Rel: October 7, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0518

Ex parte CSX Transportation, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Christopher M. Ellis

v.

CSX Transportation, Inc.)

(Montgomery Circuit Court: CV-20-901397)

BOLIN, Justice.

CSX Transportation, Inc. ("CSX"), petitions this Court for a writ of mandamus directing the Montgomery Circuit Court to, among other things discussed infra, vacate its order granting Christopher M. Ellis's motion to compel discovery and either enter an order denying Ellis's motion to compel or a protective order barring production of materials CSX contends to be protected work product or patently irrelevant. We grant the petition in part and deny it in part.

Facts and Procedural History

Ellis was employed by CSX as a remote-control foreman at CSX's Montgomery yard. While riding on the ladder of a railcar during the course of his employment with CSX, Ellis was struck in the torso by the broken door handle and latch assembly of a railcar on an adjacent track. The impact of the blow knocked Ellis off the railcar on which he was riding, causing him to suffer significant injuries. On November 17, 2020, Ellis sued CSX asserting claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq., and the Safety Appliance Act ("the SAA"), 49 U.S.C. § 20301 et seq. Ellis propounded 25 multipart interrogatories and 62 requests for production to CSX with his complaint.

On February 5, 2021, CSX served its responses to Ellis's discovery requests.

According to Ellis, CSX failed to provide complete responses to his discovery requests. On January 11, 2022, Ellis submitted a letter to CSX in an effort to resolve the discovery issues pursuant to Rule 37(a)(2), Ala. R. Civ. P., outlining the allegedly deficient responses and requesting supplementation of those responses by February 1, 2022. Ellis agreed in the letter to limit the scope, as to time and geography, of some of the discovery requests that pertained to prior accidents. Ellis also objected to the language used by CSX to verify the interrogatory responses provided by CSX. On February 2, 2022, CSX notified Ellis that it was working on responding to his letter seeking supplementation of its discovery responses and that it would "get that out to [him] shortly."

On February 17, 2022, Ellis moved the trial court for an order compelling discovery, asserting that CSX had yet to provide complete information responsive to his discovery requests and specifically identifying those discovery responses that he contended were deficient. Ellis also sought an order compelling CSX to execute a proper verification of its interrogatory responses.

On February 25, 2022, CSX filed its response in opposition to the motion to compel, stating that it was in the process of responding to Ellis's request for supplementation and that, although CSX's counsel had advised Ellis's counsel that supplemented responses would be provided shortly, Ellis chose to file the motion to compel. CSX asserted that Ellis's only effort to obtain supplemental responses was sending the letter of January 11, 2022, requesting supplementation. CSX further stated that, although Ellis technically had complied with the mandate of Rule 37(a)(2) regarding contacting opposing counsel before filing a motion to compel, Ellis had made no actual effort to determine what issues were actually in dispute and had made no further inquiries about the status of CSX's supplemental responses. CSX contended that many of the issues Ellis presented in his motion to compel had been rendered moot upon CSX's providing supplemental responses after the filing of the motion to compel and that additional issues could have been resolved informally between the parties without a motion to compel.

CSX also addressed in its response to the motion to compel those responses that Ellis asserted were deficient. CSX in particular addressed Ellis's request for production no. 4, explaining that it sought "any and all

files relating to personal injuries and/or on-duty injuries pertaining to Plaintiff and kept by Defendant in the ordinary course of Defendant's business." CSX stated that, after making various objections to the request, it directed Ellis to his personnel and medical files that had been previously produced. CSX argued that Ellis, however, in his motion to compel, had attempted to broaden the scope of the request by suggesting that his request for his "personal injury files" also included documents maintained by CSX in its risk-management system ("the RMS"), a proprietary electronic database created and maintained by CSX, such as "claim search results, claim information, claim value, injury/illness info, property damage claim(s), lost days, notes, and settlement/structure information." CSX objected to the expansion of the scope of request for production no. 4, arguing that the materials sought by Ellis in his motion to compel were privileged attorney work product created in anticipation of litigation. CSX also filed on February 25, 2022, its privilege log identifying claims files created by the CSX's risk-management department ("the RMD") and information contained in the RMS purportedly constituting "mental impressions, conclusions, opinions and

legal theories relating to [CSX's] investigation, analysis and evaluation of [Ellis's] claims and [CSX's] defenses."

