

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SHARON HOYT,

NOV 04 2013

Plaintiff-Appellee,

Wendy Elmes

v.

Appeal No. 32,762

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

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

Defendants-Appellants.

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

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I. INTRODUCTION

New Mexico law states that a court may compel a public office or its official to perform an act when performance of the act is the specially enjoined duty of that office or official. Mandamus does not permit a court to compel action by an entity or office that is not duty-bound to perform the requested act, nor does it permit a court to compel a medical officer to make a specific medical determination. The district court issued a Writ of Mandamus that is contrary to New Mexico law in the acts it seeks to compel. Plaintiff-Appellee Sharon Hoyt (“Hoyt”) approached the Office of the Medical Investigator (“OMI”) five years after her husband’s lymphoma death at Presbyterian Hospital and requested that the OMI make specific changes to his death certificate. After the OMI briefly investigated to determine that the death was not under its jurisdiction, it informed Hoyt that it could not take any action on her request. The district court ultimately issued a Writ of Mandamus ordering OMI and its chief medical investigator, Ross Zumwalt (“Zumwalt”) to certify specific findings for an amendment to the death certificate, including the cause of death, on a case over which OMI had no jurisdiction and no role. In this matter, neither OMI nor Zumwalt were appropriate parties for the Writ of Mandamus, and the content of the Writ is contrary to what is permitted via mandamus procedure under New Mexico law.

II. SUMMARY OF PROCEEDINGS

A. The District Court Improperly Issued A Writ of Mandamus.

The Petition for Writ of Mandamus commencing this action in the district court, while not so titled, was by its contents a petition for alternative writ of mandamus under § 44-2-6 NMSA 1978. [RP 1-4] The Petition, filed September 17, 2008, asked the district court to order OMI to amend the death certificate of Richard Hoyt with a change to the time of death; indicate that an autopsy was performed; and to change the cause of death stated on the original death certificate or, in the alternative, to file a response indicating why these actions could not be taken. [Id.] No proposed form of Writ was submitted with the Petition. [Id.] The Petition explained that Richard Hoyt had been treated at Presbyterian Health Systems for Non-Hodgkin's Lymphoma and died in 2000; that an autopsy was performed; and that Barbara McAneny, M.D. had certified the death certificate. [Id.] The Petition further stated that Hoyt believed that certain specific information, in the death certificate was erroneous, namely the time of death, cause of death, the fact that the decedent had undergone a recent surgery, and that an autopsy had been performed. [Id.] The Petition sought to have an amended death certificate issued. [Id.]

OMI and Zumwalt responded to the Petition through counsel, denying that OMI had jurisdiction over the death of Richard Hoyt and that Hoyt had exhausted all available remedies. [RP 14-18] A delay of more than three years ensued, which included dismissal and reinstatement by the district court. [RP 19-22] In November 2011, the district court convened a hearing at which certain Presbyterian Hospital medical records for Richard Hoyt and testimony from Ms. Hoyt were considered, and, at its end, determined that a Writ should issue. [RP 52; 58-60] No medical testimony was presented. No OMI representative nor Zumwalt was ordered to appear. [RP 47; 52]

The Writ stated that OMI and Zumwalt had investigated the death of Richard Hoyt when they examined medical records and denied Hoyt's request for amendment to the death certificate in 2005. [RP 58-60] It found that Richard Hoyt's death was a "reportable death" under the New Mexico Administrative Code" and that OMI had jurisdiction. [*Id.*] The Writ also specified the contents of an amended death certificate that OMI and Zumwalt were compelled to certify, that is, the time of death, that Richard Hoyt had undergone recent surgery, that an autopsy had been performed, and the exact wording for the cause of death. [*Id.*] Although the Bureau of Vital Statistics was not a party to the action, the district

court also specified that the amended death certificate “shall be issued no later than 30 days from the date this Writ is entered by the Court.” [*Id.*]

Because the original Petition for Writ of Mandamus had, by its contents and requested relief, been a petition for alternative writ of mandamus, and because the Writ as issued contained language to indicate that it was peremptory, OMI and Zumwalt filed an Answer to Alternative Writ of Mandamus in accordance with §44-2-6 NMSA 1978. The Answer raised error in the content of the issued Writ, clarified that OMI lacked jurisdiction under the New Mexico Administrative Code as well as the authority and ability to undertake the action specified in the Writ, and demonstrated that OMI had previously told Hoyt that it saw no indication in the Presbyterian records that the cause of death was erroneous. [RP 61-67]

