COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RICHARD J. MALOUF, D.D.S.,	§	No. 08-20-00235-CV
Appellant,	§	Appeal from the
v.	§	126th Judicial District Court
THE STATE OF TEXAS EX RELS., DR. CHRISTINE ELLIS, D.D.S., and MADELAYNE CASTILLO,	§	of Travis County, Texas
	§	(TC# D-1-GV-12-000863)
Appellees.		

O P I N I O N

Dr. Richard Malouf appeals the trial court's grant of summary judgment in favor of the State of Texas and its award of civil penalties and attorney's fees to the State and two private-citizen relators in this Medicaid fraud case.[1] We affirm as to the summary judgment order but remand for re-examination of the State's attorney's fees award.

Factual Background
Texas Medicaid Program

Medicaid is a joint federal-state indigent-assistance program providing federal funds to the states to provide medical assistance to qualified individuals, including low-income families and

[1] This case was transferred from our sister court in Travis County, Texas pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX.GOV'T CODE ANN. section 73.001. We follow the precedent of the Austin Court of Appeals to the extent they might conflict with our own. *See* TEX.R.APP.P. 41.3.

children. 42 U.S.C. § 1396-1. A state's participation is voluntary; however, participating states must comply with the Medicaid Act's provisions and regulations. 42 C.F.R. §§ 430.0-456.725. Texas has participated in Medicaid since 1967. *See* Medical Assistance Act of 1967, 60th Leg., R.S., ch. 151, 1967 TEX.GEN.LAWS 310, 310–18 (now codified at TEX.HUM.RES.CODE ANN. ch. 32). The Texas Health and Human Services Commission ("HHSC") administers Texas Medicaid. TEX.HUM.RES.CODE ANN. §§ 32.003(1), .021(a). Qualifying Texans are entitled to receive certain orthodontic services under the Texas Medicaid Early and Periodic Screening, Diagnosis, and Treatment program, also known as the Texas Health Steps Program ("THSteps"). 25 TEX.ADMIN.CODE § 33.1(a)(2008)(Dep't of State Health Servs., Purpose and Application).

Dental providers may participate in Texas Medicaid on a voluntary basis. To enroll, the dentist must sign a provider agreement with HHSC. There are four categories of enrollments for Texas Medicaid providers: "individual," "group," "performing provider," and "facility." Each Texas Medicaid provider receives a unique Texas Provider Identifier (TPI) number for each location at which they practice.

Texas Medicaid requires enrolled providers to certify they will familiarize themselves with and follow all requirements in the Texas Medicaid Provider Procedures Manual ("the Manual"), which is updated annually. Enrolled providers must also certify they will ensure employees acting on their behalf comply with all program requirements set forth in the Manual. Among other things, the Manual instructs providers how to submit reimbursement claims. Texas Medicaid requires enrolled providers to comply with the Manual's billing requirements, accurately represent services rendered, and correctly identify the performing provider, *i.e.*, the practitioner who rendered the services.

Between 2007 and 2010 (the relevant time period in this case), the Manual required enrolled providers to submit reimbursement claims using the American Dental Association ("ADA") dental claim form or its electronic equivalent. Each claim must show both the billing provider's name and TPI, and the performing provider's name, TPI, and signature. The Manual expressly prohibits dental providers from billing Texas Medicaid under their individual TPIs for services they did not provide, stating "[a] dentist must not use another dentist's provider identifier." It further specifies "[a] THSteps . . . dental provider cannot bill Texas Medicaid under his individual performing provider identified for the services provided by one or more associate dentists practicing in his office as employees or independent contractors with specific employer-employee or contractual relationships." Texas Medicaid requires all claims must be submitted within ninety-five days of the service date or else the claim will not be payable. However, Texas Medicaid will reimburse a newly enrolled provider's claim so long as it receives the claim within ninety-five days of the date on which the provider's TPI was issued.

The Texas Legislature enacted the Texas Medicaid Fraud Prevention Act ("TMFPA") in 1995 to prevent fraud, abuse, and waste of Medicaid resources. Act of May 26, 1995, 74th Leg., R.S., ch. 824, § 1, 1995 TEX.GEN.LAWS 4202, 4203 (codified at TEX.HUM.RES.CODE ANN. ch. 36). The TMFPA is a "powerful tool for targeting fraud against the Texas Medicaid program and securing the program's integrity" and authorizes "substantial monetary consequences for fraud on the system[.]" *In re Xerox Corp.*, 555 S.W.3d 518, 525 (Tex. 2018)[Citations omitted]. The TMFPA includes a qui tam provision which authorizes private citizens to sue on the government's behalf. TEX.HUM.RES.CODE ANN. § 36.101. It also grants the Texas Attorney General broad investigatory and enforcement powers and permits it to sue any enrolled provider alleged to have committed any of the statutorily defined "unlawful acts." *Id.* §§ 36.051–.055, .002.

