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SUPREME COURT OF TEXAS
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NO. 22-1046

IN THE SUPREME COURT OF TEXAS

RICHARD J. MALOUF, D.D.S.,
Petitioner

v.

THE STATE OF TEXAS ex rels. CHRISTINE ELLIS, D.D.S and MADELAYNE CASTILLO,
Respondents

On Petition for Review from the Eighth Court of Appeals, El Paso, Texas
Cause No. 08-20-00235-CV

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I. Genuine Issues of Material Fact Regarding Malouf's Knowledge Should Have Precluded Final Summary Judgment for the State Under the Texas Medicaid Fraud Prevention Act

The summary judgment record before the district court contained competent evidence to cast doubt that Malouf had actual knowledge, conscious indifference, or reckless disregard for any of 1,842 reimbursement claims submitted by his dental practice which erroneously identified him as the actual treating provider. This evidence was sufficient to create a genuine issue of fact for the scienter element of the State's claim under Section 36.002(8) of the Texas Medicaid Fraud Prevention Act (TMFPA) and should have precluded the multi-million-dollar summary judgment award of fees, penalties, attorney's fees and costs against Malouf.

A. Malouf's Controverting Evidence Was Not "Conclusory"

The State frequently characterizes evidence inhospitable to its case as "conclusory" in an attempt to conceal genuine issues of material fact. In so doing, the State urges the Court to simply disregard competent evidence controverting Malouf's liability under Section 36.002(8).

Such controverting evidence included Malouf's own deposition testimony, as elicited by the State. As to the 1,842 reimbursement claims alleged to have an incorrect provider identification number, Malouf testified that he was generally unaware of the inaccurate claims at the time they were submitted. (CR Vol. 3 at

4042, 67:14-20). Claim forms were processed by office staff at local and corporate levels. (CR 4065-66, 160:18-164:25).

Malouf qualified his general lack of awareness of the erroneous claim information, noting two scenarios when the claims bearing inaccurate identification numbers were submitted with Malouf's knowledge: instances when Malouf supervised the actual treating dentist performing service, and instances when Malouf's number was used as a workaround solution to a Medicaid computer glitch. In either type of instance, Malouf testified, Medicaid administration had instructed Malouf's office that use of his identification number in lieu of the actual treating dentist would be permissible.[1] (CR Vol. 3 at 4042, 67:21-68:8; 4043, 69:5-11; 71:14-20; 4044, 75:16-76:14; 4080, 218:19-221:2). Crucially, Malouf elaborated in his deposition testimony that there was no reason for his office staff to incorrectly use his identification number on claim forms otherwise because each of the dentists in his practice held Medicaid credentials. (CR Vol. 3 at 4043, 70:20-71:4, 71:22-25).

The sum of this testimony controverts the State's contention that Malouf either had actual knowledge, conscious indifference, or reckless disregard of his

[1] Malouf was not the only source of evidence on this point. All Smiles employee Becky Espinoza testified she received instruction from the Medicaid program that Malouf's TPI number could be used in a claim if he was physically present and supervising the treating dentist. (CR Vol. 3 at 4157, 248:19-250:21).

office incorrectly using his identification number on claim forms for treatment by other dentists. It bears emphasis that, in general, Malouf denied knowing his office staff incorrectly used his identification number on claim forms. It was only in the context of supervising other dentists or managing a computer glitch that Malouf admitted to ever having any actual knowledge. In those instances, his testimony that he acted in accordance with Medicaid administration's knowledge and instruction negates conscious indifference or reckless disregard toward the information in the claim forms.

Malouf's testimony that staff-wide credentialing eliminated any reason to use his identification number on claims performed by another dentist further controverts conscious indifference and reckless disregard because it shows he did not perceive a risk of his dental practice submitting recurring incorrect claim forms as a "highly probable" outcome. *Wal-Mart Stores v. Alexander*, 868 S.W.2d 322, 325 (Tex.1993); *Moncada v. Brown*, 202 S.W.3d 794, 802 (Tex.App. – San Antonio 2006, no pet.). Moreover, this evidence shows Malouf lacked any incentive to have his office submit claim forms with the wrong provider number. The State barely even acknowledges this controverting evidence and essentially ignores that it gives rise to a genuine issue of material fact. *State's Brief on the Merits*, p. 44.

