REL: May 25, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2017-2018

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Ex parte Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center

PETITION FOR WRIT OF MANDAMUS

(In re: Connie McLain Snow, as Administrator of the Estate of Rhonda Lynn Snow, deceased

v.

Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center)

(Mobile Circuit Court, CV-15-902232)

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SHAW, Justice.

In these petitions, which we have consolidated, Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center ("MIMC"), the defendant below, seeks a writ of mandamus directing the Mobile Circuit Court to vacate portions of its May 5, 2017, discovery orders. More specifically, in case no. 1160731, MIMC seeks mandamus review of the portion of the trial court's order compelling MIMC to produce certain documents previously submitted to the trial court for in camera review on the ground that the documents are protected from discovery under § 6-5-551 and/or § 22-21-8, Ala. Code 1975. In case no. 1160815, MIMC seeks mandamus review of another May 5, 2017, order denying MIMC's motions seeking reconsideration of, or, alternatively, a protective order

respecting, the trial court's November 10, 2016, order compelling MIMC's response to various discovery requests. In each case, we grant MIMC's petition and issue the writ.

Facts and Procedural History

MIMC operates a general medical/surgical facility in Mobile ("the medical center"). On September 4, 2015, the plaintiff/respondent, Connie McLain Snow ("Connie"), filed, in his capacity as administrator of the estate of Rhonda Lynn Snow ("Rhonda"), deceased,[1] a complaint in the Mobile Circuit Court against MIMC and numerous fictitiously named defendants. Connie's complaint alleged a single count of negligence[2] pursuant to Alabama's Medical Liability Act ("the AMLA")[3] in connection with Rhonda's treatment at the medical center on December 10-11, 2013, for surgery on her right foot.

[1]Connie was Rhonda's husband; following Rhonda's death, Connie obtained letters of administration naming him administrator of her estate.

[2]The negligence count contains, among other allegations, allegations that MIMC negligently failed to monitor Rhonda; negligently failed to train, educate, and make the medical center's staff aware of the need for extra precautions in high-risk patient populations; and negligently failed to properly train and supervise medical personnel.

[3]See § 6-5-480 et seq., Ala. Code 1975, and § 6-5-540 et seq., Ala. Code 1975.

According to the complaint, Rhonda was, on December 10, 2013, transferred following surgery to an inpatient room "for pain control and further management of antibiotics." At around 5:50 a.m. on December 11, 2013, Lateedra Barnes, R.N., an employee of MIMC, allegedly administered a dose of Dilaudid to Rhonda; thereafter, at 6:40 a.m. Rhonda was found "non-responsive" in her room and the staff at the medical center were unable to resuscitate her. Rhonda remained on life support until her death on January 3, 2014. In his complaint, Connie alleged that MIMC was negligent in developing effective policies and procedures regarding, and in training its personnel on, the proper "care, monitoring, diagnostics and/or treatment of Rhonda" and that it had breached the accepted standard of care in its treatment of Rhonda. More specifically, Connie alleged that MIMC's employees had "failed to appropriately monitor the respiratory depressive effect" of Dilaudid on Rhonda following administration of the drug.

Connie's complaint was accompanied by a combined set of "First Interrogatories and Requests for Production" of documents directed to MIMC. Among the documents Connie sought from MIMC were documents related to certain MIMC policies and

procedures both at the time of Rhonda's treatment and "currently." Other requests sought "all" procedural rules governing the administration of opiate medication to certain patients, including those suffering from sleep apnea, obesity, or obstructed airways and/or for the "ongoing clinical monitoring" of such patients, pain-management assessment of such patients, and "medication errors." In response, MIMC provided responsive documentation to some requests and objected to others on the basis that they were "not discoverable" on various grounds, including that they were privileged under either § 6-5-551[4] and/or § 22-21-8.[5]

Connie subsequently moved to compel "full and complete responses" to his first discovery requests and further requested that the trial court require MIMC to "substantiate"

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[4]Pursuant to § 6-5-551, any complaint filed against a health-care provider under the AMLA is required to "include ... a detailed specification and factual description of each act and omission alleged ... and shall include when feasible and ascertainable the date, time, and place of the act or acts." The section further prohibits any party "from conducting discovery with regard to any other act or omission."

[5]As discussed below, § 22-21-8 provides that certain accreditation, quality-assurance, credentialing, and similar materials are not subject to discovery and are not admissible evidence.

the claimed privileges with a privilege log conforming to the requirements of Rule 26(b)(6)(A), Ala. R. Civ. P. MIMC filed in March 2016 a response in opposition to Connie's motion to compel and an accompanying request for a protective order as to the personnel files of certain individuals. MIMC's response was accompanied by affidavit testimony from its risk manager, Linda A. Gamper, aimed at establishing that communications and documents prepared in response to Connie's potential claim both were attorney work product prepared in anticipation of litigation and "were created for quality assurance purposes to assess the quality of care of all patients at [the medical center]," rather than in the ordinary course of MIMC's business. MIMC later filed, at the apparent request of the trial court, a supplemental brief discussing caselaw interpreting and applying both § 6-5-551 and § 22-21-8.

Following a hearing, the trial court entered, on April 29, 2016, an order compelling MIMC to respond to Connie's first discovery requests. In that order, the trial court emphasized "the distinction between discoverability and admissibility" and noted that, although admissibility of the

responses would be considered at a later date, it found as follows on the issue of "discoverability":[6]

> "6. MIMC shall ... produce indices of all MIMC's hospital policies and procedures and indices of all its nursing policies and procedures which pertain to patient care from 2013 through current date.
>
> "7. With respect to [Connie's] Requests for Production ... having to do with MIMC's hospital policies and procedures, MIMC shall ... produce all such requested policies and procedures as were in existence in 2013 through the current date.
>
> "MIMC shall ... identify with specificity whether it has a policy and procedure responsive to each of [Connie's] Requests for Production. ...
>
> "If MIMC cannot produce or reproduce each such requested policy and procedure, it shall specify the specific reason or reasons why said documents cannot be produced.
>
> "8. With respect to [Connie's] Requests for Production [regarding orientation materials relating to opioids, including those presented to Barnes], MIMC shall ... produce all requested orientation materials in existence from the time ... Barnes was initially employed through current date concerning patient care.
>
> "9. MIMC shall ... produce all documents and things accumulated in its Risk Management Department concerning care and treatment in December 2013 of Rhonda ..., including investigative reports, sentinel event reports, witness statements,

[6]MIMC makes clear that relief is sought only as to certain portions of the trial court's April 29, 2016, order, namely the trial court's findings as set out in paragraphs 6-9, which were brought forward into one of the May 5, 2017, orders.

> photographs, digital or electronic medical data, the ampules of Dilaudid administered, Code Blue resuscitative notes, Hill ROM data concerning each person who entered [Rhonda's] room on December 11, 2013, and any video surveillance of persons entering, present in, or leaving [Rhonda's] [r]oom ... on December 11, 2013."

The trial court also ordered MIMC to produce a privilege log for all documents withheld from production as privileged under either § 6-5-551 or § 22-21-8. It further directed:

> "As for all documents or things withheld, each and every one of them shall be sequentially Bates stamped numbered from MIMC ... so the Court can determine which, if any, of the withheld documents should be produced for the Court's in camera inspection and determination of whether any one or more should be ordered produced in response to [Connie's] discovery requests."

On May 13, 2016, MIMC filed a "Motion to Reconsider and Motion for Protective Order" in which, among other relief, MIMC asked to be excused from certain enumerated provisions of the trial court's April 29, 2016, order, including, among other objections, "the production of information protected by ... §§ 22-21-8 and 6-5-551."