CSX also objected to several of the discovery requests in Ellis's motion to compel as being vague, overly broad, unduly burdensome, and/or seeking irrelevant and prejudicial evidence. CSX also contended that its verification of its interrogatory responses complied with Rule 33(a), Ala. R. Civ. P.

On March 7, 2022, CSX moved the trial court for a protective order pursuant to Rule 26(c), Ala. R. Civ. P., and requested that the trial court deny Ellis's motion to compel insofar as it sought production of information and materials that CSX asserted was protected from disclosure by the attorney work-product doctrine pursuant to Rule 26(b)(4), Ala. R. Civ. P. CSX explained in its motion that Ellis's request for production no. 4 demanded "any and all files relating to personal injuries and/or on-duty injuries pertaining to Plaintiff and kept by Defendant in the ordinary course of Defendant's business." CSX stated that it had objected to Ellis's request for "personal injury files" on various grounds but, nevertheless, had produced Ellis's personnel and medical files. CSX further asserted that Ellis had claimed in the letter of January

11, 2022, that CSX's response to request for production no. 4 was insufficient and that his request for "personal injury files" included documents maintained by CSX in the RMS, such as "claim search results, claim information, claim value, injury/illness info, property damage claim(s), lost days, notes, and settlement/structure information." CSX argued that Ellis sought through his motion to compel materials that would include privileged attorney work product created and maintained by the RMD.

CSX stated in its motion that it had no "personal injury files" on Ellis and specifically objected to Ellis's effort to expand the scope of request for production no. 4 to include privileged materials protected from disclosure under Alabama law. CSX contended that if Ellis were to specifically request the production of CSX's risk-management files, it would be obvious, on the face of the request, that such a request was intended to invade the attorney-client/work-product privileges protected under Alabama law. CSX explained that, rather than directly requesting CSX's risk-management files, Ellis had asked for "personal injury files" in the hope of acquiring privileged documents similar to documents previously inadvertently produced in a Georgia case involving CSX and

Ellis's counsel and subsequent cases in which the parties have dealt with this same issue. CSX argued that Ellis, bolstered by that prior inadvertent production of privileged documents, essentially sought CSX's privileged risk-management file relating to his injury. CSX contended that Ellis's counsel was undeniably aware that the materials sought in Ellis's motion to compel were privileged work product of CSX's in-house counsel and risk-management professionals. CSX argued that Ellis was merely attempting to capitalize on the inadvertent disclosure of privileged CSX risk-management materials made by a former CSX outside counsel in another action and that Ellis's filing his motion to compel discovery of such privileged materials appeared to be intended solely to harass and annoy CSX, to vexatiously expand the scope of discovery, and to impose a substantial burden and expense on CSX.

On March 24, 2022, the trial court notified the parties that it would consider the pending motions at a hearing on April 18, 2022. On April 11, 2022, Ellis filed a reply to CSX's response in opposition to the motion to compel, stating that, since the motion to compel had been filed, CSX had supplemented its discovery responses on two occasions and that some issues were no longer in dispute. Ellis informed the trial court that the

issues that had been resolved were not addressed in his reply to CSX's response in opposition to the motion to compel and that, in his reply, he had attempted to "streamline" for the trial court the issues that remained between the parties. Ellis then outlined and argued the discovery issues that he said remained between the parties. Ellis also filed a response to CSX's motion for a protective order on April 11, 2022.

Although the trial court had set the pending motions for a hearing on April 18, 2022, the trial court, on April 17, 2022, the day before the scheduled hearing, entered an order granting Ellis's motion to compel discovery and directing that CSX respond to Ellis's discovery requests. The trial court's order contained no findings and did not address CSX's motion seeking a protective order. CSX states that, because the order did not address its motion for a protective order, it appeared for the scheduled hearing the next day. However, the trial court canceled the scheduled hearing and advised the parties that the hearing would be rescheduled. Based on the materials before us, the hearing has not been rescheduled and the trial court has taken no action on CSX's motion for a protective order.

