

IN THE SUPREME COURT OF THE STATE OF NEVADA

OLE THEINHAUS, M.D., AND
MELISSA PIASECKI, M.D.,
Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE, AND THE HONORABLE
CONNIE J. STEINHEIMER, DISTRICT
JUDGE,

Respondents,

and

LORRIE GOETZ, INDIVIDUALLY AND
AS EXECUTOR FOR THE ESTATE OF
RYAN GOETZ, DECEASED,

Real Parties in Interest.

No. 47813

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's decision to proceed with a medical malpractice case, despite alleged defects in the required expert affidavit.

In the underlying district court action, real party in interest Lorrie Goetz filed a wrongful death action against petitioners Ole Theinhaus, M.D., and Melissa Piasecki, M.D., both psychiatrists who had rendered services to decedent Ryan Goetz. Attached to Goetz's complaint was a letter directed to Goetz's attorney from Christopher J. Alexander, Ph.D., a psychologist who does not hold a medical degree or practice psychiatry.

Petitioners moved to dismiss Goetz's action, arguing that dismissal was required under NRS 41A.071. In their motion, petitioners pointed out, among other things, that the "letter" attached to Goetz's complaint was not from a medical doctor and did not indicate that petitioners had breached a standard of care applicable to psychiatrists. Goetz opposed the motion, arguing that NRS 41A.071 calls for the affidavit of a "medical expert," which does not necessarily mean that the expert must be a physician. She also argued that Dr. Alexander satisfied the "medical expert" requirement in this case and that Dr. Alexander's letter sufficiently supported the allegations in her complaint. Alternatively, Goetz requested leave to amend her complaint to "cure the affidavit's deficiencies," indicating that she was in the process of getting an additional affidavit from another expert. Petitioners replied, pointing out the distinctions between psychology and psychiatry, namely that psychiatrists are licensed medical doctors, allowed to prescribe medications, whereas psychologists are not, and arguing that dismissal was required under NRS 41A.071 since Goetz failed to provide an affidavit from a psychiatrist. The district court entered an amended order granting petitioners' motion to dismiss.

Thereafter, Goetz filed a motion for reconsideration, repeating the arguments contained in her opposition and also arguing that the district court erred by denying her request for leave to amend her complaint. She attached to her motion an affidavit from a board certified psychiatrist, supporting the complaint's allegations. Goetz argued that

dismissal, even without prejudice, would preclude her claims against petitioners because the limitations period had since expired.

Petitioners opposed the motion. The court, noting that Goetz had failed to comply with the district court rule that requires a party to first obtain court approval before moving for reconsideration, and acknowledging that the original “affidavit” was inadequate, nevertheless determined that reconsideration was appropriate because precluding a determination on the case’s merits, based on “[Goetz’s] counsel’s action[,] would not be in the interest of justice.” The district court then reinstated the action based on the amended complaint and denied petitioners’ subsequent motion for leave to file a motion for reconsideration of the reinstatement, finding that the first “medical affidavit, although insufficient and in need of amendment, was filed with the complaint and therefore satisfies the statute and Borger v. [District Court].^{1]}” This writ 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

¹120 Nev. 1021, 102 P.3d 600 (2004).

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

capriciously.³ We generally will not exercise our discretion to consider petitions for extraordinary writ relief that challenge district court orders refusing to dismiss an action, unless dismissal is clearly required by a statute or rule, or an important issue of law requires clarification.⁴

NRS 41A.071 is a procedural rule that “requires a sworn affidavit from a medical professional before the district court may entertain a medical malpractice claim.”⁵ 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.”⁶ Moreover, we have recently clarified that, “when a plaintiff has failed to meet NRS 41A.071’s expert affidavit requirement, the complaint is void ab initio and must be

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).


⁵Szydel v. Markman, 121 Nev. 453, 463 117 P.3d 200, 206 (2005) (Hardesty, J., dissenting). Although NRS Chapter 41A does not define the word “affidavit,” it is commonly defined as “[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” See Black’s Law Dictionary 58 (7th ed. 1999).

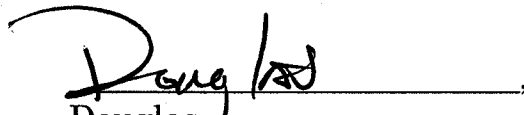
⁶120 Nev. at 1029, 102 P.3d at 606.

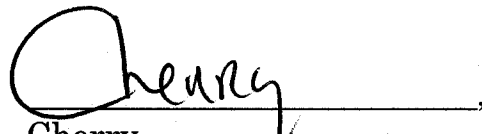
dismissed, without prejudice, and no amendment to cure an NRS 41A.071 defect is allowed.”⁷

In this case, the unsworn letter from the psychologist, Dr. Alexander, which was attached to the original complaint, failed to satisfy NRS 41A.071’s mandate that a complaint must be filed with an affidavit from a “medical expert who practices or has practiced in an area that is substantially similar to the type of practice [that petitioners’] engaged in at the time of the alleged malpractice.” Under these circumstances, we conclude that the district court was required to dismiss Goetz’s complaint. Accordingly, 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 Goetz’s complaint.

It is so ORDERED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

⁷Washoe Medical Ctr. v. Dist. Ct., 122 Nev. ___, ___, __ P.3d ___, __ (Adv. Op. No. 110, December 28, 2006).

cc: Hon. Connie J. Steinheimer, District Judge
Lemons Grundy & Eisenberg
Kenneth J. McKenna
Washoe District Court Clerk