Connie subsequently propounded a second set of requests for production to MIMC. Those new requests sought, among other things, certain "surgical postoperative standard orders made available to physicians ... from December 2013 to the

present." MIMC objected to producing the requested documents on grounds including the exemptions in § 6-5-551 and § 22-21-8. At or around this same time, Connie also propounded a second set of interrogatories to MIMC that, among other requests, sought information regarding MIMC's accreditation status and a third set of requests for production seeking information pertaining to any documentation evidencing MIMC's response to "The Joint Commission Sentinel Event Alert #49, Safe Use of Opioids in Hospitals." MIMC again objected, citing § 6-5-551, § 22-21-8, and the attorney-client privilege. MIMC did, however, produce certain documentation, including "all policies and procedures in place in December of 2013." Connie subsequently propounded to MIMC a fourth set of requests for production seeking information "from 2012 to the present" on any and all communications or correspondence between MIMC and either its employees or other health-care providers regarding the dispensation of "narcotics, opioids, Dilaudid and/or Hydromorphone" to patients generally, and to certain high-risk patients specifically, and regarding the monitoring of patients following administration of the above-described substances.

On August 12, 2016, the trial court entered an order requiring MIMC to produce the documents sought by the second set of requests for production, including reports tracking Barnes's activities and locations on December 10-11, 2013; any and all "surgical postoperative standard orders made available to physicians at [the medical center] for management of postoperative pain from December 2013 to the present"; orthopaedic postsurgical standing orders for Dilaudid; "all surgical postoperative standard orders made available to physicians while treating patients at [the medical center] which provide for the use of continuous pulse oximetry and/or capnography for monitoring postoperative patients who have been prescribed opioid medications" from December 2013 to present; and the precise standardized order used for postoperative monitoring. However, as before, the trial court permitted MIMC to provide for the court's in camera review any documents it objected to producing and a privilege log establishing the basis of each such objection. On August 30, 2016, MIMC sought both "reconsideration" and clarification of the trial court's August 12 production order as well as the entry of a protective order declaring orders pertaining to any

patient other than Rhonda and any time frame other than December 10-11, 2013, exempt from production pursuant to § 6-5-551. MIMC later supplemented that motion; in its supplemental filing, MIMC explained that it had produced the 2013 indices of all MIMC policies and procedures and Barnes's orientation transcript for the period beginning with her initial orientation and concluding on December 11, 2013.[7]

Thereafter, Connie amended his complaint. Specifically, he added allegations that, in relation to Dilaudid's potentially deadly side effect of respiratory depression and/or arrest, 16 months before December 2013 medical literature aimed at helping hospitals formulate and implement policies for ongoing clinical monitoring of at-risk patients had been distributed but that MIMC had failed to act appropriately in response; the amendment identified numerous ways in which MIMC and the fictitiously named defendants had allegedly "negligently departed from the accepted standard of

[7]Among other exhibits, MIMC attached a copy of an order issued in a separate bad-faith lawsuit Connie had initiated against his insurance company in the Clarke Circuit Court in which MIMC had been excused, pursuant to § 22-21-8, from producing quality-assurance reports and risk-management documentation Connie had sought to obtain from MIMC by means of a nonparty subpoena.

care applicable to similarly situated healthcare provider which was in effect at the time." (Emphasis added.) The amendment further added a claim alleging spoliation of the entirety of Rhonda's medical records by MIMC. At or around this same time, MIMC filed its answers to Connie's second set of interrogatories in which it objected to producing information pertaining to its accreditation status on the ground that the information was protected from discovery pursuant to both § 6-5-551 and § 22-21-8.

Later, Connie moved to compel MIMC's responses to both his second interrogatories and third requests for production of documents. He also moved to require MIMC "to fully and completely respond to" his fourth requests for production. MIMC provided its responses to Connie's fourth requests for production of documents. More specifically, MIMC produced responsive materials that had been provided to Barnes, but objected to the requests to the extent they also sought

> "information about caregivers who were not involved in [Rhonda's] care and treatment..., information about facilities other than [the medical center], ... information for a period of time that pre-date[d] ... Barnes'[s] employment at [MIMC], and as seeking information for a period of time after the acts and/or omissions made the basis of [Connie's] Complaint, all in violation of the

> protection from discovery provided by ... § 6-5-551."

MIMC further objected to the extent the requests allegedly sought information related to accreditation, quality assurance, credentialing, or similar functions in alleged violation of § 22-21-8.

On November 10, 2016, subsequent to a hearing, the trial court entered an order denying MIMC's motion seeking reconsideration of the trial court's earlier April 29, 2016, order requiring MIMC to respond to Connie's first requests for production of documents; excepting documents allegedly subject to attorney-client privilege, the trial court directed that MIMC "prepare a privilege log, Bates stamp documents [withheld based on § 22-21-8 and § 6-5-551] and produce ... said documents for an in camera review" with an accompanying privilege log. Also on November 10, 2016, the trial court entered a different order denying MIMC's motion for reconsideration and clarification of the trial court's August 12, 2016, order and its request for a protective order. In that order, the trial court directed that MIMC produce the documentation covered by the August 12, 2016, order and sought by Connie's second requests for production, subject to a

privilege log identifying any withheld documents for the trial court's in camera review, including any documents MIMC continued to maintain were privileged. In a third order entered on that same date, the trial court further granted Connie's motion to compel responses to his second interrogatories and third requests for production of documents and provided that MIMC file a privilege log regarding all documents MIMC argued were privileged for the trial court's in camera review. Also on November 10, the trial court entered a fourth order regarding Connie's motion to compel responses to his fourth requests for production; in that order, the trial court ordered MIMC to produce the requested documentation but, again, allowed MIMC to provide both a privilege log and documents for the trial court's in camera review.

MIMC filed a motion seeking additional time to comply with the trial court's November 10, 2016, orders. The trial court granted MIMC's motion, providing an additional 21 days or until December 22, 2016, for MIMC "to comply or otherwise respond."

On December 22, 2016, MIMC filed notice evidencing that it had, as directed, submitted over 6,000 pages of documents and 2 accompanying privilege logs to the trial court for an in camera review; according to MIMC, these challenged documents were, because of the parties' resolution of other disputes, responsive only to Connie's first requests for production -- namely the documents sought by paragraphs 6-9 of the trial court's April 29, 2016, order, as set out above. See note 6, supra. On that same date, MIMC also filed an explanation specifying the privileges allegedly protecting each document from production and discussing applicable authority.

MIMC also separately filed motions "to reconsider" and for a protective order with regard to the November 10, 2016, orders respectively requiring it to respond to Connie's second interrogatories, third requests for production, and fourth requests for production. As with MIMC's previous filings, the thrust of its objection was primarily that the information sought was exempt from discovery under § 6-5-551 and/or § 22-21-8. MIMC also again submitted, as support for the above-described motions, affidavit testimony from Gamper attesting that the materials in the risk-management file regarding

Rhonda's treatment at MIMC, which had been produced for the trial court's in camera inspection, included documents covered by the nonparty subpoena served on MIMC in the separate insurance litigation, see note 7, supra, as well as certain policies prepared for quality-assurance purposes. Gamper further testified that the release of those documents would be prejudicial both to MIMC and to all the patients treated there. A separate affidavit from Gamper established that other documents produced for the trial court's in camera review in response to Connie's first requests for production had been prepared in anticipation of litigation.

Connie both opposed MIMC's motions and announced his intention to depose MIMC personnel in order to fully and "substantively" respond to MIMC's claims of privilege. Upon the conclusion of Gamper's deposition, Connie filed a lengthy motion seeking to strike all three of Gamper's affidavits. He contended that Gamper's affidavits had been prepared by counsel and were not based on Gamper's personal knowledge; that her statements as to the import of the pertinent documents were conclusory; and that MIMC's counsel had, during Gamper's deposition, allegedly repeatedly instructed Gamper

not to answer questions "about her personal knowledge of the statements offered by MIMC to substantiate its claims of privilege." MIMC opposed Connie's request to strike Gamper's affidavits.

