Rel: January 24, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180961

Ex parte BBH BMC, LLC, d/b/a Brookwood Baptist Medical Center

PETITION FOR WRIT OF MANDAMUS

(In re: Charles W. Gaston, as personal representative of the Estate of Donna Jean Gaston, deceased

v.

BBH BMC, LLC, d/b/a Brookwood Baptist Medical Center; Brookwood Health Services, Inc.; and Tenet Healthcare Corporation)

(Jefferson Circuit Court, CV-18-904775)

BOLIN, Justice.

BBH BMC, LLC, d/b/a Brookwood Baptist Medical Center ("Brookwood") petitions this Court for a writ of mandamus directing the Jefferson Circuit Court to vacate its order compelling Brookwood to respond to certain interrogatories and requests for production. We grant the petition and issue the writ.

Facts and Procedural History

On January 24, 2018, Donna Jean Gaston arrived at Brookwood Baptist Medical Center ("the medical center") to participate in a voluntary psychiatric outpatient-treatment program. At approximately 8:40 a.m., Donna registered for the 9:00 a.m. outpatient group-therapy session in which she had enrolled. She then left the therapy area, accessed a parking deck on the premises of the medical center, and leaped to her death.

On November 28, 2018, Charles W. Gaston, Donna's husband, filed a wrongful-death action in the Jefferson Circuit Court seeking to hold Brookwood liable for Donna's suicide. Specifically, he alleges that the conduct of Brookwood's nurses and security fell below the applicable standard of care. He further alleges that "a hospital owes a duty to protect and promote each patient's rights, including an

effective and safe setting for patient care in the partial hospitalization program." Relevant to the resolution of this petition for a writ of mandamus, Gaston alleges in his count charging "independent acts of negligence by corporate defendants" that Brookwood,

> "[a]fter actual notice of two previous suicides from the same parking deck, ... failed to take measures to erect physical barriers or provide other deterrents like geo-fencing and landscaping to prevent suicide."

(Brookwood's petition, Exhibit A.) Additionally, in his premises-liability count, he alleges:

> "21. At all material times, [Brookwood] owed a duty to the public, including Donna, to use reasonable care and diligence to keep the premises at [the medical center], including its parking decks, in safe condition for persons who come to the premises by invitation, expressed or implied. On January 24, 2018, [Brookwood] had a duty to take such precautions and to make reasonably necessary changes in its parking decks to protect its invitees from reasonably foreseeable harm, including intentional or unintentional falls from one of its parking decks.
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> "22. [Brookwood] had actual knowledge of two previous suicides by jumping from the northeast parking deck. One of these incidents involved an in-patient at [the medical center] who, according to Brookwood, had no history of psychiatric treatment or hospitalization, and had never attempted suicide. During the course of his stay at [the medical center], he repeatedly denied that he had thoughts of hurting himself and appeared willing to accept treatment. On October 15, 2003, he escaped from [the

> medical center's] adult psychiatric unit and jumped to his death from the northeast parking deck adjacent to [the medical center].
>
> "On July 22, 2009, a 53 year old gentleman, who was not a patient, jumped to his death from the same parking deck. This man also had a history of depression and left a suicide note.
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> "[Brookwood] had actual knowledge that the northeast parking deck had been used in the past to commit suicide. The top of the parking deck is approximately sixty feet from the ground and there is absolutely no fencing, screening or other physical barriers to help prevent suicide. In addition, [Brookwood] knew or should have known that Donna was found on this same parking deck on January 21, 2018 [and security patrolmen dissuaded Donna from standing too close to the outside rail of the deck]. [Brookwood] knew, or in the exercise of reasonable care should have known, that some individuals, including Donna, did not have it within their own power to take measures necessary to provide for their own safety if allowed to gain access to the roof of this parking deck. On the contrary, [Brookwood] knew that physical barriers, including fencing and screening, are recognized as cost effective ways to help prevent suicide, especially from parking decks and other structures adjacent to hospitals where psychiatric patients are treated. Other deterrents include geo-fencing (using closed-circuit television camera coverage) and landscaping -- using trees, bushes, plantings and grass around the parking deck perimeter. [Gaston] is informed and believes that [Brookwood] considered some of these options after the previous suicides and failed to take reasonable measures necessary to provide any additional protection from jumping and, instead, left the parking deck in precisely the same condition it was in when two other lives were lost.

