



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-18-00345-CV

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**IN RE KYLE MCADAMS, EXECUTOR FOR THE ESTATE OF MICHAEL CAMERON  
HODGES, M.D., DECEASED AND M. CAMERON HODGES, M.D., P.L.L.C., RELATORS**

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Original Proceeding Arising Out of Proceedings in the 181st District Court  
Potter County, Texas  
Trial Court No. 107,219-B; Honorable John B. Board, Presiding Judge

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October 29, 2018

**MEMORANDUM OPINION**

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

This mandamus proceeding arises out of a discovery dispute in a health care liability wrongful death suit brought by J. Thomas Campbell and Margie Campbell, Individually and as Next Friends of A.T. Herrera and L.N. Herrera, Minors, and J. Thomas Campbell as Independent Administrator of the Estate of Josephine Marie Herrera, Deceased, as plaintiffs (the real parties in interest herein), against the estate of Michael Cameron Hodges, M.D., by and through its executor, Kyle McAdams and M. Cameron Hodges, M.D. P.L.L.C., d/b/a Hodges Weight Loss & Advanced Surgery, as defendants

(the relators herein). In the course of prosecuting of their claim, Real Parties in Interest sought the discovery of Dr. Hodges's personal medical and mental health records. Relators now seek a writ of mandamus from this court directing the Honorable John B. Board, Respondent, to vacate his "letter order," dated September 10, 2018, ordering the production of certain portions of Dr. Hodges's personal medical and mental health records. Because we find Relators are not entitled to the relief requested, we will deny their petition.

#### BACKGROUND

Real Parties in Interest sued Relators asserting a health care liability claim pursuant to chapter 74 of the Texas Civil Practice and Remedies Code; TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001- 74.507 (West 2017 and West Supp. 2018), alleging that Dr. Hodges was negligent in his care and treatment of Josephine Marie Herrera and that his negligence was a proximate cause of her death.<sup>1</sup> The allegations of negligence arise out of a bariatric surgical procedure performed by Dr. Hodges on Ms. Herrera in July 2017. Approximately one month after the initial procedure, Ms. Herrera began experiencing acute nausea and vomiting that required her readmission to the hospital. During her hospital stay, on two occasions, Dr. Hodges performed an endoscopic dilation in order to dilate the bariatric sleeve. He also performed a laparoscopic cholecystectomy (gallbladder removal) before she was released on August 18, 2017.

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<sup>1</sup> Cause No. 107,219-B, *J. Thomas Campbell and Margie Campbell, Individually and as Next Friends of A.T. Herrera, a Minor and L.N. Herrera, a Minor, and J. Thomas Campbell as Independent Administrator of the Estate of Josephine Marie Herrera, Deceased, Plaintiffs v. Kyle McAdams, Executor for the Estate of Michael Cameron Hodges, M.D., Deceased, the Estate of Michael Cameron Hodges, M.D., Deceased and M. Cameron Hodges, M.D., PLLC and d/b/a Hodges Weight Loss & Advanced Surgery, Defendants*, in the 181st District Court in and for Potter County, Texas.

On August 23, 2017, Ms. Herrera was again hospitalized with symptoms of nystagmus (involuntary movement of the eye) and vomiting. By August 25, her vomiting and nausea were improved but she was still complaining of constipation. On August 27, Ms. Herrera had an elevated heart rate and a decrease in movement in her intestines. Dr. Hodges sought a cardiology consult due to her tachycardia (an abnormally rapid heart rate) and she was transferred to the cardiac care unit of the hospital. On August 29, Ms. Herrera suffered cardiopulmonary arrest. Thereafter, her condition became more unstable and she died on August 30, 2017.

Less than a month later, on September 25, 2017, Dr. Hodges took his own life. The underlying lawsuit was eventually filed against the executor of his estate and against his medical business, a professional limited liability corporation. By various discovery devices, Real Parties in Interest have sought the discovery of Dr. Hodges's personal medical and mental health information. In response, Relators have asserted the physician-patient and mental health provider privileges found in Rules 509 and 510 of the Texas Rules of Evidence. See TEX. R. EVID. 509, 510. Relators have also objected to the discovery requests on the basis that the information sought is not reasonably calculated to lead to the discovery of admissible evidence and that certain requests were overly broad and unlimited in time and scope.

In response, Real Parties in Interest amended their pleading to add allegations that Dr. Hodges was practicing beyond his level of competence and that his "surgical, medical, physical, mental, emotional and psychological abilities" were a contributing cause of Ms. Herrera's death. They further alleged that it was "apparent from his suicide . . . that Dr. Hodges had emotional, mental, psychiatric, psychologic, or chemical issues

that in the reasonably prudent practice of medicine would have required [him] to obtain help for himself in order to prevent further harm to his patients . . . .” On June 28, 2018, Respondent held a hearing on the issue of the privileges and objections raised by Relators. At the conclusion of that hearing, Respondent issued an order requiring Relators to “produce for *in camera* inspection all medical and psychological records pertaining to Dr. Hodges’ medical and psychological condition for a period of 10 years prior to Dr. Hodges’ September 2017 death.” In response, Relators submitted the records in their possession from four different health care providers. Following an *in camera* inspection of those records, on September 10, 2018, Respondent issued his *letter order* designating the redaction of certain portions of the records produced and further ordering the production of the remaining portions. Relators then filed this mandamus proceeding seeking relief from that order.

