IN THE SUPREME COURT OF THE STATE OF NEVADA

LAURIE D. LARSEN, M.D.; AND SCOTT A. SLAVIS, M.D., P.C., A NEVADA CORPORATION,
Appellants,
vs.
SUE LUCERO, CARLOS LUCERO, NAKIA LUCERO, AND SHAWNA LUCERO, AS HEIRS OF DECEDENT EPEFANIO A. LUCERO, JR.; AND BONNIE J. BETTERIDGE, AS THE ESTATE SPECIAL ADMINISTRATRIX OF THE ESTATE OF EPEFANIO A. LUCERO, JR.,
Respondents.

No. 38546

FILED

MAY 16 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order granting a new trial in favor of respondents, the heirs of Epefanio A. Lucero, Jr., and the administratrix of his estate.

Dr. Laurie D. Larsen performed a right radical orchiectomy on Lucero with the assistance of Dr. Scott A. Slavis. The following day, some of Lucero's children found him dead in his trailer in Las Vegas, Nevada. Respondents filed a medical malpractice claim against appellants Dr. Larsen and Dr. Scott A. Slavis, P.C., a Nevada Corporation, alleging that Dr. Larsen negligently performed the radical orchiectomy on Lucero, causing his death. Dr. Robert Bucklin performed the autopsy on Lucero. Dr. Bucklin determined that Lucero died of massive postoperative bleeding from the operative site. Dr. Bucklin found blood in a number of

places, including the retroperitoneal space and the peritoneal cavity. Respondents alleged that Dr. Larsen perforated the peritoneum, which caused blood to flow into the peritoneal cavity. Thus, respondents requested a res ipsa loquitur jury instruction pursuant to NRS 41A.100(1)(d) and (e), arguing that Dr. Larsen performed surgery on the wrong part of Lucero's body and injured a part of Lucero's body not proximate to the treatment. Respondents offered, in the alternative, Nevada Pattern Jury Instruction 6.17 or 6.18 on res ipsa loquitur. The district court refused to give either jury instruction.

The jury returned a verdict in favor of the appellants. Respondents filed a motion for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial, arguing, among other things, that the district court erred by not giving the res ipsa loquitur jury instruction pursuant to NRS 41A.100(1)(d) and (e). The district court denied respondents' motion for judgment notwithstanding the verdict, but granted their motion for a new trial. Appellants appeal the district court's grant of a new trial.

"[A] party is entitled to jury instructions on every theory of her case that is supported by the evidence."[1] This court has held that NRS 41A.100 replaces "the classic res ipsa loquitur formulation in medical malpractice cases."[2] Under NRS 41A.100(1)(d) and (e), a rebuttable

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[1]Johnson v. Egtedar, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996).

[2]Id. at 433, 915 P.2d at 274; see also Born v. Eisenman, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998).

presumption arises that death or personal injury was caused by negligence when a plaintiff offers evidence that the patient suffered an injury on a part of the body not involved or proximate to the treatment or a surgical procedure was performed on the wrong part of the patient's body. This court has held that

> all a plaintiff need do to warrant an instruction under the statutory medical malpractice res ipsa loquitur rule is present some evidence of the existence of one or more of the factual predicates enumerated in the statute. If the trier of fact then finds that one or more of the factual predicates exist, then the presumption must be applied.[3]

Appellants contend that respondents were not entitled to a jury instruction pursuant to NRS 41A.100(1)(d) or (e) because Dr. Larsen did not perform the surgery on the wrong part of Lucero's body and the injury Lucero suffered was to a part of his body proximate to the surgery. Therefore, appellants argue, respondents did not satisfy the factual predicate required under NRS 41A.100(1)(d) or (e) to warrant giving such an instruction. We agree with appellants' argument that NRS 41A.100(1)(e) is inapplicable in this case since Dr. Larsen did not perform a surgical procedure on the wrong part of Lucero's body. However, we disagree with appellants' argument that NRS 41A.100(1)(d) is inapplicable to this case and hold that respondents were entitled to a jury instruction pursuant to NRS 41A.100(1)(d).

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[3]Johnson, 112 Nev. at 434, 915 P.2d at 274 (emphasis added).

In respondents' pretrial memorandum and during trial, they alleged that Dr. Larsen negligently sutured Lucero's spermatic cord, permitting the spermatic artery to bleed, and that she also perforated Lucero's peritoneum. Respondents argued that they were entitled to a jury instruction pursuant to NRS 41A.100(1)(d) since Dr. Larsen injured the peritoneum, a part of Lucero's "body not directly involved in the treatment or proximate thereto."[4] Although debated during trial, respondents offered expert testimony that Lucero bled to death from his spermatic artery. Respondents also presented expert testimony that Dr. Larsen perforated or caused a hole in the peritoneum, allowing the bleeding to continue unimpeded, accumulating in the peritoneal cavity until Lucero bled to death. Further, respondents offered expert testimony, with which Dr. Larsen agreed, that blood was able to communicate into the peritoneal cavity most likely because of a hole in the peritoneum.

Because respondents offered evidence that Dr. Larsen perforated the peritoneum,[5] the issues of whether Dr. Larsen did, in fact, perforate the peritoneum, and whether the peritoneum is proximate to the surgery pursuant to NRS 41A.100(1)(d), were questions of fact, which the district court should have submitted to the jury. As respondents were entitled to a jury instruction pursuant to NRS 41A.100(1)(d), we hold that

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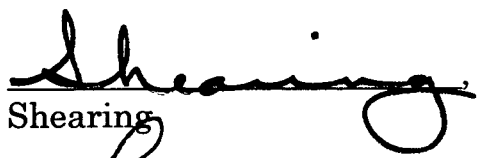
[4]NRS 41A.100(1)(d).

[5]See Johnson, 112 Nev. at 434, 915 P.2d at 274.

failing to instruct the jury accordingly warrants the grant of a new trial.[6] Accordingly, we

ORDER the judgment of the district court granting respondents a new trial AFFIRMED.



_____, J.
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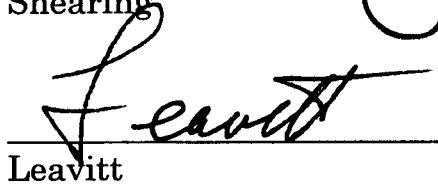

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Jennifer Togliatti, District Judge
Beckley Singleton, Chtd./Las Vegas
John H. Cotton & Associates, Ltd.
Mandelbaum Gentile & D`Olio
Schuering Zimmerman & Scully
Roy E. Smith
Clark County Clerk

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[6]Although the district court determined that respondents were entitled to a new trial for many other reasons, we need not address the other reasons without merit.