

**Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion filed August 14, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-17-00299-CV**

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**IN RE METHODIST PRIMARY CARE GROUP, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF MANDAMUS  
234th District Court  
Harris County, Texas  
Trial Court Cause No. 2015-35424**

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**MEMORANDUM OPINION**

In this original proceeding we consider whether the respondent trial judge abused his discretion in ordering the relator Methodist Primary Care Group to produce documents in discovery. Methodist has filed a petition for writ of mandamus. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App.

P. 52. In the petition, Methodist asks this court to compel the Honorable Wesley Ward, presiding judge of the 234th District Court of Harris County, to vacate the part of his order signed on April 4, 2017 (the “Discovery Order”) in which the trial court overrules Methodist’s objections to real party in interest Associates in Medicine, PA.’s Requests for Production 82, 108, 109, and 110, and orders Methodist to produce documents responsive to these requests. Because Requests 82, 108, 109, and 110 are overbroad and seek discovery of irrelevant documents, we conditionally grant the petition for writ of mandamus.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Associates in Medicine filed suit against Drs. Shari Rubin and Joshua Septimus, alleging that the physicians breached their employment contracts with Associates in Medicine by misappropriating trade secrets and improperly soliciting patients. More than eighteen months later, Associates in Medicine amended its petition to include claims against Methodist—Drs. Rubin’s and Septimus’s current employer. In its Third Amended Petition Associates in Medicine asserts, among other things, a claim against Methodist for tortious interference with prospective business relations. Associates in Medicine argued to the trial court that the categories of documents requested are relevant to its interference claim, which Associates in Medicine pled as follows:

77. Methodist interfered with prospective business relationships between AIM, AIM’s patients, and Dr. Rubin and Dr. Septimus by soliciting them to provide confidential, proprietary and/or trade secret information of AIM while still employed with the Association. This interference was done in breach of Dr. Rubin and Dr. Septimus’

fiduciary duties to AIM, and as way to avoid violations of Stark Law by Methodist.

78. Additionally, Methodist interfered with prospective business relationships of AIM's patients through soliciting AIM's patients in violation of both Dr. Septimus and Dr. Rubin's Employment Agreements and their fiduciary duties.

79. There is a reasonable probability that AIM would have continued their business relationships with Dr. Rubin and Dr. Septimus, but for their solicitation as it provided Dr. Rubin and Dr. Septimus the necessary tools to negotiate a favorable contract with Methodist.

80. There is a reasonable probability that AIM would have continued their business relationships with its patients, but for Methodist's solicitation.

Associates in Medicine served Methodist with 177 requests for production, including the following:

**REQUEST FOR PRODUCTION NO. 82:** Any and all pro formas prepared by or for Methodist Primary Care for any physicians from January 1, 2014 to December 21, 2015.

**REQUEST FOR PRODUCTION NO. 108:** Any and all documents and communications reflecting, regarding, evidencing, concerning, or discussing the total profit and loss derived by Methodist Primary Care for 2013, 2014, 2015 and 2016.

**REQUEST FOR PRODUCTION NO. 109:** Any and all documents and communications reflecting, regarding, evidencing, concerning, or discussing the budget allocated to Methodist Primary Care by the Methodist Hospital for 2013, 2014, 2015 and 2016.

**REQUEST FOR PRODUCTION NO. 110:** Any and all documents and communications reflecting, regarding, evidencing, concerning, or

discussing the amount of money Methodist Primary Care was subsidized by the Methodist Hospital for 2013, 2014, 2015 and 2016.

Methodist objected to Requests 82, 108, 109 and 110 as not reasonably calculated to lead to the discovery of admissible evidence, overbroad, and amounting to an impermissible fishing expedition. Associates in Medicine moved to compel Methodist to produce documents responsive to these and other requests.

After hearing Associates in Medicine's motion to compel, the trial court signed the Discovery Order, overruling Methodist's objections and ordering Methodist to produce documents responsive to Requests 76–79, 82, 103–104, and 107–110. Only Requests 82, 108, 109 and 110 (hereinafter the “Compelled Documents”) are the subject of the petition for writ of mandamus.

