REL: January 24, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180439

Ex parte William "Will" Willimon and Debra Wallace-Padgett

PETITION FOR WRIT OF MANDAMUS

(In re: J.N.

v.

Charles Terrell et al.)

(Talladega Circuit Court, CV-15-900353)

PARKER, Chief Justice.

William "Will" Willimon, the former bishop of the North Alabama Annual Conference, United Methodist Church, Inc. ("the

Conference"), and Debra Wallace-Padgett, the current bishop, petition this Court for a writ of mandamus directing the Talladega Circuit Court to grant them protective orders or, alternatively, to quash their deposition notices in an action against a former youth pastor alleging sexual abuse. We deny the petition.

I. Facts and Procedural History

Charles Terrell, one of the defendants in the underlying action, is the former youth pastor at First United Methodist Church of Sylacauga ("the Church"). The Church is within the governance of the Southeast District, North Alabama Annual Conference, United Methodist Church, Inc. ("the District"), and the District is within the governance of the Conference.

The plaintiff, J.N., was a minor male congregant in the Church.[1] J.N. filed the underlying action in the circuit court alleging that Terrell had sexually abused him. J.N.'s action asserted claims against Terrell, Terrell's wife, the Church, the District, and Rev. Lewis Archer, who was the Church's senior pastor and later the superintendent of the

[1]J.N. brought this action in his own name, although he was not yet 19 when the alleged sexual abuse occurred. For that reason, he is referred to in this opinion by his initials. See Rule 52, Ala. R. App. P.

District. The Conference is not a party to the underlying action.

During the course of the litigation, J.N. issued notices of deposition for Willimon and Wallace-Padgett (hereinafter collectively referred to as "the bishops"). The notice for Wallace-Padgett included a duces tecum request for the following categories of documents:

> "1. Any and all documents you prepared, reviewed, and/or received related to the Do No Harm sexual ethics seminar in Chicago, IL.
>
> "2. Any and all press releases from the [Conference] or any District within the [Conference] related to allegations of child sex abuse or the prevention of child sex abuse.
>
> "3. Any and all documents you have reviewed that relate or refer to Charles Terrell.
>
> "4. Any and all documents regarding the responsibility that the Bishop of the [Conference] and/or the District Superintendents within the [Conference] have in the prevention of the sexual abuse of children and youth that attend and/or are members of Methodist churches within the [Conference].
>
> "5. Produce any documents in your possession that refer or relate to the measures taken by the [Conference] to ensure compliance with the mandate that a child protection policy to be implemented [sic] at all Methodist churches including the [Church] at any time prior to 2014.

> "6. All social media posts or blog posts you have made that relate to the prevention of child sex abuse."

In response, the bishops each filed a motion for a protective order or, alternatively, to quash the deposition notices ("the motions"), along with affidavits in which they stated that they had no unique or personal knowledge of the matters contained in J.N.'s complaint. Wallace-Padgett also stated that requiring her to produce the requested documents would be unduly burdensome.

J.N. responded to the motions on December 26, 2018. On February 5, 2019, the circuit court heard oral argument on the motions. On February 8, the circuit court denied the motions without comment. The bishops petitioned this Court for a writ of mandamus, requesting that we reverse the circuit court's order denying the motions.

II. Standard of Review

> "'A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court.'

> "Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001).
>
> > "'"'...[M]andamus will issue to reverse a trial court's ruling on a discovery issue only (1) where there is a showing that the trial court clearly exceeded its discretion, and (2) where the aggrieved party does not have an adequate remedy by ordinary appeal. The petitioner has an affirmative burden to prove the existence of each of these conditions.'
> >
> > "'"Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003).
> >
> > "'"...."'
>
> "Ex parte Mobile Gas Serv. Corp., 123 So. 3d 499, 504 (Ala. 2013) (quoting Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 547 (Ala. 2007))."

Ex parte Fairfield Nursing & Rehab. Ctr., LLC, 183 So. 3d 923, 927-28 (Ala. 2015).

III. Discussion

The bishops argue that they are entitled to a protective order or an order quashing the deposition notices. They first argue that this Court should adopt the "apex" rule, which protects high-ranking corporate or government officers from burdensome and unnecessary depositions in matters of which the officers have no unique personal knowledge. Alternatively,

they argue that they are entitled to the relief they seek under Rule 26(b)(2)(B), Ala. R. Civ. P. In addition, the bishops argue that J.N.'s requested discovery is merely a "fishing expedition" for impeachment evidence. Finally, Wallace-Padgett argues that the information J.N. seeks is protected by the attorney-client privilege. We address each argument in turn.

