

IN THE SUPREME COURT OF THE STATE OF NEVADA

NANCY GREALIS,  
Appellant,

vs.

GARY KANTOR, M.D.; NEVADA DIALYSIS  
INC., A NEVADA CORPORATION; RENAL  
DIALYSIS OF LAS VEGAS, LTD., A  
NEVADA CORPORATION; RENAL  
DIALYSIS CENTER OF LAS VEGAS-ACUTE  
SERVICES, INC., A NEVADA  
CORPORATION; AND KANTOR  
NEPHROLOGY CONSULTANTS, LTD., A  
NEVADA CORPORATION,  
Respondents.

No. 44907

**FILED**

JUN 16 2006

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a medical malpractice action and from a post-judgment order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

In the district court, appellant Nancy Grealis alleged that respondents had failed to provide her with adequate medical care for her foot injury, and, as a result, her foot required amputation. She alleged that respondent Gary Kantor, M.D. had been her primary care provider. Grealis attached to her complaint an affidavit from John Corcoran, M.D., an internist specializing in infectious diseases, stating that the care and treatment Dr. Kantor provided to Grealis was below the applicable standard of care.

Dr. Kantor, an internist and nephrologist specializing in the treatment of kidney disorders, moved to dismiss Grealis' complaint, arguing that her affidavit did not comply with NRS 41A.071, requiring

that the affiant must practice or have practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice. During a hearing on the dismissal motion, respondents conceded that Dr. Kantor had administered antibiotic treatment to Grealis, but asserted that, although Drs. Kantor and Corcoran were both internal medicine subspecialists, Dr. Corcoran was nevertheless not qualified to attest to the “standard of care. . . for a nephrologist who does dialysis and at the same time undertakes to administer an antibiotic.” Grealis asserted that the issue was Dr. Kantor’s treatment in an area that overlapped with Dr. Corcoran’s area of practice. The district court granted the motion, determining that Grealis “need[ed] a nephrologist,” and later denied Grealis’ motion for a new trial. Grealis appeals.

“We review a district court’s conclusions of law, including statutory interpretations, de novo.”<sup>1</sup> Additionally, because a district court’s decision to dismiss a case is subject to a rigorous standard of review,<sup>2</sup> “this court must construe the pleadings liberally and draw every fair intendment in favor of the plaintiff.”<sup>3</sup> Under NRS 41A.071, a medical malpractice complaint is subject to dismissal if it is not filed with a supporting affidavit from a medical expert who practices in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice. As explained in Borger v. District Court, whether an

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<sup>1</sup>Borger v. Dist. Ct., 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004).

<sup>2</sup>Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 14 P.3d 1275 (2000).

<sup>3</sup>Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985).

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."<sup>4</sup> "[M]edical experts [may] testify in medical malpractice cases where their . . . practice reasonably relates to that engaged in by [respondents] at the time of the alleged professional negligence."<sup>5</sup>

Here, Grealis argues that the affidavit from Dr. Corcoran, an infectious disease specialist, was sufficient under this court's decision in Borger,<sup>6</sup> since an infectious disease specialist's practice is "reasonably related to" the treatment rendered to Grealis at the time when the alleged malpractice occurred, *i.e.*, treatment of her infected foot. Grealis maintains that nephrology and infectious diseases are subspecialties within the internal medicine field and that Dr. Corcoran has general knowledge sufficient to satisfy Borger's "reasonably related" requirement.

Respondents assert that Dr. Corcoran's underlying internal medicine training is irrelevant as it does not convert him into a nephrologist, and maintain that, because Dr. Kantor "was not Grealis' primary treating physician for her toes," Dr. Corcoran's expertise in infectious diseases is insufficient for him to attest to the standard of care that Dr. Kantor rendered in treating Grealis as her nephrologist.

Although Drs. Kantor and Corcoran specialize in different areas of internal medicine, at issue here is the standard of care Dr. Kantor rendered to Grealis in treating her foot infection, *i.e.*, the standard of care rendered at the time when the alleged malpractice occurred. Thus, Dr.

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<sup>4</sup>Borger, 120 Nev. at 1027-28, 102 P.3d at 605 (citation omitted).

<sup>5</sup>Id. at 1028, 102 P.3d at 605.

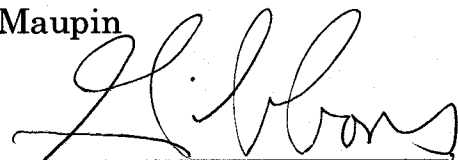
<sup>6</sup>Id.

Corcoran's area of practice—infectious diseases, reasonably relates to the practice Dr. Kantor engaged in—treating Grealis' infected foot—at the time when the alleged professional negligence took place. Accordingly, as there is a sufficient nexus between Dr. Corcoran's experience and practice in internal medicine and infectious diseases and the standard of care that respondents rendered in treating Grealis' infection, we reverse the district court's order dismissing Grealis' complaint and remand this case to the district court for further proceedings.

It is so ORDERED.<sup>7</sup>

 J.

Maupin

 J.

Gibbons

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<sup>7</sup>In light of our disposition, we do not address Grealis' argument that she alternatively should have been granted leave to amend her complaint in order to obtain a sufficient affidavit and we note that her appeal from the district court's order denying her motion for a new trial is moot.

HARDESTY, J., concurring in the result:

Although the majority's conclusion is consistent with a panel opinion of this court in Borger v. District Court,<sup>8</sup> it is inconsistent with the affidavit requirements set forth under NRS 41A.071. NRS 41A.071 mandates that the expert affiant must practice or have practiced in an area that is "substantially similar" to the type of practice that the health care provider defendant engaged in at the time of the alleged malpractice. Borger, however, broadened that standard, concluding that medical experts may attest to the standard of care in cases where their practice "reasonably relates" to the type of practice that the health care provider defendant engaged in at the time of the malpractice.<sup>9</sup> Accordingly, Borger should be revisited so that our case law comports with the more restrictive "substantially similar" standard adopted by the Legislature. And this narrower statutory standard should govern the district court's evaluation of expert affidavits submitted with medical malpractice complaints.

In this case, the district court did not err in determining that a nephrologist's affidavit was necessary to support Grealis' complaint. The statute's "substantially similar" standard contemplates the need for

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<sup>8</sup>120 Nev. 1021, 102 P.3d 600.

<sup>9</sup>Id. at 1028, 102 P.3d at 605. The Borger panel, (citing Marshall v. Yale Podiatry Group, 496 A.2d 529, 531 (Conn. App. Ct. 1985)), impermissibly expanded the affidavit standard, resorting to the Connecticut view to provide a partial framework to interpret NRS 41A.071. In this, the Borger panel ignored customary rules of statutory construction; relied on a common law affidavit standard instead of a statutory standard; and impliedly recognized that an affidavit from an orthopedic surgeon as an expert against a podiatrist meets Nevada's new legislative standard. This interpretation is inconsistent with the Legislature's malpractice reform legislation.

affidavits in subspecialty areas. Nevertheless, under Borger, Grealis' request for leave to amend her complaint should have been granted, and the district erred by implicitly rejecting that request. Consequently, I concur in the result reached by my colleagues.

A Hardesty, J.  
Hardesty

cc: Hon. Michael A. Cherry, District Judge  
William C. Turner, Settlement Judge  
Beckley Singleton, Chtd./Las Vegas  
Mayor Law Firm  
Clark County Clerk