IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI ex rel. JOHN L. PUTNAM, M.D., Appellant,	)	
v.	)	**WD84394**
STATE BOARD OF REGISTRATION FOR THE HEALING ARTS AND THE ADMINISTRATIVE HEARING COMMISSION, Respondents.	)	**FILED: December 7, 2021**

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem, Judge

Before Special Division: Mark D. Pfeiffer, P.J.,
and Alok Ahuja and Thomas N. Chapman, JJ.

The State Board of Registration for the Healing Arts has filed a complaint with the Administrative Hearing Commission (the "Commission" or "AHC"), seeking to discipline the medical license of Dr. John L. Putnam. Dr. Putnam filed a petition for a writ of prohibition in the Circuit Court of Cole County, alleging that in the administrative proceeding the Board was seeking discovery of medical records protected by the physician-patient privilege, and of information which constituted attorney work product. The circuit court refused to issue a permanent writ of prohibition. Dr. Putnam appeals. We affirm in part and reverse in part.

Factual Background

On January 8, 2019, the Board filed a complaint with the AHC, seeking to discipline Dr. Putnam's medical license. The Board's complaint alleged that Dr.

Putnam provided care and treatment to five patients which might be dangerous or harmful; improperly prescribed controlled substances to those patients; and failed to maintain complete records of the treatment he provided. In discovery before the Commission, the Board sought production of the medical records associated with Dr. Putnam's treatment of the five patients. The Board also propounded interrogatories which asked Dr. Putnam to disclose whether he had obtained any oral or written statements from the relevant patients, including "the substance" of any such statements; to identify all persons with knowledge of facts relevant to the proceeding, including "the subject and substance of each such person's knowledge"; and to identify all fact witnesses whom Dr. Putnam intended to call at trial. Dr. Putnam objected to producing the requested medical records under the physician-patient privilege. He also objected to the relevant interrogatories on the basis of the attorney-client privilege and the protection for attorney work product.

The Board filed a motion to compel Dr. Putnam to provide the documents and information it had requested. The Commission granted the Board's motion to compel. Dr. Putnam then filed a petition for a writ of prohibition in the circuit court, seeking to prevent the AHC from compelling him "to disclose information regarding his patients, privileged communications with his attorneys, or the work-product of his attorneys." The circuit court issued a preliminary writ of prohibition. After receiving full briefing and oral argument from the parties, however, the court ultimately denied Dr. Putnam's request for a permanent writ, and quashed the preliminary writ it had previously issued.

Dr. Putnam appeals.[1]

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[1] "[A]n appeal will lie 'from the denial of a writ petition when a lower court has issued a preliminary order . . . but then denies a permanent writ.'" *Bartlett v. Mo. Dep't of Ins.*, 528 S.W.3d 911, 913 (Mo. 2017) (quoting *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358 (Mo. 2013)).

Standard of Review

> Writs of prohibition are limited to the "fairly rare" situations where (1) the court or tribunal exceeded its personal or subject matter jurisdiction, (2) the court or tribunal lacked the power to act as it did, or (3) "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available[,]" or there is an issue of law that will likely escape review on appeal and cause considerable hardship or expense to the aggrieved party.

State ex rel. Rosenberg v. Jarrett, 233 S.W.3d 757, 760 (Mo. App. W.D. 2007) (quoting *State ex rel. Riverside Jt. Venture v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo. 1998)). "When a party has been directed to produce privileged information, a writ of prohibition is an appropriate remedy because an appeal cannot remedy the improper disclosure." *State ex rel. Malashock v. Jamison*, 502 S.W.3d 618, 619 (Mo. 2016); *accord State ex rel. Becker v. Wood*, 611 S.W.3d 510, 513 (Mo. 2020).