A. Apex rule

One court has articulated the apex rule as follows:

> "Courts routinely recognize that it may be appropriate to limit or preclude depositions of high-ranking officials, often referred to as 'apex' depositions, because 'high[-]level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.' Thus, parties seeking apex depositions bear the burden of demonstrating an executive has 'unique knowledge of the issues in the case' or the information sought has been pursued unsatisfactorily through less intrusive means."

Goines v. Lee Mem'l Health Sys., No. 2:17-CV-656, August 13, 2018 (M.D. Fla. 2018) (not reported in F. Supp.) (citations omitted).

Although the bishops recognize that this Court has never adopted the apex rule, they urge this Court to do so now. The bishops argue that adopting the apex rule would prevent a

litigant seeking a deposition from disrupting a high-ranking corporate officer's duties merely because the officer is associated with an entity from which the litigant seeks information. The bishops also argue that the apex rule would provide clarity regarding when trial courts may allow depositions of high-ranking corporate officers and would prevent undue burden, harassment, and delay. The bishops argue that they would be entitled to mandamus relief under the apex rule because they are former and current bishops of the Conference and the plaintiff has not demonstrated that they have unique personal knowledge of the facts in the underlying case.

Although this Court has never expressly adopted the apex rule, we applied a similar analysis in Ex parte Community Health Systems Professional Services Corp., 72 So. 3d 595 (Ala. 2011). See State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders, 228 W. Va. 749, 724 S.E.2d 353 (2012) (citing Community Health in support of its observation that courts that have allowed depositions of high-ranking corporate officials have done so based on criteria similar to the apex rule). In Community Health, a hospital corporation had

planned to relocate a hospital to the City of Irondale but then decided to relocate it elsewhere. The city sued the corporation, alleging breach of contract. In discovery, the city sought to depose the corporation's chief executive officer ("CEO"). The corporation sought a protective order, which the trial court denied.

The corporation petitioned this Court for mandamus relief, arguing that deposing the CEO was not necessary because the CEO did not have unique or superior knowledge about the corporation's decision to change the relocation site. This Court disagreed, holding that the city had demonstrated that the CEO had superior personal knowledge of the information sought. We explained:

> "This case does not present a situation where a party is attempting to depose a high-ranking corporate officer who has little to no personal knowledge of the subject matter of the litigation. Indeed, the materials before this Court indicate that [the CEO] was an integral participant in the relocation decision-making process; consequently, only he can provide the information, and a less intrusive means of discovery in this particular case would be inadequate."

72 So. 3d at 603.

In Community Health, the apex rule would not have been dispositive, so we had no need to expressly adopt or reject it

in that case. See Miller v. Mobile Cty. Bd. of Health, 409 So. 2d 420 (Ala. 1981) (stating that this Court does not need to decide issues that are not essential to the resolution of an action). However, our analysis in Community Health suggests that, in a case in which a party seeks to depose a high-ranking corporate officer who has little to no personal knowledge of the subject matter, the apex rule might entitle the officer to a protective order.

The case before us, however, is not such a case. Like the trial court in Community Health, the circuit court could have reasonably concluded that the bishops have superior personal knowledge of information that J.N. seeks. J.N. argued in his response to the bishops' motions that he sought factual information within Willimon's personal knowledge regarding Willimon's handling of Conference affairs during his tenure, including implementation of child-sexual-abuse-prevention policies, supervision of defendants Archer and Terrell, and the Conference's previous efforts to address child-sexual-abuse allegations at the local church level. J.N. contends that he was not seeking the contents of the general policy of the Conference regarding the prevention of

child sexual abuse, but was seeking information about Willimon's own comments, observations, and experience. Regarding Wallace-Padgett, J.N. likewise argues that he was seeking factual information about her involvement in programs designed to prevent child sexual abuse. Specifically, J.N. points to Wallace-Padgett's participation in a training program that addressed the Conference's mandate that child-sexual-abuse-prevention policies be implemented at the local church level. The bishops, on the other hand, relied solely on their bare assertions that they have no unique knowledge of the information J.N. sought or knowledge superior to the District's representatives whom J.N. has already deposed. Based on the parties' representations, the circuit court could have concluded that the bishops had unique or superior personal knowledge of the information J.N. sought and thus were not entitled to a protective order or an order quashing their deposition notices under Community Health.

