No. 19-1022

IN THE SUPREME COURT OF TEXAS

In re K & L Auto Crushers, LLC and Thomas Gothard, Jr.,
Relators

Original Proceeding from the 160th judicial District of Dallas County, Texas,
the Honorable Aiesha Redmond, Presiding, Cause No. DC-18-070502,
and the Fifth Court of Appeals, No. 05-19-01061-CV

BRIEF OF *AMICUS CURIAE*, TEXAS ORTHOPAEDIC ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST SAINT CAMILLUS MEDICAL CENTER, ANDREW INDRESANO, MD, AND PINE CREEK MEDICAL CENTER'S BRIEF ON THE MERITS

ANDREA SCHWAB, JD, CPA
LAW OFFICE OF ANDREA I SCHWAB, PLLC
4601 Spicewood Springs Road
Building 1, Suite 200
Austin, Texas 78759
Telephone: 512.229.6010
Facsimile: 512.532.6540
ATTORNEY FOR *AMICUS CURIAE*
TEXAS ORTHOPAEDIC ASSOCIATION

IDENTITY OF PARTIES AND COUNSEL

The parties and their counsel are correctly identified in the parties' briefs. Amicus Curiae, the Texas Orthopaedic Association is represented by the following counsel:

Andrea I. Schwab, JD, CPA
Law Office of Andrea I. Schwab, PLLC
4601 Spicewood Springs Rd.
Building 1, Suite 200
Austin, Texas 78759
andrea@aschwablaw.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

STATUTES:

RULES:

OTHER SOURCES:

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INTEREST OF AMICUS CURIAE TEXAS ORTHOPAEDIC ASSOCIATION

The Texas Orthopaedic Association ("TOA") was founded in 1936 as the united voice of orthopaedic surgeons. Its mission is to ensure outstanding musculoskeletal health for all Texans.

Texas orthopaedic surgeons regularly care for Texans suffering injuries allegedly caused by a wrongdoer. Although medical and billing records are often subpoenaed for the lawsuit between the patient and third party wrongdoer, the evidence sought from non-party providers in this case intrudes into the non-parties'

proprietary and confidential information and trade secrets, as well as billing and other information pertaining to other patients.

Texas physicians should be permitted to practice medicine free from the expense and time required to protect themselves from such invasive discovery, the disclosure of which would compromise their proprietary business information and trade secrets. The time, expense and extreme hardship in producing or defending against the discovery sought is untenable, and could ultimately result in their unwillingness or financial inability to care for patients injured at the hands of tortfeasors. Texas physicians should expect a fair system in which they can focus on the care and treatment of their patients, free from the invasion and burdens of third party lawsuits and economic harm resulting therefrom, and to be free from the presumption of unreasonable billing practices.

In re North Cypress Med. Cr. Operating Co., Ltd., 559 S.W.3d 128 (Tex. 2018) should not be expanded to apply in the context of a personal injury action and with respect to discovery sought from non-party providers. If it were to be so expanded, it would make the process unfair to Texas physicians and could threaten injured patients' access to medical care.

TOA supports Real Parties In Interest Saint Camillus Medical Center, Andrew Indresano, MD, And Pine Creek Medical Center's Brief on the Merits. Accordingly, TOA, which represents Texas orthopaedic surgeons, has an interest in preventing the type of discovery sought against non-party physicians, in protecting

the trade secrets and proprietary and confidential information of physicians, and in preserving injured patients' access to physicians. *Amicus Curiae* TOA therefore respectfully urges the Court to deny Relators' Petition for Writ of Mandamus and for such other and further relief to which Real Parties in Interest may be justly or equitably entitled.

TOA has received no financial or other assistance to prepare this *Amicus Curiae* Brief to this Honorable Court. No fee has or will be paid to TOA to prepare this Brief.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas Orthopaedic Association (TOA) submits this *amicus curiae* brief in support of Real Parties In Interest Saint Camillus Medical Center, Andrew Indresano, MD, And Pine Creek Medical Center's Brief on the Merits, and respectfully shows this Honorable Court as follows:

ARGUMENT

I. Background

Access to healthcare is of vital importance to the state of Texas. This Court should take great pause when the outcome of a case, such as this one, could impact and interfere with the access of care for injured Texans.

