

COPY

**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**

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

NOV 19 2013

*Wendy Thomas*

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**APPELLEE'S ANSWER BRIEF**

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**ORAL ARGUMENT REQUESTED**

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**I. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION. THE DISTRICT COURT'S DECISION TO ISSUE A WRIT OF MANDAMUS WAS BASED ON PRUDENCE.**

Where the district court exercises discretion founded in prudence the standard of review for writs of mandamus is abuse of discretion, *FastBucks of Roswell, New Mexico, LLC v. King*, 2013-NMCA-008 ¶ 7, 294 P.3d 1287, 1289, *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 30, 124 N.M. 698, 707; *see also* 52 Am.Jur.2d *Mandamus* § 26 (2012) (stating that a court's ruling on issuance of mandamus should be reviewed under an abuse of discretion standard). A district court abuses its discretion if its decision is “contrary to logic and reason,” *Paz v. Tijerina*, 2007-NMCA-109, ¶ 8, 142 N.M. 391, 393. Here, the district court’s decision to issue the writ of mandamus was founded in prudence and should be reviewed for abuse of discretion.

**II. ARGUMENT**

**A. APPELLANTS RAISE THEIR INABILITY TO COMPLY WITH THE PEREMPTORY WRIT OF MANDAMUS. APPELLANTS' APPEAL IS UNTIMELY; THE WRIT WAS THE FINAL APPEALABLE ORDER. ADDITIONALLY, THE ISSUES WERE NOT PRESERVED BELOW. ALL ISSUES RELATING TO THE WRIT ARE IMPROPERLY RAISED ON APPEAL.**

Appellants’ (Appellants/Defendants are collectively referred to as the singular OMI) arguments focus on the misconception that it is unable to comply with the Writ. However, OMI has not timely appealed the Writ, therefore, it is precluded from seeking appellate review on issues related to the Writ.

Additionally, OMI failed to preserve the issues below, therefore, OMI has waived these issues. Appellee Sharon Hoyt (hereinafter Hoyt) asserts that OMI should be precluded from asserting inability to comply with the Writ because of OMI's failure to timely appeal and its failure to preserve issues below.

**i. THE WRIT OF MANDAMUS WAS THE FINAL APPEALABLE ORDER.**

In the Court's Notice of Assignment to the General Calendar, the Court requested the parties to address whether the Writ 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 OMI's Answer to the Writ. Hoyt maintains that the Writ was the final appealable order. *See Ntc. Assign. Gen. Cal.*, filed May 7, 2013.

When Judge Eichwald issued the Peremptory Writ of Mandamus, it was intended to be the final appealable decision. An order is final if it includes "decretal language that carries the decision into effect by ordering that something happen." *Khalsa v. Levinson*, 1998-NMCA-110, ¶ 13, 125 N.M. 680, 684. Here, the Writ contained decretal language that ordered OMI to, "certify an amended death certificate stating that an autopsy was performed, that Richard Hoyt (herein after referred to as Decedent) had undergone a recent surgery, a node dissection, on February 7, 2000, that the time of death was 4:20 p.m. on June 20, 2000, and that the cause of death be amended to assert lymphoma with multisystem failure. [RP

58-60] Additionally, “said certificate shall be issued no later than 30 days from the date this writ is entered by this court.” [*Id.*] The canons of statutory construction interpret shall as meaning mandatory. “When the action is mandatory, “shall” should always be employed.” 1A Sutherland Statutory Construction § 21:8 (7th ed.) By using shall, it is apparent that the court intended the Writ to be mandatory and therefore, the final appealable order in this matter. “Said certificate shall be issued no later than 30 days from the date this Writ entered by the Court.” [RP 58-60] The short length of time OMI was given to effectuate the mandated changes to Decedent’s death certificate indicate that the Judge resolved all related issues and that the Writ was the final appealable order from which appeal could be sought.

