rel: December 15, 2017

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2017-2018

1160706

Ex parte Tombigbee Healthcare Authority d/b/a Bryan W. Whitfield Memorial Hospital

PETITION FOR WRIT OF MANDAMUS

(In re: T.N., an individual; A.V., an individual; O.J., an individual; and I.P., an individual v. Leland Bert Taylor, Jr., and Tombigbee Healthcare Authority d/b/a Bryan W. Whitfield Memorial Hospital)

(Marengo Circuit Court, CV-15-900137)

SELLERS, Justice.

Tombigbee Healthcare Authority d/b/a Bryan W. Whitfield Memorial Hospital ("the hospital") petitions this Court for a

writ of mandamus directing the Marengo Circuit Court to vacate its order compelling the hospital to respond to certain discovery requests and to enter a protective discovery order in its favor. We deny the petition.

Facts and Procedural History

T.N., A.V., O.J., and I.P. (hereinafter referred to collectively as "the plaintiffs") brought this action against the hospital, and its radiological technician, Leland Bert Taylor, Jr., who they allege sexually assaulted them while they were patients of the hospital. The plaintiffs asserted a claim against Taylor, alleging that he had acted negligently and/or wantonly by sexually assaulting them.[1] The plaintiffs also asserted a claim against the hospital, alleging that it was vicariously liable for the negligent and/or wanton acts of Taylor and that it was negligent and/or wanton in its hiring, training, supervision, and retention of Taylor.

Along with their complaint, the plaintiffs served the hospital with written discovery requests seeking, among other things, information concerning "other incidents" involving

[1]Taylor is not a party to this mandamus proceeding; according to the plaintiffs, he was arrested and charged with first-degree sodomy and first-degree sexual assault in connection with the allegations of sexual abuse.

Taylor; its investigation into their allegations of sexual assault by Taylor; and its hiring, training, supervision, and retention of Taylor and the termination of his employment. The hospital objected to the plaintiffs' requests, contending that the requests were protected by certain discovery privileges. Specifically, the hospital argued that any information concerning "other incidents" by Taylor was barred by § 6-5-551, Ala. Code 1975, a part of the Alabama Medical Liability Act, § 6-5-480 et seq., Ala. Code 1975, and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA"). Section 6-5-551 of the AMLA prohibits a party from conducting discovery "with regard to any other act or omission." The hospital further argued that any information concerning its hiring, training, supervising, retention, and dismissal of Taylor, as well as its investigation into the plaintiffs' allegations of sexual assault by Taylor, was privileged under § 22-21-8(b), Ala. Code 1975, which provides that "[a]ll accreditation, quality assurance credentialing and similar materials shall be held in confidence and shall not be subject to discovery."

The plaintiffs filed a motion to compel discovery, relying on Ex parte Vanderwall, 201 So. 3d 525 (2015), which

held that the AMLA did not apply to allegations of sexual assault. After conducting a hearing, the trial court entered an order granting the plaintiffs' motion to compel. The hospital moved for a protective order pursuant to Rule 26(c), Ala. R. Civ. P., concerning the discovery requests, which the trial court denied. This petition followed.

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 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).

Discussion

The hospital first contends that the trial court exceeded its discretion by allowing the plaintiffs to seek discovery of "other incidents" involving Taylor, which, they say, is prohibited by § 6-5-551 of the AMLA. See Ex parte Gentiva Health Servs., Inc., 8 So. 3d 943, 946-47 (Ala. 2008)("The exemption from discovery offered by § 6-5-551 ..., 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."). The plaintiffs, on the other hand, relying on Ex parte Vanderwall, assert that, because an act of sexual assault by a medical provider does not result in a "medical injury" as contemplated by the

AMLA, the hospital cannot rely on § 6-5-551 as a basis on which to refuse to respond to their discovery requests. Whether the plaintiffs' requested discovery is prohibited under § 6-5-551 requires a determination of whether their claim of negligent and/or wanton hiring, training, supervision, and retention is governed by the AMLA and, more specifically, whether this Court's holding in Vanderwall is instructive in this regard.

In Vanderwall, a physical therapist allegedly sexually assaulted a patient during the course of treating her for back pain. The patient sued the physical therapist, asserting a claim against him for assault and battery. The patient also sued the rehabilitation center that employed the physical therapist, asserting a claim against it of negligent and/or wanton hiring. During the course of discovery, the patient sought a declaration that her claims against the physical therapist and the rehabilitation center were not governed by the AMLA. The patient, however, dismissed her claim against the rehabilitation center, and the case proceeded against only the physical therapist. On appeal, this Court concluded that the physical therapist could not use the AMLA as a basis on

which to refuse to answer the patient's interrogatories concerning other acts or omissions on her part because "sexual misconduct by a health-care provider toward a patient is not medical treatment, and it does not result in a 'medical injury' as such an injury is understood under the AMLA." 201 So. 3d at 540.

