



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-09-00058-CV

IN RE:
GLADEWATER HEALTHCARE CENTER, IN
ITS ASSUMED OR COMMON NAME, ET AL.

Original Mandamus Proceeding

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Relators¹ are several entities and individuals that have been involved in the operation of nursing homes in Upshur County and that are defendants in a long-pending healthcare liability action.² Plaintiff in that action, the real party in interest here, alleges negligence in the care of a nursing home resident, John Richardson, leading to that resident's death. Relators seek a writ of mandamus to quash, in that action, depositions sought of certain executive officers of Relators. After examining the recent procedural history of the case, Relators' contentions, the role of the special master who ordered the depositions, and the scope of our authority to issue a writ of mandamus, we dismiss Relators' petition for want of jurisdiction.

¹Relators are Gladewater Healthcare Center, in its Assumed or Common Name; Nexion Health at Gladewater, Inc.; Nexion Health, Inc.; Nexion Health Management, Inc.; Nexion Health at Texas, Inc.; Nexion Health Leasing, Inc.; Nexion Health Realty, Inc.; Darlene Maloney, Individually; Bruce Henshaw, Individually; and Donna Albright, Individually.

²The underlying case is docketed under trial court cause number 545-03 and is styled *David Richardson, Individually, as the Representative for All Wrongful Death Beneficiaries, and as an Heir at Law and the Representative of the Estate of John Richardson, Deceased v. Gladewater Healthcare Center, in its Assumed or Common Name; Nexion Health at Gladewater, Inc.; Nexion Health, Inc.; Nexion Health Management, Inc.; Nexion Health at Texas, Inc.; Nexion Health Leasing, Inc.; Nexion Health Realty, Inc.; Darlene Maloney, Individually; Bruce Henshaw, Individually; and Donna Albright, Individually.*

(1) *Procedural Background*

In December 2008, Plaintiff noticed the depositions of three high-level executives of Relators, Fran Kirley, Brett Bolt, and Meera Riner.³ In response a short time later, Relators filed motions to quash Plaintiff's notice of intention to depose the three executives and motions for protective order prohibiting the taking of depositions of the three executives, accompanied by the requisite affidavits in which each of the three executives denied that he or she had knowledge of facts relevant to the lawsuit.

Plaintiff responded to the executives' motions, contending that answers given in deposition by Nurse Sherry Clark⁴ confirmed that "Kirley, Bolt, and Riner were key fact witnesses in the case" and "possessed unique and superior knowledge relevant to Plaintiff's core allegations." They went on to cite several specific portions of Clark's deposition that would show such. Plaintiff then stated that memoranda produced in the case, official cost-report information, and facility lease agreements confirm that all three executives possessed "unique and superior knowledge" concerning the subject matter of Plaintiff's allegations and were directly involved in the operations and management of Gladewater Healthcare Center, leading to the widespread neglect of residents and, ultimately, Richardson's injuries and death.

³Kirley is identified as president and CEO of Nexion Health, Inc., Bolt is identified as executive vice president and CFO of Nexion Health, Inc., and Riner is identified as senior vice president of operations for Nexion Health, Inc.

⁴Excerpts of Clark's August 29, 2008, deposition were attached as exhibits to Plaintiff's response to Relators' motions to quash and for protective orders.

On April 22, 2009, the trial court signed an order of reference assigning Richard Davis as special master to preside over "discovery disputes" and all other pretrial matters. *See* TEX. R. CIV. P. 171. On May 15, 2009, the special master signed an order denying Relators' motions to quash and for protective orders. Further, the special master ordered that Relators make the three executives available for deposition on or before June 15, 2009.

Relators seek from this Court a writ of mandamus directing Davis to vacate the May 15 order denying the motions to quash and for protective orders. To support their contention that Davis abused his discretion, Relators rely heavily on *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995), and *In re Alcatel USA, Inc.*, 11 S.W.3d 173 (Tex. 2000). Relators maintain that Plaintiff failed to carry the burden that was shifted to him on the filing of the motions for protective orders, and the executives' affidavits filed with the motions.

(2) *Davis' Role in this Litigation*

Relators identify Davis as an "assigned judge" and treat Davis' order as the order of the trial court. We believe this to be an improper characterization and one inconsistent with the law and the facts of this case. The trial court appointed Davis as "special master," specifically citing to the rule of civil procedure concerning special masters. *See* TEX. R. CIV. P. 171. The trial court's order appointing Davis as special master states as follows:

The Special Master's ruling and orders shall not be appealable by the aforementioned parties to this Court, but shall be appealable as any other orders of this court pursuant to the Texas Rules of Civil Procedure. This Court will promptly enter an order or rulings in accordance with the rulings and/or recommendation of the Special Master.