This case is brought based on *non-party* medical providers' motions to quash subpoenas for production of documents containing their trade secrets and proprietary and confidential information. Relators sought this cache of confidential information in the personal injury action they are defending, in hopes of lowering the plaintiffs' ultimate medical expenses damage award.

The information sought by Relators in their fishing expedition includes: 10 years of documents referring or relating to agreements with health insurance companies or federal insurance programs regarding charges for any procedures or devices; 10 years of documents regarding billing pursuant to a letter of protection; 10 years of documents relevant to amounts charged to self-pay patients for the services/devices provided to [patient]; lawsuits to recover bills from any patient for 10 years; 10 years of documents that evidence write-offs; documents showing the selling of

accounts receivable for 10 years; documents relating in any way to how they bill for medical services and products that were provided to the patient; documents or communications with manufacturers of various medical products used in the patient's care; documents showing amounts they would have and have charged all insurance companies, federal insurance programs, and all patients for the services provided to the patient; documents revealing how charge master rates are set; and documents having anything to do with agreements with or payments to manufacturers of medical hardware and products used on the patient, as well as tools used in connection with such hardware or products.

Relators argue that the discovery of this information is proper to determine *whether* the non-party providers' charges were reasonable. Indeed, Relators seek a "search warrant" to ransack a non-party physician's office in hopes of finding any evidence of improper or unreasonable billing, without any cause or presumption that would justify such an intrusion.

The outcome of this case centers on the interpretation and application of *In re North Cypress Medical Center Operating Co., Ltd.*, 559 S.W.3d 128 (Tex. 2018), in which the Court held that a trial court did not

abuse its discretion by permitting discovery of the reimbursement rates of insurers and government payors.

North Cypress, however, did not seek discovery of this information from a non-party. Nor did it involve a personal injury action, where the primary evidentiary issue for recovery of medical expense is whether they were "paid or incurred." Rather, *North Cypress* involved a lawsuit between a patient and a hospital regarding the enforceability of a *hospital lien* the hospital filed against an uninsured patient. The *central issue* of the case was the reasonableness of the charges subject to the hospital lien. The Relators seek to extend *North Cypress*' holding to a personal injury action and discovery sought from a non-party.

In a hospital lien case, reasonableness of charges is primarily relevant because the Texas Hospital Lien Statute only permits recovery of reasonable charges.TEX. PROP. CODE § 55.004(d)(1). However, Texas tort law limits the recovery of medical or health care expenses "to the amount actually *paid or incurred* by or on behalf of the claimant."[1] TEX. CIV. PRAC. & REM. CODE § 41.0105. Furthermore, Texas' collateral-source rule bars a

[1] A claim for past medical expenses must be supported by evidence that such expenses were reasonable and necessary. See *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 886 (5th Cir. 2004). A plaintiff must prove reasonableness and necessity by expert testimony or affidavit. *Hong v. Bennett*, 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006, no pet.).

wrongdoer from offsetting his liability by benefits received by the plaintiff from a third party. *Mid-Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999).

Additionally, subjecting non-party physicians to the discovery of their trade secrets and confidential and proprietary information would force the non-party physicians to shoulder the expensive and time-consuming burden of fighting these subpoenas through motions to quash and for protection, over and over again, in what would be an innumerable amount of cases involving injured patients. Furthermore, producing the documents sought would be a highly burdensome and time-consuming process, the expense and burden of which would be borne by the innocent non-party physician, subjecting the physician to violations of physician patient privilege and privacy regulations (documents relating to charges to other patients) and breach of contract (violating agreements with insurance carriers and/or attorneys). Being thrust into this expensive and time consuming process would be untenable for physicians, and could thus result in physicians being unable to treat patients who may have suffered injuries in accidents caused by third-party tortfeasors. When weighed against personal injury attorneys' desire for this information, public policy

protecting injured patients' access to healthcare must prevail for the wellbeing of Texas patients and their physicians.

It should be noted that *amicus curaie* is not weighing herein on a broader price transparency issue, which is for the Legislature to decide. Rather the purpose of this brief is to protect individual physicians' rights to their trade secrets and confidential and proprietary information, and to protect them from the expense and time of defending themselves in third party lawsuits or in collecting and producing voluminous intrusive documents.

The trial court did not abuse its discretion by quashing Defendants' subpoenas, and *amicus curaie* supports Real Parties in interest with this brief.