In anticipation that the hearing would not be rescheduled within the period in which CSX was directed to comply with the April 17, 2022, order, CSX, on April 22, 2022, moved the trial court to reconsider and vacate that order, which granted, in toto, Ellis's motion to compel discovery, and to enter a protective order as to information and materials protected by the work-product doctrine and information and materials that were patently irrelevant and the production of which would impose a burden on CSX that would far outweigh any benefit to Ellis. On April 27, 2022, CSX also moved the trial court to stay all proceedings. The trial court had not ruled on either motion at the time CSX filed its petition for a writ of mandamus on May 9, 2022.

Standard of Review

This Court has stated the following regarding a petition for the writ of mandamus challenging a trial court's ruling on a discovery issue:

> "Mandamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991). This Court will not issue the writ of mandamus where the petitioner has '"full and adequate relief"' by appeal. State v. Cobb, 288 Ala. 675, 678, 264 So. 2d

523, 526 (1972) (quoting State v. Williams, 69 Ala. 311, 316 (1881)).

"Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991). Accordingly, mandamus 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.

"Generally, an appeal of a discovery order is an adequate remedy, notwithstanding the fact that that procedure may delay an appellate court's review of a petitioner's grievance or impose on the petitioner additional expense; our judicial system cannot afford immediate mandamus review of every discovery order. See Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) ('Mandamus disrupts the trial proceedings, forcing the parties to address in an appellate court issues that otherwise might have been resolved as discovery progressed and the evidence was developed at trial.'). In certain exceptional cases, however, review by appeal of a discovery order may be inadequate, for example, (a) when a privilege is disregarded, see Ex parte Miltope Corp., 823 So. 2d 640, 644-45 (Ala. 2001) ('If a trial court orders the discovery of trade secrets and such are disclosed, the party resisting discovery will have no adequate remedy on appeal.'); (b) when a discovery order compels the production of patently irrelevant or duplicative documents, such as to clearly constitute harassment or impose a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party, see, e.g., Ex parte Compass [Bank], 686 So. 2d 1135, 1138 (Ala. 1996) (request for 'every customer file for every variable annuity' including annuity products the plaintiff did not purchase); (c) when the trial court either imposes

> sanctions effectively precluding a decision on the merits or denies discovery going to a party's entire action or defense so that, in either event, the outcome has been all but determined, and the petitioner would be merely going through the motions of a trial to obtain an appeal; or (d) when the trial court impermissibly prevents the petitioner from making a record on the discovery issue so that the appellate court cannot review the effect of the trial court's alleged error. The burden rests on the petitioner to demonstrate that its petition presents such an exceptional case -- that is, one in which an appeal is not an adequate remedy. See Ex parte Consolidated Publ'g Co., 601 So. 2d 423, 426 (Ala. 1992)."

Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813-14 (Ala. 2003)(footnote omitted). The order challenged in this case is reviewable by mandamus petition because it allegedly disregards the work-product doctrine and compels the production of patently irrelevant documents. See Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 547 (Ala. 2007).

Discussion

I. Work Product

CSX argues that the trial court exceeded its discretion in ordering the production of CSX's risk-management files in violation of the work-product doctrine. Ellis sought in request for production no. 4 "[a]ny and all files relating to personal injuries and/or on-duty injuries pertaining to Plaintiff and kept by Defendant in the ordinary course of Defendant's

business." Ellis later clarified this request in his motion to compel, stating that the request sought his entire personal-injury file, including "claim search results, claim information, claim value, injury/illness info, property damage claim(s), lost days, notes, and settlement/structure information," which is information contained in the RMS.

Rule 26(b)(4), Ala. R. Civ. P., provides:

> "(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> "....
>
> "(4) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an

> attorney or other representative of a party concerning the litigation."