The hospital contends that Vanderwall is distinguishable, primarily because the patient in Vanderwall dismissed her claim against the rehabilitation center, and Vanderwall thus never addressed whether the AMLA applied to the claim of negligent and/or wanton hiring of the physical therapist. Rather, Vanderwall addressed only whether the claim against the physical therapist, alleging assault and battery based on sexual misconduct, was governed by the AMLA and held that the AMLA did not apply. The hospital asserts that, even though the plaintiffs' negligence and/or wantonness claim against Taylor--based on acts of sexual assault--arguably might not be governed by the AMLA, the claim against it, alleging negligent and/or wanton hiring, training, supervision, and retention, would be governed by the AMLA.[2] In other words, the hospital

[2]The hospital notes that, because it cannot be held vicariously liable under a theory of respondeat superior for

asserts that the plaintiffs' claim against it is not a claim alleging sexual assault but, rather, an independent claim of medical negligence stemming from the hospital's alleged failure to protect the plaintiffs from harm and its alleged negligent and/or wanton hiring, training, supervision, and retention of Taylor. We agree.

The AMLA applies "[i]n any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care." § 6-5-548, Ala. Code 1975. Section 6-5-551 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."

Taylor's acts of sexual assault, the only viable claim against it is the claim alleging negligent and/or wanton hiring, training, supervision, and retention of Taylor. See Hendley v. Springhill Mem'l Hosp., 575 So. 2d 547, 550 (Ala. 1990)(noting that, in the master-servant relationship, "the determinative question becomes whether the act committed by the employee was done while acting within the line and scope of his employment. If it is determined that the employee was not acting within the scope of his employment, then there can be no recovery under the doctrine of respondeat superior.").

(Emphasis added.) See Ex parte Ridgeview Health Care Ctr., Inc., 786 So. 2d 1112, 1116 (Ala. 2000)(stating that "§ 6-5-551 makes it clear that a claim against a health-care provider alleging that it breached the standard of care in hiring, training, supervising, retaining, or terminating its employees is governed by the [AMLA]"). Here, the plaintiffs have specifically alleged that the hospital owed a duty to properly hire, train, supervise, and retain its employees, including Taylor; that the hospital undertook a duty to protect patients like the plaintiffs from harm while they were receiving treatment at its facility; that the hospital negligently and/or wantonly entrusted Taylor with the care and treatment of patients at its facility; that the hospital knew, or in the exercise of reasonable care, should have known that Taylor was incompetent and/or unfit to perform the job he was hired to perform; and that the hospital negligently and/or wantonly failed to act and to terminate Taylor's employment upon actual or constructive notice of his incompetence and/or unfitness to perform his job. The plaintiffs' primary contention is that the hospital was made aware of Taylor's sexual misconduct well before October 7, 2015--the date Taylor was arrested and

charged with first-degree sodomy and first-degree sexual assault in connection with the incidents of sexual misconduct that are the subject of the underlying action--yet the hospital did not terminate his employment until after this date. The plaintiffs' allegations clearly implicate the hospital's professional judgment in hiring, training, supervising, and retaining Taylor. Accordingly, we conclude that the plaintiffs' claim against the hospital alleging that it was negligent and/or wanton in its hiring, training, supervising, and retaining of Taylor involves a breach of an applicable standard of care for health-care providers and is, therefore, governed by the AMLA.

In Ex parte Altapointe Health System, Inc., [Ms. 1160544, September 8, 2017] ___ So. 3d ___ (Ala. 2017), a case in which a resident of a group home was attacked by another resident, the resident's father, the plaintiff, sued Altapointe, the operator of the group home, alleging that it was negligent and/or wanton in hiring, training, and supervising its employees; the gravamen of the complaint was that Altapointe negligently and/or wantonly failed to safeguard the resident from the attack in the group home. This Court held that the

AMLA did not apply to the father's claim, alleging negligent and/or wanton supervision, because there were no express allegations of medical negligence. Rather, the father's contentions were based "solely on the fact that the attack occurred in its facility," a contention that "merely applies the discredited 'time and place' argument to the facts of this case." ___ So. 3d at ___. In Altapointe, this Court pointed out that Vanderwall had overruled the "place and time" rule previously applied by this Court in Mock v. Allen, 783 So. 2d 828 (Ala. 2000), and O'Rear v. B.H., 69 So. 3d 106 (Ala. 2011). In Vanderwall, this Court explained:

> "[I]t is clear that the AMLA is not just concerned with who committed the alleged wrongful conduct or when and where that conduct occurred, but also with whether the harm occurred because of the provision of medical services."

201 So. 3d at 537-38. The plaintiffs' primary contention here is that the hospital was on notice of the alleged sexual assaults before Taylor was arrested and charged in connection with the assaults and subsequently released from his employment.