Hoyt moved to strike the Answer, arguing that the Writ issued by the district court was in fact a Peremptory Writ of Mandamus and that the Answer was barred by the doctrine of *res judicata*. [RP 68-72] OMI and Zumwalt responded by arguing that the statute governing mandamus required that an answer be filed to the alternative writ and that *res judicata* did not apply as there was no second claim. [RP 77-81] Following a second hearing, the district court issued an Order stating that the Writ of Mandamus was intended to be peremptory and that the Order was itself a final action from which appeal could be taken. [RP 82-83]

OMI and Zumwalt disagree with the district court that proper Writ procedure was followed, that mandamus is appropriate under the circumstances, and that either OMI or Zumwalt has the duty, authority, or ability to act in accordance with the Writ of Mandamus. The district court has left OMI and Zumwalt with no legal option other than to seek appellate relief. The question on appeal is whether the district court has appropriately issued a writ mandating that OMI or Zumwalt give a specific medical opinion and make factual findings in order to effectuate an amendment on a death certificate for a death never investigated by OMI or Zumwalt.

III. THE ISSUE OF THE ILLEGALITY OF THE WRIT OF MANDAMUS ISSUED WAS FULLY PRESERVED AND THE DISTRICT COURT PROPERLY INDICATED THAT REVIEW COULD BE SOUGHT.

This is an appeal from the district court's Writ of Mandamus entered March 15, 2012 [RP 58-60] and its Order Granting Petitioner's Motion to Strike entered January 22, 2013. [RP 82-83] The Writ of Mandamus itself did not contain language to establish that it was a peremptory writ as described in § 44-2-7 NMSA, but the district court's Order Granting Petitioner's Motion to Strike [Respondents' Answer to Writ of Mandamus] clarified that the writ was peremptory and that it was intended to be a final order or judgment on the matter and allowing appeal to be taken. [RP 82-83] The Order preserved OMI's and Zumwalt's rights to seek

appellate review of the Writ of Mandamus and the Order Granting Petitioner's Motion to Strike.

In its Notice of Assignment to the General Calendar, this Court asked the parties to address “whether the writ of mandamus was the final, appealable order or whether the district court properly indicated that review could be sought from the order granting Plaintiff's motion to strike the answer to the writ.” (*Ntc. Assign. Gen. Cal.*, filed May 7, 2013.) While the notably lengthy passages of time that have elapsed between significant procedural events in this case would understandably raise concern about finality of the process, there can be no question that the district court's Writ of Mandamus was not a final, appealable order. If the Writ was an alternative writ, the mandamus statute outlines the process to be followed at the district court. *See* §44-2-9, §4 4-2-11 NMSA 1978. It would be a legal error and unfairly prejudicial if the Writ of Mandamus were considered a final order from which appeal could be taken when the statute imagines additional process following the issuance of a writ.

If the Writ in this case was peremptory, as the district court retroactively stated in its Order Granting Petitioner's Motion to Strike [RP 82-83] a different process is contemplated to reach finality. *See* § 44-2-13. Although it did not follow the process precisely, the court's hearing following the issuance of the Writ

completed that process, leaving no other meaningful step to be taken. The district court entered an Order specifically declaring that it intended no further action and that the matter was appealable. Appellate policies and rules “are vindicated if the intent to appeal a specific judgment fairly can be inferred from the notice of appeal and if the appellee is not prejudiced by any mistake.” *Govich v. North American Systems, Inc.*, 1991-NMSC-061, ¶ __, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). The Notice of Appeal was filed within thirty days of the entry district court’s order. [RP 84-91] Appellants have acted to assert their right to appeal in a timely fashion and no prejudice can be shown to the appellee.

The Order Granting Petitioner’s Motion to Strike fully disposed of the issues before the district court. “Finality for purposes of appeal is viewed in a practical rather than a technical context and by looking into the substance of the document rather than its form.” *Khalsa v. Levinson*, 1998-NMCA-110, ¶12, 125 N.M. 680, 684, 964 P.2d 844, 849 citing *Kelly Inn No. 102, Inc. v. Kapinson*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992) (internal citations omitted); see also *Grygorwicz v. Trujillo*, 2009-NMSC-009, ¶8, 145 N.M. 650, 652, 203 P.3d 865, 868 (“[W]hen a party makes a motion challenging the district court’s determination of the rights of the parties ...the time for filing an appeal does not begin to run until the district court disposes of the motion.”) The practical effect of the Order Granting

Petitioner's Motion to Strike was to dispose of all case issues by affirming the district court's position that mandamus was warranted and appropriate against OMI and Zumwalt¹. The court's action brought the matter to an appropriate point for appellate review.

