

Rel: May 20, 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

1200621

Ex parte Dahlia McKinney, M.D.

PETITION FOR WRIT OF MANDAMUS

**(In re: Antwon L. White, as personal representative
for the Estate of Paydro White (deceased))**

v.

Baptist Health System, Inc., et al.)

(Jefferson Circuit Court, CV-16-900003)

SHAW, Justice.

Dahlia McKinney, M.D., a defendant in the wrongful-

1200621

death/medical-negligence action pending below, petitions this Court for a writ of mandamus directing the Jefferson Circuit Court to vacate an order compelling Dr. McKinney, ostensibly under Alabama's discovery rules, to alter the contents of a registered death certificate she prepared in connection with the death of Paydro White ("Paydro"). We grant the petition and issue the writ.

Facts and Procedural History

On December 31, 2013, Paydro sought medical treatment at the emergency department of Princeton Baptist Medical Center ("Princeton"), where he was diagnosed with possible pneumonia; he was discharged on that same date.

The following afternoon, Paydro returned to Princeton's emergency department seeking follow-up care; he was formally admitted for treatment by the emergency physician on duty at that time. Later that evening, after Dr. McKinney began her evening shift at Princeton, Paydro become unresponsive. Although he was initially successfully resuscitated, Paydro later died in the early morning hours of January 2,

1200621

2014. Dr. McKinney, who completed and signed Paydro's death certificate, identified the contributing causes of Paydro's death as "Pulseless electrical activity" due to "Acute Myocardial Infarction."¹ Subsequent postmortem examinations and the autopsy of Paydro's body, however, revealed that "the most likely cause of ... death [was] pulmonary Thromboembolism" -- a final diagnosis with which Dr. McKinney's later deposition testimony indicated she agreed.

¹Pursuant to § 22-9A-14(a), Ala. Code 1975, "[a] certificate of death for each death which occurs in this state shall be filed with the Office of Vital Statistics ... within five days of the death and shall be registered if it has been completed and filed in accordance with this section." In cases where death occurs while the decedent was under a physician's care, § 22-9A-14(c) provides, in pertinent part:

"The physician in charge of the care of the patient for the illness or condition that resulted in death shall complete and sign the medical certification and transmit the certificate to the Office of Vital Statistics in the manner directed by the State Registrar, within 48 hours after receipt of the certificate. In the absence of the physician, the certificate may be completed and signed by another physician designated by the physician, or the certificate may be completed and signed by the chief medical officer of the institution in which death occurred or by the physician who performed an autopsy upon the decedent."

Dorothy White ("Dorothy"), Paydro's mother, subsequently obtained letters of administration naming her the personal representative of Paydro's estate. In that capacity, Dorothy sued, in the Jefferson Circuit Court, numerous defendants allegedly connected with Paydro's medical treatment, including Dr. McKinney. In essence, Dorothy's complaint alleged claims of "Medical Malpractice-Wrongful Death," pursuant to the Alabama Medical Liability Act,² based on her contention that Paydro's death had been caused by the defendants' purported failure to timely diagnose and treat the pulmonary thromboembolism that ultimately caused Paydro's death.³ Dorothy later

²See § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975.

³Relevant to Dr. McKinney and the present petition, paragraph 96 of Dorothy's complaint specifically alleged:

"[T]he conditions listed by Dr. McKinney as the cause of death or contributing to the cause of death of Paydro ... are inaccurate, wrong, incorrect and inconsistent with clinical findings in ... medical records and autopsy findings. Dr. McKinney's determination of cause of death is not supported by results of two separate autopsies conducted following the death of Paydro ... which conclusively listed the cause of death

1200621

died, and Antwon L. White ("White") succeeded Dorothy as personal representative of Paydro's estate.

