Rel: September 25, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1181072

QHG of Enterprise, Inc., d/b/a Medical Center Enterprise

v.

Amy Pertuit

Appeal from Coffee Circuit Court
(CV-15-900156)

BRYAN, Justice.

QHG of Enterprise, Inc., d/b/a Medical Center Enterprise ("QHG"), appeals from a judgment of the Coffee Circuit Court ("the trial court") awarding Amy Pertuit ("Amy") $5,000 in

compensatory damages and $295,000 in punitive damages.[1] We reverse the judgment and render a judgment for QHG.

Background

Leif Pertuit ("Leif") was married to Deanna Mortensen; one child, Logan, was born of their marriage. Leif and Mortensen were divorced in 2007. At some point, Mortensen was awarded sole physical custody of Logan, and Leif was awarded visitation.

Leif later married Amy, a nurse. At the time of their marriage, Leif and Amy resided in Mobile, and Mortensen resided in Enterprise. Eventually, tensions arose between Leif and Mortensen regarding the issue of visitation. In March 2014, Mortensen began sending text messages to Leif accusing Amy of being addicted to drugs.

Around that time, Mortensen visited the attorney who had represented her in matters relating to her divorce from Leif ("Mortensen's attorney"). Mortensen expressed concern that Logan was in danger as a result of the visitation arrangement

[1]QHG also named Leif Pertuit as an appellee in its notice of appeal. However, as explained in more detail infra, QHG prevailed on Leif's claims in the trial court, and Leif did not appeal from the trial court's judgment. Therefore, Leif is not a party to this appeal.

and asked her attorney to assist with obtaining a modification of Leif's visitation. Mortensen's attorney explained: "We can't just go on your belief. ... You can file a petition, but it will not be granted ...."

In April 2014, Mortensen telephoned or sent a text message to Dr. Kathlyn Diefenderfer, a physician whom QHG employed as a hospitalist at Medical Center Enterprise, a hospital operated by QHG (hereinafter referred to at times as "the hospital"). Mortensen had been Dr. Diefenderfer's patient when Dr. Diefenderfer worked in her own clinic, and Dr. Diefenderfer's son played sports with Logan. Mortensen went to see Dr. Diefenderfer at the hospital. Hysterical and crying, Mortensen informed Dr. Diefenderfer that Logan was scheduled to ride in an automobile with Amy from Enterprise to Mobile for Leif's visitation and expressed concern regarding Amy's ability to drive, given her belief that Amy was using drugs and had lost her nursing license.

Dr. Diefenderfer then used a hospital computer to access the Alabama Prescription Drug Monitoring Program ("PDMP"), a database that contains information regarding drug prescriptions. See § 20-2-212, Ala. Code 1975 ("The [Alabama

Department of Public Health] may establish, create, and maintain a controlled substances prescription database program.").[2] After reviewing information pertaining to Amy's drug prescriptions, Dr. Diefenderfer told Mortensen: "All I can tell you is I would not put my son in the car."

Later in April 2014, Mortensen visited her attorney, again distraught. Mortensen informed her attorney that her suspicions about Amy's drug use had been confirmed. Mortensen's attorney said: "You cannot allege that unless you have proof. ... Where's the proof?" Mortensen indicated that Dr. Diefenderfer had acquired the necessary proof.

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[2]Section 20-2-210, Ala. Code 1975, provides:

> "The Alabama Legislature hereby finds that the diversion, abuse, and misuse of prescription medications classified as controlled substances under the Alabama Uniform Controlled Substances Act constitutes a serious threat to the health and welfare of the citizens of the State of Alabama. The Legislature further finds that establishment of a controlled substances prescription database to monitor the prescribing and dispensing of controlled substances will materially assist state regulators and practitioners authorized to prescribe and dispense controlled substances in the prevention of diversion, abuse, and misuse of controlled substances prescription medication through the provision of education and information, early intervention, and prevention of diversion, and investigation and enforcement of existing laws governing the use of controlled substances."

At the time, Mortensen's attorney was also representing Dr. Diefenderfer in a different legal matter, and the two were neighbors. Mortensen's attorney telephoned Dr. Diefenderfer, who was at home. Dr. Diefenderfer told Mortensen's attorney that no child should be around Amy because of her methadone and opiate use. At some point, Mortensen's attorney asked Dr. Diefenderfer whether she had written documentation supporting her statements, and Dr. Diefenderfer said: "Yes, I have a printout." Mortensen's attorney asked whether a subpoena would be required to obtain the documentation, and Dr. Diefenderfer again responded in the affirmative.

Based on his telephone conversation with Dr. Diefenderfer, Mortensen's attorney drafted and filed that same day a petition seeking a modification of Leif's visitation with Logan, so as to prevent Logan from being left in Amy's care. Among other things, the petition alleged:

> "[Amy] has lost her nursing license after reprimand, counseling[,] and[,] finally[,] a revocation of her license due to what is believed as prescription drug and substance abuse. Records and other evidence show that [Leif and Amy] ha[ve] purchased up to 138 pills a month of [m]ethadone, Lortabs and other narcotics for over a year. These numbers are far in excess of medically recommended dosages. [Amy] is also making purchases at four different pharmaceutical establishments in the Mobile area and

with three different doctors."

Amy later received a copy of the modification petition on Leif's behalf. According to Amy, the material allegations set out in the petition included multiple inaccuracies, and she was convinced that her private health information had been obtained in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Amy testified that her nursing license had never been suspended or revoked, that she had never been reprimanded or terminated by an employer for drug use, that she had never failed a drug test requested by an employer, that she had never been arrested for drug possession, that she had never taken methadone and Lortab together, that she had never taken 138 pills in one month, that she had never "shopped around" for doctors or pharmacies, and that her doctor had never raised a concern that Amy was addicted to opioids. Amy noted that she had been prescribed medication to help manage pain resulting from fusion surgery to repair multiple spinal fractures in her neck that had been caused by a significant motor-vehicle collision. Amy attributed one large prescription for 138 doses of methadone in November 2013 to

the fact that her doctor was leaving town for Christmas at that time.

