Rel: March 2, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2017-2018

1170013

Ex parte Industrial Warehouse Services, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Chapman Wilson, as administrator of the Estate of Janie Holt Wilson, deceased

v.

Kenneth Oneal Herbert et al.)

(Bibb Circuit Court, CV-17-900051)

1170087

Ex parte Industrial Warehouse Services, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Olivia Taylor, as administrator of the Estate of Willie James Taylor, Jr., deceased

v.

Kenneth Oneal Herbert et al.)

(Bibb Circuit Court, CV-17-900052)

PARKER, Justice.

Industrial Warehouse Services, Inc. ("IWS"), petitions this Court, in two separate petitions, for writs of mandamus directing the Bibb Circuit Court to vacate its order denying IWS's motion for a protective order concerning certain discovery requested by Chapman Wilson, as administrator of the estate of Janie Holt Wilson, deceased ("Wilson"), and by Olivia Taylor, as administrator of the estate of Willie James Taylor, Jr., deceased ("Taylor"), and to enter a protective order pursuant to Rule 26(c), Ala. R. Civ. P. We grant the petitions in part and deny them in part and issue the writs.

Facts and Procedural History

On April 20, 2017, a truck driven by Kenneth Oneal Herbert, an employee of IWS, collided with a vehicle driven by Willie James Taylor, Jr. ("Willie"); Janie Holt Wilson

("Janie") was a passenger in the vehicle. Willie and Janie died from injuries incurred as a result of the accident.

On May 3, 2017, Wilson sued IWS, among others, asserting various tort claims. On May 5, 2017, Taylor also sued IWS, among others, asserting various tort claims. The circuit court consolidated the cases.

Also on May 5, 2017, Wilson and Taylor requested that IWS respond to several interrogatories and produce numerous documents. Before responding to the discovery requests, IWS notified Wilson and Taylor that they had requested "materials from IWS ... that are proprietary to IWS and contain confidential information and/or trade secrets" and requested that the parties develop an agreed-upon protective order. The parties then engaged in negotiations over the language of the proposed protective order. IWS did not object to producing any of the requested discovery but sought to limit the use of the discovered information to the litigation of these consolidated cases. Wilson's and Taylor's trial attorneys, on the other hand, sought to use the discovery for purposes beyond the instant litigation. Specifically, Wilson's and Taylor's trial attorneys sought to be able to use the

discovered information in any future litigation against IWS and to share the discovered information with other plaintiffs' attorneys. Ultimately, the parties could not agree on a protective order.

On August 25, 2017, Wilson and Taylor filed a motion to compel IWS to fully respond to their discovery requests. On the same day, IWS filed a motion for a protective order "with regard to the production of certain confidential and/or proprietary materials." Specifically, IWS sought to prohibit the dissemination by Wilson and Taylor of its bills of lading and its operations and safety manuals.[1] Although the rule is not cited by IWS, it appears that IWS sought a protective order pursuant to Rule 26(c)(7), Ala. R. Civ. P., which states:

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make

[1]It appears that IWS sought to protect information found in numerous of its manuals and handbooks covering a variety of topics. However, the parties have not directed this Court's attention to anything in the materials before us indicating exactly which of IWS's manuals and handbooks contain information IWS seeks to protect. Nor have the parties specified the content of the manuals and handbooks at issue. Our general reference to "operations and safety manuals" references all manuals and handbooks at issue in the underlying proceeding.

> any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way ...."

On September 20, 2017, Wilson and Taylor filed a response to IWS's motion for a protective order arguing that IWS had failed to meet its burden of demonstrating good cause for the requested protective order. Wilson and Taylor argued that IWS had not demonstrated that the information in IWS's bills of lading and operations and safety manuals was actually "a trade secret or other confidential research, development, or commercial information."

On September 25, 2017, following a hearing at which the parties presented arguments, the circuit court denied IWS's motion for a protective order. The circuit court held that IWS "failed to establish 'good cause' under Rule 26(c)[, Ala. R. Civ. P.,] that the requested production would create ... an annoyance, embarrassment, oppression, or undue burden or expense or that the documents constitute confidential or proprietary information deserving of special protection." The circuit court noted that IWS "failed to produce any

affidavits, testimony or other evidence suggesting that the records sought by [Wilson and Taylor] are somehow confidential and proprietary."