In response to White's claims, Dr. McKinney, who had provided no medical treatment to Paydro other than in connection with emergency resuscitation attempts, informally requested her voluntary dismissal as a defendant. In an email communication to Dr. McKinney's counsel, White's counsel indicated that a decision on that request would be aided by Dr. McKinney's voluntary amendment of the original cause of death indicated on Paydro's death certificate to identify his cause of death as a pulmonary thromboembolism.

Thereafter, White, specifically citing Rule 37, Ala. R. Civ. P.,⁴ filed

as Pulmonary Embolism."

⁴Rule 37 is entitled: "Failure to Make Discovery: Sanctions." Subsection (a) of the rule permits a party to "apply for an order compelling discovery" under certain circumstances, and subsection (a)(2) provides, in pertinent part, that such circumstances include

"[i]f a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under

1200621

in the trial court a motion seeking an order

"compelling ... [Dr.] McKinney ... to amend and correct the medical certification portion of Paydro['s] death certificate in Line 46 Part I and Line 47 Part II to show that the correct cause of death is Pulmonary Thromboembolism/Deep Venous Thrombosis-DVT, not Pulseless electrical activity, Myocardial Infarction or Pneumonia as currently listed in Paydro White's death certificate."

In support of that request, White alleged that Dr. McKinney had allegedly "promised" during her deposition and was, as the original certifying physician, also allegedly "required by law" to amend Paydro's death certificate as described but had repeatedly refused to do so despite repeated requests from White's counsel.

Among other exhibits, White attached as support for the motion the affidavit of Adel Shaker, M.D., a forensic pathologist/medical examiner,

Rule 33, or if a party, in response to a request for production or inspection submitted under Rule 30(b)(5), or if a party in a response to a request for production or inspection submitted under Rule 34, fails to respond that production or inspection will be permitted as requested or fails to produce or permit inspection as requested, or if a person objects to or fails to comply, in whole or in part, with a subpoena under Rule 45(a)(3)"

1200621

who attested that, based on his postmortem examination of Paydro's body, he concurred with the findings of an initial autopsy performed at Princeton that concluded that the most likely cause of Paydro's death was a pulmonary thromboembolism. Also according to Dr. Shaker's affidavit testimony, he had unsuccessfully attempted to amend Paydro's death certificate as originally completed by Dr. McKinney to reflect the correct cause of death, but he had been informed by the Alabama Department of Vital Statistics that "only the medical certifier, [Dr. McKinney,] who signed the death certificate may make corrections/changes to cause of death or other changes in the medical certification section of Paydro['s] ... death certificate." White's motion was further supported by Dr. McKinney's deposition testimony agreeing with the autopsy findings that Paydro's death most likely resulted from a pulmonary thromboembolism.

Dr. McKinney opposed White's motion. Specifically, she alleged that the motion seeking an order compelling the amendment of Paydro's death certificate was not filed in response to Dr. McKinney's failure to appropriately respond to a pending discovery request under either Rule

1200621

33 or Rule 34, Ala. R. Civ. P., and was, thus, "improper and unfounded in ... Rule 37." She instead deemed White's request both "an improper discovery motion and outside of [the trial court's] discretion" Dr. McKinney further argued that provisions of the Alabama Administrative Code cited in support of the motion "do[] not require Dr. McKinney to alter the death certificate, but merely provide[] a method for doing so."

Dr. McKinney's response further explained her refusal to alter the death certificate to secure her dismissal from the action as follows:

"Counsel for [Dr. McKinney] found this request to be improper and therefore did not respond to it, since this implicated an improper quid pro quo for her dismissal from this suit. [Dr. McKinney] cannot change a public record to secure her dismissal from this suit, and she should not be asked to do so."

Finally, Dr. McKinney disputed that she had ever "promised" to amend the death certificate.