## **II. MANDAMUS STANDARD**

To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy. *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016) (per curiam). Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is reasonably calculated to lead to the discovery of admissible evidence. *Id.* What is “relevant to the subject matter” is to be broadly construed. *Id.* These liberal bounds, however, have limits, and discovery requests

must not be overbroad. *Id.* A request is not overbroad so long as it is reasonably tailored to include only matters relevant to the case. *Id.* at 223–24. Discovery orders requiring document production from an unreasonably long time period or from distant and unrelated locales are impermissibly overbroad. *Id.* at 224. Likewise, discovery requests that are not limited with regard to time, place, or subject matter are overbroad. *Id.* at 225–26. Discovery may not be used as a fishing expedition. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex.1998) (orig. proceeding) (per curiam).

### III. ANALYSIS

Courts measure the scope of discovery by the live pleadings regarding the pending claims.<sup>1</sup> Associates in Medicine has pled a claim against Methodist for tortious interference with prospective business relations. One of the elements of the claim is “an ‘independently tortious or unlawful’ act by the defendant that prevented the relationship from occurring.” *Faucette v. Chantos*, 322 S.W.3d 901, 914 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001)). Associates in Medicine states that its tortious-interference claim is predicated on its allegation that Methodist’s interference was independently tortious or unlawful because Methodist provided compensation

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<sup>1</sup> See *In re Booth*, No. 14-14-00637-CV, 2014 WL 5796726, at \*2 (Tex. App.—Houston [14th Dist.] Oct. 21, 2014, orig. proceeding) (per curiam) (mem. op.) (citing *In re Citizens Supporting Metro Solutions, Inc.*, No. 14-07-00190-CV, 2007 WL 4277850, at \*3 (Tex. App.—Houston [14th Dist.] Oct. 18, 2007, orig. proceeding) (mem. op.)).

arrangements to Drs. Rubin and Septimus that violated the Stark Law<sup>2</sup> and the Anti-Kickback Statute.<sup>3</sup> Through Requests 82, 108, 109, and 110, Associates in Medicine seeks to discover evidence that Methodist violated the Stark Law or the Anti-Kickback Statute in 2013, 2014, 2015, and 2016. Associates in Medicine therefore argues that the Compelled Documents are relevant to its claim for tortious interference.

We presume for purposes of this opinion, but we do not decide, that a violation of the Stark Law or the Anti-Kickback Statute that interferes with a prospective

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<sup>2</sup> The Stark Law prohibits physicians from referring patients to entities with which the physician has a financial relationship for certain designated health services payable by Medicare unless the transaction is structured to fit within one of the Stark Law's exceptions. 42 C.F.R. §§ 411.353(a), 411.357. Under the "Bona Fide Employment Exception" physician employees that have compensation arrangements with an entity do not violate the Stark Law so long as the amount paid to the physician is: (1) For identifiable services; (2) The amount of remuneration is consistent with the fair market value of the services and is not determined in a manner that takes into account the volume or value of any referrals by the referring physician; and (3) The remuneration provided is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer. 42 C.F.R. § 411.357(c).

<sup>3</sup> The Anti-Kickback Statute makes it a felony to offer kickbacks or other payments in exchange for referring patients for the furnishing of any item or service for which payment may be made in whole or in part under a federal health care program. 42 U.S.C. § 1320a-7b.

business relation of the plaintiff may serve as the basis for an action for tortious interference with prospective business relations.<sup>4</sup>

Associates in Medicine's relevancy argument fails for at least three reasons. First, Associates in Medicine's live pleading (Third Amended Petition) does not support its relevancy assertions. Associates in Medicine does not allege that Methodist interfered with prospective business relations through violations of the Stark Law or the Anti-Kickback Statute, but rather alleges that the interference was done in a way to avoid violations of the Stark Law:

77. Methodist interfered with prospective business relationships between AIM, AIM's patients, and Dr. Rubin and Dr. Septimus by soliciting them to provide confidential, proprietary and/or trade secret information of AIM while still employed with the Association. This interference was done in breach of Dr. Rubin and Dr. Septimus' fiduciary duties to AIM, and *as way to avoid violations of Stark Laws* by Methodist.