1. Appellant's practice

Appellant founded All Smiles Dental Center in 2002 as a general dentistry practice in the Dallas-Fort Worth area serving Medicaid patients. All Smiles later began providing orthodontic services. By 2007, Appellant purchased full ownership of All Smiles, and in late 2010, he sold his majority interest while remaining involved in some of the practice's affairs.

Appellant voluntarily participated in the Texas Medicaid program. He enrolled several times both individually and as All Smiles' owner, and each time he did so, he executed a provider-enrollment application and Texas Medicaid dental provider agreement. As required by Medicaid, Appellant and All Smiles were separately enrolled in the Texas Medicaid program with their own TPI.

Between September 7, 2007 and January 31, 2010, All Smiles' front-office staff prepared bills for Medicaid orthodontic patients based upon chart notes, then sent them to the corporate office for review and submission to Medicaid for payment. Claims were then submitted either electronically or on paper through the ADA dental claim form. As All Smiles' owner, Appellant "assumed responsibility for ensuring the practice followed Medicaid's rules and practices" and "therefore made efforts to ensure he stayed abreast of Medicaid requirements and policies, including periodic review of [the Manual]."

However, during that period, All Smiles submitted—and Texas Medicaid reimbursed—3,711 unique line-item reimbursement claims for orthodontic services to Texas Medicaid using Appellant's TPI for services he did not personally render. In other words, each claim represented to Medicaid Appellant performed each service for which reimbursement was sought. But Appellant was not the treating provider for these services; other All Smiles providers were. In total,

Texas Medicaid reimbursed $538,228.45 in claims reflecting Appellant's TPI which he did not personally render.

Procedural Background

This case began in 2012 as two separate qui tam actions brought by Relators Christine Ellis, D.D.S. and Madelayne Castillo. In June 25, 2012, the State intervened in both actions, and on November 8, 2012, the cases were consolidated into the present action. Appellant attempted to dismiss the action, and the case was stayed pending his interlocutory appeal. After Appellant's first appeal was unsuccessful, the parties resumed discovery, and the State periodically amended its petition through August 9, 2019, when it filed its ninth amended petition, the live pleading in the case. Appellant was represented by three different sets of counsel and proceeded *pro se* from March 2019 through December 2019. During that time, the parties entered into an agreed scheduling order, which the trial court entered on October 17, 2019. Among other things, the order noted all pleadings deadlines had passed and dispositive motions were due on February 21, 2020.

In January 2020, Appellant hired his current counsel, who requested leave to amend the scheduling order to extend the deadline for designating testifying experts but sought no other changes to the order. The court denied the motion.

The parties filed cross-motions for summary judgment on February 21, 2020. The State sought traditional, partial summary judgment. It argued between September 7, 2007 and January 31, 2010, Appellant submitted thousands of claims for payment to Texas Medicaid in violation of TMFPA section 36.002(8)—*i.e.*, he knowingly represented to Texas Medicaid he was the performing provider for services he did not personally render. Appellant advanced a no-evidence summary judgment motion as to all of Appellees' claims.

On February 28, 2020, Appellant filed a motion for leave to amend his pleadings for the first time since August 9, 2013, to add several affirmative defenses, including unconstitutionality of TMFPA fines as applied to him. The State objected, claiming surprise and prejudice, and arguing Appellant's proposed amendment would reshape the case and delay resolution. Appellant filed a reply in support of his motion, but the trial court denied leave for amendment.

Meanwhile, the parties filed responses to each other's motions for summary judgment and replies in support of their own. Appellant also raised evidentiary objections to documents appended to the State's reply.

The trial court overruled Appellant's evidentiary objections, denied his no-evidence summary judgment motion, and granted the State's motion for partial summary judgment on its Section 36.002(8) claims.[2] Appellees moved for attorney's fees and expenses, which the court granted. The State nonsuited its remaining claims and all defendants besides Appellant, then moved to enter final judgment.

On August 10, 2020, the trial court entered final judgment, which awarded the following against Appellant:

- To the State:
    - $538,227.45 for Medicaid payments resulting from unlawful acts, plus 5% per annum interest accruing from January 31, 2010, through the date of the State's recovery;
    - $9,210,000.00 for "per violation" statutory minimum civil penalties;[3]

[2] The court later signed an order nunc pro tunc correcting a clerical error in the summary judgment order.

[3] The trial court found Appellant committed 1,842 unlawful acts, not 3,711 as the State had argued. The trial court appeared to count all service line items on a single claim form as one unlawful act, as Appellant advanced in his summary judgment response. Accordingly, the "per violation" statutory minimum civil penalties ordered are lower than the State requested. Neither party contests this calculation on appeal.

