

***Borger v. Lovett*, 120 Nev. Adv. Rep. 102 (2004)¹**

**MEDICAL MALPRACTICE- PROCEDURE IN FILING A CLAIM:
PROFESSIONAL AFFIDAVIT REQUIREMENT IN NRS 41A.071**

Summary

This case appeared before the Nevada Supreme Court on a writ of mandamus filed by petitioner Alan M. Borger challenging the district court orders dismissing Petitioner's medical malpractice action and denying his motion to amend his malpractice complaint. The main issue on appeal was the foreclosure of Petitioner's medical malpractice claim against Respondent James Lovett, M.D. for failure to file a correct affidavit of merit pursuant to newly enacted NRS 41A.071.

Petitioner consulted respondent Dr. Lovett in connection with his recurrent lower digestive tract difficulties. After several consultations with petitioner, Dr. Lovett secured a clinical consultation from and Dipak Desai M.D., a gastroenterologist. Dr. Desai diagnosed that Petitioner suffered from a condition known as Crohn's disease and agreed with Lovett's recommendations for surgical intervention. Subsequently, Lovett preformed a colectomy² and ileostomy³ on Petitioner.

The surgery did not correct Petitioner's condition. Subsequently, Petitioner began treatment with a second gastroenterologist, Marc Kudisch, M.D. Dr. Kudisch ultimately concluded that Dr. Desai misdiagnosed Petitioner's with Crohn's disease, and that Dr. Lovett preformed an unnecessary and overly aggressive procedure. Subsequently, Petitioner filed a complaint for medical malpractice with the Nevada Medical-Legal Screening Panel.⁴

While Petitioner's case was still pending the law governing medical malpractice was amended in a special session of the Legislature. A portion of the law, codified under NRS 41A.071, requires that medical malpractice complaints filed on or after October 1, 2002 be accompanied by affidavits of merits from medical experts.⁵ Under NRS 41A.071, 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 defendant's] alleged malpractice."⁶ Any current malpractice plaintiffs with claims pending during the statutory change were given the option of proceeding under the old or new statutory system. Petitioner proceeded under the old statutory system to avoid the new caps on noneconomic damages.

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² Surgical excision of a portion of or the entire colon. ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY C60 (2002).

³ Surgical creation of an external opening into the ileum (portion of the small intestine) through the abdominal wall. *Id.* at 12.

⁴ See NEVADA REVISED STATUTES 41A.016(1) (repealed 2002); NEVADA REVISED STATUTES 41A.039(1) (repealed 2002).

⁵ The purpose of this requirement was to ensure that all medical malpractice claims filed had a measure of merit. This statutory requirement took the place of the Nevada Medical-Legal Screening Panel that was repealed under the same legislation.

⁶ NEVADA REVISED STATUTES 41A.071 (2003).

On December 19, 2002, before the conclusion of the screening panel proceedings, Petitioner filed his first formal complaint in district court against both Dr. Lovett and Dr. Desai. No affidavit of merit accompanied the initial complaint. Subsequently, on March 7, 2003 Petitioner filed an amended complaint, which incorporated an affidavit of Dr. Kudisch supporting the allegations against both physicians.

Dr. Lovett contested the complaint as to him for failure to supply an affidavit from a general surgeon. Dr. Lovett argued that Dr. Kudisch's affidavit was inapplicable to him since Dr. Kudisch was a gastroenterologist and not a general surgeon like Dr. Lovett. The district court agreed, and dismissed the case against Dr. Lovett reasoning that Dr. Kudisch and Dr. Lovett did not practice in substantially similar enough areas, gastroenterology versus general surgery, to allow the affidavit to satisfy the statutory requirements of NRS 41A.071, despite Petitioner's offer to amend his complaint to include an affidavit from a general surgeon.

Petitioner filed a writ of mandamus with the supreme court to "compel the performance of an act which law requires as a duty resulting from an office, trust, station, or to control an arbitrary or capricious exercise of discretion."⁷ The court determined that the petition raised "important legal issues on new legislation that were likely to be the subject of extensive litigation in the near term"⁸ and to avoid inconsistent ruling at the district court level, it elected to resolve the petition on its merits.

The supreme court recognized that the Legislature did not provide any guidance for courts as to what qualifies as a "substantially similar to the type of practice engaged in at the time of the alleged malpractice."⁹ The supreme court looked to other jurisdictions that had a similar affidavit requirement and found Connecticut authority that held "[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."¹⁰ The supreme court went on to hold that "[t]he diagnosis and treatment rendered by Dr. Lovett implicates Dr. Kudisch's area of expertise, the practice of gastroenterology. Thus, the statute was not violated when Dr. Kudisch drew conclusions about perceived deficiencies in Dr. Lovett's diagnosis..."¹¹ The court concluded that the affidavit met the requirements of NRS 41A.071.

