Rel: December 14, 2018

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170567

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

PETITION FOR WRIT OF MANDAMUS

(In re: Lula Battle, as personal representative of the Estate of Willie Trainor-Battle, deceased

v.

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

(Mobile Circuit Court, CV-15-900351)

WISE, Justice.

Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center ("Mobile Infirmary") has filed a petition for a writ of mandamus asking this Court to direct the Mobile Circuit Court to vacate paragraph 11 of its February 6, 2018, protective order. We grant the petition and issue the writ.

Facts and Procedural History

On February 4, 2015, Lula Battle, as personal representative of the estate of Willie Trainor-Battle, deceased, filed a wrongful-death complaint against Mobile Infirmary, Dr. Rabin L. Shrestha, Jr., and various fictitiously named defendants. In the complaint, Battle alleged that, on or about August 26, 2013, Trainor-Battle was admitted to Mobile Infirmary Medical Center ("the hospital") for the treatment of a sickle-cell crisis with severe pain; that hospital personnel attempted to manage Trainor-Battle's pain by using IV administration of Demerol, methadone, and Phenergan; that Trainor-Battle was found unresponsive and not breathing at approximately 5:25 a.m. on August 28, 2013; that efforts to resuscitate Trainor-Battle were unsuccessful; and that Trainor-Battle was pronounced dead at 5:55 a.m. on August

28, 2013. The complaint alleged that Trainor-Battle died as a result of medical malpractice.

Battle served requests for production and interrogatories on Mobile Infirmary. In its mandamus petition, Mobile Infirmary alleges:

> "The information requested included personnel records for certain of Mobile Infirmary's employees who were involved in Mr. Trainor-Battle's care and treatment, as well as many hundreds, if not thousands, of pages of information that must be printed out from Mobile Infirmary's electronic medical records system. These electronic medical records programs consist of software designed by various third-party vendors, and these vendors consider their programs confidential and proprietary. In addition, Mobile Infirmary has developed some of its own programs and/or modifications to the systems designed by third-party vendors, and Mobile Infirmary considers this information to be confidential and proprietary property as well.
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> "In order to provide sufficient protection both to its employees' personal information as well as the confidential and proprietary electronic medical records programs, Mobile Infirmary typically requires a Protective Order before such information can be produced. Here, the parties were unable to reach an agreement over the appropriateness or terms of a Protective Order."

On February 2, 2018, Mobile Infirmary filed a motion for a protective order. It submitted a proposed protective order and asked the trial court to enter that order. Mobile

Infirmary went on to state in its motion for a protective order:

> "3. Mobile Infirmary anticipates that [Battle] will propose a Protective Order similar (or identical) to the Amended Protective Order entered on February 21, 2017 by Judge Michael Youngpeter in the Dotson v. Mobile Infirmary case. While Mobile Infirmary asserted several bases for objecting to the entry of this Order in the Dotson case, Mobile Infirmary's primary objection was based on the inclusion of Paragraph 11, most specifically the language in Paragraph 11 that allows Plaintiff's counsel to affirmatively use documents produced in the Dotson case pursuant to the Protective Order in other cases pending against Mobile Infirmary.
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> "4. Mobile Infirmary opposes the entry of a Protective Order in this case that contains any language that affirmatively allows [Battle's] counsel to use documents produced in this case in other cases against Mobile Infirmary (or for any purpose other than prosecuting [Battle's] claims in this case).
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> "5. Under Alabama law, Paragraph 11, as contained in the Amended Protective Order in the Dotson case, violates the restrictions on discovery provided by the Alabama Medical Liability Act, specifically Alabama Code § 6-5-551. Paragraph 11 also is contrary to the procedures for discovery outlined in the Alabama Rules of Civil Procedure."

On February 5, 2018, Battle filed a proposed protective order that included the language to which Mobile Infirmary had previously stated its opposition.

On February 6, 2018, the trial court entered a protective order in this case. That order included the following paragraph:

> "11. Nothing in this Order shall prevent [Battle's] counsel from sharing the Confidential Information obtained in this Lawsuit with other partners, associates and staff of the same law firm who may be involved in other litigation against Mobile Infirmary. However, to the extent [Battle's] counsel and law firm wish to affirmatively use Confidential Information (to question witnesses, to provide to experts, defend or support motions, etc.) in other cases against Mobile Infirmary, [Battle's] counsel and law firm must seek approval for such use from the judges presiding over the other cases. The Court reserves until the termination of this Lawsuit its ruling as to the ultimate disposition of the Confidential Information."

