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# **SUPREME COURT OF ALABAMA**

OCTOBER TERM, 2019-2020

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**Ex parte D.P.T.**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: D.P.T.)**

**v.**

**United States Automobile Association, American Bankers  
Insurance of Florida, Inc., and American Collectors  
Insurance, LLC)**

**(Geneva Circuit Court, CV-17-900037)**

SELLERS, Justice.

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D.P.T. seeks a writ of mandamus directing the Geneva Circuit Court to rescind a discovery order that, D.P.T. asserts, requires him to execute written authorizations allowing the respondents, D.P.T.'s insurers--United States Automobile Association, American Bankers Insurance of Florida, Inc., and American Collectors Insurance, LLC (hereinafter collectively referred to as "the insurers")--to obtain records containing communications that he alleges are privileged under the psychotherapist-patient privilege. See § 34-26-2, Ala. Code 1975; Rule 503, Ala. R. Evid. The insurers, however, have represented to this Court that they seek only D.P.T.'s "employment" records. In addition, the trial court itself filed a brief in response to the mandamus petition, which is a somewhat rare occurrence, in which it represented to this Court that it directed D.P.T. to execute an authorization allowing only the release of "employment" records. D.P.T., who, as the petitioner, has the burden of establishing a clear legal right to the issuance of the writ of mandamus, has not demonstrated that his "employment" records contain privileged communications. See Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001) (a petitioner for the writ of mandamus

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must demonstrate, among other things, "a clear legal right to the order sought"). Thus, we deny the petition for the writ of mandamus.

In July 2015, a vehicle occupied by D.P.T. and his minor stepson was rear-ended by another vehicle. On his own behalf and as next friend of his stepson, D.P.T. sued the driver of the other vehicle. Later, D.P.T. amended his complaint to state a claim against the insurers for underinsured-motorist benefits. D.P.T.'s and his stepson's claims against the driver of the other vehicle involved in the car accident were settled, and the action proceeded against the insurers.

D.P.T. has asserted that his injuries from the car accident forced him to retire prematurely from the United States Army, which resulted in a loss of income. Accordingly, the insurers sought to obtain records relating to D.P.T.'s military service. D.P.T., however, refused to execute an authorization allowing the Army to produce those records. It is undisputed that D.P.T. has been treated at clinics operated by the Department of Veterans Affairs for post-traumatic stress disorder resulting from his combat experience in Iraq and Afghanistan. The stated basis for his refusal to sign

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authorizations for the release of his military records is a claim that the records contain confidential communications between him and psychotherapists.

The insurers filed a motion to compel D.P.T. to sign an authorization for the release of the records, which the trial court granted within minutes of its filing. Subsequently, D.P.T. filed a motion asking the trial court to reconsider its ruling and, later, a motion for a protective order. The trial court denied those motions, and D.P.T. initiated this mandamus proceeding. This Court ordered answers and briefs on the issue whether the records sought are protected by the psychotherapist-patient privilege.

A writ of mandamus will issue if a trial court exceeds its discretion by ordering the production of records that are privileged. See Ex parte University of South Alabama, 183 So. 3d 915, 920 (Ala. 2015). Section 34-26-2, Ala. Code 1975, provides:

"[T]he confidential relations and communications between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

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Similarly, Rule 503(b), Ala. R. Evid., provides:

"A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family."

Although this Court has acknowledged exceptions to the psychotherapist-patient privilege, none of those exceptions would apply in the present case. See Ex parte West Mental Health Ctr., 884 So. 2d 835, 840 (Ala. 2003) (recognizing five exceptions to the psychotherapist-patient privilege--where the mental state of a parent in a child-custody matter is at issue, where a defendant in a criminal trial raises an insanity defense, where the communications are relevant in proceedings seeking to hospitalize a patient for mental illness, where the communications are made during a court-ordered examination of the mental condition of a party or witness, and where it is alleged that there has been a breach of duty arising out of the psychotherapist-patient relationship).

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In their response to D.P.T.'s mandamus petition, the insurers assert that "[t]he trial court ordered [D.P.T.] to execute an authorization for the release of employment records" only and that, therefore, the trial court "did not [exceed] its discretion by ordering discovery without an accommodation for the psychotherapist-patient privilege." In its brief in response to D.P.T.'s mandamus petition, consistent with the insurers' position, the trial court states that its discovery order "does not provide for the discovery of all [D.P.T.'s] military records" because "the records to be released are exclusively [D.P.T.'s] employment records."