"23. Unlike the other [medical-center] patient who jumped from the parking deck, Donna had expressed suicidal thoughts and, just three days prior to her death, showed active signs of suicidal intent and plan. She had a long history of psychiatric treatment and hospitalization, as well as previous suicide attempts. All of this information was right there in Donna's medical chart at [the medical center] and [Brookwood] had actual knowledge of her thoughts of hurting herself. Thus, the events of January 24, 2018, were reasonably foreseeable to [Brookwood] and, had [it] exercised reasonable care in the fifteen years after the first suicide from this parking deck, Donna would not have been able to jump to her death.

"24. [Brookwood was] negligent and breached [its] duty of reasonable care to Donna in one or more of the following ways:

"a. After actual notice of two previous suicides from the same parking deck, [Brookwood] failed to take measures to erect physical barriers or provide other deterrents like geo-fencing and landscaping to prevent suicide.

"b. [Brookwood] failed to protect, guard and secure Donna's safety while an invitee of the PHP [partial-hospitalization] program.

"c. [Brookwood] failed to implement adequate security policies, security measures, and security procedures necessary to protect Donna under the circumstances.

"d. [Brookwood] put profit before safety after two people had jumped from the same parking deck and, following those deaths, refused to take the steps necessary to prevent additional deaths."

(Brookwood's petition, Exhibit A.)

With the filing of his complaint, Gaston propounded discovery to Brookwood, and on April 3, 2019, Brookwood provided responses to that discovery. Brookwood refused to respond to certain requests, asserting that the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA"),[1] prohibited such discovery. On July 9, 2019, Gaston moved to compel Brookwood to respond further to certain interrogatories and to produce certain documents that pertained to the modifications made to Brookwood's parking deck following previous suicides. Specifically, he requested that Brookwood respond to the following:

> "Interrogatory No. 18: After the previous suicides from the Northeast Parking Deck, what changes or modifications were considered?
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> "Interrogatory No. 19: Why were no changes or modifications made?
>
> "Interrogatory No. 20: Who did you consult with about these changes and modifications?"

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[1]See George H. Lanier Mem'l Hosp. v. Andrews, 901 So. 2d 714, 721 (Ala. 2004)(explaining the relationship between the provisions of the AMLA set out in § 6-5-480 et seq. and those set out in § 6-5-540 et seq.).

> "Request for Production No. 27: Please produce all documentation of changes or modifications to the Northeast Parking Deck which were considered in the last fifteen (15) years following the first suicide from jumping from the deck."

In the trial court, Gaston maintained that, because he nominally delineated one of the counts in his complaint as a premises-liability claim, the mandatory limitations in the AMLA on discovery and admissible evidence did not apply to the requested discovery. In the alternative, he argued that, even if the action is exclusively a medical-malpractice action, the AMLA does not apply to the requested discovery because information about the earlier suicides is not being requested. Rather, he maintained, the requested discovery is directed toward "what considerations Brookwood considered about suicide-prevention in its parking deck prior to Donna's death and ... what training and procedures Brookwood had in place regarding suicide prevention prior to Donna's death." (Brookwood's petition, Exhibit C.) On August 7, 2019, the trial court granted Gaston's motion to compel. On August 13, 2019, Brookwood moved for a protective order. On August 27, 2019, before the trial court ruled on Brookwood's motion for a protective order, Brookwood filed its petition for a writ of mandamus with this Court. On September 26, 2019, the trial

court denied Brookwood's motion for a protective order. In its order the trial court concluded

> "that discovery regarding the changes or modifications considered by [Brookwood] following prior suicides from the Northeast Parking Deck, the same deck from which [Donna] committed suicide, is relevant and calculated to lead to the discovery of admissible evidence in [Gaston's] premises-liability count to show the state of [Brookwood's] knowledge, notice, and the standard of care which should have been exercised by [Brookwood] to prevent [Donna's] foreseeable death and to make the premises safe. And, even if the [AMLA] exclusively applied to all aspects of this action, the Court also finds that the subject discovery is permissible as properly limited in time, geography, and scope, as it does not seek information about: exactly how any of the prior incidents occurred; who, if anyone, [Brookwood] found to be at fault; prior breaches of the standard of care; or impermissible 'pattern and practice' evidence."

