

Rel: May 27, 2022

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200362

Ex parte Lisa Mestas

PETITION FOR WRIT OF MANDAMUS

**(In re: David Lee Autrey, as personal representative of the
Estate of Bridgette Ann Moore, deceased**

v.

University of South Alabama Health Services Foundation et al.)

(Mobile Circuit Court: CV-18-900096)

SHAW, Justice.

Lisa Mestas, a defendant below, petitions this Court for a writ of mandamus directing the Mobile Circuit Court to vacate its order denying

her motion for a summary judgment in this wrongful-death/medical-negligence action commenced by David Lee Autrey, as the personal representative of the estate of his wife, Bridgette Ann Moore, and to enter a summary judgment in Mestas's favor on the basis of State-agent immunity. We grant the petition and issue the writ.

Facts and Procedural History

In May 2017, Autrey's wife, Moore, went to the University of South Alabama Medical Center ("USA Medical Center"), a hospital, to undergo a surgery required by the prior amputation of her right leg. The surgery was performed without incident, and Moore was transferred to a hospital room for recovery. At approximately 9:30 p.m. that night, nurses found Moore unresponsive. Attempts to revive her were unsuccessful, and Moore was pronounced deceased. It was later determined that Moore died as a result of opioid-induced respiratory depression ("OIRD").

Autrey commenced an action against the University of South Alabama Health Services Foundation, Mestas, and three nurses who were involved in Moore's postoperative care, alleging claims of medical

negligence.¹ Specifically, Autrey alleged, among other things, that the defendants, including Mestas, had departed from the applicable standard of care and were negligent in providing medical care to Moore, causing her death.

Mestas answered and asserted various affirmative defenses, including immunity. She subsequently filed what she styled as a motion to dismiss or, in the alternative, a motion for a summary judgment, and then she filed a similar motion after Autrey filed an amended complaint (both motions are hereinafter referred to collectively as "the motion for a summary judgment"). Mestas's motion for a summary judgment included evidentiary exhibits and was supplemented by later filings. Mestas argued that, at all times relevant to Autrey's lawsuit, she was an employee of the University of South Alabama ("USA") and served as the Chief Nursing Officer ("CNO") for USA Health System, which included USA Medical Center, various clinics, and a children's hospital. According to Mestas, as the CNO, her primary responsibilities were administrative in nature and she had not provided any direct patient care since 2010.

¹Autrey later amended the complaint to add USA Health Care Management, LLC, as a defendant.

Mestas argued that because Autrey's claims against her arose from the line and scope of her employment with a State agency,² and because she did not treat Moore, she was entitled to, among other things, State-agent immunity.

In opposition to Mestas's motion for a summary judgment, Autrey argued that his action was against Mestas in her individual capacity and that she had not proven that she was entitled to State-agent immunity. In support of his filings, Autrey included various evidentiary exhibits, including the affidavit of Kimberly Arnold, the CNO for Northwest Medical Center in Bentonville, Arkansas.

The trial court, considering the parties' arguments and evidence, denied the motion for a summary judgment.³ Mestas filed the instant

²There appears to be no dispute that Mestas, as an employee of USA, is a State agent. Ex parte University of South Alabama, 183 So. 3d 915, 919 (Ala. 2015) ("USA is a State institution of higher learning and, as a matter of law, is a State agency").

³The trial court stated in its order that it considered Mestas's motions as motions for a summary judgment; the order does not indicate the factual or legal findings on which its ruling was based.

petition for a writ of mandamus; this Court subsequently ordered answers and briefs.⁴

Standard of Review

"A writ of mandamus is an extraordinary remedy[] and is appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court."

Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001).

As noted above, this petition challenges the denial of a motion for a summary judgment.

"Although this Court generally will not review a trial court's denial of a summary-judgment motion, we will consider a challenge to a denial of a summary-judgment motion that is 'grounded on a claim of immunity.' [Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002).] Our review in such a case is limited to the trial court's determination of immunity issues; we will not consider secondary arguments that a summary judgment was

⁴Autrey has filed with this Court a motion to strike Mestas's reply brief because it exceeded the 3,000-word limitation for reply briefs related to petitions for extraordinary writs found in Rule 32(b)(3), Ala. R. App. P. Mestas's counsel acknowledges that the reply brief exceeded the word limitation found in Rule 32(b)(3), explaining that "while simultaneously working on another appellate brief from the same underlying case which was subject to the 7,000-word limitation in Rule 28(j)(1), [Ala. R. App. P., she] mistakenly proceeded as though that limitation applied to this brief." Autrey's motion is well taken, and Mestas's reply brief will not be considered.

appropriate on other grounds or review the trial court's conclusions on other issues. ...