At some point after the modification petition was filed, Mortensen's attorney met Dr. Diefenderfer at her home and delivered what he purported to be a subpoena directing Dr. Diefenderfer to produce: "Records which indicate that Logan ... may by in imminent danger if in the physical custody of Amy ...." In reality, the purported subpoena had never been filed in the court in which the modification petition was pending; neither the court presiding over that action nor opposing counsel was aware of the purported subpoena. See Rule 45, Ala. R. Civ. P. (providing the procedure for seeking the issuance of a subpoena). At some point after Mortensen's attorney presented the purported subpoena to Dr. Diefenderfer, Dr. Diefenderfer gave him a report generated by Dr. Diefenderfer from the PDMP and printed at her home that reflected Amy's name and listed prescriptions for methadone and Lortab.

The total number of times Dr. Diefenderfer accessed the PDMP to obtain medical information concerning Amy is unclear. It is undisputed that she did so more than once. However, Dr.

Diefenderfer testified that such access occurred only once at the hospital -- on the day that Mortensen sought her assistance regarding Logan's scheduled visitation with Leif.

At the hearing on Mortensen's modification petition, Amy testified, in the presence of Leif and Leif's mother, regarding the allegations raised by Mortensen in her petition. The court presiding over that action denied the modification petition, ordering Leif's visitation to resume as previously ordered.

As a result of the events described above, Amy submitted a report to the Enterprise Police Department, a complaint to the United States Department of Health and Human Services, a complaint to the Alabama Bar Association, and a complaint to the Alabama Board of Medical Examiners. Indictments were presented by the grand jury of Coffee County against Mortensen and Dr. Diefenderfer, charging each with violating § 20-2-216, Ala. Code 1975.[3] The indictments were later recalled upon

[3]Section 20-2-216 provides:

> "Any person who intentionally makes an unauthorized disclosure of information contained in the controlled substances prescription database shall be guilty of a Class A misdemeanor. Any person or entity who intentionally obtains unauthorized access to or who alters or destroys

Mortensen's and Dr. Diefenderfer's entering into pretrial-diversion agreements with the district attorney's office. The Alabama Board of Medical Examiners sent Dr. Diefenderfer a letter of concern.

On October 24, 2014, the United States Department of Health and Human Services, Office for Civil Rights ("OCR"), sent a letter to "[t]he [o]ffice" of Dr. Diefenderfer, explaining that OCR had received a complaint regarding Dr. Diefenderfer's access of the PDMP in April 2014. The letter was sent to the address of Dr. Diefenderfer's previous employer, Enterprise Medical Clinic. The letter stated that Dr. Diefenderfer's actions "could reflect a violation" of specified federal regulations. Among other things, the letter stated:

> "OCR has determined to resolve this matter through the provision of technical assistance to the Office. To that end, OCR has enclosed [certain] material[s] .... It is our expectation that you will review these materials closely and share them with your staff as part of the [HIPAA] training you provide to your workforce. It is also our expectation that you will assess and determine whether there may have been an incident of noncompliance as alleged by the complainant in this matter, and, if so, to take the

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> information contained in the controlled substances prescription database shall be guilty of a Class C felony."

> steps necessary to ensure such noncompliance does not occur in the future."

Four days later, QHG received, via a courier from Dr. Diefenderfer's previous employer, a copy of the letter sent by OCR.

Richard Ellis was QHG's chief executive officer ("CEO") at the time, and Kathy McCurdy was the compliance and privacy officer for Medical Center Enterprise. As the compliance and privacy officer, McCurdy was responsible for investigating the complaint against Dr. Diefenderfer. McCurdy was also Mortensen's aunt. Ellis and McCurdy met with Dr. Diefenderfer and discussed the importance of patient privacy and compliance with the requirements of HIPAA and explained QHG's commitment to safeguarding patient privacy. Dr. Diefenderfer agreed regarding the importance of HIPAA and patient privacy. Dr. Diefenderfer was not reprimanded, suspended, or fired by QHG. Evidence was also presented indicating that Dr. Diefenderfer believed that the hospital "backed her up a hundred percent."

In September 2015, Leif and Amy (hereinafter referred to collectively as "the Pertuits") commenced this action. As amended, the Pertuits' complaint named as defendants Dr. Diefenderfer, Mortensen, Mortensen's attorney, and QHG. The

Pertuits asserted counts alleging "negligence and wantonness"; "violation of the right of privacy"; "tort of outrage (intentional infliction of emotional distress)"; and "conspiracy" against Dr. Diefenderfer, Mortensen, Mortensen's attorney, and QHG. Leif also asserted a claim for "loss of consortium."

The Pertuits alleged that Dr. Diefenderfer was acting within the line and scope of her employment with QHG during all times relevant to the actions made the basis of the foregoing claims. The Pertuits asserted separate counts against QHG for "respondeat superior/ratification" and "negligent and wanton training, supervision[,] and retention." The Pertuits sought compensatory and punitive damages for each of their claims.

At some point after the Pertuits filed their complaint, QHG terminated its employment relationships with hospitalists working at Medical Center Enterprise. Specifically, QHG entered into a contract with a management company called Schumacher Group, which, in turn, employed the hospitalists working at Medical Center Enterprise. According to Amy, from that point, hospitalists working at Medical Center Enterprise

became independent contractors with regard to QHG. Amy's brief, at 14.