- $1,076,456.90 for two times the award of Medicaid payments resulting from unlawful acts;
- $4,345,647.00 for attorney's fees under TEX.HUM.RES.CODE ANN. § 36.007; and
- $265,200.32 for costs and expenses.

- To Appellee/Relator Castillo:
  - $651,052.50 in attorney's fees; and
  - $18,925.60 in costs and expenses.
- To Appellee/Relator Ellis:
  - $436,529.50 in attorney's fees; and
  - $9,286.40 in costs and expenses.

Appellant moved for a new trial, which was overruled by operation of law. *See* TEX.R.CIV.P. 329b(c). This appeal followed.

Standard of Review

In addition to appealing the trial court's grant of summary judgment, Appellant raises evidentiary objections, challenges the trial court's denial of his request to amend his pleading, and contests the order awarding Appellees attorney's fees. Each has its own standard of review.

Summary Judgment

We review summary judgments *de novo*. *McGehee v. Endeavor Acquisitions, LLC*, 603 S.W.3d 515, 521 (Tex.App.—El Paso 2020, no pet.). In a traditional summary judgment motion, the moving party bears the burden to establish there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Id.* If both sides move for summary judgment and the trial court grants one but denies the other, we review all summary judgment evidence and issue the judgment the trial court should have rendered. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

Evidentiary Objections

We review the admission or exclusion of summary judgment evidence for abuse of discretion. *Hawxhurst v. Austin's Boat Tours*, No. 08-19-00257-CV, 2020 WL 5094673, at *2 (Tex.App.—El Paso Aug. 28, 2020, no pet.)(mem. op.)(citing *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 520 S.W.3d 145, 157 (Tex.App.—Austin 2017, pet. denied)). A trial court abuses its discretion by acting without reference to any guiding rules or principles. *Id.*

Pleading Amendment

We will not overturn a trial court's decision to allow or deny leave to file an amended pleading unless it constitutes a clear abuse of discretion.[4] *First State Bank of Mesquite v. Bellinger & Dewolf, LLP*, 342 S.W.3d 142, 146 (Tex.App.—El Paso 2011, no pet.). A trial court abuses its discretion in denying leave to amend unless: "(1) the party opposing the amendment presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment." *Id.* [Citations omitted].

Attorney's Fees

We review an attorney's fees award for abuse of discretion. *Elness Swenson Graham Architects*, 520 S.W.3d at 169 (citing *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004)).

Analysis

Appellant raises the following five issues on appeal:

[4] Under Texas Rule of Civil Procedure 63, a party may file amended pleadings without leave up to seven days before trial. TEX.R.CIV.P. 63. But this deadline does not apply if the trial court has entered a scheduling order setting a different deadline, as was the case here. *See id.*

1. The State did not meet its summary judgment burden to produce competent evidence of claims Appellant submitted to Medicaid.

2. There is a genuine issue of material fact whether Appellant "knowingly" engaged in conduct deemed unlawful under Section 36.002(8) on each occasion alleged.

3. There is a genuine issue of material fact whether Appellant failed to identify the license type and identification number of the service provider.

4. The civil penalties awarded against Appellant under the TMFPA are unconstitutionally excessive under state and federal constitutions.

5. The trial court's award of attorney's fees to Appellees was excessive.

1. Did the State produce competent evidence of Appellant's Medicaid claims?

Appellant argues that the State's expert witness, Michael Augusteijn, improperly analyzed "secondhand data" in conducting the data analysis of Appellant's Medicaid claims. He contends there is no indication in the summary judgment record Augusteijn ever reviewed the actual paper or electronic claims he submitted to Medicaid. Instead, Augusteijn reviewed data compiled by the Texas Medicaid and Healthcare Partnership ("TMHP"), a group of contractors charged with administering Texas Medicaid and other state health-care programs on HHSC's behalf. Appellant also argues the State filed its business-record authentication for this data untimely because it appended the records custodian's affidavit to its reply brief, not its motion for partial summary judgment. Accordingly, Appellant argues the TMHP data lacked authentication and was therefore hearsay. Appellant objected to Augusteijn's report and the data on which it was based on those grounds, but the trial court did not explicitly overrule his objections before granting the State's motion for partial summary judgment.

The State responds by explaining how TMHP processes claims. It first receives reimbursement claims from enrolled providers submitted on ADA claims forms or their electronic equivalents. TMHP then inputs the claims data into a database known as "Vision 21." This data

includes, among other things, the service claimed for reimbursement, the date the service was rendered, the amount reimbursed for each service, the TPI of the billing provider, and the TPI of the performing provider.