"In reviewing the denial of a summary-judgment motion asserting immunity, whether by petition for a writ of mandamus or by permissive appeal, this Court applies the following standard of review:

"'If there is a genuine issue as to any material fact on the question whether the movant is entitled to immunity, then the moving party is not entitled to a summary judgment. Rule 56, Ala. R. Civ. P. In determining whether there is [an issue of] material fact on the question whether the movant is entitled to immunity, courts, both trial and appellate, must view the record in the light most favorable to the nonmoving party, accord the nonmoving party all reasonable favorable inferences from the evidence, and resolve all reasonable doubts against the moving party, considering only the evidence before the trial court at the time it denied the motion for a summary judgment. Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000).'

"Wood, 852 So. 2d at 708."

Ex parte Smith, 327 So. 3d 184, 187 (Ala. 2020).

Discussion

In her petition, Mestas argues that she is entitled to State-agent immunity to the extent that Autrey's claims are asserted against her in

her individual capacity.⁵ The rule for determining when a State agent sued in his or her individual capacity is entitled to State-agent immunity was restated in Ex parte Cranman, 792 So. 2d 392 (Ala. 2000) (plurality), and was adopted by a majority of this Court in Ex parte Butts, 775 So. 2d 173 (Ala. 2000); that rule provides, in pertinent part:

"A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's

"(1) formulating plans, policies, or designs; or

"(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:

"....

"(d) hiring, firing, transferring, assigning, or supervising personnel; or

"....

"Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity

"(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations

⁵Although there is some discussion in the materials before us as to whether Mestas was sued in her official capacity, Autrey made clear in the trial court and in his answer to this petition that he is suing Mestas in her individual capacity.

of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

"(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

Cranman, 792 So. 2d at 405.

Autrey, quoting his complaint, contends that he alleged that Mestas "had the duty to provide reasonably proper and adequate medical care, nursing care, monitoring and/or treatment" to Moore but that she had "negligently breached those duties in one or more of the following respects," including:

"F. Negligently failing to train, educate and make the hospital's nursing staff aware of how to adequately assess a postoperative patient who is being administered pharmaceutical pain medications;

"G. Negligently failing to appropriately administer and provide for safety precautions in the treatment and care of Bridgette Ann Moore;

"H. Negligently failing to train, educate and make the hospital's nursing staff aware of the need for extra precautions in high-risk patient populations;

"I. Negligently failing to adopt, implement and/or follow policies, procedures, and protocols for the treatment and care of postoperative patients being administered pharmaceutical pain medications.' "

Autrey's respondent's brief at 1.

In her petition, Mestas argues that the evidence shows that, in serving as the CNO for USA Health System, which includes USA Medical Center, her duties were administrative in nature:

"She testified that she 'had administrative responsibility for USA Medical Center' and described herself as an administrative/corporate employee. The description of her position identifies her as an administrative employee and sets out categories of responsibility which include the development of plans, systems and processes as well as maintenance of appropriate staffing, management of staff, evaluation of both the clinical and financial aspects of patient care, and involvement with credentialing processes and regulatory compliance. It is evident from the broad and generalized nature of the functions included in the job description that Nursing Officer Mestas must exercise discretion while performing her duties; the job functions clearly relate to responsibilities which are administrative rather than ministerial in nature."

Petition at 16 (exhibit citations omitted).⁶

The "job description" Mestas references provides that the "job purpose" of the CNO is as follows:

"Performs the primary functions of an Associate Health System Administrator in planning, organizing, directing, controlling, and evaluating all functions and activities. Develops and maintains programs that achieve and sustain

⁶Mestas further notes in her petition that she did not provide patient care, did not render any medical care or treatment to Moore, and did not teach and train the other defendant nurses.

the mission, philosophy and objectives of the University of South Alabama Health System for base hospital and system-wide nursing functions that include inpatient and outpatient nursing areas."

The "essential job functions" of the CNO are stated as follows:

"1. Participates as a member of the leadership team in the organization's decision-making structure and process.

"....

"3. Develops and maintains an organizational plan for providing clinical care for patients that ensures the continuous and timely availability of those services. Develops standardized processes across the health system continuum to improve patient care and cost effectiveness.

"4. Assures a sufficient and qualified number of staff is available to care for patient needs based on acuity and regulatory requirements. Assesses staffing needs across the health system continuum to effectively utilize staff for fluctuating volumes.