Affidavits consisting only of conclusions are insufficient to raise an issue of fact in a summary judgment proceeding. *Brownlee v. Brownlee*, 665 S.W.2d 111,

112 (Tex.1984). Nothing about Malouf's nuanced deposition testimony, however, was "conclusory." Malouf attested to a general fact (he lacked awareness of incorrect information being submitted on claim forms), then identified two exceptions to the general fact (supervising and computer glitch workaround). Malouf even offered some explanation underlying the general fact (staff-wide credentials obviated need for use of wrong identification number).

Malouf's general denial of awareness was a factual statement about his own lack of knowledge rather than a mere legal conclusion. Notwithstanding the State's speciously liberal deployment of the "conclusory" epithet, Malouf's lack of awareness is itself an elemental fact and should not require further elaboration on underlying factual premises. "I do not know what time it is" is not a conclusory statement, even if the declarant fails to elaborate on not owning a watch, looking at a clock, or checking the position of the sun in the sky. Likewise, Malouf's statement that he did not generally know his identification number was being used on claim forms is self-explanatory and requires no exposition of subsidiary facts. This does not make the statement impermissibly "conclusory" in the summary judgment context.

The State cites multiple cases in which conclusory statements are disregarded as summary judgment evidence. None of them bear valid comparison to the context or nature of Malouf's factual and nuanced testimony about his own awareness or

knowledge. *States' Brief on the Merits*, p. 30-33; *See, e.g., Purcell v. Bellinger*, 940 S.W.2d 599, 602 (Tex.1997) (per curiam) (statement that child's interest was "not necessarily identical" to parent's in prior suit was conclusory); *Eberstein v. Hunter*, 260 S.W.3d 626, 630 (Tex.App. – Dallas 2008, no pet.) (defendant's assertion of novation agreement held conclusory) (attorney affidavit opining on reasonableness of fees held conclusory); *McIntyre v. Ramirez*, 109 S.W.3d 741, 749-50 (Tex.2003) (expert witness' unsupported legal conclusion did not defeat summary judgment); *Brownlee*, 665 S.W.2d at 112 (Tex.1984) (affidavit assertion that contractual obligation was modified held insufficient to raise fact issue); *Life Ins. Co. of Va. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 382 (Tex.1978) (affidavit asserting unspecified offsets and credits did not create genuine issue of material fact); *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex.1996) (per curiam) (expert affidavit's conclusory opinion did not raise fact issue on willful misconduct); *Cornyn v. Speiser, Krause, Madole, Mendelsohn & Jackson*, 966 S.W.2d 645, 651 (Tex.App. – San Antonio 1998, pet. denied) (inconsistent plaintiff statements failed to raise fact issue under ADA or TCHRA). The State has failed in its effort to discredit Malouf's testimony by labeling it "conclusory."

B. Malouf's Testimony Regarding Information Known to Him and Risk Perceptible to Him is Probative Evidence Creating a Genuine Fact Issue for Trial

The State also attempts to discredit opposing evidence as "self-serving" and "not readily controverted." *State's Brief on the Merits*, pp. 31-34. Rule 166a only permits testimonial evidence from an interested witness *in support of* summary judgment if, among other things, the testimony could have been readily controverted. TEX. R. CIV. P. 166a(c). As noted in Petitioner's Brief on the Merits, however, this restriction only limits a summary judgment movant's use of testimonial evidence from an interested party. The rule is silent as to whether a nonmovant may rely upon an interested witness' testimony to create a genuine fact issue for trial even if it is not readily controvertible. Indeed, Rule 166a dictates that courts afford deference to summary judgment nonmovants by taking true all evidence favorable to the nonmovant, indulging every reasonable inference in the nonmovant's favor, and resolving any doubts in the nonmovant's favor. *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671, 680 (Tex.2017). Given these precepts, it would seem logical that a nonmovant may avail itself of probative evidence even of a quality that might not independently support a summary judgment in the nonmovant's favor.

The nonmovant's right to a trial is at stake in a summary judgment proceeding. Rule 166a's restrictions on interested party testimony operate as a safeguard to

ensure a nonmovant is not unduly deprived of an opportunity to present evidence at trial. It makes no sense to interpret Rule 166a in such a way that would prohibit a nonmovant from presenting testimonial evidence in a summary judgment proceeding if, given the opportunity, the nonmovant could present that same testimonial evidence at a trial. Here, Malouf proffered his own testimony as a nonmovant in direct contradiction to an element of the State's claim. Malouf proffered testimony about his own lack of knowledge and awareness as a shield; not as a sword. Because his testimony was relevant and would not deprive any party of a trial, if considered, the lower courts should not have disregarded the testimony as "not readily controverted."