Because we conclude that the AMLA governs the parameters of discovery in this action, we now address whether § 6-5-551

prohibits the plaintiffs from seeking information concerning "other incidents" or complaints involving Taylor, i.e., any act or omission other than the ones that allegedly render the hospital liable. The hospital asserts that two of the plaintiffs have requested discovery regarding "other incidents" or complaints and regarding the hospital's investigation of those incidents or complaints. The hospital asserts that, because the plaintiffs have filed their cases jointly, any responses of the hospital to the discovery requests will necessarily discuss facts or issues pertaining to the claims of the other plaintiffs. In other words, the hospital argues that § 6-5-551 prohibits each plaintiff from discovering information pertaining to any of the other plaintiffs. The hospital, however, has not cited any authority for its argument that the AMLA's "other acts or omissions" language would preclude plaintiffs who have filed a joint complaint from engaging in discovery related to the same employee by whom they were all victimized. In Ex parte Ridgeview, this Court stated:

> "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, Hayes is not entitled to discovery regarding acts or omissions by Ridgeview 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 Ridgeview liable."

786 So. 2d at 1116-117 (emphasis added). In their complaint, the plaintiffs specifically and factually describe the sexual assaults allegedly inflicted upon them by Taylor. Because the plaintiffs have consolidated their claims, it would be impractical, if not impossible, to prevent each plaintiff from discovering information concerning the alleged acts by Taylor against the other plaintiffs. Therefore, contrary to the hospital's assertion, § 6-5-551 does not prohibit each plaintiff from discovering information pertaining to the claims of the other plaintiffs. Accordingly, the hospital has

not shown a clear legal right to have the trial court's discovery order vacated.

The hospital finally contends that the trial court exceeded its discretion by denying the hospital's motion for a protective order pursuant to § 22-21-8(b), which provides that "[a]ll accreditation, quality assurance credentialing and similar materials shall be held in confidence and shall not be subject to discovery." As indicated, the plaintiffs' discovery requests included information concerning the hospital's hiring, training, supervision, retention, and dismissal of Taylor, as well as information concerning its investigation into their allegations of sexual assault by Taylor. It is well settled 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.

In support of its motion for a protective order, the hospital offered the affidavit of Cindy Parten, Director of Professional Standards for the hospital, who testified that the discovery the plaintiffs seek is not part of the plaintiffs' medical charts or kept in the ordinary course of

business but, rather, is created as a result of quality-assurance investigations and that the importance of their confidentiality cannot be understated. Specifically, Parten testified:

> "4. I am knowledgeable concerning the claims set forth in the [present suit brought by the plaintiffs]. I am also knowledgeable as to what information [the hospital] had, if any, as to each Plaintiff and any complaints brought to [the hospital's] attention prior to the current suit being filed. ... More specifically, [the hospital] did engage in investigations with respect to [Taylor] with regard to certain claims made by certain patients in 2015 both prior and subsequent to Mr. Taylor's employment with [the hospital] ending on October 7, 2015. As a result of these investigations, quality assurance reports were generated for both internal purposes within [the hospital] pursuant to its quality assurance process, as well as reports prepared at the request of and submitted to [the hospital's] professional liability insurance carrier with reasonable anticipation of litigation given the nature of the allegations asserted against Mr. Taylor.
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> "5. Quality assurance activities and investigations, regardless of the reason for why they are initiated, are an important and vital process for [the hospital]. They begin prior to an individual beginning employment with [the hospital] in the form of gathering information on that prospective employee to ensure appropriateness and qualifications for the position to be filled. They continue after employment when any issue is raised that could [a]ffect the healthcare being rendered to patients at [the hospital]. The importance of open and honest investigations, including discussions with other employees of [the hospital] regarding

such issues, cannot be understated. It is a vital process that exists to promote the quality and betterment of healthcare at [the hospital]. If quality assurance investigations, and the documents and other materials generated during those investigations, did not remain confidential, then those persons involved in the quality assurance processes would be less inclined to provide candid and open review of the conduct of [hospital] employees involved in patient care.

"6. All documents and other materials created during the course of quality assurance investigation are not kept in the ordinary course of business, nor do they become a part of a patient's medical chart.

"7. Quality assurance documents and other materials are, obviously, created for quality assurance purposes. The creation of these documents and materials are needed to guarantee quality of care for all patients.

"8. I understand that Plaintiffs ... have requested an unprecedented look into the hiring, training, supervision and retention of [Taylor], as well as any complaints [the hospital] received pertaining to Mr. Taylor. I have personal knowledge regarding the discovery for which Plaintiffs seek and the information requested as to [Taylor] falls within the ambit of quality assurance inasmuch as investigations of complaints relative to [Taylor] were conducted within the confidentiality afforded the quality assurance process and were intended for its protection and privacy of patients as well as employees.

"9. It is essential that the discovery ... Plaintiffs seek be kept confidential to ensure that [the hospital] can continue to obtain complete and accurate information about the qualifications and conduct of its employees, both prior to employment

> and upon initiation of any quality assurance investigation, for the reasons set forth herein."

