IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE ESTATE OF VICTOR BURT ORSCHEL, DECEASED; AND VICTOR ARTHUR ORSCHEL, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF VICTOR BURT ORSCHEL,
Appellants,
vs.
VALLEY HEALTH SYSTEM, LLC, D/B/A SPRING VALLEY HOSPITAL MEDICAL CENTER; CHRISTOPHER CHOI, M.D.; CHRISTOPHER CHOI, M.D., A PROFESSIONAL CORPORATION, A NEVADA CORPORATION; NAYA MCKINNON, M.D.; AND MCKINNON MEDICAL GROUP, PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY,
Respondents.

No. 75556-COA

ORDER OF REVERSAL AND REMAND

The estate of Victor Burt Orschel and Victor Arthur Orschel appeal from a district court order dismissing a medical malpractice action pursuant to NRS 41A.071. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Appellants sued Valley Health System, LLC (Valley); Christopher Choi, M.D.; Christopher Choi, M.D., a Professional Corporation; Naya McKinnon, M.D.; and McKinnon Medical Group, PLLC, (respondents), to recover damages for the alleged wrongful death of Victor Burt Orschel. Appellants attached to their complaint the sworn medical expert affidavit of Sami A. Hashim, M.D., in which Dr. Hashim alleged that the physicians and employees of Spring Valley Hospital, Dr. Christopher Choi, and Dr. Naya

19-31287

McKinnon "fell below the standard of care" in treating Victor Burt Orschel. Specifically, in his affidavit, Dr. Hashim opined that Dr. McKinnon negligently treated Orschel's rheumatoid arthritis with Remicade, a "black box" drug,[1] and that Valley and Dr. Choi negligently treated Orschel by failing to recognize the known adverse reactions associated with the use of Remicade during hospital admissions and doctor visits, which resulted in worsening symptoms as the Remicade caused Orschel's health to decline, eventually leading to his death.

Valley moved to dismiss the complaint under NRCP 12(b)(5), arguing that Dr. Hashim's affidavit was defective due to its failure to sufficiently allege specific acts of negligence, and that the complaint therefore failed to state a claim upon which relief could be granted. Valley's co-respondents joined in the motion, further arguing that the affidavit was defective under NRS 41A.071 because Dr. Hashim did not practice, at the time of the alleged malpractice, in an area substantially similar to respondents' respective practice areas. Appellants opposed and moved the district court for leave to amend the complaint. Over the course of three hearings, the district court ordered supplemental briefing and, at respondents' request, Dr. Hashim's deposition.

Ultimately, the district court granted Valley's motion to dismiss, the joinders thereto, and McKinnon's separate motion to dismiss, and denied appellants' countermotion to amend. The district court found that Dr. Hashim's affidavit failed to comply with NRS 41A.071 and, therefore, that appellants' complaint was *void ab initio* and could not be amended under

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[1]"This type of warning" "appears on a prescription drug's label and is designed to call attention to serious or life-threatening risks." U.S. Food and Drug Administration, *A Guide to Drug Safety Terms at FDA*, https://www.fda.gov/media/74382/download (last visited May 29, 2019).

Washoe Medical Center v. Second Judicial District Court, 122 Nev. 1298, 148 P.3d 790 (2006). This appeal followed.

"We review a district court's conclusions of law, including statutory interpretations, de novo." *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004). Further, because NRS 41A.071 provides "the threshold requirements for initial pleadings in medical malpractice cases, not the ultimate trial of such matters, we must liberally construe this procedural rule of pleading in a manner that is consistent with our NRCP 12 jurisprudence." *Id.* at 1028, 102 P.3d at 605. When reviewing dismissal under NRCP 12(b)(5), "this court will recognize all factual allegations in [appellant's] complaint as true and draw all inferences in its favor. [Appellant's] complaint should be dismissed only if it appears beyond a doubt that [appellant] could prove no set of facts, which, if true, would entitle [appellant] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).[2]

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[2]Appellants argue that the district court effectively granted summary judgment by considering matters beyond the pleadings in its order granting dismissal. We acknowledge that the district court cited Dr. Hashim's deposition testimony to support dismissal under NRS 41A.071, and respondents have not contested reviewing the dismissal under the summary judgment standard. While we agree that "if the district court considers matters outside of the pleadings, this court reviews the dismissal order as though it were an order granting summary judgment," *Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08, 167 P.3d 408, 409 (2007), we decline to extend this rule to dismissal of a complaint as *void ab initio* under NRS 41A.071. Because a complaint found to be *void ab initio* "does not legally exist," *Washoe Med.*, 122 Nev. at 1304, 148 P.3d at 794, a court cannot enter summary judgment on that complaint, *see Sahlberg v. P.S.C. Inc.*, 626 Fed. App'x 719, 722 (9th Cir. 2015) ("Summary judgment is a final judgment on the merits.").