The State offers no answer to this analysis of Rule 166a(c). Rather, the State posits it is better to resolve a case's merits on summary judgment, through strictly indirect circumstantial evidence, than at trial where all forms of evidence, direct and otherwise, may be introduced and considered by the factfinder. *See State's Brief on the Merits*, pp. 35-36.

Here lurks a core contradiction in the State's position: If the "mental workings of an individual's mind" cannot be readily controverted, how then can they be conclusively proven? The State would have the Court infer Malouf's intent in 1,842 instances – as a matter of law – from circumstantial and anecdotal evidence, while

simultaneously tying Malouf's hands by disallowing his direct controverting testimony.

Texas courts have long acknowledged that issues of intent and knowledge are not susceptible to being readily controverted and are therefore inappropriate for summary judgment. *RRR Farms, Ltd. v. American Horse Protection Ass'n, Inc*., 957 S.W.2d 121, 132 (Tex.App. – Houston [14th Dist.] pet. denied); *Taylor v. Bonilla*, 801 S.W.2d 553, 557 (Tex.App. – Austin 1990, writ denied); *Allied Chemical Corp. v. DeHaven*, 752 S.W.2d 155, 158 (Tex.App. – Houston [1st Dist.] 1988, writ denied); *Futerfas v. Park Towers*, 707 S.W.2d 149, 157 (Tex.App. – Dallas 1986, writ ref'd n.r.e.); *Bankers Commercial Life Ins. Co. v. Scott,* 631 S.W.2d 228, 231 (Tex.App. – Tyler 1982, writ ref'd n.r.e.).

The lower court erred by misapplying the "not readily controverted" rule to bar nonmovant testimony while also failing to acknowledge that when "not readily controverted" testimony is necessarily at the center of the case, summary judgment is not appropriate in the first place. The lower courts should have either denied or reversed the State's motion for summary judgment, based on the above line of authority, or otherwise accepted Malouf's testimony proffered in his own defense on the issue of his own knowledge.

The misapplication of Rule 166a(c) by one or both lower courts deprived Malouf of a fair opportunity to present a defense on the scienter element of the

State's claim. This deprivation and the aberrant final judgment in this case warrants correction and presents the Court with an opportunity to clarify the application of Rule 166a(c) to nonmovant testimony on elemental issues of knowledge and intent in summary judgment proceedings.

C. The State Failed to Conclusively Prove Malouf Had Actual Knowledge or Acted with Conscious Indifference or Reckless Disregard for 1,842 Claims

A number of recurring weaknesses exist in the State's argument for affirming summary judgment. In lieu of a granular analysis, the following is a summary of highlighted issues which are either salient in the State's argument or otherwise warrant a specific response.

1. Undue Elevation of the Medicaid Manual

The State often refers to the Medicaid manual's prohibition against using another provider's identification number in a claim form as evidence that Malouf knew this was a prohibited practice. *See, e.g., State's Brief on the Merits*, pp. 22, 27. The State invites one to conclude that a violation of the Medicaid manual is a violation of Section 36.002(8). This is not the case. While perhaps a source of regulatory authority, courts must look to the statute itself and its plain language to determine whether a violation occurred. As noted in Petitioner's Brief on the Merits, regardless of what the Manual may prohibit, the mere submission of a claim form

inaccurately identifying the treating provider does not violate Section 36.002(8) unless the license type is also inaccurately indicated.

In any event, Malouf's knowledge of the manual does not evince his knowledge that inaccurate claim forms were being submitted by his office staff. Indeed, Malouf testified that he was generally unaware of such submissions except in the two sets of circumstances described above. The Manual's prohibition could therefore only have relevance in the exceptional instances when Malouf was aware inaccurate forms were submitted but believed that practice was sanctioned and directed by Medicaid administration. Even then, Malouf's testimony demonstrates that while the Manual may say one thing, the administration may communicate something different through other channels. Accordingly, the State has overemphasized the probative value of the Medicaid manual.