Accordingly, application of the apex rule would not affect the outcome of the present petition, so we decline the bishops' invitation to adopt it here. We do not foreclose the possibility of adopting it in a future case in which it is

dispositive. Moreover, a writ of mandamus will issue to reverse a trial court's discovery order only when that court has exceeded its discretion. Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003). Application of the apex rule would not have been dispositive in this case, and we cannot conclude that the circuit court exceeded its discretion by failing to apply it. Therefore, the bishops are not entitled to mandamus relief on the basis of the apex rule.

B. Rule 26(b)(2)(B), Ala. R. Civ. P.

Next, the bishops argue that they are entitled to mandamus relief under Rule 26(b)(2)(B), Ala. R. Civ. P. That rule provides:

> "The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines: (i) that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) that the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) that the proposed discovery is outside the scope permitted by Rule 26(b)(1)."

Willimon failed to preserve this issue because he did not present it in the circuit court. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992). Accordingly, we address

only Wallace-Padgett's arguments with regard to Rule 26(b)(2)(B). She contends that she is entitled to a protective order or to an order quashing her deposition notice because, she says, (1) the discovery sought is unreasonably cumulative or duplicative, (2) J.N. has had ample opportunity by discovery to obtain the information sought, and (3) the discovery sought is unduly burdensome.

1. Unreasonably cumulative or duplicative

In support of Wallace-Padgett's argument that her deposition would be unreasonably cumulative or duplicative, she relies on Ex parte Fairfield Nursing & Rehabilitation Center, LLC, 183 So. 3d 923 (Ala. 2015). There, the plaintiff deposed numerous representatives of the defendant corporations. After this Court reversed a judgment in the defendants' favor, the trial court granted the plaintiff's motion to compel further depositions of the corporate representatives. On mandamus review, this Court reversed the trial court's order, holding that the new depositions would be unreasonably duplicative of the depositions already taken. We cited nine examples of issues to be addressed in the new depositions that had already been addressed in the prior depositions. 183 So. 3d at 928-29.

In the present case, Wallace-Padgett argues that J.N. has already deposed three people, including two District superintendents, who had knowledge of the District's and Conference's policies and procedures for the prevention of child sexual abuse. Wallace-Padgett relies on her affidavit, in which she testified that her knowledge of the practices of the Conference is not unique or superior to that of the people already deposed. Accordingly, she contends that her deposition would be unreasonably cumulative or duplicative.

We disagree. Unlike the defendants in Fairfield Nursing, who presented multiple examples of prior testimony, Wallace-Padgett does not provide this Court with examples of prior deposition testimony addressing the same information that J.N. seeks to obtain from her. Although Wallace-Padgett provides excerpts from the depositions of Rev. Archer and Rev. James Haskins, none of that testimony discussed the Conference's handling of allegations of child sexual abuse, a topic on which J.N. sought to depose Wallace-Padgett. Thus, those deposition excerpts are insufficient to demonstrate that Wallace-Padgett's deposition would be unreasonably cumulative or duplicative.

Wallace-Padgett also points to her affidavit statement that she has no unique knowledge of the matters in J.N.'s complaint and that her knowledge is less than that of people who were involved at the local church level. This bare assertion is insufficient to demonstrate that Wallace-Padgett's deposition would be unreasonably cumulative or duplicative. Moreover, Wallace-Padgett fails to cite any testimony from previously deposed people that demonstrates that they have more knowledge of the Conference's handling of child-sexual-abuse allegations than she has. Cf. Fairfield Nursing, 183 So. 3d at 928-29. Accordingly, Wallace-Padgett fails to demonstrate that she has a clear legal right to a protective order or to an order quashing her deposition notice on the ground that her deposition would be unreasonably cumulative or duplicative.

2. Ample opportunity to obtain the information requested

In a one-sentence argument, Wallace-Padgett asserts that "J.N. failed to provide evidence that he has not had ample opportunity to obtain the information requested from parties to the action." But the party contesting a discovery request, not the party seeking discovery, bears the burden of establishing entitlement to relief under Rule 26(b)(2)(B).

Fairfield Nursing, 183 So. 3d at 928. Wallace-Padgett's argument improperly seeks to shift to J.N. the burden on the issue whether he had an ample opportunity to obtain the information sought. Thus, Wallace-Padgett fails to show that she is entitled to a protective order or the quashing of her deposition notice on this ground.

3. Undue burden

Wallace-Padgett also contends that her deposition would be unduly burdensome, again relying on Fairfield Nursing. In that case, we observed that "Rule 26(b)(2)(B)[(iii)], Ala. R. Civ. P., provides that a trial court 'shall' limit or prohibit discovery if it determines ... that the discovery sought is 'unduly burdensome.'" 183 So. 3d at 928.

