IN THE SUPREME COURT OF TEXAS

NO. 16-0851

IN RE NORTH CYPRESS MEDICAL CENTER OPERATING CO., LTD., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

CHIEF JUSTICE HECHT, joined by JUSTICE GREEN and JUSTICE GUZMAN, dissenting.

The Court holds that rates used by governmental programs like Medicare and Medicaid and by private insurers to reimburse a hospital for healthcare provided to covered patients—rates no patient ever pays out of her own pocket—are "reasonably calculated to lead to the discovery of admissible evidence" of what a patient reasonably *should* pay for healthcare.[1] How, exactly? Well, the Court says, there is "at least the potential connection"[2] between government-set and insurer-negotiated reimbursement rates and reasonable charges to a self-pay patient. Of course, the Court explains, "many considerations go into negotiated rates",[3] so "reimbursement rates standing alone are [not] dispositive of the question of what constitutes a reasonable and regular rate for a hospital's services"[4] and "are not necessarily a perfect comparator in evaluating the reasonableness of a

[1] *Ante* at ___ (quoting TEX. R. CIV. P. 192.3(a)).

[2] *Ante* at ___.

[3] *Ante* at ___.

[4] *Ante* at ___.

provider's charges."[5] Agreed. So, then, what is the "potential connection" between reimbursement rates and reasonable charges to self-payers? Here, with dizzying circularity, is the Court's only answer: "It defies logic to conclude that . . . payments [by the government and insurers] have nothing to do with the reasonableness of charges to the small number of patients who pay directly."[6] Actually, it is the Court's analysis that defies logic.

The Court cannot distinguish this case from our decision last Term in *In re National Lloyds Insurance Co.* that one party's attorney fees in a case are generally irrelevant in determining whether an opposing party's attorney fees are reasonable.[7] Nor does the Court address our concern in that case, raised here as well, that any marginal relevance the requested discovery might have in a particular case is outweighed by the real risks of abuse and confusion of the jury.[8]

For these reasons, I respectfully dissent.

I

Seven years ago in *Haygood v. De Escabedo*, the Court observed that "it has become increasingly difficult to determine what [healthcare] expenses are reasonable."[9] While an individual healthcare provider, like any service provider, must take into account its costs, profit margins, and market—including its experience, expertise, and location—in setting its charges, governmental

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[5] *Ante* at ___.

[6] *Ante* at ___.

[7] 532 S.W.3d 794, 812–813 (Tex. 2017) (orig. proceeding).

[8] *Id.* at 813.

[9] 356 S.W.3d 390, 391 (Tex. 2011).

regulation and private insurance have driven charges for healthcare into a now-familiar, two-tiered structure.[10] The higher tier consists of the "full" or "list" prices set out in a detailed "chargemaster" for each service, similar to the "sticker price" of a new car.[11] The lower tier includes the reimbursement rates set by governmental insurers like Medicare and Medicaid or negotiated with private insurers.[12] Governmental insurers provide one- to two-thirds of most American hospitals' income, and their reimbursement rates, usually based on patient diagnoses, may not even cover a procedure's cost.[13] The amount a private insurer is willing to pay to a hospital for a particular service—and the amount that a hospital is willing to accept—reflects a number of factors including the volume of patients that the insurer has previously or potentially could direct to that hospital and the insurer's promise of prompt payment.

Because reimbursement rates are often percentages of or influenced by list prices, providers are incentivized to set list prices as high as possible.[14] List prices are usually multiple times reimbursement rates.[15] Each patient is charged the list price.[16] If the patient is insured, the price is

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[10] *Id.* at 393 & n.13.

[11] *Id.* at 393; Keith T. Peters, *What Have We Here? The Need for Transparent Pricing and Quality Information in Health Care: Creation of an SEC for Health Care*, 10 J. HEALTH CARE L. & POL'Y 363, 366 (2007).

[12] *Haygood*, 356 S.W.3d at 393.

[13] *See* 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, 459 (2013) ("There is a significant body of research suggesting that the reimbursement[] rates paid by government insurers such as Medicare and Medicaid are actually below fully allocated cost for most hospitals."); Peters, *supra* note 11 at 367 ("Medicare's reimbursement rates do not typically cover the actual cost of providing health care to a hospital's patients.").