The language of the Writ indicated that it was peremptory. “The peremptory writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, shall be omitted.” NMSA § 44-2-6. Language requiring OMI to show cause why it had not performed the mandated duties was omitted from the Writ. [RP 58-60]

The difference between the language in the Petition and the language in the Writ is insignificant. OMI asserts that the language of the Writ varies significantly from the language in the Petition and, therefore, the Writ was an alternative writ requiring response. [RP 61-67] However, the language in the Petition and the language in the Writ do not vary significantly. [RP 1-5, 58-60] To the extent the

language varies at all, it is minimal and certainly does not alter the relief sought. Once the writ is issued, the petition disappears and the writ replaces the petition. *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 703. Because the petition disappears when the writ is issued the language used in the Writ is irrelevant.

In this case it is also prudent to note that the court issued the Writ after holding a two-hour evidentiary hearing on the merits of the case. See Transcript of Proceedings from Nov 16, 2011, filed with the Court on September 19, 2013. It is illogical to conclude that the court would expect OMI to file an answer to the Writ when the answer would address the identical issues presented to the court during the hearing. The Writ issued by the court left no necessary issues of fact or law undetermined. [RP 58-60] The parties had an opportunity to be heard. [*Id.*] The court disposed of all issues raised by the parties. [*Id.*] No future proceedings were contemplated in the Writ. [*Id.*] In conclusion, the Writ issued by the court on March 15, 2012, was peremptory; therefore, it was the final appealable order from which review could be sought.

**ii. OMI FAILED TO TIMELY APPEAL FROM THE WRIT OF MANDAMUS**

OMI failed to timely appeal from the Writ. The Rules of Appellate Procedure provide that an appeal of right from the district court “shall be filed ... within thirty (30) days after the judgment or order appealed from is filed in the

district court clerk's office.” NMRA 12-201(A)(2). This rule states a “mandatory precondition to the exercise of jurisdiction,” *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 277–78. The court issued the writ of mandamus as the final appealable order on March 15, 2012. [RP 58-60] OMI did not file its Notice of Appeal until February 19, 2013. [RP 84-91] OMI failed to timely appeal the writ because it did not file its notice to appeal within thirty days of filing the Writ with the clerk’s office. OMI filed its notice of appeal almost an entire year after the issuance of the Writ. [RP 58-60, 84-91] Because OMI failed to timely appeal from the Writ, OMI is precluded from appealing any issues relating to the Writ. OMI has not satisfied the mandatory precondition to establishing the Court’s jurisdiction. The only issue OMI timely appealed is the court’s Order granting Petitioner’s Motion to Strike. The merits of the Motion to Strike are fully addressed below.

**iii. OMI ASSERTS ARGUMENTS ON APPEAL THAT WERE NOT PRESERVED BELOW; THOSE ISSUES ARE NOT PROPERLY BEFORE THE COURT.**

Notwithstanding that the issues relating to the Writ were not timely appealed, OMI failed to preserve the issues below. To preserve an issue for appeal, the issue must have been raised below. *State v. Druktenis*, 2004-NMCA-032, ¶ 122, 135 N.M. 223, 258. To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued

in the appellate court. *Azar v. Prudential Ins. Co. of America*, 2003-NMCA-062, ¶ 120, 133 N.M. 669, 679. OMI must establish that it provided support for its position to the district court in order to establish that the issue was preserved for appeal. OMI is unable to cite any evidence in the record that establishes its inability to perform the requested actions demanded by the Writ. OMI's baseless proclamations to the district court that it was unable to perform the acts required by the Writ were insufficient to preserve the issues for appeal. OMI failed to call any witnesses during the hearing to testify that it is unable to complete the changes to the death certificate. OMI did not file a single affidavit purporting to establish lack of jurisdiction over Decedent's death. Because OMI failed to preserve the issues below, the issues are waived and are not properly before the Court.

