

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY LOU MCCORMICK,  
Appellant,  
vs.  
PATRICIA SIMMS, D.O., AND THE  
UNIVERSITY MEDICAL CENTER, LAS  
VEGAS, NEVADA,  
Respondents.

No. 47680

**FILED**

JAN 11 2007

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order granting respondents' motion to dismiss. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

In the district court, appellant Mary Lou McCormick filed a complaint in proper person for medical malpractice against respondents, University Medical Center, a Nevada state hospital, and its employee, Dr. Patricia Simms. McCormick's complaint did not include a medical expert's affidavit to support her allegations, as required under NRS 41A.071, and respondents moved to dismiss based on this deficiency. McCormick did not file a written opposition and no court reporter was present during the hearing on the dismissal motion. The district court granted respondents' motion, concluding that dismissal was mandatory under NRS 41A.071. This appeal followed.

On appeal, McCormick does not contest that NRS 41A.071 mandated the dismissal of her complaint, but instead generally argues that, because NRS 41.035 caps damage awards against employees of state hospitals at \$50,000, NRS 41A.071 is discriminatory and operated in violation of her constitutional equal protection rights. To explain, McCormick contends that, because of the \$50,000 cap that she asserts would apply to her medical malpractice case, all of the attorneys to whom

she spoke refused to represent her, indicating that her case was “not worth their time.” She further contends that it is impossible to obtain a medical expert affidavit when proceeding in proper person because physicians have a policy of requiring that an affidavit request be from an attorney. Accordingly, she argues, in applying NRS 41A.071 to her, a plaintiff unable to obtain the required affidavit solely because she was proceeding without an attorney (due to NRS 41.035’s damages cap), the district court unconstitutionally denied court access to a distinct class of litigants, namely, medical malpractice plaintiffs in cases against state hospitals and state-employed doctors.

In her proper person appeal statement, McCormick states that she pointed out her frustration with the statutory cap and affidavit requirements to the district court. Because McCormick did not file any written opposition to the dismissal motion and the hearing was not recorded, however, it is unclear whether McCormick properly raised these issues below. At any rate, the district court did not make any findings in this regard. Generally, an appellant has the burden to create an adequate record on appeal.<sup>1</sup> Notwithstanding this general requirement, when appropriate, this court may consider constitutional issues even if they were not raised below.<sup>2</sup> In this case, however, McCormick’s argument that

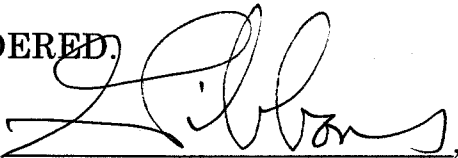
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<sup>1</sup>See Hampton v. Washoe County, 99 Nev. 819, 672 P.2d 640 (1983) (providing that, if the record is insufficient to allow review of the district court’s decision, this court will presume the lower court acted correctly); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) (noting that the appellant has the responsibility to provide this court with materials necessary for a determination of the issues raised in the appeal).

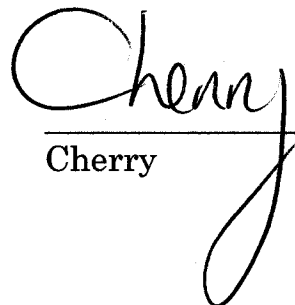
<sup>2</sup>Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 643-44, 600 P.2d 1189, 1191 (1979).

the statutes at issue are unconstitutional—as they were applied to her—raises factual issues that must have been presented to the district court in the first instance.<sup>3</sup> Here, there is nothing in the record to support McCormick’s equal protection arguments. For this reason, and based on McCormick’s failure to meaningfully oppose respondents’ motion to dismiss, we conclude that the district court properly applied NRS 41A.071 in determining that McCormick’s complaint must be dismissed.<sup>4</sup> Accordingly, we affirm the district court’s dismissal order.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

<sup>3</sup>See Malecon Tobacco v. State, Dep’t of Taxation, 118 Nev. 837, 59 P.3d 474 (2002) (noting, in the context of an appeal from a district court order denying review of an agency decision, that, when resolution of a constitutional issue depends on factual determinations, those factual determinations should be made first by the tribunal that is especially equipped to inquire, in the first instance, into the facts); see also Standard Prod. v. Dept. of Revenue, 773 P.2d 201, 206 (Alaska 1989) (noting, in the context of an appeal from a trial court order dismissing the underlying action for failure to exhaust administrative remedies, the importance of establishing a record for court review when a factual context is needed for deciding a constitutional issue); cf. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that the district court is the appropriate forum in which to resolve factual issues).

<sup>4</sup>See Washoe Med. Ctr. v. Dist. Ct., 122 Nev. \_\_\_, \_\_ P.3d \_\_\_ (Adv. Op. No. 110, December 28, 2006); Borger v. Dist. Ct., 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004).

cc: Hon. Timothy C. Williams, District Judge  
Mary Lou McCormick  
Annette L. Bradley  
Clark County Clerk