During the course of this litigation, in 2016, Dr. Diefenderfer prepared a report ("the 2016 report"), in which Dr. Diefenderfer referenced Amy's use of medications and other factors leading to Dr. Diefenderfer's conclusion that "Amy exhibits the behaviors of a patient with antisocial personality disorder, defined as a person who[se] ways of thinking, perceiving situations[,] and relation to others are dysfunctional and destructive." Among other things, Dr. Diefenderfer's report suggested that Amy's "long[-]term use of Methadone ha[d] ... contributed to her psychological and emotional disorder resulting in a frivolous law suit." Dr. Diefenderfer gave a copy of the report to Mortensen because, at the time, Dr. Diefenderfer felt that she and Mortensen "were partners in this." According to Dr. Diefenderfer's testimony, when she created the 2016 report, she was employed by Schumacher Group -- not by QHG. QHG did not learn of the report until later.

In September 2016, QHG filed a summary-judgment motion. The trial court entered an order granting QHG's motion,

concluding, in pertinent part: "Because [QHG] cannot be held liable for the alleged intentional acts of [Dr.] Diefenderfer committed outside the scope of her employment, [QHG] is entitled to a judgment as a matter of law." The Pertuits filed a motion asking the trial court to reconsider its order, asserting that discovery had not yet been completed. The trial court granted the Pertuits' motion and set aside its previous order granting QHG's summary-judgment motion.

The Pertuits reached settlements with Dr. Diefenderfer, Mortensen, and Mortensen's attorney. The terms of Dr. Diefenderfer's settlement agreement with the Pertuits specified that the agreement did not constitute an admission of liability on Dr. Diefenderfer's part. Dr. Diefenderfer, Mortensen, and Mortensen's attorney were eventually dismissed from the action.

A jury trial was conducted over the course of several days on the Pertuits' claims against QHG. QHG filed a written motion for a judgment as a matter of law at the close of the Pertuits' case. The trial court denied QHG's motion. At the close of all the evidence, QHG's attorney orally moved for a judgment as a matter of law, and the trial court heard

arguments from counsel regarding the motion. The trial court denied QHG's motion.

The jury returned a verdict in favor of QHG on all claims asserted against it by Leif. The jury returned a verdict in favor of Amy on her claims against QHG, awarding her $5,000 in compensatory damages and $295,000 in punitive damages. QHG filed a renewed motion for a judgment as a matter of law, pursuant to Rule 50(b), Ala. R. Civ. P., and a separate motion requesting a new trial or, in the alternative, a remittitur.[4] The trial court entered orders denying QHG's motions. The trial court entered a judgment on the jury's verdict in favor of Amy and on the jury's verdict in favor of QHG regarding Leif's claims. QHG appealed.[5]

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[4]In New Addition Club, Inc. v. Vaughn, 903 So. 2d 68, 72 (Ala. 2004), this Court held "that if a party moves for a judgment as a matter of law or, in the alternative, for a new trial before the court has entered a judgment, the motion shall be treated as having been filed after the entry of the judgment and on the day thereof."

[5]During the pendency of this appeal, this Court remanded this cause to the trial court for the disposition of certain matters. On September 10, 2020, QHG filed a supplemental brief pursuant to Rule 28A, Ala. R. App. P., asserting additional argument in support of its position that the trial court erred by failing to enter a judgment as a matter of law in QHG's favor. Amy filed a motion to strike QHG's supplemental brief. As explained infra, we have concluded that QHG was entitled to a judgment as matter of law based on

Analysis

QHG raises 10 arguments on appeal. One of QHG's arguments is that this action represents an attempt by Amy to assert a private right of action to enforce the provisions of HIPAA, which, QHG contends, she lacks authority to do. See Acara v. Banks, 470 F.3d 569, 572 (5th Cir. 2006). In response, Amy argues that her claims were not brought to enforce the provisions of HIPAA; she says they are "common law tort claims that incorporate QHG's privacy policies, employee contract, and HIPAA into each element where appropriate." Amy's brief, at 29. Amy asserts, however, that "this is a case of first impression for Alabama." Amy's brief, at 30. In support of her argument that we should recognize her claims, Amy points to Walgreen Co. v. Hinchy, 21 N.E.3d 99 (Ind. Ct. App. 2014), a decision of the Indiana Court of Appeals that, Amy says, recognized claims similar to those she brought against QHG. Amy's brief, at 30-31.[6]

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the arguments asserted in QHG's initial briefs. Therefore, we do not consider the additional arguments asserted in QHG's supplemental brief, and Amy's motion to strike QHG's supplemental brief is denied as moot.

[6]Neither party has raised any issue concerning federal preemption and HIPAA on appeal. Therefore, we express no opinion regarding preemption in this case.

QHG also argues that it was entitled to a judgment as a matter of law under well settled principles of law. For the reasons explained below, we agree. Therefore, we decline Amy's invitation to tread new ground in the field of Alabama tort law based on the facts of this case, and we expressly reach no holding in this case concerning the general viability of tort claims that, as a matter of Alabama law, seek to incorporate the privacy provisions of HIPAA. We need not decide that question at this time because, even assuming that such claims are generally cognizable under Alabama law, insufficient evidence was presented to satisfy the essential components of the theories of liability relied upon by Amy against QHG.[7]

> "In American National Fire Insurance Co. v. Hughes, 624 So. 2d 1362 (Ala. 1993), this Court set out the standard that applies to the appellate review of a trial court's ruling on a motion for a [judgment as a matter of law]:
>
> "'The standard of review applicable to

[7]At trial, Amy presented the testimony of an expert witness, Donna Grindle, who, among other things, opined that QHG had violated the provisions of HIPAA in various ways. We express no opinion regarding Grindle's conclusions in that regard. As noted, our decision in this appeal is based only on Amy's failure to present sufficient evidence to support essential components of the state-law theories of liability she asserted against QHG and does not address federal law.