On October 2, 2017, IWS filed a motion requesting that the circuit court reconsider its ruling denying IWS's motion for a protective order. In support of its motion to reconsider, IWS attached the affidavit testimony of Phyllis Hahn, IWS's director of safety and human resources. Hahn's affidavit testimony indicated that IWS's bills of lading include some information that is subject to confidentiality agreements IWS has entered into with its clients. Hahn's affidavit testimony states that allowing IWS's clients' information on the bills of lading to be made public "could easily be interpreted by our clients as a breach of confidentiality." Hahn also states in her affidavit testimony that IWS's bills of lading are "essentially ... a client list" that, if made public, would allow IWS's competitors an unfair advantage. Hahn's affidavit testimony also indicates that IWS's operations and safety manuals are "created in-house" or "purchased from reputable trucking compliance companies" and "are incorporated into our particular business model and

practice and, therefore, unique to our company." On October 4, 2017, Wilson and Taylor filed a response to IWS's motion to reconsider and a motion to strike Hahn's affidavit testimony as untimely.

On October 5, 2017, the circuit court denied IWS's motion to reconsider and struck Hahn's affidavit testimony. IWS filed its mandamus petitions with this Court on October 6, 2017.

Standard of Review

> "'"In Ex parte Norfolk Southern Ry., 897 So. 2d 290 (Ala. 2004), this Court delineated the limited circumstances under which review of a discovery order is available by a petition for a writ of mandamus and the standard for that review in light of Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003):
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> > "'"'"Mandamus is an extraordinary remedy and will be granted only when there is '(1) a clear legal right in the petitioner to the order sought, (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so, (3) the lack of another adequate remedy, and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991). In Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003), this

> Court announced that it would no longer review discovery orders pursuant to extraordinary writs. However, we did identify four circumstances in which a discovery order may be reviewed by a petition for a writ of mandamus. Such circumstances arise (a) when a privilege is disregarded, see Ex parte Miltope Corp., 823 So. 2d 640, 644-45 (Ala. 2001); (b) when a discovery order compels the production of patently irrelevant or duplicative documents the production of which clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit received by the requesting party, see, e.g., Ex parte Compass Bank, 686 So. 2d 1135, 1138 (Ala. 1996); (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 of the case 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 an 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)."'
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> "'"897 So. 2d at 291–92 (quoting Ex parte Dillard Dep't Stores, Inc., 879 So. 2d 1134, 1136–37 (Ala. 2003))."'
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> "Ex parte Nationwide Mut. Ins. Co., 990 So. 2d 355, 360 (Ala. 2008) (quoting Ex parte Orkin, Inc., 960 So. 2d 635, 638 (Ala. 2006))."

Ex parte Bosch LLC, 177 So. 3d 884, 890-91 (Ala. 2014). IWS argues that the circuit court's order denying its motion for a protective order pertains to a trade-secret privilege and thus is reviewable under category (a) ("[A] discovery order may be reviewed by a petition for a writ of mandamus ... when a privilege is disregarded ....").

Further, this Court stated in Ex parte Compass Bank, 686 So. 2d 1135, 1137 (Ala. 1996):

> "Because discovery involves a considerable amount of discretion on the part of the trial court, the standard this Court will apply on mandamus review is whether there has been a clear showing that the trial court [exceeded] its discretion. Ex parte Clarke, 582 So. 2d 1064, 1067 (Ala. 1991); Ex parte McTier, 414 So. 2d 460 (Ala. 1982)."

Discussion

The issue before this Court is whether the circuit court exceeded its discretion in denying IWS's motion for a protective order. Rule 26(c), Ala. R. Civ. P., quoted earlier, vests the circuit court with authority to enter a protective order. Rule 26(c)(7) allows for a protective order to be entered to protect trade secrets or other confidential information. As set forth in Rule 26(c)(7), a protective order may be entered only upon a showing of good cause for the protection sought. In Ex parte Cuna Mutual Insurance Society, 507 So. 2d 1328, 1329 (Ala. 1987), this Court stated that "it is the movant's burden to show good cause why the protective order should be granted." IWS, as the movant, had the burden of demonstrating good cause for the protective order it seeks. In the present case, the circuit court held that IWS "failed to establish 'good cause' under Rule 26(c)[, Ala. R. Civ. P.,] that the requested production would create ... an annoyance, embarrassment, oppression, or undue burden or expense or that the documents constitute confidential or proprietary information deserving of special protection."