II. ***North Cypress*** **Does Not Control In This Case**

The Relator is relying on *North Cypress* in seeking discovery of financial information pertaining to non-party physicians. *North Cypress* does not apply in the context of a personal injury action and with respect to discovery sought from non-parties, as here. *North Cypress* does not govern the discovery issue before the Court and the information sought is not relevant to the primary issues of the underlying case.

North Cypress involved a declaratory judgment action against the hospital directly based on a hospital lien, alleging that the hospital's charges exceeded the reasonable and regular rate for services rendered. *North Cypress,* 559 S.W.3d at 129-30. The hospital had placed a lien on the patient for outstanding charges, and the patient sought to have that lien invalidated. The discovery propounded against the hospital went to the heart of the action against the hospital—to prove the plaintiff's allegations that the lien was invalid due to unreasonable charges, because the Hospital Lien Act requires charges to be reasonable to be recoverable. TEX. PROP. CODE § 55.004(d)(1).

In this case, however, the defendants sought discovery from non-party treating physicians, against whom no cause of action has been filed for unreasonable charges. Indeed, permitting this type of discovery suggests a *presumption* of unreasonable billing on behalf of the nonparty physician—if there is no presumption, then clearly it is an impermissible fishing expedition to find evidence of unreasonableness.

Permitting discovery against innocent non-party providers would send a chill through the healthcare community, exposing confidential and

proprietary information and potentially limiting access to healthcare for patients who have suffered injuries from an accident or alleged negligence.

North Cypress noted that the "'subject matter' of the underling action, which involves the enforceability of a hospital lien securing payment of charges for services rendered to an uninsured patient, encompasses the reasonableness of those charges." *North Cypress,* 559 W.3d at 129. Furthermore, "Because the subject matter of this action involves a dispute over a hospital lien" the Court evaluated the relevance of the requested information from this perspective. The Court wrote, "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."

Because the primary issue in enforcing a hospital lien is the reasonableness of those charges, the Court analyzed hospital trends in reimbursement payments. *Id*. at 132-133, and virtually all of the Court's case analyses regarding reasonableness of charges in *North Cypress* involved hospital charges, hospital trends, and the Texas Hospital-Lien Statute. *Id*., citing *Bowden v. Medical Center*, 773 SE2d 692 (Ga. 2015), *Parkview Hospital, Inc. v. Frost*, 52 N.E.3d 804, 805-06, 810 (Ind. Ct. Ap.

2016), *Children's Hospital Central California, v. Blue Cross of California*, 172 Cal. Rptr. 3d 861 (Cal.App. 2014), and *Colomar v. Mercy* Hospital, 461 F. Supp. 2d 1265 (S.D. Fla 2006).

Bowden, like *North Cypress*, involved a patient who brought a lawsuit to challenge a hospital lien it claimed was based on unreasonable charges. *Bowden v. Medical Center*, 297 Ga. 285, 773 SE2d 692 (2015). Likewise, *Parkview Hospital, Inc. v. Frost* involved the determination of reasonable charges under the Indiana Hospital Lien Act. *Parkview Hospital, Inc. v. Frost*, 52 N.E.3d 804, 805-06, 810 (Ind. Ct. Ap. 2016). *Children's Hospital Central California, v. Blue Cross of California*, also involved a direct lawsuit between an insurer and hospital, involving the payment of hospital charges. Finally *Colomar v. Mercy* Hospital, 461 F. Supp. 2d 1265 (S.D. Fla 2006) was a lawsuit brought by a patient against the hospital for breach of contract and violation of Florida's Deceptive and Unfair Trade Practices Act, as a putative class action complaint challenging the reasonableness of a hospital's charges to uninsured patients.

All of these cases analyzed and relied upon by the Court involved causes of action in which 1) the hospital was a party and 2) in which the charges by the hospital were the primary basis of the lawsuit. The Court

clearly rendered an opinion about the discoverability of documents that went to the heart of the allegations in the lawsuit against a hospital which was a party in the lawsuit. This case is clearly distinguishable in that the Relator here is seeking discovery of information ancillary to the case and against a non-party against whom no claim for unreasonableness of charges has been made.

