

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FAMILY HEALTH CARE SERVICES,
D/B/A SOUTHWEST MEDICAL
ASSOCIATES HOME HEALTH, A
DOMESTIC CORPORATION,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; THE HONORABLE DOUGLAS
SMITH, DISTRICT JUDGE; AND THE
HONORABLE CRISTINA D. SILVA,
DISTRICT JUDGE,

Respondents,

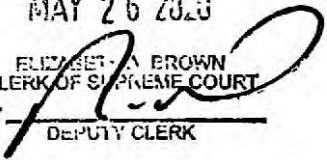
and

SHEILA T. MILLER, INDIVIDUALLY,
Real Party in Interest.

No. 79213-COA

FILED

MAY 26 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order denying, in part, a motion to dismiss in a medical malpractice action.¹

Real party in interest Sheila T. Miller filed a complaint against petitioner Family Health Care Services, dba Southwest Medical Associates Home Health (SMA) and other defendants for damages she incurred when part of a sponge was left in her body that should have been removed following wound VAC treatment. She attached medical expert affidavits from a nurse and a doctor to the complaint. SMA subsequently filed a

¹While District Court Judge Cristina D. Silva signed the order at issue in this matter, that order memorialized a prior ruling on the motion to dismiss by former District Court Judge Douglas E. Smith.

motion to dismiss the claims against it, arguing that the expert affidavits were deficient under NRS 41A.071 and that the rebuttable presumption of negligence set forth in NRS 41A.100(1), Nevada's *res ipsa loquitur* provision did not apply.² Miller opposed the motion and requested leave to amend the expert affidavits if necessary. The district court granted dismissal as to Miller's *res ipsa loquitur* claim but otherwise denied the motion to dismiss, finding the affidavits sufficient. This petition followed.

This court has original jurisdiction to grant a writ of mandamus, and issuance of such extraordinary relief is solely within this court's discretion. *See Nev. Const. art. 6, § 4; Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). 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 a manifest abuse or an arbitrary or capricious exercise of discretion. *See NRS 34.160; State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). In that regard, this court looks to whether the district court misinterpreted or misapplied a law or otherwise reached a decision that was founded on prejudice or contrary to the evidence or rule of law. *See id.* at 931-32, 267 P.3d at 780 (explaining when a district court will be deemed to have manifestly abused its discretion or otherwise exercised it in an arbitrary or capricious manner). Here, having considered the petition, answer and reply, as well as the parties' supporting documentation, we elect to exercise our discretion and consider the petition for a writ of mandamus

²In her answer, Miller argues that the district court erred in dismissing her *res ipsa loquitur* claim and therefore, that claim should still be valid and allowed to proceed against SMA. We decline to address the merits of this argument because Miller has not filed a petition for extraordinary writ relief on this basis, and this request is thus not properly before us as she has failed to seek affirmative relief.

in the interest of judicial economy and to control a manifest abuse of discretion. *See Smith*, 107 Nev. at 677, 818 P.2d at 851; *see also Armstrong*, 127 Nev. at 931, 267 P.3d at 779.

“A complaint that does not comply with NRS 41A.071 is void and must be dismissed; no amendment is permitted.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). NRS 41A.071 provides, in relevant part, that a medical malpractice complaint must be filed with an affidavit that supports the allegations contained in the action, identifies by name or conduct each health care provider who is alleged to be negligent, and sets forth a specific act of negligence as to each defendant.

In its petition, SMA argues that the affidavits attached to Miller’s complaint were deficient because they failed to set forth allegations of professional negligence or medical malpractice by SMA specifically or SMA’s healthcare providers. Miller failed to respond to that argument in her answer to the petition, and thus she has conceded this point. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the respondents’ failure to respond to appellant’s argument in their answering brief as a confession of error). Regardless, our review reveals that SMA’s arguments have merit as the affidavits failed to set forth any specific act of alleged negligence by SMA such that they could not support any allegations against it. Indeed, the affidavits indicated that the affiants did not review records from the home healthcare providers, such as SMA. Thus, the affidavits are deficient and could not be relied on to support Miller’s claims against SMA.

While Miller does not address the sufficiency of her affidavits, she does argue that the district court should consider her request to amend the affidavits, since it failed to do so. But this argument lacks merit. The case law is clear, as set forth above, that a complaint that does not comply

with NRS 41A.071 is void, that it must be dismissed, and that no amendment is allowed. *See Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794; *see also Alemi v. Eighth Judicial Dist. Court*, Docket No. 66917 (Order Granting Petition for Writ of Mandamus, Jan. 7, 2016) (concluding, albeit in an unpublished order, that leave may not be granted to amend a medical malpractice complaint and affidavit when the affidavit is present, but deficient); NRAP 36(c)(3) (allowing citation to the supreme court's unpublished dispositions issued on or after January 1, 2016, for their persuasive value). Therefore, since the district court may not grant leave to amend in this situation, there is no basis upon which to direct the district court to consider whether to allow the affidavits to be amended. And because the affidavits were deficient as to SMA and amendment is not available, the district court was required to dismiss the complaint as to SMA, without prejudice. *See* NRS 41A.071.

Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF mandamus instructing the district court to grant SMA's motion to dismiss and dismiss the action as to SMA without prejudice.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Eighth District Court, Chief Judge
Eighth District Court, Department 8
Hon. Cristina D. Silva, District Judge
Hutchison & Steffen, LLC/Las Vegas
Workers' Comp Lawyers of Nevada
Eighth District Court Clerk