> a ruling on a motion for JNOV [now referred to as a renewed motion for a judgment as a matter of law] is identical to the standard used by the trial court in granting or denying a motion for directed verdict [now referred to as a motion for a judgment as a matter of law]. Thus, in reviewing the trial court's ruling on the motion, we review the evidence in a light most favorable to the nonmovant, and we determine whether the party with the burden of proof has produced sufficient evidence to require a jury determination.'

"624 So. 2d at 1366 (citations omitted). Further, in Cessna Aircraft Co. v. Trzcinski, 682 So. 2d 17 (Ala. 1996), this Court held:

> "'The motion for a J.N.O.V. [now referred to as a renewed motion for a judgment as a matter of law] is a procedural device used to challenge the sufficiency of the evidence to support the jury's verdict. See, Rule 50(b), [Ala.] R. Civ. P.; Luker v. City of Brantley, 520 So. 2d 517 (Ala. 1987). Ordinarily, the denial of a directed verdict [now referred to as a judgment as a matter of law] or a J.N.O.V. is proper where the nonmoving party has produced substantial evidence to support each element of his claim. However, if punitive damages are at issue in a motion for a directed verdict or a J.N.O.V., then the "clear and convincing" standard applies. Senn v. Alabama Gas Corp., 619 So. 2d 1320 (Ala. 1993).'

"682 So. 2d at 19 (footnote omitted). '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v.

> Founders Life Assurance Co., 547 So. 2d 870, 871 (Ala. 1989). See § 12-21-12(d), Ala. Code 1975."

Cheshire v. Putman, 54 So. 3d 336, 340 (Ala. 2010).

As noted, the bases for QHG's liability asserted in the Pertuits' complaint, as amended, were "respondeat superior/ratification" and "negligent and wanton training, supervision[,] and retention." Each theory of liability is predicated on the notion that Dr. Diefenderfer's actions in this case were wrongful and that QHG is consequently responsible for Dr. Diefenderfer's wrongful conduct.[8] As also noted, Amy entered into a settlement agreement with Dr. Diefenderfer that included no admission of liability on the part of Dr. Diefenderfer.

As with our assumption stated above regarding the general availability of state-law tort claims that incorporate the privacy provisions of HIPAA, for the purposes of this opinion we assume, without deciding, that Alabama law provides a remedy in tort against a defendant who commits the actions Dr.

[8]On appeal, Amy states: "Claims against [QHG] are for Invasion of Privacy, Outrage, Respondeat Superior, and Negligent and [W]anton[] Training, Supervision and [R]etention ...." Amy's brief, at 29. It is clear from her brief, however, that Amy's first two "claims" are still predicated on QHG's conduct concerning, and relationship to, Dr. Diefenderfer. Amy's brief, at 35-39.

Diefenderfer committed in this case. We make this assumption because, by virtue of the settlement between Amy and Dr. Diefenderfer, the primary issue presented by this appeal is not whether Dr. Diefenderfer is liable to Amy for her actions but, rather, whether QHG is liable to Amy as a consequence of Dr. Diefenderfer's actions.

QHG argues that Amy failed to present substantial evidence indicating that QHG was liable for Dr. Diefenderfer's actions under either a theory of "respondeat superior/ratification" or "negligent and wanton training, supervision[,] and retention." We address each in turn.

I. Respondeat Superior

QHG argues that Amy failed to present substantial evidence indicating that Dr. Diefenderfer was acting within the scope of her employment with QHG when she committed the conduct forming the basis of Amy's claims or that Dr. Diefenderfer's conduct furthered QHG's business interests. QHG cites, among other authority, Solmica of Gulf Coast, Inc. v. Braggs, 285 Ala. 396, 232 So. 2d 642 (1970), for the standard used to determine whether an employee's conduct fell within the line and scope of his or her employment. In

Braggs, we stated:

> "'The test is the service in which the employee is engaged. City of Bessemer v. Barnett[, 212 Ala. 202, 102 So. 23 (1924)]. The rule which has been approved for determining whether certain conduct of an employee is within the line and scope of his employment is substantially that if an employee is engaged to perform a certain service, whatever he does to that end, or in furtherance of the employment, is deemed by law to be an act done within the scope of the employment. Railway Express Agency v. Burns, 225 Ala. 557, 52 So. 2d 177 [(1950)]; Rochester-Hall Drug Co. v. Bowden, 218 Ala. 242, 118 So. 674 [(1928)].'"

285 Ala. at 401, 232 So. 2d at 642 (quoting Nelson v. Johnson, 264 Ala. 422, 427, 88 So. 2d 358, 361 (1956)); see also Synergies3 Tec Servs., LLC v. Corvo, [Ms. 1170765, August 21, 2020] ____ So. 3d ____ (Ala. 2020).

QHG employed Dr. Diefenderfer as a hospitalist. Ellis, QHG's CEO during the relevant times, testified as follows during his deposition:[9]

> "In general terms, a hospitalist is a physician who manages the inpatient care for a variety of patients while they're -- while they have inpatient status in the hospital. So typically they do not have an outside clinic and all they do is see patients in the hospital. A clinic physician so to speak or an outpatient physician might refer a patient for admission and the hospitalist would provide their care, coordinate consultants such as a cardiologist or a pulmonologist or a neurologist

[9]A video of Ellis's deposition was played at trial.

> and sort of be the captain of the ship so to speak for that care of the patient."