A. Reasonableness v. Paid or Incurred

The Texas Hospital Lien statute contains language that a hospital is to recover the full amount of its lien, subject only to the right to question "the reasonableness of the charges comprising the lien." *North Cypress*, 559 S.W.3d at 131 (quoting *Sahara 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"). Section 55.004(d)(1) of the Texas Property Code provides, "A hospital lien described by Section 55.002(a) does not cover charges for other services that exceed a reasonable and regular rate for the services." TEX. PROP. CODE § 55.004(d)(1). Based on the language of the Texas' hospital-lien statue, the Court determined that the "central issue in a case challenging

such a lien is what a reasonable and regular rate would be." *North Cypress*, 559 S.W.3d at 133.

On the other hand, Texas defendants found liable in personal injury lawsuits owe past medical damages that are *paid or incurred* by the patient. TEX. CIV. PRAC. & REM. CODE § 41.0105. Section 41.0105 of the Texas Civil Practice and Remedies Code provides: "*EVIDENCE RELATING TO AMOUNT OF ECONOMIC DAMAGES. In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant*." *Id*. Section 41.0105 of the Texas Civil Practice and Remedies Code, enacted in 2003 as part of a wide-ranging package of tort-reform measures, provides that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." *Haygood v. De Escabedo,* 356 SW3d 390 (Tex. 2011). This statute limits recovery, *and consequently the evidence at trial*, to expenses that the provider has a legal right to be paid. *Id*. at 391. Thus, the amount actually paid or incurred by or on behalf of a plaintiff patient should be the primary evidence that is relevant to Plaintiff's claimed damages for medical expenses.

Additionally, Texas's collateral-source rule bars wrongdoers from offsetting their liability by benefits received by the plaintiff from a third party. *Mid Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999). In the context of a personal injury action that the reduced prices that an uninsured plaintiff "may have received had he participated in health benefits or insurance programs for which he may have been eligible are irrelevant." *Guzman v. Jones*, 804 F.ed 707, 712-13 (5th Cir. 2015).

Charges from a treating physician that are paid, or charges that are deferred but incurred (pursuant to, for example, a letter of protection) are recoverable. Regardless of if or how the patient obtains money to pay for these fees, they are owed to the physician, for medical services rendered to the patient.

The dispositive legal question in *North Cypress*, pursuant to the Texas Hospital Lien Act, was whether the hospital could enforce a lien against the plaintiff patient for services provided. Essential to that inquiry was a statutorily mandated evaluation of the reasonableness of the amount of the hospital chose to bill the uninsured patient. The hospital in that case had the burden of proving the reasonableness of the lien at issue. Conversely, in a personal injury action, the dispositive issue is whether the

tortfeasor was negligent. Tangential to that case, and only after liability is established, is the recovery of medical damages.

The bill received by an uninsured patient is the primary evidence of the amount of past medical damages "because [the patient] received the medical care, was billed for it, has provided no payments to cover it, and could be subject to suit for non payment of the full amount billed." *Guzman v. Jones*, 804 F. 3d 707, 711 (5th Cir. 2015);. "The amount a patient might have owed under different circumstances has no bearing on what [the patient] actually owes now." *Lackey v. Dement*, 2019 WL 3238896 (W.D. Texas 2019). What a Plaintiff's physician charges insured patients or other patients for the procedures has no bearing on what Plaintiff owes to his or her physician. Any marginal relevance the requested discovery might have in a particular case is outweighed by the real risks of abuse and undue burden on non-parties.

B. Even If Reasonableness Were Relevant, Charges To Other Patients Does Not Determine Reasonableness

Relators seek information from the non-party movants about rates they have charged other patients. "List prices and reimbursement rates are

both reasonable charges under the circumstances." *North Cypress*, 559 S.W.3d at 139 (J. Hecht, dissenting). Depending on whether the patient is insured or uninsured, the physician may see a delay in receiving reimbursement. A physician may accept a lower reimbursement rate in exchange for the reassurance of receiving payment promptly from an insurance company. On the other hand, a physician may be unwilling to receive a reduction of his or her rates when the patient is uninsured, and the physician assumes the risk of a delay in payment or possibly suffer no payment at all. Although not required to do so, a provider may choose to reduce charges based on the patient's ability to pay and in some instances provide care free of charge for charity. All of these scenarios depend on the circumstances. As the Court explained in *Haygood v. De Escobedo*, *the benefit of an insurer's discounted rate belongs to the insurer, not the insured, and certainly not to the uninsured patient*. *Haygood v. De Escobedo*, 356 S.W.3d at 395; *North Cypress*, 559 S.W.3d at 139 (J. Hecht, dissenting).