However, this was not the end of the court's holding. The court went on to determine if Petitioner's alternate theory—that the district court should have allowed him the opportunity to amend his complaint to include an affidavit of a general surgeon—was viable as well, given that the issue was likely to arise in a substantial number of cases statewide. The court concluded that the Legislature was silent as to whether a district court may grant leave to amend where compliance with NRS 41A.071 is lacking; however, the court determined that dismissal was the appropriate action since it promoted the purpose of the measure, to prevent frivolous lawsuits. The court did leave a small loophole, allowing the district court to grant leave to "amend malpractice complaints supported by disputed affidavits under circumstances where justice so requires."¹²

⁷ *Brewery Arts Ctr. v. State Bd. Examiners*, 108 Nev. 1050, 1053, 843 P.2d 369, 372 (1992); *see also* NRS 34.160.

⁸ *Borger v. Lovett*, 120 Nev. Adv. Rep. 102 at 7 (2004).

⁹ NRS 41A.071

¹⁰ *Marshall v. Yale Podiatry Group*, 496 A.2d 529, 531 (Conn. App. Ct. 1985).

¹¹ *Borger*, 120 Nev. Adv. Rep. 102 at 12 (2004).

¹² *Id.* at 14.

Issue and Disposition

Issue

1. Is an affidavit made in support of a medical malpractice claim made by a doctor in a related but not similar field qualify under NRS 41A.071 to allow a claim of action against that related doctor?
2. Can a complaint lacking a proper affidavit under NRS 41A.071 be amended to include a qualifying affidavit at a later date?

Disposition

1. Yes, the statute does not require that the doctors work in the same area of medicine, only in a “substantially similar” area to the doctor who is alleged to have engaged in the malpractice.
2. No, the purpose behind the statute is to prevent frivolous claims, allowing amendment after the fact would violate this intent. However, the district court may grant leave to amend complaints supported by disputed affidavits under circumstances where justice so requires and for reasons of judicial efficiency.

Commentary

State of the Law Before *Borger*

The passage of NRS 41A.071, and its compatriots stemming from the emergency session of the legislature wholly changed the law governing the procedures for filing a medical malpractice claim in Nevada. Prior to the emergency legislative session a plaintiff in a medical malpractice action had to file a claim with the Nevada Medical-Legal Screening Panel prior to filing a complaint with the district court.¹³ Only after the panel made its determination, could the plaintiff commence an action. The new medical malpractice legislation did away with this requirement in favor of the affidavit system used by a multitude of other states including Connecticut¹⁴ and Michigan.¹⁵

Effect of *Borger* on Current Law

The decision in *Borger* clarified a contentious area of law in the new medical malpractice legislation. Establishing a rule that allows an expert in a substantially similar area as the accused doctor to file a valid affidavit streamlines the procedural actions needed to establish a valid medical malpractice case. Otherwise plaintiffs like Mr. Borger would have to retain separate experts to bring a valid claim. This could be onerous for a

¹³ See NEVADA REVISED STATUTES 41A.016(1) (repealed 2002); NEVADA REVISED STATUTES 41A.039(1) (repealed 2002).

¹⁴ See *Marshall v. Yale Podiatry Group*, 496 A.2d 529, 531 (Conn. App. Ct. 1985).

¹⁵ See Mich. Comp. Laws §§ 600.2912d(1), 600.2169(1)(a) (2000).

plaintiff since experts are expensive to retain. Another important fact is that Nevada has a small professional community, whether it is doctors, attorneys or accountants. It would be hard to retain a different expert for every specialty that would not have some conflict with another professional in our community. Admittedly, experts can be obtained from out of state, but this only increases the cost to the plaintiff.

Also important is the court's dicta relating to the amending of complaints that rely on faulty affidavits. By closing this loophole, with the exception of very limited cases where justice so requires, the court further strengthens this new legislation. Now plaintiffs and their counsel must insure that they have a factually strong cases supported by independent expert testimony or risk losing their cause of action altogether.

Conclusion

Borger illustrates two important rules for any modern practitioner of medical malpractice law in Nevada. First, a plaintiff may use expert testimony of a doctor in a similar, but not exact, practice area of the doctor whom the medical malpractice is alleged against as long as the expert is in a practice area "substantially similar" to that in the defendant doctor engaged at the time of the malpractice. Second, in order to have a valid claim a plaintiff must have the proper affidavit at the time the complaint is filed or risk a dismissal of the action without prejudice. A plaintiff cannot simply file an action hoping that he may later find an expert to support his claim. This rule supports the purpose of limiting frivolous medical malpractice lawsuits in Nevada.