

**SCOPE OF DISCOVERY IN TEXAS
UPDATE 2009**

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CHAPTER 13

SCOPE***Allstate Ins. Co. v. Plambeck***

Slip Copy, 2008 WL 5411435 (N.D.Tex. Dec.29, 2008)

Requirements and burdens with regard to demonstrating relevancy.

This is a federal court opinion dealing with the relevancy of discovery sought from a non-party. It is informative because the general rule regarding relevancy in federal court is similar to the standard in Texas. The opinion makes clear that it is the burden of the party seeking discovery to demonstrate the relevancy of the request. *See E.E.O.C. v. Renaissance III Organization*, No. 3-05-CV-1063-B, 2006 WL 832504 at *1 (N.D.Tex. Mar. 30, 2006) (Kaplan, J.), *citing Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 650 (N.D.Ill.1994) (“To place the burden of proving that the evidence sought is not reasonably calculated to lead to the discovery of admissible evidence on the opponent of discovery is to ask that party to prove a negative. This is an unfair burden, as it would require a party to refute all possible alternative uses of the evidence, possibly including some never imagined by the proponent.”). Once plaintiffs establish that the documents requested are within the scope of permissible discovery, the burden shifts to Chateau to show why discovery should not be permitted. *See Spiegelberg Manufacturing, Inc. v. Hancock*, No. 3-07-CV-1314-G, 2007 WL 4258246 at *1 (N.D.Tex. Dec. 3, 2007) (Kaplan, J.) (citing cases).

What is important in this decision that informs our practice is that the non-party agreed to produce discovery relevant and limited to plaintiffs’ pleading. The Court held that to allow discovery beyond this would amount to a fishing expedition.

In Re BP Products North America Inc.

263 S.W.3d 106 (Tex.App.-Houston [1st Dist.],2006)

Reserve calculation beyond scope of discovery. No waiver of attorney client privilege and core work product by disclosing to the SEC the amount but not the calculations and methodology.

This opinion arose out of the BP Plant Explosion Litigation. Days after the explosion, BP announced that it had reserved \$700 million to pay claims arising from the explosion. The Plaintiff Steering Committee sought and obtained a court order compelling Defendant to produce documents used by BP to compute the reserve figure reported to the Securities and Exchange Commission (“SEC”). BP asserted attorney-client privilege as to the calculations claiming

announcement of the amount reserved did not waive the privilege as to the documents underlying the calculation and the methodology used to obtain the reserve total (these items were not disclosed to the SEC). In support of its response to the motion to compel production, BP produced the affidavit of its in-house attorney who prepared the reserve number. In the affidavit he stated that, while the number was not confidential, the materials that he used to reach the calculation and the methodology he used were confidential. Plaintiffs contended before the trial court and on appeal that the affidavit was conclusory and therefore constituted no evidence. The trial court granted the motion to compel finding essentially that there had been a knowing waiver of the attorney-client privilege by publishing the reserve amount. The appellate court found that the affidavit was evidence based and not conclusory.

In addition, Noble provides factual bases for BP’s assertion that the documents in question constituted work product, in the form of “material prepared or mental impressions developed in anticipation of litigation or for trial” by or for a party, or a party’s representatives, and “a communication made in anticipation of litigation or for trial” between a party and the party’s representatives or among the party’s representatives. *See* TEX.R. CIV. P. 192.5.

Given the adequacy of the affidavit and the apparent fact that it was difficult to identify the documents without waiving the privilege (Tex. R. Civ. P. 193.6 requirements do not apply to documents for which attorney-client privilege is asserted), the appellate court found that the trial judge had abused her discretion by not viewing the documents *in camera*.

The other issue in this decision was whether BP had waived its privilege by disclosing information derived from privileged matters in conformance with federal regulations. The Court essentially dodged this issue. While finding that federal cases had generally held that a party complying with federal regulatory agencies waived the privilege (*See United States v. El Paso, Co.*, 682 F.2d 530, 538-40 (5th Cir.1982), the appellate court was able to factually distinguish each of the cases which leaves open the question in Texas about whether a party’s disclosure of confidential matters (i.e. protected attorney client communications and core work product) to a federal agency constitutes waiver of the entire privilege.

In re Brewer Leasing, Inc.

255 S.W.3d 708 (Tex.App.-Houston [1st Dist.],2008).

Scope – financial records and corporate tax returns with regard to net worth.