The State says TMHP provided it with Appellant's claims data for orthodontic services from January 1, 2000, through April 30, 2013. It explains that, in addition to reviewing the TMHP claims data, Augusteijn also reviewed All Smiles' business records, which include patient-treatment notes generated by All Smiles' providers and were important to Augusteijn's review to compare with TMHP claims data to see whether Appellant had accurately designated the performing provider on the claim forms.

The Texas Rules of Evidence authorize expert witnesses to testify about facts or data beyond their personal knowledge if they have "been made aware of" or "reviewed" them. TEX.R.EVID. 703. So long as the facts or data are of the type reasonably relied on by experts in that field in forming opinions on the subject, the facts or data need not be admissible in evidence. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007)(orig. proceeding)(citing TEX.R.EVID. 703). Therefore, in many cases, experts rely on inadmissible hearsay, privileged communications, and other information that a lay witness may not. *Id.*

Augusteijn's analysis of the TMHP data directly aligns with what Rule 703 permits. The State put forth Augusteijn to quantify TMFPA civil remedies as an expert witness. Augusteijn adequately established his expertise in the subject by testifying to his experience analyzing databases and calculating remedies in past litigation. His testimony explained the State provided Texas Medicaid claims data and All Smiles' patient records for his review, and his quantification of civil remedies included the calculation of payments to Appellant by Texas Medicaid, as well as the number of TMFPA violations and range of TMFPA civil penalties per violation. Reviewing

claims data is central to the process of forming an opinion whether an individual submitted falsified claims and quantifying civil damages for those violations. In other words, the facts and data Augusteijn relied on are of the type reasonably relied on by experts in the field in forming opinions on the subject. There is no indication from the record the trial court's decision not to strike Augusteijn's expert report because he reviewed TMHP data constituted an abuse of discretion.

In any event, the State's business-record authentication was timely filed and substantially complies with the requirements for a business-records affidavit. *See* TEX.R.EVID. 803(6), 902(10). The State appended the records custodian's affidavit to its reply brief in response to Appellant's authenticity and lack-of-foundation arguments in his summary judgment response. The State's reply cannot be construed as an amended summary judgment motion because it does not address new grounds for judgment. *See Durbin v. Culberson Cnty.*, 132 S.W.3d 650, 656 (Tex.App.—El Paso 2004, no pet.)(citing TEX.R.CIV.P. 166a(c)). The State's reply was just that—a reply to arguments made by Appellant in his response.[5] *See id.* While a non-movant may submit evidence of its response to a summary judgment motion only up to seven days before the hearing, this limit does not apply to a movant's reply. *Id.* (citing TEX.R.CIV.P. 166a(c)). Accordingly, the State's business-record authentication was timely filed.

Appellant's contention the data Augusteijn reviewed is "secondhand" simply because it was extracted from TMHP's Vision 21 database is unfounded. Appellant cites no authority requiring the State to use the actual submitted ADA claims forms or their electronic equivalents in proving a TMFPA claim against him. And, as the State points out, the TMHP data *is* Texas Medicaid claims data. The Vision 21 database exists for the purposes of receiving and processing

[5] The same can be said for Appellant's contention the trial court erred by not striking the supplemental keys to Augusteijn's data analysis spreadsheet submitted with the State's reply.

Texas Medicaid claims submitted and paid as authorized by the Texas Medicaid program. It makes good sense that the group charged with administering Texas Medicaid on HHSC's behalf would maintain records of its voluminous claims data in an electronic database, rather than rely on the provider's originally submitted claim forms. We overrule Appellant's evidentiary objections and hold the trial court did not abuse its discretion by allowing the State's expert witness to testify about the TMHP data. Issue One is overruled.

2. Is there is a genuine issue of material fact whether Appellant "knowingly" engaged in unlawful conduct under Section 36.002(8)?

Appellant argues the trial court erred in finding no genuine issue of material fact as to the TMFPA's requisite culpable mental state. Under Section 36.002(8), "[a] person commits an unlawful act if the person . . . makes a claim under the Medicaid program and *knowingly* fails 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 ANN. § 36.002(8)[Emphasis added]. Under the TMFPA, a person acts "knowingly" if he or she "has knowledge of the information;" "acts with conscious indifference to the truth or falsity of the information;" or "acts in reckless disregard of the truth or falsity of the information." *Id.* § 36.0011(a). A person may act "knowingly" even without proof he or she had the "specific intent to commit an unlawful act under Section 36.002[.]" *Id.* § 36.0011(b). Because the TMFPA does not define "conscious indifference" or "reckless disregard," we give each term its ordinary meaning. *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006)(citing TEX.GOV'T CODE ANN. § 312.002). The Texas Supreme Court has said these terms "require proof that a party knew the relevant facts but did not care about the result." *Id.* (citing cases).

