

IN THE SUPREME COURT OF THE STATE OF NEVADA

DR. JEFF MOXLEY,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
DOUGLAS HERNDON, DISTRICT
JUDGE,

Respondents,

and

PATRICIA MORRIS, AN INDIVIDUAL;
AND BILLIE MORRIS, AN
INDIVIDUAL,
Real Parties in Interest.

No. 47641

FILED

JAN 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus or prohibition challenges a district court order denying petitioner's motion to dismiss.

Real parties in interest, Patricia and Billie Morris, filed a complaint for dental malpractice against petitioner Dr. Jeff Moxley. The Morrises' complaint did not include a dental expert's affidavit to support their allegations, as required under NRS 41A.071. Subsequently, Dr. Moxley moved to dismiss the complaint, based on the NRS 41A.071 deficiency. The Morrises opposed the dismissal motion and filed a countermotion to amend their complaint to include a dental expert's affidavit, which they had since obtained. The Morrises argued that leave to amend should be freely granted when justice so requires and that in their case, dismissal, even without prejudice, would bar their claims because the limitations period had expired. Dr. Moxley replied, arguing

that NRS 41A.071 and this court's opinion in Borger v. District Court¹ mandated dismissal. The district court denied Dr. Moxley's motion, "based on its inherent equity powers," and allowed the Morrises to amend their complaint to include the affidavit. This petition followed.

Both mandamus and prohibition are extraordinary remedies, and it is within this court's discretion to determine if a petition will be considered.² Writ relief generally is not available unless the district court manifestly abused its discretion or exercised its discretion arbitrarily or capriciously.³ We generally will not exercise our discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions to dismiss, unless dismissal is clearly required by a statute or rule, or an important issue of law requires clarification.⁴

As we explained in Borger, "NRS 41A.071 clearly mandates dismissal, without leave to amend, for complete failure to attach an affidavit to the complaint."⁵ Thus, this case presents a clear instance in which dismissal was mandatory under a statute, NRS 41A.071. Moreover, we have recently clarified that failure to comply with NRS 41A.071's affidavit requirement renders a complaint void and, thus, NRCP 15's

¹120 Nev. 1021, 102 P.3d 600 (2004).

²See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

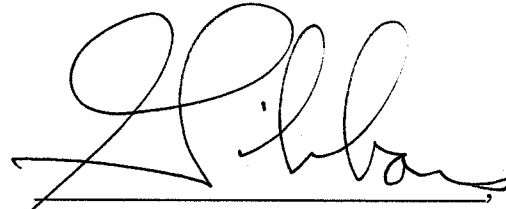
³See State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002).

⁴Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

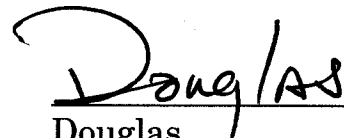
⁵120 Nev. at 1029, 102 P.3d at 606.

amendment provisions do not apply.⁶ Accordingly, because we conclude that the district court was required to dismiss the Morrises' complaint, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to dismiss without prejudice the Morrises' complaint.

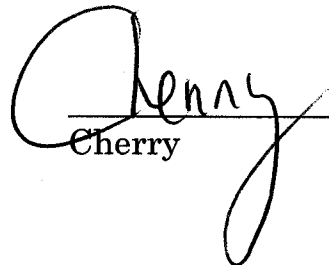
It is so ORDERED.



Gibbons J.



Douglas J.



Cherry J.

cc: Hon. Douglas W. Herndon, District Judge
Smith Law Group
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Goodman & Chesnoff
Clark County Clerk

⁶Washoe Med. Ctr. v. Dist. Ct., 122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 110, December 28, 2006).