As a preliminary matter, the court erred in permitting Dr. Hashim's deposition at the pleading stage of the proceedings, and then in considering his testimony as a basis for granting dismissal under NRS 41A.071. This is because NRCP 12 jurisprudence governs, which requires a review of the factual allegations in the complaint (and in medical malpractice cases, the attached expert's affidavit).[3] Further, even if we were inclined to treat this as a motion for summary judgment, there is no mechanism under NRCP 56 to permit the *moving* party to request discovery in order to facilitate dismissal. Indeed, by requesting the deposition of Dr. Hashim there is an implicit acknowledgment that his affidavit met the initial pleading requirements of NRS 41A.071, and respondents were required to ask the court to look beyond the pleadings to obtain dismissal.

We next address the requirements of NRS 41A.071, which are as follows:

> 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 . . . [s]upports the allegations contained in the action; . . . [i]s 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; . . . [i]dentifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and . . . [s]ets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

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[3]We note that this case involves an affidavit that was in fact attached to the complaint and therefore is readily distinguished from those cases where no affidavit was filed or was filed after the complaint. *See, e.g., Baxter v. Dignity Health*, 131 Nev. 759, 761, 357 P.3d 927, 928 (2015); *Washoe Med.*, 122 Nev. at 1301, 148 P.3d at 792.

Initially, we dispel the notion that NRS 41A.071 requires Dr. Hashim to have the same title or exact credentials as respondents. *Borger*, 120 Nev. at 1028, 102 P.3d at 605 ("[T]he statute does not require that the affiant practice in the same area of medicine as the defendant."). Although NRS 41A.071 does not define the testimonial requirement of "substantially similar," the supreme court in *Borger* approvingly cited a Connecticut court's interpretation of a similarly worded statute in holding "that [t]he threshold question of admissibility is governed by the scope of the witness' knowledge and not the artificial classification of the witness by title." *Id.* at 1027-28, 102 P.3d at 605 (alteration in original) (internal quotation marks omitted); *see Marshall v. Yale Podiatry Grp.*, 496 A.2d 529, 531 (Conn. App. Ct. 1985). This is also consistent with Nevada caselaw interpreting an expert's qualifications to testify at trial. *See, e.g., Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007) ("[T]here is no requirement that the expert medical witness be from the same specialty as the defendant; the issue is simply one of the witness'[s] actual knowledge.") (second alteration in original) (internal quotation marks omitted). Thus, in *Staccato*, a physician was permitted to testify as to the applicable standard of care for a nurse when administering intramuscular injections because both were qualified to administer them. *Id.* at 530-31, 170 P.3d at 505-06.

In this case, appellants argue that Dr. Hashim practices and has practiced in an area substantially similar to respondents' respective practice areas, and that the district court too strictly construed NRS 41A.071 when it found that he had not. Respondents answer that Dr. Hashim did not practice in a substantially similar area, and Drs. McKinnon and Choi further argue

that Dr. Hashim not only did not practice in a substantially similar area, but also did not do so "at the time of the alleged professional negligence."[4]

We agree with appellants and conclude that Dr. Hashim's affidavit satisfied the threshold requirements of NRS 41A.071 as a matter of law. Specifically, his affidavit was a sworn statement, and it identified each respondent by name or by conduct and addressed the reasons why each fall below the standard of care in treating Orschel. Notably, Dr. Hashim's affidavit is six pages, five of which specifically describe how each respondent

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[4]Respondents argue that the language of NRS 41A.071 that specifies "at the time of the alleged professional negligence" must be read to require the expert to have been practicing, at the time of the alleged malpractice, in an area that is substantially similar to the defendant's practice area. This interpretation, however, is incorrect under the statute's plain language. The statute simply requires that the expert practice or have practiced in an area that is substantially similar to the area in which the defendant practiced at the time of the alleged professional negligence. Thus, "at the time" modifies the defendant's practice area, and not the expert's.