"5. Establishes standards of clinical care and practice that are consistent with current research, outcome measures, and nationally recognized standards. This includes, but is not limited to, outcome measures, BCBS tiered program, state and national infection reporting requirements and evidence based medicine. Creates standardized processes across the health system continuum.

"6. Assures compliance with regulatory agencies such as the Joint Commission, CMS, third party payers, as well as current federal and state laws.

"7. Evaluates and develops systems for ongoing quality improvement in hospital processes, patient safety initiatives,

and management of staff. Incorporates best practices across the health system continuum.

"8. Serves as a leader and advocate for patient safety throughout the health system.

"9. Develops and maintains a standardized process for budgeting that supports patient care needs while driving efficiency and cost containment.

"10. Assists in evaluation and determination of new or current product lines.

"11. Conducts and reviews cost to benefit analysis on clinical procedures to assure the services are appropriate for the patient population served both clinically and financially at all responsible clinical sites.

"12. Develops and maintains a knowledge base related to medical staff credentialing regulatory requirements and processes."

Mestas's duties, she alleges, fit within the Ex parte Cranman categories of "formulating plans, policies, or designs" and exercising "judgment in the administration of a department or agency of government." 792 So. 2d at 405. She further argues that she "was not personally involved" in educating or training the other defendant nurses because she was not one of the "Nurse Educators" for USA Medical Center.

Autrey contends that the affidavit testimony of Kimberly Arnold, who, as noted above, is the CNO for an Arkansas hospital, contradicted Mestas's assertions that she performed only administrative duties. Arnold testified that the actions of CNOs like Mestas "directly affect patient care and patient safety." She indicated that Mestas's "essential job functions," numbered five through eight above, were "mandatory and nondiscretionary requirements of the CNO at any hospital," including USA Medical Center.

Arnold identified two publications by "the Joint Commission," a medical accrediting organization, discussing care for patients at risk for OIRD. According to her, an August 2012 "Sentinel Event Alert" issued by the Joint Commission

"identifies patients who are at higher risk for OIRD, and also identifies Effective Processes for protecting these patients from adverse outcomes. These processes include: (i) creating and implementing policies and procedures for the ongoing clinical monitoring of patients receiving opioid therapy; (ii) educating clinical staff about the potential effect of opioid therapy on respiratory depression; (iii) educating clinical staff on how to effectively protect patients receiving opioid therapy from respiratory depression; and (iv) assessing the clinical staffs understanding of how to identify and effectively protect patients receiving opioid therapy from injuries and deaths caused by respiratory depression."

She further discussed another Joint Commission publication, issued in June 2015, described as a "safety advisory":

"This safety advisory states: 'patients with [obstructive sleep apnea ('OSA')] can experience complications when receiving sedatives, such as opioid analgesia or general anesthesia. These medications diminish the protective arousal reflex triggered by bouts of hypoxia, thereby increasing the risk of prolonged periods of apnea and respiratory arrest.' This safety advisory further states: 'Staff and The Joint Commission's Division of Healthcare Improvement sites the following concerns regarding OSA Failure to implement appropriate monitoring of patients with risk factors associated with OSA Lack of communication among health care providers regarding patients with OSA for potential risk factors associated with OSA Lack of postoperative evaluation and treatment for OSA.' This safety advisory further states: 'Evaluate the patient's plan of care to ensure all precautions are taken while in your facility.'"

Arnold testified that, based on those publications, Moore was known to be at high risk for OIRD, but Moore's medical chart did not indicate that she had been screened for respiratory-depression risk factors. "One of the key reasons" no such screening occurred, according to Arnold, was that Mestas

"failed to take the mandatory and non-discretionary steps of implementing clinical policies, procedures, education, or training designed to protect patients such as [Moore] from the known dangers of OIRD. By failing to implement these mandatory and non-discretionary clinical safety measures, Nurse Mestas failed to perform her 'essential job functions.' In particular, Nurse Mestas failed to 'assure compliance with

regulatory agencies such as 'The Joint Commission'; failed to 'develop ... patient safety initiatives' relative to OIRD; and failed to 'advocate for patient safety.' These essential job functions did not afford Nurse Mestas the leeway to ignore them or exercise her judgment as to whether to implement them and ensure compliance by the clinical nursing staff. Rather, these essential job functions are just as the name suggests -- essential. Stated another way, these essential job functions were required, mandatory, and non-discretionary parts of her position at the hospital."