The hospital asserts that Parten's affidavit testimony is almost identical to the testimony of the hospital representative in Ex part Qureshi, 768 So. 2d 374 (Ala. 2000). Qureshi, however, is distinguishable insofar as the plaintiff in that case sued the physician, alleging medical malpractice. The plaintiff also sued the hospital, alleging that it had been negligent in hiring and credentialing the physician. The plaintiff sought discovery from the hospital concerning the physician's application for staff privileges. The hospital objected, claiming that the requested information was privileged under § 22-21-8. In response to the plaintiff's motion to compel, the hospital offered the affidavit of the chairman of its credentialing committee, who testified

> "that the documents that would be responsive ... were maintained as part of [the hospital's] credentialing file on [the physician]. [The credentialing chairman] further stated that it was essential that the materials gathered by the hospital be kept confidential, so as to ensure that physicians applying for hospital staff privileges would provide complete and accurate information about their qualifications. Moreover, [the credentialing chairman] stated, if the information did not remain confidential then 'physicians and health care institutions from whom materials are requested in the credentialing process would be less

> inclined to provide frank and open criticisms of physician applicants where warranted.'"

768 So. 2d at 376 (emphasis added).

The instant case does not involve a physician's application for staff privileges, which, as explained in Qureshi, are kept confidential to ensure that physicians applying for staff privileges provide "complete and accurate information about their qualifications." 768 So. 2d at 376. Rather, this case involves former patients of the hospital who were allegedly sexually assaulted by a former employee of the hospital. The hospital has failed to demonstrate that the quality-assurance privilege applies to claims arising out of allegations of sexual acts that are wholly unrelated to medical treatment or that investigations related to allegations of sexual assault are undertaken to improve the quality of patient care. See Ex parte Krothapalli, 762 So. 2d 836 (Ala. 2000)(discussing purpose of peer-review statutes like § 22-21-8). Given the discretion afforded the trial court with respect to discovery matters, we conclude that the hospital has failed to meet its burden of proving the existence of the privilege afforded by § 22-21-8 and the prejudicial effect of disclosing the information the

plaintiffs seek. See Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003)("Discovery 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.").

Conclusion

The hospital has failed to demonstrate a clear legal right to the relief sought. Accordingly, its petition for a writ of mandamus is denied.

PETITION DENIED.

Stuart, C.J., and Bolin, Parker, Main, Wise, and Bryan, JJ., concur.

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

Shaw, J., dissents.

MURDOCK, Justice (concurring in part and concurring in the result).

I concur in that portion of the main opinion explaining the inapplicability of the limitation on discovery of quality-assurance information under § 22-21-8, Ala. Code 1975. I strongly disagree, however, with both the main opinion and the dissent as to their conclusion that the claims against the Tombigbee Healthcare Authority d/b/a Bryan W. Whitfield Memorial Hospital ("the hospital") are governed by the Alabama Medical Liability Act, § 6-5-480 et seq., Ala. Code 1975, and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA").

This Court has held that the AMLA does not govern the liability of a health-care provider in relation to conduct that does not involve a deficiency in medical care. See Ex parte Vanderwall, 201 So. 3d 525 (Ala. 2015); Ex parte Altapointe Health Sys., Inc., [Ms. 1160544, Sept. 8, 2017) ___ So. 3d ___ (2017). The central premise of Vanderwall and Altapointe is that the AMLA was crafted by our legislature to govern cases where patients are injured as a result of their medical care. In Vanderwall, this Court expressly rejected the notion that tortious conduct was governed by the AMLA merely because it is committed by a health-care provider, even

if it was committed at a place and time normally associated with the provision of medical care. In so doing, we expressly rejected the place-and-time rule articulated in Mock v. Allen, 783 So. 2d 828 (Ala. 2000), noting that the "when and where" rule from Mock is "not plausible," that such a rule "'does not accord with what is right and just,'" and that Mock was "'wrong when decided.'" Vanderwall, 201 So. 3d at 536 (citations omitted). In Altapointe, this Court described the place-and-time rule from Mock as "discredited" and rejected the appellant's attempt to have us resurrect and apply that rule. I am greatly concerned that both the main opinion and the dissent reflect a contrary view that undermines the central premise and the precedential import of Vanderwall and Altapointe.

The main opinion takes the position that a hospital's negligence in hiring or supervising a radiology technician who the hospital knows or should know is a sexual predator may be characterized as "medical negligence" under the AMLA. ___ So. 3d at ___ ("In other words, the hospital asserts that the plaintiffs' claim against it is not a claim alleging sexual assault but, rather, an independent claim of medical

negligence stemming from the hospital's ... alleged negligent and/or wanton hiring, training, supervision, and retention of Taylor. We agree." (emphasis added)). I cannot agree. I am unable to conclude that the claim at issue in this case involves "medical negligence." I therefore cannot conclude that the AMLA governs the disposition or litigation of that claim. It is for this reason, and not for the reasons offered by the main opinion, that I conclude that § 6-5-551, Ala. Code 1975, does not prohibit the plaintiffs from seeking information from the hospital concerning "other incidents" or complaints involving Leland Bert Taylor, Jr.