On May 5, 2017, the trial court entered an order on the various pending discovery motions remaining before it at that time. Specifically, the trial court:

> "1. DENIE[D] [MIMC]'s December 22, 2016, Motion to Reconsider and Motion for Protective Order Related to Court's November 10, 2016, Order Compelling [MIMC] to Respond to [Connie's] Second Interrogatories ...;
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> "2. DENIE[D] [MIMC]'s December 22, 2016, Motion to Reconsider and Motion for Protective Order Related to Court's November 10, 2016, Order Compelling [MIMC] to Respond to [Connie's] Third Requests for Production ...; and
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> "3. DENIE[D] [MIMC]'s December 22, 2016, Motion to Reconsider and Motion for Protective Order Related to Court's November 10, 2016, Order Compelling [MIMC] to Respond to [Connie's] Fourth Requests for Production ...."

Also on May 5, 2017, the trial court entered another order identifying by Bates stamp numbers the items among those provided to the trial court for its in camera review that MIMC would also be required to produce.[8] There is nothing in the

[8]We note that nothing in the materials before us suggests that the trial court, in so holding, found MIMC's compliance

limited materials before us suggesting that the trial court granted Connie's motion seeking to strike Gamper's affidavits. See note 11, infra.

MIMC sought additional time to comply with the trial court's production orders as well as additional time to "otherwise respond," including possibly seeking mandamus relief from this Court. The trial court granted MIMC until May 19, 2017, to act. MIMC filed, on May 19, 2017, its initial mandamus petition in case no. 1160731 seeking relief from the May 5, 2017, order requiring it to produce certain items MIMC had previously provided to the trial court for in camera review; MIMC subsequently filed, on June 12, 2017, its second mandamus petition in case no. 1160815 seeking relief from the trial court's May 5, 2017, order denying MIMC's various motions for reconsideration and for protective orders.[9] This Court consolidated the petitions, ordered

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with its discovery mandates to be either "recalcitrant" or procedurally insufficient, as Connie suggests, or that the trial court's May 5, 2017, orders from which MIMC seeks relief were in any way intended as a discovery sanction.

[9] "[I]n Ex parte Meadowbrook Insurance Group, Inc., 987 So. 2d 540 (Ala. 2007), this Court reiterated the prerequisite of a timely filed motion for a protective order to review by a petition for the

answers and briefs, and stayed enforcement of the trial court's orders pending our review.

Standard of Review

> "'Mandamus is an extraordinary remedy and will be granted only when there is "(1) a clear legal right in the petitioner to the order sought, (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so, (3) the lack of another adequate remedy, and (4) properly

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writ of mandamus:

> "'[A] petition [for a writ of mandamus] challenging an order compelling discovery is timely only if (1) a protective order is sought, pursuant to Ala. R. Civ. P. 26(c), within the time set for compliance with the order, Ex parte Orkin, Inc., 960 So. 2d 635, 640 n. 5 (Ala. 2006) (citing with approval Wang v. Hsu, 919 F.2d 130, 131 (10th Cir. 1990)), and (2) the mandamus petition is filed no more than 42 days after the denial of the protective order. 960 So. 2d at 640.'
>
> "987 So. 2d at 546."

Ex parte Terminix Int'l Co., 14 So. 3d 849, 852-53 (Ala. 2009). The trial court denied MIMC's motions for a protective order on May 5, 2017, and, on that same date by separate order, required MIMC to produce the allegedly privileged documents submitted for the trial court's in camera review. Both petitions were filed within 42 days of the trial court's May 5 orders. Therefore, the petitions are timely. See id. See also Rule 21(a)(3), Ala. R. App. P.; Ex parte Community Health Sys. Prof'l Servs. Corp., 72 So. 3d 595, 598 (Ala. 2011) ("[T]he presumptively reasonable time for filing a petition for a writ of mandamus is 42 days ....").

> invoked jurisdiction of the court." Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991). In Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003), this Court announced that it would no longer review discovery orders pursuant to extraordinary writs. However, we did identify four circumstances in which a discovery order may be reviewed by a petition for a writ of mandamus. Such circumstances arise (a) when a privilege is disregarded, see Ex parte Miltope Corp., 823 So. 2d 640, 644-45 (Ala. 2001) .... The burden rests on the petitioner to demonstrate that its petition presents such an exceptional case--that is, one in which an appeal is not an adequate remedy. See Ex parte Consolidated Publ'g Co., 601 So. 2d 423, 426 (Ala. 1992).'
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> "Ex parte Dillard Dep't Stores, Inc., 879 So. 2d 1134, 1136-37 (Ala. 2003)."

Ex parte Fairfield Nursing & Rehab. Ctr., L.L.C., 22 So. 3d 445, 447 (Ala. 2009).

> "Because discovery involves a considerable amount of discretion on the part of the trial court, the standard this Court will apply on mandamus review is whether there has been a clear showing that the trial court [exceeded] its discretion. Ex parte Clarke, 582 So. 2d 1064, 1067 (Ala. 1991); Ex parte McTier, 414 So. 2d 460 (Ala. 1982)."

Ex parte Compass Bank, 686 So. 2d 1135, 1137 (Ala. 1996).

Discussion

I. Case No. 1160731

In this petition, MIMC challenges the trial court's May 5, 2017, order both requiring production of the documentation previously provided for that court's in camera review and compelling MIMC's response to Connie's first and second requests for production.

A. Section 6-5-551 Exemption

MIMC first contends that the trial court exceeded its discretion in compelling production of "policies and procedures, educational/training material and physician orders that are not related to the acts and/or omissions alleged in [Connie's] complaint." More specifically, MIMC maintains that the trial court erroneously ordered MIMC to produce, in response to Connie's first and second requests for production, as described in more detail above, policies, procedures, training materials, and physician standing orders implemented by MIMC after December 10 and 11, 2013, because, it argues, those items are exempt from discovery under § 6-5-551. We agree.

Section 6-5-551 states:

> "In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in

> providing health care, or the hiring, training, supervision, retention, or termination of care givers, the [AMLA] shall govern the parameters of discovery and all aspects of the action. The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts. The plaintiff shall amend his complaint timely upon ascertainment of new or different acts or omissions upon which his claim is based; provided, however, that any such amendment must be made at least 90 days before trial. Any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. Any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission."

(Emphasis added.) In Ex parte Anderson, 789 So. 2d 190, 195 (Ala. 2000), the Court explained:

> "If all conditions of the statute are met, then any other acts or omissions of the defendant health-care provider are exempt from discovery, and the discovering party is prohibited from introducing evidence of them at trial. See § 6-5-551. Such exemptions would include information regarding any other incidents regarding [the health-care provider and its] alleged breach of the standard of care."

Here, as in Ex parte Anderson, it appears undisputed that Connie's complaint falls within the purview of § 6-5-551. See Ex parte Coosa Valley Health Care, Inc., 789 So. 2d 208, 217

(Ala. 2000) ("This Court's decision in Ex parte McCollough[, 747 So. 2d 887 (Ala. 1999),] recognized that an action against a health-care provider alleging negligent hiring, training, and supervision is an 'action ... for breach of the standard of care' and is thus governed by § 6-5-551 ...."). As such, as the Court also held in Ex parte Anderson, § 6-5-551 precludes "[d]iscovery of any incidents of malpractice other than those specifically alleged in the complaint." 789 So. 2d at 198. As set out above, Connie's complaint specifically alleges a breach by MIMC and/or its employees of the applicable standard of care "on December 10, 2013 and December 11, 2013."

