IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN DOLORFINO Appellant, vs. UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA; AND ROBERT HARPER ODELL, JR., Respondents.	**SUPREME COURT NO.: 72443** DISTRICT COURT NO: A735063

DR. ROBERT ODELL, JR.'S

PETITION FOR EN BANC

RECONSIDERATION

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 petitions this Court for En Banc Reconsideration of the Court's November 30, 2018 Order Denying Rehearing of its opinion entered in this proceeding on October 4, 2018.This Petition is made pursuant to Nevada Rule of Appellate Procedure 40A on the grounds that the proceeding involves a substantial precedential, constitutional or public policy issue. This Petition is based upon the papers and pleadings on file herein, the exhibits attached thereto, the following Points and Authorities submitted in support hereof, and any oral argument which may be heard at the hearing of the Petition, if any.

Dated this 14th day of December 2018.

JOHN H. COTTON & ASSOCIATES, LTD.

By /s/ Vincent J. Vitatoe

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MEMORANDUM OF POINTS & AUTHORITIES

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE.

On September 13, 2017, Appellant SUSAN DOLORFINO ("Dolorfino") filed her Opening Brief. On October 30, 2017, Respondent UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA ("UMC") filed its Answering Brief. On October 31, 2017, Respondent ROBERT HARPER ODELL, JR. ("Dr. Odell") filed his Answering Brief. Dr. Odell hereby incorporates and reasserts the Statement of Facts from the previously filed Answering Brief dated October 31, 2017.

On June 14, 2018, this Court heard oral arguments. On October 4, 2018, this Court issued its Order reversing the District Court. See Order on file. In its Order, this Court applied NRS 41A.100 and acknowledged that the "case stems from a tooth injury." Id. at 2. The Court also noted that Dr. Odell, an anesthesiologist, provided "endotracheal intubation…[which] involves passing a plastic tube through the patient's mouth and trachea to maintain an open airway while the patient is under general anesthesia." Id. The Court further highlighted the fact that Dolorfino signed a consent form to receive Dr. Odell's anesthesia treatment and acknowledged her understanding that "injury to teeth/dental appliances was a risk associated with general anesthesia." Id. (internal quotations omitted).

Ultimately, this Court issued its Order "in accordance with *Banks*" finding

that "Dolorfino's tooth injury was not 'directly involved' or 'proximate' to her hysterectomy[.]" Id. at 6. This Court then generally concluded, in similar fashion, that "[f]or purposes of NRS 41A.100(1)(d), a tooth injury is not 'directly involved' or 'proximate' to a hysterectomy." Id. at 7. It is Dr. Odell's position that the 2015 amendments to NRS 41A, including NRS 41A.100, clarified the need for this Court to analyze the res ipsa issue from the perspective of Dr. Odell's anesthesia treatment, not the hysterectomy treatment supplied by a surgeon. Believing that NRS 41A's highly individualized approach to professional negligence cases precluded a surgeon's anatomical scope of treatment being superimposed upon an anesthesiologist's anatomical scope of treatment for purposes of permitting a plaintiff to proceed forward without an expert affidavit pursuant to NRS 41A.100, Respondent moved for Rehearing but was denied.

Now, Respondent requests en banc reconsideration of that denial. The issue before this Court is whether plaintiffs in this State can apply the standard of care solely relevant to one provider of health care to a different provider of health care for purposes of avoiding NRS 41A.071's general affidavit requirement and, thereby, impose a *presumption* of negligence via the res ipsa loquitur doctrine codified in NRS 41A.100. Stated differently, this Court must address whether the operative fields applicable surgeons become the *de facto* anatomical parameters applicable to anesthesiologists (or other providers of health care) when

determining if the latter should be presumed negligent for any injury occurring outside the surgical field no matter how directly tied the injury may be to the actual treatment of the non-surgeon provider of health care, such as an anesthesiologist.

II. ARGUMENT

1. Petition is Timely and Proper.

NRAP 40A(b) states that a timely petition "for en banc reconsideration of the panel's decision on rehearing within 10 days after written entry of the decision." Here, the Order denying rehearing issued November 30, 2018. Consequently, this Petition is timely filed within 10 days.