IWS argues that it presented good cause for the protective order because, IWS argues, the discovery sought by

Wilson and Taylor contains confidential information and trade secrets. Specifically, IWS argues that the bills of lading contain confidential client information and that the operations and safety manuals, "prepared or obtained at cost and tailored specifically for [the] benefit of IWS's business operation, certainly qualify as proprietary trade secrets."

Section 8-27-2(1), Ala. Code 1975, a part of the Alabama Trade Secrets Act, defines a "trade secret" as information that

> "a. [i]s used or intended for use in a trade or business;
>
> "b. [i]s included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
>
> "c. [i]s not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
>
> "d. [c]annot be readily ascertained or derived from publicly available information;
>
> "e. [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and
>
> "f. [h]as significant economic value."

IWS argues that the information in its bills of lading and operations and safety manuals satisfies the definition of trade secret in § 8-27-2(1).

Concerning the information in IWS's bills of lading, IWS explains that, if the information contained in the bills of lading is disseminated, IWS's competitors would be able to identify its clients, its billing information, its billing rates, what it was hauling for its clients, to where it was delivering, etc. IWS notes that this information is, in fact, the subject of confidentiality agreements between it and its clients, which prohibit IWS from disclosing this information. In its amicus brief, the Alabama Trucking Association, Inc. ("ATA"), states the following concerning information contained on a trucking company's bills of lading:

> "If IWS's competitors are allowed to obtain unredacted bills of lading ..., they will be able to determine not only the identity of IWS's customers, but also the logistics it employs to transport its freight, the prices it and its customers charge, the rates of transportation, what type of freight is being hauled, how much freight is being hauled, the frequency of the shipments, how IWS plans its trips, etc."[2]

[2]In the circuit court's order of September 25, 2017, denying IWS's motion for a protective order, the circuit court did allow IWS to "redact any incremental billing information contained on its bills of lading." However, IWS notes in its

ATA's amicus brief, at p. 7.

Concerning the information in IWS's operations and safety manuals, IWS states that it expended considerable time, effort, and money in developing its business model, which, it says, its operations and safety manuals are part of. IWS admits, as Wilson and Taylor argue, that the applicable standards of operations and safety within the trucking industry are readily ascertainable.[3] IWS argues, however, that "the particular manner in which IWS incorporates that information into its business model is specifically unique to IWS." IWS's reply brief, at p. 6. In its amicus brief, ATA states that dissemination of the information contained in IWS's operations and safety manuals "will permit the public and IWS's competitors to exploit IWS's business strategies and will give its competitors an unfair advantage in the highly

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reply brief that "'[i]ncremental billing information' is not, to IWS's knowledge, a term of art and does not have any specifically identifiable meaning." IWS's reply brief, at p. 10. It is not clear what information on IWS's bills of lading may be redacted or if such redactions would adequately protect the allegedly confidential material or trade secrets.

[3]In fact, IWS acknowledged that "not every page of [the operations and safety manuals] may be unique in its contents."

competitive Alabama trucking industry." ATA's amicus brief, at pp. 7-8.

In response, Wilson and Taylor argue that the information in IWS's bills of lading and operations and safety manuals is not a trade secret or confidential because, they appear to argue, the information is publicly known, can be readily ascertained from public information, and/or is not secreted from the public. Specifically, Wilson and Taylor argue that the information does not contain trade secrets because (1) IWS is required by federal law to report the information from these sources to the Federal Motor Carrier Safety Administration ("the FMCSA") and (2) IWS makes the information available to its employees. It appears that Wilson and Taylor are arguing that the requested discovery is not a trade secret based on § 8-27-2(1)c, d, and/or e; Wilson and Taylor do not make any argument concerning § 8-27-2(1)a, b, or f.[4]

