

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 SUSAN DOLORFINO;
3 Appellant,

Supreme Court No.: 72443
District Court Case No.: A-16-735063-C

4 vs.

5 UNIVERSITY MEDICAL CENTER
6 OF SOUTHERN NEVADA; ROBERT
7 HARPER ODELL, JR.,
 Respondents.

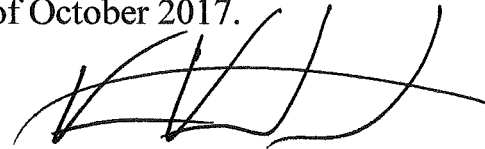
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9 **NRAP 26.1 DISCLOSURE STATEMENT**

10 The undersigned Counsel of record certifies that the following are persons
11 and entities as described in NRAP 26.1(a), and must be disclosed. These
 representations are made in order that the judges of this court may evaluate
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SUSAN DOLORFINO

Appellant,

vs.

UNIVERSITY MEDICAL CENTER OF
SOUTHERN NEVADA; AND
ROBERT HARPER ODELL, JR.,

Respondents.

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SUPREME COURT NO.: 72443

DISTRICT COURT NO: A735063

RESPONDENT DR. ROBERT ODELL, JR.'S ANSWERING BRIEF

Respondent, Dr. Robert Odell, Jr., by and through his counsel of record, John H. Cotton, Esq. and Vincent J. Vitatoe, Esq. of the law firm of John H. Cotton & Associates, Ltd., hereby submits his Answering Brief and Memorandum of Points and Authorities Opposing Appellant's Opening Brief.

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I. INTRODUCTION

The decision of the District Court was proper. First, NRS 41A requires a Complaint against a provider of health care regarding the rendering of health care to be supported by an expert affidavit. Second, the Complaint in this case concerned professional negligence and the exception set forth in NRS 41A.100(1)(d) is inapplicable. Fourth, Appellant's position would lead an unwarranted, illogical outcome as professional negligence actions against anesthesiologists would no longer require an expert affidavit.

II. FACTUAL AND PROCEDURAL BACKGROUND.

1. Dr. Odell is an Anesthesiologist. See Appellant's Appendix Volume 1 at 24-46 at Exhibit A.

2. Appellant's Complaint was filed without a supporting expert affidavit. Id. at 1-6.

3. Appellant's Complaint alleged that Dr. Odell performed a tracheotomy. See Appellant's Appendix Volume 1 at 2-3.

4. A tracheotomy involves making an incision through a patient's throat into the patient's trachea to relieve an obstruction to breathing. Id. at 24-46 at Exhibit A.

5. Appellant's Complaint alleges that Dr. Odell was "negligent by *inter*

alia not properly handling an instrument used for tracheotomies and dropping it on Appellant's mouth during surgery." Id. at 3.

6. Appellant's Complaint alleges that she suffered an injury to her tooth as a result of Dr. Odell's conduct. Id. at 2-3.

7. Dr. Odell never performed a tracheotomy on Appellant. Id. at 24-46 at Exhibit A.

8. Dr. Odell administered general anesthesia to Appellant during her hysterectomy procedure on April 14, 2015 and performed an endotracheal intubation to maintain Appellant's airway while she was under general anesthesia. Id. at 24-46 at Exhibit C bates TLG 00205-207.

9. The endotracheal intubation that Dr. Odell performed involved placing a plastic tube into Appellant's mouth and passing the tube past the teeth and down through Appellant's trachea to maintain an open airway while Appellant was under general anesthesia. Id. at 24-46 at Exhibit A

10. Prior to the procedure, Dr. Odell explained to Appellant that one of the risks of general anesthesia is injury to her teeth. Id. at 24-46 at Exhibit C bates TLG 0032-33.

11. Appellant and Dr. Odell both signed an informed consent document confirming that this risk, in addition to other risks, was explained and that

Appellant agreed to receive general anesthesia with the understanding that her teeth could be injured as a result. Id.

III. LEGAL ARGUMENT.

This Court should affirm the District Court's ruling as related to Dr. Robert Odell, Jr. because NRS 41A governed the lawsuit, none of the NRS 41A.100 exceptions applied, and Appellant's position causes an unwarranted burden on Anesthesiologists.

A. NRS 41A APPLIES TO DR. ROBERT ODELL, JR.

Recognizing the applicability of NRS 41A to the underlying lawsuit is a threshold issue. NRS 41A.015 defines "professional negligence" as follows:

NRS 41A.015 "Professional negligence" defined. "Professional negligence" means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.