This Court has stated the following regarding Rule 26(b)(4):

> "[Rule 26(b)(3) now Rule 26(b)(4)[1]] allows for the discovery, upon a showing of 'substantial need' and 'undue hardship,' of relevant facts that are contained in trial preparation materials; however, the last sentence of that rule protects against the disclosure of an attorney's mental impressions or legal theories that may be included in such materials. This Court applied this general principle in Ex parte Alabama Power Co., 280 Ala. 586, 196 So. 2d 702 (1967):
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> > "'It makes a difference as to whether the product of the lawyer's work consists of relevant facts, discovered by him and not available to his adversary, upon which he relies to recover, or whether the work product consists of legal theories and contentions upon which he relies to recover upon a given set of facts. The general rule is that claims and contentions need not be [disclosed].'
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> "Id., 280 Ala. 586, 592, 196 So. 2d 702, 707-08.
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> "Our work-product rule is a codification of the holding in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). See, Committee Comments, Rule 26(b)(3) [now Rule 26(b)(4)], Ala. R. Civ. P. In Hickman, the Supreme Court refused to allow discovery of both written and oral statements made by witnesses to defense counsel during informal interviews. The Court reasoned that to allow such discovery would allow opposing counsel to peer into the all-important mental impressions and strategies of defense counsel, and that an attorney's mental impressions of a case lie at the very

[1]Rule 26(b)(3) was renumbered as Rule 26(b)(4) pursuant to amendments to Rule 26 that became effective February 1, 2010.

> heart of our justice system. Id., 329 U.S. at 510-11, 67 S.Ct. at 393-94, 91 L.Ed. at 462.
>
> "....
>
> "... Recently, the United States Court of Appeals for the Eleventh Circuit, interpreting Hickman and other cases regarding opinion work product, held that while opinion work product does not have absolute protection it nevertheless 'enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.' Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386 (11th Cir.), modified on other grounds, 30 F.3d 1347 (11th Cir. 1994), cert. denied, 513 U.S. 1110, 115 S.Ct. 900, 130 L.Ed.2d 784 (1995)."

Ex parte Stephens, 676 So. 2d 1307, 1311-13 (Ala. 1996), overruled on other grounds, Ex parte Henry, 770 So. 2d 76 (Ala. 2000). This Court has explained the following:

> "'"Under Rule 26(b)(3) [now Rule 26(b)(4), Ala. R. Civ. P.,] the party objecting to discovery bears the burden of establishing the elements of the work-product exception."' Ex parte Cummings, 776 So. 2d 771, 774 (Ala. 2000) (quoting Ex parte Garrick, 642 So. 2d 951, 952-53 (Ala. 1994)). Those elements are 'that (1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party.' Johnson v. Gmeinder, 191 F.R.D. 638, 643 (D. Kan. 2000); see also 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2024, at 336 (1994).
>
> "Once '"the parties are 'at issue as to whether the document[s] sought [were], in fact, prepared in anticipation of litigation,'"' the objecting party must make '"[a]n evidentiary

> showing."' Ex parte Cummings, 776 So. 2d at 774 (quoting Ex parte State Farm [Mut.] Auto. Ins. Co., 761 So. 2d 1000, 1002-03 (Ala. 2000), quoting in turn Ex parte Garrick, 642 So. 2d at 953 (emphasis added)). ...
>
> "[When the determinative issue is whether the discovery to be produced was prepared in anticipation of litigation,] '[a] "blanket claim" as to the applicability of the work product doctrine does not satisfy the [objecting parties'] burden of proof.' Disidore v. Mail Contractors of America, Inc., 196 F.R.D. 410, 413 (D. Kan. 2000). '"That burden cannot be discharged by mere conclusory or ipse dixit assertions."' Id. (quoting McCoo v. Denny's, Inc., 192 F.R.D. 675, 680 (D. Kan. 2000)). Where the record contains 'no affidavits, memorandums, or reports to support the [objecting parties' contentions],' the court can only 'speculate' as to whether the materials 'fall under the work-product exception.' Ex parte Fuller, 600 So. 2d 214, 216 (Ala. 1992). See also Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, a Div. of Equifax Servs., Inc., 120 F.R.D. 504, 510 (W.D. La. 1988) ('A clear showing must be made which sets forth the items or categories objected to and the reason for that objection.... Accordingly, the proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege.')."

Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d at 548. Additionally, this court has stated:

> "The mere fact that litigation does eventually ensue does not, by itself, cloak materials with the protection of the work-product privilege. Sims v. Knollwood Park Hosp., 511 So. 2d 154 (Ala. 1987). '"[T]he test should be whether, in light of the nature of the document and factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."' Sims, 511

> So. 2d at 157 (quoting Binks Mfg. Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (7th Cir. 1983))."

Ex parte State Farm Mut. Auto. Ins. Co., 761 So. 2d 1000, 1002 (Ala. 2000).

Once Ellis filed his motion to compel, which included his clarification as to the scope of request for production no. 4, he and CSX were at issue with one another as to whether the documents sought by that request were prepared in anticipation of litigation. Thus, the burden was on CSX to establish that the requested materials were prepared in anticipation of litigation. See Ex parte State Farm, supra. In support of its position that the requested risk-management materials are protected under the work-product doctrine, CSX presented the trial court with a letter from Ellis's counsel dated March 17, 2020, which was three days after the accident in this case occurred, advising CSX that they represented Ellis regarding his "claims for any and all injuries and damages arising from his on-the-job injury." CSX also presented the trial court with the affidavit of Michael Scully, CSX's senior director of risk management. Scully testified that the RMD is a part of the CSX's legal department and that he reports directly to CSX's general counsel. Scully stated that the RMD is managed and supervised by CSX's general

counsel. Scully testified that the RMD investigates and evaluates potential and actual claims asserted by employees against CSX in anticipation of litigation and in consultation with CSX's counsel. According to Scully, RMD's investigation may include, but is not limited to, determining how the employee was allegedly injured; determining the medical condition of the employee; collecting any available relevant medical information; documenting the amount of time the employee has lost from work; interviewing any witnesses or other persons with knowledge of the employee's injury giving rise to the claim; preserving relevant evidence; and documenting the accident scene or involved equipment.

Scully further testified that the RMD evaluates for CSX's internal purposes a number of factors to assess the potential value of an employee's claim, including how an injury occurred; the merits of the employee's claim; the nature of the injury; the potential past and future lost wages of the employee; the employee's medical history and any prior known injuries or preexisting conditions; whether the employee's injury prevents him or her from working; and the likelihood of the employee's future return to work. Scully stated that the RMD consults with CSX's

counsel to evaluate the claim and, if appropriate, arrive at a reasonable settlement value of the claim.

Scully also testified that the information generated by the RMD in investigating and evaluating a claim is entered into the RMS. Scully stated that the RMS has a home screen that contains various tabs that function like a table of contents. Located under each tab are various screens that contain fields that are completed by RMD personnel while investigating and evaluating claims. Scully testified that those completed fields contain notes taken by RMD personnel concerning the status of the investigation, witness interviews, and evidence preserved and documented by the RMD and include the RMD personnel's mental impressions, conclusions, opinions, and theories regarding the merits of the claim, the value of the claim, and CSX's possible defenses, which are formed in collaboration with CSX's counsel.

Based on the foregoing, we conclude that CSX established that the materials contained in the RMS were prepared in anticipation of litigation. Initially, we note that this Court has recognized that anticipating the commencement of an action against a railroad company following an injury to a railroad employee and expecting litigation to

arise as a result of such an injury are reasonable assumptions. See Ex parte Norfolk S. Ry. Co., 897 So. 2d 290 (Ala. 2004). CSX presented evidence indicating that, within three days of the accident, Ellis's counsel had notified CSX that Ellis had obtained representation regarding his claims against CSX for "any and all injuries and damages arising from his on-the-job injury." CSX also presented the affidavit of Scully, CSX's senior director of risk management, who testified that the RMD is part of CSX's legal department and that the RMD investigates and evaluates potential and actual claims asserted by employees against CSX in anticipation of litigation. Scully further testified that the information generated by the RMD in investigating and evaluating a claim -- including how the employee was injured, relevant medical information, potential past and future lost wages of the employee, and the merits of the employee's claim -- is entered into the RMS.

