

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1461 CD 2021

**MARLON OSBOURNE, MD AND CITY OF PHILADELPHIA OFFICE OF
THE MEDICAL EXAMINER,**

Petitioners,

V.

**JOSHUA M. GREENBERG AND SANDRA GREENBERG,
ADMINISTRATORS OF THE ESTATE OF MS. GREENBERG R.
GREENBERG,**

Respondents.

AMICUS BRIEF

Filed In Support of Petitioners

NATIONAL ASSOCIATION OF MEDICAL
EXAMINERS (NAME)
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Dated: April 29, 2022

TABLE OF AUTHORITIES

CASES

Chadwick v. Dauphin County Office of Coroner, 905 A.2d 600 (Pa. Comm. 2006)

Tanenbaum v. D'Ascenzo, 51 A.2d 757 (Pa. 1947)

Maxwell v. Farell School District Board of Directors, 112 A.2d 192 (Pa. 1955)

Anderson v. Philadelphia, 36 A.2d 442 (Pa. 1944)

STATUTES

16 Pa. C.S., Chap. IV, Art. IX *et.seq.*

16 Pa. C.S. § 9521 *et.seq.*

210 Pa. C.S. Rule 531

TREATISE ARTICLE

National Association of Medical Examiners Position Paper: *Medical Examiner, Coroner, and Forensic Pathologist Independence*, Acad Forensic Pathol, 2013 3(1) (93-98)

BASIS OF FILING

The National Association of Medical Examiners (“NAME”), makes this filing as *Amicus Curiae* pursuant to 210 Pa. C.S. Rule 531.

STATEMENT OF INTEREST

NAME, the *Amicus Curiae*, is the primary professional organization for forensic pathologists and associates in the U.S. It was founded in 1966 and has since expanded to include medical examiners and coroners, medicolegal death investigators, and affiliates throughout the world. The *Amicus* respectfully asks the Court to consider its argument against allowing Respondent’s requested remedy for a Writ of Mandamus to issue. The *Amicus* has chosen to speak to this Honorable Court in the case at bar because the independence in medical diagnosis and judgment in the medicolegal death investigation will be placed at risk if aggrieved third parties, however well-meaning and vested, are granted the power to change medicolegal death investigation findings through mandamus.

Medicolegal death investigations are performed by coroner and medical examiner offices to explain the occurrence of unexpected, suspicious, and/or violent deaths and to educate on prevention of premature death in the living. Medicolegal death investigations often require a medical procedure called an autopsy, which is an examination of the body of the deceased performed by a forensic pathologist. The findings of the forensic pathologist as to the scientific and medical explanation of a death may be necessary to support criminal and/or civil litigation, allow for estate settlements, and ensure that insurance companies make appropriate payments. Forensic pathologists may provide key testimony that will permit the incarceration of murderers and thereby prevent future murders, recognize the death of a child to be from

abuse by a caretaker, explain the industrial hazard of a death at work, reveal a previously unrecognized genetic disorder that will affect others in a family, report consumer product risks to the Consumer Product Safety Commission, contribute suicide statistics to suicide prevention, and identify human remains from a mass disaster, thereby allowing closure for the families.

Forensic pathologists, medical examiners and coroners are not infallible; however, these trained professionals are vested with authority to make determinations as to procedures, protocols, factual investigations, and medical diagnosis regarding cause and manner of death. Forensic pathologists are first medical doctors who specialize in pathology and then proceed to further specialization in forensic pathology. In order to reach this professional status, forensic pathologists must successfully matriculate through college and medical school and then must undergo rigorous pathology education and training. Forensic pathologists must complete an additional year in a forensic pathology fellowship program that is accredited by the Accreditation Council for Graduate Medical Education before testing for board certification. At least three board examinations must be successfully completed post-medical school to become a board-certified forensic pathologist, and then certification is maintained only by passing regularized testing conducted by the Pathology Board. In addition to continued testing to maintain certification, forensic pathologists must maintain state licensure by completing rigorous yearly continuing medical education training and adhering to moral character and ethics standards. In cases such as the one at bar, forensic pathologists use their specialized medical training to reach medical diagnosis relating to cause and manner of death through the autopsy, which is a surgical procedure focusing on particularized detail relating to a decedent's pathology, physical condition, medical condition, toxicological findings, medical history, external condition and features, and other factors contributing to medical diagnosis.

