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### Summary of Washoe Med. Ctr. v. Dist. Ct., 122 Nev. Adv. Op. No. 110

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*Nevada Law Journal*

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## **CIVIL PROCEDURE — AMENDED COMPLAINTS**

### **Summary**

An appeal involving an issue of first impression – whether a plaintiff in a medical malpractice action may amend her complaint, under NRCP 15(a), to comply with NRS 41A.071, which requires that complaints for medical malpractice be accompanied by a medical expert affidavit.

### **Disposition/Outcome**

The court granted Washoe Medical’s petition. The court also directed the district court clerk to issue a writ of mandamus directing the district court to grant Washoe Medical’s motions to dismiss the complaint and to strike the first amended complaint in a medical malpractice action.

### **Factual and Procedural History**

On March 31, 2005, one day before the statute of limitations expired, Barker filed a complaint against Washoe Medical and Dr. Glenn for alleged negligence during a surgical procedure. However, Barker did not include a medical expert affidavit with her complaint, as required under NRS 41A.071.

On June 22, 2005, Washoe Medical moved to dismiss the complaint because it violated NRS 41A.071. On July 1, 2005, after the statute of limitations had run, Barker filed an amended complaint that included the required affidavit, which was dated June 30, 2005. Barker argued that because the motion to dismiss was not a responsive pleading, she had the right to amend under NRCP 15(a).

The district court concluded the Barker’s amendment was permissible under NRCP 15(a). Washoe Medical then petitioned the court for a writ of mandamus directing the district court to dismiss Barker’s original complaint and strike her first amended complaint.

### **Discussion**

#### **Writ of Mandamus**

A writ of mandamus is available “to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.”<sup>2</sup> Unless dismissal is clearly required by a statute or rule or an important issue of law needs clarification, the court will not exercise its discretion to consider writ petitions that challenge district court orders denying motions to dismiss. This writ petition involves an issue of first impression that needs

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<sup>1</sup> By Aubree Nielsen

<sup>2</sup> NEV. REV. STAT. § 34.160 (2005).

clarification, so the court exercised its discretion to entertain the writ petition. This issue is a matter of statutory interpretation, which the court reviews de novo.

### NRS 41A.071 and complaint amendment to comply with the expert affidavit requirement

NRS 41A.071 states, “If an action for medical malpractice...is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit.” Conversely, NRCP 15(a) permits a plaintiff to amend her pleading once as a matter of course before a responsive pleading is served. Barker argued that NRCP 15(a) supersedes NRS 41A.071. Washoe Medical argued that Barker’s complaint was dismissed by operation of law when it was filed without a medical expert affidavit, and therefore, there was no complaint to be amended. The court agreed with Washoe Medical.

The court contrasted this case with its *Lapica v. District Court* decision,<sup>3</sup> which was based on NRS 41A.070. This statute states that when a medical malpractice complaint fails to meet this statute’s requirement, the complaint “is subject to dismissal for failure to comply.” The court held in the case that because the defendant did not move to dismiss the complaint and because the court did not dismiss the complaint sua sponte, the complaint was valid. Because the Legislature used the language “subject to” dismissal in NRS 41A.070, it allowed the court discretion. However, the Legislature used the “shall” be dismissed language in NRS 41A.071, which indicates that discretion is mandatory.

The court found that the legislative history of NRS 41A.071 further supports the conclusion that a complaint that does not comply with NRS 41A.071 is void and cannot be amended. Thus, the court concluded that a medical malpractice complaint filed without a supporting medical expert affidavit is void *ab initio*, meaning it is of no force and effect. The defective complaint does not legally exist, and therefore, it cannot be amended. Thus, NRCP 15(a)’s amendment provisions are inapplicable.

The court found that this conclusion accords with its previously noted view of NRS 41A.071. Also, the court found that this conclusion is similar to the majority of state courts that have addressed the issue under similar statutory schemes.

### **Dissent**

#### ROSE, C.J., dissenting:

Justice Rose believed the majority’s interpretation disregarded NRCP 15(a) and also exalted form over substance. He believed that although the Legislature had the power to enact NRS 41A.071, the law must not conflict with the court’s preexisting procedural rules. He interpreted NRS 41A.071 and NRCP 15(a) as being in direct conflict, and under the court’s rules of construction, NRCP 15(a) supersedes NRS 41A.071 and controls. Thus, a plaintiff may amend her complaint under NRCP 15(a) to bring the complaint into compliance with NRS 41A.071.

Justice Rose further dissented because the majority’s decision disposes of cases without a determination on their merits. He cited examples from New Jersey courts and Illinois courts where the courts liberally construed the medical malpractice statutes so that cases will be decided on the merits.

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<sup>3</sup> 97 Nev. 86, 624 P.2d 1003 (1981).

MAUPIN, J., with whom DOUGLAS, J., agrees, dissenting:

Justices Maupin and Douglas disagree with the majority's interpretation of NRS 41A.071. The statute does not state that a complaint filed in violation is void; rather, it requires the district court to dismiss the action when such violations are identified. The dissent finds that the noncompliant complaint is voidable and still pending until dismissed. Ms. Barker brought the complaint into compliance prior to the ultimate ruling upon the motion to dismiss. Under NRCP 15(a), the amended complaint related back to supersede the original filing for purposes of the rules of pleading and for statute of limitation purposes. Thus, the amendment of the complaint cured the defective complaint to comply with NRS 41A.071. If the Legislature wanted to make defective complaints void, it could have done so, but because it did not do so, the statute must give way to the procedural rules governing the amendment of pleadings.

### **Conclusion**

When a plaintiff fails to meet NRS 41A.071's expert affidavit requirement, the complaint is void *ab initio* and must be dismissed, without prejudice, and no amendment to cure an NRS 41A.071 defect is allowed. Accordingly, the court granted Washoe Medical's petition and directed the court clerk to issue a writ of mandamus directing the district court to grant Washoe Medical's motion to dismiss and motion to strike.