On October 2, 2019, Brookwood supplemented its petition for a writ of mandamus, informing this Court that the trial court had denied Brookwood's motion for a protective order and that its mandamus petition was ripe for review.[2]

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[2] "'In 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 a writ of mandamus:

> "'"[A] petition [for a writ of mandamus] challenging an order compelling discovery is timely

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 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
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> 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."
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> "'987 So. 2d at 546.'
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> "Ex parte Terminix Int'l Co., 14 So. 3d 849, 852-53 (Ala. 2009)."

Ex parte Mobile Infirmary Ass'n, 278 So. 3d 1195, 1203-04 n. 9 (Ala. 2018)

> 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)."

> "'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)."

Ex parte Mobile Infirmary Ass'n, 278 So. 3d at 1204.

Discussion

For purposes of review of this mandamus petition, Gaston has waived "any argument that might be based upon there being

a separate and independent count for premises liability." (Gaston's response at p. 19.) Therefore, this Court will consider only whether the requested discovery is within the scope of permissible discovery pursuant to § 6-5-551, Ala. Code 1975, and Rule 26, Ala. R. Civ. P.

"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:
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> > "'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.'"

Ex parte Mobile Infirmary Ass'n, 278 So. 3d at 1205-06.

In light of Gaston's concession for purposes of this mandamus review, his complaint is governed by § 6-5-551. See Ex parte McCollough, 747 So. 2d 887 (Ala. 1999), superseded by statute as stated in Ex parte Coosa Valley Health Care, Inc., 789 So. 2d 208, 217 (Ala. 2000)(recognizing that an action against a health-care provider alleging negligent hiring, training, and supervision constitutes an action alleging breach of the standard of care and is governed by § 6-5-551). And, in accordance with § 6-5-551, discovery of any incidents of malpractice other than those specifically alleged in the complaint is precluded.

Brookwood maintains that Gaston's discovery is overly broad and that it violates the confines of § 6-5-551 because it does not seek discovery related to the particular treatment rendered to Donna, the policies or procedures in place necessary to promote safe care and treatment for Donna, or the condition of the premises at the time of Donna's treatment. Gaston contends that the requested discovery is permissible because, he says, it does not seek facts underlying the earlier suicides.[3]

A review of Gaston's complaint and the requested discovery reveals that the information sought is inextricably intertwined with the earlier suicides in the parking deck and that it does not address the alleged breach of the standard of care owed to Donna. Section 6-5-551 prohibits discovery of acts or omissions other than the ones specifically pleaded in the complaint. Here, Gaston alleges that Brookwood's failure "to erect physical barriers or provide other deterrents like

[3]Before this Court Gaston also maintains that Brookwood has waived any privilege in light of past admissions and discovery in other litigation. This argument, however, was not made in the trial court, and this Court will not address it. See Ex parte Ford Motor Co., 47 So. 3d 234, 241 (Ala. 2010)(recognizing that this Court's review is restricted to evidence and arguments considered by the trial court).

geo-fencing and landscaping to prevent suicide" was a breach of the standard of care Brookwood owed Donna. Whether changes had been considered and made or not made to the parking deck in the past is contingent, at least in part, on the facts underlying the earlier suicides. Any such considerations and determinations were in response to the earlier suicides and constitute "act[s] or omission[s]" with regard to the earlier suicides. Therefore, this information is not available in determining whether Brookwood provided a safe setting for Donna's care on the day of the incident.