2. Trial Arguments Disguised as Summary Judgment Arguments

The State's motion for summary judgment repeatedly urged the district court to make credibility judgments and simply disbelieve evidence controverting its position, attacking the evidence as "vague", lacking "credible details which might be used to corroborate his account," and "particularly striking" in absence of detail," (CR Vol. 3 at 2899, 2901). The phrases "no credible details," "simply not credible," and "strains credibility" each appear in the State's motion for summary judgment, all referring to Malouf's testimony. (CR Vol. 3 at 2901, 2902, 2909).

The State continues to argue the credibility and weight of evidence. For example, the State critiques bolstering testimony from one of Malouf's employees as "opaque", complaining it could have been more specific. *State's Brief on the Merits*, p. 21. The State also challenged Malouf's sworn testimony about Medicaid's computer glitch workaround instruction because it was not corroborated by other evidence. *State's Brief on the Merits*, p. 39. These are not valid grounds on which to exclude summary judgment evidence, even if they may be appropriate arguments for a jury trial. Throughout its brief, the State cites apparent conflicts in the evidence, but draws the conclusion that Malouf's side of the evidence must simply be disbelieved so the State may have its summary judgment. *Se, e.g., State's Brief on the Merits*, p. 43 (characterizing expert affidavits in conflict with Malouf testimony as "unrebutted"). To the contrary, the State has only demonstrated that genuine issues of fact abound in this case and merit a full trial where the parties may present their case to a finder of fact for resolution.

3. Conflation of "Malouf and His Fiscal Agents"

The State attempts to conflate the submission of claims by office staff with Malouf's own knowledge of what was submitted to Medicaid. *See, e.g., State's Brief on the Merits,* p. 22. This is misleading because the State bears the burden of proving Malouf's knowledge and no other person's knowledge. The State contends that Malouf must have known of each inaccurate claim because each bore his signature.

Id. This, by itself, however, does not conclusively prove Malouf's knowledge in the face of Malouf's sworn testimony that he was generally aware inaccurate claims had been submitted. Moreover, the State offers record citations for the proposition that Malouf knew inaccurate claims were being submitted while he was out of the country which do not support the proposition. Rather, they merely establish that Malouf was out of the country while inaccurate claims were submitted. None of the State's record citations evince Malouf's knowledge about claims submitted while he was away. *Id.* The fact that claim forms bore Malouf's signature while he was physically absent supports the opposite conclusion, that Malouf did not know forms were being submitted, in his absence, bearing his purported signature. Finally, the State's argument that Malouf bore ultimate regulatory responsibility for the claims pursuant to the Medicaid manual does not establish his knowledge under Section 36.002(8) that inaccurate claims were submitted bearing his name.

4. The "Failure to Refund" Red Herring

As noted in Petitioner's Brief on the Merits, it is undisputed that the claim forms at issue, while inaccurately identifying Malouf as the treating provider, accurately reflected services actually performed at Malouf's dental practice by a license and credentialed dentist. It is therefore misleading for the State to suggest that Malouf owed any obligation to refund payments on those claims as overpayments, duplicate payments, or erroneous payments. *State's Brief on the*

Merits, p. 28. Moreover, the State did not accurately cite Malouf's deposition testimony on this point. Rather, Malouf testified that his practice had made self-refunds to Medicaid before but saw no issue to warrant refunding for the claims in question after the matter came to his attention two years after leaving the practice. CR 1, 529:19-24, 531:12-24.

5. Straw Man Rebuttal

The State devotes a page of its brief to refute the proposition that Medicaid staff could grant exceptions to program requirements. Here, the State has misapprehended Malouf's argument. The scope of Medicaid administration's proper legal authority is beside the point. The individual authorities in Medicaid administration, on whom Malouf and his employees rely upon for guidance and instruction as program providers, sometimes gave instructions which were either unclear or at times inconsistent with what the State contends is clearly mandated in the Medicaid manual. Regardless, the plain language of Section 36.002(8) – and not the Medicaid manual – is the controlling legal authority in this case.

II. Malouf Should Have Prevailed on His No-Evidence Motion for Summary Judgment Because None of the Claims at Issue Indicated an Incorrect License Type

A. The Lower Court's Construction of Section 36.002(8) Violates Principles of Statutory Construction

The State has failed to offer any valid justification for the lower courts' disposition of Malouf's no-evidence motion for summary judgment, which is based upon the plain language of Section 36.002(8). Under this section, a person commits an unlawful act by making a claim under the Medicaid program and knowingly failing to "indicate the type of license ***and*** the identification number of the licensed health care provider who actually provided the service[.]" TEX. HUM. RES. CODE § 36.002(8) (emphasis added).