By its terms, the AMLA applies "[i]n any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care." Ala. Code 1975, § 6-5-548 (emphasis added); see also Vanderwall, 201 So. 3d at 533. Likewise, the limitation on discovery under § 6-5-551 of the AMLA applies "[i]n 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."[3] (Emphasis added.) As

[3]Section 6-5-551 states in relevant part:

we explained in Vanderwall, the "standard of care" referenced in the AMLA is the degree of care that must be used by a health-care provider acting "within the ambit of 'medical treatment' or 'providing professional services.'" Vanderwall, 201 So. 3d at 537.

> "'[T]he AMLA applies to conduct that is, or that is reasonably related to, the provision of health-care services allegedly resulting in a medical injury. Just as the Alabama Legal Services Liability Act does not apply to every action against a person who is a lawyer, see Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800 (Ala. 1999), the AMLA does not apply to every action against a person who is a doctor, see Thomasson v. Diethelm, 457 So. 2d 397 (Ala. 1984). ... Although Mock's claims arise out of conduct that took place at a time when there was a

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> "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."

(Emphasis added.)

> doctor-patient relationship for the purpose of examination and treatment, see Thomasson, that fact alone cannot subject to the provisions of the AMLA all conduct by the doctor, however unrelated to the provision of medical services.'"

Vanderwall, 201 So. 3d at 537 (quoting, "as the correct interpretation of AMLA," Justice Lyons's dissenting opinion in Mock v. Allen, 783 So. 2d 828, 836-37 (Ala. 2000) (emphasis added in Vanderwall)).

> "In short, the simple fact is that sexual misconduct by a health-care provider toward a patient is not medical treatment, and it does not result in a 'medical injury' as such an injury is understood under the AMLA. The AMLA addresses the provision of medical services to patients and failures to meet the applicable standard of care in providing those services. M.C.'s action against Vanderwall is not concerned with such matters. Accordingly, the trial court did not err in granting M.C.'s motion to compel discovery on the ground that the AMLA does not govern M.C.'s claims against Vanderwall."

Vanderwall, 201 So. 3d at 540 (emphasis added); see also Altapointe, ___ So. 3d at ___ ("The gravamen of Avnet's complaint is that Altapointe negligently and wantonly failed to safeguard Hunter from such an attack [assault and battery by another patient]. There are no express allegations of medical negligence. ... Because there is no evidence before us that would permit us to conclude that the assault on Hunter

was somehow linked to the administration of medical care or professional services by Altapointe, we cannot say that the AMLA applies to Avnet's claims.").

The clause in § 6-5-551 referencing "the standard of care" is followed by a second, dependent clause. As a dependent clause, the latter clause does not expand the boundaries established in the first clause's reference to "the standard of care." Specifically, § 6-5-551 states that the AMLA applies to a "breach of the standard of care" (clearly a reference to the medical standard of care), before proceeding to state: "whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers." Thus, the acts to which § 6-5-551 applies, whether "acts or omissions in providing health care" or "the hiring, training, supervision, retention, or termination of care givers," must first involve a breach of the "standard of care," i.e., medical care by a medical caregiver. "Medical care" by a "medical caregiver" is the only type of conduct that triggers the application of the AMLA.

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)); Ala. Code 1975, § 6-5-549.1(b) ("[I]t is the declared intent of this Legislature to ensure that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama. The continuing and ever increasing threat of legal actions for alleged medical injury causes and contributes to an increase in health care costs and places a heavy burden on those who can least afford such increases. The threat of such actions contributes to the performance of expensive medical procedures by physicians and other health care providers which otherwise would not be considered necessary. The spiraling cost and decreasing availability of essential medical services caused by the threat of litigation constitutes a danger to the health and safety of the citizens of this state. ... [T]he increasing threat of legal actions for alleged medical injury has resulted in a continuing limitation on the number of physicians providing specialized health care in this state." (emphasis added)).

By the same token, the legislature did not purpose to protect physicians from complaints alleging that the physician

has sexually abused a patient. See Vanderwall and Altapointe, supra. By the same token, the legislature did not purpose to protect hospitals from complaints alleging that the hospital negligently hired or negligently supervised a physician who sexually abuses a patient. Such activities do not concern the provision of "medical care" any more than do the other non-medical activities referenced above (involving the maintenance of hospital premises, etc.). To the extent the AMLA concerns hiring, supervision, etc., of caregivers, such concern is solely with the hiring, supervision, etc. of caregivers qua caregivers. The AMLA does not govern the hiring of caregivers who become tortfeasors apart from the provision of medical care.