Appellant contends evidence in the summary judgment record creates a genuine issue of material fact whether he acted knowingly on each occasion in which his TPI appeared as the

treating provider on a claim for a service he did render. He points specifically to his deposition testimony, which he characterizes as a direct denial of his actual knowledge of this practice:

> Q. Dr. Malouf, at any point was your TPI used to bill for services that you did not personally render?
>
> A. I've come to learn that, yes, that has occurred.
>
> Q. At the time you did not know?
>
> A. No, I did not.

Appellant argues this testimony alone creates a genuine issue of material fact as to whether he had actual knowledge of each claim involving the improper use of his TPI. However, Appellant raises two exceptions to this general proposition: (1) he knew he used his TPI on a claim when, he alleges, he supervised or trained the treating dentist; and (2) he knew he used his TPI on a claim when "glitches" in Medicaid's system changed or lost identification numbers assigned to All Smiles or its dentists, which required "a temporary workaround solution."

Appellant also maintains the record does not support summary judgment based on conscious indifference or reckless disregard. He claims evidence shows his understanding of Medicaid billing requirements "evolved" over time based on varying directions he received from Medicaid. He also contends evidence shows his efforts to gain clarity about Medicaid requirements. Collectively, he argues the evidence is inconsistent with a Medicaid provider acting with conscious indifference or reckless disregard, and he says there is no indication he perceived any risk or harm in substituting his TPI for services he did not render because the other All Smiles providers were ultimately credentialed by Medicaid.

As a threshold matter, Appellant argues summary judgment is generally inappropriate because conscious indifference or reckless disregard require inquiry into a defendant's state of

mind and involve issues of his intent. However, Section 36.0011(b) specifically states the "knowingly" showing may be met without proof the person had the "specific intent to commit an unlawful act" under the TMFPA. Accordingly, the TMFPA has no such categorical preclusion from resolution by summary judgment.

The summary judgment record indicates no genuine issue of material fact that Appellant acted with conscious indifference or reckless disregard when he indicated on Texas Medicaid claims he was the treating provider for services he did not render. It is uncontested Appellant enrolled as a Texas Medicaid provider on multiple occasions and signed the requisite agreements which bound him to familiarize himself with and follow all requirements in the Manual. Indeed, Appellant states that as All Smiles' owner, he "assumed responsibility for ensuring the practice followed Medicaid's rules and practices." The Manual explicitly stated: "A dentist must not use another dentist's provider identifier." Appellant agreed he was bound by that rule. Even if Appellant's understanding of Texas Medicaid billing requirements did "evolve" over the relevant timeframe, this fundamental prohibition did not.

Further, additional evidence in the summary judgment record indicates Appellant knew his TPI was used on Texas Medicaid claims for services he did not render. For example, Appellant testified that, as owner of All Smiles, he was responsible for all its policies and expected All Smiles employees to refrain from deviating from those policies without his permission. Multiple All Smiles employees indicated in deposition testimony they understood Texas Medicaid required claims data to reflect the TPI of the provider who rendered services but would have used a different provider's TPI at Appellant's instruction. Several emails among All Smiles employees, including Appellant, reflect instances in which Appellant's TPI was used for services he did not render, and other emails explain Texas Medicaid billing requirements and proper TPI use.

Particularly considering this undisputed record evidence, Appellant's deposition testimony generally denying actual knowledge of the fact his TPI was used on claims for services he did not render may be disregarded as a matter of law as conclusory. *See Gunville v. Gonzales*, 508 S.W.3d 547, 560 (Tex.App.—El Paso 2016, no pet.)("A statement is conclusory if it fails to provide underlying facts supporting the conclusion."). Because these statements are self-serving and based on his belief, without support by facts, they are not easily controvertible. *See Doe I v. Ripley Entm't, Inc.*, No. 05-18-00470-CV, 2020 WL 57339, at *3 (Tex.App.—Dallas Jan. 6, 2020, no pet.)(concluding the same based on self-serving affidavit testimony). "Self-serving, speculative and conclusory statements of fact or law are insufficient to raise an issue of fact." *Los Cucos Mexican Cafe, Inc. v. Sanchez*, No. 13-05-578-CV, 2007 WL 1288820, at *2 (Tex.App.—Corpus Christi–Edinburg May 3, 2007, no pet.)(citing cases); *see also Cross v. Littlefield*, No. 11-14-00224-CV, 2016 WL 6998981, at *3 (Tex.App.—Eastland Nov. 30, 2016, no pet.)(plaintiff's allegations of lack of knowledge about purportedly dangerous conditions in premises-liability case were "self-serving, speculative and conclusory" and as such not competent summary judgment evidence); *Bridges v. Citibank (S. Dakota) N.A.*, No. 2-06-081-CV, 2006 WL 3751404, at *3 (Tex.App.—Fort Worth Dec. 21, 2006, no pet.)(defendant's testimony she "d[id] not know" the terms and conditions of agreement without facts supporting that statement was insufficient to create a fact issue and properly disregarded at summary judgment stage); *1994 Land Fund II v. Ramur, Inc.*, No. 05-98-00074-CV, 2001 WL 92696, at *5 (Tex.App.—Dallas Feb. 5, 2001, no pet.)(affidavit submitted on defendant's behalf stating he was not "aware of" a fraudulent transfer without factual support was conclusory and did not support summary judgment). Appellant's testimony therefore provides no probative value to our analysis and cannot raise a fact issue on