[4]We note that, by using the conjunctive "and" to separate its subsections, § 8-27-2(1) requires that, in order to be considered a trade secret, the information at issue must satisfy all of the subsections -- a through f. See Bell Aerospace Servs., Inc. v. U.S. Aero Servs., Inc., 690 F. Supp. 2d 1267, 1273 (M.D. Ala. 2010) ("[The party asserting the trade-secret privilege] has the burden of establishing each element [of § 8-27-2(1), Ala. Code 1975,] for the information in question to be considered a trade secret. Public Systems, Inc. v. Towry, 587 So. 2d 969, 971 (Ala. 1991)."). Therefore,

We will address Wilson and Taylor's arguments in turn. First, IWS readily admits that it must report some information contained in its bills of lading and operations and safety manuals to the FMCSA. However, IWS notes that the information it reports to the FMCSA is not made public. Wilson and Taylor have not directed this Court's attention to anything before us indicating that the FMCSA makes the information reported to it available to the public. Further, IWS is required by federal law to report the information to the FMCSA, and Wilson and Taylor have not directed this Court's attention to anything indicating that IWS may avoid such reporting. Accordingly, IWS is doing all it reasonably can under the circumstances to keep the information secreted from the public. IWS even entered into confidentiality agreements with its clients that prohibit the public disclosure of the information in its bills of lading. We do not find this argument convincing.

Within this argument, however, Wilson and Taylor specifically argue that the information in IWS's operations and safety manuals can be readily ascertained from public

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if Wilson and Taylor succeed in demonstrating that the information they seek in the present case does not satisfy any one of the subsections in § 8-27-2(1), then the information does not meet the definition of a trade secret.

information. Wilson and Taylor assert that the information in IWS's operations and safety manuals is "used to teach commercial drivers how to operate a vehicle" and that the information "will reference codes and regulations which are uniform throughout the United States and common in the trucking industry." Wilson and Taylor's response, at p. 14. Wilson and Taylor note that "IWS has made no showing and offered no explanation how training manuals could be the subject of a trade secret or why it would be detrimental for the public to know how [IWS] trains its drivers." Id., at p. 15.

We find this particular argument concerning the information in IWS's operations and safety manuals convincing. IWS acknowledges that the information in its operations and safety manuals is, in part, based on regulations applicable to the entire trucking industry. IWS argues that the manner in which it incorporates those regulations constitutes a trade secret. However, other than this general assertion, IWS has not offered any explanation as to how the information in its operations and safety manuals, which, in part, is readily ascertained from publicly available information, constitutes

a trade secret. We conclude that IWS has not met its heavy burden of demonstrating that the circuit court exceeded its discretion in concluding that the information in IWS's operations and safety manuals does not constitute "confidential ... commercial information" under Rule 26(c)(7).

Second, Wilson and Taylor argue that the information in both IWS's bills of lading and its operations and safety manuals is not a trade secret because IWS shares the information with its employees. Wilson and Taylor have not directed this Court's attention to any authority indicating that a company loses the benefit of the trade-secret privilege by sharing the privileged information with its employees. This argument is not convincing.

We conclude that IWS has demonstrated that the information in its bills of lading is confidential and satisfies the definition of a trade secret set forth in § 8-27-2(1). IWS has demonstrated good cause for a protective order pursuant to Rule 26(c)(7) concerning the information in IWS's bills of lading consisting of trade secrets and confidential information. However, IWS has not demonstrated that the information in IWS's operations and safety manuals is

confidential or that it satisfies the definition of a trade secret set forth in § 8-27-2(1).

Wilson and Taylor also argue that every detail of the underlying litigation, including IWS's trade secrets and confidential information, should be made public. Wilson and Taylor argue that they "have every right to have the public made aware of IWS's actions in their dangerous and reckless operation of a commercial motor vehicle on the highways of Alabama." Wilson and Taylor's response, at p. 17. IWS is not requesting that all details of the trial be kept from the public, only its trade secrets and confidential information. IWS has not requested that the details of the accident be suppressed, and we see no reason that they be suppressed. However, IWS has demonstrated that it has a right to a protective order concerning the information in its bills of lading.

We also note that Wilson and Taylor make much of the fact that, because the circuit court struck Hahn's affidavit testimony, IWS presented no evidence in support of its argument that the information in IWS's bills of lading

contains trade secrets.[5] However, Wilson and Taylor have not directed this Court's attention to any relevant authority indicating that a party seeking a protective order pursuant to Rule 26(c)(7) must present evidence to support the assertion that the discovery sought contains a trade secret or confidential information. Wilson and Taylor do cite Ex parte Scott, 414 So. 2d 939 (Ala. 1982), in making their argument; however, that case does not support their position.