A writ of prohibition is discretionary. *Rosenberg*, 233 S.W.3d at 760. Accordingly, we review the circuit court's denial of writ relief for an abuse of discretion, to the extent that Dr. Putnam preserved his appellate arguments in the circuit court and before the Commission. *Id.* A circuit court abuses its discretion when its "ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. 2003). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.* (citation omitted). "[T]he trial court necessarily abuses its discretion where its ruling is based on an erroneous interpretation of the law." *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. W.D. 2009).

Dr. Putnam concedes that his first and second Points on appeal were not preserved before the AHC or the circuit court, and are therefore subject to review solely for plain error. Plain error review is "rarely . . . granted in civil cases."

Mayes v. Saint Luke's Hosp., 430 S.W.3d 260, 269 (Mo. 2014) (citation omitted). We will find plain error "only if there are substantial grounds for believing that the [circuit] court committed error that is evident, obvious, and clear and where the error resulted in manifest injustice or miscarriage of justice." *Id.* (citation and internal quotation marks omitted); Rule 84.13(c).

Discussion

Dr. Putnam raises five Points on appeal. First, he argues the circuit court plainly erred in quashing the preliminary writ because § 334.097.6[2] requires the Board to secure written authorization from a patient or issue a subpoena to obtain the patient's medical records – neither of which occurred here. Second, he argues that the patient medical records the Board sought were not discoverable under Supreme Court Rule 56.01(b)(1). Third, Dr. Putnam argues that compelling him to produce patient medical records to the Board would require him to violate the fiduciary duty of confidentiality which he owes to his patients, and would potentially subject him to civil liability. In Points IV and V, Dr. Putnam argues that he was justified in refusing to respond to certain interrogatories, because the Board sought information protected by the attorney work product doctrine.

We reject Dr. Putnam's first three Points, which claim that the Board lacks authority to obtain patient medical records from him through discovery. We conclude, however, that the Board's interrogatories improperly asked Dr. Putnam to disclose the work product of his attorneys, when the interrogatories requested that he disclose the "substance" of statements his legal representatives obtained during their investigation and defense of the disciplinary proceeding. We accordingly affirm the circuit court's denial of a writ of prohibition in part, but reverse its

[2] Unless otherwise noted, statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2020 Cumulative Supplement.

refusal to issue a writ precluding the Commission from compelling Dr. Putnam to disclose attorney work product.

I.

Dr. Putnam's first Point argues that the circuit court plainly erred in quashing the preliminary writ because § 334.097.6 provides that "[t]he board shall not obtain a patient medical record without written authorization from the patient to obtain the medical record or the issuance of a subpoena for the patient medical record."

Notwithstanding § 334.097.6, the circuit court found that the requested patient records were discoverable under § 334.100.7. Section 334.100.7 states:

> In any investigation, hearing or other proceeding to determine a licensee's or applicant's fitness to practice, any record relating to any patient of the licensee or applicant shall be discoverable by the board and admissible into evidence, regardless of any statutory or common law privilege which such licensee, applicant, record custodian or patient might otherwise invoke. In addition, no such licensee, applicant, or record custodian may withhold records or testimony bearing upon a licensee's or applicant's fitness to practice on the ground of privilege between such licensee, applicant or record custodian and a patient.

Dr. Putnam argues that § 334.100.7 must be read in concert with § 334.097.6, and that, when the two statutes are considered together, the Board must secure a patient's written authorization or a subpoena to obtain medical records, even when the Board seeks the records in the context of the disciplinary proceedings contemplated by 334.100.7. We disagree.

Section 334.097.6 does not govern the Board's access to patient medical records in the course of disciplinary proceedings. Section 334.097 addresses physician recordkeeping generally. Thus, §§ 334.097.1 and .2 require that physicians "maintain . . . adequate and complete patient record[s]," and specify the specific information which must be retained, and for how long. Section 334.097.6

then provides that, in general, the Board "shall not obtain a patient medical record without written authorization from the patient . . . or the issuance of a subpoena."