Despite the allegations in the complaint that the breach of the standard of care occurred on December 10 and 11, 2013, MIMC correctly argues that the trial court's May 5, 2017, order required MIMC to produce, in response to Connie's requests for production, various previously withheld items dating from 2013 "through the current date." The order, therefore, required the production of both nursing policies and procedures and of physician standing orders pertaining to the postoperative care of patients other than Rhonda, the

administration of drugs other than Dilaudid, and MIMC personnel other than those involved in Rhonda's care. Additionally, the trial court's order required MIMC to produce orientation materials for employees also not involved in Rhonda's care and that were presented to the employees after the date on which the alleged breach of the standard of care occurred, i.e., materials that could have in no way affected the care Rhonda received at the medical center or MIMC's alleged breach. To the extent that the order did so, it was overbroad. We agree with MIMC's contention that, under § 6-5-551 and our caselaw, Connie's discovery requests seeking that information were, in fact, prohibited.

> "Section 6–5–551, as amended, makes it clear that in an action against a health-care provider, based on acts or omissions in the 'hiring, training, supervision, retention, or termination of [the health-care provider's employees],' the plaintiff is entitled only to discovery concerning those acts or omissions 'detailed specifica[lly] and factual[ly] descri[bed]' in the complaint and 'alleged by [the] plaintiff to render the health care provider liable to [the] plaintiff.' Thus, if the plaintiff alleges that the defendant health-care provider breached the standard of care by negligently training, supervising, retaining, or terminating an employee or by negligently entrusting an employee with an instrumentality, then the plaintiff may discover information only concerning those acts or omissions by those employees whose conduct is detailed specifically and factually described in the

> complaint as rendering the health-care provider liable. Consequently, [a plaintiff] is not entitled to discovery regarding acts or omissions by [the health-care provider] in the hiring, training, supervising, retaining, or terminating of employees other than those employees whose acts he detailed specifically and factually described in his complaint as rendering [the health-care provider] liable. ... Therefore, as to interrogator[ies] [seeking evidence of other acts or omissions of the health-care provider and its employees beyond those alleged in the plaintiff's complaint,] [the health-care provider] has shown a clear legal right to have the trial court's discovery order vacated."

Ex parte Ridgeview Health Care Ctr., Inc., 786 So. 2d 1112, 1116-17 (Ala. 2000).

Similarly, as to any discovery requests seeking information relevant to the period after December 11, 2013, those requests do not "contain any information concerning any of the alleged acts or omissions set forth in the complaint," including alleged acts or omissions in the hiring, training, and/or supervision of employees who tended Rhonda. Ex parte Gentiva Health Servs., Inc., 8 So. 3d 943, 949 (Ala. 2008). See also Ex parte Coosa Valley Health Care, Inc., 789 So. 2d at 218 (holding that, under § 6-5-551, a nursing-home resident, who alleged that the nursing home had breached a duty to adequately hire, train, and staff its personnel was not entitled to discovery regarding acts or omissions by the

nursing home in hiring, training, and supervising employees other than those employees who had provided care and/or services to the resident). The requests are, therefore, prohibited by § 6-5-551, and the trial court exceeded its discretion in ordering MIMC's response. See Ex parte Gentiva Health Servs., 8 So. 3d at 949 (vacating a trial court's order requiring a hospital to produce the resignation letter of its former employee/codefendant following the incident made the subject of the plaintiff's complaint on the ground that the letter failed to reference either the plaintiff's care or the employee's training and/or supervision). Although the materials before us suggest that, in so ordering, the trial court made a distinction between "discoverability" and "admissibility," § 6-5-551 makes no such distinction and, in fact, prohibits "conducting discovery with regard to any ... act or omission" other than those detailed in the plaintiff's complaint. To the extent Connie appears to argue that allegations in his amended complaint regarding MIMC's alleged failure to appropriately respond to a notification calling for the establishment of clinical monitoring of at-risk patients to whom opioids have been administered, which was distributed

prior to Rhonda's death, establishes his entitlement to training and procedures implemented after Rhonda's death, we are unconvinced. Instead, requiring MIMC to divulge that information would allow disclosure of materials § 6-5-551 explicitly curtails. Thus, under § 6-5-551 and the caselaw cited above, all discovery materials regarding policies, procedures, orders, training, etc., identified above in this subsection, that were created or implemented after the alleged breach of the standard of care in December 2013 are not discoverable.

B. Section 22-21-8 Privilege

MIMC also contends that the trial court exceeded its discretion to the extent that its May 5, 2017, orders required MIMC to produce information in alleged violation of both the quality-assurance privilege found in § 22-21-8 and the work-product doctrine. In particular, MIMC seeks relief from the trial court's requirement compelling it to produce, in response to Connie's first requests for production, MIMC's "Medical/Healthcare Errors Response Policy" and the "Quality

and Patient Safety Program Plan."[10] MIMC also challenges the portion of the order requiring it to produce "quality assurance material from its Risk Management file." Connie counters that MIMC failed, via its submissions below, to sufficiently establish MIMC's entitlement to the claimed privileges.[11]

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[10]MIMC also seeks relief from the requirement that it disclose "certain ... training modules ... created and provided to ... Barnes [after December 11, 2013,] as part of the quality assurance process." The production of those training modules are, however, sufficiently addressed by this Court's holding in Part I.A., supra.

[11]More specifically, according to Connie, Gamper's second and third affidavits were untimely submitted in that they came after the trial court had already ordered MIMC to produce the disputed information and had denied its request for protective orders; were insufficient to the extent they allegedly failed to establish Gamper's personal knowledge or clinical qualification; and were "untested by cross-examination" at Gamper's ensuing deposition. As explained elsewhere, the claim regarding Gamper's alleged lack of personal knowledge appears based on the fact that MIMC's counsel disclosed during Gamper's deposition that he had drafted the affidavits that Gamper ultimately executed. That fact aside, it appears undisputed that each of Gamper's affidavits attested to both her personal knowledge of its contents and her competency to testify thereto.

As also noted elsewhere, nothing before this Court suggests that, before MIMC's filing of the present petitions, the trial court ruled on Connie's motion to strike Gamper's affidavits. To the contrary, Connie represents that the trial court purposefully did not rule on that motion in light of MIMC's mandamus filings and this Court's related review. Although, as discussed, Connie lodges several criticisms aimed

> "[The plaintiff's] claim to discovery of information and materials pursuant to §§ 22-21-8, 34-24-58, and 34-24-59, Ala. Code 1975, is absolutely barred, regardless of the fact that such information and materials might have been gathered as a consequence of the incident regarding [the plaintiff]. Section 22-21-8, Alabama's 'peer-review statute,' reads:
>
> > "'§ 22-21-8. Confidentiality of accreditation, quality assurance credentialling materials, etc.
> >
> > "'(a) Accreditation, quality assurance and similar materials as used in this section shall include written reports, records, correspondence, and materials concerning the accreditation or quality assurance or similar function of any hospital, clinic, or medical staff. The confidentiality established by this section shall apply to materials prepared by an employee, advisor, or consultant of a hospital, clinic, or medical staff and to materials prepared by an employee, advisor or consultant of an accrediting, quality assurance or similar agency or similar body and to any individual who is an employee, advisor or consultant of a hospital, clinic, medical staff or accrediting, quality assurance or similar agency or body.'
>
> "This Court elaborated on the confidentiality of peer-review proceedings in Ex parte Qureshi, 768 So. 2d 374 (Ala. 2000), in which we determined that the

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at the sufficiency of Gamper's affidavit testimony, he does not renew, in this Court, his request to strike those affidavits.

trial court erred in compelling discovery from a physician and hospitals when they were sued by a patient for medical malpractice. That opinion contains a sound statement of the applicable public-policy considerations:

> "'This Court recently addressed [the confidentiality of hospital and physician information] in Ex parte Krothapalli, 762 So. 2d 836 (Ala. 2000). We wrote:
>
> > "'"... Section 22-21-8 was enacted as Act No. 81-801, Ala. Acts 1981. The title to that Act reads: 'To provide for the confidentiality of all written materials and activities concerning the accreditation, quality assurance, or similar function of any hospital, clinic, or medical staff.'
> >
> > "'"....
> >
> > "'"In Cruger v. Love, 599 So. 2d 111 (Fla. 1992), the Florida Supreme Court, construing Florida's peer-review statute, Fla. Stat. Ann. § 766.101(5) (1989), stated:
> >
> > > "'"'The Florida Legislature enacted these peer review statutes in an effort to control the escalating cost of health care by encouraging self-regulation by the medical profession through peer review and

> evaluation. In order to make meaningful peer review possible, the legislature provided a guarantee of confidentiality for the peer review process....
>
> "'"'....
>
> "'"'... While we recognize[] ... that the discovery privilege [impinges] upon the rights of litigants to obtain information helpful or even essential to their cases, we assume[] that the legislature balanced that against the benefits offered by effective self-policing by the medical community.
>
> "'"'We hold that the privilege provided by [the peer-review statutes] protects any document considered by the committee or board as part of its decision-making process. The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee or board during the peer review

> or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might someday be used against them by a third party will be reluctant to fully detail matters that the committee should consider.'