Ellis testified that Dr. Diefenderfer's access of Amy's private medical information via the PDMP did not relate in any way to Dr. Diefenderfer's employment as a hospitalist.

Dr. Diefenderfer testified as follows during examination by QHG's attorney at trial:

> "Q. Was this something that you did in your duties as a hospitalist?
>
> "A. Absolutely not.
>
> "Q. This is a mistake that didn't involve the hospital?
>
> "A. No, sir.
>
> "Q. No, sir --
>
> "A. No, sir.
>
> "Q. It didn't involve the hospital?
>
> "A. Not at all in my opinion."

Dr. Diefenderfer testified that she was not acting within the line and scope of her employment with QHG when she accessed Amy's personal medical information while at her house because her actions in that regard did not relate to caring for a patient. Dr. Diefenderfer also testified that the PDMP is maintained by the Alabama Department of Public Health, that

only "[p]hysicians and people that can prescribe narcotics" can access the PDMP, and that she had to use her physician-license number to log into the PDMP.

McCurdy, the compliance and privacy officer for Medical Center Enterprise, testified that the hospital itself had no access to the PDMP and that only physicians were able to access it.[10] McCurdy further testified that, according to hospital policy, whenever a hospital employee accesses the private health information of friends or family, or even the employee's own information, the employee is not acting as an employee of the hospital and that the hospital is required to have written authorization for the release of such information.[11] It is undisputed that Amy was not a patient of

[10]See § 20-2-214, Ala. Code 1975 (defining the persons and entities that are authorized to access the PDMP, which does not include health-care facilities).

[11]McCurdy's testimony concerning the hospital's policies is relevant to the question whether Dr. Diefenderfer's actions fell within the scope of her employment as a matter of law. However, the fact that an employee violated his or her employer's company policies is not, taken alone, dispositive of such an inquiry. See Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297, 305 (Ala. 1986)("A corporation or employer will be liable for the torts of its employee committed while acting in the line and scope of his employment even though the corporation or employer did not authorize or ratify such acts and even if it expressly forbade them."), and Williams v. Hughes Moving & Storage Co., 578 So. 2d 1281, 1283 (Ala.

the hospital and that she did not consent to Dr. Diefenderfer's access of her personal medical information via the PDMP and subsequent disclosure of that information to Mortensen and Mortensen's attorney.

The foregoing evidence indicates that Dr. Diefenderfer's actions in accessing and disclosing Amy's personal medical information stored on the PDMP were not within the scope of Dr. Diefenderfer's employment with QHG because Dr. Diefenderfer's conduct in that regard was unrelated to the purpose for which QHG employed her, namely, to treat the hospital's patients. See Braggs, 285 Ala. at 401, 232 So. 2d at 642.

On appeal, Amy points to several items that she contends amounted to substantial evidence indicating that Dr. Diefenderfer was acting within the scope of her employment when she accessed and disclosed Amy's personal medical information. First, she implies that Mortensen was "a long-time patient" of the hospital. Amy's brief, at 25. However, the testimony Amy cites in support of that assertion included

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1991)("The mere fact that [the employee] was acting against company policy is not ... conclusive as to the question of [the employee]'s status at the time of the accident.").

no such evidence and was primarily Dr. Diefenderfer's account of what transpired when Mortensen came to her with concerns about Amy's alleged drug use. At another point during the trial, Dr. Diefenderfer testified: "[Mortensen] was a patient of mine in my clinic for probably about seven years." (Emphasis added.)[12] Thus, no evidence was presented at trial indicating that Mortensen was a patient of the hospital.

Regardless, even assuming that Mortensen had been a patient of the hospital at some point, it is undisputed that the reason for Mortensen's April 2014 visit to the hospital was not to obtain medical treatment from the hospital's employees but, rather, to obtain Dr. Diefenderfer's assistance or advice regarding Logan's scheduled visitation with Leif.

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[12]During the charge conference at the close of trial, the parties' attorneys argued about whether any evidence had been presented at trial indicating that Mortensen had ever been a patient of the hospital. Eventually, Amy's attorneys pointed to a portion of Dr. Diefenderfer's deposition, in which she testified that the hospital had a file regarding certain "lab work" pertaining to Mortensen. However, Dr. Diefenderfer's deposition was not admitted as evidence at trial, because the Pertuits called Dr. Diefenderfer as a witness to offer live testimony during the presentation of the their case. See Mobile Infirmary v. Eberlein, 270 Ala. 360, 370, 119 So. 2d 8, 17-18 (1960)(noting that oral testimony is preferred over deposition testimony); Committee Comments on 1973 Adoption of Rule 32, Ala. R. Civ. P. (noting that Eberlein was still applicable).

On appeal, Amy contends that a jury question was presented regarding whether Dr. Diefenderfer's actions -- both at the hospital and elsewhere -- were within the scope of her employment with QHG because, she says: "Doctors are professionals. They do not stop being doctors when they leave their place of work." Amy's brief, at 26. Amy also points to Dr. Diefenderfer's testimony indicating that she believed she had an ethical obligation to help Mortensen.

One case QHG cites in response is Hendley v. Springhill Memorial Hospital, 575 So. 2d 547 (Ala. 1990). In Hendley, this Court held that, as a matter of law, an employee[13] of a hospital was acting outside the scope of his employment when he allegedly performed an unauthorized vaginal examination on one of the hospital's patients. 575 So. 3d at 551. Citing Avco Corp. v. Richardson, 285 Ala. 538, 234 So. 2d 556 (1970), the Hendley Court articulated the applicable rule as follows:

> "[I]n cases where a servant's deviation from the master's business is slight and not unusual, a court may determine, as a matter of law, that the servant was still executing the master's business. On the other hand, with a very 'marked and unusual' deviation, the court may determine that the servant is not on his master's business at all. Cases

[13]The Hendley Court assumed for the purposes of that case that an employment relationship existed. 575 So. 2d at 550.