Unlike § 334.097 (which deals with a physician's general recordkeeping obligations), § 334.100 specifically governs proceedings seeking to deny, revoke, or suspend a physician's license. Sections 334.100.1 to .6 detail the Board's authority to discipline a physician's license, the various circumstances which constitute cause for discipline, and the procedures under which administrative disciplinary proceedings will be conducted. Although the physician-patient privilege may generally shield a patient's medical records from disclosure in litigation,[3] § 334.100.7 provides that, "[i]n any investigation, hearing or other proceeding to determine a licensee's or applicant's fitness to practice," patient medical records "shall be discoverable by the board . . . , regardless of any statutory or common law privilege which such licensee . . . or patient might otherwise invoke." The statute also provides that a licensee may not withhold such records from the Board "on the ground of privilege between such licensee . . . and a patient."

There may be a conflict between § 334.097.6's general requirement that the Board have patient consent or a subpoena before obtaining patient medical records, and § 334.100.7's statement that such records "shall be discoverable" in disciplinary proceedings notwithstanding any claim of privilege. But well-established rules of statutory construction require that we give precedence to § 334.100.7 in this context. "[T]he doctrine of *in pari materia* recognizes that statutes relating to the same subject matter should be read together, but where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general statute." *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 606 (Mo. 2019) (quoting *State ex rel. Taylor v. Russell*,

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[3] *See* § 491.060(5); *Brandt v. Pelican*, 856 S.W.2d 658, 661 (Mo. 1993).

449 S.W.3d 380, 382 (Mo. 2014)). Section 334.100.7 is the more specific statute in this context: it specifically addresses the discoverability of patient medical records in physician disciplinary proceedings, as compared to the general recordkeeping practices addressed in § 334.097.

Under § 334.100.7, patient medical records "shall be discoverable" by the Board in physician disciplinary proceedings (like the ongoing proceeding involving Dr. Putnam's license), notwithstanding the privilege which otherwise attaches to such records. Dr. Putnam's claim that the Board was required to secure patient consent, or a subpoena, to obtain the requested records is meritless.

Dr. Putnam contends that reading § 334.100.7 to permit discovery of patient medical records is inconsistent with the protections provided to such records under the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. 104–191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.) ("HIPAA"). We disagree. HIPAA and its implementing regulations "prohibit[ ] health care providers from disclosing 'protected health information,' . . . unless medical providers comply with a narrow list of . . . specifically enumerated exception[s]." *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 150 (Mo. 2010). One such exception permits "[a] covered entity [to] disclose protected health information to a health oversight agency for oversight activities authorized by law, including . . . licensure or disciplinary actions . . . ; or other activities necessary for appropriate oversight of . . . [t]he health care system[.]" 45 C.F.R. § 164.512(d)(1)(i). The Board of Registration for the Healing Arts qualifies as a "health oversight agency" under the HIPAA regulations. *See* 45 C.F.R. § 164.501.

The HIPAA regulations also provide that "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding . . . [i]n response to an order of a court or administrative tribunal; or . . . [i]n response to a subpoena, discovery request, or other lawful process," so long as

the disclosed information is covered by a "qualified protective order." 45 C.F.R. § 164.512(e)(1)(i)-(ii). The "covered entity may . . . disclose protected health information [under these exceptions] without the written authorization of the individual . . . or the opportunity for the individual to agree or object . . . ." 45 C.F.R. § 164.512. The Board propounded discovery requests to Dr. Putnam seeking the patient records, the AHC issued an order compelling their production, and the circuit court found that the Commission had put a qualified protective order in place.[4] Despite Dr. Putnam's contrary arguments, disclosure of the patient medical records sought by the Board was fully consistent with HIPAA.