There is no formula established by the Legislature or a court to determine reasonableness of charges based on the circumstances of a physician's particular practice, patient mix, negotiated rates, etc. Therefore

the discovery of this information is not relevant to the issue of the charges paid or incurred by a patient with respect to services a physician provided to his or her patient.

In a case such as this, there has been no finding or allegation of unreasonableness in charges, nor any implication that the patients were treated disparately from other similarly situation patients, to justify the discovery of information used to support such allegation. This is the definition of a an impermissible fishing expedition—the search for something, anything, to create an allegation of impropriety. This Court has emphasized that discovery may not be used as a "fishing expedition". See *American Optical Corp.,* 988 S.W.2d 711, 713 (Tex. 1998). Requests must be reasonably tailored to include only matters relevant to the case. See *American Optical*, 988 S.W.2d 711, at 713.

As Justice Hecht also points out in his dissenting opinion, 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 care a different client to advance the opposing position. *North Cypress*, 559 S.W.3d at 140 (J. Hecht, dissenting opinion). citing *In re National Lloyds Insurance Co.*, 532 S.W.3d 794, 799-800, 809

(Tex. 2017) (orig. proceeding). Taken further, in a breach of contract case, for example, where attorneys' fees are awarded, would it be reasonable to obtain all contracts an attorney has with all clients to determine whether those fees are reasonable?

In *National Lloyds,* the Court referred to a case in which a homeowner sues for property damage claims, writing, "[W]e fail[ed] to see how [the insurer's] overpayment, underpayment, or property payment of the claims of unrelated third parties [was] probative of" whether the plaintiff's claim had been undervalued; the Court noted "the many variables" that wold 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" 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 'impermissilbe fishing expedition.'" *Id*.

Indeed, the medical care of humans contains more variables than adjusting property damage—how one patient its treated based on their comorbidities, particular damages, care needed, and strategy for particular

care is irrelevant in the treatment provided to other patients who all have unique circumstances.

Justice Hecht summarized this perfectly:

> 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.

North Cypress, 559 SW.3d at 141 (J. Hecht, dissenting opinion).

C. Even If Reasonableness is Relevant, This Can Be Shown By Less Intrusive Means

Even when financial records are relevant to issues in a case and requested from a party, privacy concerns require a trial court to explore other methods of obtaining the information. *See Maresca v. Marks,* 362

S.W.2d 299, 301 (Tex.1962); *El Centro del Barrio, Inc. v. Barlow,* 894 S.W. 2d 775, 779–80 (Tex.App.—San Antonio 1994, orig. proceeding). Here, the information sought by Relators, including contracted reimbursement rates, are not the only source of information about rates for procedures that relators could use to challenge there reasonableness of medical expenses. For example, the Texas Department of Insurance publicly posts the average actual and billed prices for various procedures. (See Texas Healthcare Costs, available at www.texashealthcarecosts.org.) Furthermore, the Medicare and Medicaid reimbursement rates are publicly available. Finally, Parties in litigation have the opportunity to obtain such information through expert testimony regarding alleged unreasonableness of such charges.

Rule 192.4 limits the scope of permissible discovery to exclude information that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." TEX. R. CIV. P. 192.4(a). Discovery should also be limited if its burden or expense "outweighs its likely benefit taking into account the needs of the case, the amount in controversy, the parties' resources, the

importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." TEX. R. CIV. P. 192.4(b).

The burden and expense to non-parties is disproportionate to the needs of the case, and could be avoided by obtaining this information or testimony through less invasive means.

III. Expanding *North Cypress* to Non-Parties Would Have Unintended Consequences

A. Access to Care Could be Compromised

Subjecting non-party physicians to these discovery requests would impose upon them undue burden and expense. The time and expense of defending, or even complying with, innumerable requests would be unconscionable and would threaten access to medical care, because the costs to the practice would be unsustainable. Permitting discovery of non-party providers would create a cascade of unintended consequences.

