

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK MILFORD PECK,

Appellant,

vs.

VALLEY HOSPITAL MEDICAL  
CENTER; DAVID R. ZIPF, M.D.; AND  
MICHAEL D. BARNUM, M.D.,

Respondents.

Case No.: 68664

District Court No. A-14-708447-C  
Dept. No. III

Electronically Filed  
Jun 01 2016 10:11 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**APPEAL**

From the Eighth Judicial District Court  
The Honorable Douglas W. Herndon

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**APPENDIX TO APPELLANT FRANK PECK'S OPENING BRIEF**

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*Frank Milford Peck*

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3.	Opposition to Defendant's David R. Zipf M.D.'s Motion for Judgment on the Pleadings	June 26, 2015	1	0028-0039
4.	Defendant Michael D. Barnum, M.D.'s Joinder to Defendant David R. Zipf, M.D.'s Motion for Judgment on the Pleadings	July 2, 2015	1	0040-0046
5.	Opposition to David R. Zipf, M.D.'s Motion to Strike Punitive Damages	July 9, 2015	1	0047-0051
6.	Defendant David R. Zipf, M.D.'s Reply to Plaintiff's Opposition to Motion for Judgment on the Pleadings	July 15, 2015	1	0052-0057
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10	Notice of Entry of Order Filed by Defendant David R. Zipf, M.D. and Notice of Entry of Order Filed by Defendant Michael D. Barnum, M.D.	August 6, 2015	1	0072-0081
11	Notice of Appeal by Frank Peck	August 17, 2015	1	0082-0083

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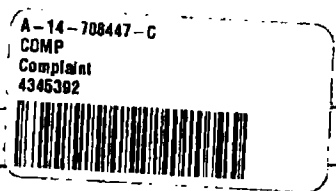
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#30

PK



FILED  
OCT 13 2014  
Clerk of Court

Frank M. Peck 57106  
HOSP Box 650  
Indian Springs, NV 89070  
Plaintiff, pro se.

DISTRICT COURT CLARK COUNTY, NEVADA

Frank M. Peck, CASE NO. A-14-708447-C  
Plaintiff, DEPT NO. III

VS. TORT ACTION  
Valley Hospital Medical Center, et al, MEDICAL MALPRACTICE,  
David R. Zopf MD, NEGLIGENCE COMPLAINT  
Michael D. Barnum MD, NRS 41A.100 BES 1P3A  
John Does I-V, LOQUITUR  
Defendants, JURY TRIAL DEMANDED

Comes Now, the Plaintiff, Frank M. Peck pro se  
hereinafter Mr. Peck with his MEDICAL MALPRACTICE  
NEGLECT COMPLAINT, NRS 41A.009 et seq.

1. INTRODUCTION

This is a Civil Tort Action Alleging Medical  
Malpractice Negligence NRS 41A.100(1)(a).

To wit; Needle or Guide left in Plaintiffs'  
left hand.

RECEIVED  
SEP 19 2014  
CLERK OF THE COURT

5

2.

### JURISDICTION

This Honorable court has jurisdiction over the  
Plaintiff's STATE TORT claim under NRS 41A.100  
res ipsa loquitur.

3.

### PARTIES

Plaintiff Frank M. Peck is a state prisoner  
incarcerated at High Desert State Prison:  
P.O. Box 650 Indian Springs, NV, 89070.

Defendant Valley Hospital Medical Center  
620 Shadow Lane Las Vegas, NV, 89106-4194

Defendant Doctor David R. Zipf MD  
620 Shadow Lane Las Vegas, NV, 89106-4194

Defendant Doctor Michael D. Barnum MD  
620 Shadow Lane Las Vegas, NV, 89106-4194

Defendant John Does 1-5 unknown Nurses PAs  
620 Shadow Lane Las Vegas NV 89106-4194

4.

### VENUE

At all times relevant all Defendants worked  
and resided in Clark County.

(2)

5.

## Facts

1. Plaintiff Peck was admitted to Valley Hospital on December 31st 2013.
2. Plaintiff Peck was discharged from Valley Hospital on January 17th 2014.
3. Plaintiff Peck on February 18th 2014 submitted a MEDICAL KIT to Prison medical staff alerting them that something possibly a needle is just under the skin in Mr. Peck's left hand.
4. Between Feb 18th 2014 and March 8th 2014 Plaintiff Peck was seen by NDOC Doctor Suwee who confirmed that "something foreign was in in Mr. Peck's hand" and at that time Dr. Suwee ORDERED AN X-RAY of Mr. Peck's hand.
5. On March 8th 2014 an X-RAY technician employed by Desert Radiology took (3) X-RAYS of Mr. Peck's left hand that clearly showed an object in Mr. Peck's left hand.