Following further filings and a hearing, the trial court, on May 21, 2021, entered an order granting White's motion to compel. Specifically, in that order, the trial court, citing Dr. McKinney's acknowledgment that the original cause of death she had identified was preliminary and her

agreement with the findings of the subsequent postmortem examinations and relying on the established administrative procedures for amending a registered death certificate,⁵ ordered "that Dr. McKinney file required documents with [the] Office of Vital statistics within ten (10) days to amend or correct Paydro['s] ... death certificate in accordance with her deposition testimony that the probable cause of death is Pulmonary Thromboembolism." (Emphasis omitted.)

In response, Dr. McKinney filed a mandamus petition. This Court ordered answers and briefs. At Dr. McKinney's request, the trial court stayed execution of its order compelling amendment of Paydro's death certificate pending the outcome of the present petition.

Standard of Review

"Mandamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner 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) properly invoked

⁵See §§ 22-9A-14 and 22-9A-19, Ala. Code 1975, and rr. 420-7-1-.10 and 420-7-1-.18, Ala. Admin. Code (Ala. Bd. of Health, Dep't of Pub. Health).

jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991). This Court will not issue the writ of mandamus where the petitioner has '"full and adequate relief"' by appeal. State v. Cobb, 288 Ala. 675, 678, 264 So. 2d 523, 526 (1972) (quoting State v. Williams, 69 Ala. 311, 316 (1881)).

"Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991). Accordingly, mandamus will issue to reverse a trial court's ruling on a discovery issue only (1) where there is a showing that the trial court clearly exceeded its discretion, and (2) where the aggrieved party does not have an adequate remedy by ordinary appeal. The petitioner has an affirmative burden to prove the existence of each of these conditions.

"Generally, an appeal of a discovery order is an adequate remedy, notwithstanding the fact that that procedure may delay an appellate court's review of a petitioner's grievance or impose on the petitioner additional expense; our judicial system cannot afford immediate mandamus review of every discovery order. See Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) ('Mandamus disrupts the trial proceedings, forcing the parties to address in an appellate court issues that otherwise might have been resolved as discovery progressed and the evidence was developed at trial.'). In certain exceptional cases, however, review by appeal of a discovery order may be inadequate, for example, (a) when a privilege is disregarded, see Ex parte Miltope Corp., 823 So. 2d 640, 644-45 (Ala. 2001) ('If a trial court orders the discovery of trade secrets and such are disclosed, the party resisting discovery

will have no adequate remedy on appeal.');

(b) when a discovery order compels the production of patently irrelevant or duplicative documents, such as to clearly constitute harassment or impose a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party, see, e.g., Ex parte Compass [Bank], 686 So. 2d 1135, 1138 (Ala. 1996) (request for 'every customer file for every variable annuity' including annuity products the plaintiff did not purchase);

(c) when the trial court either imposes sanctions effectively precluding a decision on the merits or denies discovery going to a party's entire action or defense so that, in either event, the outcome has been all but determined, and the petitioner would be merely going through the motions of a trial to obtain an appeal; or

(d) when the trial court impermissibly prevents the petitioner from making a record on the discovery issue so that the appellate court cannot review the effect of the trial court's alleged error. The burden rests on the petitioner to demonstrate that its petition presents such an exceptional case -- that is, one in which an appeal is not an adequate remedy. See Ex parte Consolidated Publ'g Co., 601 So. 2d 423, 426 (Ala. 1992)."

Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813-14 (Ala. 2003)

(footnote omitted).

The trial court's May 21, 2021, order purports to be a discovery order. This Court concludes that, under the specific facts of this case, the trial court's order directing Dr. McKinney to amend the death certificate was not authorized by our discovery rules, was not required by law, was

1200621

not proven to be necessary, and was not an order the trial court had discretion to enter. Further, Dr. McKinney has demonstrated that her mandamus petition presents an "exceptional case in which an appeal is not an adequate remedy." Ex parte Ocwen, 872 So. 2d at 814.

Discussion

The sole issue presented by Dr. McKinney's mandamus petition is whether, in directing her to amend Paydro's death certificate, the trial court exceeded its discretion when, Dr. McKinney argues, there is no underlying failure by her to respond to an outstanding discovery request that would properly support a motion made pursuant to Rule 37 or otherwise provide a legal basis for the trial court's order.