#### MANDAMUS STANDARD OF REVIEW

Mandamus is an extraordinary remedy granted only when a relator can show that (1) the trial court abused its discretion and (2) that no adequate appellate remedy exists. *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). When seeking mandamus relief, a relator bears the burden of proving these two requirements. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

To establish an abuse of discretion, a relator must demonstrate the trial court acted unreasonably, arbitrarily, or without reference to any guiding rules or principles. See *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). Accordingly, in order to be entitled to mandamus relief in this case, Relators must

establish the trial court could not have reasonably reached the conclusion that it did. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 698 (Tex. 2015) (orig. proceeding).

To establish no adequate remedy by appeal, a relator must show there is no adequate remedy at law to address the alleged harm and that the act requested is a ministerial act, not involving a discretionary or judicial decision. *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). In that regard, mandamus is appropriate when the trial court erroneously orders the disclosure of privileged information because the trial court's error cannot be adequately corrected on appeal. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 697-98.

#### DISCOVERY OF PRIVILEGED EVIDENCE

Rule 509 of the Texas Rules of Evidence provides that a patient may refuse to disclose and prevent any other person from disclosing “(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and (2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.” See TEX. R. EVID. 509(c). This privilege does not, however, apply “[i]f any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.” See TEX. R. EVID. 509(e)(4). See also *R.K. v. Ramirez*, 887 S.W.2d 836, 840 (Tex. 1994) (orig. proceeding). Rule 510 contains a similar privilege and exemption for communications to and records of a mental health professional. See TEX. R. EVID. 510(b), (d)(5). Once a party has asserted a privilege, the trial court abuses its discretion if it orders the production of

privileged records unless the party seeking discovery can establish an applicable exemption.

Before a trial court considers the application of an exemption to a privilege, it should first satisfy itself that the evidence being sought is relevant and relied upon by the party seeking discovery. Whether someone's medical or mental health condition is a part of a party's claim or defense is a matter the trial court must determine, as a matter of law, from the face of that party's pleadings. *Ramirez*, 887 S.W.2d at 843 n.7.

A party "relies on the patient's physical, mental, or emotional condition as a part of the party's claim" when substantive law assigns significance to the condition, as when legal consequences flow from the existence or non-existence of that condition. *Id.* at 842-43. Evidence is "relevant" to a condition if the evidence has any tendency to make the existence of that condition more or less probable than it would have been without the evidence and the condition is of consequence in determining the action. See TEX. R. EVID. 401.

Therefore, in a discovery dispute involving an assertion of privilege, the burden of pleading and producing evidence necessary to establish that privilege is on the party resisting disclosure. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 698. In such a case, the party resisting discovery need only produce the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true," and then tender the discovery responses to the trial court for an *in camera* inspection. *Id.* at n.13 (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 222 (Tex. 2004) (orig. proceeding)).

When a party has properly asserted a privilege and the trial court has satisfied itself that the records sought fall within that privilege, but the party requesting discovery maintains the records to be produced could fall within an exception (i.e., that the evidence is relevant and relied upon by the party seeking discovery), then the court should conduct an *in camera* review of the evidence to ensure that the order of production is no broader than is reasonably necessary considering the competing interests at stake. *Ramirez*, 887 S.W.2d at 843. When reviewing a production order pertaining to an exception to a privilege, the reviewing court may not substitute its judgment for that of the trial court, and the existence of a privilege, the scope of the exemption and permitted discovery, and the ultimate admission of evidence are matters within the sound discretion of the trial court. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 698.

#### ANALYSIS

Here, Real Parties in Interest made Dr. Hodges's medical, emotional, and mental health condition a relevant part of their claim by alleging that his "surgical, medical, physical, mental, emotional and psychological abilities" were a contributing cause of Ms. Herrera's death and that it was "apparent from his suicide . . . that Dr. Hodges had emotional, mental, psychiatric, psychologic, or chemical issues that in the reasonably prudent practice of medicine would have required [him] to obtain help for himself in order to prevent further harm to his patients . . . ." By the allegation that his medical and mental health condition presented a risk to Ms. Herrera that constituted negligence and was a proximate cause of her death, Dr. Hodges's medical and mental health condition became a contested fact that carries with it some legal significance regarding the ultimate resolution of this matter. Accordingly, we cannot say the trial court abused its discretion

by ordering the limited production of Dr. Hodges's medical and mental health records for purposes of an *in camera* review.

Furthermore, we cannot say the trial court abused its discretion in ultimately ordering the partial production of Dr. Hodges's medical and mental health records. To the contrary, Judge Board meticulously followed the Supreme Court's directives as set forth in *Ramirez*. First, he ordered a limited production of records for *in camera* review, narrowly tailoring the production of evidence, by balancing the need for the production of relevant information with the interest of producing the minimum possible violation of Dr. Hodges's privilege. He accomplished this by (1) limiting the time period of the records to be produced to ten years, (2) barring Real Parties in Interest from deposing Dr. Hodges's widow (in deference to the traumatic nature of his suicide), and (3) prohibiting Real Parties in Interest from obtaining the identity of Dr. Hodges's medical and mental health providers. Judge Board then conducted an *in camera* review of the records produced and further limited the production of evidence by specifically identifying portions that were to be redacted before the remaining portion was produced.

#### CONCLUSION

Relators' petition for a writ of mandamus is denied.

Patrick A. Pirtle  
Justice