"'"599 So. 2d at 113-14. (Citation omitted.)

"'"Similarly, the South Carolina Supreme Court, in McGee v. Bruce Hosp. System, 312 S.C. 58, 439 S.E.2d 257 (1993), explained:

> "'"'The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers

> to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. ...
>
> "'"'....
>
> "'"'We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source.'

"'"312 S.C. at 61-62, 439 S.E.2d at 259-60. (Citations omitted.)

"'"It seems clear to us, as it did to the Supreme Courts of Florida and South Carolina, that the purpose of a peer-review statute is to encourage full candor in peer-review proceedings and that this policy is advanced only if all documents considered by the committee or board during the peer-review or credentialing process are protected. In the title to Act No. 81-801, the

> Legislature stated the purpose of the Act as being '[t]o provide for the confidentiality of all written materials and activities concerning the accreditation, quality assurance, or similar function of any hospital, clinic, or medical staff.' ...
>
> "'"We note that § 22-21-8(b) provides:
>
> > "'"'Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials nor should any person involved in preparation, evaluation, or review of such materials be prevented from testifying as to matters within his knowledge, but the witness testifying should not be asked about any opinions or data given by him in preparation, evaluation, or review of accreditation,

> quality assurance or similar materials.'
>
> "'"Accordingly, § 22-21-8 does not protect information if it is obtained from alternative sources. Hence, a plaintiff seeking discovery cannot obtain directly from a hospital review committee documents that are available from the original source, but may seek such documents from the original source. ..."
>
> "'762 So. 2d at 838-39....'
>
> "768 So. 2d at 377-78. (some emphasis added in Qureshi, other emphasis added here.) Section 22-21-8, as explained in Qureshi and Krothapalli, provides that under our peer-review statute, information and documents produced by hospitals, their agencies, or bodies, in furtherance of their official duties and activities in regard to the peer-review process, are not discoverable."

Ex parte Anderson, 789 So. at 199-202.

In support of its initial March 2016 opposition to Connie's motion seeking to compel responses to his first requests for production, MIMC submitted, in substantiation of its assertion of the quality-assurance privilege found in § 22-21-8 and the attorney-client and work-product privileges on which it had withheld certain items from production, the affidavit testimony of Gamper, who was identified as "the

Manager for Infirmary Health System, Inc. Risk Management." Gamper's initial affidavit, after testifying to her personal knowledge and competency to testify to the matters covered therein, stated:

> "The documents prepared by and sent to the Risk Management Department on or after December 11, 2013, in addition to being prepared in anticipation of litigation and constituting work product, were created for quality assurance purposes to assess the quality of care of all patients [of MIMC]. Confidentiality of those documents is needed to keep the investigation of incidents and care of patients at [the medical center] candid and open. Production of documents to those outside [the medical center] will be detrimental to the quality of care provided for all patients. Additionally, these documents were not prepared in the ordinary course of business and are not a part of the medical records of [Rhonda]."

When MIMC produced the "Medical/Healthcare Errors Response Policy" and the "Quality and Patient Safety Program Plan" for the trial court's in camera review, it provided additional, more detailed affidavit testimony from Gamper. Specifically, Gamper testified:

> "The Risk Management Department of Infirmary Health Systems, Inc. performs quality assurance functions for its affiliate [MIMC]. This Department performed such functions in connection with the review of the care and treatment of Rhonda ... in December of 2013.
>
> "... The Risk Management file materials concerning the care and treatment of Rhonda ... in

December of 2013, which this Court has ordered to be produced for in camera review, are Bates stamped PL1-PL187. I am personally familiar with these documents, and these are the documents which I described in my earlier affidavit of March 24, 2016 ....

"... On or about December 11, 2013, the Risk Management Department had reason to believe that litigation against [MIMC] as a result of the December 11, 2013 Code Blue event involving Rhonda ... was likely to occur.

"... As I stated in my March 24 affidavit, on December 12, 2013, the Risk Management Department notified our third party administrator Western Litigation, Inc. regarding a potential claim by Rhonda ... and our Department began to review the situation in anticipation of such litigation. [MIMC] formally retained A. Edwin Stuardi and his firm on December 20, 2013 to represent its interests regarding Rhonda. ... The communications between the Risk Management department, our insurers, third party administrators and our counsel, made in anticipation of such litigation, are reflected at PL001-PL012 and PL025-PL029 of the Risk Management file. In further anticipation of litigation, the Risk Management Department made requests for investigation of this matter as contained at PL019 and requested that a report of the event be prepared by ... Barnes ..., which reports are contained at PL013-017 and PL030-PL032. In further anticipation of litigation and at the request of our litigation counsel, the Risk Management Department also requested that certain information be generated for review by the Risk Management Department and our counsel. The documents that were generated to report this information are Bates-stamped PL106-129. Handwritten notes (PL018) and a fax transmittal sheet (PL043) were also prepared in anticipation of litigation.

"... Other materials in this Risk Management file, specifically at PL020-PL024, PL033-PL041, and PL075-PL102, are copies of the subpoena received from the Clarke County Circuit Court; correspondence from [Connie's] counsel in the proceedings in that Court, entitled Connie McLain Snow vs. Liberty Nat. Life Ins. Co., CV 2014-900084; and documents prepared or notes generated in response to the subpoena received from that court or to the written communications from [Connie's] counsel in that action. Thus, all of this material was generated to prepare for a hearing before that Court on [MIMC's] responses and objections to that subpoena.

"Further, as described in my earlier affidavit, many of the documents prepared by and sent to the Risk Management Department on or after December 11, 2013, as contained in the file materials submitted in camera to this Court, were requested, prepared, and/or utilized for quality assurance purposes to assess the quality of care of all patients at [the medical center]. Specifically, such quality assurance materials include the documents marked 013-017, 018-019, 022, 025-029, 030-032, 042, 044-074, 106-187. Confidentiality of these file materials is necessary in order to keep the investigation of incidents for quality assurance purposes candid and open. Production of these file materials to those outside the [medical center] will be detrimental to the quality of care provided to all patients. These documents were not prepared in the ordinary course of business and are not part of the medical records of [Rhonda].