Contrary to Dr. McKinney's contention, White argues that his motion to compel did, in fact, raise "a discovery issue" subject to Rule 37 -- a premise with which the trial court apparently agreed -- because, he maintains, the motion "arose from Dr. McKinney's deposition testimony" in which she admitted that Paydro's probable cause of death was a pulmonary thromboembolism. He further argues that Dr. McKinney

1200621

failed to file a motion seeking a protective order within the 10-day period prescribed in the trial court's May 21, 2021, order.

We see nothing in the materials before us suggesting that the challenged order was issued to compel action in response to Dr. McKinney's "failure to make discovery." Although White, relying on Rule 37 and its accompanying commentary, contends that the challenged order "arose from Dr. McKinney's properly noticed Rule 30(b)(5) deposition testimony," we cannot agree.

Although it appears undisputed that, during her deposition, Dr. McKinney conceded the ultimate cause of Paydro's death and indicated that she had, despite that knowledge, not amended the preliminary cause of death indicated on Paydro's death certificate, those facts are irrelevant to our analysis under Rule 37. As White concedes, Rule 37(a) applies when

"a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, ... or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for production or inspection submitted under Rule 30(b)(5), or if a party in a response to a

request for production or inspection submitted under Rule 34, fails to respond that production or inspection will be permitted as requested or fails to produce or permit inspection as requested, or if a person objects to or fails to comply, in whole or in part, with a subpoena under Rule 45(a)(3)"

Rule 37(a)(2). None of the foregoing circumstances are implicated here.

Our conclusion is not altered by the generally broad powers of discovery vested in our trial courts, as recognized by other authorities White identifies. In sum, despite White's cited basis for his underlying request and the trial court's own characterization of the resulting order, the trial court's order, to the extent it purported to compel discovery by requiring an amendment of Paydro's death certificate, was not authorized by Rule 37, the rule cited by White in seeking, and relied on by the trial court in compelling, the amendment.

Not only does the amendment compelled by the trial court appear to have been unauthorized by the authorities on which both White and the trial court relied upon, but nothing suggests that it was necessary. Contrary to White's apparent concerns, Alabama law provides that a cause of death indicated on a death certificate is not determinative as to

1200621

the ultimate cause of death. Cf. Union Cent. Life Ins. Co. v. Scott, 286 Ala. 10, 16, 236 So. 2d 328, 334-35 (1970) (observing that "[t]he death certificate was not conclusive against the beneficiary as to the cause of the insured's death. It has only prima facie effect as to the facts stated therein," and that "[t]he plaintiff had the right to try to contradict the facts as stated in the death certificate"), and Ex parte Orton, 402 So. 2d 980, 982 (Ala. 1981) ("While it is undisputed that the death certificate showed death to be by natural causes, this Court recognized in Union Central Life Insurance Company v. Scott, 286 Ala. 10, 236 So. 2d 328 (1970), that the death certificate is not conclusive as to the cause of death and contradictory testimony of lay witnesses can rebut such evidence."). See also § 12-21-101, Ala. Code 1975 ("Registers of marriages, births and deaths, kept in pursuance of law or any rule of a church or religious society may be certified by the custodian thereof and, when so certified, are presumptive evidence of the facts therein stated as well as of the law or rule in pursuance of which such registry was made and of the authority to certify the same."), and Liberty Nat'l Life Ins. Co. v. Reid, 276 Ala. 25,

1200621

34, 158 So. 2d 667, 675 (1963) ("[A] physician's certificate as to cause of death, while considered prima facie true is conclusive only if un rebutted.").