In light of Ellis's notifying CSX three days after the accident that he had obtained representation regarding his "claims for any and all injuries" arising from his on-the-job injury and the nature of the aforementioned information contained in the RMS, we conclude that the materials contained in the RMS "'"can fairly be said to have been

prepared or obtained because of the prospect of litigation."'" Ex parte State Farm, 761 So. 2d at 1002 (citations omitted). CSX has established that the materials contained in the RMS are protected under the work-product doctrine because they are privileged materials that were prepared in anticipation of litigation by RMD personnel in consultation with CSX's counsel. See Ex parte Meadowbrook Ins. Grp., 987 So. 2d at 548.

We further note that CSX established through Scully's affidavit that some materials contained in the RMS consisted of the RMD personnel's mental impressions, conclusions, and opinions. That opinion work product "'enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.'" Ex parte Stephens, 676 So. 2d at 1313 (citation omitted). Further, Rule 26(b)(4) provides that, even when ordering the discovery of materials prepared in anticipation of litigation after the party seeking discovery of the materials has made the required showing, the trial court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Assuming that Ellis made the required showing

demonstrating that he was entitled to the discovery of any factual work product contained in the RMS, Ellis was still not entitled to the discovery of the opinion work product contained in the RMS.[2]

Because we have determined that CSX demonstrated that the materials contained in the RMS were prepared in anticipation of litigation, the burden shifted to Ellis to show a substantial need for those materials in order to prepare his case and that he is unable without undue hardship to obtain the substantial equivalent of those materials by other means. Rule 26(b)(4); Ex parte Mobile Gas Serv. Corp., 123 So. 3d 499, 510 (Ala. 2013). Ellis filed a response in opposition to CSX's motion for a protective order, in which Ellis simply took the position that not all the materials contained in the RMS were privileged. In that response, Ellis argued the following:

> "... Plaintiff's position, which the Court agreed to investigate, is that the [RMS] file may contain some privileged materials, but the entire file is certainly not privileged. Plaintiff has seen a version of the file,[3] and it is Plaintiff's position that within this file there is relevant medical

[2]Whether Ellis made the required showing under Rule 26(b)(4) that he was entitled to the discovery of the factual work product is discussed infra.

[3]This appears to be a reference to the materials that were inadvertently produced in other litigation in Georgia.

> information, previous personal injury entries, and other innocuous information that is relevant to damages calculations (lost time, etc.). Not all of the information is legal, as [CSX] suggests.
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> "... Further, [CSX] is asking this Court, and Plaintiff, to take its word that all of the information is privileged without anything more. It makes blanket assertions like, '[CSX] Screens are Opinion Work Product,' but does not explain how items in it's lengthy lists on pages 6-7, like 'VocRehab information' and 'Lost Days' and 'Surveillance Information' are not relevant and discoverable.
>
> "... It is Plaintiff's position that these items are absolutely discoverable. It may be that certain information, like claim value, is protected, but that is certainly not the entire file as [CSX] is hoping the Court will rule.
>
> "... Plaintiff merely asks that the Court ensure Plaintiff is able to obtain relevant and necessary information in the course of discovery. Plaintiff's position is that several items, such as those listed above, are not privileged. However, if this Court decides to also undergo an in-camera review to determine privilege, Plaintiff asks that the Court require the entire file responsive to Plaintiff's request."

Ellis's argument was simply that not all the materials contained in the RMS were privileged under the work-product doctrine and nonprivileged materials in the RMS were discoverable. Nothing in Ellis's response indicates that he has a substantial need for the materials contained in the RMS in order to prepare his case and that he is unable without undue hardship to obtain the substantial equivalent of those materials by other

means. See Rule 26(b)(4); Ex parte Mobile Gas, 123 So. 3d at 510. Additionally, Ellis presented nothing disputing Scully's testimony that certain materials contained in the RMS included the mental impressions, conclusions, or opinions of RMD personnel. Accordingly, we conclude that Ellis failed to make the required showing under Rule 26(b)(4) demonstrating that he is entitled to the work product contained in the RMS.

Based on the foregoing, we conclude that CSX has presented a clear legal right to the relief it seeks as to this issue, see Ex parte Ocwen Fed. Bank, supra; accordingly, we grant the petition in part and direct the trial court to vacate its order to the extent that it requires the production of materials contained in the RMS, in violation of the work-product doctrine.