> falling between these two extremes must be regarded as involving a question of fact to be left to the jury."

575 So. 2d at 550 (emphasis added); see also Corvo, ____ So. 3d at ____ (holding that a circuit court erred by failing to enter a judgment as a matter of law in favor of employers after reasoning: "Theft and conversion are a 'marked and unusual deviation' from the business of Synergies3 and DIRECTV for which Castro and McLaughlin were in Corvo's house -- installing equipment for DIRECTV's satellite television service. Furthermore, there was no evidence indicating that the theft or conversion was done for Synergies3's or DIRECTV's benefit or in furtherance of their interests."); Conner v. Magic City Trucking Serv., Inc., 592 So. 2d 1048, 1050 (Ala. 1992)(affirming a "directed verdict" in favor of an employer after determining that an employee's decision to chase the plaintiff while holding a snake was a "marked and unusual" deviation from the employer's business and, therefore, outside the scope of employment); Sakas v. Capital Concepts Corp., 565 So. 2d 237, 238 (Ala. 1990)(affirming a summary judgment in favor of the owner of an apartment complex after determining that an apartment manager's decision to break into the

plaintiff's apartment, remove some of her clothes, and beat her with a hammer constituted a "marked and unusual deviation" from the employer's business); and Prosser v. Glass, 481 So. 2d 365, 368 (Ala. 1985)("[The alleged employee] was employed as a mechanic to assist in the experimentation and development of [a] swirlplate. ... [H]is repair of Glass's truck, which did not have a swirlplate, would not reasonably further the purpose of developing the [swirlplate], which was the business at hand. Therefore, [the alleged employee's] deviation from the scope of his master's business was marked and unusual, and thus outside the scope of employment. The summary judgment for [the alleged employer] is affirmed.").

In this case, no evidence was presented indicating that QHG employed Dr. Diefenderfer to assist or advise third parties in making a determination regarding whether they should permit their children to attend court-ordered visitation with a former spouse or to seek a modification of a former spouse's court-ordered visitation. Therefore, Dr. Diefenderfer's decision to collect and disclose Amy's personal medical information in furtherance of those pursuits constituted a "marked an unusual deviation" from QHG's

business, undertaken by Dr. Diefenderfer for personal reasons that were outside the scope of her employment by QHG. See AVCO Corp., 285 Ala. at 542, 234 So. 2d at 560. Thus, the evidence presented did not amount to "'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment [could] reasonably infer the existence of the fact sought to be proved,'" Cheshire, 54 So. 3d at 340 (quoting West v. Founders Life Assurance Co., 547 So. 2d 870, 871 (Ala. 1989)), i.e., that Dr. Diefenderfer was engaged in her employment by QHG or furthering the hospital's business interests when she accessed and disclosed Amy's personal medical information in 2014. See Braggs, 285 Ala. at 401, 232 So. 2d at 642. Accordingly, the trial court erred by denying QHG's motion for a judgment as a matter of law on Amy's claims asserting liability on a theory of respondeat superior.

II. Ratification

Both QHG and Amy cite East Alabama Behavioral Medicine, P.C. v. Chancey, 883 So. 2d 162 (Ala. 2003), in their respective appellate briefs. In Chancey, we stated the following concerning ratification:

> "In addition to vicarious liability under the doctrine of respondeat superior, an employer can

> also be held liable for the unlawful acts of its employee if the employer ratifies those acts. Potts v. BE & K Constr. Co., 604 So. 2d 398, 400 (Ala. 1992). An employer ratifies an act when 1) it expressly adopts the employee's behavior or 2) it implicitly approves the behavior. Potts, 604 So. 2d at 400. Furthermore, '[a]n employer's failure to stop the tortious conduct after it learns of the conduct will support an inference that the employer tolerated the conduct.' Id. Acquiescence or ratification requires full knowledge or means of knowledge of all material facts. American Nat'l Bank & Trust Co. v. Powell, 235 Ala. 236, 245, 178 So. 21, 29 (1937); Van Heuvel v. Roberts, 221 Ala. 83, 87, 127 So. 506, 509 (1930). An employer cannot be said to have ratified an employee's conduct when the employer, upon learning of an employee's conduct, which was not in the scope of the employee's employment, gives instructions calculated to prevent a recurrence. Joyner [v. AAA Cooper Transp.,] 477 So. 2d [364] at 365 [(Ala. 1985)] (after an employee's homosexual advances to another employee were reported to the employer, the employer conducted an investigation and informed the offending employee that if another complaint of this nature came to the employer's attention the offending employee would be laid off and a full-scale investigation conducted)."

883 So. 2d at 169-70 (emphasis added).

In Chancey, a patient sought treatment from a psychologist for depression, anxiety, and panic attacks. After a therapy session, the patient and the psychologist expressed romantic feelings for one another over drinks at a restaurant. A few days later, they terminated the psychologist-patient relationship.

A few days after the psychologist-patient relationship was terminated, the psychologist's employer, East Alabama Behavioral Medicine, P.C. ("East Alabama"), learned of the patient's infatuation with the psychologist. East Alabama's administrators confronted the psychologist, and, among other things, instructed her to end all contact with the patient. Evidence was also presented indicating that East Alabama's administrators had instructed the psychologist to alter the patient's medical records, so as to make it appear as if the patient had expressed his feelings for the psychologist during a therapy session and that the psychologist had instructed the patient regarding the limits of their therapeutic relationship.