In Ex parte Scott, a circuit court entered a protective order prohibiting the production of discovery. The party seeking the protective order did not present evidence in support of its motion for a protective order, only arguments. On mandamus review, this Court determined that the party seeking the protective order pursuant to Rule 26(c) failed to prove that it would suffer prejudice if it was required to produce the requested discovery. This Court did not hold that the circuit court erred in granting the protective order

[5]IWS argues that the circuit court erred in striking Hahn's affidavit. However, we will not address this issue because IWS has not demonstrated that the circuit court's striking of Hahn's affidavit is a discovery order that may be reviewed by a petition for a writ of mandamus. See Ex parte Bosch, supra.

because the Rule 26(c) movant had failed to present evidence in support of its motion. Rather, this Court specifically stated:

> "There are no assertions in the motions for a protective order that would amount to a showing of good cause. ... We do not think these assertions indicate annoyance, embarrassment or oppression or show undue burden or expense as required by Rule 26(c), A[la]. R. C[iv]. P. Hence, to grant a protective order on the grounds asserted by the defendants is an abuse of discretion."

Ex parte Scott, 414 So. 2d at 941 (emphasis added). This Court considered that mere assertions could be sufficient to support a motion for a protective order but concluded that, under the facts of that case, the movant's assertions did not satisfy its burden of demonstrating good cause for a protective order. Ex parte Scott does not support Wilson and Taylor's argument.

A party moving for a protective order may try to support its motion with assertions alone. Certainly, a movant for a protective order may choose to present additional evidence concerning the confidential nature of the contested discovery; however, such evidentiary submissions are not required to demonstrate the good cause necessary to support a protective order. A circuit court may determine that a movant's

assertions satisfy its burden. Of course, the movant's assertions may be probed at a hearing on the motion, as the circuit court did in the present case, and the contested discovery may even be produced for an in camera review by the circuit court to confirm the veracity of the assertions made by the movant. However, a movant's failure to present evidence in support of the motion for a protective order is not, in and of itself, a reason to deny such a motion. Wilson and Taylor's argument that IWS was required to present evidence proving that the requested discovery contained information that was a trade secret or confidential is not convincing.

Conclusion

IWS has demonstrated a clear legal right to a writ of mandamus directing the Bibb Circuit Court to vacate that portion of its order denying IWS's motion for a protective order regarding the information contained in IWS's bills of lading and to enter an order pursuant to Rule 26(c)(7) concerning that information, and as to that portion of the order its petitions are granted. The circuit court may use its discretion in crafting a protective order that provides

adequate protection for the trade secrets contained in the discovery produced by IWS. However, IWS has not demonstrated a clear legal right to a writ of mandamus directing the circuit court to vacate that portion of its order denying IWS's motion for a protective order concerning the information contained in IWS's operations and safety manuals, and as to that portion of the circuit court's order, its petitions are denied.[6]

1170013 -- PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

1170087 -- PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Main and Sellers, JJ., concur.

Stuart, C.J., concurs in the result.

Bolin, Wise, and Mendheim, JJ., concur in part and dissent in part.

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[6]We note that IWS also appears to argue that the circuit court exceeded its discretion by requiring IWS to "produce documents as far back as six months prior to the date of the accident." IWS's petitions, at p. 24. However, IWS has not demonstrated that this scope-of-discovery issue is appropriate for mandamus review, and, thus, we do not address it. See Ex parte Bosch, supra.

Shaw and Bryan, JJ., concur in the result in part and dissent in part.

WISE, Justice (concurring in part and dissenting in part).

As to that portion of the main opinion denying the petitions in part and holding that the information in the operations and safety manuals is discoverable, I concur. As to that portion of the main opinion granting the petitions in part and holding that the information in the bills of lading warrants a protective order, I dissent, and, as to that issue, I join Justice Shaw's special writing.

MENDHEIM, Justice (concurring in part and dissenting in part).

I agree with the main opinion that the petitions for a writ of mandamus should be granted to direct the trial court to issue a protective order for the bills of lading of Industrial Warehouse Services, Inc. ("IWS"). I would, however, also direct the trial court to issue a protective order for IWS's operations and safety manuals as well. Accordingly, as to that portion of the opinion, I dissent.