**B. NOTWITHSTANDING THE ISSUES OF UNTIMELY APPEAL AND FAILURE TO PRESERVE THE ISSUES BELOW THE DISTRICT COURT PROPERLY ISSUED A PEREMPTORY WRIT OF MANDAMUS.**

The court correctly issued a peremptory writ of mandamus ordering OMI to amend Decedent's death certificate. [RP 58-60] OMI has a duty to amend Decedent's death certificate because OMI had jurisdiction over Decedent's death because it was a reportable death. [*Id.*] OMI investigated Decedent's death. Further, OMI had the authority to make the necessary amendments to Decedent's death certificate. [*Id.*] OMI failed or refused to amend Decedent's death certificate. [*Id.*] Hoyt has a right to have Decedent's death certificate amended to reflect

accurate and complete information. [*Id.*] Because OMI has a duty to effectuate the requisite changes, and because Hoyt has a right to have the death certificate reflect accurate information, and because she has exhausted all alternatives, the court properly granted the Peremptory Writ of Mandamus.

**i. UNDER NEW MEXICO LAW OMI HAD JURISDICTION OVER DECEDENT'S DEATH**

The court correctly held that OMI had jurisdiction over Decedent's death. [RP 58-60] OMI argues that it does not have a legal duty to amend Decedent's death certificates because Decedent's death was not within its jurisdiction. [RP 61-67] OMI claims that it does not have jurisdiction because, "Mr. Hoyt's death was not sudden, suspicious, nor unexplained, as he suffered from cancer and [sic] had recently undergone surgery." [RP 92-101] However, deaths relating to surgical procedures are reportable deaths for which OMI has jurisdiction. NMAC § 7.3.2.10 (B)(2)(g). The court held that, because Decedent's death was related to surgical procedure, his death was a reportable death. [RP 58-60] The following is an excerpt from Decedent's autopsy report:

Richard Hoyt had surgery in the form of a node resection on February 7, 2000. The surgery was done on February 7<sup>th</sup>, 2000, involved excision of the right external iliac and superficial groin nodes and retroperitoneal fatty tissue. Post-operatively, the patient had many problems with nutrition and necrosis of the Sartorius flap which resulted in closure of the wound by secondary intention. He was treated in the SNF unit and then finally was discharged home in March. He has had gradual worsening of his right groin induration and he continued to drain fluid in the area. He was readmitted to the

Hospital on May 29<sup>th</sup> 2000, following aspiration of what was felt to be pus from the right groin area measuring approximately 100 cc's. He, also at the same time, became febrile. After admission, Penrose drain was placed in the right groin wound to facilitate drainage of the area, however, he continued to complain of right hip pain becoming more and more severe. Search was undertaken for retroperitoneal abscess or right hip infection. He was being covered by antibiotics he also experienced spiking temperatures, and gradually his condition worsened. He became weaker and experienced pulmonary, hepatic and renal failure, becoming unresponsive toward the end of the course of his illness and he expired on 6/20/2000." See Transcript of Proceedings and Exhibits, Exhibit 2, filed with the Court on September 19, 2013.

The autopsy report clearly establishes that Decedent's death was in association with, or as a result of, surgical procedures. The court correctly held that because Decedent's death was related to a surgical procedure, it was a reportable death; therefore, OMI had jurisdiction over Decedent's death. [RP 58-60]

**ii. OMI INVESTIGATED DECEDENT'S DEATH; DECEDENT'S DEATH CERTIFICATE IS INACCURATE; OMI HAS A DUTY TO AMEND DECEDENT'S DEATH CERTIFICATE.**

There is no dispute that if OMI conducted an investigation it has a duty to amend Decedent's inaccurate death certificate. "In all cases of reportable deaths as defined in this document, the OMI will: conduct an investigation leading to the determination of the cause and manner of death". NMAC § 7.3.2.8(F). In 2005 OMI investigated Decedent's death. [RP 58-60] OMI subpoenaed Decedent's medical records to conduct an investigation. [RP 61-67] Dr. Barry and Dr. Zumwalt reviewed Decedent's medical records while investigating Decedent's

death. [*Id.*] OMI provided Hoyt with a document titled “investigation log” as a result of its investigation. The investigation revealed inaccuracies in Decedent’s death certificate, including; the time of death and whether an autopsy was performed. [*Id.*] OMI disputes that Decedent had recently undergone a surgical procedure, and that the reported cause of death is inaccurate. OMI asserts that the cause of death is correct even though it does not match the cause of death identified in the autopsy report. *See* Transcript of Proceedings and Exhibits, Exhibit 2, filed with the Court on September 19, 2003. OMI asserts that Decedent’s death certificate accurately reported that he had not undergone a recent surgery. [*Id.*]