Dr. Choi further argues that because Dr. Hashim admitted in his deposition that he is "not an expert in primary care," the district court could not "judicially impose expert qualifications upon" him. Valley and Dr. Choi also argue that appellants waived their appeal as to Valley and Dr. Choi, respectively, because appellants did not address how the district court erred by dismissing the suit with respect to them specifically and as distinct parties, and both purport to support this argument by citing *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280 (2006). We conclude that these arguments are unpersuasive and decline to further consider them. *Cf. id.* at 330 n.38, 130 P.3d at 1288 n.38 (explaining that this court need not consider an appellant's argument that is not cogent or lacks relevant, supporting authority). Valley also argues that the affidavit was insufficiently specific in various respects under NRS 41A.071. Because the district court did not address these issues, however, we decline to do so in the first instance. *See, e.g., Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (declining to address an argument that the district court did not address).

fell below the applicable standard of care.[5] Further, attached to the affidavit was Dr. Hashim's curriculum vitae, which lists his medical education, training, and experience. Based on his credentials and the facts as presented, we agree that Dr. Hashim has satisfied the requirement of "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 malpractice," NRS 41A.071(2), including his experience in administering medication used to treat rheumatoid arthritis. Dr. Hashim's affidavit also sufficiently details his practice "as a senior attending physician . . . at St. Luke's Hospital/Medical Center," where he "complete[s] medical rounds each day seeing patients." Dr. Hashim "also attend[s] to private patients."[6] Thus, under the rigorous review that NRCP 12(b)(5) requires for a motion to

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[5]We are not persuaded by Valley's argument that Dr. Hashim does not identify the hospital employees, including the hospitalists (physicians), by name. NRS 41A.071(3) specifically permits the affidavit to either identify by name, or describe by conduct, each provider of health care alleged to be negligent. In his affidavit, Dr. Hashim does in fact identify the attending hospitalist by name, and describes instances of allegedly negligent conduct by the hospital employees.

[6]We note that Dr. Hashim never testified that he did not know what a hospitalist is, but that it "is not [his] terminology," and that he speaks instead of "interns, residents and fellows, and teaching."

We further note that these findings are immaterial under NRS 41A.071. The statute provides a clear standard for expertise—practice in a substantially similar area—and whether the affiant holds him or herself out as an expert in a particular area, whether he or she has practiced recently in that area, whether that practice is in an *identical* area to that of the alleged malpractice, whether he or she works with professionals in that identical area, and how he or she refers to hospitalists are therefore immaterial to his or her qualification as an expert under the statute. A medical expert affiant simply must practice or have practiced in a substantially similar area.

dismiss, we conclude that the court erred in dismissing the complaint under NRS 41A.071. *See Borger*, 120 Nev. at 1028, 102 P.3d at 605 (holding that the district court erred by determining that a medical expert affiant did not practice in a substantially similar area when "[t]he diagnosis and treatment rendered by [the defendant doctor] implicate[d] [the expert]'s area of expertise").[7]

Therefore, we conclude that the district court erred by finding Dr. Hashim's affidavit defective under 41A.071, and granting dismissal of the complaint as *void ab initio*. Accordingly, we

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

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

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[7]In granting dismissal, the district court found that appellants' complaint was *void ab initio* under *Washoe Med.*, 122 Nev. at 1298, 148 P.3d at 790, and thus denied leave to amend. Because we have reversed the dismissal, we decline to fully consider appellants' argument that the district court abused its discretion by denying leave to amend. We note for the parties and the district court, however, that under *Borger*, the district court may grant leave to amend a defective affidavit. 120 Nev. at 1029-30, 102 P.3d at 606. A complaint is *void ab initio* only for *total failure* to include an affidavit. *See Washoe Med.*, 122 Nev. at 1304-05, 148 P.3d at 794 (holding that a complaint that included *no affidavit whatsoever* was *void ab initio*, which conclusion "accords with our previously noted view of NRS 41A.071 and NRCP 15(a)'s leave-to-amend provision [in *Borger*]). We also note that appellants may have the opportunity to identify additional experts when expert disclosures are due to address additional standard of care issues.

cc: Hon. William D. Kephart, District Judge
M. Nelson Segel, Settlement Judge
Stovall & Associates
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Carroll, Kelly, Trotter, Franzen, McBride & Peabody/Las Vegas
Hall Prangle & Schoonveld, LLC/Las Vegas
Eighth District Court Clerk