After we decided Fairfield Nursing, however, we amended Rule 26(b)(2)(B)(iii) to require trial courts to limit discovery if "the proposed discovery is outside the scope permitted by Rule 26(b)(1)." We also amended Rule 26(b)(1) to allow discovery if the matter is not privileged, is relevant, and is proportional to the needs of the case. Those amendments became effective on December 21, 2018, before the oral argument in the circuit court and the circuit court's order on Wallace-Padgett's motion, so the rule as amended

applied to the motion. See Ex parte Luker, 25 So. 3d 1152 (Ala. 2007) (holding that an amendment to a Rule of Civil Procedure applied in a pending proceeding).

Under Rule 26(b)(1)(ii), as amended, when determining proportionality, the trial court must consider, among various other factors, "whether the burden or expense of the proposed discovery outweighs its likely benefit." Thus, under Rule 26(b)(2)(B)(iii) and (b)(1)(ii), as amended, whether the requested discovery would impose an undue burden is only one factor among several to be weighed in determining whether to enter a protective order.

In her argument, Wallace-Padgett provides no discussion of the other proportionality factors, including "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, [and] the importance of the discovery in resolving the issues." Wallace-Padgett's sole reliance on the "burden" factor is insufficient to establish that the circuit court erred under the proportionality analysis required by Rule 26(b)(1)(ii). See Alabama Aircraft Indus., Inc. v. Boeing Co., 2:11-cv-03577-RDP, Jan. 13, 2016 (N.D. Ala. 2016) (not

reported in F. Supp.) ("Boeing's arguments are largely ineffectual ..., emphasizing the burden that Boeing will be saddled with as a result of AAI's Proposal, but failing to demonstrate how such a burden deviates from the proportionality required by Rule 26(b)(1)[, Fed. R. Civ. P.] ...."). Accordingly, Wallace-Padgett has not demonstrated a clear legal right to a protective order or to an order quashing her deposition notice under Rule 26(b)(2)(B)(iii).[2]

C. "Fishing expedition"

Next, the bishops argue that, to the extent J.N. seeks information to challenge the District representatives' testimony that the District had no authority to remove an employee of the Church, J.N.'s deposition notices are no more

[2]Wallace-Padgett also argues that imposing a substantial burden on a nonparty is not generally acceptable, relying on several federal cases. See Medical Components, Inc. v. Classic Med., Inc., 210 F.R.D. 175, 180 (M.D.N.C. 2002) (holding that a subpoena to nonparty must avoid imposing undue burden or expense); United States v. Meridian Senior Living, LLC, [5:16-CV-410-BO, November 1, 2018] ___ F. Supp. 3d ___ (E.D.N.C. 2018) (holding that party requesting discovery from nonparty must show that the information sought cannot be obtained from a party); Haworth, Inc. v. Herman Miller, Inc., 998 F.2d 975 (Fed. Cir. 1993) (holding that a party requesting information from a nonparty must show that the information cannot be obtained from a party). But Wallace-Padgett does not sufficiently develop that argument, failing to articulate how it applies to the discovery request here. Thus, we need not address that argument.

than a "fishing expedition" to obtain impeachment evidence. The bishops cite EEOC v. Southern Haulers, LLC, Civil Action No. 11-00564-N, May 17, 2012 (S.D. Ala. 2012) (not reported in F. Supp.), in which the federal district court held that the mere possibility that a party seeking discovery could elicit potential impeachment evidence does not justify broad discovery requests. In so holding, that court distinguished Abu v. Piramco Sea-Tac Inc., No. C08-1167RSL, February 5, 2009 (W.D. Wash. 2009) (not reported in F. Supp.), in which a court held that the defendant was entitled to discovery of impeachment evidence because the plaintiff had already shown herself to be untruthful. Thus, Southern Haulers stands for the proposition that, unless a witness has shown himself to be untruthful, a party may not obtain discovery merely for the purpose of obtaining evidence with which to impeach that witness. Here, the bishops argue that, because J.N. has not shown that the District's representatives have shown themselves to be untruthful, J.N. is not entitled to depose them merely to obtain evidence with which to impeach them.

However, the bishops' reliance on Southern Haulers is misplaced. The bishops' argument is based on their assertion that J.N. seeks to depose them for the purpose of obtaining

impeachment evidence. In support, the bishops quote J.N.'s statement, in his response to the bishops' motions, that disallowing their depositions "would prejudice [J.N.'s] right to further challenge the validity or legitimacy of the District's defense." Nothing about that statement indicates that J.N. is merely seeking impeachment evidence.