II. Relevancy

CSX next argues that the trial court's order allowed for the production of patently irrelevant material, thereby imposing an undue burden on CSX while providing no real benefit to Ellis. Ellis sought the following disputed discovery:

> 1. Interrogatory no. 6 asked about all oral and written complaints or information regarding any other CSX

> employees injured "in the same manner" as Ellis within the previous 5 years.
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> 2. Request for production no. 26 sought records of all employee claims "for any and all similar injuries, and for any prior incident in the area in which the accident in this case occurred."
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> 3. Request for production no. 30 asked for copies of any and all written complaints received by CSX "specifically dealing with unsafe conditions, 'near misses' and/or injuries that happened at or near the area where the incident occurred."
>
> 4. Request for production no. 45 sought all "policies, rules, bulletins, communication[s] or warning(s) issued by any entity … to employees regarding operations at the Montgomery Yard."
>
> Rule 26(b)(1) provides:
>
> > "Parties may obtain discovery regarding any matter, not privileged, which is: (i) relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party; and (ii) proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

"In determining whether the information sought by a party 'appears reasonably calculated to lead to the discovery of admissible evidence,' a

court must consider the nature of the plaintiff's claim and whether, in light of the claim, the plaintiff has demonstrated a particularized need for the discovery being sought." Ex parte Miltope Corp., 823 So. 2d 640, 643 (Ala. 2001). Specifically, CSX argues that the "claim" presented by Ellis in this case is whether the injury he suffered when he was struck by the broken door handle and latch assembly on a passing railcar was negligently caused by CSX in violation of FELA. CSX argues that many of Ellis's discovery requests can be read as seeking only pattern and practice evidence relevant to supporting a claim for punitive damages, which are not available under FELA. See The Dutra Grp. v. Batterton, 588 U.S. ___, 139 S.Ct. 2275 (2019).

Ellis responds by arguing that his counsel has litigated FELA cases for nearly 30 years and is well aware that punitive damages are not available in FELA cases. Rather, Ellis contends that CSX has a duty under FELA to provide its employees with a reasonably safe place to work and that the information sought as to prior injuries at CSX's Montgomery yard is relevant to the issues of notice and the standard of care applicable to, and the duty owed by, CSX in inspecting its railcars. Ellis further argues that the discovery sought is directly relevant to

whether there were operational deficiencies within CSX's Montgomery yard that may have led to Ellis's accident and whether those deficiencies also led to previous injuries to other employees in similar accidents.

To establish negligence under FELA, a plaintiff must show that the harm he or she suffered was reasonably foreseeable to the defendant; to establish the element of reasonable foreseeability, a plaintiff must show that the defendant had actual or constructive notice of the condition that allegedly caused or contributed to the cause the plaintiff's injuries. See, e.g., Gallick v. Baltimore & Ohio R.R., 372 U.S. 108, 117-18 (1963); Haas v. Delaware & Hudson Ry. Co., 282 F. App'x 84, 87 (2d Cir. 2008) (not published in Federal Reporter) (citing Sinclair v. Long Island R.R., 985 F.2d 74, 77 (2d Cir. 1993)); Holbrook v. Norfolk S. Ry. Co., 414 F.3d 739, 742 (7th Cir. 2005). Evidence of alleged previous incidents may be relevant to the issue of foreseeability in a FELA case. See Thomas v. Reading, Blue Mtn. & N. R.R., No. Civ. A. 01-5834, Sept. 15, 2003 (E.D. Pa. 2003)(not published in Federal Supplement). See also Dennis v. Consolidated Rail Corp., No. CIV. A 93-1915, Sept. 7 1994 (E.D. Pa. 1994)(not published in Federal Supplement); Bodey v. Burlington N. R.R., No. 94-35340, July 28, 1995 (9th Cir. 1995)(not published in Federal

Reporter) (holding that evidence of two prior incidents was relevant to whether the injury-causing event was foreseeable); and DeWitty v. National R.R. Passenger Corp., No. 89-55151, Nov. 1, 1990 (9th Cir. 1990)(not published in Federal Reporter).

