IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-IA-00490-SCT

NEWSOUTH NEUROSPINE, LLC

v.

MELITA C. HAMILTON

DATE OF JUDGMENT:	03/12/2018
TRIAL JUDGE:	HON. STANLEY ALEX SOREY
TRIAL COURT ATTORNEYS:	THOMAS L. TULLOS MATTHEW DAVID SITTON ROBERT A. MILLER
COURT FROM WHICH APPEALED:	JASPER COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEYS FOR APPELLANT:	MATTHEW D. SITTON THOMAS L. KIRKLAND, JR.
ATTORNEY FOR APPELLEE:	THOMAS L. TULLOS
NATURE OF THE CASE:	CIVIL - OTHER
DISPOSITION:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED - 11/21/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

CONSOLIDATED WITH

NO. 2018-CA-00629-SCT

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BEFORE KITCHENS, P.J., MAXWELL AND CHAMBERLIN, JJ.

KITCHENS, PRESIDING JUSTICE, FOR THE COURT:

¶1. Melita C. Hamilton sued Weatherford International, LLC, and William T. Dixon in the Circuit Court of the First Judicial District of Jasper County. During the lawsuit, Hamilton requested a copy of her medical records from NewSouth Neurospine, LLC. NewSouth billed Hamilton $210.65 for production of 233 pages of medical records and the execution of a medical records affidavit. When Hamilton disputed the amount of the fees, NewSouth asserted that the amount was allowed by Mississippi Code Section 11-1-52 (Rev. 2019). Hamilton moved for discovery sanctions on the ground that NewSouth's bill exceeded what was permitted by the Health Insurance Portability and Accountability Act (HIPAA). The trial court granted Hamilton's motion, finding that under the HIPAA Privacy Rule, NewSouth was limited to charging a reasonable, cost-based fee for reproduction of medical records. The trial court ordered NewSouth to refund Hamilton $159; NewSouth appeals.[1] We affirm the order

[1] NewSouth filed both a direct appeal and a petition for an interlocutory appeal, which was granted. The two appeals, which are identical in subject matter, have been consolidated.

of a refund for reproducing part of Hamilton's medical records, but we reverse the order of a refund of $25 for executing a medical records affidavit.

FACTS

¶2. Mississippi Code Section 11-1-52 prescribes the maximum amounts that a Mississippi medical facility may charge for photocopying medical records. Section 11-1-52(1) provides, in pertinent part, that

> [a]ny medical provider or hospital or nursing home or other medical facility shall charge no more than the following amounts to patients or their representatives for photocopying any patient's records: Twenty Dollars ($20.00) for pages one (1) through twenty (20); One Dollar ($1.00) per page for the next eighty (80) pages; Fifty Cents (50¢) per page for all pages thereafter. Ten percent (10%) of the total charge may be added for postage and handling.

Miss. Code Ann. § 11-1-52(1) (Rev. 2019). Under subsection (3), a medical facility may charge a maximum fee of $25 "for executing a medical record affidavit, when the affidavit is requested by the patient or the patient's representative." Miss. Code Ann. § 11-1-52(3) (Rev. 2019).

¶3. Mississippi Code Section 11-1-52 was amended in 2006 to codify the obligation of medical facilities to comply with HIPAA when charging fees for photocopying, postage, and handling of medical records. According to subsection (4), "[i]n charging the fees authorized under subsection (1) of this section, the medical provider, hospital, nursing home or other medical facility shall comply with the federal Health Insurance Portability and Accountability Act (HIPAA)." Miss. Code Ann. § 11-1-52(4) (Rev. 2019). Under 42 U.S.C. § 17935(e) and its implementing regulations, an individual has a right of access to a copy of his or her

medical records, known as protected health information. 42 U.S.C. § 17935(e) (Supp. IV 2016); 45 C.F.R. § 164.524(a) (2019). For a copy of protected health information, the provider may charge the individual a "reasonable, cost-based fee" limited to the cost of:

> (i) Labor for copying the protected health information requested by the individual, whether in paper or electronic form;
>
> (ii) Supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media;
>
> (iii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and
>
> (iv) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(iii) of this section.

