IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SHARON HOYT,

Plaintiff-Appellee,

v.

STATE OF NEW MEXICO,
NEW MEXICO OFFICE OF THE
MEDICAL INVESTIGATOR,
ROSS E. ZUMWALT, M.D., CHIEF
MEDICAL INVESTIGATOR,

Defendants-Appellants.

Appeal No. 32,762

Seventh Judicial District Court
Torrance County
No. D-202-CV-2008-00179
Judge George Eichwald

DEFENDANTS-APPELLANTS NEW MEXICO OFFICE OF THE MEDICAL INVESTIGATOR AND ROSS E. ZUMWALT M.D., CHIEF MEDICAL INVESTIGATOR'S REPLY BRIEF

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I. INTRODUCTION

Hoyt offers no binding legal support for the assertion that the Writ of Mandamus issued by the district court was peremptory and the final action from which appeal could be taken. Instead, Hoyt incorrectly extrapolates that certain language in the Writ transformed the relief requested by the petition, and ignores that the Writ petition sought an alternative writ by invoking the statutory language for such a writ. The Writ as issued did not state that it was peremptory and instead explicitly acknowledged that the district court would maintain jurisdiction and that the parties would cooperate in attempting to effectuate the specifications of the Writ. The district court determined after the fact that it intended the writ to be peremptory and clarified that it contemplated no further action and that the matter was appealable from its Order granting Hoyt's Motion to Strike. Even if the Writ had been clearly peremptory at the time it was issued, there is no support for the notion that it was only then appealable. This appeal was timely filed and is properly before the Court.

Hoyt has offered no argument to overcome the central reason that the Writ was improperly granted: there was no duty by Zumwalt or OMI to amend the death certificate to make specific findings. Under the applicable regulations, neither Zumwalt nor OMI has any power to do so. The Writ issued by the district court was improper in that it mandated action that was not a duty of the office and was in

fact beyond the authority of Zumwalt and OMI. This Court should reverse the district court by finding that its Writ of Mandamus was improperly issued and not in accordance with the law governing mandamus.

II. THE APPEAL IS TIMELY AND WAS PROPERLY PRESERVED.

A. Timeliness of the Appeal.

The sole support and basis for Hoyt's position that Zumwalt and OMI's appeal was untimely relies on the proposition that the district court's Writ of Mandamus was the final appealable order. [AB 2-4] Hoyt cites a single case, *Khalsa v. Levinson*, to support this position. [AB 2] *Khalsa v. Levinson* is a "civil, non-jury case" between parents in a child custody dispute where the question on appeal was whether findings of fact and conclusions of law constituted a final, appealable order in the absence of a judgment under Rule 1-054(B) NMRA. 1998-NMCA-110, ¶ 13,125 N.M. 680, 684, 964 P.2d 844, 848. It is not a case involving a mandamus proceeding or otherwise addressing whether a peremptory writ lacking the appropriate statutory language to affirm that it is peremptory might be a final order from which appeal could be taken. Even in the absence of a similar legal circumstance, the analysis of *Khalsa* supports OMI and Zumwalt. In *Khalsa*, the district court entered fourteen pages of findings and conclusions on numerous issues litigated by the parties and also contained language indicating that it was "final and appealable." *Id.* at ¶¶ 14-15, 125 N.M. at 685, 964 P.2d at 849. "In

general, 'an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.'" *Id.* at ¶17 *citing Principal Mut. Life Ins. Co. v. Straus*, 116 N.M. 412, 413, 863 P.2d 447, 448 (1993) (internal citations omitted). In this case, the district court's Order Granting Petitioner's Motion to Strike was the final order in this matter because all issues had been disposed of to the fullest extent possible. The district court declined to permit Zumwalt and OMI to answer the Writ or offer any further argument on the legal prohibitions to the Writ. [RP 82-83] Even if the Writ had been clearly peremptory, there is no authority to support the proposition that its issuance would have been the only time for appeal. OMI and Zumwalt should not be denied their right to appeal because the district court decided after the fact that the Writ was peremptory.

Hoyt relies on the district court's "two hour evidentiary hearing" as possible support for the notion that OMI and Zumwalt had "an opportunity to be heard" that somehow made the requested alternative writ a peremptory writ. [AB 4] This is not supported by the statutory procedural requirements for issuance of a writ of mandamus nor the interpretation of those requirements in case law. Not only has New Mexico recognized that "mandamus is a drastic remedy to be invoked only in extraordinary circumstances," *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶11, 140 N.M. 168, 171, 140 P.3d 1117, 1120 (internal citations

omitted), but it is "an exceedingly rare case where a peremptory writ is proper." *Id.* at ¶ 12. *Mimbres Valley* stands for the proposition that a public officer's right notice and opportunity to be heard on a writ is invoked after the alternative writ is issued, and that the opportunity to be heard is a trial type proceeding. *Id.* ¶ 15, 140 N.M. at 172, 1117 N.M. at 1122. The hearing by the district court prior to issuing the writ was not in accordance with the statutory procedure governing writ and did not itself transform the writ from alternative to peremptory. *See* 44-2-1 *et seq.* The Writ issued by the district court cannot be considered peremptory because it did not find that "the right to require performance of the act [amendment of a death certificate with specific findings] was clear" nor that it was apparent that "no valid excuse could be given [by OMI and Zumwalt] for not performing it." *Mimbres Valley* at ¶ 12, *citing* § 44-2-7.