A "provider of health care" is defined as follows:

NRS 41A.017 "Provider of health care" defined. "Provider of health care" means a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees

Pursuant to NRS 41A.071, all legal claims sounding in professional negligence brought against a provider of health care must be filed with an affidavit of a medical expert who has practiced in an area that is substantially similar to the type of practice at issue in the given dispute. If such affidavit is absent, dismissal must occur. NRS 41A.071.

Here, the legal cause of action set forth in the operative Complaint concerned professional negligence as specifically identified in the Fourth Cause of Action titled “Medical Malpractice—NRS41A.100.” See Appellant’s Appendix Volume 1 at 4. The professional negligence asserted involves an injury to a tooth and the alleged improper handling of a surgical tool. Id. Dr. Robert Odell is and was an Anesthesiologist licensed pursuant to NRS 630. See Appellant’s Appendix Volume 1 at 24-46 at Exhibit A. Thus, Dr. Odell is and was a “provider of health care” pursuant to NRS 41A.017. Consequently, NRS 41A.071’s general affidavit requirement applied. The only exceptions to this general requirement are set forth in NRS 41A.100.

B. NRS 41A.100(1)(D) IS INAPPLICABLE.

There are only five narrowly tailored exceptions to the NRS 41A.071 requirement and those exceptions are enumerated in NRS 41A.100. See Johnson v. Egtegar, 112 Nev. 428, 433, 915 P.2d 271 (1996) (explaining that “the

legislature intended NRS 41A.100 to replace, rather than supplement, the classic *res ipsa loquitur* formulation in medical malpractice cases where it is factually applicable”); see also Banks v. Sunrise Hosp., 120 Nev. 822, 832, 102 P.3d 52 (2004) (“NRS 41A.100 has replaced the doctrine of *res ipsa loquitur* in medical malpractice cases”).

Under NRS 41A.100(1)(d), an expert affidavit would not be required if Appellant’s alleged injury “was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto.” Appellant believes an expert affidavit was not required pursuant to NRS 41A.100(1)(d) because, allegedly, “an injury was suffered during the course of treatment to a part of the body, (the mouth), not directly involved in the treatment, (the uterus), and as such the presumption of negligence automatically applies.” See Appellant’s Appendix Volume 1 at 4-5. Such a belief was wrong.

Dr. Odell is a Board Certified Anesthesiologist. Id. at 24-46 at Exhibit A. Putting aside that Appellant alleged in her Complaint that Dr. Odell performed a tracheotomy (which he most certainly did not), Dr. Odell’s care and treatment of this patient was limited to anesthesiology services during her hysterectomy. Dr. Odell is not a surgeon. He did not provide surgical services and was not working in the patient’s surgical field. Appellant underwent a total abdominal

hysterectomy. Her surgical field, where the Surgeons were operating, was the lower abdomen and pelvic cavity. Appellant incorrectly seeks to task Dr. Odell with liability under a theory of *Res Ipsa Loquitur* because she experienced an anesthesia-related complication outside of the surgical field even though Dr. Odell's course of treatment was never part of or otherwise in the surgical field.

Appellant's application of the statute creates a false standard as to Dr. Odell, and all Anesthesiologists in as much as any anesthesia-related complication during surgery would amount to *Res Ipsa Loquitur* because it is not directly related or proximate to the surgical field. Taken to its logical conclusion, medical malpractice plaintiffs could sue Anesthesiologists without ever having to comply with NRS 41A.071, so long as the surgery was not in or around the patient's head and neck, because it is not "directly or proximately related to" the surgery or the surgical field. This is not what is contemplated by NRS 41A.100 or NRS 41A.071.

Anesthesiology is a complex medical subspecialty. In order to survive, Appellant's Complaint should have been supported by an affidavit of merit by an Anesthesiologist, opining that Appellant's tooth injury was the result of negligence on the part of Dr. Odell and not the result of a known complication, as indicated in the informed consent signed by Appellant. Instead, Appellant decided to forego an expert opinion and asserted that the anesthesia-related complication was not

directly related or proximate to her hysterectomy. As such, she attempted to proceed under the codified theory of *Res Ipsa Loquitur*. Arguably, as explained further below, this logic might hold true if Appellant sued a Surgeon who injured her tooth while performing a hysterectomy. However, she is not. Appellant was, instead, suing an Anesthesiologist who allegedly injured her tooth while performing anesthesia services. Under this set of facts, NRS 41A.100(1)(d) does not apply and an affidavit of merit was required.

