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### Summary of Rogers v. State, 127 Nev. Adv. Op. No. 25

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*Nevada Law Journal*

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*Rogers v. State*, 127 Nev. Adv. Op. No. 25 (June 2, 2011)<sup>1</sup>  
CRIMINAL LAW AND PROCEDURE—DOCTOR-PATIENT PRIVILEGE

**Summary**

Appeal from judgment of conviction, pursuant to jury verdict, of driving under the influence of a controlled substance on grounds certain evidence was inadmissible.

**Disposition/Outcome**

A unanimous three-judge panel affirmed because the statutory doctor-patient evidentiary privilege does not apply to paramedics or EMTs.

**Factual and Procedural History**

David M. Rogers (“Rogers”) was convicted of driving under the influence of a controlled substance (marijuana) causing substantial bodily harm and was sentenced to a prison term. The jury heard evidence from a paramedic who took Rogers by ambulance to the hospital. The paramedic testified that Rogers told him he had smoked marijuana before the accident. Rogers argued on appeal that his statement to the paramedic was inadmissible because it was protected by Nevada’s doctor-patient privilege. Rogers alleged other grounds for appeal, but none were properly preserved.

**Discussion**

*Doctor-Patient Privilege*

Nevada’s doctor-patient privilege is codified at NRS 49.215-.245.<sup>2</sup> Each of the key terms in the statute—doctor, patient, and confidential—has a given definition.<sup>3</sup> “‘Doctor’ means a person licensed to practice medicine, dentistry or osteopathic medicine in any state or nation, or a person who is reasonably believed by the patient to be so licensed, and in addition includes a person employed . . . as a psychiatric social worker.”<sup>4</sup>

The Court rejected expanding the doctor-patient privilege to include EMTs or paramedics. Although Rogers intended his statement to the paramedic to remain confidential, the Court found “doctor,” as defined in statute, does not include EMTs or paramedics. Because evidentiary privileges “are in derogation of the search for truth,”<sup>5</sup> the Court has consistently held that statutory privileges should be construed narrowly, according to the “plain meaning of [their]

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<sup>1</sup> By Sean W. McDonald.

<sup>2</sup> The general rule of the privilege states “A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient’s doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient’s family.” NEV. REV. STAT. § 49.225 (2009).

<sup>3</sup> See *id.* § 49.215(1)-(3).

<sup>4</sup> *Id.* § 49.215(2).

<sup>5</sup> *United States v. Nixon*, 418 U.S. 683, 710 (1994), cited in *Ashokan v. State Dep’t of Ins.*, 109 Nev. 662, 856 P.2d 244, 247 (1993).

words.”<sup>6</sup> Further, the Legislature has not included EMTs or paramedics in the statute’s definition of “doctor.” Applying the narrow construction of statutory privileges, the doctor-patient privilege statute does not apply to communications between an EMT or paramedic and patient when those communications do not occur in the presence, or at the direction, of a doctor, as defined in statute.<sup>7</sup>

Rogers further argued that his statement to the paramedic is protected because the statute protects as privileged all communications “among the patient, the patient’s doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor.” Because EMTs are regulated by the state and since the paramedic worked under the auspices of a medical director, Rogers concluded the paramedic was acting under the direction of a doctor—the medical director under whose auspices the paramedic worked—thereby qualifying for the privilege.

The Court dismissed that argument as a misreading of the statute. The statute protects the relationship between “the” patient’s doctor, not the relationship between “a” doctor and another person. The medical director who supervised the paramedic was not Rogers’ doctor, and thus the privilege does not apply. The district court below found the paramedic was not operating under the direction of Rogers’ doctor.

### **Conclusion**

Although a policy argument can be made that the doctor-patient privilege should apply to paramedics and EMTs, the Court could not ignore the substantial competing concern with availability of evidence. Because statutory evidentiary privileges are construed narrowly, and since Rogers could not meet the burden of establishing the privilege,<sup>8</sup> the judgment of the district court was affirmed.

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<sup>6</sup> *Ashokan*, 109 Nev. at 670, 856 P.2d at 249; *McNair v. Dist. Ct.*, 110 Nev. 1285, 1288, 885 P.2d 576, 578 (1994); *Whitehead v. Comm’n on Jud. Discipline*, 110 Nev. 380, 414-15, 873 P.2d 946, 968 (1994); *see State v. Fouquette*, 67 Nev. 505, 536-37, 221 P.2d 404, 420-21 (1950).

<sup>7</sup> *Accord Med-Express, Inc. v. Tarpley*, 629 So. 2d 331, 332 (La. 1993); *State v. LaRoche*, 442 A.2d 602, 603 (N.H. 1982); *State v. Ross*, 947 P.2d 1290, 1292 (Wash. Ct. App. 1997).

<sup>8</sup> *McNair*, 110 Nev. at 1289, 885 P.2d at 579.