scienter. *See Doe I*, 2020 WL 57339, at *3 ("[C]onclusory statements in depositions based on belief do not constitute probative summary judgment evidence." [Citation omitted]).

The exceptions in which Appellant claims he did know his TPI was used on claims for which he was not the treating provider do not change this analysis. First, even if we assume Texas Medicaid permitted supervising dentists to list their TPI as treating provider on claims, there is no evidence Appellant did in fact supervise the performing providers in connection with the claims at issue. Indeed, deposition testimony of several All Smiles providers who rendered services represented to Texas Medicaid as having been provided by Appellant reflect scant personal interaction with Appellant and no training, observation, or supervision by Appellant during patient treatments.

Second, Appellant's contention he used his TPI for services other All Smiles providers rendered as a "workaround" to a Texas Medicaid "glitch" also finds limited support in the record, with only his deposition testimony stating that for a period in 2008, there was an instruction to bill under his TPI. However, even assuming these two exceptions reflect appropriate adjustments to standard Texas Medicaid billing requirements and practices—and there is no indication they do—the evidence does not raise a fact issue that they in fact occurred in this case.

Collectively, the summary judgment record does not raise a genuine issue of material fact as to whether Appellant acted with conscious indifference or reckless disregard. The evidence reflects he knew the relevant facts—(1) Texas Medicaid prohibited enrolled providers from submitting claims using another provider's TPI; and (2) he submitted claims with his TPI as treating provider for services he did not render—but did not care about the result. Because we find there is no genuine issue of material fact whether Appellant acted with conscious indifference or reckless disregard, Section 36.002(8)'s scienter requirement is satisfied. We therefore need not

consider whether Appellant acted with actual knowledge and overrule Appellant's arguments addressing that culpable mental state. Issue two is overruled.

3. Is there is a genuine issue of material fact whether Appellant failed to identify the license type and identification number of the treating provider?

a. License type

Appellant argues there is a genuine issue of material fact whether he failed to identify the performing provider's license type. He argues because Section 36.002(8)'s language is unambiguous, we must strictly construe it: "A person commits an unlawful act if the person . . . makes a claim under the Medicaid program and knowingly fails 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 ANN. § 36.002(8). He contends the State did not prove he knowingly failed to indicate both the type of license *and* the identification number of the treating provider. In other words, he argues even if we accept the State's assertion that he failed to indicate the identification number of the performing provider, he did not also fail to identify the license type because he and the other All Smiles providers all shared a common license type—*i.e.*, they are all dentists.

The State responds it conclusively established Appellant's claims provided *no* information about the performing provider; accordingly, it follows that Appellant did not indicate the license type of the actual performing provider because he falsely claimed he treated the patient. We agree.

Appellant's argument is a red herring. The claims at issue contain no information about the provider who rendered the services reflected because Appellant falsely represented he provided the service. That is reflected in summary judgment evidence. The fact that Appellant and the performing provider are both dentists and therefore share the same license is immaterial.

We hold there is no genuine issue of material fact whether Appellant failed to properly indicate the treating provider's license type.

b. Identification number

Appellant also argues there is a genuine issue of material fact whether he failed to indicate the performing provider's identification number. He contends the State improperly assumes "identification number" must refer to an individual provider's TPI even though the TMFPA defines "provider" more broadly to include "a management company that manages, operates or controls another provider," "an employee of a provider," and "a managed care organization." *Id.* § 36.001(9). He also claims if the Legislature had intended to impose such severe liability on anyone who used an identification number other than that of the performing provider, it would have used the defined term "health care practitioner," which encompasses a narrower term than "provider," pointing to other statutes which permit other types of healthcare providers more flexibility in Texas Medicaid claims. *See* 15 TEX.ADMIN.CODE § 354.1061(1)(2013)(Tex. Health and Hum. Servs. Comm'n, Add'l Claim Info. Requirements)(stating radiology and pathology groups practices do not have to provide "the appropriate identification number" of the radiologist or pathologist who provided a specific service on claims for physician services made under the Texas Medicaid program).