Alabama law requires the preparation and filing of a certificate of death within five days of a death. See note 1, *supra*. Given that statutory deadline, it is apparent that, in some cases, further investigation will determine a different cause of death. Thus, as both White's filings and the trial court's order observe, the Alabama Code and the Alabama Administrative Code provide a process allowing for the amendment of death certificates. See § 22-9A-19(a), Ala. Code 1975 ("A certificate registered under this chapter [Title 22, Chapter 9A, 'Vital Statistics,'] may be amended only in accordance with this chapter and rules adopted by the [State] [B]oard [of Health] to protect the integrity and accuracy of vital records."); r. 420-7-1-.18, Ala. Admin. Code (Ala. Bd. of Health, Dep't of Pub. Health). However, as Dr. McKinney also correctly notes, there appears to be no corresponding authority requiring such amendments. In fact, Rule 420-7-1-.10(3), Ala. Admin. Code (Ala. Bd. of Health, Dep't

of Pub. Health), which the trial court's order compelling the amendment quotes, specifically provides:

"If, after completing the cause of death, the medical certifier wishes to provide supplemental information or make a change to the cause of death, that medical certifier shall forward the supplemental information or the changed cause of death to the State Registrar in a format that contains the same information as the medical certification portion of the current death certificate and provides sufficient information to identify the deceased individual."

(Emphasis added.)

Here, however, Dr. McKinney, the medical certifier, clearly does not wish to undertake that optional amendment because, according to her, she fears potential career implications of making the requested amendment in light of its now having been linked to her request for dismissal from the underlying action. Dr. McKinney argues:

"The question of the cause of [Paydro's] death is not a question of law for the trial court, nor should any non-physician dictate the wording of a death certificate. The court's opinion as to the probable cause of death should not determine the official record of death of the state of Alabama. If the evidence at trial does not support the cause of death as stated in the death certificate, the trial court can exclude the death certificate from evidence. However, the trial court should not be asked to order the evidence to be altered on the

pretext of a Rule 37 motion to compel.

"Moreover, the suggestion that Dr. McKinney may be dismissed after altering the official death certificate presents implications for Dr. McKinney as to why she would alter an official record as to the cause of death eight years after the fact and while a party to a medical malpractice case, particularly if the claim against Dr. McKinney is dropped following her alteration of the death certificate. This would suggest the equivalent of a Mary Carter Agreement,^[6] which was the concern of Dr. McKinney's counsel and why there was no further discussion of this subject. There may also be implications on cross-examination at trial and with the Alabama Board of Medical Examiners. Such implications should not be forced on Dr. McKinney by an order granting an inappropriate and misplaced Rule 37 motion."

Because the authorities on which the trial court ostensibly relied in issuing its purported discovery order compelling Dr. McKinney to amend Paydro's death certificate do not provide the trial court authority to issue its order, the trial court exceeded its discretion. Furthermore, this petition presents an exceptional case in which an appeal is not an

⁶Generally, a "Mary Carter Agreement," which originated in Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967), refers to some type of secret agreement between a plaintiff and one or more but not all the named defendants that limits the liability of the agreeing defendants.

1200621

adequate remedy.

In light of our resolution of the main issue in this case, we likewise agree with Dr. McKinney that a motion for a protective order was unnecessary here. White correctly points out that Rule 26(c), Ala. R. Civ. P., and certain decisions of this Court provide that, within the period established by a trial court for producing compelled discovery, "a party dissatisfied with the trial court's ruling on a motion to compel discovery must first make a timely motion for a protective order, so as to create a record to support the essential allegation that the petitioner has no other adequate remedy." Ex parte Horton Homes, Inc., 774 So. 2d 536, 540 (Ala. 2000). However, as noted above, the order in this case does not compel discovery.

Conclusion

Based on the foregoing, Dr. McKinney has demonstrated a clear legal right to the requested relief. We therefore grant her petition and order the trial court to vacate its order compelling Dr. McKinney to amend the cause of death on Paydro's death certificate and to enter an

1200621

order denying White's motion seeking to compel Dr. McKinney to perform that action.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart,
and Mitchell, JJ., concur.