To be sure, as D.P.T. points out, the insurers' motion to compel referenced more than just employment records. It specifically mentioned the alleged relevance of D.P.T.'s employment, retirement, and medical records and asked for an order directing D.P.T. to "sign all authorizations required for the disclos[ure] of these records." The trial court granted the insurers' motion without any expressed limitations. That said, in support of the motion to compel, the insurers submitted correspondence from their counsel to D.P.T.'s counsel, which requested that D.P.T. execute an

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authorization that identified only "employment" records as the "items [D.P.T. is] requesting [to be released from the Army]." A box that is specifically titled "medical records" on the authorization D.P.T. was asked to sign was not checked. As noted, the insurers have expressly represented to this Court that they sought only "employment" records, and the trial court has represented that it intended only to order D.P.T. to sign the authorization the insurers provided him and that was submitted with the motion to compel. Based on the materials before us, including the insurers' and the trial court's representations, we conclude that D.P.T. was asked to execute only the release allowing for the production of employment records and that the trial court compelled him to sign only that particular release. Because D.P.T. has not demonstrated that his employment records contain privileged psychotherapist-patient communications, we deny his petition for the writ of mandamus.

PETITION DENIED.

Parker, C.J., and Bolin and Wise, JJ., concur.

Mitchell, J., concurs in the result.

Shaw, Bryan, and Stewart, JJ., dissent.

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SHAW, Justice (dissenting).

The defendant insurers in the action below filed by the petitioner, D.P.T., filed a motion to compel the production of certain records, alleging that discovery was "necessary on topics including ... [D.P.T.'s] military employment history, factors leading to his alleged forced retirement, and medical treatment during military service." (Emphasis added.) The motion to compel stated that "discovery must be had regarding the timing of [D.P.T.'s] retirement and his medical and employment status" and that D.P.T. "had failed to disclose any military employment/medical records." (Emphasis added.) The defendant insurers asserted in their motion that D.P.T. "has very clearly made his military service/medical/retirement [sic] the paramount issue in this case" and that D.P.T.'s "employment and medical records are objectively relevant and material to his claim for employment and medical damages, and he should be ordered to sign an authorization to permit [the] Defendants to obtain those records." (Emphasis added.) The defendant insurers acknowledged concerns that some records might "contain sensitive and/or otherwise private information" and suggested that "a carefully crafted authorization would



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alleviate the concern." They further indicated that they were "agreeable" to a protective order "wherein any records received pursuant to the authorization may only be used in this litigation, and that at the conclusion of this litigation, the records, and all copies made, will be destroyed."<sup>1</sup>

The defendant insurers clearly have the right to discover the vast bulk of the materials they sought, including employment records, military-service records, and even medical records. However, it appears from the materials before us that some of D.P.T.'s medical records would include information that is protected by the psychotherapist-patient privilege. See Ex parte Western Mental Health Ctr., 884 So. 2d 835, 840 (Ala. 2003). Although the one authorization prepared in this case sought only "employment records," the motion to compel suggests that much more was desired. The trial court granted the motion without limitation, stating that D.P.T. had "14 days to provide the defendants with discovery requests." The trial court's order denying D.P.T.'s motion to reconsider required D.P.T. "to execute the

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<sup>1</sup>Such a protective order would still have required any privileged materials to be produced.

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appropriate authorizationsg for the records the [defendant insurers] request." (Emphasis added.)

It is true that, at present, the only authorization provided for D.P.T. to execute is for the production of his employment records, and the defendant insurers are clearly entitled to those records--as long as they do not contain privileged materials. However, as the present case currently stands, the trial court has entered an order that, on its face, grants a motion to compel that indicates that the defendant insurers also desired what appears to be privileged information and a follow-up order directing D.P.T. to execute authorizationsg. The fact that privileged information has not yet been sought does not cure this fact.

Therefore, D.P.T. has shown that, in entering the order granting the motion to compel, the trial court exceeded its discretion and that, accordingly, D.P.T. is entitled to mandamus relief. All that is required in this case is an appropriate protective order or modification of the order compelling production to ensure that privileged information is not produced. I would grant the petition and issue a writ directing the trial court either to amend its order or to

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enter an appropriate protective order. Therefore, I respectfully dissent.

Bryan and Stewart, JJ., concur.