

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN BOVEE, INDIVIDUALLY AND  
AS SPECIAL ADMINISTRATOR, ON  
BEHALF OF THE ESTATE OF ELSIE  
BOVEE, DECEASED; TIMOTHY  
BOVEE, AN INDIVIDUAL; AND  
DENNY ROBINSON, AN INDIVIDUAL,  
Appellants,

vs.  
RADIOLOGY SPECIALISTS, LTD.;  
AND DENNIS C. LEMON, D.O.,  
Respondents.

No. 41767

**FILED**

MAY 17 2006

BY *J. A. BLOOM*  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

In this appeal, we consider whether the district court erred in concluding that a cardiovascular surgeon was unqualified under NRS 41A.071 to testify in an affidavit of merit concerning the standard of care applicable to a radiology group and an emergency room physician in their diagnosis of a cardiovascular condition. For the reasons stated below, we reverse.

FACTS AND PROCEDURAL HISTORY

Elsie Bovee died of an aortic dissection within 24 hours of her admittance to the emergency room at Sunrise Mountainview Hospital. Brian Bovee, individually and in his capacity as special administrator of Ms. Bovee's Estate, as well as Timothy Bovee and Denny Robinson, in their individual capacities, (collectively referred to as "the Estate") filed a complaint against Dr. Dennis Lemon, an emergency room physician, and Radiology Specialists, Ltd., among other medical providers.

The Estate filed an amended complaint including an affidavit by Robert Shuman, M.D., certified in general surgery and cardiovascular thoracic surgery. In his affidavit, Dr. Shuman opined that Ms. Bovee exhibited classic symptoms of a dissecting aortic aneurysm (chest pain radiating to the back, numbness of an extremity) in the emergency room. Dr. Shuman therefore concluded that the defendants' diagnostic procedures fell below the standard of care in failing to order and perform a CT scan, a radiological procedure utilized in the diagnosis of an aortic dissection.<sup>1</sup> Dr. Shuman further stated that a CT scan would have demonstrated the necessity for immediate cardiac surgery.

The defendants, including Dr. Lemon and Radiology Specialists, moved to dismiss the Estate's complaint for failure to provide an affidavit of an expert who practices in an area substantially similar to that of each defendant, as required under NRS 41A.071. After briefing and oral argument, the district court determined that (1) Dr. Shuman did not practice in an area substantially similar to any of the defendants, and (2) the district court lacked discretion to permit the Estate to further amend its complaint to submit an affidavit by an appropriate expert. The district court therefore dismissed the complaint without prejudice.

#### DISCUSSION

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<sup>1</sup>Radiology Specialists argues that the affidavit of merit was insufficient because it failed to specifically mention its name in the affidavit. We reject this contention, because Dr. Shuman generally states at the beginning of his affidavit that "the radiology department" fell below the standard of care. We conclude that this reference is sufficient to implicate Radiology Specialists, given that Radiology Specialists is the only radiology group specified in the amended complaint accompanying the affidavit.

On appeal, the Estate asserts that the district court erred in its dismissal of the complaint because Dr. Shuman was qualified to testify to the proper diagnosis and treatment of the condition at issue: an aortic dissection. The Estate also asserts that the district court erred in concluding that it lacked discretion to grant leave to amend the complaint to conform to the requirements of NRS 41A.071.

NRS 41A.071 provides:

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.

This court reviews questions of law, such as those requiring statutory construction, de novo.<sup>2</sup> In Borger v. District Court, we embraced the Connecticut view that “[t]he threshold question of admissibility is governed by the scope of the witness’ knowledge and not the artificial classification of the witness by title.”<sup>3</sup> This court explained that the special session legislation, of which NRS 41A.071 was a part, permitted medical experts to testify if their present or former practice reasonably relates to that of the defendant at the time of the alleged negligence.<sup>4</sup>

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<sup>2</sup>Gilman v. State, Bd. of Vet. Med. Exam’rs, 120 Nev. 263, 271, 89 P.3d 1000, 1005-06 (2004); Borger v. Dist. Ct., 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004).

<sup>3</sup>Borger, 120 Nev. at 1027-28, 102 P.3d at 605 (quoting Marshall v. Yale Podiatry Group, 496 A.2d 529, 531 (Conn. Ct. App. 1985)).

<sup>4</sup>Id. at 1028, 102 P.3d at 605.

In Borger, this court determined that a gastroenterologist could provide an affidavit of merit against a general surgeon, because the claim of malpractice—misdiagnosis of an intestinal inflammation and unnecessary performance of related surgery—implicated the gastroenterologist's area of expertise.<sup>5</sup>

We conclude that this case presents a situation similar to that in Borger. The condition at issue was an aortic dissection. As such, we conclude that when the condition at issue is cardiovascular in nature, a cardiovascular surgeon is competent to testify to the diagnostic standard of care as to radiology and emergency room physicians. In this case, the radiological testing by Radiology Specialists and the emergency room diagnosis by Dr. Lemon both implicate Dr. Shuman's knowledge and expertise as a cardiovascular surgeon. Therefore, he is competent to testify in an affidavit of merit under NRS 41A.071.<sup>6</sup>

In reaching this decision, we note that the apparent purpose of NRS 41A.071 is to prevent the advancement of frivolous lawsuits in our courts, prohibit an expert in one area of medicine from superimposing an inapplicable standard of care upon another area, and prevent "jack-of-all-trade" medical experts from giving opinions outside their area of expertise. We conclude that our decision implicates none of these concerns, given the close association between Dr. Shuman's knowledge and expertise as they relate to a cardiovascular diagnosis.

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<sup>5</sup>Id. at 1024, 1028, 102 P.3d at 603, 605.

<sup>6</sup>We do not reach the question of whether respondents had a defense premised upon the statute of limitations. Our review of the record reveals no motion to dismiss based on this defense, and respondents have provided no citation in this regard.

We note also that, under Borger, the district court had discretion to permit amendment of the complaint in the event that it found the affidavit insufficient under NRS 41A.071.<sup>7</sup>

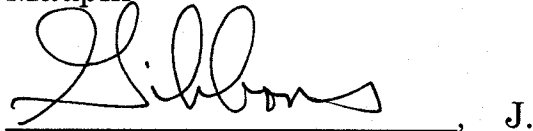
CONCLUSION

We conclude that the affidavit of Dr. Shuman was sufficient under NRS 41A.071. Therefore, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Honorable Jackie Glass, District Judge  
Greenman Goldberg Raby & Martinez  
Alverson Taylor Mortensen & Sanders  
Lewis Brisbois Bisgaard & Smith, LLP  
Clark County Clerk

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<sup>7</sup>See Borger, 120 Nev. at 1029-30, 102 P.3d at 606 (when dispute over whether an affidavit of merit accompanying a complaint complies with NRS 41A.071, district court may grant leave to amend complaint where justice so requires).