On March 6, 2018, Mobile Infirmary filed a "Motion to Modify and Reconsider Paragraph 11 of Protective Order Entered by Court on February 6, 2018 and for Entry of Protective Order Pursuant to Rule 26[, Ala. R. Civ. P.,] Regarding Provisions of Paragraph 11 of February 6, 2018 Protective Order." In its motion, Mobile Infirmary asked the trial court to delete paragraph 11 of the protective order in its entirety. Mobile Infirmary attached to its motion copies of protective orders that had been entered in other cases in Mobile County or Baldwin County. Subsequently, Battle filed a motion to strike

the copies of those protective orders that were attached to Mobile Infirmary's motion to modify and reconsider. Mobile Infirmary states that the trial court denied its motion to modify and reconsider from the bench on March 20, 2018.

On March 21, 2018, Mobile Infirmary filed its petition for a writ of mandamus, and this Court ordered answer and briefs.

Standard of Review

> "'In Ex parte Norfolk Southern Ry., 897 So. 2d 290 (Ala. 2004), this Court delineated the limited circumstances under which review of a discovery order is available by a petition for a writ of mandamus and the standard for that review in light of Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003):
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>> "'"'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 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); (b) when a discovery order compels the production of patently irrelevant or duplicative documents the production of which clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit received by the requesting party, see, e.g., Ex parte Compass Bank, 686 So. 2d 1135, 1138 (Ala. 1996); (c) when the trial court either imposes sanctions effectively precluding a decision on the merits or denies discovery going to a party's entire action or defense so that, in either event, the outcome of the case has been all but determined and the petitioner would be merely going through the motions of a trial to obtain an appeal; or (d) when the trial court impermissibly prevents the petitioner from making a record on the discovery issue so that an appellate court cannot review the effect of the trial court's alleged error. 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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> > "'897 So. 2d at 291-92 (quoting Ex parte Dillard Dep't Stores, Inc., 879 So. 2d 1134, 1136-37 (Ala. 2003)).'
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> "Ex parte Orkin, Inc., 960 So. 2d 635, 638 (Ala. 2006)."

Ex parte Nationwide Mut. Ins. Co., 990 So. 2d 355, 360 (Ala. 2008). Additionally, "[d]iscovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991)." Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003).

Discussion

Mobile Infirmary asks this Court to direct the trial court to vacate paragraph 11 of the protective order. Specifically, Mobile Infirmary argues that paragraph 11 of the protective order violates § 6-5-551, Ala. Code 1975, and that it "provides an extra-procedural method for introducing documents produced in the instant case into other cases, contrary to the Alabama Rules of Civil Procedure and Alabama Code § 6-5-551, Ala. Code 1975." (Petition at pp. 9-10.)

> "This Court has held that, generally, appellate review of a discovery order may be afforded by the appeal of a final judgment in the case but that, '[i]n certain exceptional cases, ... review by appeal of a discovery order may be inadequate....' Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d [810,] 813 [(Ala. 2003)]. One of the 'exceptional cases' the Ocwen Court noted is 'when a privilege is disregarded.' This Court has previously determined that
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>> "'[t]he exemption from discovery offered by § 6-5-551, Ala. Code 1975, which prohibits a party in a medical-malpractice action "from conducting discovery with regard to any other act or omission," i.e., any act or omission other than the one that allegedly renders the health-care provider liable, is treated as a privilege for purposes of determining whether in issuing the discovery order the trial court has disregarded a privilege, thus warranting review of the discovery order by way of a petition for a writ of mandamus.'
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> "Ex parte Gentiva Health Servs., Inc., 8 So. 3d 943, 946-47 (Ala. 2008)."

Ex parte Vanderwall, 201 So. 3d 525, 532-33 (Ala. 2015). Thus, the trial court's February 6, 2018, protective order is reviewable by a petition for a writ of mandamus.

Section 6-5-551, Ala. Code 1975, provides:

> "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 Alabama Medical Liability Act 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.)

> "We have reviewed the language of the statute, and we conclude that its meaning could not be clearer. 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."