We note that in its Brief, the Board contended that the HIPAA regulations *mandated* Dr. Putnam's disclosure of the patient records it sought. But those regulations merely *permitted* disclosure – they did not require it. With respect to the privacy of patient medical records, HIPAA represents a floor, not a ceiling. The statute only preempts "any contrary provision of State law," 42 U.S.C. § 1320d-7(a)(1), and the implementing regulations make clear that preemption does *not* apply where a "provision of State law relates to the privacy of individually identifiable health information and is more stringent than a [HIPAA] standard, requirement, or implementation specification." 45 C.F.R. § 160.203(b); *see Proctor*, 320 S.W.3d at 148-49. Therefore, the fact that HIPAA does not prohibit the

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[4] In the argument under his third Point, Dr. Putnam contends that the AHC failed to put in place the "qualified protective order" required by the HIPAA regulations. This argument was not included in Dr. Putnam's Point Relied On, and we would be justified in refusing to consider it for that reason alone. *See, e.g.*, *State v. Gibbons*, 629 S.W.3d 60, 87 n.14 (Mo. App. W.D. 2021). In addition, Dr. Putnam has not included the protective order entered by the AHC in the record on appeal – thereby making it impossible for this Court to assess the adequacy of the protective order's terms. This gap in the record separately requires us to reject Dr. Putnam's argument concerning the adequacy of the AHC's protective order. *See, e.g.*, *Deere v. Deere*, 627 S.W.3d 604, 609 (Mo. App. W.D. 2021); *D.D.W. v. M.F.A.*, 594 S.W.3d 274, 276 n.4 (Mo. App. S.D. 2020).

disclosure the Board sought is not decisive; we must nonetheless determine whether any provision of Missouri law prevented discovery.

Point I is denied.

II.

The Supreme Court's Rules of Civil Procedure governing discovery are generally applicable in contested proceedings before the AHC. *See* 1 C.S.R. 15-3.420(1). In his second Point, Dr. Putnam argues that the circuit court plainly erred in failing to follow Supreme Court Rule 56.01(b)(1), which specifies that "[p]arties may obtain discovery regarding any matter, *not privileged*, that is relevant to the subject matter involved in the pending action . . . ." (Emphasis added.)

As discussed in § I above, the patient records at issue here are specifically made discoverable by § 334.100.7, and the statute specifies that the physician-patient privilege may not be invoked by a licensee to prevent the discovery of such records. In these circumstances, Rule 56.01(b)(1) does not shield the records at issue from discovery. Point II is denied.

III.

In Point III, Dr. Putnam argues that disclosure of the patient records would violate his fiduciary obligation to protect the confidentiality of his patients' medical information, and thereby expose him to potential civil liability.

In *Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. 1993), the Missouri Supreme Court held that "a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with his treatment of the patient." *Id.* at 670. This fiduciary duty is distinct from the evidentiary physician-patient privilege created by § 491.050(5). *See id.* at 669-70. *Brandt* held that, "[i]f such [patient health-care] information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician." *Id.* at 670.

Brandt recognized that the fiduciary duty of confidentiality is "not absolute," and "must give way if there is a stronger countervailing societal interest." *Id.* at 671. Thus, in *Brandt* itself, the Court held that the physician's fiduciary duty of confidentiality was inapplicable where the patient affirmatively put his medical condition at issue in litigation. *Id.* at 672-73. Moreover, *Brandt* recognized that the General Assembly had created exceptions to the fiduciary duty of confidentiality, by enacting a variety of statutes requiring or authorizing a physician to disclose patient information in certain circumstances, and specifying that the physician would face no liability for making the authorized disclosures. *Id.* at 670 (citing statutes authorizing physicians to report patients treated for gunshot wounds; intoxicated patients treated for injuries arising out of automobile accidents; children who may have been exposed to controlled substances; and information requested by the Department of Health for epidemiological studies). By recognizing these statutory exceptions, *Brandt* itself recognized that the legislature could limit a physician's fiduciary duty of confidentiality where appropriate.