As this Court observed in Ex parte Ridgeview Health Care Center, Inc., 786 So. 2d 1112, 1116-17 (Ala. 2000):

> "Section 6-5-551, as amended, makes it clear that in an action against a health-care provider, based on acts or omissions in [providing health care], 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.'"

Here, Gaston alleges that Brookwood breached the standard of care by not providing a safe environment for Donna's care. The discovery at issue pertains to modifications made or note made to the parking deck at the medical center following previous suicides, as opposed to information related to

Donna's suicide or treatment. Although Gaston may discover information concerning those acts or omissions by those employees whose conduct is detailed specifically and factually described in the complaint as rendering Brookwood liable for Donna's death, Gaston is not entitled to discovery regarding acts or omissions by Brookwood related to other incidents. Therefore, because the requested discovery seeks evidence of other acts or omissions of Brookwood and its employees beyond the alleged standard of care owed to Donna, Brookwood has shown a clear legal right to have the trial court's discovery order vacated. See § 6-5-551 and Rule 26(b)(1)(requiring requested information to be "reasonably calculated to the discovery of admissible evidence").

Conclusion

Based on the foregoing, we hold that Brookwood has demonstrated that the trial court exceeded its discretion in requiring Brookwood to respond to the discovery requests at issue; accordingly, Brookwood has demonstrated a clear legal right to the relief requested. Therefore, we grant Brookwood's petition and direct the trial court to vacate its August 7, 2019, discovery order requiring Brookwood to produce information and documents in response to Gaston's

interrogatory nos. 18, 19, and 20 and his request for production no. 27.

PETITION GRANTED; WRIT ISSUED.

Shaw, Wise, Bryan, and Sellers, JJ., concur.

Parker, C.J., and Mendheim and Stewart, JJ., concur specially.

Mitchell, J., concurs in the result.

MENDHEIM, Justice (concurring specially).

I concur with the main opinion's conclusion that, based on the arguments presented to us, the Alabama Medical Liability Act, see § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA"), prohibits the discovery sought by Charles W. Gaston in his action alleging the wrongful death of his wife, Donna, against BBH BMC, LLC, d/b/a Brookwood Baptist Medical Center ("Brookwood"). I write specially to emphasize that this conclusion is dictated because of Gaston's arguments and concessions rather than the allegations that appear to be the basis for the discovery requests at issue.

If I were at liberty to assess Gaston's discovery requests apart from his own characterizations and concessions, I would conclude that Gaston seeks to discover information pertaining to his allegations of premises liability against Brookwood and that, therefore, the requests are not governed by the AMLA. In his premises-liability count, Gaston alleges that Brookwood failed in its "duty to the public, including Donna, to use reasonable care and diligence to keep the premises at [Brookwood Medical Center], including its parking decks, in safe condition for persons who come to the premises by invitation, expressed or implied." The "acts or omissions"

Gaston complains about in that count[4] -- and the information Gaston seeks in the discovery requests at issue[5] -- have nothing to do with the provision of medical services.

In Ex parte Vanderwall, 201 So. 3d 525, 540 (Ala. 2015), this Court stated that "[t]he AMLA addresses the provision of medical services to patients and failures to meet the applicable standard of care in providing those services." In Ex parte Altapointe Health Systems, Inc., 249 So. 3d 1108 (Ala. 2017), the Court reiterated this point in concluding that the action of a plaintiff against a group home for the mentally ill seeking damages for injuries he sustained as the result of an allegedly violent and unprovoked attack by a fellow resident of the group home was not governed by the AMLA because "[t]here [were] no express allegations of medical negligence" and "there [was] no evidence before us that would

[4]Gaston complains about Brookwood's alleged failure to erect "physical barriers, including fencing and screening," or "other deterrents [that] include geo-fencing (using closed-circuit television camera coverage) and landscaping -- using trees, bushes, plantings and grass around the parking deck perimeter" to prevent people from jumping off the parking deck.