[14] *Haygood*, 356 S.W.3d at 393.

[15] *See* George A. Nation, III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 104 (2005–2006) (stating that a hospital's list prices "are generally at least double and may be up to eight times what the hospital would accept as payment in full for the same services" from a private or

reduced to the set or negotiated reimbursement rates.[17] If the patient is not insured, a provider may choose to reduce charges based on the patient's means, and in some instances, provide care free of charge for charity.[18] But it is not required to do so.[19] Healthcare providers generally contend, as does North Cypress, that list prices and reimbursement rates are both reasonable charges *under the circumstances*—that is, depending on whether the patient is or is not insured. There is no demonstrated relationship between reimbursement rates and prices regularly charged to uninsured patients.

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

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governmental insurer), *cited in Haygood*, 356 S.W.3d at 393 n.17.

[16] *Haygood*, 356 S.W.3d at 394.

[17] *Id*. n.20.

[18] *Id*. at 393 n.14.

[19] Of course, a healthcare provider is free to charge whatever it chooses for its services, whether reasonable or not, just as any service provider can, and the consumer is free to choose another healthcare provider that charges less. But patients are not usually in a position to investigate and compare different hospitals' charges, and obviously they cannot do so when they present to the emergency room. Amici curiae Christus Health and Texas Health Resources argue that not all charges secured by a lien under the Hospital Lien Act need be reasonable. They point out that a lien can include only reasonable and necessary charges for a physician's emergency hospital care, TEX. PROP. CODE § 55.004(c), and does not cover charges for emergency medical services or other services that exceed a reasonable and regular rate, *id.* § 55.004(d)(1), (g)(1), but otherwise "[a] hospital lien . . . is for the amount of the hospital's charges for services provided", *id.* § 55.004(b). *But see Daughters of Charity Health Servs. v. Linnstaedter*, 226 S.W.3d 409, 411 (Tex. 2007) (stating that "[t]he lien amount cannot be more than 'a reasonable and regular rate'" (quoting § 55.004(d)(1))); *Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 309 (Tex. 1985) (stating 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"). North Cypress does not argue that it can charge Roberts unreasonable prices for the services it provided her. Rather, it argues that its charges to her were reasonable.

insurer's discounted rate belongs to the insurer, not the insured.[20] 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.

Rather, a reasonable charge to Roberts would be what North Cypress, and perhaps other similarly situated hospitals, regularly charge uninsured patients. The record indicates that North Cypress based its charges to Roberts on its list prices, reduced by exactly 25%. Roberts does not argue, and there is nothing to indicate, that North Cypress ever gave a different discount to another patient in Roberts' position or that it discriminated against her in any way. Nor does Roberts argue, or anything suggest, that North Cypress based its charges to Roberts or other self-payers on reimbursement rates. To the contrary, the evidence is undisputed that North Cypress charged Roberts 25% of its list prices. Thus, contrary to the Court's "logic", nothing in North Cypress' reimbursement rates can show that the charges to Roberts were either reasonable or unreasonable. The reimbursement rates are purely irrelevant. Suppose North Cypress' list price for a procedure were $200, Medicare would reimburse $25, and 3 private insurers would reimburse $90, $100, and $110, respectively. Would a $150 charge to all uninsured patients be reasonable or unreasonable? There is simply no way to tell. Roberts has not shown that lower reimbursement rates for insured

[20] *See* 356 S.W.3d at 395 ("An adjustment in the amount of [a provider's full] charges to arrive at the amount owed is a benefit to the insurer, one it obtains from the provider for itself, not for the insured.").

patients can lead to admissible evidence of reasonable charges for uninsured patients. That evidence is of the usual and customary prices regularly charged uninsured patients.

II

We have recently granted mandamus relief from orders requiring discovery of irrelevant information in comparable situations. The Court cannot distinguish those cases.

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.[21] The trial court ordered production.[22] We held that one party's attorney fees are generally irrelevant in determining the reasonableness of an opposing party's attorney fees.[23] 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.[24]

In a similar case identically styled, another homeowner, also suing her insurer for underpaying her property-damage claim, sought discovery of the insurer's claim files for other homes in the same town damaged by the same storm.[25] The homeowner argued that the other claim files could be used to "establish[] a baseline" to compare the adjustment of her claim.[26] "[W]e

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[21] 532 S.W.3d 794, 799–800, 809 (Tex. 2017) (orig. proceeding).