Based on the foregoing, the AMLA is inapplicable to the direct-liability claim (the hospital's allegedly negligent or wanton hiring, training, supervision, or retention of Taylor) in the present case. Sexual molestation has no relation to the provision of medical care, see Vanderwall, 201 So. 3d at 537 ("We do not believe the legislature intended for the protections afforded under the AMLA to apply to health-care providers who are alleged to have committed acts of sexual

assault; such acts do not, by any ordinary understanding, come within the ambit of 'medical treatment' or 'providing professional services.'"), and the AMLA does not address anyone's liability in relation to sexual molestation, whether that of a physician who commits such molestation or of a hospital that negligently hires, trains, supervises, or retains someone who commits such molestation.

The AMLA governs liability and related discovery standards only when the plaintiff's alleged injury results from the negligent or wanton provision of medical care; the fact that a health-care provider is named as a defendant is insufficient, in itself, to summon the protections of the AMLA. If a radiology technician sexually molests a patient, the AMLA no more applies to that activity than it does to a hospital-maintenance employee's engaging in that same activity. Likewise, the AMLA no more applies to the hospital's alleged negligent hiring, training, supervision, or retention of that technician vis-à-vis such activity than it does to the hospital's hiring, training, supervision, or retention of the maintenance employee vis-à-vis such activity.

The alleged misdeed of the hospital in the present case does not raise any question as to whether the hospital engaged in sound hiring or supervisory practices in relation to the quality of Taylor's actions as a radiology technician but, rather, whether the hospital engaged in sound hiring and supervisory practices as to a matter unrelated to medical care. The AMLA, including the discovery limitations of § 6-5-551 and other provisions, therefore is not applicable. To hold otherwise would mean that an AMLA action depends merely on the location and timing of the individual health-care provider's wrongful acts (i.e., whether he or she was on duty in a hospital or a doctor's office), rather than to the type of wrongful acts in which the defendant allegedly engaged.[4]

[4]To hold otherwise also would mean that other provisions of the AMLA would be applicable. For example, the plaintiff would be required to present expert testimony from a "similarly situated health care provider" as to the vetting processes used by hospitals for matters unrelated to medical care, including to what degree background checks, criminal and otherwise, must be conducted; to what extent a hospital must require references and contact those references; to what extent a review of social media is required in this day and age, etc. See Ala. Code 1975, § 6-5-548 (expert-testimony requirements). I am unaware of any AMLA action where the AMLA statutory requirement for expert testimony as to the standard of care has been extended to the hiring practices of hospitals as those practices relate to criteria unrelated to the provision of medical services.

Such a holding would not merely erode Vanderwall, it effectively would eviscerate it. Indeed, I posit that if the applicability of the AMLA is not limited to actions involving the services of a caregiver as a caregiver, then Vanderwall was wrongly decided and we are sub silentio overruling it. If we focus solely on the language of the dependent clauses in § 6-5-551 noted above so as to make an AMLA action merely a matter of timing and location of the allegedly wrongful acts, not whether the defendant's acts relate to the "standard of [medical] care," why did we reject that approach as determinative in Vanderwall? See 201 So. 3d at 536 ("[T]he alleged sexual misconduct occurred in the place and during the time that Vanderwall otherwise was engaged in treating M.C. for her back pain. Thus, under the interpretation of the AMLA enunciated in Mock[v. Allen, 783 So. 2d 828 (Ala. 2000),] and reiterated in O'Rear[v. B.H., 69 So. 3d 106 (Ala. 2011)], M.C.'s allegation of sexual misconduct would be governed by the proof requirements of the AMLA. We cannot in good conscience, however, continue to adhere to the rule articulated in Mock and O'Rear.").

The dissent acknowledges Vanderwall, but I would argue that the position taken in the dissent is more aligned with the view expressed by its author in his dissent in Vanderwall. See Vanderwall, 201 So. 3d at 542-44 (Shaw, J., dissenting). A similar argument could be made as to the main opinion.[5] But, as we have held, it is not merely any negligence of a health-care provider occurring in a health-care setting that triggers the application of the AMLA to that provider or his or her employer. The clearly established rule, at least before today, was simply whether the cause of action concerns "the provision of medical services to [a] patient[] and failures to meet the applicable standard of care in providing those [medical] services." Vanderwall, 201 So. 3d at 540. That rule no longer appears so clear.

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[5]See Altapointe, ___ So. 3d at ___ (Sellers, J., concurring in part and dissenting in part):

> "I believe that, once it is established that a defendant is a health-care provider, then § 6-5-548, Ala. Code 1975, bars discovery of insurance limits. Notwithstanding that the act that is the subject of litigation may not have been related to the provision of medical services, once a threshold determination is made that the defendant is a health-care provider, insurance limits are not discoverable."

(Emphasis added.)

SHAW, Justice (dissenting).

I respectfully dissent.