About three weeks later, the psychologist and the patient became sexually involved. The patient's wife asked him to leave the marital home. The psychologist thereafter resigned her position at East Alabama. After the affair ended, East Alabama rehired the psychologist, on the condition that she undergo a psychiatric evaluation and any necessary treatment. The psychologist was also restricted to treating only female patients.

The patient and his wife sued the psychologist and East Alabama, alleging, in pertinent part, "negligent or wanton counseling; negligent or wanton 'abandonment'; and negligence or wantonness per se." Chancey, 883 So. 2d at 166. The patient and his wife settled their claims against the psychologist, and a jury trial was conducted on their claims against East Alabama. The jury returned a verdict in favor of the patient and his wife, awarding them each $1 in compensatory damages and $495,000 in punitive damages. East Alabama appealed.

On appeal, the patient and his wife argued, in pertinent part, that East Alabama had ratified the psychologist's conduct by ordering that the patient's medical records be altered and by failing to terminate the psychologist's employment. This Court held that the trial court had erred by failing to enter a judgment as a matter of law in favor of East Alabama, and we reversed the trial court's judgment and rendered a judgment in favor of East Alabama. In so doing, we reasoned:

> "While the falsification of medical records is inexcusable, it cannot serve as evidence that East Alabama ratified [the psychologist]'s subsequent conduct, which was taken contrary to the

> instructions given [the psychologist] by East Alabama. When East Alabama allegedly instructed [the psychologist] to change [the patient's] records, all [East Alabama's administrators] knew was that [the patient] and [the psychologist] had met for drinks and that [the psychologist] had terminated or was in the process of terminating the psychologist-patient relationship between her and [the patient]. It is undisputed that when [East Alabama] learned of [the psychologist]'s social relationship with [the patient], they instructed her to end both the professional relationship and the social relationship. East Alabama had no knowledge at the time the records were falsified that [the psychologist] and [the patient] would thereafter have sexual relations, that [the patient]'s wife would thereafter ask him to leave their home, and that [the psychologist] would leave her husband as a result of her affair with [the patient]. Ratification requires full knowledge of the facts. American Nat'l [Bank & Trust Co. v. Powell], 235 Ala. [236] at 245, 178 So. [21] at 29 [(1937)]; Van Heuvel [v. Roberts], 221 Ala. [83] at 87, 127 So. [506] at 509 [(1930)]. The [patient and his wife] offered no evidence indicating that East Alabama failed to stop the subsequent tortious conduct of [the psychologist] after it learned of the infatuation. To the contrary, [East Alabama's administrators] instructed [the psychologist] to end the relationship. Likewise, no ratification was shown in Joyner [v. AAA Cooper Transportation, 477 So. 2d 364 (Ala. 1985),] when the employer warned the employee against repeating the conduct made the basis of the action. 477 So. 2d at 365. In Joyner, the record reflected that no subsequent misdeed occurred, while here, the subsequent misdeeds were contrary to East Alabama's express instructions."

Chancey, 883 So. 2d at 170 (some emphasis added).

On appeal, Amy argues that Dr. Diefenderfer's creation of

the 2016 report that relied, at least in part, on information regarding Amy's personal medical information that Dr. Diefenderfer had learned during her 2014 access of the PDMP is evidence that QHG's response to Dr. Diefenderfer's actions in 2014 amounted to ratification. As we explained in Chancey, "[r]atification requires full knowledge of the facts." Chancey, 883 So. 2d at 170.

Of course, QHG could not have known in 2014 that Dr. Diefenderfer would create the 2016 report. Indeed, no evidence was presented indicating that QHG was even aware of Dr. Diefenderfer's conduct in 2014 until it received notice of a complaint from OCR in October 2014, because QHG lacked the ability to restrict Dr. Diefenderfer's access to the PDMP in that Dr. Diefenderfer's access was derived from her licensure as a physician; QHG itself possessed no authority to access the PDMP. Therefore, it is clear that knowledge of the 2016 report cannot be imputed to QHG with regard to its response to Dr. Diefenderfer's conduct in 2014. See Chancey, 883 So. 2d at 170.

Regarding QHG's response to Dr. Diefenderfer's 2014 conduct, the evidence presented indicated that QHG

representatives, specifically Ellis and McCurdy, met with Dr. Diefenderfer after learning of her access and disclosure in 2014 of Amy's personal medical information and discussed the importance of patient privacy and compliance with the requirements of HIPAA and explained QHG's commitment to safeguarding patient privacy. Dr. Diefenderfer agreed with QHG regarding the importance of HIPAA and patient privacy.

We note the evidence presented demonstrating that McCurdy was Mortensen's aunt and the evidence presented indicating that Dr. Diefenderfer believed the hospital "backed her up a hundred percent." However, we cannot ignore the fact that, notwithstanding McCurdy's relationship to Mortensen and whatever personal beliefs Dr. Diefenderfer harbored regarding the propriety of her conduct after meeting with Ellis and McCurdy, no evidence was presented indicating that Dr. Diefenderfer thereafter used the hospital's resources to access and disclose personal medical information pertaining to third parties who were not patients of the hospital after her meeting with Ellis and McCurdy. An employer cannot be said to have ratified an employee's conduct when, after instruction by the employer, the employee's conduct stops. See Chancey, 883

So. 2d at 170.

With regard to the 2016 report, Dr. Diefenderfer testified that she did not again access the PDMP when creating the 2016 report. As noted above, Dr. Diefenderfer testified that, when she printed Amy's personal medical information from the PDMP in 2014, she did so at home. Thus, there is no indication that Dr. Diefenderfer used the hospital's computer or other resources in creating the 2016 report at all, much less with QHG's "implicit[] approv[al]." See Chancey, 883 So. 2d at 170.

