TIPS *from the Trenches*

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PROPER CONSTRUCTION OF § 6-5-551, ALA. CODE 1975

When plaintiff's allegations in a complaint subject to the Alabama Medical Liability Act depend upon proof of a health care provider's prior acts or omissions, discovery may in fact be had of such prior acts or omissions, and such prior acts or omissions may indeed be introduced into evidence at trial despite a health care provider's assertion of "privilege" under § 6-5-551, Ala. Code 1975.

The Statute

§ 6-5-551. Complaint to detail circumstances rendering provider liable; discovery.

In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers, the Alabama Medical Liability Act shall govern the parameters of discovery and all aspects of the action. ***The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts.*** The plaintiff shall amend his complaint timely upon ascertainment of new or different acts or omissions upon which his claim is based; provided, however, that any such amendment must be made at least 90 days before trial. ***Any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. Any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission.***

Id. (emphasis added).

Section 6-5-551 states, in pertinent part, that "[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*." (emphasis added). Health care provider defendants often assert objections to requested discovery by merely citing or quoting § 6-5-551's language and asserting: "Objection – discovery of other acts and omissions is prohibited." But what does the statute really mean and how should it properly be construed?

Several opinions from the Supreme Court of Alabama provide guidance. First, its meaning was explained in *Ex parte Anderson*, 789 So. 2d 190 (Ala. 2000) as follows:

> We have viewed the language of the statute, and we conclude that its meaning could not be clearer. If all conditions of the statute are met, then any other acts or omissions of the defendant health-care provider are exempt from discovery, and the discovering party is prohibited from introducing evidence of them at trial.

Id. at 195. Stated differently, later in the

opinion:

> **"[d]iscovery of incidents of malpractice other than those specifically alleged in the complaint is precluded."**

Id. at 198 (emphasis added).

In *Ex parte McCullough*, 747 So. 2d 887 (Ala. 1999), the Court examined § 6-5-551 prior to its legislative amendment effective May 9, 2000. While *McCullough*'s holding was superceded by that amendment (see *Ex parte Ridgeview Healthcare Center, Inc.*, 786 So. 2d 1112, 1116-17 (Ala. 2000), explaining the effect of the 2000 amendment), *McCullough*'s underlying reasoning remains sound, namely, *if the requested discovery is directly relevant to the wrongs alleged in the plaintiff's complaint, it remains discoverable.*

As explained by the Court in *Ex parte McCullough*:

> ... the discovery sought by Ms. McCullough is not sought as pattern-and-practice evidence, but is sought for the sake of showing negligence, wantonness, willfulness or breach of a contractual duty to provide adequate care by Dailrada Health Center in its hiring, training, staffing, etc., which negligence, wantonness, willfulness, or breach, the plaintiff alleges, proximately caused the death of her grandmother. The items sought would be relevant to these allegations, and much of the information in those items would be necessary to prove them. Ms. McCullough alleges that the death of her grandmother was proximately caused by the 'systemic failure' of Dailrada to provide procedures to minimize the risk of harmful acts such as those that led to Ms. Lofton's death, and by understaffing, hiring unqualified persons, and failing to train, supervise and discipline them. To prove these allegations, particularly as to wanton or willful misconduct, Ms. McCullough would have to prove facts that gave Dailrada notice or knowledge of the inadequacy of its procedures and staffing.
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> These allegations of wrongful conduct would require proof that Dailrada had notice or knowledge of the alleged increased risk of harm due to its alleged 'systemic failure' to provide for adequate staffing and other safeguards. The degree of culpability of Dailrada's conduct would be directly related to the number of similar incidents, because a large number of similar incidents that could be traced to the alleged 'systemic failure' would tend to show wanton or even willful disregard for the safety of the persons entrusted to Dailrada's care. Thus, the requested discovery is directly relevant to the wrongs alleged in McCullough's complaint.

Id. at 890-91. Analogously, so long as plaintiff is not seeking to introduce evidence of "other incidents" of unrelated malpractice, or "pattern-and-practice" evidence; but is instead, seeking evidence of knowledge or notice of foreseeable harm that constitute essential elements of a negligence claim, § 6-5-551 may not properly stand in the way.