(emphasis added). Accordingly, Associates in Medicine's live petition does not support any discovery regarding whether Methodist violated the Stark Law or the Anti-Kickback Statute.

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<sup>4</sup> Alternatively, Methodist argues that its alleged violations of the Stark Law cannot serve as the basis for an action for tortious interference with business relations because the Stark Law does not provide a private right of action, and therefore is not an actionable tort. *See Ameritox, Ltd. v. Millennium Labs., Inc.*, 803 F.3d 518, 521 (11th Cir. 2015) ("[N]either Stark nor AKS provide private rights of action . . ."); *see also U.S. ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, 675 F.3d 394, 395 (4th Cir. 2012) ("[T]he Stark Law does not create its own right of action . . ."). Associates in Medicine, however, contends that Methodist's argument goes against the supreme court's decision in *In re Memorial Hermann Hosp. Sys.*, 464 S.W.3d 686, 705–06 (Tex. 2015) (orig. proceeding). We need not decide this issue.

Second, to be actionable, the act of interference with the prospective business relations must be wrongful or unlawful. *See Wal-Mart Stores, Inc.*, 52 S.W.3d at 724; *Faucette*, 322 S.W.3d at 914. The alleged act of interference is not Methodist's alleged unlawful compensation of Drs. Rubin and Septimus, but that Methodist interfered with Associates in Medicine's business relations by stealing proprietary and trade secret information and by soliciting Associates in Medicine's patients. Thus, discovery regarding the legality of Drs. Rubin's and Septimus's compensation is not relevant to proving the alleged acts of interference.

Third, even if Associates in Medicine asserted that Methodist's alleged illegal compensation of Drs. Rubin and Septimus interfered with Associates in Medicine's prospective business relations, this allegation, at most, would entitle Associates in Medicine to discovery regarding whether Methodist's compensation of these two doctors violated the Stark Law or the Anti-Kickback Statute, not discovery as to whether Methodist may have violated these laws through the hiring of other doctors whom Associates in Medicine has not accused of stealing trade secrets or soliciting patients. In other words, only discovery related to the conduct that Associates in Medicine alleges interfered with its business relations would be relevant.

The Compelled Documents are not properly limited to documents related to the legality of Drs. Rubin's and Septimus's compensation. Rather, these requests constitute a fishing expedition to discover Methodist's potential violations of the Stark Law and Anti-Kickback Statute from 2013 through 2016, regardless of whether such potential violations interfered with Associates in Medicine's prospective business relations. The only documents that possibly could be relevant



to any claim that Methodist interfered with Associates in Medicine's business relations through illegal compensation arrangements with Drs. Rubin and Septimus would concern only Drs. Septimus's and Rubin's compensation. According to Methodist, it already has produced pro formas and other financial documents regarding the hiring and compensation of Drs. Rubin and Septimus.

In Request 82, Associates in Medicine seeks the production of any and all pro formas prepared by or for Methodist from January 1, 2014 to December 21, 2015 for any physicians. According to Methodist, complying with this request would require it to produce not only the pro formas for Drs. Septimus and Rubin, but also the pro formas for 78 other physicians, some of whom are not even employed by Methodist. Although the pro formas for Drs. Septimus and Rubin, which already have been produced, may be relevant to whether their compensation violated the Stark Law or the Anti-Kickback Statute, Associates in Medicine provides no explanation as to why the pro formas for other physicians would be relevant. Associates in Medicine has not alleged that Methodist's hiring and compensation of these other physicians interfered with Associates in Medicine's prospective business relations.