45 C.F.R. § 164.524(c)(4) (2019).

¶4. NewSouth received Hamilton's written and signed medical records request on November 2, 2017. Hamilton requested that NewSouth mail a compact disc (CD) to her attorneys, Tullos and Tullos, PLLC, containing a copy of her medical records from September 23, 2011, to the present. Hamilton contended that NewSouth should charge her $6.50 for this service.[2] NewSouth invoiced Tullos and Tullos $210.65 for production of Hamilton's medical records on CD. NewSouth's invoice reflected that it charged Hamilton the maximum amounts permitted by Section 11-1-52. NewSouth charged $166.50 for 233

[2] HIPAA guidelines allow a provider to charge a flat fee of $6.50 as an alternative to calculating the actual or average costs of transmitting electronic copies of medical records maintained electronically. U.S. Dep't of Health & Human Servs., *Individuals' Right under HIPAA to Access their Health Information 45 CFR §164.524*, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html (last visited Oct. 15, 2019). Because NewSouth did not maintain its records electronically, this provision does not apply.

pages of medical records, equating to $1 per page for the first one hundred pages, and $.50 per page for the next 133 pages. NewSouth also charged $25 for executing a medical records affidavit. For postage and handling, NewSouth charged Hamilton $19.15, which was 10 percent of the cost of copying plus the cost of the medical records affidavit.

¶5. Hamilton's counsel contacted NewSouth's medical records custodian and disputed the charges. On December 29, 2017, Hamilton obtained a *subpoena duces tecum* for Hamilton's medical records. On January 10, Hamilton filed a motion for sanctions against NewSouth for failing to respond to the *subpoena duces tecum*.[3] She requested appropriate sanctions, including attorney fees. NewSouth responded to the motion for sanctions, arguing that the charges permitted by Mississippi Code Section 11-1-52 are reasonable, cost-based fees under HIPAA. NewSouth claimed that because Hamilton lacked any legal basis for her argument, it was frivolous, entitling NewSouth to attorney fees.

¶6. NewSouth attached the affidavit of its medical records custodian, Tarasa Williams, averring that NewSouth does not have an electronic health records system. Therefore, "[i]n the instance of requests for medical records in an electronic format, medical records must be copied, scanned, and then grouped together in a PDF format." NewSouth also attached guidelines published by the United States Department of Health and Human Services (HHS)

[3] NewSouth should have responded to the *subpoena duces tecum*. Mississippi Rule of Civil Procedure 45 provides mechanisms for complying with a *subpoena duces tecum*, objecting to it, or contesting it with a motion to quash or modify the subpoena. M.R.C.P. 45 (d), (e). The failure of a person served with a subpoena to obey without adequate excuse subjects the person to the possibility of being held in contempt of court. M.R.C.P. 45(g).

setting forth permissible methods for calculating the reasonable, cost-based fee allowed by HIPAA.

¶7. Hamilton filed a reply, arguing that NewSouth's fee exceeded the actual cost of paper, labor, and postage. She attached an advertisement for copy paper priced at five hundred sheets for $53, equating to 1.06 cents per sheet. She argued that, assuming an employee earning $20 per hour for labor took one third of an hour to copy the medical records, the cost of labor was $6.66. And, Hamilton contended, the actual cost of postage was $7.80, the amount of postage noted on the mailing itself.

¶8. After a hearing on February 9, 2018, it was established that Hamilton had paid the fee demanded by NewSouth under protest and that NewSouth had mailed the records to Hamilton in paper form, not on a CD. In its ruling, the trial court held that HIPAA limited NewSouth to charging a reasonable, cost-based fee for reproducing medical records, including the cost of supplies, labor, and postage. The trial court found that NewSouth had overcharged Hamilton for her medical records and had allowed a charge of $0.10 per page for paper, $20 for labor, and $7.80 for postage. The trial court found this totaled $50.80; NewSouth was ordered to refund Hamilton an overcharge of $159.[4] The trial court found from the HHS guidelines that the fee could not include costs of verification and allowed no amount for executing a medical records affidavit. Because the matter was one of first impression, the trial court did not impose attorney fees or other sanctions on either party.

[4] The trial court's order of a refund of $159 meant that Hamilton's actual cost of the medical records was $51.65, because $210.65–$159 = $51.65. Because the trial court's arithmetic error resulted in an overcharge of less than one dollar and Hamilton makes no complaint about the error, we leave the trial court's calculation intact.

DISCUSSION

¶9. The trial court's ruling on the limitations that HIPAA places on Section 11-1-52 presents a question of law that is reviewed *de novo*. ***Miss. Dep't of Revenue v. Hotel and Restaurant Supply***, 192 So. 3d 942, 945 (Miss. 2016). NewSouth makes three arguments about why it did not violate HIPAA by charging Hamilton the amounts listed in Section 11-1-52(1). First, NewSouth argues that, because the fees listed in Section 11-1-52(1) and charged to Hamilton were of the type contemplated by 45 C.F.R. § 164.524, namely, photocopying, handling, and postage, the fees were reasonable. Second, NewSouth argues that HIPAA has not preempted state fee schedules such as Section 11-1-52(1) because Section 11-1-52(1) provides for a reasonable, cost-based fee. Third, NewSouth contends that the Mississippi Legislature has determined that the fees listed in Section 11-1-52(1) are reasonable.