Because the Writ of Mandamus lacked the requisite language and findings to make it a peremptory writ, in effect, the district court has issued an alternative writ of mandamus but not permitted the full procedure that such a writ requires. *See Mimbres Valley* at ¶ 19, 140 N.M. at 174, 140 P.3d at 1123 ("Where issues of fact are raised by the alternative writ and answer, a trial must first be held to resolve those factual issues to determine if the petitioner is entitled to the extraordinary writ of mandamus[.]") (internal citations omitted). This Court could remand this matter to the district court for such a trial, but such a remedy would ignore that the

writ sought in this matter was inappropriate and in violation of the law governing mandamus.

B. Preservation of the Issues.

It is unclear from Appellee's Answer Brief what issue or issues are alleged to have not been preserved in the district court. [AB 5-6] The issue on appeal, just as in the district court, is that the relief sought by the Petition for Writ of Mandamus and contained the Writ of Mandamus were not appropriate for a mandamus proceeding in that OMI and Zumwalt lacked the requisite duty. The Petition for Writ of Mandamus sought to have OMI and Zumwalt amend the death certificate of Richard Hoyt and make specific findings in an amended certificate to the time of death; cause of death; performance of an autopsy; and recent surgical procedure. [RP 1-4] To differing extents, the Writ of Mandamus mandated that OMI and Zumwalt make specific findings on these topics. [RP 58-60] The appeal addresses the improper issuance of the Writ and the various factors that demonstrate the error by the district court. These issues are properly before this Court on an appeal of a Writ of Mandamus. The Appellee's assertion that some issue has not been preserved for appeal is simply incorrect as the issue before the district court and this Court is whether the Writ of Mandamus is proper under the applicable law.

III. THE ANSWER BRIEF OFFERS NO LEGAL SUPPORT ADDRESSING THE UNFULFILLED REQUIREMENTS FOR MANDAMUS.

In support of its position that the Writ of Mandamus was properly issued, the Answer Brief primarily relies on the Writ of Mandamus itself. [AB 6-16] There is no discussion of the statute governing mandamus, § 44-2-1 *et seq.* There is no analysis of whether there was a clear duty of the OMI that Zumwalt or OMI staff failed to perform. [*Id.*] There is no discussion addressing whether making specific findings in an amendment to a death certificate is a duty of OMI or Zumwalt that is enjoined by law in accordance with § 44-2-4, or whether Hoyt had no other plain, speedy or adequate remedy at law as required by § 44-2-5. There is no discussion or analysis to support that the Writ of Mandamus satisfied the requirements outlines in § 44-2-6 because those requirements were not satisfied.

The crucial first step of the analysis for whether a court should issue a writ of mandamus is for a court to determine that the "inferior tribunal, corporation, board or person" has a duty resulting from that position to perform a certain act. § 44-2-4. Even if OMI or Zumwalt had the authority to amend Richard Hoyt's death certificate, which they do not in the absence of jurisdiction, merely having "authority" is insufficient for mandamus. *See id.; see also* [AB 6, 10]. There is no support in statute or regulation for the premise that OMI or Zumwalt has a duty to seek amendment to a death certificate when asked to do so, particularly when the

death did not fall within OMI's jurisdiction. *See* § 24-11-5; *see also* NMAC 7.3.2.10(B) and (D). The duties of OMI are governed by § 24-11-3, which makes no mention of death certificate amendment in any circumstance. In the absence of a duty arising from the office, mandamus cannot properly issue.

There is also no support in the record or in law that Hoyt had no other "plain, speedy or adequate remedy at law," as required by §44-2-5. This is not meaningfully addressed in the Answer Brief other than a passing statement, without legal citation, that "OMI is mistaken in their belief that the Bureau of Vital Statistics ... can make [amendments to a death certificate]." The Bureau of Vital Statistics is in fact the state agency responsible for issuing death certificates and amendments. *See* §24-14-20. Further, amendments to a death certificate are governed by NMAC 7.2.2.13(C), which places no duty whatsoever on either the OMI or its chief medical investigator. Statistical information may be changed through an established procedure that does not require any medical expertise. NMAC7.2.2.13(C)(1). Changes to time of death and cause of death, as mandated by the Writ of Mandamus, "shall only be changed by the preparation and filing of a medical affidavit signed by the certifier[,]" NMAC 7.2.2.13(C)(2). In this case, the "death certificate for Richard Hoyt was...certified by Barbara McAneny, M.D." [RP 58] Not only is a medical affidavit by the certifier, Dr. McAneny, the most

plain and adequate remedy at law, it is the only method by which the death certificate at issue could be amended.

It is not enough for Hoyt to assert that OMI and Zumwalt had the authority to amend the death certificate of Richard Hoyt or that either could have done more to assist Hoyt in the amendment she sought. In order to for the Writ of Mandamus to be proper, there must be a clear legal duty by OMI or Zumwalt to provide Hoyt the requested relief and a failure to provide such relief. OMI took the investigatory steps to confirm the lack of jurisdiction and from that point, there was no duty to Hoyt in this circumstance. The Answer Brief has provided no legal support for any duty. The Writ of Mandamus was improperly issued and this Court should overturn the district court and vacate the Writ of Mandamus.

IV. CONCLUSION

For all of these foregoing reasons, OMI and Zumwalt respectfully request that this Court overturn the Writ of Mandamus and vacate the district court action against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was mailed to the following:

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