What Texas Medicaid permits for reimbursement claims involving other healthcare services is immaterial because the policy for orthodontic services billing is clear: "A dentist must not use another dentist's provider identifier." Further, Appellant's argument as to whether he failed to identify the performing provider's license type swallows his argument here—we must follow the plain language of Section 36.002(8), which states a claim must include "the identification number of the licensed health care provider who actually provided the service[.]"

TEX.HUM.RES.CODE ANN. § 36.002(8). The ADA claim form requires claimants to identify both the treating dentist and the billing dentist, and further specifies the billing dentist's provider identifier is "*not* a provider identifier for a provider employed within a group."

Given the clarity in the statute, the Manual, and ADA claim form that each claim must include the "identification number of the licensed health care provider who actually provided the service," we hold there is no genuine issue of material fact whether Appellant failed to properly indicate the performing provider's TPI. Issue Three is overruled.

4. Are the TMFPA penalties unconstitutionally excessive?

Appellant argues the civil penalties under the TMFPA are unconstitutionally excessive under state and federal constitutions as applied to him. But his live pleading does not assert unconstitutionality as an affirmative defense. *See In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000) ("In the absence of an appropriate pleading raising the issue of unconstitutionality, the trial court is generally without authority to reach the issue."). Thus, before we can reach his unconstitutionality argument, we first must decide whether the trial court abused its discretion in denying him leave to amend pleadings to add that affirmative defense. If not, Appellant waived the argument. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993)("[A] claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal.").

Generally, a party may amend its pleadings any time prior to seven days before trial. TEX.R.CIV.P. 63. That deadline may be altered by the trial court's entry of a scheduling order. TEX.R.CIV.P. 166. Even after the pleadings deadline in a scheduling order has passed, a party may seek leave of court to amend its pleadings. TEX.R.CIV.P. 63. A trial court may permit amended pleadings and "shall do so freely" if amendment would preserve the merits of the action and the objecting party fails to demonstrate amendment would cause prejudice. TEX.R.CIV.P. 66. Indeed,

a trial court may not refuse amendment unless: "(1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face." *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994), *cert. denied*, 512 U.S. 1236 (1994); *see also First State Bank of Mesquite*, 342 S.W.3d at 146. The party opposing amendment bears the burden to show prejudice or surprise. *First State Bank of Mesquite*, 342 S.W.3d at 146.

However, the trial court may conclude amendment is on its face calculated to surprise or reshape the cause of action, prejudicing the opposing party and unnecessarily delaying trial. *Id.* (citing cases). An amendment that is prejudicial on its face is characterized by three things: (1) it asserts a new substantive matter that would reshape the nature of the trial itself; (2) the opposing party could not have anticipated the new matter given the development of the case up to the time the amendment was requested; and (3) the amendment would detrimentally affect the opposing party's presentation of its case. *Bagwell v. Ridge at Alta Vista Invs. I, LLC*, 440 S.W.3d 287, 293 (Tex.App.—Dallas 2014, pet. denied)[Citation omitted]. If the trial court concludes amendment is prejudicial on its face, the opposing party's objection is enough to show surprise. *First State Bank of Mesquite*, 342 S.W.3d at 146.

Here, the constitutionality of civil penalties under the TMFPA would have injected a new substantive matter into the case. The State objected to the amendment. Because Appellant proposed amendment after the pleading deadlines expired, after discovery deadlines expired, after his current lawyers had not sought to raise it when they moved to amend the agreed scheduling order's expert-witness deadlines, after the State filed its motion for partial summary judgment, and after nearly eight years of litigation, the trial court could have found Appellant's proposed late amendment was calculated to surprise or reshape the cause of action, prejudicing the State and

unnecessarily delaying trial. As such, the State's objection alone was enough to show prejudice or surprise and provide grounds for denying the proposed amendment.

Accordingly, we hold the trial court acted within its discretion in denying Appellant leave to amend his pleadings. Because we find Appellant waived the issue of as-applied unconstitutionality by not timely raising it as an affirmative defense, we do not reach his arguments on the merits. Issue Four is overruled.

5. Are the assessed attorney's fees excessive?

Appellant challenges two issues related to the trial court's award of attorney's fees.[6] First, he contends each Appellee's fee award is excessive because the "majority of fees" were incurred before the State raised its Section 36.002(8) claim. Second, as to the State in particular, he contends the trial court erred in awarding the State more in attorney's fees than it actually incurred by using a lodestar calculation based on local private-sector market rates.