A detailed discussion of each disputed discovery request is not required. Suffice it to say that the disputed discovery requests seek information relative to similar prior accidents, incidents, and "near misses," which may be directly relevant to the issues of notice and foreseeability in this case. Accordingly, we cannot say that the trial court exceeded the broad discretion afforded to it in discovery matters by granting Ellis's motion to compel. We conclude that CSX has not demonstrated a clear legal right to the relief sought as to this issue. Ex parte Ocwen Fed. Bank, supra.

III. Scope of the Trial Court's Order

CSX argues that many of the issues raised in Ellis's motion to compel were addressed while the motion was pending through CSX's providing supplemental discovery responses, thus rendering moot many of Ellis's grievances. CSX further argues that other issues were narrowed in scope by Ellis's reply to CSX's response in opposition to the motion to compel.

However, CSX contends that the trial court's order did not recognize the narrowing of the scope of the motion to compel and that, therefore, the trial court exceeded its discretion by granting the motion to compel in full. In other words, CSX argues that the trial court exceeded its discretion by ordering the production of discovery beyond the scope of the requests that were before it at the time it entered the order. See Ex parte Sexton, 904 So. 2d 1251, 1252 (Ala. 2004) (granting mandamus relief when "the trial court's order exceeded the scope of the request before it").

Initially we note that CSX has not specifically identified or stated with particularity the issues that it contends were addressed through its production of supplemental discovery responses or were narrowed in scope by Ellis. The materials before this Court indicate that Ellis had agreed to limit the scope -- in terms of time and geography -- of some of the discovery requests pertaining to prior accidents before he filed the motion to compel and that those limitations were incorporated into the motion to compel. Additionally, before the trial court entered its order granting the motion to compel, Ellis filed a reply to CSX's response in opposition to the motion to compel stating that, subsequent to the filing of the motion to compel, CSX had supplemented its responses to the

discovery requests and that, accordingly, some issues were no longer in dispute. Ellis informed the trial court in that reply that the issues that had been resolved were not addressed in the reply and that he had attempted to "streamline" the issues addressed in the reply to those that he believed remained between the parties. Ellis then went on to outline and argue the discovery issues that he said remained between the parties.

Based on the foregoing, we cannot say that the trial court's order exceeded the scope of the discovery requests that were left remaining for that court's adjudication. The materials before us establish that the trial court was apprised, before ruling on the motion to compel that certain issues relating to the discovery requests that no longer existed between the parties either (1) because of CSX's production of supplemental discovery responses or (2) because of Ellis's agreement to narrow -- in terms of time or geography -- the scope of certain discovery requests. There is nothing before this Court indicating that the trial court did not consider those limitations of the issues when it entered its order. Because the trial court ruled on the motion to compel before the scheduled hearing set for the next day, and, thus, without further input from the parties or

counsel, we presume that the trial court adjudicated only the issues that remained pending between the parties. Accordingly, we conclude that CSX has failed to establish a clear legal right to mandamus relief as to this issue.

IV. Verification of Interrogatory Answers

Ellis objected to the language used by CSX to verify the interrogatory responses provided by CSX and sought an order compelling CSX to execute a proper verification of its interrogatory responses. CSX argues that the verification provided for its interrogatory responses fully complied with the requirements of Rule 33, Ala. R. Civ. P., and that it has a clear legal right not to be compelled to provide a new or different verification.

Determining whether a statement verifying an interrogatory response sufficiently satisfies the requirements of Rule 33 is not one of the exceptional circumstances for which mandamus review is available. See Ex parte Ocwen Federal Bank, supra (discussing the discovery related issues for which mandamus review is available). Accordingly, we will not address this issue raised by CSX.

Conclusion

We grant the petition for a writ of mandamus in part and direct the trial court to vacate its order to the extent that it requires the production of materials contained in the RMS, in violation of the work-product doctrine. We deny the petition for a writ of mandamus in all other regards.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Stewart, J., concurs in part and concurs in the result, with opinion.

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

Although I agree that the mandamus petition should be granted as to issue I, I would direct the trial court to conduct an in camera review of the materials contained in the risk-management system because it appears that some of those materials may be discoverable. I concur fully in the remainder of the opinion.