Here, the General Assembly has declared in § 334.100.7 that, where a physician is accused of committing acts which would justify disciplining the physician's license, the physician-patient privilege does not prevent the Board's discovery of patient medical records relevant to the disciplinary proceeding. Physician disciplinary proceedings implicate important public interests: "The primary purpose of the statutes authorizing the Board to discipline a physician's license is to safeguard the public health and welfare." *Colyer v. State Bd. of Registration for Healing Arts*, 257 S.W.3d 139, 144 (Mo. App. W.D. 2008) (citation omitted). Thus, by specifying that the physician-patient privilege cannot shield relevant information from discovery in a physician disciplinary proceeding, the General Assembly has declared that the interests of a patient in the confidentiality of their medical records must give way to the "stronger countervailing societal

interest" of protecting the public health and welfare. *Brandt*, 856 S.W.2d at 671. Dr. Putnam's fiduciary duty of confidentiality does not prevent him from producing documents which are expressly made discoverable by § 334.100.7. *See State Bd. of Reg. for Healing Arts v. Vandivort*, 23 S.W.3d 725, 727 & n.1 (Mo. App. W.D. 2000) (*dictum* observing that § 334.100.7 "seems to undercut . . . significantly" a physician's argument that he could be subjected to civil liability for disclosing patient medical records sought by the Board in a disciplinary investigation).

Point III is denied.

IV.

In his fourth Point, Dr. Putnam argues that the Board's Interrogatories Number 14 and 15 violate the attorney work product doctrine. Interrogatories Number 14 and 15 request that Dr. Putnam state whether he had obtained statements from any of the affected patients, and that he identify persons having knowledge of the relevant facts. Dr. Putnam concedes that such requests were proper. The Board's interrogatories also ask Dr. Putnam to relate the "substance" of the patients' oral statements and the witnesses' knowledge, however. Dr. Putnam contends that the request for the "substance" of a witnesses' knowledge or prior oral statements invades the work product of his attorneys. We agree.

Interrogatories Number 14 and 15 provide:

> 14. State whether you or anyone acting on your behalf has knowledge of any statements made by Patient(s) or by any persons purporting to be the servant, agent, or employee of Patient(s) pertaining to the matters alleged in the pleadings of this case. If your answer is in the affirmative, please state:
>
> a. The name and address of all persons having knowledge of such statement or statements.
>
> b. Whether such statements were written, recorded, or oral.
>
> c. For each oral statement, please state the name and address of the person or persons hearing such statements, the

> name and address of the person making such statement[,] *the substance thereof*, and the place or places where each statement was made.
>
> 15. Identify all persons with knowledge of any facts relating to the matters alleged in the pleadings in this case and *state the subject and substance of each such person's knowledge known to you.*

(Emphasis added.)

"The work product doctrine is a defense to pretrial discovery. . . . [It] precludes discovery of the mental impressions, conclusions, opinions, or legal theories, both tangible and intangible, created or commissioned by counsel in preparation for possible litigation." *State ex rel. Malashock v. Jamison*, 502 S.W.3d 618, 619-20 (Mo. 2016). "Work product consists of . . . material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions." *State ex rel. Bd. of Pharmacy v. Otto*, 866 S.W.2d 480, 483 (Mo. App. W.D. 1993) (citation omitted).

In *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550 (Mo. 1995), the Missouri Supreme Court held that the protection for attorney work product prevented a plaintiff from propounding interrogatories which asked the defendant to identify persons from whom statements had been obtained, and the particulars of those statements.

> To the extent the above interrogatories seek any information regarding oral interviews of persons contacted, they seek information that is clearly protected as intangible work product. *See Otto*, 866 S.W.2d at 483–84.
>
> As to written or recorded statements, we have no difficulty in understanding how the above interrogatories seek information that would, to some degree, reveal Santa Fe's attorney's mental impressions, conclusions, opinions, or legal theories. The broad interrogatories seek a schematic of the attorney's investigative process. In general, this schematic aides the other attorney not because it reveals facts relevant to the case, but because it reveals the

> investigative process and relative weight attributed to certain witnesses' statements by the opposing side. The work product doctrine applies to protect the requested information.