Moreover, there is no indication that QHG participated in, consented to, or condoned Dr. Diefenderfer's creation of the 2016 report or that the 2016 report had any relation to her employment with QHG. Dr. Diefenderfer's testimony indicated that she created the 2016 report because she felt that it would assist her and Mortensen with the Pertuits' litigation against them. Indeed, Dr. Diefenderfer testified that, when she created the 2016 report, she was no longer employed by QHG but was instead employed by Schumacher Group.[14]

[14]We note that, on appeal, Amy appears to concede that QHG "reliev[ed] itself of any future liabilities with respect to hospitalists" working at Medical Center Enterprise once the change involving Schumacher Group was implemented. Amy's

Furthermore, even assuming that Dr. Diefenderfer created the 2016 report while she was still employed by QHG, it is undisputed that QHG became aware of the 2016 report only after the fact. As already stated, "[r]atification requires full knowledge of the facts." Chancey, 883 So. 2d at 170. Therefore, there is no basis upon which one could reasonably infer that QHG "implicitly approve[d]" Dr. Diefenderfer's creation of the 2016 report when it had no knowledge of its existence until well after its creation. Chancey, 883 So. 2d at 170.

In light of the foregoing, we conclude that the evidence presented did not amount to "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment [could] reasonably infer," West, 547 So. 2d at 871, that QHG ratified Dr. Diefenderfer's conduct. See Chancey, 883 So. 2d at 170-71. Therefore, the trial court erred by denying QHG's motion for a judgment as a matter of law on the issue of ratification. See Chancey, 883 So. 2d at 173.

III. Negligent and Wanton Training, Supervision, and Retention

On appeal, Amy cites no authority discussing her

brief, at 14.

"negligent and wanton training, supervision[,] and retention" claim as a theory of liability under Alabama law. Among other authority, QHG cites Armstrong Business Services, Inc. v. AmSouth Bank, 817 So. 2d 665 (Ala. 2001), for the standard used in evaluating claims of negligent supervision.[15] In Armstrong, we explained:

> "A claim of negligent supervision is stated as follows:
>
> > "'"In the master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the

[15]A plurality of this Court has indicated that there is no distinction under Alabama law between claims of negligent supervision and claims of negligent training. See Corvo, ____ So. 3d at ___; and Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 940 (Ala. 2006). As noted, Amy cites no authority concerning her claim of "negligent and wanton training, supervision[,] and retention." Therefore, we need not consider whether such a distinction exists in this case.

> master, in the exercise of due care, must have had them brought to his notice. While such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had he exercised ordinary care."'
>
> "Big B, Inc. v. Cottingham, 634 So. 2d 999, 1003 (Ala. 1993)(quoting Lane v. Central Bank of Alabama, N.A., 425 So. 2d 1098, 1100 (Ala. 1983)(quoting Thompson v. Havard, 285 Ala. 718, 725, 235 So. 2d 853 (1970))). 'Wanton supervision' requires that the employer wantonly disregard its agent's incompetence ...."

817 So. 2d at 682 (emphasis added). "Like a claim of respondeat superior, liability under a theory of negligent supervision is based on the employment relationship." Hammock v. Wal-Mart Stores, Inc., 8 So. 3d 939, 942 (Ala. 2008)(holding that a "respondeat superior claim" and a "negligent-supervision-and-training claim" were "intertwined" for the purposes of a Rule 54(b), Ala. R. Civ. P., certification analysis).

In this case, no evidence was presented indicating that QHG had reason to believe that Dr. Diefenderfer would access the PDMP to obtain the personal medical information of someone

who was not one of the hospital's patients before she did so with regard to Amy in 2014. Moreover, although Dr. Diefenderfer's conduct in 2014 was outside the scope of her employment with QHG, upon QHG's discovery of her conduct, it provided instruction regarding the importance of patient privacy and compliance with the requirements of HIPAA and explained to Dr. Diefenderfer QHG's commitment to safeguarding patient privacy. The evidence presented indicated that QHG had no knowledge of any further instances of Dr. Diefenderfer's access to or disclosure of a third party's personal medical information until after she created the 2016 report. At that time, however, Dr. Diefenderfer was no longer an employee of QHG. Moreover, as already explained above, there was no indication that Dr. Diefenderfer's creation of the 2016 report was related to her previous employment with QHG.[16]

In light of the foregoing, we conclude that the evidence presented did not amount to "evidence of such weight and quality that fair-minded persons in the exercise of impartial

[16]At trial, Dr. Diefenderfer testified that she left her position at Medical Center Enterprise in September 2018 to work in a different hospital.

judgment [could] reasonably infer," West, 547 So. 2d at 871, that QHG negligently supervised Dr. Diefenderfer. See Armstrong, 817 So. 2d at 682. Therefore, the trial court erred by denying QHG's motion for a judgment as a matter of law regarding Amy's claim of "negligent and wanton training, supervision[,] and retention."

Conclusion

We express no opinion regarding the general viability, as a matter of Alabama law, of tort claims that seek to incorporate the privacy provisions of HIPAA. Even assuming that such tort claims are generally cognizable under Alabama law, however, the trial court nevertheless erred by denying QHG's motion for a judgment as a matter of law with respect to Amy's asserted theories of respondeat superior; ratification; and negligent and wanton training, supervision, and retention because there was not substantial evidence indicating that QHG was liable to Amy as a consequence of Dr. Diefenderfer's conduct under any of those theories. Because we resolve this appeal on the foregoing grounds, we pretermit consideration of the remaining arguments raised by QHG on appeal. Therefore, we reverse the trial court's judgment awarding Amy $5,000 in

compensatory damages and $295,000 in punitive damages and render a judgment in favor of QHG.

MOTION TO STRIKE DENIED; REVERSED AND JUDGMENT RENDERED.

Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., recuses himself.