[22] *Id.* at 801.

[23] *Id.* at 812–813.

[24] *See id.* at 810–812.

[25] *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 487–488 (Tex. 2014) (per curiam) (orig. proceeding).

[26] *Id.* at 489.

fail[ed] to see how [the insurer's] overpayment, underpayment, or proper payment of the claims of unrelated third parties [was] probative of" whether the plaintiff's claim had been undervalued.[27] We noted "the many variables" that would affect evaluation of a claim, "such as when the claim was filed, the condition of the property at the time of filing (including the presence of any preexisting damage), and the type and extent of damage inflicted by the covered event."[28] And we characterized the plaintiff's proposed strategy of "[s]couring claim files in hopes of finding similarly situated claimants whose claims were evaluated differently" as "an 'impermissible fishing expedition.'"[29]

Evidence of how other property-damage claims were valued does not generally lead to admissible evidence that another claim was undervalued. Evidence of what one party paid its lawyer to take one position in a case does not generally lead to admissible evidence that the attorney fees an opposing party paid her lawyer to take a different position were reasonable. By the same token, evidence of healthcare reimbursement rates set by the government or negotiated by private insurers does not lead to admissible evidence that prices charged a self-paying patient, without reference to reimbursement rates, were unreasonable.

III

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

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[27] *Id.*

[28] *Id.*

[29] *Id.* (quoting *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (per curiam) (orig. proceeding)); *see, e.g.*, *In re State Farm Lloyds*, 520 S.W.3d 595, 611 (Tex. 2017) (orig. proceeding) ("Reasonable discovery does not countenance a 'fishing expedition.'"); *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding) ("[D]iscovery may not be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing party.").

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.'"[30] The court must limit discovery when its burden outweighs its likely benefit.[31]

North Cypress billed Roberts $11,037.75. The insurer of the man responsible for the auto accident offered to settle Roberts' claim against him for $17,380, of which $9,404 was for past medical expenses. Roberts asked North Cypress to reduce its bill to $3,500, based on her counsel's estimation of "the reasonable and necessary charges . . . for the treatment received based on the geographic area and similarly sized facilities." North Cypress agreed to a 25% reduction, to $8,278.31. Roberts asked for a further reduction to $6,269.33, two-thirds of the amount offered by the tortfeasor's insurer. When North Cypress refused to lower its bill by another $2,000, Roberts sued for actual and punitive damages under statutes governing deceptive trade practices, debt collection, and fraudulent liens.[32] The discovery ordered by the trial court has brought the parties to this Court in a dispute over $2,000–$5,000.

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

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[30] *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 813 (Tex. 2017) (orig. proceeding) (omission in original) (quoting TEX. R. EVID. 403).

[31] TEX. R. CIV. P. 192.4(b); *see also In re State Farm Lloyds*, 520 S.W.3d at 615 ("[P]roportionality is the polestar.").

[32] Roberts has pleaded claims under the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41 *et seq.*, the Texas Debt Collection Act, TEX. FIN. CODE § 392.001 *et seq.*, and the Fraudulent Lien Act, TEX. CIV. PRAC. & REM. CODE § 12.001 *et seq.* She seeks actual and exemplary damages, attorney fees, and declaratory relief. She also claims that North Cypress' lien is invalid because she was never formally admitted for treatment, but this claim does not involve the discovery dispute before us.

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.

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Cost and delay are the prevalent criticisms of the American civil justice system, and the main contributor to both is discovery.[33] "'Discovery is often the most significant cost of litigation' and a potential 'weapon capable of imposing large and unjustifiable costs on one's adversary.'"[34] 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.

I would grant relief.

Nathan L. Hecht
Chief Justice

Opinion delivered: April 27, 2018

[33] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS 2 (2009).

[34] *In re Nat'l Lloyds*, 532 S.W.3d at 813 (quoting *In re Alford Chevrolet-Geo*, 997 S.W.2d at 180).