

10-4-2018

## Dolorfino v. Univ. Med. Ctr. of S. Nev., 134 Nev. Adv. Op. 79 (Oct. 4, 2018)

Steven Brecher

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Torts Commons](#)

---

### Recommended Citation

Brecher, Steven, "Dolorfino v. Univ. Med. Ctr. of S. Nev., 134 Nev. Adv. Op. 79 (Oct. 4, 2018)" (2018). *Nevada Supreme Court Summaries*. 1200.

<https://scholars.law.unlv.edu/nvscs/1200>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [david.mcclure@unlv.edu](mailto:david.mcclure@unlv.edu).

CIVIL APPEAL: NEGLIGENCE

**Summary**

The Court held that a claim of injury suffered during medical treatment may not be dismissed for lack of a supporting affidavit from a medical expert if the injured body part is not “directly involved in” or “proximate” to the treatment, where those phrases are to be interpreted quite narrowly.

**Background**

Appellant Dolorfino underwent a hysterectomy at University Medical Center (respondent). Dr. Robert Odell, Jr. (respondent) administered the required general anesthesia which involved an endotracheal intubation to assure an open airway. Dolorfino claimed that, during a power outage and resulting blackout, Dr. Odell dropped a medical instrument onto her tooth, injuring it. Dolorfino sued respondents, seeking recovery for damages to her tooth.

NRS 41A.071 requires the district court to dismiss professional negligence claims filed without a supporting affidavit from a medical expert.<sup>2</sup> Dolorfino’s complaint was not accompanied by such an affidavit, and therefore the district court granted respondents’ motions for summary judgment in the form of dismissal of the complaint. Dolorfino appealed.

**Discussion**

NRS 41A.100(1)(d) provides an exception to the requirement for specific evidence of negligence provided by a medical expert if the claimed injury is to a part of the body that is not “directly involved” in or “proximate” to the treatment.<sup>3</sup> For such injuries, NRS 41A.100(1) establishes a rebuttable presumption of negligence<sup>4</sup> in accord with the common law doctrine of *res ipsa loquitur*,<sup>5</sup> and the affidavit requirement of NRS 41A.071 does not apply.<sup>6</sup>

Dolorfino argued that the NRS 41A.100(1)(d) exception applied in her case because of the lack of nexus between the injured tooth and the hysterectomy. University Medical Center argued that the tooth was proximate to the endotracheal intubation and anesthesia was required by the hysterectomy. Dr. O’Dell warned that Dolorfino’s position implies that anesthesiologists would rarely have the affidavit protection of NRS 41A.071.

The Court discussed previous cases that dealt with the scope of NRS 41A.100(1)(d)’s exception.<sup>7</sup> One case addressed a claim for brain injury caused by an anesthesia error during a shoulder operation.<sup>8</sup> There, the Court held that an NRS 41A.100(1)(d) instruction was

---

<sup>1</sup> By Steven Brecher.

<sup>2</sup> NEV. REV. STAT. § 41A.071 (2017).

<sup>3</sup> NEV. REV. STAT. § 41A.100(1)(d) (2017).

<sup>4</sup> NEV. REV. STAT. § 41A.100(1) (2017).

<sup>5</sup> *Johnson v. Egtedar*, 112 Nev. 428, 433–34, 915 P.2d 271, 274 (1996).

<sup>6</sup> *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005).

<sup>7</sup> *Johnson*, 112 Nev. at 434, 117 P.2d at 275; *Banks v. Sunrise Hosp.*, 120 Nev. 822, 833, 102 P.3d 52, 60 (2004).

<sup>8</sup> *Id.* at 827-28, 102 P.3d at 56–57.

appropriate.<sup>9</sup> Previous cases demonstrated that the language “directly involved in the treatment or proximate thereto” of NRS 41A.100(1)(d) is to be interpreted quite narrowly; specifically, parts of the body targeted by anesthesia are not “directly involved” with or “proximate” to surgery on unrelated parts.

Dr. O’Dell’s argument of dire consequences for anesthesiologists is rendered unpersuasive by the longstanding settled law in this area, which the Court will not overturn without “compelling reasons,”<sup>10</sup> which are absent here.

### **Conclusion**

The Court held that Dolorfino’s tooth injury was not “directly involved” in or “proximate” to the hysterectomy, and therefore the district court erred in dismissing her complaint because it was not supported by an affidavit from a medical expert. Thus, the Court reversed and remanded for further proceedings.

---

<sup>9</sup> *Id.* at 833, 102 P.3d at 60.

<sup>10</sup> *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008).