IV. THE DECISION OF THE TRIAL COURT TO ISSUE A WRIT OF MANDAMUS, WHETHER ALTERNATIVE OR PREMPTORY, WAS PREMISED ON A MISAPPREHENSION OF THE LAW GOVERNING MANDAMUS. AS SUCH, IT IS SUBJECT TO *DE NOVO* REVIEW.

It is inherent that in reviewing whether mandamus was appropriately granted, this Court will also review the statutes and regulations which formed the basis for the writ. *See State ex rel. San Miguel BCC v. Williams*, 2007-NMCA-036, ¶9, 141 N.M. 356, 360, 155 P.3d 761, 765 (“Determining whether the acts compelled by the writ were ‘clearly enjoined by law’ requires us to consider the meaning of various statutes is a question of law.”) (Internal citations omitted). Statutory construction is an issue of law and subject to a *de novo* standard of review. *See Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶5, 124 N.M. 405, 951 P.2d 1066. This Court's task will be to determine whether the district court was correct in finding that OMI and Zumwalt had a duty enjoined by

¹ Hoyt has never alleged that she has sustained damages and has never requested an award.

law to certify that amendment was warranted and that specific changes be made to the death certificate of Richard Hoyt and that Hoyt had no plain, speedy and adequate remedy at law, when OMI and Zumwalt had never had jurisdiction over the death of Richard Hoyt and had no such duty in any event.

V. ARGUMENT

A. Mandamus May Not Be Used To Compel An Office Or Official To Undertake A Discretionary Act Or Render A Specific Opinion.

In New Mexico, autopsies and post-mortem examinations are performed by physicians or surgeons after appropriate authorization to determine the medical cause of death. *See generally* § 24-12-4 NMSA 1978. The cause of death is one element of information that eventually becomes part of a certificate of death in accordance with the Vital Statistics Act, §§ 24-4-1 *et seq.* The OMI and its chief medical investigator, Zumwalt, also identified by statute as the “state medical examiner,” have many duties with respect to investigation and reporting of certain deaths. *See* §§ 24-11-1 *et seq.* None of these duties includes assisting citizens in the amendment of death certificates not originally certified by OMI, nor is there any duty by OMI or its examiners to make specific findings or to reach specific conclusions regarding a death.

It is well settled in New Mexico 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). It is appropriate only when the office or officer has a duty resulting from the office that is specially enjoined, §44-2-4, and the party seeking the writ has no “plain, speedy and adequate remedy in the ordinary course of law.” §44-2-5. “The writ itself is therefore required to set forth the full and complete allegations which entitle the petitioner to the writ,” regardless of the content of the petition for the writ. *Mimbres Valley Irrigation Co.* at ¶14, 140 N.M. at 172, 140 P.3d at 1121. The Writ of Mandamus issued against OMI and Zumwalt made no such findings either against them or in affirmance of Hoyt’s inability to avail herself of other methods to obtain the relief she sought. [RP 58-60]. Instead, the Writ simply stated the method by which cause of death can be certified under New Mexico’s laws and regulations, and stated that Hoyt had contacted OMI and Presbyterian Hospital. [*Id.*] Nevertheless, the Writ went on to identify specific findings, both medical and otherwise, that OMI and Zumwalt were compelled to make and certify for an amended death certificate, relying only on certain selected records from Presbyterian Hospital. [*Id.*]

As a physician and medical examiner, it would be a violation of his medical ethics for Zumwalt – or any other OMI pathologist – to certify an amendment to a death certificate on the cause of death and other requested subjects when he had

not originally investigated the death, examined the body, performed the autopsy or otherwise conducted the normal investigation that provides the requisite degree of medical probability appropriate for certification. To compel Zumwalt or OMI to act as mandated in the Writ would be unfairly prejudicial to them, as they have ethical obligations that run counter to what the Writ compels. The district court should not be permitted to override a physician's ethical obligations by mandating the specific findings to which the physician must certify.

The Writ also erroneously stated that OMI had jurisdiction over the death of Richard Hoyt. Deaths falling under the jurisdiction of OMI are governed by § 24-11-5 and more specifically described in NMAC 7.3.2.10(B) and (D). The death of Richard Hoyt at Presbyterian Hospital in 2000 from lymphoma (or any other disease process) did not in any way give OMI jurisdiction over it. Even if the death had been one over which OMI had jurisdiction, there is no duty in any statute or regulation requiring OMI to make specific findings related to time of death, the definition of "recent" surgery, and the cause of death. In the absence of such a duty, the Writ of Mandamus issued in this matter was contrary to New Mexico law governing mandamus.