IWS sought a protective order as to several operations and safety manuals authored by IWS or purchased from third-party vendors and provided to drivers of IWS's trucks. IWS asserted in its motion for a protective order that the materials in the operations and safety manuals "related to the services provided to or available to its drivers and other employees that are proprietary to IWS and contain confidential and/or trade secrets." See Rule 26(c), Ala. R. Civ. P. (providing that, for "good cause shown," the trial court may order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way" (emphasis added)).

Wilson and Taylor are entitled to the requested information, and IWS makes no argument to the contrary. Further, IWS asserted to the trial court in its motion for a protective order that "[t]he Protective Order shall not restrict the use of documents at trial." Rather, the issue simply is whether the discovered information should be subject to a protective order that prohibits dissemination to nonparties.

The main opinion faults IWS for seeking a protective order because part of the information in the requested manuals "is readily ascertained from publicly available information." ___ So. 3d at ___. But the fact that an operations or safety manual might incorporate some publicly available information does not mean that the manner in which that information is presented for purposes of instructing drivers might not reflect "a trade secret or other confidential research, development, or commercial information" under Rule 26(c). Although I agree that a protective order should not be used to shield information that is publicly available, the trial court can protect IWS's interests by drafting a protective order that excludes protection for any publicly available

information and that otherwise restricts the disclosure and use of the disputed discovery to and by the parties in this case. Also, if the trial court had further concerns with IWS's assertions, the court could conduct an in camera inspection to discern the extent to which protection was otherwise justified. Likewise, if upon receipt and review of the manuals, Wilson and Taylor find that IWS's assertions are incorrect, they could request the trial court to amend or to vacate the protective order.

The main opinion also faults IWS for making "general assertion[s]" and for not disclosing sufficient information as to how the requested manuals "constitute[] a trade secret." ___ So. 3d at ___. I note that the protection under Rule 26(c) is not limited to "trade secrets," and, as a general principle, I find the main opinion's approach troubling because its application might be read as requiring a litigant to disclose its confidential information to the discovering party in order to establish the need for a protective order to protect that confidential information. Again, it seems the simple solution, which protects the disclosing party but also allows for the full exercise of the

opposing party's right to discovery, is for the trial court to conduct an in camera inspection or to allow the discovery to proceed with a protective order in place, which may be lifted, if necessary, after the opposing party reviews the discovery.

In my opinion, IWS established "good cause" for a protective order that prohibits disclosure to nonparties of both its bills of lading and its operations and safety manuals. Accordingly, I respectfully dissent from that portion of the main opinion denying a protective order for IWS's operations and safety manuals.

Bolin, J., concurs.

SHAW, Justice (concurring in the result in part and dissenting in part).

I believe that the petitioner, Industrial Warehouse Services, Inc. ("IWS"), failed to meet its burden of showing that the bills of lading sought to be discovered in this case constituted trade secrets or confidential information for purposes of warranting a protective order under Rule 26(c), Ala. R. Civ. P. Therefore, I respectfully dissent from the portion of the main opinion issuing the writ of mandamus. As to the portion of the main opinion denying the petitions in part, I concur in the result.

IWS had the "burden to show" that the bills of lading were protected as trade secrets or as confidential and that a protective order should thus be granted as to them. Ex parte Cuna Mut. Ins. Soc'y, 507 So. 2d 1328, 1329 (Ala. 1987) ("[I]t is the movant's burden to show good cause why the protective order should be granted."). Cf. Ex parte Michelin North America, Inc., 161 So. 3d 164, 170 (Ala. 2014) ("A party asserting the trade-secret privilege has the initial burden of showing that the information sought to be shielded from disclosure constitutes a trade secret the disclosure of which

would result in injury."), and Ex parte Coosa Valley Health Care, Inc., 789 So. 2d 208, 219 (Ala. 2000) ("[T]he burden of proving that a privilege exists and proving the prejudicial effect of disclosing the information is on the party asserting the privilege."). IWS's motion for a protective order, however, failed to include any "showing" that the bills of lading or information contained in them was secret or confidential. Instead, the motion simply contained a single assertion on the issue: "[T]he Plaintiffs have requested materials from IWS related to the services provided to or available to its drivers and other employees that are proprietary to IWS and contain confidential information and/or trade secrets." No explanation or argument as to "how" or "why" was given or made, the actual materials were not identified, no explanation of the actual contents of the bills of lading was actually provided to the trial court, and no evidence[7] was submitted to substantiate its claim. Simply put, this single assertion by IWS in its motion was not sufficient to show the trial court the reason the bills of