OMI makes conflicting arguments with regard to whether or not Decedent had recently undergone a surgical procedure before his death. In one instance OMI argues that because Decedent had recently undergone a surgical procedure, his death was not within their jurisdiction, “Mr. Hoyt’s death was not sudden, suspicious, nor unexplained, as he suffered from cancer and [sic] had recently undergone surgery,” on the other hand, it contends that Decedent’s death certificate accurately reflects that Decedent had not recently undergone a surgical procedure. [RP 61-67] OMI’s inconsistent position as to whether Decedent underwent recent surgery is indicative of their refusal to assist Hoyt in amending Decedent’s

inaccurate death certificate; this behavior is in direct conflict with the policies and purposes behind the Office of the Medical Investigator.

In conclusion, the court correctly held that OMI investigated Decedent's death; the investigation revealed inconsistencies in the death certificate, therefore, OMI had a duty to amend the death certificate accordingly.

**iii. OMI HAD THE AUTHORITY TO AMEND DECEDENT'S DEATH CERTIFICATE**

The court was correct in holding that OMI had the authority to amend Decedent's death certificate. The amendment of medically related items and items related to injury may only be submitted by the office of the medical investigator or equivalent military or tribal authorities and only on the form prescribed by the state registrar. NMAC § 7.2.2.13(C)(3). OMI's investigation revealed that there were medically related inaccuracies in Decedent's death certificate. [RP 61-67] OMI's duty to amend the medically related inaccuracies in Decedent's death certificate is not discretionary. The inaccurate information in Decedent's death certificate is medically related; therefore, OMI has the obligation to making the appropriate changes.

Additionally, NMAC § 7.2.2.17(A)(2) provides that the medical certification of cause of death shall be made by the certifier who signed the medical certification or the office of the medical investigator. This section establishes that OMI is capable of certifying a death. "Date 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). “Certifier,” for purposes of death records, means a person authorized to certify cause of death pursuant to the laws of New Mexico. NMAC § 7.2.2.7(D). The physicians at OMI who investigated Decedent’s death qualify as certifiers; they have the authority to prepare and file a medical affidavit to change Decedent’s listed cause of death. The court made an on the record finding that OMI can make the requested changes to Decedent’s death certificate. In light of these findings, the court properly held that OMI had the duty to amend Decedent’s death certificate.

**iv. THE COURT PROPERLY HELD THAT HOYT HAD A RIGHT TO HAVE THE INACCURATE DEATH CERTIFICATE AMENDED AND THAT SHE HAD EXHAUSTED ALL OTHER ALTERNATIVE REMEDIES.**

The court correctly held that OMI had authority to amend Decedent’s death certificate. OMI asserts its inability to make the required amendments. [RP 61-67] “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 pursuant to that act to protect the integrity and accuracy of vital records and health statistics”. NMSA § 24-14-25 “Unless otherwise directed by the state registrar, no certificate, registration form, record or report shall be complete and acceptable for

registration that: contains improper or inconsistent data.” NMAC § 7.2.2.8 (A)(7). Decedent’s death certificate contained inconsistent information. The language of these statutes exemplifies the requirement that death certificates be accurate. Because of the accuracy requirement and the fact that Decedent’s death certificate is inaccurate it is established that Hoyt had a right to have the death certificate amended. Therefore, the court correctly held that Hoyt had the right to have Decedent’s inaccurate and incomplete death certificate amended.

The court correctly held that Hoyt had exhausted all other possible remedies to correct Decedent’s death certificate. [RP 58-60] OMI asserts that Hoyt has not attempted amendment through the certifier of the original death certificate, and/or the Bureau of Vital Statistics. [RP 14-18, 92-101] OMI is mistaken in their belief that the Bureau of Vital Statistics (hereinafter Bureau) can make the required amendments to Decedent’s death certificate. The Bureau lacks the authority to make the requested changes to Decedent’s death certificate. As previously stated, the amendment of medically related items may only be submitted by OMI. Because OMI has exclusive jurisdiction to amend medically related items, it follows that the Bureau cannot make these amendments.