898 S.W.2d at 553; *see also id.* at 554 (holding that interrogatory asking defendant to identify "who, among the co-workers, [the defendant] has interviewed" sought information which was "clearly protected as intangible work product"); *State ex rel. Hackler v. Dierker*, 987 S.W.2d 337, 338 (Mo. App. E.D. 1998) ("interrogatories requesting the names of witnesses from whom statements have been obtained" improperly sought discovery of intangible attorney work product); *Otto*, 866 S.W.2d at 483-84 (litigant cannot by interrogatory request a "detailed description of the [opposing party's] investigation," the identity of each person the opponent contacted and what the witnesses said, or a description of the documents prepared during the investigation).

State ex rel. Rogers v. Cohen, 262 S.W.3d 648 (Mo. 2008), addressed a grand jury subpoena seeking "a written transcript of a witness statement obtained by counsel." *Id.* at 654. The Court held that the subpoena impermissibly invaded counsel's work product; it reasoned that "[t]his statement constitutes 'material [ ] collected by an adverse party's counsel in the course of preparation for possible litigation,' and, therefore, constitutes work product." *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 505 (1947)).

Although *O'Malley* and *Rogers* hold that the substance of witness statements obtained by counsel constitute protected attorney work product, the Board argues that the work product doctrine is inapplicable, because § 334.100.7 authorizes the Board to obtain discovery of "any record relating to any patient of the licensee . . . , regardless of any statutory or common law privilege which such licensee . . . might otherwise invoke." The short answer to the Board's argument is that Interrogatory Number 14.c does not seek the production of <u>*records*</u>, but instead ask Dr. Putnam to describe "the substance" of oral statements provided by the patients. Section

334.100.7 is inapplicable here. Further, although we need not definitively resolve the issue, we are skeptical that § 334.100.7's authorization for discovery of "any record relating to any patient" was intended to apply to documents generated by a physician's legal representatives in the course of their investigation and defense of a disciplinary proceeding. If the statute were read as broadly as the Board contends, it potentially would authorize discovery of the entirety of an attorney's file, since in a disciplinary proceeding like this one, *all* of the attorney's file arguably consists of "record[s] relating to" the patient(s) the physician is accused of mistreating.

Under the *O'Malley* and *Rogers* decisions, the Board was not entitled to obtain through discovery "the substance" of any oral statements Dr. Putnam's legal representatives had obtained from the relevant patients in the course of their investigation and defense of the disciplinary proceeding. The circuit court erred by failing to issue a permanent writ of prohibition preventing the AHC from compelling disclosure of "the substance" of such statements in response to the Board's Interrogatory Number 14.c.[5]

In Interrogatory Number 15, the Board sought information concerning "persons with knowledge of any facts relating to the matters alleged in the pleadings." Dr. Putnam does not object to the requirement that he identify persons with factual knowledge; he objects only to Interrogatory Number 15's request that he disclose "the subject and substance of each such person's knowledge known to you."

The Board was entitled to discovery of the identities of persons with knowledge of the facts, and the general subject matter of those persons' knowledge. Despite the protection for attorney work product, an interrogatory may request

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[5] On appeal, Dr. Putnam challenges only the Board's request for "the substance" of any oral patient statements. Accordingly, we do not address the propriety of the Board's request for other information concerning patient statements.

information on a "factual matter within the knowledge of the party interrogated or his attorney," even where the facts were "developed as the result of the party's investigation." *State ex rel. Hof v. Cloyd*, 394 S.W.2d 408, 411 (Mo. 1965). Almost sixty years ago, the Missouri Supreme Court rejected a litigant's claim that it would invade attorney work product to require her to disclose the identity of witnesses to an accident, when those witnesses had been discovered by her attorneys during their investigation. *State ex rel. Pete Rhodes Supply Co. v. Crain*, 373 S.W.2d 38, 44 (Mo. 1963).