Impeachment evidence is evidence that undermines the credibility of a witness; as such, it need not be relevant or material to the issues in the case. See State v. Howington, 268 Ala. 574, 575, 109 So. 2d 676, 677 (1959) ("[C]ross-examination of a witness may even pertain to irrelevant and immaterial matters as bearing on the memory, accuracy, credibility, interest or sincerity of the witness."). Evidence that challenges the validity of a defense, on the other hand, is substantive evidence. See Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 517 (5th Cir. 1993) ("Substantive evidence is that which is offered to establish the truth of a matter to be determined by the trier of fact. ... Impeachment evidence, on the other hand, is that which is offered to 'discredit a witness ... to reduce the effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] or

[her] testimony.'"). Such evidence is generally discoverable under Rule 26(b)(1)(i), Ala. R. Civ. P., which defines relevant evidence as including evidence "relat[ing] ... to the ... defense of any other party [than the party seeking discovery]."

In short, the bishops fail to demonstrate that J.N.'s requested depositions are merely a fishing expedition to discover impeachment evidence. Thus, they fail to demonstrate that they have a clear legal right to a protective order or to an order quashing their deposition notices on that basis.

D. Attorney-client privilege

Finally, Wallace-Padgett argues that "[m]any of the topics [in the duces tecum document categories list in her deposition notice] would ... require [her] to testify about matters that are within the attorney[-]client privilege[,] as any knowledge [Wallace-Padgett] has of this particular matter has been obtained through discussions with her counsel." In support, Wallace-Padgett cites her affidavit, in which she stated: "Any knowledge I have would be based on information provided to me by my attorney."

There are two problems with Wallace-Padgett's argument. First, contrary to the assumption underlying the argument, the

duces tecum list in the deposition notice is not necessarily determinative of the topics on which J.N. seeks to depose Wallace-Padgett. It is simply a list of categories of documents that she was requested to bring to the deposition. The list may be broader than, narrower than, or otherwise different from the range of topics on which J.N. intends to depose her. Compare Rule 30(b)(1), Ala. R. Civ. P. ("If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the [deposition] notice."), and Rule 45(a)(1), Ala. R. Civ. P. ("A command to produce evidence ... may be joined with a command to appear ... at deposition ...."), and (a)(1)(C) ("Every subpoena shall ... command each person to whom it is directed ... to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person ...."), with Rule 30(c), Ala. R. Civ. P. ("Examination ... of witnesses [at deposition] may proceed as permitted at the trial ....").

Therefore, the list of documents standing alone is not properly a basis for Wallace-Padgett's objection that her

deposition notice requests testimony about information protected by the attorney-client privilege.

Second, Wallace-Padgett's argument is premised on an assumption that all information she received from her attorney is automatically protected by the attorney-client privilege. That is not so. The privilege protects communications between an attorney and client, not necessarily all information or documents transmitted by or accompanying those communications. See Ex parte Alfa Ins. Corp., [Ms. 1170804, April 5, 2019] ___ So. 3d ___, ___ (Ala. 2019) ("'"'[T]he protection of the [attorney-client] privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'"'" (quoting Ex parte Alfa Mut. Ins. Co., 631 So. 2d 858, 860 (Ala. 1993), quoting in turn other cases (emphasis omitted))).

For these reasons, Wallace-Padgett's broad objection to her deposition notice based on the attorney-client privilege

is ill-founded. Although during the deposition she may be entitled to object to particular matters of inquiry as protected by the privilege, she has not established that the circuit court exceeded its discretion by denying her request for protection from the deposition as a whole. Accordingly, Wallace-Padgett does not have a clear legal right to a protective order or to an order quashing her deposition notice based on the attorney-client privilege.

IV. Conclusion

Based on the foregoing, the bishops have failed to demonstrate that they have a clear legal right to the broad protective orders they requested or to orders quashing their deposition notices. Accordingly, the bishops' petition for the writ of mandamus is denied.

PETITION DENIED.

Shaw, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs specially.

Bolin and Bryan, JJ., concur in the result.

Wise and Sellers, JJ., dissent.

MITCHELL, Justice (concurring specially).

I would be open to considering adoption of an apex-deposition rule in a case where the petitioner asks us to do so, the circumstances of the case would warrant adoption of such a rule, and the parties and any amici curiae provide developed arguments about how such a rule should be formulated and would apply. This is not that case. For the reasons provided in the majority opinion, I concur with the decision to deny the petition for the writ of mandamus.