This opinion deals with the issue of scope of discovery relevant to net worth when gross negligence is alleged. See *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988). More specifically, the Plaintiff sought financial records and corporate income tax returns. While a trial court may order documents produced relevant to net worth when gross negligence is alleged, a trial court abuses its discretion by ordering the production of financial records “that would not necessarily evidence” net worth. *In re Garth*, 214 S.W.3d 190, 194 (Tex.App.-Beaumont 2007, orig. proceeding).

Defendants in this instance produced an unaudited, uncertified balance. The appellate court noted that *Garth* does not provide guidance with regard to the nature of the balance sheet required to foreclose discovery regarding net worth, but noted that in *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558, 559 (Tex.1992) Sears disclosed its net worth “by providing its audited and certified annual reports” and by including an affidavit by the Manager of Federal Income Tax Returns for Sears that stated that the annual reports accurately reflected Sears's net worth.” In view of the uncertified, unaudited balance sheet, the appellate court concluded that the court’s order compelling production of additional financial records was not an abuse of discretion.

The court next turned to the issue of whether the corporate tax returns were relevant and discoverable on the issue of net worth. While Plaintiffs argued that there were schedules in a corporate tax return that might be relevant on the issue of net worth and that corporate tax returns did not have the same protection as personal income tax returns (See *Hall v. Lawlis*, 907 S.W.2d 493, 494-95 (Tex.1995). The appellate court disagreed and held that corporate income tax returns should be given the same consideration as personal tax returns (See *Sears, Roebuck & Co. v. Ramirez*, *supra*) and that “[t]ax returns may be discovered only when the “pursuit of justice between litigants outweighs protection of their privacy.” *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex.1962). The court found that Plaintiffs had not made such a showing in this instance and that the court had abused its discretion in ordering the production of corporate income tax returns. However, the following caveat is noteworthy:

We are mindful that our opinion is based solely on the record before us and

we express no opinion regarding whether, after additional discovery, the tax returns could be shown to be material. See *Kern v. Gleason*, 840 S.W.2d 730, 735-37 (Tex.App.-Amarillo 1992, no writ) (noting that if alternate source of information proves to be incomplete, renewed request for income tax returns could be made).

In re House of Yahweh

266 S.W. 3d668 (Tex.App.-Eastland,2008)

Order for financial records regarding net worth overbroad.

This case also dealt with the issue of discovery of financial data and tax returns relevant to a claim of gross negligence. The trial court ordered production of all the requested information. The issues in this case were slightly different from those in *Brewer*, *supra*. In this case, Defendant objected to the production of tithing records and also argued that a prima facie showing of gross negligence was required before a Defendant has to disclose net worth information.

The court first disposed of the argument that a prima facie showing of gross negligence was a pre-requisite to allowing discovery of net worth. A party seeking discovery of net worth information is not required to make a prima facie showing of a right to recover exemplary damages before discovery is permitted. *Lunsford*, 746 S.W.2d at 473.

Citing *Brewer*, *supra*, the appellate court held that the trial court did not abuse its discretion in allowing broad discovery of net worth, but that the court likely abused its discretion in not narrowing the discovery to the issue of net worth. In this regard, it held that the trial court erred in failing to limit discovery to Defendants' *current* balance sheet because earlier balance sheets would not be relevant to Defendants' current net worth.

The appellate court also held that, to the extent the court’s order required the production of documents not relevant to net worth, the court had exceeded its discretion. In this regard, the following types of documents were found not to be relevant to net worth: property lists (Request No. 20), bank statements (Request No. 21), stock ownership statements (Request No. 22), tithing records (Request No. 23), donation records (Request No. 24), income tax returns (Request No. 25), asset lists (Request No. 26), income and budget forecasts (Request No. 29), evaluations of financial performance (Request No. 30), and correspondence relating to House of Yahweh's profitability (Request No. 31). The appellate court

observed that there was no evidence in the record linking these documents to net worth. Therefore, the court order compelling production of these categories of documents was an abuse of discretion.

Once again, as in *Brewer*, income tax returns were not found to have relevancy to the Defendants net worth in this instance.

In re Mallinckrodt, Inc.

