IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL D. TARLTON,
Appellant,
vs.
JENELLE LAUCHMAN, PT, AN INDIVIDUAL; AND PR AQUISITION CORPORATION, INC., D/B/A SELECT PHYSICAL THERAPY, A DELAWARE CORPORATION,
Respondents.

No. 75597-COA

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a complaint in a medical malpractice action. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Appellant Michael D. Tarlton filed a medical malpractice complaint against respondents PR Acquisition Corporation, Inc., dba Select Physical Therapy and Jenelle Lauchman, without attaching the expert affidavit required by NRS 41A.071. Tarlton filed an amended complaint, again without attaching the expert affidavit. After the statute of limitations expired on Tarlton's claims, he filed a second amended complaint, this time attaching the expert affidavit. Respondents moved to dismiss the complaint, arguing that the original and first amended complaints were void ab initio because they did not include the required expert affidavit, and that the second amendment complaint was filed after the statute of limitations expired. The district court agreed with respondents and granted the motion to dismiss pursuant to NRCP 12(b)(5) and NRS 41A.071. On appeal, Tarlton argues that the district court erred in dismissing his complaint. We agree, as the facts of this case did not warrant dismissal under NRCP 12(b)(5) and NRS 41A.071.

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A dismissal for failure to state a claim pursuant to NRCP 12(b)(5) is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

NRS 41A.071 prescribes:

> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
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> 1. Supports the allegations contained in the action;
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> 2. Is 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 professional negligence;
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> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
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> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

The purpose of NRS 41A.071 "is to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (internal quotation marks omitted).

"[A] medical malpractice complaint filed without a supporting medical expert affidavit [required by NRS 41A.071] is void ab initio, meaning

it is of no force and effect." *Id.* And, an NRS 41A.071 defect "cannot be cured through amendment," because the complaint does not legally exist. *Id.* at 1300-01, 1304, 148 P.3d at 792, 794. However, in very limited circumstances, a complaint that is not concurrently filed with an expert affidavit will survive a motion to dismiss, and in such limited circumstances, the district court should read the complaint as incorporating the unattached affidavit. *See Baxter v. Dignity Health*, 131 Nev. 759, 765, 357 P.3d 927, 931 (2015). In particular,

> where the complaint incorporates by reference a preexisting affidavit of merit, which is thereafter filed and served with the complaint, and no party contests the authenticity of the affidavit or its date, the affidavit of merit may properly be treated as part of the pleadings in evaluating a motion to dismiss.

Id.

In *Baxter*, before filing his medical malpractice complaint, the plaintiff consulted with a medical expert that prepared the supporting declaration. *Id.* at 761, 357 P.3d at 928. The complaint referenced the doctor's declaration, and asserted that the declaration was being filed at or about the time of the filing of the complaint. *Id.* Although the plaintiff did not attach the declaration to the complaint, he filed the declaration the next day. *Id.* The district court dismissed the plaintiff's complaint, by which time the statute of limitations had run on the plaintiff's claim. *Id.* at 761-62, 357 P.3d at 928-29. The Nevada Supreme Court clarified that "NRS 41A.071 does not state that the affidavit of merit must be physically attached to the malpractice complaint—or even physically filed, for that matter." *Id.* at 764-65, 357 P.3d at 931. Determining that the plaintiff's complaint referenced the declaration, the affidavit was filed five judicial hours after the complaint, and the defendants were in "no worse position" than if the plaintiff had attached

the declaration to the complaint instead of filing it one day later, the supreme court concluded that "[s]ubstantial justice is done by reading the complaint as incorporating the declaration in deciding dismissal." *Baxter*, 131 Nev. at 765-66, 357 P.3d at 931 (internal quotation marks omitted).