Coroners and medical examiners who are not forensic pathologists are imbued with powers, duties, and responsibilities to conduct investigations that enable the respective coroners and medical examiners to reach determinations and conclusions on cause and manner of death. Coroners, medical examiners, forensic pathologists and forensic toxicologists work closely and cooperatively to gather and interpret all medical, scientific, and factual information that is needed for a cause and manner of death determination. In Pennsylvania, medical examiners and coroners have broad statutory authority to conduct investigations, require autopsies, call inquests, and gather pertinent information so they can fulfill their primary statutory duties to make findings relating to death. Elected coroners not only undertake specialized training mandated under statute before commencing duties, but also must participate in continuing education to remain current in expertise. *See 16 Pa. C.S. § 9521 et seq.*

The foundational and critical independence that must be maintained by coroners, medical examiners, and forensic pathologists in making cause and manner of death determinations in medicolegal death investigations simply cannot be overstated. Cases that involve sudden, unexpected, and / or violent death often become loci of disagreement where pressure and influence become particularly acute. Such pressure not only come from surviving family members and closely-related aggrieved stakeholders, but also comes from political officials, prosecutors, mainstream and social media, and special interest groups who seek to influence the pathologist's findings for reasons other than scientific or medical validity and accuracy.

The NAME Position Paper entitled, "Medical Examiner, Coroner, and Forensic Pathologist Independence, Acad.For.Path. 2013 3(1) (93-98) provides objective statistical information demonstrating that many coroners, medical examiners and forensic pathologists are exposed to and have experienced significant pressure to modify their diagnosis and findings. In fact, the NAME position paper states that over 70% of the survey respondents from the NAME membership have been subjected to

pressure to amend or influence their respective findings, and many have suffered negative consequences for resisting that pressure and those influences. When cases are complicated, stigmatic, or perceptually disrespectful to the decedent, or financially impactful, vigorous challenges to findings are increasingly common. The forensic pathologist, however is a physician first—influences of the world must be set aside in his or her medical work to preserve the integrity of medical practice and equal access to justice and fairness in medicolegal death investigations to the greatest practicable degree.

NAME acknowledges in their aforementioned position paper on preservation of independence in medical diagnosis and findings that credible experts may have legitimate differences of opinions. The NAME position paper acknowledges that medical opinions based on current science and research can change over time. Notwithstanding these practical, commonsensical admissions, the NAME position paper clearly and forcefully articulates the position that coroners, medical examiners and forensic pathologists who make findings in medicolegal death investigations after full and fair investigation must be protected from outside influence that may have interests other than objective medical and scientific truth.

LEGAL AUTHORITY AND ARGUMENT

On behalf of the National Association of Medical Examiners, I have reviewed the Court's Order dated February 4, 2022, the Petition for Permission to Appeal Interlocutory Order dated December 23, 2021 filed by Plaintiff / Petitioners, and the Answer in Opposition to Petition for Permission to Appeal Interlocutory Order filed by Defendant / Respondents. I have also reviewed select notations in the Court's docket relating to these proceedings. The *Amicus* unequivocally acknowledges the complex facts and allegations underlying the events leading to the filing of the instant case to

which the *Amicus* has not been privy. The litigation of the instant case that precedes this filing has clearly been contentious, significant, and multifaceted in fact and law. While the *Amicus* will not speak directly to the facts in dispute, it must cite to the admissions in the Defendants' / Respondents' answer brief acknowledging that after a lengthy and detailed process of review and reconsideration, "...[t]he City Medical Examiner's Office has refused to...change Ellen's death certificate." Respondents Greenburg Answer in Opposition to Petition for Permission to Appeal Interlocutory Order, Page 6. It is the extended process of review conducted by the City of Philadelphia Office of the Medical Examiner – a multiyear process in which the Respondents were clearly included and heard – that makes this Honorable Court's adherence to existing precedent so extraordinarily critical.

The *Amicus* asks the Court to follow the on-point authority of *Chadwick v. Dauphin County Office of the Coroner*, 905 A.2d 600 (Pa. Comm. 2006) (*hereinafter Chadwick v. Dauphin County*) which specifically speaks into the *Amicus*' primary concern of preservation of independence in medicolegal death investigation findings and cause and manner of death determinations.

Just as the Respondents in the case at bar have requested a Writ of Mandamus lie, the Plaintiff in *Chadwick v. Dauphin County* requested a writ of mandamus issue to compel the county coroner to change the cause of death on the autopsy report. The *Chadwick v. Dauphin County* court stated:

As a high prerogative writ, mandamus writs are rarely issued and never where the plaintiff seeks to interfere with a public official's exercise of discretion." These fundamentals have long been honored by this Court. In *Bradly v. Casey*, this Court stated that "[t]he requirements to sustain an action in mandamus are clear. **It is an extraordinary remedy designed to compel public officials to perform a ministerial act or mandatory duty...**" (*Emphasis added and internal citations omitted*)

Chadwick v. Dauphin County at 603.