Arnold similarly testified that there was no plan of care to ensure that Moore was monitored for OIRD, and that that was attributable to Mestas's failure to perform her job functions, and she reiterated that Mestas's functions "were mandatory obligations that relate directly to the clinical safety of patients at CNO Mestas'[s] hospital. These functions were required in order to meet the standard of care for a CNO." Finally, Arnold stated if "Mestas had adequately performed her essential job functions, and had implemented the type of safety processes that are endorsed in Joint Commission publications about protecting high risk patients from OIRD," then Moore's "death probably would have been prevented."⁷

⁷Mestas testified that the Joint Commission documents were intended to be informative only and did not contain any mandatory rules or regulations from the Joint Commission that would have required her to implement policies or procedures based on them at USA Medical

Autrey points out that Mestas admitted that she did not implement Joint Commission guidance relative to OIRD and that, according to Arnold, that amounted to a failure to abide by her job functions. He reemphasizes that Mestas's job functions, according to Arnold, were "mandatory and nondiscretionary" requirements of a CNO. He further argues that Arnold's affidavit establishes that Mestas's role as a CNO was not purely administrative because, according to Arnold's affidavit, CNOs "are a type of healthcare service provider" and their actions "directly affect patient care and patient safety." He then concludes: "Nurse Arnold's testimony demonstrates that Nurse Mestas did not prove her affirmative defense[] of ... State-agent immunity" Autrey's respondent's brief at 18.

Mestas is a State agent, and her job functions in creating standards of care and practice, assuring compliance with those standards, evaluating and developing systems for quality improvement, and advocating for patient safety are all actions in formulating plans and

Center. She further explained that any policies or procedures that are put into place concerning patient care and safety are first discussed by a patient-care committee, which is led by her assistant CNO, and are then implemented following committee vote.

policies and exercising judgment in the administration of an agency for which Ex parte Cranman provides immunity. The evidence shows that Mestas performs administrative functions governing how clinical staff, including nurses, provide care to patients, including any care that might have been informed by the Joint Commission publications. To the extent that Arnold's testimony shows that Mestas had a duty to implement Joint Commission guidance and failed to do so in a way that contributed to Moore's death, that is relevant only as to whether Mestas was negligent in performing her functions, not as to whether the performance of her functions is protected by State-agent immunity in the first place.⁸ Autrey's answer and respondent's brief do not establish that Mestas's alleged acts or omissions in this case were not the type of conduct covered by State-agent immunity.

Autrey also cites caselaw holding that decisions involving the treatment of medical patients generally do not fit within a category of conduct for which Ex parte Cranman provides immunity. See Dunnam

⁸Autrey does not contend that Mestas acted "willfully, maliciously, fraudulently, in bad faith, beyond ... her authority, or under a mistaken interpretation of the law," in which cases State-agent immunity under Ex parte Cranman may not apply. 792 So. 2d at 405.

v. Ovbiagele, 814 So. 2d 232, 237 (Ala. 2001) (noting that there is "a general rule that medical professionals who are employed by the State are not entitled to immunity solely because the regular performance of their work requires the exercise of discretion. Rather, immunity is conferred only when a state agent meets one of the criteria set out in [Ex parte] Cranman."); Ex parte Rizk, 791 So. 2d 911, 914 (Ala. 2000) (holding that doctor's treatment of a patient during an emergency caesarean-section delivery did "not fit within any of the categories of immune State-agent conduct"). Wimpee ex rel. Johnston v. Stella, 791 So. 2d 915, 918 (Ala. 2000) (holding that two doctors' medical treatment during the delivery of a child did not fit within any of the categories of immune State-agent conduct); Ex parte Flynn, 776 So. 2d 99, 101-02 (Ala. 2000) (holding that a nurse, to the extent that she may have been called upon to use her judgment in implementing a doctor's orders, was not engaged in any category of conduct recognized as immune by Ex parte Cranman); and Ex parte Cranman, 792 So. 2d at 406 ("The conduct of the physicians, in their treatment of [the patient], does not fit within any category of conduct recognized by the restated rule as immune."). Although this case does involve allegations that a health-care provider

breached the applicable standard of care, unlike in the cases cited, Mestas's relevant job functions fall under a category of conduct specifically identified as warranting immunity under Ex parte Cranman.

Conclusion

Mestas has demonstrated that she is entitled to State-agent immunity and that she has a clear legal right to the relief sought. Therefore, we grant her petition and issue the writ; the trial court is directed to enter an order granting her motion for a summary judgment.

PETITION GRANTED; WRIT ISSUED.

Bolin, Wise, Bryan, Sellers, and Mitchell, JJ., concur.

Parker, C.J., and Mendheim and Stewart, JJ., concur in the result.