If *North Cypress* were extended to situations such as this case, physicians would be asked disclose confidential, privileged and proprietary information, contracts and pricing. Not only does this information contain trade secrets and other confidential information which is not public, it could potentially cause physicians to violate contractual confidentiality provisions

with payors and others. Most contracts with insurance carriers contain confidentiality provisions, prohibiting the disclosure of the contents of the agreement. Letters of protection with attorneys are also often confidential. Information regarding charges to other patients and collections history could violate the physician patient privilege.

Physicians would be required to pay attorneys' fees and utilize office staff resources to respond to these requests, and to file motions to quash and motions for protection in the subject lawsuit. If a non-party physician does not have the ability, resources or time to defend these requests, appear at deposition, etc., then that physician will suffer the potential consequences of disclosing proprietary and confidential information and trade secrets, violating privileges, and breaching agreements with third parties.

Additionally, if a physician does not challenge the requests and appear in the trial, he or she could be subjected to a finding that his or her medical charges are not reasonable. This finding would follow the physician indefinitely. Asked in a subsequent action if his or her charges were ever found to be unreasonable, he or she would have to answer in the affirmative. This would harm the physician's future contract negotiations.

Indeed, this scenario would not be limited to one case. Physicians, such as orthopaedic surgeons who regularly see patients who have suffered accidents at the hands of tortfeasors (motor vehicle accidents, work injury accidents, etc.), would potentially have hundreds or thousands of these requests. The cost of defending allegations of unreasonable billing in cases, in which they provided healthcare services and in which they are not a party, would become unsustainable. The potential outcome could unfortunately become their inability to continue care for patients that sustained an injury due to alleged fault of others. Patients could therefore have difficulty in finding healthcare providers to care for them.

B. Trade Secrets Would Be Exposed

Reimbursement rates are trade secrets and should not be disclosed. *Perez v. Boecken*, 2019 WL 5080392 (W.D. Texas 2019). The Texas Uniform Trade Secrets Act ("TUTSA") requires that courts preserve the secrecy of an alleged trade secret by reasonable means. TEX. CIV. PRAC. & REM. CODE § 134A.006 ("In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means. There is a presumption in favor of granting protective orders to preserve

the secrecy of trade secrets."). The Texas Uniform Trade Secret Act ("TUTSA") defines a trade secret as:

> Information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:
>
> (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

TEX. CIV. PRAC. & REM. CODE § 134A.002(6).

Courts in Texas consider six factors—established by the Texas Supreme Court in *In re Bass* in accordance with the Restatement of Torts—in determining whether a trade secret exists: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of

effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003). A "party claiming a trade secret is not required to satisfy all six factors but instead courts must weigh all six factors, as well as any other relevant factor, in the context of the surrounding circumstances to determine whether the information at issue constitutes a trade secret."[2] *Id*.

Physician insurance contracts, provider agreements, and reimbursement and contractual rates are highly proprietary and confidential and protected from public disclosure by the express terms of the contracts. Physicians are not permitted to disregard these contractual obligations. Negotiated rates, billing and collection practices, and the pricing policies and processes of physicians are so valuable to them that they often implement within their practices rules and policies specifically designed to safeguard such information and limit its disclosure. There is economic value in such confidential and proprietary information that its disclosure

[2]Although the *Bass* decision pre-dates the enactment of TUTSA, the Texas Supreme Court's trade secret analysis in In re Bass "is not inconsistent with the TUTSA definition, and there is nothing else in TUTSA that is in tension with the applicable reasoning of Bass." *Lackey v. Dement*, 2019 WL 3238896 (W.D. Tex. July 18, 2019).

would cause economic harm to the physicians in regards to contractual negotiations.

C. Confidentiality Does Not Protect Disclosure

"Even when financial records are relevant ... privacy concerns require a trial court to explore other methods of obtaining the information." *In re Doctors' Hosp.*, 2 S.W.3d 504, 506 n.1 (Tex. App.–San Antonio 1999, orig. proceeding). Materiality requires a finding that the same information cannot be obtained from an alternate source, and that should hold true in this case. *In re Sullivan*, 214 S.W.3d 622, 624–25 (Tex. App.–Austin 2006, orig. proceeding). The party seeking the production must show why the discovery it has conducted and other potential follow-up discovery cannot reveal the requested information. *Sullivan*, 214 S.W.3d at 625.