In my writing in Ex parte Vanderwall, 201 So. 3d 525 (Ala. 2015), I stated:

> "In Mock v. Allen, 783 So. 2d 828 (Ala. 2000), this Court rejected the argument that the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975 ('the AMLA'), '[did] not apply ... because "[t]he acts of intentional sexual assault of which [the patient] complains were for no medical reason"' and were 'outside the scope of the physician's professional services and did not constitute professional malpractice.' Instead, the rule has been as follows:
>
> > "'[M]ost of the reported cases where appellate courts have declined to hold that the physician's conduct constituted professional malpractice involved either an intimate sexual relationship or sexual misconduct having no connection with the rendering of professional services. ...
> >
> > "'By contrast, in cases where the alleged sexual misconduct occurs as part of a physician's examination and/or treatment of a patient, the conduct is considered to have occurred during the delivery of professional services, and is therefore cognizable as a medical-malpractice claim. ...'
>
> "783 So. 2d at 832-33 (emphasis added)."

Ex parte Vanderwall, 201 So. 3d at 542 (Shaw, J., concurring in case no. 1130041 and dissenting in case no. 1130036).

Under Mock v. Allen, 783 So. 2d 828 (Ala. 2000), the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA"), would apply in this case. However, this Court in Ex parte Vanderwall sua sponte overruled Mock. The Court stated: "The AMLA addresses the provision of medical services to patients and failures to meet the applicable standard of care in providing those services." Ex parte Vanderwall, 201 So. 3d at 540. The AMLA was not "intended," the Court said, "to apply to health-care providers who are alleged to have committed acts of sexual assault; such acts do not, by any ordinary understanding, come within the ambit of 'medical treatment' or 'providing professional services.'" 201 So. 3d at 537.

Tombigbee Healthcare Authority d/b/a Bryan W. Whitfield Memorial Hospital ("the hospital") does not ask this Court to overrule Ex parte Vanderwall; instead, it argues that, under the rationale of that decision, the AMLA would still apply. In the instant case, the duties allegedly breached by the hospital are stated in the complaint as follows: "[A] duty to the Plaintiffs to properly hire, train, supervise, and retain their employees" and "a duty to protect patients ... from harm

while receiving treatment and care...." These duties of the hospital, by their very nature, are duties that arise in "the provision of medical services to patients." Ex parte Vanderwall, 201 So. 3d at 540. For purposes of this claim, the hospital is not being sued for "committ[ing] acts of sexual assault." I do not read Ex parte Vanderwall as holding that this claim is outside the AMLA. Further, § 6-5-551 appears to indicate that it applies to negligent or wanton hiring, training, and supervision claims against health-care providers even if the conduct challenged did not result from acts or omissions "in providing health care." Section 6-5-551 states, in applicable part:

> "In any action for injury, damages, or wrongful death ... 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."

(Emphasis added.) See also Ex parte Ridgeview Health Care Ctr., Inc., 786 So. 2d 1112, 1116 (Ala. 2000) ("[Section] 6-5-551 makes it clear that a claim against a health-care provider alleging that it breached the standard of care in hiring, training, supervising, retaining, or terminating its

employees is governed by the Alabama Medical Liability Act.").

The plaintiffs also claim that the hospital is vicariously liable for any sexual assault by its former employee, Leland Bert Taylor, Jr. However, "[t]o recover against a defendant under the theory of respondeat superior, it is necessary for the plaintiff ... to establish that the act was done within the scope of the employee's employment." Hendley v. Springhill Mem'l Hosp., 575 So. 2d 547, 550 (Ala. 1990) (plurality opinion). If Taylor was acting within the scope of his employment, as alleged in the complaint, then, by necessity, he was engaged in the "provision of medical services to patients," and the AMLA would apply.[6]

Thus, as the main opinion concludes, the AMLA applies to the plaintiffs' claims against the hospital. "To be clear, the application of ... the AMLA in no way denies the plaintiff a cause of action or the ability to seek damages for any

[6]I see nothing indicating that Taylor's employment with the hospital involved providing non-medical services. If Taylor indeed sexually abused patients, then he was not acting in the line and scope of his employment, and the hospital could not be held vicariously liable. Hendley, 575 So. 2d at 551 (holding that alleged sexual abuse by a purported agent of a hospital was an act based on wholly personal motives having no relation to the business and "a gross deviation from the purpose" of the employment).

alleged misconduct by the defendant. Instead ... the plaintiff's claim is litigated pursuant to certain statutorily prescribed substantive and procedural requirements." Ex parte Vanderwall, 201 So. 3d at 542 (Shaw, J., concurring in case no. 1130041 and dissenting in case no. 1130036). When § 6-5-551 applies, "[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."