¶10. We reject these arguments and affirm the trial court's ruling that the fees NewSouth charged Hamilton for photocopying, handling, and postage did not comply with HIPAA although they did not exceed the amounts listed in Section 11-1-52(1). NewSouth is correct that the fees set forth in Section 11-1-52(1) reflect a legislative determination creating a ceiling for reasonable fees. But after making that determination, the legislature amended Section 11-1-52 to provide that the fees charged under Section 11-1-52(1) must comply with HIPAA. Miss. Code Ann. § 11-1-52(4); 2006 Miss. Laws ch. 588, § 1 (H.B. 1235), Westlaw. Thus, the legislature has recognized that fees charged by medical facilities for reproduction of medical records must comply both with Section 11-1-52(1) and HIPAA.

¶11. The Court of Appeals has determined that a medical facility cannot impose fees for reproduction of medical records that exceed the fees allowed by Section 11-1-52(1). ***Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson***, 19 So. 3d 735, 741-42 (Miss. Ct. App. 2008). Section 11-1-52(1) provides one limitation on the amount of fees that may be charged for medical records reproduction. But Section 11-1-52(4) places an additional check on such fees, because they also must not exceed what is allowed by HIPAA. Therefore, in some cases, a medical facility may charge the maximum amounts listed in Section 11-1-52(1) and still comply with HIPAA because in the particular case the fees would be reasonable and cost based. But in cases in which the fees set forth in Section 11-1-52(1) exceed what is reasonable and cost based, Section 11-1-52(4) and HIPAA would require a lower fee.

¶12. NewSouth acknowledges that, under HIPAA, a medical facility's fee for reproducing medical records must be reasonable and cost based. The HHS guidelines that NewSouth attached to its response to the motion for sanctions provide that a covered entity may calculate a reasonable, cost-based fee using one of two methods: (1) calculating the actual allowable costs for fulfilling the request, or (2) developing a schedule based on average costs for fulfilling standard requests. U.S. Dep't of Health and Human Servs., *Individuals' Right under HIPAA to Access their Health Information 45 CFR §164.524*, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html (last visited Oct. 15, 2019). Simply referencing a state fee schedule is insufficient to comply with HIPAA's mandate of a reasonable, cost-based fee because a state fee schedule bears no

relationship to an entity's actual costs in a specific case. A state fee schedule is not a calculation of actual costs, nor does it embody a given medical provider's calculation of average costs for fulfilling standard requests. In fact, the same HHS guidelines that NewSouth admits are authoritative provide that

> a covered entity's fee for providing an individual with a copy of her [protected health information] must be reasonable in addition to cost-based, and there may be circumstances where a State[-]authorized fee is not reasonable, even if the State[-]authorized fee covers only permitted labor, supply, and postage costs. For example, a State-authorized fee may be higher than the covered entity's cost to provide the copy of [protected health information].

U.S. Dep't of Health and Human Servs., *Individuals' Right under HIPAA to Access their Health Information 45 CFR §164.524*, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html (last visited Oct. 15, 2019). The HHS guidelines make abundantly clear that fees authorized by a state fee schedule will comply with 45 C.F.R. § 164.524(c)(4) only if they are reasonable and cost based.

¶13. Because NewSouth failed to respond to a *subpoena duces tecum* and was in the position of defending a motion for sanctions, it had the burden to establish an undue burden or expense by showing that the fees it demanded for copying the medical records complied with HIPAA. ***Wiwa v. Royal Dutch Petroleum Co.***, 392 F.3d 812, 818 (5th Cir. 2004). NewSouth charged Hamilton $185.65 for a paper copy of her medical records and $25 for executing a medical records affidavit. NewSouth presented no evidence that $185.65 constituted actual costs of paper, supplies, labor, and postage. 45 C.F.R. § 164.524(c)(4)(i)-(iii). Nor did it show that it had charged $185.65 with reference to a fee schedule based on the average cost of fulfilling a standard medical records request. NewSouth did not show that

the fee schedule in Section 11-1-52(1) bore any relationship to actual costs. Because NewSouth failed to show that its fee was reasonable and cost based as required by HIPAA, the trial court did not err by finding that NewSouth had overcharged Hamilton and by ordering NewSouth to provide her a refund for the cost of reproducing her medical records.[5] Because NewSouth challenges only the order of a refund for the cost of reproduction of Hamilton's medical records and neither party challenges the amount of that refund, we do not address it.

