

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SUNRISE MOUNTAINVIEW  
HOSPITAL, INC.,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE ROB  
BARE, DISTRICT JUDGE,  
Respondents,  
and  
DONALD STOVNER, AN INDIVIDUAL,  
Real Party in Interest.

No. 72192

FILED

JUN 20 2017

ELIZABETH A. BROWN  
CLERK OF DISTRICT COURT  
BY *Amulca*  
DEPUTY CLERK

*ORDER GRANTING PETITION FOR WRIT OF MANDAMUS*

This original petition for a writ of mandamus challenges a district court decision denying a motion to dismiss for failure to attach a proper affidavit pursuant to NRS 41A.071.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Although this court will generally not consider writ petitions denying motions to dismiss, in some instances, writ relief may be appropriate for such petitions when no factual dispute exists and the district court was obligated to dismiss the action pursuant to clear authority. *See Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59.

17-901276

NRS 41A.071 requires dismissal of a medical malpractice action not accompanied by an expert affidavit supporting the allegations therein. This requirement may be satisfied either by a formal affidavit sworn before an officer authorized to take oaths or by an unsworn declaration that complies with NRS 53.045. *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 921-22 (2010).

Real party in interest does not dispute that the statement attached to his initial complaint was not an affidavit. Instead, he contends that it met NRS 53.045's requirements for an unsworn declaration. As relevant here, an unsworn declaration executed outside of Nevada must substantially state that the declaration is sworn "under penalty of perjury *under the law of the State of Nevada.*" See NRS 53.045(2) (emphasis added).


The declaration submitted by real party in interest was executed by a Pennsylvania doctor, and real party in interest has never asserted that it was executed within the state of Nevada. Thus, it was required to include language indicating that it was declared pursuant to Nevada law. See *id.* Nevertheless, the declaration submitted by real party in interest did not contain such language. As a result, we conclude that it did not comply with NRS 53.045(2). And because the complaint was not supported by an affidavit or unsworn declaration that complied with NRS 53.045, the district court was required to dismiss the complaint. See NRS 41A.071 (providing that the district court "shall dismiss" an action that is not supported by an expert affidavit).

Moreover, insofar as the initial complaint was void ab initio due to the lack of an affidavit or unsworn declaration, it could not be amended, see *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev.

1298, 1304, 148 P.3d 790, 794 (2006) (concluding that a complaint that does not comply with NRS 41A.071 “does not legally exist and thus it cannot be amended”), and the district court was likewise required to dismiss the purported amended complaint. Thus, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to dismiss the complaint in Eighth Judicial District Court Case No. A706414.<sup>1</sup>

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Rob Bare, District Judge  
Hall Prangle & Schoonveld, LLC/Las Vegas  
Parker & Edwards  
Eighth District Court Clerk

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<sup>1</sup>Because we grant the petition for the reasons discussed herein, we need not reach petitioner’s additional arguments regarding the substantive sufficiency of the initial supporting affidavit or the sufficiency of the additional purported affidavit submitted with real party in interest’s amended complaint.