262 S.W.3d 469 (Tex.App.-Beaumont, 2008).

Scope of decades overbroad, burden of proof regarding relevance

The discovery dispute arises out of a benzene case that allegedly resulted in a worker developing non-Hodgkins lymphoma that caused his death. Plaintiffs notice Defendant's corporate representatives and, in conjunction with the depositions, requested the production of a number of documents regarding Defendants use of benzene from 1945-1985 (forty years). The trial court overruled Mallinckrodt's motion to quash.

The appellate court cites *In re Dana* for the proposition that before a court can order production based on discovery requests that cover multiple decades, the discovery proponent must make a threshold evidentiary showing to demonstrate the relevance of the requested documents. See *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex.2004) (per curiam). The trial court failed to define the universe of relevancy and hence abused its discretion. "In this case, Mallinckrodt's motion to quash required the trial court to address a preliminary scope-of-discovery issue and define the universe of Mallinckrodt products for which Strother's evidence demonstrated an exposure." The court held that the trial court abused its discretion by not tailoring the requests to the products to which Plaintiff alleged to have been exposed and by not tailoring the requests to dates of alleged exposure.

In re Manion

Not Reported in S.W.3d, 2008 WL 4180294 (Tex.App.-Amarillo,2008)

Financial records relevant to claims pled

This case involved a breach of syndication agreement relating to the care and breeding of a stallion. Various claims and counterclaims of breach of contract were alleged, including a claim that the syndication really was not a legitimate business entity. Defendant served written discovery requests for numerous financial documents relating to Plaintiff's purchase and sale of horses, and also served a deposition with subpoena duces tecum for documents

from Plaintiff's bank. Plaintiff moved to quash the notices and Defendant filed a motion to compel claiming the documents were relevant to its allegation that Plaintiff had breached its fiduciary duty. Plaintiff claimed the records requests were unduly burdensome and that the records were confidential. However, Plaintiff produced no evidence to support his claims. The Amarillo Court of Appeals pointed out that the general rule in financial records production cases is that the party attempting to prevent or restrict discovery has the burden of pleading and proving the basis for the desired limitation. *In re Patel*, 218 S.W.3d 911, 915 (Tex.App.-Corpus Christi 2007, orig. proceeding). This court previously had ruled that there is no constitutionally protected privacy right in one's personal financial records. *Martin v. Darnell*, 960 S.W.2d 838, 844-45 (Tex.App.-Amarillo 1997, no writ). The records in this instance were found to be relevant to the allegations alleged in Defendant's petition. Given the absence of evidence supporting a claim of privilege and the demonstration of relevancy, the trial court was found to have not abused its discretion in ordering the production of the financial records.

In re Memorial Hermann Healthcare System

--- S.W.3d ---, 2008 WL 4542720 (Tex.App.-Hous. 14 Dist.],2008)

Discovery request not overbroad

This case arises out of a dispute between two rival hospitals. Stealth Limited filed an anit-trust suit against Memorial Hermann Healthcare claiming that it caused the demise of a hospital owned and operated by Stealth. The Texas Attorney General, independent of that litigation, issued a civil investigative demand (CID) on Memorial Hermann Healthcare. In the instant lawsuit, Stealth requested that Memorial Hermann produce copies of all materials previously disclosed to the attorney general in response to the CID. Memorial Hermann took the position that the requested materials were privileged from discovery in private antitrust litigation and that Stealth's requests were overly broad. The trial court ordered production and Memorial Hermann filed a petition for writ of mandamus.

The appellate court held that "any privilege created by section 15.10(i) of the Texas Free Enterprise and Antitrust Act does not extend to CID materials held by the defendant in private antitrust litigation." It also found the requests were not "facially" overbroad.

Essentially, Memorial Hermann claimed that when it turned over approximately 87,000 pages of documents to the State Attorney General in connection with the Attorney General's CID, it created a blanket

privilege with regard to all such documents in a private anti-trust action against Memorial Hermann. The court found that the statute clearly did not contemplate such a privilege and that to engraft such a privilege would be against good public policy as it would hamstring any private litigant in obtaining documents relevant to its cause of action. The Court goes on to construe the Texas statute in harmony with the sister federal statute by finding that federal courts have not afforded private defendants the privilege that Memorial Hermann sought in this case.