Ex parte Anderson, 789 So. 2d 190, 195 (Ala. 2000).

Pursuant to paragraph 11 of the protective order, Battle's counsel will be allowed to share any confidential information counsel obtains in this case with medical-malpractice plaintiffs in other cases against Mobile

Infirmary, so long as those other plaintiffs are represented by Battle's counsel's law firm, regardless of whether such evidence is related to any acts or omissions alleged by those plaintiffs. Section 6-5-551 prohibits a plaintiff in a medical-malpractice action from obtaining discovery regarding acts or omissions other than those specifically alleged in his or her complaint. However, paragraph 11 of the protective order would give other medical-malpractice plaintiffs who are represented by Battle's counsel's law firm access to confidential information that they would be prohibited from discovering in their own case pursuant § 6-5-551. Additionally, paragraph 11 of the trial court's protective order opens the door for other medical-malpractice plaintiffs represented by Battle's counsel's law firm to seek permission to use information regarding acts or omissions unrelated to their cases "to question witnesses, to provide to experts, to defend or support motions, etc.," even though those other plaintiffs would be prohibited from obtaining discovery of that information in their own case. Thus, paragraph 11 of the protective order effectively creates an "end-run" around the limitations on discovery set forth in § 6-5-551. Accordingly,

the trial court exceeded its discretion when it included paragraph 11 in the protective order.

Conclusion

For the above-stated reasons, Mobile Infirmary has established a clear legal right to the relief sought. Accordingly, we grant the petition for a writ of mandamus and direct the trial court to vacate paragraph 11 of its February 6, 2018, protective order.

PETITION GRANTED; WRIT ISSUED.

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

Parker and Shaw, JJ., and Thompson, Special Justice,* dissent.

Stuart, C.J., recuses herself.

*Judge William C. Thompson, presiding judge of the Alabama Court of Civil Appeals, was appointed on May 10, 2018, to serve as a Special Justice in regard to this petition. When Judge Thompson was appointed, there was equal division among the eight members of the Court then sitting on this case on a question material to the determination of the case. See § 12-2-14, Ala. Code 1975.

SHAW, Justice (dissenting).

The petitioner, Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center ("Mobile Infirmary"), a defendant in the underlying wrongful-death action asserting that Willie Trainor-Battle died as a result of medical malpractice, challenges a portion of a protective order issued by the trial court. Specifically, paragraph 11 of the order allows counsel representing the plaintiff, Lula Battle, the personal representative of the estate of Willie Trainor-Battle, to "share" certain discovery materials obtained from Mobile Infirmary with other attorneys in the counsel's firm "who may be involved" in other lawsuits against Mobile Infirmary. Mobile Infirmary contends that paragraph 11 violates Ala. Code 1975, § 6-5-551. That Code section provides, among other things, that, in medical-malpractice actions, "[a]ny 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."

It appears that, in the instant case, the materials Battle wishes to acquire are not "with regard to any other act or omission" unrelated to her case. Therefore, Battle is not

a party to which the discovery and admissibility prohibitions of the Code section apply, and Mobile Infirmary has no valid objection under § 6-5-551 in this case.

If Battle, or more specifically her counsel, wishes to "share" any discovered materials acquired in this case, § 6-5-551 may bar a different plaintiff in another action from receiving it. It would be incumbent on Mobile Infirmary to have the trial court in that other action bar that plaintiff from acquiring such materials. Such a request could be made in the other action, and, if § 6-5-551 prevents that plaintiff from receiving the materials, then a protective order should be issued in that case. In other words, in that instance, paragraph 11 would have no effect and no "end-run" around § 6-5-551 would be accomplished.

In any event, the plain language of § 6-5-551 simply does not provide the relief Mobile Infirmary requests against this plaintiff in this case. It might be easier and more efficient for this Court to strike paragraph 11 instead of requiring a different court to apply § 6-5-551 in another case. Nevertheless, sometimes the application of the plain language of a Code section requires a less-than-efficient result.

DeKalb Cty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998) ("It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be."). Because the plain language of § 6-5-551 does not provide for the relief Mobile Infirmary requests in this case, and because any modification to the plain language of § 6-5-551 is within the legislature's prerogative, I respectfully dissent to issuing the writ in this case.

Parker, J., and Thompson, Special Justice, concur.