En banc reconsideration of a Panel decision is not favored and will only be granted under the following circumstances: (1) Reconsideration by the full court is necessary to secure and maintain uniformity of its decisions; or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. NRAP 40A(a); Ronning v. State, 116 Nev. 32, 33, 992 P.2d 260, 260 (2000).

The Panel's decision is contrary to NRS 41A.071, NRS 41A.100, and the overall intent of NRS 41A—a collection of statutes which cause categorical differences in professional negligence cases when compared to general negligence cases. Examination of these statutes evidence legislative and judicial wisdom insofar as an individualized and deferential approach characterizes these cases so that a given plaintiff must *generally* supply competent expert support at *every* stage

of litigation against *each and every* provider of health care who potentially acted negligently. This wisdom emanates from the recognition that lay people—including lawyers, in this instance—typically lack the years of training and experience necessary to properly analyze whether a given provider of health care deviated from the applicable standard of care and caused injury.

The issue pending before this Court is of state-wide importance as this measured, deferential approach risks being upended by a dramatic expansion of NRS 41A.100's application to cases—an application which is particularly troubling as no expert support is required and negligence is simply presumed. This case represents a prime example of how *different* providers of health care's treatment can be improperly pieced together causing a plaintiff to enjoy the substantial (but unwarranted) benefits of NRS 41A.100's presumed negligence. Consequently, this Petition presents a particularly "substantial precedential, constitutional or public policy issue."

This Court concluded "[f]or purposes of NRS 41A.100(1)(d), a tooth injury is not 'directly involved' or 'proximate' to a hysterectomy." See Order at 7. The issue is that the anesthesiologist, Dr. Odell, never performed (or attempted to perform) the hysterectomy nor did Dolorfino bring suit against the provider of health care who *did* perform the hysterectomy, a surgeon. Therefore, it is unclear how the surgeon's treatment constitutes "the treatment" applicable Dr. Odell under

a NRS 41A.100(d) analysis. Therefore, as explained in detail below, Dr. Odell believes this Court overlooked material facts in the case, conflated standards of care for two different providers of health care, and misapplied the language of NRS 41A.100 particularly in light of the broader NRS 41A statutory framework and intent.

2. The Nevada Legislature Clearly Mandated an Individual Approach To Professional Negligence Cases, Including Res Ipsa Cases Under NRS 41A.100(1).

If this Court applies NRS 41A.100(1) *separately* to each provider of health care, a different outcome occurs in favor of Dr. Odell. Two cases cited by the Court in its Order show how res ipsa cases under NRS 41A.100(1)(d) *should* work. Both cases concern suits against surgeons by patients who suffered injury to parts of their body outside the expected surgical field.

For example, in Johnson v. Egtedar, this Court emphasized the fact "Dr. Egtedar **operated** at the wrong level of Johnson's spine and **plunged an instrument out of the operative field** penetrating her spinal dura, psoas major muscle, colon and left ureter." (emphasis added) Johnson v. Egtedar, 112 Nev. 428, 431, 915 P.2d 271, 273 (1996). Similarly, this Court in Born v. Eisenman, noted that it "applied res ipsa to two scenarios, one involving a ligation to the ureter during surgery to a patient's ovary and uterus, and another involving a bowel injury that occurred during surgery upon a patient's ureter and ovary." 114 Nev.

854, 855, 859, 962 P.2d 1227, 1228, 1230 (1998). Importantly, the consolidated cases in Born were initially brought against surgeons and this Court applied the res ipsa statute, NRS 41A.100(1), from the perspective of the surgeons. In sum, from the standpoint of the given surgeon in *each* scenario articulated in Johnson v. Egtedar and Born v. Eiseman, the injuries to the body occurred outside the expected anatomical parameters of the planned surgical treatments.

The complication arises when analyzing Banks v. Sunrise Hosp., 120 Nev. 822, 102 P.3d 52 (2004). However, Banks must now be read and distinguished in light of the amended version of NRS 41A.100(1) applicable to this case. All parties agree that the 2015 amendments to NRS 41A apply to this case. See Dolorfino's Opening Brief, pg. 5-6. Dr. Odell argued that Banks is distinguishable because the Banks case *was* filed with an expert affidavit. This distinction alluded to the substantive changes NRS 41A.100 and NRS 41A.071 underwent in 2015.