6.

### Cause of Action

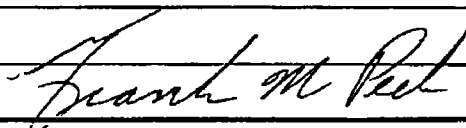
Plaintiff Peck alleges that the Defendants committed medical malpractice by deviating from the accepted standard of medical care or practice by "leaving a foreign substance in Mr. Peck's hand" NRS 41A.100(1)(a) (res ipsa loquitur doctrine) legally causing the injury suffered by Plaintiff. *Fernandez v. Admirand*, 108 Nev 963, 843 P.2d 354 (1992).

The above claim is specific in regard to all the Defendants named in this complaint as well as the discoverable names of additional defendants.

### Damages

Plaintiff seeks damages in the amount of (\$100,000.00), one hundred thousand dollars for pain and suffering, mental and emotional distress for past, current and future suffering plus punitive damages, costs, fees, expenses for removal of object and reasonable attorneys fees. And any other relief the court deems appropriate.

Dated 9-13-14



Frank M. Peck 57106

HDSP Box 650

(4) Indian Springs, NV 89070

State of Nevada<sup>ss</sup>  
County of Clark     Affidavit of Frank M. Peck

I Frank M. Peck do hereby swear under the penalty of perjury to the following:

1. I Am the Plaintiff in the Attached Civil tort claim for malpractice against Valley Hospital, et al.

2. All assertions in said complaint are true based upon personal knowledge and I am over the age of 18 and competent to testify to all matters contained therein.

3. I bring this complaint in good faith and for no improper reason.

Further Affiant sayseth naught

Dated this 13th day of September 2014.

Signed under penalty of perjury NRS 208.165  
and 28 U.S.C. 1746.

\* Affirmation contains no social security numbers of any person.

*Frank M Peck*

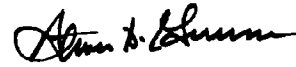
Frank M. Peck 57106

HDSP Box 650

Indian Springs, W. 89070

Plaintiff, pro se.

(5)



CLERK OF THE COURT

1 **MOT**  
2 ARTHUR W. TUVerson, ESQ.  
3 Nevada State Bar No. 005156  
4 DANIELLE WOODRUM, ESQ.  
5 Nevada State Bar No. 012902  
6 LAW OFFICES OF ARTHUR W. TUVerson  
7 A Limited Liability Partnership  
8 Including Professional Corporations  
9 7201 West Lake Mead Boulevard, Suite 570  
10 Las Vegas, Nevada 89128  
11 Telephone: (702) 631-7855  
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13 [dwoodrum@awtlawoffice.com](mailto:dwoodrum@awtlawoffice.com)  
14 Attorney for Defendant DAVID R. ZIPF, M.D.

9 **DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

11 \*\*\*\*\*

12 FRANK M. PECK,

13 Plaintiff,

14 v.

15 VALLEY HOSPITAL MEDICAL CENTER,  
16 et al., DAVID R. ZIPF, M.D., MICHAEL D.  
BARNUM, M.D., JOHN DOES I - V,

17 Defendants.

CASE NO.: A-14-708447-C  
DEPT. NO.: III

Hearing Date:

Hearing Time;

18  
19 **DEFENDANT DAVID R. ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE**  
20 **PLEADINGS AND SUPPORTING AFFIDAVIT OF DANIELLE WOODRUM, ESQ.**

21 COMES NOW, Defendant DAVID R. ZIPF, M.D., by and through his counsel of record,  
22 the LAW OFFICES OF ARTHUR W. TUVerson, LLP, and hereby submits this motion for  
23 judgment on the pleadings and supporting affidavit of Danielle Woodrum, Esq.

24 ///

25 ///

26 ///

27 ///

28 ///

LAW OFFICES OF ARTHUR W. TUVerson  
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TELEPHONE (702) 631-7855

1 This Motion is made based upon the attached Memorandum of Points & Authorities, the  
2 papers and pleadings on file, and any evidence and/or argument that may be taken at the time for  
3 hearing on this matter.

4 DATED: June 17, 2015

LAW OFFICES OF ARTHUR W. TUVERSON

5  
6 BY: 

ARTHUR W. TUVERSON, ESQ.

Nevada State Bar No. 005156

DANIELLE WOODRUM, ESQ.

Nevada State Bar No. 012902

7201 West Lake Mead Boulevard, Suite 570

Las Vegas, Nevada 89128

(702) 631-7855

Attorneys for Defendant DAVID R. ZIPF, M.D.