The next complaint the Court addressed was whether Plaintiffs' request was improperly overbroad. Memorial Hermann contended that, because the attorney general is authorized to conduct a "fishing expedition" through a civil investigative demand, any discovery request that echoes a CID therefore must be patently overbroad. The Court disagreed. The peculiar thing about Memorial Hermann's position is that the statute limits what the Attorney General may request to only materials that would be discoverable under the Texas Rules of Civil Procedure. A demand may require the production of documents "only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery." Tex. Bus. & Comm.Code Ann. § 15.10. The Court points out that Memorial Hermann never demonstrated that the discovery being sought was not relevant to Stealth's cause of action. There was no demonstration that the discovery request would capture irrelevant documents requiring that the discovery request needed to be tailored. "When a party's attempted reach exceeds its legal grasp, we routinely limit the reach; we do not amputate the hand." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 191-92 (Tex.1999) (orig.proceeding) (citations omitted) (Hecht, J., concurring in part and dissenting in part).

In re Mitsubishi Heavy Industries America, Inc.

--- S.W.3d ---, 2008 WL 4182825 (Tex.App.-Dallas, 2008)

Court discretion to order signed medical authorization

In this original proceeding, Mitsubishi complained that the trial court abused its discretion in ordering it to sign an authorization permitting the release of proprietary documents in the files and databases of the Federal Aviation Administration, or within the FAA's custody or control, pertaining to Mitsubishi MU-2 aircraft.

The Court found that the trial court could order the parties to sign authorizations and that it was in the discretion of the trial court to harmonize the competing

interests and fashion an authorization that protected any asserted privileges. See *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988); *Martinez v. Rutledge*, 592 S.W.2d 398, 400 (Tex.Civ.App.-Dallas 1979, writ ref'd n.r.e.) The parties apparently had in place a protective order that prevented dissemination of materials marked confidential. This protective order, however, would not provide much protection in obtaining documents from the FAA. The Court inquired of Mitsubishi's attorney whether the order was inadequate and should be modified. The appellate court notes that there is no evidence in the record that Mitsubishi's attorney ever offered any modification. Accordingly, no abuse of discretion was found.

In re Pennington

Not Reported in S.W.3d, 2008 WL 2780660 (Tex.App.-Fort Worth,2008)

Blanket authorization abuse of discretion when no mental condition pled

This case involved a motor vehicle collision resulting in personal injuries. The trial court issued an order requiring the Plaintiff to sign a blanket medical release that encompassed any records relating to her mental health history. Of course, that does not tell the full story. In this instance, not only did the Plaintiff refuse to sign a blanket medical authorization, but she also refused to provide the names of her mental health care providers and asserted that this information was privileged. Plaintiff, however, did provide the names of her healthcare providers for the 10 years prior to the collision and she provided the actual records of all of her medical care providers relating to the injuries sustained in the collision. These records revealed that Plaintiff was taking antidepressant and anti-anxiety medication at the time of the accident.

Naturally, upon learning the above information, Defendants amended their answer to claim that Plaintiff's injuries pre-existed the collision. They also filed a motion to compel ostensibly claiming that the identity of the mental health professionals was relevant to their defense that Plaintiff's claims of emotional/psychological injury were pre-existing at the time of the collision.

Plaintiff argued that the applicable rules allowed her to choose whether to produce an authorization or the records:

Pennington responded to the motion, claiming that she was not required to sign the medical release because she had tendered all the medical records related to her injuries in lieu of signing a release under rule 194.2(j) of the rules of civil

procedure. TEX.R. CIV. P. 194.2(j) (providing that in suit alleging physical or mental injury and damages for same, opponent may request “all medical records and bills that are reasonably related to the injuries or damages asserted or, *in lieu thereof*, an authorization permitting the disclosure of such medical records and bills” (emphasis added)); *In re Shipmon*, 68 S.W.3d 815, 820 (Tex.App.-Amarillo 2001, orig. proceeding [mand. denied]) (interpreting rule 194.2(j) as authorizing party to obtain discovery of medical records through request for disclosure *or* by obtaining records through obtaining opposing party's authorization for disclosure).