"In Texas, as in the federal courts, each party generally must pay its own way in attorney's fees." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019)[Citations omitted]. However, attorney's fees are recoverable if they are authorized by contract or statute. *Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013). If a statute authorizes attorney's fees, a prevailing party may recover fees from the opposing party so long as the party seeking the award proves the "reasonableness and necessity" of the fees. *Rohrmoos*, 578 S.W.3d at 484. "Reasonableness and necessity" are fact questions to be determined by the fact finder and act as a limit on the amount of fees the prevailing party can shift to the non-prevailing party. *Id.* at 489 (citing cases). This showing ensures the award compensates the prevailing party for its losses

[6] Appellant does not contest the trial court's award of expenses or costs to any Appellee.

resulting from the litigation process. *Id.* at 487. Attorney's fees are compensatory awards, so fee-shifting is not a mechanism to greatly improve an attorney's economic situation. *Id.* (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)).

The party seeking attorney's fees must also show the fees were incurred on a claim that allows such recovery and segregate fees incurred among different claims. *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997)[Citation omitted]. However, "when the claims are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable, the party suing for attorney's fees may recover the entire amount covering all claims." *Id.* [Internal quotations omitted]. Accordingly, if the issues are "integrally related" to the claims which permit recovery of attorney's fees, full recovery of attorney's fees is permitted. *Id.*

In a TMFPA action, Section 36.007 states "[t]he attorney general may recover fees, expenses, and costs reasonably incurred in obtaining injunctive relief or civil remedies or in conducting investigations under this chapter, including court costs, reasonable attorney's fees, witness fees, and deposition fees." TEX.HUM.RES.CODE ANN. § 36.007. Section 36.110 entitles private plaintiffs to "receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred," which the trial court shall determine "only after the defendant has been found liable in this action[.]" *Id.* § 36.110(c).

The exception to the segregation requirement applies here. The claims of all plaintiffs throughout the inception of this case depended on the same set of facts or circumstances—whether Appellant represented to Texas Medicaid he performed services he did not actually render in violation of the TMFPA. *See Anderson Mill Mun. Util. Dist. v. Robbins*, 584 S.W.3d 463, 475 (Tex.App.—Austin 2005, no pet.)(discussing exception to segregation requirement in Texas Water

Code context). The trial court did not abuse its discretion by holding the State and both Relator-Appellees are entitled to recover attorney's fees from the start of their respective work on the case.

However, we disagree with the trial court's award to the State of attorney's fees calculated on a local private-sector market rate. In *Rohrmoos*, the Texas Supreme Court counseled when fee-shifting enabling statutes have an explicit reference to attorney's fees that are "incurred," the word "incurred" acts to limit the amount of fees the court may award, and a fee is "incurred" when a party becomes liable for it. 578 S.W.3d at 489 (citing *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010)). That differs from enabling statutes which do not contain an explicit requirement that fees be "incurred;" in those cases, courts evaluate legally sufficient evidence supporting a "reasonable and necessary" attorney's fee award. *Id.* at 489–90. An amount incurred is not conclusive evidence demonstrating reasonableness or necessity, and the party seeking the award still bears the burden to establish reasonableness and necessity. *Id.* at 488.

The TMPFA provides "[t]he attorney general may recover fees, expenses, and costs *reasonably incurred* in obtaining . . . civil remedies or in conducting investigations under this chapter, including court costs, reasonable attorney's fees, witness fees, and deposition fees." TEX.HUM.RES.CODE ANN. § 36.007 [Emphasis added]. Accordingly, the State's attorney's fee award should be limited to the amount it reasonably incurred or, in other words, the amount for which it became liable. That means a lodestar calculation based on local private-sector market rates is inappropriate in this case because the State was not liable for those rates. Instead, its attorney's fee award must be limited to the court costs, attorney's fees, witness fees, and deposition fees it actually paid, so long as it establishes that amount is reasonable and necessary.

The State's attorney's fees expert, Thomas Albright, prepared economic data reflecting the attorney's fees incurred by the State in this matter, totaling $1,350,829 through April 2020. The

record contains detailed billing records and Albright's thorough analysis in his original and supplemental expert reports. However, the "determination of reasonable attorney's fees is a question for the trier of fact." *McAnelly v. Brady Med. Clinic, P.A.*, No. 03-04-00095-CV, 2004 WL 2556634, at *4 (Tex.App.—Austin Nov. 12, 2004, no pet.)(mem. op.)(citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991)), *holding modified on other grounds by Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006)). The trial court determined the State's market-rate fee award was reasonable and necessary, but it has not considered whether the incurred fees are. Accordingly, we remand to the trial court for reexamination of the State's incurred attorney's fees to ensure the State has established reasonableness and necessity of the award requested. Issue Five is sustained.

CONCLUSION

For the foregoing reasons, we affirm the trial court's grant of the State's motion for partial summary judgment. We remand to the trial court for reexamination of the State's attorney's fees award consistent with this opinion.

October 14, 2022 YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.