Medicolegal death investigation actors such as medical examiners, coroners, forensic pathologists, and forensic toxicologists use medical procedures, toxicology testing, prescription drug records, medical history and records, scene investigation, witness statements, and other data and information pertinent to an investigation and the totality of the circumstances to conduct comprehensive case medicolegal death investigation evaluations. The outcome of those processes not only allows determination as to medical diagnosis of the deceased including cause of death in a particular case, but those processes also provide discrete incremental statutory information for policy and law makers, including the Centers for Disease Control and Prevention's National Vital Statistics System. Such professional methodologies and processes that employ medical, scientific, and experiential training and expertise to reach specialized and detailed findings relating to cause and manner of death cannot accurately be termed a "ministerial act" or a "mandatory duty".

The *Amicus* acknowledges Plaintiff's accurate assertion that the *Chadwick v. Dauphin County* court did find that a writ of mandamus can be used to compel a public official to exercise discretion where he refuses to do so. The Court cited to *Tanenbaum v. D'Ascenzo*, 51 A.2d 757, 758 (Pa. 1947): "But *where* by a mistaken view of the law or by an arbitrary exercise of *authority there has been in fact no actual exercise of discretion, the writ will lie.*"

The *Tanenbaum* Court's explanatory language of clarification that immediately follows the quoted passage cited immediately above must be considered to complete the Court's reasoning as it relates to the case at bar as the language of clarification is contextually persuasive and directly relevant.. The *Tanenbaum* Court continued:

Tanenbaum did not establish that where discretion has been exercised and plaintiff believes the exercise to have been arbitrary, the discretionary act can be revised in a mandamus action."

Citation [.....]

The *Chadwick v. Dauphin County* opinion atcontinues with a citation to *Maxwell v. Farell School District Board of Directors*, 112 A.2d 192, 195 (Pa.1955) which distinguishes an ‘abuse of discretion’ from an ‘exercise of discretion with which an aggrieved party disagrees’. The *Maxwell* court stated:

It is well settled that in a mandamus proceeding a court can compel a public official who is vested with discretionary power to exercise discretion; but (unless the discretion is arbitrarily or fraudulently exercised or is based upon a mistaken view of the law) it cannot interfere with or control the official’s discretion or judgment. Expressed another way, it is the discretion and judgment of the official (who is vested with a discretionary power) which prevails and not that of a court or a jury or a person aggrieved; and a Court cannot compel such official to exercise his discretion in a manner which will produce a result which the Court may deem wise or desirable.

The *Chadwick* opinion at further states:

First, *Maxwell* relies on *Tanenbaum*, which holds that the exercise of discretion can be compelled if arbitrarily refused; it says nothing about correcting the arbitrary exercise of discretion.” Second, the remainder of the quote clarifies that discretion belongs to public officials, not to courts and not to plaintiffs.

The *Chadwick* opinion concludes, in part, with the following statement:

Indeed, our Supreme Court has long enjoined that “[w]here the [public

official] is clothed with discretionary powers, and has exercised those powers, mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, though in fact, the decision may be wrong.” *Chadwick v. Dauphin County Office of Coroner*, citing to *Anderson v. Philadelphia*, 36 A.2d 442, 444 (Pa. 1944).

CONCLUSION

The *Amicus* has extensively cited to the *Chadwick v. Dauphin County Office of the Coroner* decision with full awareness and respect for this Honorable Court, as the *Amicus* is very well-aware that the Court has full ability to read the opinion on its own. The direct, on-point authority and persuasive dicta in *Chadwick v. Dauphin County*, however speaks more eloquently and coherently than your *Amicus* can possibly argue. As an organization comprised of medical examiners, forensic pathologists, and medicolegal death investigators, the pain and anguish families and loved ones experience in death is acutely evident. When those who love the decedent feel wronged or unheard in the process, the pain and anguish is intensified and magnified. In those cases, it is not at all uncommon for families to feel strongly about correcting the perceived error or wrong.

Binding Pennsylvania authority, however, only allows this remedy when a public official has refused meaningful process, review, reconsideration, and decision-making based on the full and fair process. In this case, Respondents contributed to a comprehensive “re-look” at the entirety of the information that led to a cause and manner of death determination. That full review in which the Respondent’s participated resulted in a decision not to amend the cause and manner of death. As the Court in *Chadwick v. Dauphin County* makes clear, such a process was not arbitrary or fraudulent despite Respondent’s extreme disagreement with outcome. Your *Amicus*

respectfully asks this Honorable Court to so find, and to deny the Plaintiff's motion to proceed under Writ of Mandamus. The independence of coroners, medical examiners, forensic pathologists, and the entirety of the medicolegal death community depends on this Court's adherence to existing legal authority.

Respectfully Submitted this th day of May, 2022.

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I certify that this filing complies with the provisions of Case Records Public Access Policy of the Unified Judicial System of Pennsylvania as set forth in Pa. R. App. P. 127.

/s/ MJ Menendez
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Dated: April 30, 2022

CERTIFICATE OF SERVICE

I, Mary Jo (M.J.) Menendez, hereby certify that I served the foregoing *Amicus Brief* to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa. R. App. P. 121:

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Dated: April 29, 2021