¶14. NewSouth also complains that the trial court erred by ordering it to refund the $25, the maximum fee allowed by statute, that Hamilton paid for execution of a medical records affidavit. This Court agrees with NewSouth that the execution of a medical records affidavit is not covered by HIPAA's restriction on fees. While the trial court correctly found that, under the HHS guidelines, HIPAA does not allow fees for verification, the guidelines say that "verification" means "tak[ing] reasonable steps to verify the identity of an individual making a request for access." U.S. Dep't of Health and Human Servs., *Individuals' Right under HIPAA to Access their Health Information 45 CFR §164.524*,

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[5] The separate opinion breezes past HIPAA's requirement that the fee charged by a medical provider for copying medical records must be reasonable and based on actual costs. The separate opinion finds that the maximum amounts listed in Section 11-1-52(1) are "a uniform, reasonable standard method to calculate appropriate reproduction costs." CIPDIP Op. ¶ 26. While that may be so, this Court cannot ignore Section 11-1-52(4), which provides that fees charged under Section 11-1-52(1) are limited by HIPAA's requirements. And those requirements are that the fee be not only reasonable but also based on the actual costs incurred by the medical provider. Section 11-1-52(1) prescribes the maximum amounts that may be charged. Moreover, copying fees charged by the courts of this state are totally irrelevant to this decision because neither Section 11-1-52(1) nor HIPAA applies to fees charged by the judicial branch of state government.

https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html (last visited Oct. 15, 2019). HIPAA's privacy rule applies to the reproduction of medical records, not to the execution of a medical records affidavit for the purpose of establishing the authenticity of the records in court. *See* M.R.E. 902(11). Therefore, the trial court erred by ordering NewSouth to refund Hamilton for the cost of executing a medical records affidavit.

¶15. Before concluding, we address NewSouth's attachment to its appellate brief of a letter from the United States Department of Health and Human Services, Office for Civil Rights (OCR), dated January 17, 2019. The letter says that Attorney Thomas Tullos, on behalf of his client, Hamilton, had filed a complaint against NewSouth for charging unreasonable fees for medical records in violation of HIPAA. The letter goes on to say that, due to deficiencies in the medical records request, NewSouth did not violate the HIPAA privacy rule. NewSouth requests that this Court take judicial notice of this letter under Mississippi Rule of Evidence 201(c)(2). Under that rule, regarding an adjudicative fact, the Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." M.R.E. 201(c)(2).

¶16. We decline to take judicial notice of the letter's contents. Rule 201(b) sets forth the "kinds of facts that may be judicially noticed." The rule provides that

> [t]he court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> > (1) is generally known within the trial court's territorial jurisdiction; or
> >
> > (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

M.R.E. 201(b). The letter does not meet the requirements of Rule 201(b) because many assertions in the letter are subject to reasonable dispute. Moreover, the letter was written after the trial court's ruling in this case, nothing shows that the OCR based its conclusion on the same facts that were before the trial court, and the OCR's opinion in no way restricts this Court in its review of the record and proceedings before the trial court.

CONCLUSION

¶17. We affirm the trial court's decision that the fees NewSouth charged Hamilton for reproducing her medical records exceeded the amounts allowed by HIPAA and Mississippi Code Section 11-1-52(4). But we find that NewSouth was entitled to charge $25 for executing a medical records affidavit, to which HIPAA does not apply. Therefore, we affirm in part, reverse in part, and remand this case for further proceedings.

¶18. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

RANDOLPH, C.J., KING, P.J., MAXWELL, BEAM AND CHAMBERLIN, JJ., CONCUR. GRIFFIS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN AND ISHEE, JJ.

GRIFFIS, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶19. Is $210.65 for production of 233 pages of medical records a reasonable cost? Actually, the amount in controversy in this dispute is $134, the refund that was ordered by the circuit judge.

¶20. At the conclusion of this personal-injury case, Hamilton's attorneys filed a motion for contempt against NewSouth, a nonparty in the underlying litigation, and sought to recover their payment to NewSouth for medical records.

¶21. The circuit judge did not hold NewSouth in contempt and denied Hamilton's request for attorneys' fees. However, the judge ruled that NewSouth had overcharged for the medical records requested and paid for by Hamilton's attorneys. The judge ruled that the reasonable cost of the medical records was $50.80. Thus, the judge held that, because Hamilton's attorneys had paid NewSouth's $210.65 charge, NewSouth must reimburse Hamilton's attorneys $159. The majority has determined that the circuit judge erred when he ordered a $25 refund for the execution of the medical-records affidavit. Thus, the amount in controversy here is actually $134.