"... I am also familiar with the Medical Healthcare Errors Response policy; the Quality and Patient Safety Program Plan; the Infirmary Health System Corporate Risk Management Electronic Incident Reporting System module; the Infirmary Health Electronic Incident Reporting November 2014; the Informed Consent Process module; the Informed Consent Process Version 2 module; the Medical Alarm

> Safety module; the [Mobile Infirmary] Joint Commission Policy Updates 2014 module; the Patient Safety Education Card module; the Policy Review - Isolation and Standard Precautions [Mobile Infirmary] LTAC 2015 module; the Policy Review-IV Administration of Vasoactive and Antiarrythmic Medications module; the Policy Review-Tube Feeding Administration Urine Specimen Collection module; the Preventing Opioid Adverse Events module; the Safety Alert Tubing Misconnection module; the Strip, Flip and Pull module; the Ticket to Ride module; the Trace the Lines module; and the Preventing Infection from the Misuse of Vials module (including related video, which is not Bates numbered[)].
>
> "... The Medical Healthcare Errors Response Policy and Quality and Patient Safety Program Plan were created directly in relation to the quality assurance function of [MIMC]. The Medical Healthcare Errors Response Policy and Quality and Patient Safety Program Plan provide information to [medical-center] employees about the quality assurance process.
>
> "Similarly, the Infirmary Health System Corporate Risk Management Electronic Incident Reporting System module and Infirmary Health Electronic Incident Reporting November 2014 modules were created by Risk Management Department to train [medical-center] employees about the use of electronic incident reporting that is done for purposes of carrying out the quality assurance function of the hospital.
>
> "... Confidentiality of all of these materials is necessary to protect the process for identification of, reporting of, and investigation of patient care related events. If these materials are made available outside of [the medical center], the quality assurance process will be compromised and [Connie's] counsel will be given a roadmap to inquire about and discover information about the

> quality assurance process at [the medical center]. This would be prejudicial to [MIMC] and will be detrimental to the quality of care provided to all patients.
>
> "The Informed Consent Process module, Informed Consent Process Version 2 module, Medical Alarm Safety module, [Mobile Infirmary] Joint Commission Policy Updates 2014 module, Patient Safety Education Card module, Policy Review-Isolation and Standard Precautions [Mobile Infirmary] LTAC 2015 module, Policy Review-IV Administration of Vasoactive and [Antiarrythmic] Medications module, Policy Review-Tube Feeding Administration Urine Specimen Collection module, Preventing Opioid Adverse Events module, Safety Alert Tubing Misconnection module, Strip, Flip and Pull module, Ticket to Ride module, Trace the Lines module, and the Preventing Infection from the Misuse of Vials module (including related video, which is not Bates numbered[)], were also created by or in connection with the Risk Management Department as a result of the quality assurance process. These modules and training material were prepared and presented as a part of [MIMC's] quality assurance process and are actions taken as part of the quality assurance process. The disclosure of these materials would be prejudicial to [MIMC] because it would discourage full candor during the quality assurance process. It also would have a chilling effect on [MIMC's] ability to train its employees about issues recognized, discussed, evaluated or recommended during the quality assurance process. This candor is necessary to protect the public interest."

Connie is correct that we have previously held that "the party asserting the privilege under § 22-21-8 has the burden of proving the existence of the privilege and the prejudicial effect of disclosing the information." Ex parte Fairfield

Nursing, 22 So. 3d at 448. MIMC contends that, via Gamper's affidavits, it established both that the reports Connie seeks to have produced are quality-assurance materials and that their production would negatively impact MIMC's ability both to properly care for all patients and to train its employees accordingly. As to the contents of the risk-management file, MIMC similarly argues that Gamper's testimony sufficiently established either that the affected documents were created in direct response to Rhonda's death or "for, among other purposes, enabling the Risk Management Department to carry out its quality assurance function."

Contrary to those claims, Connie asserts that the documents MIMC was ordered to produce are both created and used in the ordinary course of a hospital's business and appears to contend that MIMC failed to produce evidence demonstrating that the aim of the Risk Management Department in generating the disputed documents was quality assurance. Compare Ex parte St. Vincent's Hosp., 652 So. 2d 225, 230 (Ala. 1994) ("The burden of proving that a privilege exists and proving the prejudicial effect of disclosing the information is on St. Vincent's. St. Vincent's has produced

no evidence that the Infection Control Committee served as a utilization review committee and no evidence that a function of that committee was accreditation or quality assurance.").

Here, however, as quoted above, Gamper specifically testified that "[t]he Risk Management Department of Infirmary Health Systems, Inc. performs quality assurance functions for its affiliate [MIMC]." Gamper further attested that the contents of MIMC's risk-management file, including those submitted for the trial court's in camera review and those MIMC was ultimately ordered to produce, "were requested, prepared, and/or utilized for quality assurance purposes to assess the quality of care of all patients at [the medical center]."

Gamper's sworn testimony in her affidavits constitutes substantial evidence in support of MIMC's claims. Although Connie has not disputed the assertions contained in Gamper's affidavits with his own contrary evidence, he nonetheless argues that MIMC is improperly applying the term "quality assurance" outside the context of its intended use and further observes that other jurisdictions have narrowly construed statutory exemptions for quality-assurance, accreditation, or

peer-review materials. He additionally criticizes this Court's conclusion in Ex parte Fairfield Nursing, 22 So. 3d at 452, that "the language of § 22-21-8 does not require that a quality-assurance 'committee' exist, nor does it limit the privilege to materials created solely at the direction of such a committee" and maintains that such a broad "construction" of § 22-21-8 as that urged by MIMC would deprive medical-malpractice plaintiffs of a remedy.[12]

We disagree. Instead, the information contained in Gamper's affidavits appears to be entirely consistent with information in affidavits previously deemed sufficient to warrant application of § 22-21-8:

> "We agree with [the defendant] that the evidence presented in the affidavits submitted in support of the assertion of the privilege is substantially similar to the evidence presented in the affidavits in Kingsley [v. Sachitano, 783 So. 2d 824 (Ala. 2000),] and Ex parte Qureshi. The affidavits [the defendant] offered stated that the requested documents were created for quality-assurance purposes, that the documents are needed to guarantee the high quality of care for all residents, and that the confidentiality of the reports and statements is necessary. Section 22-21-8 expressly applies to 'quality assurance' materials.

[12]Without elaboration, Connie alleges that this "construction" would violate §§ 10 and 13 of the Alabama Constitution of 1901.

> "The affidavit in Kingsley stated that the requested documents 'were the subject of quality assurance, credentialling, and accreditation.' 783 So. 2d at 828. The affidavit in Ex parte Qureshi stated that the requested documents were a part of the hospital's credentialing file. 768 So. 2d at 376. Additionally, the affidavit in Ex parte Qureshi stated that 'it was essential that the materials gathered by the hospital be kept confidential' to ensure that 'complete and accurate information' would be provided regarding the qualifications of physicians seeking privileges at the hospital. 768 So. 2d at 376.
>
> "The respondents in these present cases have not offered any evidence in opposition to the affidavits submitted by [the defendant] with its motions to reconsider."

Ex parte Fairfield Nursing, 22 So. 3d at 450. The undisputed evidence submitted to the trial court by MIMC demonstrates that the disputed documents clearly fall under the protection of § 22-21-8. Here, as in Ex parte Fairfield Nursing, supra, "because [MIMC] offered sufficient evidence demonstrating that it is entitled to the privilege provided in § 22-21-8, the trial court exceeded its discretion in ordering [MIMC] to produce the requested documents in the underlying actions." 22 So. 3d at 454.

As an additional matter, both Gamper's affidavits and the dates of implementation of certain modules suggest that at least some of the disputed materials were created after

Rhonda's treatment at the medical center and, therefore, as discussed in Part I.A., supra, could have no bearing on, nor by their absence prevent Connie from proving, Connie's own claims against MIMC regarding its conduct in December 2013 -- especially where, as here, MIMC has produced in excess of 15,000 pages of documentary evidence during discovery. Indeed, there is nothing suggesting that, without the materials in MIMC's risk-management file, Connie will be unable to successfully prosecute his claim against MIMC. It is further immaterial that the information Connie seeks and the trial court required MIMC to produce from its risk-management materials "might have been gathered as a consequence of the incident regarding [Rhonda]." Ex parte Anderson, 789 So. 2d at 199. As to any claim by Connie that this Court has interpreted the reach of § 22-21-8 too broadly and/or that in Ex parte Fairfield Nursing, supra, the Court "got off track" to the extent it rejected the need for "demonstrat[ing] the existence of an official committee as a part of [the] assertion of the privilege provided in § 22-21-8," we note that that decision applies the plain language of § 22-21-8. Ex parte Fairfield Nursing, 22 So. 3d at 451, 453-54.

