

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANN CHAVEZ,
Appellant,

vs.

VALLEY HEALTH SYSTEMS, LLC, A
NEVADA CORPORATION D/B/A
DESERT SPRINGS HOSPITAL; PREM
KITTUSAMY, M.D., LTD., A
DOMESTIC PROFESSIONAL
CORPORATION; SANJAY MALHOTRA,
M.D., A PROFESSIONAL
CORPORATION; WILLIAM A. RESH,
M.D., A PROFESSIONAL
CORPORATION; EJAZ KAMBOZ, M.D.,
A PROFESSIONAL CORPORATION;
AND ROBERT C. WESLEY, JR., M.D.,
A PROFESSIONAL CORPORATION,
Respondents.

No. 50987

FILED

APR 09 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Anderson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a medical malpractice complaint. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In this case, appellant filed a complaint alleging medical malpractice and attached an unsigned document purporting to be an affidavit of a medical expert in support of the malpractice claims. Approximately two months later, but before appellant served the complaint on respondents, appellant filed a signed copy of the affidavit. Respondents filed a motion to dismiss, arguing that the complaint was void and must be dismissed for failure to comply with NRS 41A.071's mandatory affidavit requirement. Respondents argued that the unsigned document did not constitute a valid affidavit and thus the complaint was filed without an affidavit. Appellant countered by arguing that the purpose of the affidavit requirement under NRS 41A.071 was met because

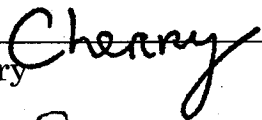
respondents were provided with notice of the claims and the affidavit was signed before the complaint was served. Appellant further argued that the unique circumstances of this case supported a more liberal application of the affidavit requirement. Specifically, appellant's counsel stated that he was retained following the death of appellant's previous counsel, that he had only a short period of time to file the complaint because of the statute of limitations involved, and that the medical expert had provided him with information to draft the affidavit but was unavailable to sign the affidavit immediately. The district court concluded that the unsigned document was insufficient to meet the affidavit requirement and granted the motion to dismiss based on NRS 41A.071 and this court's holding in Washoe Medical Center v. District Court, 122 Nev. 1298, 148 P.3d 790 (2006). This appeal followed. The parties' arguments on appeal mirror those asserted in district court.


In Washoe Medical Center, we concluded that a medical malpractice complaint filed without the required affidavit under NRS 41A.071 was "void ab initio and must be dismissed." Id. at 1300, 148 P.3d at 792. We continued by stating that "[b]ecause a void complaint does not legally exist, it cannot be amended." Id. In accordance with our ruling in Washoe Medical Center, we affirm the district court's order dismissing appellant's complaint. As the district court recognized, the unsigned document attached to the complaint did not constitute an affidavit and was therefore invalid to support the complaint. Therefore, the complaint, filed without the required affidavit, was void and the defect could not be cured by a subsequent affidavit.


Appellant argues that because she attached an affidavit, although unsigned, this case falls under this court's decision in Borger v. District Court, 120 Nev. 1021, 102 P.3d 600 (2004), which held that when

an affidavit was attached to a complaint but there is a dispute over whether it complies with all the requirements under NRS 41A.071, the plaintiff may be permitted to file an amended complaint. *Id.* at 1029-30, 102 P.3d at 606. The Borger case, however, is distinctly different from the present case. In Borger, there was no dispute as to whether the affidavit filed was a legal, valid affidavit. The dispute was whether the affidavit met a separate requirement, under NRS 41A.071, that the affidavit be provided by a medical expert in a similar field. *Id.* at 1026-27, 102 P.3d at 604. In the present case, since the document was unsigned, there was no affidavit filed at all. Therefore the Borger case is inapposite,¹ and the district court properly dismissed the complaint. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Cherry

 J.
Saitta

 J.
Gibbons

¹On appeal, appellant impliedly asserts an argument that an affidavit is unnecessary in this case based on the res ipsa loquitor doctrine because the claims fall within the common knowledge of a layperson. See Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005). In her opposition to the motion to dismiss in district court, however, appellant stated that this was not a res ipsa loquitor case. Regardless, appellant's claims do not fall under the res ipsa loquitor doctrine as outlined in NRS 41A.100; therefore, a medical affidavit was required.

cc: Hon. Mark R. Denton, District Judge
Robert F. Saint-Aubin, Settlement Judge
George E. Cromer
Arnold Weinstock
Carroll, Kelly, Trotter, Franzen & McKenna
Hall, Prangle & Schoonveld, LLC/Las Vegas
John H. Cotton & Associates, Ltd.
Eighth District Court Clerk