Missouri's protection for attorney work product derives from and follows federal precedent defining the scope of the work product immunity. Under federal caselaw, it is well-established that a party may propound interrogatories asking an opponent to identify persons with knowledge of relevant facts. *See, e.g.*, *Tracy v. NVR, Inc.*, 250 F.R.D. 130, 132 (W.D.N.Y. 2008) ("The better reasoned decisions . . . are those that draw a distinction between discovery requests that seek the identification of persons with knowledge about the claims or defenses (or other relevant issues) – requests that are plainly permissible – and those that seek the identification of persons who have been contacted or interviewed by counsel concerning the case."; collecting cases); *In re Theragenics Corp. Secs. Litig.*, 205 F.R.D. 631, 634 (N.D. Ga. 2002) ("Numerous courts since *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), have recognized that names and addresses of witnesses interviewed by counsel who have knowledge of the facts alleged in the complaint are not protected from disclosure by the work product doctrine."); *Commonwealth of Mass. v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 152 (D. Mass. 1986). Indeed, the Federal Rules of Civil Procedure now require litigants to disclose, without a discovery request, "the name . . . of each individual likely to have discoverable information – along with the subjects of that information – that the

disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i).

Therefore, Interrogatory Number 15 was not objectionable for requesting that Dr. Putnam disclose the identity of "persons with knowledge of any facts relating to the matters alleged in the pleadings," and the general subject matter of such persons' knowledge. We conclude, however, that the Interrogatory went too far when it asked Dr. Putnam to "state the . . . substance of each such person's knowledge known to you." Requiring Dr. Putnam to recite "the substance" of fact witnesses' knowledge, beyond a description of the *subject matter* of their knowledge, would effectively require that Dr. Putnam summarize any interviews his legal representatives had conducted of such persons, or any statements obtained from them – much like the privileged matter requested by Interrogatory Number 14.c.

We therefore conclude that the circuit court abused its discretion by refusing to issue a writ of prohibition prohibiting the AHC from compelling Dr. Putnam to disclose the substance of any oral statements he had obtained from the relevant patients, or the substance of any fact witnesses' relevant knowledge.

V.

Dr. Putnam's final Point challenges the Board's Interrogatory Number 16, which asks him to "identify all fact witnesses that [he] intends to call at the trial of this action." Dr. Putnam acknowledges that he can be required to disclose his expected trial witnesses "at some point, immediately prior to the hearing on the merits." He argues, however, that it violates the attorney work product doctrine to require him to disclose his intended trial witnesses early in the discovery process.

Dr. Putnam did not preserve this timing argument either before the AHC, or in the circuit court. He did not raise this timing issue in his responses and objections to the Board's interrogatories, or in his suggestions in opposition to the Board's motion to compel. Further, Dr. Putnam did not argue that discovery of his

intended trial witnesses was fatally premature either in his petition for a writ of prohibition filed in the circuit court, or in his suggestions in support of the petition.

Where an appellant does not argue a specific theory or claim of error prior to appeal, that error is not preserved. *See, e.g.*, *City of Aurora v. Spectra Commc'ns Grp., LLC*, 592 S.W.3d 764, 789-90 (Mo. 2019). We will not review this unpreserved claim, particularly where Dr. Putnam does not request plain-error review. Point V is denied.

Conclusion

The judgment of the circuit court is affirmed in part and reversed in part. Pursuant to Rule 84.14, we enter the judgment the circuit court should have entered. We issue a permanent writ of prohibition prohibiting the Administrative Hearing Commission from compelling Dr. Putnam to disclose, in response to the Board's Interrogatories Number 14.c and 15, the substance of any oral statements his legal representatives obtained from the patients at issue, or the substance of any fact witnesses' knowledge learned through counsel's investigation. In all other respects, Dr. Putnam's petition for a writ of prohibition is denied.

Alok Ahuja, Judge

All concur.