In *In re National Lloyds Insurance Co.* an insured brought suit against the insurer alleging breach of contract, breach of duty of good faith and fair dealing, fraud, and violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code. 449 S.W.3d 486, 488 (Tex. 2014) (orig. proceeding) (per curiam). The trial court ordered the production of documents related to insurance claims filed by others in the insured's neighborhood. *Id.* The insured argued that any significant

differences between how her claim was valued and how other claims were valued in her general area would be evidence of bad faith. *Id.* at 489. The Supreme Court of Texas disagreed, stating that it failed to see how the insurer's overpayment, underpayment, or proper payment of the claims of unrelated third parties would be probative of its conduct with respect to the insured's undervaluation claims. *Id.* The supreme court stated "[s]couring claim files in hopes of finding similarly situated claimants whose claims were evaluated differently from [the insured's claim] is at best an 'impermissible fishing expedition.'" *Id.* Just as the requested documents regarding the payment of claims of unrelated third parties were irrelevant and an impermissible fishing expedition, so too are Associates in Medicine's requests for documents pertaining to physicians whom Associates in Medicine has not alleged interfered with its business relations.

Requests 108, 109, and 110 seek documents related to (1) the total profit and loss derived by Methodist Primary Care for 2013, 2014, 2015 and 2016, (2) the budget allocated to Methodist Primary Care by the Methodist Hospital for 2013, 2014, 2015 and 2016, and (3) the amount of money Methodist Primary Care was subsidized by the Methodist Hospital for 2013, 2014, 2015 and 2016. Associates in Medicine argues that complying with these requests may result in the disclosure of documents showing that Methodist violated the Stark Law or the Anti-Kickback Statute by over-compensating its physicians. But Associates in Medicine has not established that these documents would be relevant to determining whether the compensation of Drs. Septimus and Rubin violated the Stark Law or the Anti-Kickback Statute. Drs. Septimus and Rubin were not even employed by Methodist

until May 15, 2015, so documents for 2013 and 2014 would have no relevance. Moreover, Methodist's global profits and losses, financial budgets, and subsidies have no bearing on whether its compensation of Drs. Septimus and Rubin violated the Stark Law or the Anti-Kickback Statute. Associates in Medicine points out that Methodist, in its Internal Revenue Service Form 990 for 2013, reported a net loss of \$3,257,285, with assets at year end of negative \$45,775,108. Associates in Medicine cites federal cases indicating that a kickback scheme may be inferred when a defendant employs a physician at a substantial loss. But, producing the financial records for the entity as a whole would reveal nothing about the legality of Drs. Septimus's and Rubin's compensation arrangements or whether they were being employed at a loss. More importantly, Associates in Medicine has not established that these documents would be relevant to determining whether Methodist interfered with Associates in Medicine's business relations by stealing Associates in Medicine trade secrets and soliciting its patients, which are the only acts of interference that that Associates in Medicine has alleged.

In any event, as Methodist points out in its reply, Associates in Medicine already has the publically-available income statements for Methodist, a non-profit corporation. Thus, much of the discovery Associates in Medicine seeks appears to duplicate information that it already has or that is available to it under section 22.353 of the Texas Business Organization Code. *See* Tex. Bus. Org. Code § 22.353 (non-profit corporation shall make its records available to the public for inspection and copying).

We conclude the trial court clearly abused its discretion by ordering Methodist to produce the Compelled Documents because Requests 82, 108, 109, and 110 are overbroad and seek production beyond the rules of procedure. *See In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d at 226.

#### **IV. CONCLUSION**

We conditionally grant the petition for writ of mandamus. We direct the trial court to vacate the part of the Discovery Order that overrules Methodist's objections to Requests 82, 108, 109, and 110 and orders Methodist to produce documents responsive to these requests. We are confident the trial court will act in accordance with this opinion. The writ of mandamus will issue only if the trial court fails to do so.

#### **PER CURIAM**

Panel consists of Chief Justice Frost and Justices Donovan and Brown.