Here, although Tarlton filed his original complaint and his first amended complaint without concurrently filing the required expert affidavit, we conclude that the circumstances presented in this case save Tarlton's complaint from dismissal. Dr. Wolpov's affidavit preexisted Tarlton's complaint and the complaint referenced the preexisting affidavit. Respondents do not dispute the affidavit's authenticity or its date. Respondents also do not assert that they would be in a worse position than if Tarlton had attached the affidavit to the complaint prior to the expiration of the statute of limitations. Rather, respondents were able to challenge the sufficiency of the affidavit because the complaint incorporated the affidavit by reference. Indeed, Tarlton's unattached affidavit was central to his claims. Tarlton later attached the affidavit to the complaint, albeit after the statute of limitations had run on his claims. NRS 41A.071 does not state that the affidavit has to be physically attached to the complaint or even physically filed, *Baxter*, 131 Nev. at 764-65, 357 P.3d at 931; thus, Tarlton's failure to attach the affidavit to the complaint prior to the expiration of the statute of limitations, alone, does not constitute a failure to timely comply with NRS 41A.071.[1] Tarlton did not initiate his medical malpractice action without consulting an expert's opinion, consistent with NRS 41A.071's purpose "to

[1]We note that prior to the holding in *Baxter*, the supreme court interpreted NRS 41A.071 as mandating dismissal if the expert affidavit was not physically attached to the complaint. *See, e.g., Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004).

ensure that plaintiffs file non-frivolous medical malpractice actions in good faith based upon competent expert medical opinion." *Baxter*, 131 Nev. at 766, 357 P.3d at 931. The district court should have read the complaint as incorporating the affidavit when deciding respondents' motion to dismiss. *See Baxter*, 131 Nev. at 764, 357 P.3d at 930 (providing that the district court can "consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." (internal quotation marks omitted)). As a result, the district court erred in granting respondents' motion to dismiss.[2] Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, A.C.J.
Douglas

_____, J.
Gibbons

TAO, J., concurring:

Before filing his complaint, Tarlton obtained an expert affidavit supporting his medical malpractice claims, but failed to file the affidavit with

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[2]In light of our holding, we need not address respondents' contention that Tarlton's second amended complaint is impermissible pursuant to NRCP 15(a).

the court or serve it upon any defendant until after the statute of limitations had expired. My colleagues conclude that under these circumstances Tarlton's complaint cannot be dismissed for failure to comply with NRS 41A.071. I concur to the extent that this outcome is consistent with the Nevada Supreme Court's conclusion in *Baxter v. Dignity Health*, 131 Nev. 759, 357 P.3d 927 (2015). *Baxter* states that an expert affidavit need not be either attached to the complaint, or even "physically filed, for that matter," so long as the complaint refers to it or incorporates it. *Id.* at 764-65, 357 P.3d at 931. Under principles of vertical stare decisis, we must follow and apply this reasoning faithfully. I'm just not sure that this reasoning is entirely correct in view of what the statute actually says.

> NRS 41A.071 states, in pertinent part:
>
> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
>
> 1. Supports the allegations contained in the action . . . .

The words of this statute say that the action must be dismissed if it is "filed without an affidavit." I agree with *Baxter* that these words don't require that the affidavit be attached to the complaint. But I disagree with *Baxter* to the extent it reads the sentence to mean that the affidavit need not ever be physically filed in the action at all. If a sign warns that customers cannot "enter without a shirt and shoes," I don't think most people would understand that to mean that customers may enter entirely naked so long as they own a shirt and shoes that happen to exist somewhere in the world; I imagine most people would naturally understand the sign to require that the shirt and shoes must actually be worn by the customer as he enters the store. Likewise, when NRS 41A.071 says that an action must be dismissed if "filed without an

affidavit," I would think the most natural reading is that the affidavit must be filed as part of the action, not that it merely happen to exist somewhere. Indeed, reading the sentence as *Baxter* suggests violates accepted rules of English grammar by making the verb "filed" apply to the noun "action" but not apply to the noun "affidavit"—which leaves the noun "affidavit" without an accompanying verb at all, just dangling there without logically connecting to the rest of the sentence.

Consequently, I wonder whether *Baxter* correctly interprets the words the Legislature actually chose to utilize in NRS 41A.071. Nonetheless, *Baxter* is currently the law that governs this appeal, and Tarlton did file his affidavit in the action (he just filed it late), exceeding what *Baxter* seems to permit. Accordingly, I agree that dismissal was unwarranted, and concur.

Tao, J.
Tao

cc: Hon. Richard Scotti, District Judge
Parry & Pfau
Alverson Taylor & Sanders
Eighth District Court Clerk