Even if there was a confidentiality order that prevented the dissemination of protected information to the public, such an order does not alone justify disclosure. *See e.g., Ex parte Lowe,* 887 S.W.2d 1, 4 (1994). This is especially true here because the non-party providers are subject to possible civil liability if they release confidential information about contracts or patients. Additionally, a confidentiality order does not overcome a claim

of privilege (such as the potential violation of the physician patient relationship in the disclosure of a letter of protection). *In re Xeller*, 6 S.W.3d 618, 625–26 (Tex. App.—Houston [14th Dist.], orig. proceeding). For example, in the context of information protected by the attorney-client privilege, that redaction of the privileged portion of the information will not then render the remainder of the document discoverable. *See, e.g., In re Bloomfield Mfg. Co.,* 977 S.W.2d 389, 392 (Tex.App.—San Antonio 1998, orig. proceeding); *Pittsburgh Corning Corp. v. Caldwell,* 861 S.W.2d 423, 425 (Tex.App.—Houston [14th Dist.] 1993, orig. proceeding).

Finally, entering into a protective order does not erase the burden that was only tangentially related to a case. See *Lackey v. Dement*, 2019 WL 3238896 (W.D. Tex. July 18, 2019). In *Lackey*, the court wrote:

> The discovery sought here is form a non-party medical provider—ADHE—for the purpose of challenging the uninsured Plaintiff's claimed damages in the form of past medial expenses and potentially reducing the liability of Defendants. In this context, the Court is not convinced that the requested discovery is proportional to the needs of this case. It places a burden on the third party to provide information hat only tangentially relates to an issue in the case.

Id. at *4-*5. Any marginal relevance of Relators' requested discovery does not justify subjecting non-party physicians to the burden and expense of disclosure, even under protection, of trade secrets and confidential and proprietary information. This intrusion into a non-party physician's private information, and risk of dissemination publicly, is unconscionable and unwarranted for a tortfeasor's defense in a third party lawsuit.

Prayer

For the reasons stated herein, *Amicus Curiae* Texas Orthopaedic Association urges this Honorable Court to deny Relators' Petition for Writ of Mandamus.

Respectfully submitted,

/s/ *Andrea I. Schwab*
Andrea I. Schwab, JD, CPA
State Bar No. 00792823
Law Office of Andrea I. Schwab, PLLC
4601 Spicewood Springs Rd.
Building 1, Suite 200
Austin, Texas 78759
Tel: 512.229.6010
Fax: 512.532.6540
andrea@aschwablaw.com

Counsel for Amicus Curiae,
Texas Orthopaedic Association

Certificate of Compliance

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Date December 22, 2020

/s/ *Andrea I Schwab*
Andrea I. Schwab, JD, CPA

Certificate of Service

I certify that on the 22nd day of December, 2020, a true and correct copy of the foregoing document was sent to the following:

Wade C. Crosnoe
State Bar No. 00783903
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500
Austin, Texas 78701
email: wcrosnoe@thompsoncoe.com

William H. Shamble
Weston L. Hall
Chamblee Ryan, PC
2777 Stemmons Freeway, Suite 1157
Dallas, Texas 75207
email: wchamblee@cr.law
email: whall@cr.law

Counsel for Relators K&L Auto Crushers, LLC and Thomas Gothard, Jr.

The Honorable Aiesha Redmond
160th Judicial District Court
George Allen Sr. Courts Building
600 Commerce Street, 6th Floor
Dallas, Texas 75201

Respondent

Rosalyn R. Tippett
Tippett Law Office
2450 Lakeside Parkway
Suite 150 (personal box 116)
Flower Mound, Texas 75022
rtippett@tippettlawoffice.com

J. Martin Futrell
Amy K. Witherite
Eberstein & Witherite, LLP
10440 N. Central Expy.
Suite 400
Dallas, Texas 75231-2228
Martin.futrell@ewlawyers.com
Amy.witherite@ewlawyers.com

Counsel for Real Parties in Interest Kevin Walker & Latunija Johnson

Morgan A. McPheeters
McPheeters Law, PLLC
4447 N. Central Expy.
Suite 101, Box #158
Dallas, Texas 75205
morgan@mcpheeterslaw.com

Counsel for Real Parties in Interest Saint Camillus Medical Center, Andrew Indresano, MD, and Pine Creek Medical Center

/s/ *Andrea I Schwab*
Andrea I. Schwab, JD, CPA