

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ZUFELT AND DARLENE
ZUFELT, INDIVIDUALLY AND AS
HUSBAND AND WIFE,
Appellants,

vs.

MARK L. CAPENER, M.D.; AND BASIN
EAR, NOSE AND THROAT,
Respondents.

No. 44531

FILED

DEC 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a medical malpractice action for failure to include a medical expert affidavit with the original complaint. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

Respondent Mark Capener, M.D. operated on appellant Roland Zufelt. Complications arose from the surgery, and Roland, along with his wife, appellant Darlene Zufelt, filed a medical malpractice action against Capener. The Zufelts failed to include a medical expert affidavit with their complaint, as required under NRS 41A.071. The Zufelts later amended their complaint to include a medical affidavit and served Capener with the amended pleading. Capener answered the amended complaint, but then moved to dismiss, arguing that the complaint must be dismissed under NRS 41.A071. The district court granted Capener's motion and dismissed the original complaint, finding the lack of a medical affidavit fatal. The Zufelts appeal, arguing that the district court erred.



We conclude that the district court properly granted Capener's motion and dismissed the Zufelts' complaint.

We review an order granting a motion to dismiss for an abuse of discretion.¹ However, the district court's decisions here involve statutory construction, which is an issue of law that we review de novo.² We recently held that, under NRS 41A.071, a complaint filed without a supporting medical expert affidavit is void and cannot be amended to cure the NRS 41A.071 defect.³ Therefore, we conclude that the district court correctly dismissed the Zufelts' original complaint.⁴

¹Abreu v. Gilmer, 115 Nev. 308, 312-13, 985 P.2d 746, 749 (1999).


²Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004).

³Washoe Medical Ctr. v. Dist. Ct. (Barker), 122 Nev. ___, ___, ___ P.3d ___, ___ (Nev. Adv. Op. 110 2006); see also Borger v. Dist. Ct., 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (concluding in dictum that leave to amend may not be granted to cure the lack of an expert affidavit).

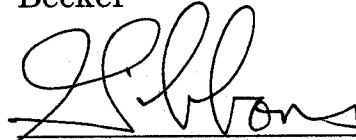
⁴We have considered the parties' other assertions and conclude that they are without merit.

Accordingly, we

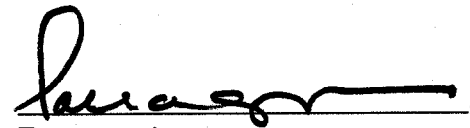
ORDER the judgment of the district court AFFIRMED.⁵

 _____, J.

Becker

 _____, J.

Gibbons

 _____, J.

Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Noel E. Manoukian, Settlement Judge
Steven J. Klearman & Associates
Osborne & Hall, Chtd.
Washoe District Court Clerk

⁵The Honorable James W. Hardesty, Justice, voluntarily recused himself from participation in the decision of this appeal.

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

Based upon my dissent in Washoe Medical Center v. District Court,¹ I believe that the district court reached the correct result in this matter, but for the wrong reason.

The incident stimulating the running of the two-year statute of limitation for bringing this malpractice suit occurred in February of 2001. Mr. and Mrs. Zufelt filed their complaint in December of 2002, approximately three months prior to the running of the prescriptive period. This complaint contained no expert affidavit in compliance with NRS 41A.071. No motion to dismiss or answer to the complaint was ever filed. Rather, the Zufelts filed an amended complaint that complied with the statute in March of 2004, well after the statutory limitation period had expired. Dr. Capener filed an answer to the amended complaint and moved to dismiss the action. The district court dismissed the original complaint because of the failure to provide the NRS 41A.071 affidavit. In this, the district court concluded that the amended complaint could not be used to cure the original statutory defect and, thus, did not relate back under NRCP 15(c).

NRS 41A.071 provides as follows:

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.

¹122 Nev. ___, ___ P.3d ___ (Nev. Adv. Op. 110 _____ 2006).

NRS 41A.071 does not state that a complaint filed in violation of it is void; rather, it requires the district court to dismiss the action when such violations are identified. This renders the non-compliant complaint voidable and still pending until dismissed. Under our decision in Borger v. District Court,² the district court could not, upon a motion to dismiss a complaint, grant leave to amend a complaint with no affidavit. That said, the Zufelts filed their amended complaint before any attempt was made to serve Dr. Capener. All during this time, the action remained pending. Certainly, under NRCP 15(a), the Zufelts were permitted to file the amended complaint anytime before service of a responsive pleading which, under NRCP 15(c), related back to supersede the original filing for purposes of the rules of pleading and for statute of limitation purposes. Accordingly, the complaint as amended, cured the filing defect and therefore complied with NRS 41A.071. Thus, our dictum in Borger does not apply because, as of the application to dismiss this action, the complaint was in compliance and not subject to dismissal. In short, once the district court appreciates the defect, it must dismiss; but when the complaint at issue has already been brought into compliance, the court must allow the action to proceed.

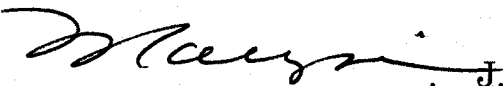
Had the Legislature wanted to make such filings void, or provide that such filings would not toll the applicable statute of limitations, it could have done so.³ While one could reasonably conclude

²120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004).

³Even if the district court was correct in its analytics, it appears that the statute of limitations was tolled between the filing of the original complaint and dismissal of the action.

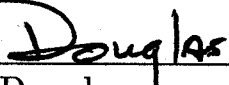
that the Legislature never intended that a complaint filed in violation of NRS 41A.071 could toll prescriptive time periods, the medical malpractice legislation at issue here was enacted in derogation of the common law. Thus, the failure to expressly provide that such filings are either void or are ineffective to toll applicable limitation periods compels the result I suggest we should obtain here.⁴ Absent such express provisos, this piece of legislation must give way to our procedural rules governing the amendment of pleadings.⁵

I would, however, affirm the district court below. The action should have been dismissed under NRCP 4(i) for failure to effect service within 120 days of the filing of the complaint. Here, the Zufelts left this action unattended without service for two years before attempting to comply with NRS 41A.071.



Maupin

I concur:



_____, J.
Douglas

⁴See Rush v. Nevada Industrial Insurance Commission, 94 Nev. 407, 407, 580 P.2d 952, 954 (1978) (noting that this court will not construe a statute as taking away a common law right at the time of enactment “unless that result is imperatively required”) (quoting Fabricius v. Montgomery Elevator Company, 121 N.W.2d 361, 362 (Iowa 1963)); Orr Ditch Co. v. Dist. Ct., 64 Nev. 138, 164, 178 P.2d 558, 571 (1947) (stating that unless intention to alter is clearly expressed, there is a presumption that lawmakers did not intend to abrogate the common law).

⁵See State v. Dist. Ct., 116 Nev. 953, 959, 11 P.3d 1209, 1213 (2000).

ROSE, C.J., dissenting:

I dissent for the same reasons that I dissented in Washoe Medical Center v. District Court (Barker).¹ However, the Zufelts never served their original complaint, and they waited nearly one-and-one-half years to amend the original complaint and then serve the amended complaint. The district court did not reach whether the Zufelts' complaint should be dismissed for failure to timely serve under NRCP 4(i), and I would remand this case to the district court for that determination.


_____, C. J.
Rose

¹122 Nev. ___, ___, ___ P.3d ___, ___ (Nev. Adv. Op. 110, ~~November~~ ^{December} 28, 2006). pkc