


IN THE SUPREME COURT OF THE STATE OF NEVADA

REGINA UCKER,
Appellant,
vs.
STEVEN KURTZ, M.D.; STEVEN B.
KURTZ, M.D., CHARTERED; ALAN
DEMBY, M.D.; AND ALAN DEMBY,
M.D., A PROFESSIONAL
CORPORATION,
Respondents.

No. 43786

FILED

JAN 23 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant's medial malpractice complaint for failure to comply with NRS 41A.071. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On May 11, 2004, appellant filed a complaint, alleging that she suffered permanent damage to her intercostals nerve after respondents, on May 11, 2001, performed a radical nephrectomy¹ surgery on appellant. Respondents answered and moved to dismiss appellant's complaint, arguing that the medical expert affidavit appellant filed with her complaint did not comply with NRS 41A.071, which requires that the expert affiant must practice or have practiced "in an area that is

¹A radical nephrectomy involves complete removal of a cancerous kidney and the neighboring adrenal gland and lymph nodes.

substantially similar to the type of practice [respondents] engaged in at the time of the alleged malpractice.”

Specifically, respondents argued that appellant wrongly claimed that respondents were “general surgeons,” when, in fact, they were board certified urologists, who performed a urological surgery on appellant. Respondents contended that, because appellant’s medical expert was a family practitioner, who specialized in geriatric medicine, he was not qualified to attest to the standard of care respondents rendered to appellant during the radical nephrectomy. Respondents noted that appellant’s medical expert had only received minimal training in general surgery in his first post-graduate year, more than sixteen years earlier, while respondents completed four-year residencies in urology, including specialized surgical training.

Appellant opposed the motions, arguing that respondents were acting as surgeons at the time when they operated on her, and appellant’s medical expert had surgical experience and training necessary to determine the standard of care in her case

Respondent Dr. Demby replied, asserting that, since completing a fellowship in geriatric medicine in 1992, appellant’s expert had practiced exclusively in the area of family medicine and geriatrics. Dr. Demby argued that, because appellant’s expert’s practice area was wholly dissimilar to urology, he was not qualified to attest to the standard of care rendered when respondents performed the urological surgery on appellant. Respondent Dr. Kurtz replied, noting, among other things, that

a radical nephrectomy is performed to remove a cancerous kidney and, generally, only urologists, and not general surgeons, are given hospital privileges to perform this type of surgery. Dr. Kurtz argued that, regardless, appellant's expert was not a "general surgeon" because a general surgeon has to complete a four-year residency in general surgery in order to become board eligible to take the certification examination in general surgery. After a hearing on the matter, the district court granted respondents' motion to dismiss appellant's complaint.

On appeal, appellant argues that her claims against respondents were directed at them while they were functioning as general surgeons, not urologists, on May 11, 2001. She contends that, because her medical expert had training in "surgery/medicine" between 1984 and 1985 and "general surgery" between 1986 and 1987, he was qualified to attest to the standard of care rendered during the May 11, 2001 surgery.

Respondents argue that there was no evidence to suggest that appellant's expert ever performed a radical nephrectomy, and that he is neither a general surgeon nor a urologist. Thus, they assert that he is not qualified to attest to the standard of care in this case. Respondents also contend that appellant's expert fails under Borger v. District Court² because neither his present nor former practice reasonably relates to the practice respondents engaged in at the time of the alleged malpractice.

²120 Nev. ___, 102 P.3d 600 (2004).

A complaint for medical malpractice is subject to dismissal if it is not filed with “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.”³ Whether the expert affiant meets NRS 41A.071’s qualification requirement, is measured by the “scope of the witness’ knowledge and not the artificial classification of the witness by title.”⁴ Although NRS 41A.071 “does not allow unrestricted use of medical expert witnesses who testify based upon acquired knowledge outside the witness’ area of present or former practice,” it does allow “medical experts to testify in medial malpractice cases where their present or former practice reasonably relates to that engaged in by [respondents] at the time of the alleged professional negligence.”⁵

In Borger, we explained that, for purposes of NRS 41A.071, a gastroenterologist was qualified as a medical expert where appellant’s claims were against a general surgeon who misdiagnosed a gastroenterological disorder and performed a related, unnecessary

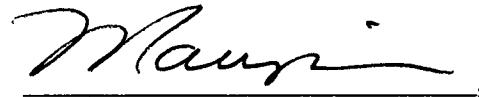
³NRS 41A.071.

⁴Borger, 120 Nev. at ___, 102 P.2d at 605 (quoting Marshall v. Yale Podiatry Group, 496 A.2d 529, 531 (Conn. App. Ct. 1985)).

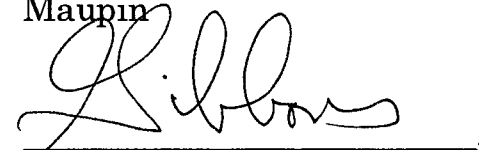
⁵Id. at ___, 102 P.2d at 605.

surgery.⁶ In this case, appellant's expert is a geriatric family practitioner and there is nothing in the record to support that he has now, or ever had, a practice reasonably related to urology or general surgery. As supported by the record, a radical nephrectomy is a surgery generally reserved for urologists for the treatment of a urological disease. Thus, there exists no nexus between appellant's expert's experience and practice in family medicine and geriatrics and the radical nephrectomy surgery respondents performed to remove appellant's kidney. Accordingly, as appellant failed to meet the requirements set forth under NRS 41A.071, we

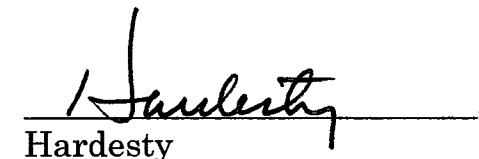
ORDER the judgment of the district court AFFIRMED.⁷

 _____, J.

Maupin

 _____, J.

Gibbons

 _____, J.

Hardesty

⁶Id.

⁷Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

cc: Hon. Valorie Vega, District Judge
Victor Lee Miller
Lewis Brisbois Bisgaard & Smith, LLP
Mayor & Horner, Ltd.
Clark County Clerk