Defendants, not being content with merely alleging “pre-existing condition,” filed a second amended answer, which is reprinted because of its artfulness:

All injuries, damages and/or liabilities complained of by [Pennington] herein are the result, in whole or in part, of pre-existing mental, emotional and/or physical conditions and disabilities, and are not the result of any acts or omissions on the part of [McBride and Zachry]. Such conditions and disabilities specifically include but are in [no] way limited to [Pennington's] ... depression, [and] anxiety ... and/or resulting from each and every one of the foregoing. Such conditions and disabilities also include but again are in no way limited to any and all ... emotional and/or mental consequences of [Pennington's] 1998 low back injury, [Pennington's] 1999 motor vehicle collision, [Pennington's] numerous surgical treatments, and/or [Pennington's] marital, criminal and employment history over the ten years preceding the incident in question, as well as any and all conditions or disabilities treated or in any way caused by [Pennington's] use of Lithium, Xanax, Wellbutrin, Trazadone....

A key case in this analysis is *R.K. v. Ramirez*, 887 S.W.2d 836, 843 (Tex.1994).

As a general rule, a mental condition will be a ‘part’ of a claim or defense if the pleadings indicate that the jury must

make a factual determination concerning the condition itself. In other words, information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense.

Ramirez, 887 S.W.2d at 843; *In re Toyota Motor Corp.*, 191 S.W.3d 498, 502 (Tex.App.-Waco 2006, orig. proceeding [mand. denied])

“[O]nly if the patient's condition itself is a fact that carries legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party” will discovery be allowed. *Ramirez*, 887 S.W.2d at 843.

Another important case in the analysis is *In re Nance*, 143 S.W.3d 506, 511-12 (Tex.App.-Austin 2004, orig. proceeding).

Defensive claims that a plaintiff's damages and injuries were caused by pre-existing conditions do not involve the resolution of ultimate issues of fact that have legal significance standing alone. *In re Nance*, 143 S.W.3d at 512. Instead, these types of defensive assertions are in the nature of inferential rebuttal claims and, thus, are not sufficient to put a plaintiff's mental condition at issue so as to make medical records about that condition discoverable. *Id.* at 512-13;

Based upon the holding in *Nance* case, the appellate court found that the order for a blanket authorization for all the Plaintiff's mental health records going back to 1996 was an abuse of discretion:

In re Soto

270 S.W.3d732 (Tex. App. Amarillo- 2008)
Medical authorizations

This opinion centers on the interpretation of Tex. R. Civ. P. 194.2(j). The case involved a motor vehicle collision. Most of the Plaintiffs alleged personal injuries. Defendant served a request for disclosure. Plaintiffs responded that they would make available to Defendant all medical records obtained and filed with the court. Defendant filed a motion to compel Plaintiffs each to sign a medical authorization for all medical records from birth. The Court modified

the request to require that each Plaintiff sign a medical authorization for medical records from and after 2004.

The Amarillo court deferred to its earlier opinion in *In re Shipmon*, 68 S.W.3d 815 (Tex.App.-Amarillo 2001, orig. proceeding). In that case, the court held that under the “new rules [of civil procedure] a party may obtain discovery of medical records of another party or obtain an authorization from another party by request for disclosure.” The Amarillo court interpreted this rule to allow the requesting, not the responding party, to choose whether it wished to accept production of records or compel production of an authorization so it could obtain the records itself.

The court goes on to point out that Plaintiffs raised neither an “objection” or a “privilege” to the request for disclosure or the request for an authorization. This is a curious observation because Tex. R. Civ. P. 194.5 states specifically that “no objection or assertion of work product is permitted to a request under this rule.” Arguably, particularly under this opinion, a party may and should raise an objection to a request for a medical authorization if the scope of the authorization is outside the scope of permissible discovery (i.e. a fishing expedition) and if the requested authorization invades privileged matters (see, *Mutter v. Wood* 744 S.W.2d 600 (Tex. 1988) the responding party should assert a privilege under Tex. R. Civ. P. 193 and file a motion for protection.

In re Watson

259 S.W.3d 390 (Tex.App.-Eastland,2008).

Trial court conditional limitation on scope of discovery

The discovery dispute in this instance arose in the context of a will contest. There was an issue about testamentary capacity. The plaintiff sought medical records regarding the testator. The administrator of the estate objected to the scope of the discovery and the Court issued a “conditional” order limiting the scope of discovery provisionally to a specific time period (seven days) before the will was signed, “and conditioned further discovery requests upon a good-faith showing that Watson had a meritorious challenge to the 2003 will.” Plaintiff filed a petition for writ of mandamus which was denied. The appellate court held that the trial court was within its discretion to limit discovery, particularly since the plaintiff was given the opportunity to have the scope of discovery expanded upon a demonstration of relevancy and need.