To the extent MIMC presumes that the trial court based its order compelling production, at least in part, on the exception found in § 22-21-8(b) providing that "[i]nformation, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials," we note that there is nothing on the face of the trial court's order substantiating such a presumption. In any event, as MIMC also notes, we have held that, although § 22-21-8 does not protect information obtained from alternative sources, a plaintiff seeking to discover that information cannot obtain it directly from the health-care provider. Ex parte Anderson, 789 So. 2d at 201. See also Ex parte Krothapalli, 762 So. 2d 836, 839 (Ala. 2000) ("[A] plaintiff seeking discovery cannot obtain directly from a hospital review committee documents that are available from the original source, but may seek such documents from the original source."). Therefore, even presuming that the trial court required the production of only information similarly available from another, alternate source, our caselaw will

nonetheless not support that holding. To the extent that the trial court ordered the production of materials identified by Gamper as relating to quality assurance and thus protected by § 22-21-8, the trial court exceeded its discretion. Thus, we direct those portions of its May 5, 2017, orders compelling production to be vacated.[13]

II. Case No. 1160815

In its second petition, MIMC seeks relief from the trial court's May 5, 2017, discovery order denying MIMC's motions to reconsider or for protective orders, which were filed in response to the trial court's November 10, 2016, order compelling MIMC to respond to certain discovery requests from Connie's second interrogatories, third requests for production, and fourth requests for production.[14]

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[13]To the extent MIMC notes that among the materials it was compelled to produce were documents allegedly protected by the attorney-client or work-product privileges, but not the quality-assurance privilege, we see no sufficient request to issue a writ directing the trial court to vacate its orders compelling protection of those materials.

[14]We initially note that Connie appears to criticize MIMC for failing to also submit, before filing a mandamus petition, the withheld documentation made the subject of the petition in case no. 1160815 for the trial court's in camera review; however, Connie cites nothing indicating that submission of the documents for inspection was a prerequisite to mandamus review. See, generally, Ex parte Fairfield Nursing, 22 So. 3d

A. The Discovery Requests and Objections Thereto

In his second interrogatories, Connie sought, among other things, information regarding MIMC's "Joint Commission Accreditation," including when MIMC became accredited, whether it is currently accredited, and whether its accreditation status had ever been withdrawn or MIMC placed on probation or had been "otherwise at risk of losing accreditation," including the circumstances. Connie's second interrogatories also inquired as to MIMC's subscription to and, generally, its receipt of, "The Joint Commission Sentinel Event Alert publications" from the period "2012 to the present date." Connie also specifically sought information as to whether MIMC had received "Sentinel Event Alert #49 titled 'Safe Use of Opioids in Hospitals'" and, if so, requested that MIMC provide details regarding its response/implementation of the concerns highlighted in that alert.

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at 454. See also note 8, supra. In any event, in its reply brief, MIMC explains that the trial court's May 5, 2017, order denying its motions to reconsider and/or for a protective order failed to contain the language found in the trial court's November 10, 2016, order requiring MIMC's response to Connie's first requests for production but allowing MIMC to separately submit any documents it objected to producing under either § 6-5-551 or § 22-21-8 and an accompanying privilege log for the trial court's in camera review.

In response to the foregoing interrogatories, MIMC apparently disclosed its current accreditation status, which was also allegedly available on the Joint Commission's Web site, but objected to the interrogatories to the extent that they allegedly sought "accreditation, quality assurance, credentialing or similar functions" and argued that, because Connie's complaint and any amendment to that pleading contained no allegations regarding MIMC's accreditation status, the requested information was protected from discovery under § 6-5-551. As to Connie's queries regarding sentinel-event alerts, MIMC disclosed only its awareness that Sentinel Event Alert #49 had, on the referenced date, been posted to the Joint Commission's Web site. MIMC again objected to responding to the remainder of Connie's request on the ground that the requested information was allegedly exempt from discovery under both § 6-5-551 and § 22-21-8.

Pursuant to his third requests for production of documents, Connie sought MIMC's disclosure of "any and all correspondence, emails, documents, memos, meeting agendas, minutes of meetings, action plans and/or materials," if any, undertaken by MIMC in response to Sentinel Event Alert #49.

MIMC again objected on the ground that the request allegedly sought information exempt from discovery pursuant to § 6-5-551 and § 22-21-8. MIMC also asserted that the documents were protected from disclosure by the attorney-client privilege. As to Connie's related request seeking production of any policies and procedures implemented or reviews by MIMC in response or relation to Sentinel Event Alert #49, MIMC objected to the request as seeking information protected from discovery by § 6-5-551 but did produce a list of all policies and procedures in place in December 2013.

Connie's fourth requests for production sought, "[f]or the time period 2012 to the present," the following:

> "[A]ny and all communications of any description (correspondence, emails, memos, notifications, alerts, warnings, etc., whether written or electronic) between [MIMC] and its employees, Infirmary Health System employees and/or any other healthcare providers regarding:
>
> > "a. dispensing narcotics, opioids, Dilaudid and/or Hydromorphone to patients;
> >
> > "b. administering narcotics, opioids, Dilaudid and/or Hydromorphone to patients;
> >
> > "c. administering narcotics, opioids, Dilaudid and/or Hydromorphone to obese patients and/or patients known or expected to have sleep apnea;

> "d. administering narcotics, opioids, Dilaudid and/or Hydromorphone in accordance with range/PRN orders;
>
> "e. monitoring patients who have been administered narcotics, opioids, Dilaudid and/or Hydromorphone.
>
> "This request specifically includes but is not limited to any and all HealthStream communications (correspondence, emails, memos, notifications, alerts, warnings, etc., whether written or electronic)."

A second request asked for identical information within the same time frame regarding "any and all educational/training materials (tests, lessons, course outlines, reference materials, study guides, PowerPoints [slide-show presentations] and/or other learning materials, etc., whether written or electronic)."

In response MIMC produced documents that had been provided to Barnes. It objected, however, to producing further documentation on various grounds, including that Connie's request was allegedly "overbroad in time and scope" and that it sought "information not relevant to the claims asserted in this litigation" "about caregivers who were not involved in [Rhonda's] care and treatment," and "about facilities other than [MIMC]." MIMC further objected on the

grounds that the information sought predated Barnes's employment with MIMC and postdated the period identified in Connie's complaint in violation of the protection from discovery provided by § 6-5-551 and that it further sought information protected from discovery under § 22-21-8.

B. Discussion

As explained above, included in the trial court's November 10, 2016, discovery orders was its decision compelling full responses to each of the above-described discovery requests. MIMC filed, as to each, a motion seeking reconsideration of the trial court's order compelling its response and for a protective order. MIMC supported each motion with authority and attachments, including the affidavit testimony of Gamper. Specifically, in addition to the incorporation of her initial March 24, 2016, affidavit, as discussed above, MIMC also produced an additional affidavit by Gamper, which was executed on December 21, 2016, and in which Gamper attested, in pertinent part, as follows:

> "I am familiar with the accreditation process for [MIMC] and the information (including documentation) generated, prepared, presented, maintained and evaluated in connection with the accreditation process and [MIMC] maintaining its accredited status. The disclosure of these

materials would be prejudicial to [MIMC] because it would discourage full candor during the accreditation process. This candor is necessary to protect the public interest.