[7]See Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000) (noting that statements in motions and arguments of counsel are not "evidence").

lading were due protection or that they were trade secrets as defined under Ala. Code 1975, § 8-27-2(1).[8]

It is certainly true that there may be times when the content of material sought to be discovered reveals on its face that it is a trade secret or confidential; thus, no supporting evidence or detailed explanation would be required to show that such is the case. I see nothing, however, indicating that a bill of lading is such a material. Generally, a bill of lading is "[a] document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods." Black's Law Dictionary 198 (10th ed. 2014). Nothing in the nature of such a document indicates that it inherently contains confidential information.

[8]After the trial court denied the motion for a protective order, IWS filed a motion to reconsider that included an affidavit providing testimony stating that the bills of lading contained trade secrets or confidential information. That affidavit was stricken. Nothing in the petitions convinces me that the trial court erred in striking that belated filing or that the arguments in the motion to reconsider are properly before us. That said, I disagree with any implication in the main opinion, ___ So. 3d at ___ n.5, that a motion to strike cannot be reviewed as part of a ruling on a discovery order that is otherwise capable of mandamus review under Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003).

IWS asserts in its mandamus petitions that the bills of lading contained information such as client names, sellers, buyers, and rates. This assertion was not provided to the trial court; it thus cannot form a basis on which to issue a writ of mandamus because, "[i]n determining, on mandamus review, whether the trial court exceeded the limits of its discretion, 'the appellate courts will not reverse the trial court on an issue or contention not presented to the trial court for its consideration in making its ruling.'" Ex parte Ebbers, 871 So. 2d 776, 786 (Ala. 2003) (quoting Ex parte Wiginton, 743 So. 2d 1071, 1073 (Ala. 1999)). Further, any assertions by the amici curiae tending to support IWS's arguments and assertions were also not presented to the trial court and also cannot be considered by this Court on mandamus review. Id. See also Courtaulds Fibers, Inc. v. Long, 779 So. 2d 198, 202 n.1 (Ala. 2000) (holding that this Court will not decide a question presented by amicus curiae that was not presented by the parties); Morgan Cty. Comm'n v. Powell, 292 Ala. 300, 311, 293 So. 2d 830, 840 (1974) ("An amicus curiae is limited to the issues made by the parties to a suit, and issues not made in proceedings below, nor raised in brief of

appellant, cannot be injected into a review by any action on the part of the amicus curiae."). Additionally, there is nothing innate in information regarding pricing and customers that is necessarily confidential or secret; indeed, many businesses actually advertise this information. IWS might certainly keep this information confidential, but it did not "show" this to the trial court.[9] Thus, I do not believe that IWS has demonstrated a clear legal right to the writ of mandamus.

Although I agree with the general principle that a protective order should be required to prevent a discovering party from disclosing trade secrets or confidential information to parties not involved in the litigation, IWS simply did not meet its burden of showing that the bills of lading at issue here were due to be protected. Therefore, I respectfully dissent from issuing the writ.

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[9]IWS also asserts that it has certain confidentiality agreements with other parties that require it to protect the information in the bills; however, no assertion regarding the existence of confidentiality agreements is found in the motion for a protective order or in its supporting brief filed in the trial court. Further, that assertion is not substantiated by evidence.

BRYAN, Justice (concurring in the result in part and dissenting in part).

I concur in the result in the main opinion insofar as it grants the petitions for a writ of mandamus filed by Industrial Warehouse Services, Inc. ("IWS"), and directs the trial court to issue a protective order for IWS's bills of lading. However, I dissent from that part of the main opinion declining to direct the trial court also to issue a protective order that prohibits disclosure of IWS's operations and safety manuals to nonparties. In that regard, I join Justice Mendheim's reasoning in his special writing as to why the trial court should be directed to issue a protective order as to IWS's operations and safety manuals.