¶22. NewSouth charged Hamilton's attorney $210.65. This was based on the rates authorized by Mississippi Code Section 11-1-52 and itemized as follows:

$1/page x 100 pages =	$100.00
$0.50/page x 133 pages =	$ 66.50
Medical records affidavit	$ 25.00
Postage and handling	$ 19.15
Total	$210.65

¶23. The majority recognizes that federal law does not establish the amount that NewSouth may charge for providing its medical records. NewSouth followed Mississippi Code Sections 11-1-52(1) and (3) (Rev. 2019) and charged an appropriate and reasonable amount. The majority claims that NewSouth was required to present evidence to support the reasonableness of its charge.

¶24. The majority relies only on the argument of Hamilton's attorneys. No affidavit or other evidence actually challenges the amount charged by NewSouth. Hamilton's attorney did not provide an affidavit itemizing costs of reproduction. They simply attached an

advertisement and concluded that based on the price of five hundred sheets of paper for $53, the cost of paper was 1.06 cents/sheet.

¶25. Neither the circuit judge nor the majority consider the actual cost of the copy machine; the rental costs for the copy-machine space; the operating costs, such as toner cartridges, maintenance, or repair costs; the salary and benefit costs for the employees that are necessary to maintain, search for, and copy medical records to fill such requests; the additional rental costs for such employees; and the additional insurance costs. The majority claims that this opinion "breezes past HIPAAs requirement that the fee charged by a medical provider for copying medical records must be reasonable and based on actual costs." Maj. Op. ¶ 13 n.5 Yet no evidence before the circuit judge or this Court shows that the charge of $0.10/page for a copy is based on actual costs. This decision will create an unnecessary burden in litigation. Trial courts will now be required to have a separate hearing, in every case, to determine reimbursements for medical records, and the majority opinion will require that Mississippi medical-care providers will need a certified public accountant to calculate costs for each submission, which is impractical and unnecessary especially for the *de minimus* amount in controversy here.

¶26. Section 11-1-52 was promulgated as a uniform, reasonable standard method to calculate appropriate reproduction costs. It benefits litigants, lawyers, and medical providers to have a uniform standard. Every production of medical records should not require a hearing and testimony from a certified public accountant for the court to determine

reasonable costs. In fact, the decision by the majority and the circuit court negates Section 11-1-52—it is no longer of any use for the very reason it was promulgated.

¶27. The circuit judge and the majority have ruled that a reasonable fee for copying is $0.10/page. The Circuit Clerk of Jasper County charges $0.50/page for copies. Likewise, the Clerk of this Court, according to the Clerk of Appellate Courts Fee Schedule, charges $0.50/page for copies. If Hamilton's attorneys had asked for 233 pages from this Court's Clerk, they would have been charged $116.50 for the copies. If the copies requested were from "bound volumes or records," they would have been charged $466 for the copies. If Hamilton's attorneys had asked for an Act of Congress Certificate, which is similar to an affidavit, they would have been charged $25. If a notary fee was part of the request, they would have been charged an additional $2.50. In addition, the Clerk may have charged an on-site retrieval fee of $10, plus postage. Thus, copies requested from the Clerk of this Court would require the payment of a minimum of $159.30 to a maximum of $511.13 including $7.80—the actual cost of postage. The majority claims that what courts charge is irrelevant "because neither Section 11-1-52(1) nor HIPAA applies to fees charged by the judicial branch of state government." Maj. Op. ¶ 13 n.5. I disagree. Courts are required to charge only reasonable costs and fees. Here, we rule that a $0.50/page copy charge is unreasonable for medical providers to collect, but we allow court clerks to collect the same amount as a reasonable charge.

¶28. Here, we consider the payment of $210.35, now $134. I am of the opinion that it was not necessary for NewSouth to submit an affidavit or a calculation of its costs in order to

charge this amount. Based on the majority's determination of reasonable costs of copying, this Court should immediately revise the Clerk of Appellate Courts Fee Schedule to charge $0.10/page for copies. Likewise, this Court should order that clerks of chancery and circuit courts may charge no more than $0.10/page for copies.

¶29. I would reverse and render the circuit judge's order compelling NewSouth to reimburse Hamilton's attorneys $159.

COLEMAN AND ISHEE, JJ., JOIN THIS OPINION.