The Nevada Legislature's 2015 amendments to NRS 41A emphasized the *individualized* approach litigants and courts must take in professional negligence cases. The 2015 amendments did away with ambiguity in the pleading requirements as the revised NRS 41A.071 underscored a personalized approach requiring plaintiffs to file expert affidavits that "[i]dentifies by name, or describes by conduct, **each** provider of health care who is alleged to be negligent; and…[s]ets forth factually a specific act or acts of alleged negligence **separately**

as to **each** defendant in simple, concise and direct terms." (emphasis added). The 2015 amendments also included important revisions to NRS 41A.100 as follows:

> 41A.100 1. Liability for personal injury or death is not imposed upon any provider of ~~[medical]~~ ***health*** care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the ***provider of health care caused the*** personal injury or death occurred in any one or more of the following circumstances:
>
> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
>
> (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
>
> (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
>
> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or
>
> (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.
>
> 2. Expert medical testimony provided pursuant to subsection 1 may only be given by a provider of ~~[medical]~~ ***health*** care 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 negligence.
>
> 3. ~~[As used in this section, "provider of medical care" means a physician, dentist, registered nurse or a licensed hospital as the employer of any such person.]~~ ***The rebuttable presumption pursuant to subsection 1 does not apply in an action in which a plaintiff submits an affidavit pursuant to NRS 41A.071, or otherwise***

> ***designates an expert witness to establish that the specific provider of health care deviated from the accepted standard of care.***
>
> ***4. Nothing in this section shall be construed to preclude any party to the suit from designating and presenting expert testimony as to the legal or proximate cause of any alleged personal injury or death.***

Pursuant to the revised NRS 41A.100(3), if Banks were filed today, there would be no res ipsa issue at all because "the rebuttable presumption pursuant to subsection 1 does not apply in an action in which a plaintiff submits an affidavit pursuant to NRS 41A.071." But the plain language, legislative intent, and underlying logic present in the 2015 amendments provide further distinctions when determining the applicability of Banks to the present matter.

The relationship between NRS 41A.100 and NRS 41A.071 is clear given NRS 41A.100(3) explicitly references NRS 41A.071. It is also noteworthy that NRS 41A.100(3) states "[t]he rebuttable presumption pursuant to subsection 1 does not apply in an action in which a plaintiff submits an affidavit pursuant to NRS 41A.071, or otherwise designates an expert witness to establish that the **specific** provider of health care deviated from the accepted standard of care." (Emphasis added). As such, NRS 41A.100(3) removes all doubt that a res ipsa analysis must be applied on a *specific* basis to *each* provider of health care premised upon the standard of care applicable to *that* provider.

The revision to NRS 41A.100 thus ensured harmony with NRS 41A.071 which, as mentioned, similarly emphasizes the individualized lens through which

courts must examine these tort cases. If a plaintiff is required to provide sworn testimony against *each and every* provider of health care—in an individualized fashion—to commence suit pursuant to NRS 41A.071, then it naturally follows that a plaintiff must have an individualized res ipsa case against *each and every* provider of health care where no expert affidavit is supplied. Stated differently, if a litigant must, as a threshold issue, provide expert testimony specifying how a given provider's conduct deviated from the standard of care *applicable to that provider's treatment*, then a litigant must, as a threshold issue, produce evidence of an injury fitting one or more of the scenarios outlined in NRS 41A.100(1) *applicable to that provider's treatment*.

Indeed, a separate, individualized approach to res ipsa cases under NRS 41A.100(1) is consistent with another critical component of NRS 41A: several liability. Several liability is codified in NRS 41A.045 and states "each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for **that portion** of the judgment which represents the percentage of **negligence attributable to the defendant**." (Emphasis added). In other words, one defendant's conduct does not impute liability upon another defendant in view of a pure several liability framework. That being the case, it would dramatically undermine the concept of several liability if plaintiffs are able to bring cases pursuant to NRS 41A.100(1) by stitching together the standard of

care applicable one provider of health care with an injury caused by a *different* provider of health care when the latter provider is subject to a *different* standard of care.