Additionally, applications to amend the medical certification of cause of death shall be made only by the certifier who signed the medical certification or the office of the medical investigator. NMAC § 7.2.2.17(A)(2). The Bureau is not

qualified as a certifier, therefore, the Bureau is unable to amend Decedent's cause of death.

In conclusion, the court properly issued a peremptory writ of mandamus that commanded OMI to certify an amended death certificate for Decedent. The court mandated that the amended certificate shall be issued no later than 30 days from the date the Writ was entered. [RP 58-60] The words requiring OMI to show cause why it has not done as commanded were omitted from the writ. [*Id.*] The court held that OMI had jurisdiction over Decedent's death, that OMI has authority to make the required amendments, and that Hoyt had a right to have the death certificate amended. [*Id.*] Additionally, the court properly held that Hoyt had exhausted all possible alternative remedies. [*Id.*] In light of the forgoing findings, the court properly issued a peremptory writ of mandamus.

**C. THE DISTRICT COURT PROPERLY GRANTED HOYT'S MOTION TO STRIKE. THE WRIT ENTERED BY THE DISTRICT COURT WAS A PEREMPTORY WRIT TO WHICH ANSWER WAS INAPPROPRIATE.**

The court properly granted Hoyt's motion to strike OMI's Answer. [RP 82-83] The court issued a peremptory writ commanding OMI to act. [*Id.*] The Writ omitted language allowing OMI to show why it had not acted accordingly. [*Id.*] OMI filed an Answer to the peremptory writ of mandamus. [RP 61-67] Hoyt moved to strike the Answer on the basis that the court issued a peremptory writ suggesting that the Writ was the final appealable order; therefore, answer was

inappropriate. [RP 82-83] OMI asserts that the Writ was an alternative writ that required it to file an answer. [RP 61-67] As explained in detail above, the Writ issued by the court was a peremptory writ, not an alternative writ. OMI is correct in asserting that NMSA § 44-2-9 requires an answer to an alternative writ of mandamus [RP 61-67], but it is incorrect in asserting that the Writ issued by the court was an alternative writ.

Prior to issuing the writ, the court held a hearing during which Judge Eichwald heard argument on the merits, took testimony, and received exhibits. [RP 68-72] OMI had the opportunity to present its arguments on the merits of the case during the hearing. [*Id.*] The court left no issues to be resolved when it issued the Writ. [*Id.*] It is illogical to conclude that the court would have conducted a two-hour evidentiary hearing on the merits of Hoyt's petition and subsequently issue an alternative writ requiring OMI to file an answer in which OMI would assert arguments identical to those presented during the evidentiary hearing. The court only allowed OMI thirty days to amend Decedent's death certificate; this short time frame is evidence that the writ was intended to be the final resolution of the case. Prior to ruling on Hoyt's Motion to Strike, the court held a second hearing during which the court heard argument on the merits of the motion. Subsequently, the court issued an order granting the motion. [RP 82-83] Because the Writ was

peremptory the answer was inappropriate, therefore, the court properly granted Hoyt's Motion to Strike.

### **III. CONCLUSION**

In conclusion, OMI failed to timely appeal from the peremptory writ of mandamus, which was the final appealable order. OMI failed to preserve the issues below that it has raised on appeal; further, those issues fail to show abuse of discretion. The court properly issued a peremptory writ of mandamus. Subsequently, the court properly granted Hoyt's Motion to Strike.

WHEREFORE, Appellee/Plaintiff Hoyt respectfully requests this Court affirm Judge Eichwald's rulings and remand this matter for any subsequent related matters.

### **IV. REQUEST FOR ORAL ARGUMENT**

Pursuant to NMRA 12-214(B)(1), Hoyt respectfully requests oral argument in this matter. This case presents public policy concerns surrounding the importance of complete and accurate information reported to the Bureau of Vital Statistics; oral argument will assist the Court in addressing the rights and responsibilities of the parties.

Respectfully Submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically and mailed by US Mail, postage prepaid, to the following counsel of record this 19<sup>th</sup> day of November 2013:

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