"I am also familiar with the process applicable at [MIMC] for reviewing Sentinel Event Alerts from The Joint Commission (including but not limited to Sentinel Event Alert #49) and developing and implementing any actions in response to such Alerts. The process of reviewing Sentinel Event Alerts from The Joint Commission is initiated in the Hospital Quality improvement Committee, which performs quality assurance functions on behalf of [MIMC], and all actions ultimately taken in response to a Sentinel Event Alert are a result of the process initiated by the Hospital Quality Improvement Committee and are a part of the quality assurance process.

"Indeed, all review of Sentinel Event Alerts and developing and implementing action plans is done as part of [MIMC's] quality assurance process. Further, all documents generated, prepared, maintained, created, produced or presented in connection with [MIMC's] review, evaluation, recommendations, findings, opinions, and actions taken in response to any Sentinel Event Alert from The Joint Commission are generated, prepared, maintained, created, produced and presented as a part of [MIMC's] quality assurance process. This quality assurance process includes communications with employees and other healthcare providers about the recommendations, findings, opinions and actions taken in response to any Sentinel Event Alert, as well as the process of carrying out any recommendations and action plans.

"The disclosure of these materials would be prejudicial to [MIMC] because it would discourage full candor during the quality assurance process. This candor is necessary to protect the public

> interest, to encourage openness during the investigation and evaluation of Sentinel Event Alerts, and to improve the quality of care provided for all patients.
>
> "To the extent there were communications between ... Barnes, any other [MIMC] employee, Infirmary Health Systems employee, or other healthcare provider and the Risk Management Department or any other person or entity involved in the quality assurance process related to the Dilaudid administration made the basis of [Connie's] Complaint, these communications relate directly to the quality assurance process and were made as a part of the quality assurance process. The disclosure of these materials would be prejudicial to [MIMC] because it would discourage full candor during the quality assurance process. This candor is necessary to protect the public interest.
>
> "Moreover, to the extent there was any education or training provided to ... Barnes, any [MIMC] employee, any Infirmary Health Systems employee or any other healthcare provider related to the Dilaudid administration made the basis of Plaintiff's Complaint, this education/training was part of the quality assurance process. The disclosure of these materials would be prejudicial to [MIMC] because it would discourage full candor during the quality assurance process. This candor is necessary to protect the public interest."

As also mentioned above, after he deposed Gamper, Connie moved to strike all of Gamper's affidavit testimony filed by MIMC in the matter, which motion the trial court never ruled on.

In its May 5, 2017, order the trial court denied all of MIMC's motions. MIMC contends in the present petition that

the trial court exceeded its discretion because it directed MIMC to produce items that are exempt from discovery under § 22-21-8.

1. Second Interrogatories/Third Requests for Production

MIMC contends that the questions included in the second set of interrogatories, which seek disclosure of information related to MIMC's accreditation and probation history and to MIMC's receipt of sentinel-event alerts from the Joint Commission, improperly request accreditation and/or quality-assurance material protected from discovery by § 22-21-8 and by § 6-5-551. MIMC also contends that the questions included in Connie's second set of interrogatories to MIMC, which seek disclosure about Sentinel Event Alert #49 and MIMC's response to and implementation of that alert, are likewise protected from disclosure by § 22-21-8. More specifically, MIMC notes that Gamper's affidavit, which is set out in large part above, established that the entire process of reviewing and implementing sentinel-event alerts "is initiated in the Hospital Quality Improvement Committee, which performs quality assurance functions on behalf of [MIMC]."

Similarly, MIMC maintains that, to the extent Connie's third requests for production of documents sought the production of materials that evidence MIMC's response to and implementation of Sentinel Event Alert #49, those materials were likewise generated pursuant to MIMC's quality-assurance process. As to Connie's request regarding MIMC's receipt of and response to sentinel-event alerts, generally, MIMC argues that no alert other than Sentinel Event Alert #49 is at issue. Based on the analysis detailed in Part I.B., above, and, more particularly this Court's decision in Ex parte Fairfield Nursing, supra, we agree. Specifically, as we found in Ex parte Fairfield Nursing and in Part I (case no. 1160731), MIMC presented sufficient evidence demonstrating that the materials it objected to producing were entitled to the privilege provided in § 22-21-8; thus, we likewise find that the trial court exceeded its discretion in ordering MIMC to respond to the identified portions of both Connie's second interrogatories and his third requests for production. 22 So. 3d at 454.

We further note, as discussed in Ex parte Anderson, supra, that merely answering the question as to any

accreditation probation would itself constitute impermissible evidence of other acts or omissions. We explained:

> "Discovery of any incidents of malpractice other than those specifically alleged in the complaint is precluded. As previously stated in Part I of this opinion, § 6-5-551 states in plain language that 'discovery with regard to any other act or omission' or the introduction 'at trial [of] evidence of any other act or omission' is prohibited.
>
> "Despite her argument to the contrary, [the plaintiff] is not even entitled to learn whether any such 'complaints' exist. The mere acknowledgment of whether a complaint was ever filed concerning alleged incidents of malpractice would indeed constitute evidence of prior claims of medical malpractice allegedly committed by [the defendant doctor]; this is exactly the kind of information the statute protects from discovery. Therefore, even a simple 'yes' or 'no' answer to the question whether any complaints against [the defendant doctor] had been filed regarding alleged incidents of malpractice other than those that involved [the plaintiff] would fall within the prohibition of the statute."

789 So. 2d at 198. Further, to the extent Connie sought information regarding sentinel-event alerts other than those at issue in Rhonda's case, our caselaw clearly establishes that "[Connie] is entitled to discovery of information involving the provision of care and/or services to [Rhonda], but not to other persons." Ex parte Coosa Valley Health Care, 789 So. 2d at 218. Thus, to the extent the trial court also

compelled MIMC to produce materials involving persons other than Rhonda and/or the treatment of such other persons, the trial court also exceeded its discretion. See id.

2. Fourth Requests for Production

Finally, MIMC contends that, with regard to Connie's attempt to obtain, via his fourth requests for production of documents, communications among MIMC personnel regarding the administration of Dilaudid and educational materials related to its administration, any such communication occurred as part of MIMC's quality-assurance process and that any resulting education was also implemented "as part of the quality assurance process." Therefore, according to MIMC, that information is likewise exempted from discovery by § 22-21-8. MIMC further argues that both the subject requests and Connie's related request for educational materials are overbroad in violation of § 6-5-551, to the extent they are not limited to either the particular treatment allegations or the time frame in Connie's complaint, are not limited to the MIMC employees responsible for Rhonda's treatment and care, and are not limited to the facility where Rhonda was hospitalized. Again, for the reasons set forth in and the

authority cited by this Court in both Parts I.A. and I.B., above, we agree.

Conclusion

In consideration of the foregoing, we hold that MIMC has demonstrated that the trial court exceeded its discretion in requiring MIMC to respond to the discovery requests at issue, namely Connie's discovery requests seeking information concerning any act or omission other than those specifically alleged in Connie's complaint as amended and in requiring MIMC to produce information specifically exempted from discovery by the plain language of § 22-21-8; accordingly, MIMC has also demonstrated a clear legal right to the relief sought. Therefore, in case no. 1160731, we grant MIMC's petition and direct the trial court to vacate all portions of its May 5, 2017, discovery order requiring MIMC to produce documents that MIMC had designated as privileged pursuant to either § 6-5-551 or § 22-21-8. In case no. 1160815, we direct the trial court to vacate the portions of its May 5, 2017, discovery order requiring MIMC to respond to the above-described portions of Connie's second interrogatories, third requests for production, and fourth requests for production.

1160731 -- PETITION GRANTED; WRIT ISSUED.

Bolin, Main, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

Parker, J., concurs in part and concurs in the result.

1160815 -- PETITION GRANTED; WRIT ISSUED.

Bolin, Main, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

Parker, J., concurs in the result.

PARKER, Justice (concurring in part and concurring in the result in case no. 1160731).

I concur in the result as to Part I.B. of the opinion; I concur fully in the remainder of the opinion addressing case no. 1160731.