C. APPELLANT’S ARGUMENT CAUSES ILLOGICAL RESULTS.

As explained, the upshot of Appellant’s argument is that an expert affidavit will no longer be required in the vast majority of cases of professional negligence involving the conduct of an Anesthesiologist. This conclusion not only upends the purpose of NRS 41A, it would constitute a significant expansion of Banks v. Sunrise Hosp., 120 Nev. 822, 844, 102 P.3d 52, 67 (2004), the case Appellant primarily relies upon in the Opening Brief.

Banks involved a patient who underwent shoulder surgery and, during the course of surgery, suffered a brain injury apparently due to the malfunction of an anesthesia machine and negligence of the Anesthesiologist. Id. at 56-57. The Complaint in Banks was also supported by the affidavit of an anesthesiologist who opined that the anesthesiologist failed to act properly under the circumstances. Id.

at 57-58. Yet, the Banks Court concluded that NRS 41A.100(1)(d) was applicable because a brain injury occurred during as shoulder surgery.

However, the Banks Court recognized its decision was highly fact-based. This fact-based analysis must always apply as related to the application of NRS 41A.100(1). To hold Banks necessitates application of a *Res Ipsa Loquitur* exception to all Anesthesiologist malpractice cases when the patient suffers an injury to any part of the body outside the surgical field, without consideration of the Anesthesiologist's duties or treatment in the particular case, would overextend Banks' holding and effectively eliminate the requirements of NRS 41A.071 to an entire class of health care providers.

Respondent submits that Banks should be interpreted to mean that, in determining the applicability of NRS 41A.100(1)(d), a Court must assess the actual injury in relation to the anatomy involved with the intended provision of health care. Stated differently, the Banks decision and NRS 41A.071 are consistent only when a court permits professional negligence cases to proceed *without* an expert affidavit pursuant to NRS 41A.100(1)(d) if and only if the injury sustained is in a location that is not part of the intended anatomy “directly involved in the treatment or proximate thereto.”

Such analysis was applied by the District Court in this case. The injury

related to a tooth. A tooth is part the mouth. The application of general anesthesia in this case necessarily involved the *intentional* passage of an endotracheal tube through the mouth. Therefore, the injury was sustained to a part of the anatomy “directly involved in the treatment or proximate thereto.” As such, the general requirements of NRS 41A.071 applied and the District Court correctly dismissed the case for lack of an expert affidavit. This decision should not be disturbed.

Appellant’s primary error is ignoring the “treatment” element of the analysis. Appellant focuses on only *one* aspect of the health care provided and assumes that is the only relevant “course of treatment” involved in a NRS 41A.100 analysis. Yet, frequently, a patient receives multiple forms of health care at the same time. The Banks case is a good example of this reality. When the patient in Banks went into cardiac arrest, a cardiologist got involved and helped resuscitate the patient. Id. at 57. Consequently, a surgeon, an anesthesiologist, and a cardiologist all provided health care to one patient during the course of one procedure. Appellant’s analysis essentially ignores the reality that different medical specialties often render services to the *same* patient at the *same* time. It is simply mixing apples and oranges to use *one* physician’s limited course of treatment when analyzing an injury allegedly caused by *another* physician’s conduct without regard to latter’s *intended* course of treatment.

The same logic renders irrelevant the issue of *how* the injury occurred (e.g., whether a medical instrument dropped, slipped, or was otherwise negligently handled) for purposes of NRS 41A.100(1)(d). The relevant inquiry is the one set forth above: *where* did the injury occur in relation to the anatomy involved in the intended course of treatment?

In sum, for a professional negligence cause of action to proceed under NRS 41A.100(1)(d) without the requisite expert affidavit against a provider of health care provider there must be a clear disconnect between (a) the health care provider's intended course of treatment (and related anatomy), and (b) the location of the injury suffered. The District Court recognized and applied this analysis in dismissing the Complaint. That analysis should be left undisturbed.

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IV. CONCLUSION

In light of the foregoing, Respondent requests that this Court affirm the District Court's ruling as related to Dr. Robert Odell, Jr.

Dated this 31st day of October, 2017.

JOHN H. COTTON & ASSOCIATES, LTD.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2604 words; and/or

☒ does not exceed 30 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of October, 2017.

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CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that on the 31ST day of October 2017, I served a true and correct copy of the foregoing **RESPONDENT DR. ROBERT ODELL, JR.'S ANSWERING BRIEF** was submitted electronically for filing and service to the following individuals:

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