The district court was mistaken in finding that Hoyt's 2005 communications with OMI and OMI's retrieval of the Presbyterian Hospital records conferred

jurisdiction, but even if OMI jurisdiction existed, the district court committed error in mandating the specific findings that OMI should make with respect to the death. OMI and Zumwalt have no special legal duty to make any specified finding on any death. *See* §44-2-4. The contents of a death certificate that are certified by a physician are at their medical discretion; “mandamus will not lie ‘to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his duties.’” *State ex rel. Richardson v. 5th Judicial District Nominating Commission*, 2007-NMSC-023, ¶10, 141 N.M. 657, 659, 160 P.3d 566. OMI and Zumwalt have investigatory and reporting duties that do not touch upon Hoyt’s requested death certificate amendment, but even if they did, the district court cannot compel the content of discretionary conclusions that would go into an original or amended death certificate. This Court should overturn or otherwise vacate the Writ of Mandamus for compelling a specific finding that is not a duty of OMI or Zumwalt.

B. The Writ of Mandamus Against OMI And Zumwalt Was Not Appropriate Under New Mexico Law.

Hoyt’s Petition for Writ of Mandamus sought the amendment of her husband Richard Hoyt’s death certificate. Amendment of vital records such as death certificates is governed by the Vital Statistics Act, specifically §24-14-25. This

section states in part, “A certificate or report registered under the Vital Statistics Act may be amended only in accordance with that act and regulations adopted by the department [of health] pursuant to that act to protect the integrity and accuracy of vital records and health statistics.” §24-14-25(A). The referenced regulations are found in NMAC 7.2.2.13. With respect to amendment of a death certificate, the applicable regulation states,

[D]ate of death, place of death, time of death, date pronounced, time pronounced, manner of death, and any portion of the cause of death may not be changed through the use of an amended certificate. These items shall only be changed by the preparation and filing of a medical affidavit signed by the certifier.

NMAC 7.2.2.13(C)(2). Neither Zumwalt nor any other physician at OMI certified the original death certificate of Richard Hoyt; as such, not only do they not have a duty to amend these elements of the certificate as requested in the Petition for Writ of Mandamus, they lack the requisite authority. In order to compel action through mandamus, there must be a duty enjoined by law to take the action. §44-2-4. None existed in this case and for this reason the Writ of Mandamus should not have issued. “Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.” *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶16, 124 N.M. 698, 704, 954 P.2d 763,

769 citing *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs*, 89 N.M. 313, 316, 551 P.2d 1360, 1363 (1976). It is “appropriate to compel the performance of a statutory duty only when that duty is clear and indisputable.” *Id.* (internal citations omitted). Where there is no duty at all, much less a clear one, the court cannot compel action via mandamus.

Further, the blanket assertion that Hoyt contacted Presbyterian Hospital and OMI in order to have her husband’s death certificate amended is insufficient to satisfy the requirement that the petition has no “plain, speedy and adequate remedy at law” under §44-2-5. [RP 58-60] The information from the original death certificate which Hoyt sought to have amended is included on such certificates in accordance with the Vital Statistics Act, §§ 24-4-1 *et seq.* Neither the Petition for Writ of Mandamus nor the Writ itself affirmatively assert that Hoyt attempted amendment through the certifier of the original death certificate, and the Bureau of Vital Statics – the entity in charge of maintaining vital records and amendments thereto – was not addressed in either document. There is no finding in the Writ that Hoyt had no other remedy at law nor that compelling OMI and Zumwalt to offer specific opinions on matters of which they have no firsthand knowledge will vindicate a legal right held by Hoyt. *See* §44-2-5. In fact, there is no finding that

Hoyt has a legal right to pursue the amendment of Richard Hoyt's death certificate with any public office or officer.

The Writ of Mandamus issued by the district court was improper and not compliant with New Mexico law. It did not make the requisite legal or factual findings that must be present in a Writ of Mandamus. There is no evidence that Hoyt had no other remedy at law; in fact, amendment of a death certificate is administered by a completely different state entity. There is no legal finding that Hoyt had a legal right to an amended death certificate. Even if she did, OMI and Zumwalt were clearly inappropriate parties against whom to compel the action sought. This Court should not uphold a Writ of Mandamus under these circumstances.

VI. 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.

VII. REQUEST FOR ORAL ARGUMENT

Oral argument will assist the Court in address questions about the applicable statutory and regulatory authority that render mandamus inappropriate under these circumstances.

Respectfully submitted,

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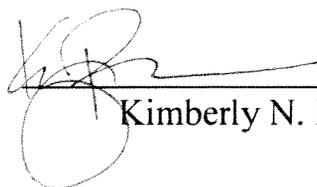
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief-in-Chief was mailed to the following:

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