This piece-meal approach occurred in the present matter where Dolorfino improperly connected the injury allegedly caused by one provider of health care (Dr. Odell, an anesthesiologist) to the medical treatment provided by a different provider of health care (the surgeon performing the hysterectomy in the abdomen). In other words, Dolorfino took the standard of care applicable to the surgeon (operating in the abdomen) and implicitly imposed that standard upon an anesthesiologist (working in the mouth/throat) while declaring that the injury to the tooth caused by the anesthesiologist was far away from her abdomen even though the anesthesiologist never worked in the abdomen nor intended to work in the abdomen.

Taking the reverse of the situation highlights the issue: it is illogical to permit a suit to go forward on a res ipsa basis against an anesthesiologist due an injury in the abdomen on the basis that the anesthesiologist worked in the mouth and the abdomen is not directly or proximately related to the mouth. Looking at the case from the perspective of another provider of health care exposes the same flaw: it is illogical to permit a suit to go forward on a res ipsa basis against a surgeon operating in the abdomen due to an injury in the mouth simply because the

abdomen is not directly or proximately related to the mouth. The missing ingredient in all the aforementioned situations, including the instant matter, is determining "the treatment" applicable to *each* provider of health care and *then* analyzing whether that same provider caused an injury to a part of the body not directly related to the anatomical parameters of "the treatment." If so, then res ipsa applies. If not, then expert support is mandatory. This approach is precisely what is found in the 2015 amendments which require a NRS 41A.100(1) analysis of the injury in relation to each provider of health care's specific medical treatment.

It is a fact of medical science that multiple providers of health care frequently and simultaneously (or in highly coordinated fashion) provide health care to a given patient. An anesthesiologist and a surgeon each provide separate medical treatment in complementary, overlapping fashion. An anesthesiologist often administers general anesthesia via passage of a tube through the mouth, which includes the teeth. Consequently, a res ipsa case based upon a dislodged tooth injury is not viable against an anesthesiologist because the tooth is admittedly within the part of the body an anesthesiologist's general anesthesia treatment is expected to encounter. A lay person would have no basis to know whether a tooth injury allegedly caused by an anesthesiologist performing an endotracheal intubation is obviously negligent or not. This is why harmony exists between NRS 41A.071 and NRS 41A.100—expert testimony is only unnecessary in the most

obvious cases where negligence can be presumed because an injury occured to a structure of the body well outside the limited area of *intended* treatment by a *particular* provider of health care.

A plain language application of NRS 41A.100 leads to the individualized result argued for by Dr. Odell. NRS 41A.100 states there can be no liability imposed upon "any provider of health care based on alleged negligence in the performance of **that care** unless evidence consisting of expert medical testimony…is presented…except that such evidence [NRS 41A.071 affidavit] is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that **the provider of health care caused** the personal injury or death occurred in any one or more of the following circumstances… [a]n injury was suffered during **the course of treatment to a part of the body not directly involved in the treatment or proximate thereto**." The issue is thus whether a *given* provider of health care caused injury to a part of the body not directly involved in *that* provider of health care's treatment or proximate thereto. Consequently, if this Court properly applies the operative version of NRS 41A.100(1) in light of the overall statutory intent and tenor of NRS 41A, then this Court should affirm the District Court's decision at least as related to Dr. Odell because an injury to a tooth is in fact an injury to a part of the body directly involved in an endotracheal intubation, the treatment supplied.

III. CONCLUSION

Dr. Odell respectfully requests this Court to grant the Petition for Rehearing.

DATED this 14th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 Petition 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 Petition 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 3,204 words; and/or

☐ does not exceed 10 pages.

Dated this 14th day of December, 2018.

JOHN H. COTTON & ASSOCIATES, LTD.

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CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that on the 14th day of December 2018, I served a true and correct copy of the foregoing **DR. ROBERT ODELL, JR.'S PETITION FOR EN BANC RECONSIDERATION** was submitted electronically for filing and service to the following individuals:

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