The hospital argues in its petition that "each of the Plaintiffs is barred from discovery pertaining to any of the other Plaintiffs." Petition, at 4 (footnote omitted). As the main opinion notes, under the unusual facts of this case--there are four plaintiffs and evidence regarding acts related to one plaintiff will, by necessity, be received by the others--"it would be impractical, if not impossible, to prevent each plaintiff from discovering information concerning the alleged acts by Taylor against the other plaintiffs." ___ So. 3d at ___. The discovery restrictions of § 6-5-551 do not seem to anticipate a scenario where multiple plaintiffs have joined their claims in this manner and thus, by necessity, receive the same discovery. However, we have held that § 6-5-

551 essentially precludes a joint action by multiple plaintiffs in the first place:

> "[Section] 6-5-551 necessarily removes from the trial court any discretion to allow the introduction, in the trial of [one plaintiff's] claims, of any evidence of [a defendant's] alleged wrongful acts and omissions as to [a co-plaintiff], whether with or without limiting instructions. ... If both sets of plaintiffs are allowed to prosecute their claims in the same trial, a violation of § 6-5-551 is unavoidable."

Ex parte Brookwood Med. Ctr., 994 So. 2d 264, 268 (Ala. 2008).[7]

I agree with the main opinion, however, that the instant petition "has not cited any authority for its argument that the AMLA's 'other acts or omissions' language would preclude plaintiffs who have filed a joint complaint from engaging in discovery related to the same employee by whom they were all victimized." ___ So. 3d at ___. However, the petition also challenges the plaintiffs' discovery requests related to wrongdoing by Taylor in regard to other patients, namely,

[7]The hospital previously petitioned this Court for mandamus review of the trial court's denial of a motion to sever; that petition was denied. Ex parte Tombigbee Healthcare Auth. d/b/a Bryan W. Whitfield Mem'l Hosp. (No. 1160707, June 30, 2017) (unpublished order). However, "the denial of relief by mandamus does not have res judicata effect." Cutler v. Orkin Exterminating Co., 770 So. 2d 67, 69 (Ala. 2000). Thus, this issue will likely arise again.

patients who are not the plaintiffs. The hospital's motion for a protective order stated:

> "Plaintiffs ... propounded their First Interrogatories to [the hospital] and therein sought expansive discovery as to [the hospital's] knowledge, and any actions it took, relating not only to Plaintiffs['] ... underlying allegations of wrongdoing as to co-Defendant Taylor, but as to any other individual who was allegedly assaulted by Taylor.
>
> "...[The hospital] provided its responses to the aforementioned discovery and asserted appropriate objections to those discovery requests that sought to conduct discovery in violation of Ala. Code §§ 6-5-551 and 22-21-8."

(Emphasis added.)

> The hospital states in its petition to this Court:
>
> "This Petition for Mandamus concerns [the hospital's] Motion for Protective Order as to the Plaintiffs' discovery requests seeking information regarding the hiring, training, supervision and retention of Defendant Taylor as well as any complaints the Hospital received pertaining to Taylor. [Section] 6-5-551, Code of Alabama (1975) prohibits discovery of acts of omissions relating to patients other than the patient who has brought the claim. As each of the Plaintiffs is not entitled to discovery regarding the complaints of the other Plaintiffs, the Hospital's Motion for Protective Order should have been granted."

Petition, at 2 (emphasis added).

The challenge in the petition to "any" discovery regarding complaints about Taylor by persons other than the

plaintiffs is not a model of clarity; the petition is mainly directed toward challenging the fact that each plaintiff will receive discovery regarding the other plaintiffs. However, the issue was raised in both the motion for a protective order and in this Court. I would grant the petition and instruct the trial court that the discovery restrictions in § 6-5-551 applied to the plaintiffs' discovery requests regarding any individual other than the plaintiffs who was allegedly assaulted by Taylor.

I also respectfully dissent from the main opinion's holding that Ala. Code 1975, § 22-21-8(b), is inapplicable in this case. That Code section states:

> "All accreditation, quality assurance credentialling and similar materials shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional or institution arising out of matters which are the subject of evaluation and review for accreditation, quality assurance and similar functions, purposes, or activities."

The Code section provides that "all" quality-assurance materials are protected in "any" civil action; it does not provide an exception for quality-assurance materials related to an alleged sexual assault by a hospital employee against a patient. It is undisputed that the hospital investigated the

allegations against Taylor and produced certain quality-assurance reports as a result of that investigation. The affidavit of Cindy Parten, quoted in the main opinion, makes clear that the information requested by the plaintiffs "'falls within the ambit of quality assurance inasmuch as investigations of complaints relative to [Taylor] were conducted within the confidentiality afforded the quality assurance process and were intended for its protection and privacy of patients as well as employees.'" ___ So. 3d at ___. She further testified that "'[i]t is essential that the discovery ... Plaintiffs seek be kept confidential to ensure that [the hospital] can continue to obtain complete and accurate information about the qualifications and conduct of its employees, both prior to employment and upon initiat[ion] of any quality assurance investigation.'" ___ So. 3d at ___. It appears to me that discoverable materials gathered for quality-assurance purposes regarding Taylor are protected by § 22-21-8(b). I would grant the petition and issue a writ of mandamus directing the trial court to enter a protective order regarding those materials. I thus respectfully dissent.