[5]As the main opinion notes, Gaston's discovery requests concerned "what changes or modifications were considered" to the parking deck by Brookwood in the wake of two suicides in 2003 and 2009, respectively.

permit us to conclude that the assault on [the plaintiff] was somehow linked to the administration of medical care or professional services by [the defendant]." 249 So. 2d at 1113. In a special writing in Ex parte Tombigee Healthcare Authority, 260 So. 3d 1 (Ala. 2017), Justice Murdock adroitly explained the reasoning behind the limitation of the AMLA's applicability to "the provision of medical services":

> "Obviously, a hospital exists to provide medical care. Just as obviously, however, that fact does not make all tortious conduct that occurs in a hospital facility at the hands of one employed by the hospital subject to the limitations imposed by the AMLA. If it did, the AMLA would govern claims for injuries resulting from the negligent mopping of floors by a hospital employee, the negligent installation or maintenance of HVAC equipment by a hospital employee, the negligent maintenance or repair of a doorway threshold by a hospital employee, or the negligent maintenance or repair of a stairway railing by a hospital employee. Indeed, it would apply to claims arising from injuries resulting from such acts of negligence even if such acts were performed by a physician or nurse employed by the hospital, or the more plausible scenario of a hospital-employed physician or nurse -- or radiology technician -- spilling a drink on a hospital floor that causes a third party to slip and fall. The point is that such activities or the hiring or supervision by a hospital of those who engage in such activities does not involve the provision of medical care within the meaning of the AMLA. Disputes over injuries arising from such activities simply do not involve the type of 'care' the legislature was addressing when discussing the 'standard of care' in the AMLA. See Ala. Code 1975, § 6-5-540 ('It is hereby declared by the Legislature

> of the State of Alabama that a crisis threatens the delivery of medical services to the people of Alabama and the health and safety of the citizens of this state are in jeopardy.... [I]t is the declared intent of this Legislature to insure that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama. This Legislature finds and declares that the increasing threat of legal actions for alleged medical injury causes and contributes to an increase in health care costs and places a heavy burden upon those who can least afford such increases, and that the threat of such actions contributes to expensive medical procedures to be performed by physicians and other health care providers which otherwise would not be considered necessary, and that the spiraling costs and decreasing availability of essential medical services caused by the threat of such litigation constitutes a danger to the health and safety of the citizens of this state, and that this article should be given effect immediately to help control the spiraling cost of health care and to insure its continued availability.' (emphasis added)) ...."

260 So. 3d at 11 (Murdock, J., concurring in part and concurring in the result) (some emphasis added).

Gaston's premises-liability count easily falls within the types of scenarios described by Justice Murdock. Moreover, Gaston's discovery requests seeking information about what changes or modifications were made to the parking deck after the two previous suicides clearly pertain to his premises-liability count. However, in addition to that count, Gaston pleaded that Brookwood had violated the standard of care it

owed Donna as a patient "with respect to policies, procedures and practices which should have been in place and implemented to provide safe care and treatment to Donna."[6] As the main opinion observes, in the trial court Gaston initially argued that, because he had asserted a count alleging premises liability in his complaint, the AMLA's limitations on discovery and admissibility were inapplicable. But on mandamus review, Gaston elected to "waive[] any arguments that might be based on there being a separate and independent count for premises liability." Thus, the fact that Gaston's discovery requests do not pertain the Brookwood's provision of medical services to Donna does not help Gaston because he is "satisfied for this Court to review the discovery issue as if Gaston's complaint stated only a single medical-malpractice cause of action."

Given Gaston's concession, even though I dissented from ordering answers and briefs in this case, I see no alternative to the main opinion's conclusion that the AMLA is applicable

[6]This count includes such allegations as Brookwood's failing to know about or document Donna's previous suicidal ideas and attempts, to develop an appropriate plan of care for a patient at high risk of suicide, to notify appropriate personnel of Donna's "elopement," or to do a suicide-risk assessment before Donna committed suicide.

and that Gaston's discovery requests seek evidence of other acts or omissions on the part of Brookwood and its employees beyond the alleged violation of the standard of care owed Donna.

Parker, C.J., and Stewart, J., concur.