We find no order confirming the special master's discovery "order" or recommendations, however.⁵ And Relators clearly seek mandamus relief only from the special master's ruling. So, before we get to the merits of Relators' contentions, we first must decide whether we have the authority to issue a writ of mandamus against a special master appointed pursuant to Rule 171 of the Texas Rules of Civil Procedure.

⁵Though we are not called on to decide whether the trial court's order of reference is in any way objectionable under Rule 171 of the Texas Rules of Civil Procedure, we note that the order contains suspect language that may be interpreted to forego the trial court's review of the special master's recommendations. Rule 171 contemplates the trial court's review of the special master's report:

The order of references to the master may specify or limit his powers, and may direct him to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only and may fix the time and place for beginning and closing the hearings, and for the filing of the master's report. Subject to the limitations and specifications stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order.

....

The court may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary in the particular circumstances of the case.

TEX. R. CIV. P. 171. The special master's report is to be subject to the trial court's review. *See Hebisen v. Clear Creek Indep. Sch. Dist.*, 217 S.W.3d 527, 535 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing legislative concern as expressed in TEX. HOUSE JUDICIAL AFFAIRS COMM., INTERIM REPORT: PARAJUDICIAL PERSONNEL, 67th Leg., at 20 (1980) that special masters "must never become independent of the judges they serve"); *see generally Simpson v. Canales*, 806 S.W.2d 802, 811–12 (Tex. 1991).

(3) *Our Authority to Issue Writs*

Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a:

- (1) judge of a district or county court in the court of appeals district; or
- (2) judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district.

TEX. GOV'T CODE ANN. § 22.221(b) (Vernon 2004). We lack jurisdiction to issue a writ against a person whose capacity is not listed in Section 22.221.⁶ *See In re Jon*, 97 S.W.3d 870, 871 (Tex. App.—Texarkana 2003, orig. proceeding).

(4) *Writ Unavailable Against Special Master, Not Sought Against Trial Court*

Clearly, a special master is not one of the officers listed in Section 22.221 of the Texas Government Code, against whom we may issue a writ of mandamus.

In re Alcatel is a case which appears to deal with the recommendations of a special master in the context of mandamus relief. 11 S.W.3d at 175. The important distinction between *Alcatel* and the instant case, though, is that the trial court in *Alcatel* reviewed and affirmed the special master's report or order, and the writ of mandamus was sought against the trial court based on the order *it* signed after reviewing the special master's report or order. *See id.* Here, the record does

⁶We add that we may issue all writs necessary to enforce our jurisdiction even against a person whose capacity is not listed in Section 22.221. *See* TEX. GOV'T CODE ANN. § 22.221(a) (Vernon 2004); *In re Washington*, 7 S.W.3d 181, 183 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding). Relators do not contend that a writ of mandamus against the special master, here, is a writ of mandamus necessary to enforce our jurisdiction.

not reflect such an order from the trial court. The order at issue here comes from and is signed by the special master only.

Relators seek a writ of mandamus against Davis, identifying him as an assigned judge, a role distinct from his appointed role as special master. *See* TEX. GOV'T CODE ANN. § 74.056 (Vernon 2005) (relating to assignment of judges by presiding judge of administrative region). Clearly, here, Davis is not in the role of an assigned judge.⁷ He stands in the role of a special master and, as such, is not one against whom we can issue a writ of mandamus.

Since the trial court has not entered an order affirming or otherwise reviewing the special master's rulings and/or recommendations, we have nothing to review which would authorize us to issue a writ of mandamus against the trial court on this petition. Relators do not seek such. Nor have they argued that the trial court's order appointing Davis as special master constitutes a blanket order affirming in advance any report or recommendations from the special master.⁸ We have not been requested to issue a writ of mandamus against the district court, nor could we without having any action by the trial court to review.

⁷In their petition, Relators claim that we have jurisdiction because they seek "relief from an order issued by a district judge in the Court of Appeals district." The only order of the trial court is that order of reference to the special master, and we see no elements of that order being attacked by Relators. The order being attacked is the order of the special master concerning the depositions. Relators are reminded of their duty to this Court to be accurate in their recitation of facts.

⁸We do not endorse such an argument or pass on the merits of such a contention. We only mention the possible argument to point out that Relators have limited their petition to seeking a writ of mandamus against Davis rather than the trial court that appointed Davis as special master.

Due to our lack of jurisdiction, we deny Relators' petition for writ of mandamus.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 13, 2009
Date Decided: July 14, 2009