The State does not dispute that the TMFPA is a penal statute and therefore must be strictly construed to protect individuals against whom liability is sought; in this instance, Malouf. Any ambiguity in a penal statute must be interpreted in favor of the party facing the penalty. *Hovel v. Batzri*, 490 S.W.3d 132, 133-34 (Tex.App. – Houston [1st Dist.] 2016, pet. denied). The intermediate court of appeals, however, failed to construe Section 36.002(8) in such a manner and instead opted for a rationalization that would excuse the State from having to prove *both* a knowing failure to indicate the type of license of the actual treating provider *and* their correct identification number. In short, the lower court did not just fail to strictly construe

Section 36.002(8) in Malouf's favor, it actually eased the liability standard set by the statute's plain language.

The State does not dispute that the actual treating provider for each claim in question was a licensed dentist just like Malouf. It is also undisputed that each claim in question was submitted on an electronic or paper claim form which plainly showed the actual treating provider, whomever it may be, was a licensed dentist. As a result, there could never be confusion or misapprehension about the claim being presented for professional dental services rendered. Consequently, Medicaid would not be at risk of improperly reimbursing Malouf's practice at a rate commensurate with some other professional license. If, on the other hand, a claim form incorrectly identified both the treating provider by identification number and that provider's license type, such a risk would be present. Neither the State nor the intermediate appellate court appear to appreciate this material difference in potential outcomes for the Medicaid program.

The appellate court's rationale made it easier for the State to hold Malouf liable under Section 36.002(8) and will potentially result in liability to anyone else who submits a claim in which either piece of information is wrong. If only a wrong identification number means the claim form has no information about the actual treating provider, it is equally true that a claim form in which only a license type is wrong means the claim form has no information about the actual treating provider.

Under either scenario, the State is excused from proving that two separate pieces of information are false on a claim and the statute might as well say "…type of license ***or*** identification number…." This is not just inconsistent with the rule of lenity in construing a penal statute, it is inconsistent with the plain wording of Section 36.002(8).

A proper construction of Section 36.002(8), in accordance with the applicable rules of statutory construction, compels the conclusion that Malouf is not liable under the statute because no claim failed to indicate the correct license type of the actual treating provider, regardless of whether the actual provider was Malouf or some other dentist in his office.

B. The State's Proposed Construction of Section 36.002(8) Lacks Any Clear Guiding Principle

Malouf urges the Court to construe the TMFPA in keeping with its stated purpose of targeting fraud against the Texas Medicaid program. In keeping with that objective, acts of regulatory non-compliance that do not result in fraud or receipt of an unauthorized, unearned, or inflated benefit, need not be punished on the same scale as acts of fraud. This Court has previously observed the TMFPA equips the State with a broad panoply of tools to punish fraud on the system, including civil remedies, onerous administrative sanctions, mandatory suspension or revocation of a license, permit, certification, or state-provider agreement and exclusion from the

Medicaid program for at least ten years. *In re Xerox*, 555 S.W.3d 518, 525 (Tex.2018). The State is amply equipped to address regulatory or programmatic non-compliance among its provider participants on a number of levels. Given these options, the State need not subject a health care provider to potentially multi-million dollar civil liability in order to rectify an incorrect provider identification number on a form, especially when no unwarranted disbursement of program funds may result.

The State, however, freely acknowledges that under its proposed construction of Section 36.002(8), fraud or receipt of unearned or unauthorized benefits from the Medicaid program have no bearing on a party's liability. *State's Brief on the Merits*, pp. 48-50. The State does not articulate any limiting or organizing principle informing its construction of the Act. Rather, what exposes a person to potentially multi-million-dollar civil liability under Section 36.002(8), in the State's view, is an incorrect identification number placed on a reimbursement claim form, irrespective of whether it has any bearing on Medicaid's operation or disbursements. For that reason, the Court should decline to adopt the State's proposed construction of Section 36.002(8).

CONCLUSION AND PRAYER FOR RELIEF

Malouf stands on his opening prayer and seeks all other relief to which he may be entitled.

Respectfully submitted,

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/s/ *W. Lance Cawthon*
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CERTIFICATE OF SERVICE

I certify that on the 11th day of October, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court pursuant to the Electronic Filing Procedures and using the CM/ECF system, and that a true and correct electronic copy was thereby caused to be served on Appellees.

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