged "reduction" was not in overall compensation, but rather to a decrease in *take home* pay thanks to increased health insurance premiums. The court ruled that the administrative decisions prohibiting compensation reductions did not apply to this situation.

Electronic Signatures: *Testimony setting forth circumstances showing that electronic signatures must have been executed by the purported signatories conclusively established the electronic signatures were those of the purported signatories under the Texas Uniform Electronic Transactions Act notwithstanding purported signatories' denial of having electronically signed the instrument.*

Under the Texas Uniform Electronic Transactions Act, "[a]n electronic record or … signature is attributable to a person [by] showing . . . the efficacy of any security procedure applied to determine the person to which the electronic record or electronic. That Act states "[a]n electronic record or electronic signature is attributable to a person [by] showing . . . the efficacy of any security procedure applied" for that purpose. In *Aerotek, Inc. v. Boyd*, an employer maintained former employees agreed to arbitrate their employment disputes by electronically signing the agreement. On that basis, the employer moved to compel arbitration.

The employer presented testimony that the computerized sign-up procedures was rigidly regulated by a software process for electronically executing hiring documents, including the arbitration agreement. The testimony presented by the employer was by a witness that did not specifically recall these employees filling out the electronic registration forms. Instead, the witness's testimony was to the effect it would have been practically impossible for the employees to complete the sign-up process without executing the arbitration agreement. The employees, on the other hand, denied under oath that they ever executed the agreement to arbitrate employment disputes.

When there is a dispute over the execution of an arbitration agreement, the trial court is obliged to resolve the issue. Based on the conflicting testimony – the employer's presentation that it was impossible for the agreement not to have been signed by the employees versus the employees' sworn denial of indicating their assent to arbitration by electronically signing the agreement – the trial court denied arbitration. A divided court of appeals affirmed, reasoning the trial court was the trier of fact entitled to resolve the conflict between the employers' and the employees' version of events based on the testimony of interested witnesses.

Writing for an 8:1 majority, Chief Justice Hecht ruled the testimony presented by the employer *conclusively established* the employees electronically signed the arbitration agreements. The employer's evidence about the security procedures verifying that the electronic signatures on the documents was uncontroverted.

> The efficacy of the security procedure provides the link between the electronic record stored on a computer or in a database and the person to whom the record is attributed. A record that cannot be created or changed without unique, secret credentials can be attributed to the one person who holds those credentials.

For the majority this was enough to *conclusively* satisfy the requirement of showing the procedure applied was effective to assure the electronic signature belonged to the alleged signatory. The majority responded by invoking the Legislature's policy declaration more than the conventional rules concerning what is, and what isn't, probative evidence. They explained, "Our policymaking branch of government, the Legislature, has expressly declared it … the policy of this State to facilitate those transactions." "Courts cannot unnecessarily stand in the way of the Legislature's attempts to keep pace with that innovation." Fair enough, but the Legislature is and was well aware of the long-standing rules concerning when evidence has probative value. If the Legislature meant to modify those rules in the Texas Uniform Electronic Transactions Act, it is not unreasonable to think it would and should have specifically said so.

Justice Boyd dissented because he believed the court of appeals correctly applied the standard of review for a trial court's factual determinations which prevents them from being overturned if there's any evidence to support it. Justice Boyd asserted the denial of the employees alone was enough to create a factual dispute the trial judge was entitled to resolve, no matter how compelling the contrary evidence might have been. As a matter of first impression, the dissent has much superficial appeal.

However, in this writer's view, it cannot withstand more considered scrutiny. Though often confused for one another, testimony is not necessarily probative evidence. What the divergence of opinions in *Aerotek* reflects, although neither the majority nor the dissent characterize it this way, is the familiar struggle over whether unexplained

testimonial conclusions can have any probative value when they are at odds with uncontroverted circumstances that make it impossible for the conclusion to be true. It is well-settled conclusions of witnesses – lay or expert – have no probative value if they are contrary to incontrovertible facts. The testimony of a wide-eyed child claiming to have seen reindeer fly cannot overcome the scientific fact that it is impossible for reindeer to fly. In this case, the majority is simply saying: 1) uncontroverted evidence established that it was impossible for the electronic documents to bear the employees' electronic signature without that signature having been executed by the employee; and 2) the employee's denial that they electronically signed the agreement without more does not undermine the ineluctable conclusion that the employees electronically signed the documents because there was no other way the electronic signature could have been added.

Perhaps the employees' counsel should have asserted the employment enrollment process obscured the significance of the arbitration clauses or that the employees did not understand the agreement they electronically signed – an easy suggestion to make with 20-20 hindsight and without being under the gun at trial. But still ….

> **Will Contest - Estoppel:** *Acceptance of benefits to which a beneficiary had no independent right estops the beneficiary from contesting the validity of the will even if the contestant would have received greater benefits by setting the will aside and inheriting by intestate succession.*

In re Dempsey Johnson Estate considered whether the rule that a beneficiary cannot accept the benefits of a will while challenging its validity applies if the beneficiary receives less under the will than she would receive if the will contest were successful. Under an opinion by Justice Bland, a unanimous court ruled that it does. Acceptance of benefits is an affirmative defense to a will contest. Once the proponent establishes that the contestant accepted *any* benefits under the will, the burden shifts to the contestant to adduce evidence the acceptance of benefits was consistent with the position the will was invalid. Generally, this is accomplished by proving a right to the benefit that is independent of the decedent's bequest such as a right on a pay-on-death provision of a joint bank account or a right to the asset as part of the claimant's community property interest.

In reaching this conclusion, the court disapproved of the suggestion in *Holcomb v. Holcomb*, 803 S.W.2d 411, 414 (Tex. App.—Dallas 1991, writ denied), that a contestant's hypothetical receipt of greater benefits via intestate succession meant the contestant did not jeopardize standing by accepting lesser benefits under the will. "[T]he test for … whether a contestant's acceptance of benefits estops her from bringing a will contest 'does not depend upon the value of the benefits,' '[n]or is it … determined by comparing them with what the statutes of descent and distribution would afford the beneficiary in the absence of a will.' Rather, the doctrine asks whether the contestant has an existing legal entitlement to these benefits *other than* under the will." (Footnotes omitted)." "Because [the contestant]" accepted benefits under [the] will, the trial court properly dismissed her challenge to its validity."