

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANNA SALCEDO, M.D.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,

and

JOHN PACELLI, AS SPECIAL
ADMINISTRATOR FOR THE ESTATE
OF DAVID PACELLI, INDIVIDUALLY,
AND STEPHANIE PACELLI,
INDIVIDUALLY,
Real Parties in Interest.

No. 55751

FILED

APR 28 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss in a medical malpractice action.

Decedent David Pacelli came under the care of Dr. Rick Martin, an emergency room physician, when he was admitted to the emergency room for treatment for food poisoning after ingesting fish sandwiches from McDonalds. Dr. Martin indicated in David's medical record that he was critically ill on March 24, 2007. Due to David's labored respiratory efforts, Dr. Martin had one of the paramedics intubate him. During the intubation, David vomited and aspirated a large amount of gastric contents into his lungs, requiring him to be connected to a respirator. David was taken to the x-ray department for an MRI and

vomited without the presence of a nasogastric tube or suction device. David's condition did not improve, and he passed away on April 17, 2007.¹

On March 21, 2008, the real parties in interest, the decedent's brother, John Pacelli, acting as administrator of David's estate and individually, and mother, Stephanie Pacelli, acting individually (collectively, the Pacellis), filed a complaint alleging products liability and medical malpractice against McDonalds, St. Rose Hospital, physicians, and other hospital staff involved in David's medical care; Dr. Salcedo was not named as a defendant and Dr. Simone Russo's affidavit attached in support of the Pacellis' complaint did not name Dr. Salcedo. The Pacellis subsequently filed a first amended complaint, which also failed to name Dr. Salcedo as a defendant. After being granted leave to do so, in March 2009, the Pacellis subsequently filed a second amended complaint, which added Dr. Salcedo as a defendant. However, Dr. Salcedo was not served with the second amended complaint. In October 2009, the Pacellis filed a third amended complaint, which included Dr. Salcedo as a defendant and was served upon her.

Dr. Salcedo filed a motion to dismiss in December 2009, based on NRCP 12(b)(5), NRS 41A.071, NRS 41A.097, and NRCP 10(a). Dr. Salcedo argued that the Pacellis failed to establish that she breached the standard of care to bring a claim for medical malpractice against her, no claim had been asserted against her, the complaint failed to comply with

¹During discovery, Dr. Martin indicated that his care of David ended when David was assessed by Dr. Salcedo, the admitting physician. The district court also states in its order denying Dr. Salcedo's motion to dismiss that Dr. Salcedo took over David's care from Dr. Martin.

NRS 41A.071 because Dr. Russo's affidavit did not support the allegations and did not set forth that he practiced in a substantially similar type of practice as her, and the Pacellis' third amended complaint did not relate back to the original complaint and was barred by the statute of limitations.

After hearing arguments, the district court concluded that: (1) Dr. Simone Russo's affidavit complied with NRS 41A.071; (2) the complaint and amendments clearly set forth a claim for medical malpractice; and (3) Dr. Salcedo was on notice of the litigation and was not prejudiced by the Pacellis' delay in naming her as a defendant. Thereafter, the district court denied Dr. Salcedo's motion to dismiss on all grounds.

Dr. Salcedo filed the instant petition for a writ of mandamus or prohibition arguing that the district court erred in denying her motion to dismiss because the complaint did not comply with the mandatory expert affidavit requirements of NRS 41A.071, and that the district court had a mandatory duty to dismiss the action against her because there was no legal basis to add her to the action after a year had passed since the action was filed and the statute of limitations had expired. We agree.²

Standard of review

A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion. See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). A writ of prohibition arrests the proceedings of a district

²The parties are familiar with the facts, and we will not recount them except as pertinent to our disposition.

court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. A writ of mandamus or prohibition “shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.170.

Medical expert affidavit

The primary issue this petition presents is whether the district court was required to grant Dr. Salcedo’s motion to dismiss pursuant to NRS 41A.071. Dr. Salcedo argues that Dr. Russo’s affidavit fails to mention her name or provide any information regarding her alleged malpractice. She contends that dismissal was required under NRS 41A.071 for failure to file an affidavit supporting the allegations contained in the action.

NRS 41A.071 states:

If an action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.

(Emphasis added.) This court has held that “under NRS 41A.071, a complaint filed without a supporting medical expert affidavit is void ab initio and must be dismissed.” Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006). For this reason, in analyzing cases involving NRS 41A.071’s expert filing requirement, this court has refused to allow subsequent amendment of a complaint to bring it into compliance with the statute. Id. at 1304, 148 P.3d at 794 (“A complaint that does not comply with NRS 41A.071 is void and must be dismissed; no amendment

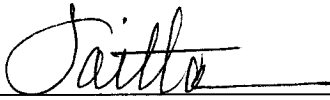
is permitted.”). “[A]lthough [NRS 41A.071] may have harsh results in some cases, it cuts with a sharp but clean edge.” *Id.* at 1305, 148 P.3d at 795 (quotations omitted).


The district court found that Dr. Russo’s affidavit was sufficient because he indicated “that the care rendered by Dr. Martin and medical staff fell below the acceptable standard of care.” In addition, the district court found that although Dr. Salcedo was “not specifically referenced in the affidavit, the affidavit makes it clear that it is Dr. Russo’s opinion that the medical care in general rendered during Mr. Pacelli’s hospital stay fell below the standard of care.” We disagree.

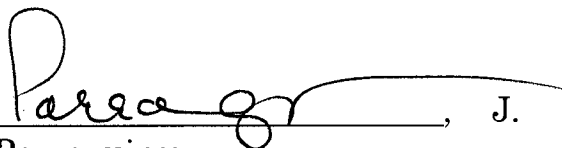
Dr. Russo’s affidavit does not support the allegations against Dr. Salcedo because Dr. Salcedo is not named, and although the affidavit is broadly written, Dr. Salcedo’s involvement is not implicated. We conclude that Dr. Russo’s medical affidavit was defective as to claims against Dr. Salcedo because it did not specifically name Dr. Salcedo or specify the conduct supporting the allegations against her. Thus, the district court had an obligation under the strict language of NRS 41A.071, which requires a medical affidavit to include support for allegations against the named defendant doctors, to dismiss the action, and it manifestly abused its discretion when it failed to do so. We therefore conclude that a writ is appropriate in this case because Dr. Salcedo does not have “a plain, speedy, and adequate remedy in the ordinary course of law.” *Redeker*, 122 Nev. at 167, 127 P.3d at 522; NRS 34.170.³ Accordingly, we

³Dr. Salcedo also argues that the district court erred in denying her motion to dismiss because the Pacellis failed to meet the requirements of
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ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant Dr. Salcedo's motion to dismiss due to the defective affidavit and the statute of limitations.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. James M. Bixler, District Judge
Hutchison & Steffen, LLC
Lemons, Grundy & Eisenberg
Christensen Law Offices, LLC
Eighth District Court Clerk

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NRS 41A.097 by adding her as a defendant long after the expiration of the one-year statute of limitations had run. We agree and conclude that a writ directing the district court to dismiss the complaint against Dr. Salcedo would be appropriate on this basis as well.