In *Ex parte Mendel*, 942 So. 2d 829 (Ala. 2006), the Supreme Court adhered to this same approach with respect to two of plaintiff's theories of recovery as pled in her amended complaint – negligent failure to obtain the patient's informed consent and negligent misrepresentation about the dentist's qualifications and credentials. Because these theories were specifically pled, despite objections premised upon § 6-5-551, discovery of a dentist's prior acts and omissions was expressly permitted:

> Therefore, as controlled by Previto's detailed specification and factual description in her complaint of Dr. Mendel's alleged failure to obtain her informed consent, the discovery of information about previous suspensions and/or revocations of his license to practice dentistry is not prohibited by § 6-5-551 to the extent the information reflects multiple suspensions and/or revocations, and provided further that the revocations or suspensions relate to negligence or professional incompetence in the practice of dentistry. Discovery of any materials or information not having that direct relevance to the claim of lack of informed consent as pleaded by Previto is prohibited by § 6-5-551. *See Ex parte Anderson*, 789 So. 2d 190, 195, 198 (Ala. 2000); and *Ex parte Ridgeview Health Care Ctr.*, 786 So. 2d at 1116-17.

We next consider the effect of the discovery exemption in § 6-5-551 in light of Previto's fraudulent-misrepresentation claims. In *Johnson v. McMurray*, 461 So. 2d 775 (Ala. 1984), this Court had the following to say concerning a patient's claim of fraud against his doctor:

> "This Court has determined that the relationship between a doctor and his patient is a 'confidential' one. *Hudson v. Moore*, 239 Ala. 130, 194 So. 147 (1940). The policy considerations for confidentiality in the doctor/patient relationship are grounded in the necessity on the part of the patient to fully disclose to his doctor all information essential to the patient's proper diagnosis and treatment, and in the corresponding duty on the part of the doctor to fully disclose to the patient facts necessary to enable the patient to intelligently exercise his right to control, to the extent feasible, his own health care."

461 So. 2d at 778.

As noted, Previto charges in her complaint that Dr. Mendel misrepresented his competence and qualification to perform dental-implant surgery and suppressed information that his "license to practice dentistry has been suspended and/or revoked on multiple occasions" and that "he had been reprimanded by numerous dental review boards and had received suspensions and/or revocations in numerous states." Given the procedural posture in which this case reaches us, we will assume, but need not decide, that Dr. Mendel owed Previto a duty to disclose "multiple" suspensions or revocations; reprimands by "numerous" dental review boards; or suspensions or revocations in "numerous" states. Only a quantity of such sanctions corresponding to the magnitudes specifically pleaded would qualify that information for discovery as being "with regard to" the detailed specifications and factual descriptions

> of the acts or omissions alleged in the complaint.
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> Therefore, given the scope of discovery arising from the specific acts and omissions pleaded by Previto, we hold that she may discover from Dr. Mendel the matters explained above with respect to her claims of lack of informed consent and fraudulent misrepresentation.

Id. at 837-38.

Still other Alabama authorities echo these holdings. See, e.g., *Ex parte Brookwood Medical Ctr.*, 994 So. 2d 264, 269 (Ala. 2008), Lyons, J., concurring specially (" 'Other' [in § 6-5-551] obviously refers to an act or omission **other than those acts and omissions alleged in the complaint**"); *Long v. Wade*, 980 So. 2d 378, 390 (Ala. 2007) (Murdock, J., concurring) ("...the purpose [of the last sentence of § 6-5-551] **[is] to prevent the introduction of collateral acts or omissions on the part of health-care providers**"); *Middleton v. Lightfoot*, 885 So. 2d 111, 116-17 (Ala. 2003), Houston, J., concurring specially (We have repeatedly interpreted this provision according to the plain-meaning rule, **ruling inadmissible all evidence of "other act[s] or omission[s]" outside those specifically pleaded**); John Scott Thornley, *Diagnosing Section 6-5-551 of the Alabama Medical Liability Act and the Inadmissibility of Collateral Acts and Omissions Against Health Care Providers*, 54 Ala. L. Rev. 1441, 1442 (2003) ("**In essence, § 6-5-551 bars plaintiffs from introducing collateral 'acts or omissions' of health care providers**.").

At bottom, § 6-5-551's discovery privilege and evidentiary exemption have as their purpose the foreclosing of discovery and proof at trial of incidences of malpractice other than those which could be found to be a proximate cause of the injury or death made the basis of the complaint. If plaintiff seeks discovery related to the harm she alleges was a proximate cause of injury or death, § 6-5-551 presents no obstacle to its discovery, or, ultimately to its admission into evidence at trial.