11  
12 NOTICE OF MOTION

13 TO: All parties, and their respective attorneys:

14 PLEASE TAKE NOTICE that Defendant DAVID R. ZIPF, M.D.'s MOTION FOR  
15 JUDGMENT ON THE PLEADINGS or will be heard in Department III of the above entitled  
16 Court on the 22 day of JULY, 2015, at 9:00A.m.

17 DATED: June 17, 2015

LAW OFFICES OF ARTHUR W. TUVERSON

18  
19 BY: 

ARTHUR W. TUVERSON, ESQ.

Nevada State Bar No. 005156

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**AFFIDAVIT OF DANIELLE WOODRUM, ESQ.**  
**IN SUPPORT OF DEFENDANT DAVID R. ZIPF, M.D.'S**  
**MOTION FOR JUDGMENT ON THE PLEADINGS**

STATE OF NEVADA        )  
                                  ) ss.  
COUNTY OF CLARK        )

DANIELLE WOODRUM, ESQ., being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the state of Nevada, and an attorney with the LAW OFFICES OF ARTHUR W. TUVERTSON.

2. I am the attorney of record for Defendant DAVID R. ZIPF, M.D. in this matter.

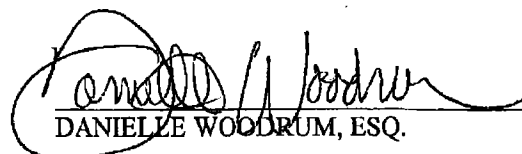
3. I have been involved in the handling of this case and am familiar with the facts testified to herein.

4. Attached to Defendant DAVID R. ZIPF, M.D.'s Motion for Judgment on the Pleadings as Exhibit A is a true and correct copy of Nevada Department of Corrections Medical Kite and/or Service Report.

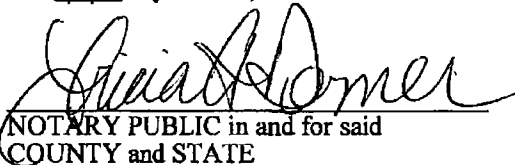
5. Attached to DAVID R. ZIPF, M.D.'s Motion for Judgment on the Pleadings as Exhibit B is a true and correct copy of the Nevada Department of Corrections Physicians' Orders Form.

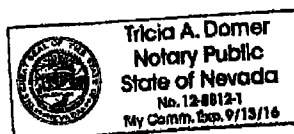
6. Attached to Defendant DAVID R. ZIPF, M.D.'s Motion for Judgment on the Pleadings as Exhibit C is a true and correct copy of the Quality Medical Imaging Radiology Interpretation.

Further your Affiant sayeth naught.

  
DANIELLE WOODRUM, ESQ.

SWORN and SUBSCRIBED to before me  
this 17<sup>th</sup> day of June, 2015.

  
NOTARY PUBLIC in and for said  
COUNTY and STATE



MEMORANDUM OF POINTS & AUTHORITIES

## I. INTRODUCTION

Plaintiff is a prisoner at High Desert State Prison in Indian Springs. Plaintiff, in proper person, filed the instant "medical malpractice negligence" ("professional negligence") action relying strictly on the doctrine of *res ipsa loquitur* as defined by NRS 41A.100(1)(a). Plaintiff contends NRS 41A.100(1)(a) is applicable because a foreign object, an intravenous ("IV") needle, was inadvertently left in his hand after he was hospitalized at Valley Hospital. However, radiology records referenced in Plaintiff's Complaint, demonstrate that no foreign object was ever found in Plaintiff's hand. Thus, judgment as a matter of law is appropriate as Plaintiff's only basis for alleging professional negligence against Dr. Zipf is the alleged retention of a foreign object.

Moreover, even if the Court were to ignore the radiology records, which demonstrate no foreign object was identified in Plaintiff's hand, NRS 41A.100(1)(a) is still inapplicable as it only applies to cases when a foreign object is **unintentionally** left in a patient during a **surgical procedure**, such as when a surgical sponge or instrument is left in a patient during surgery. It does not apply when a medical device that is supposed to remain in a patient for a period of time, such as an IV access device, is retained. Furthermore, the *res ipsa loquitur* doctrine is inapplicable as to Dr. Zipf, because Plaintiff has failed to allege that Dr. Zipf had exclusive, let alone any, control over the placement or removal of the IV needle and/or catheter.

Plaintiff did not attach to his Complaint an expert affidavit to support his allegations of professional negligence against Dr. Zipf. Ostensibly, Plaintiff failed to do because of his reliance on NRS 41A.100(1)(a) which provides an exception to the expert affidavit requirement embodied in NRS 41A.071. However, as noted above and explained below, the *res ipsa loquitur* exception embodied in NRS 41A.100(1)(a) is inapplicable in this case. Therefore, Plaintiff's Complaint fails as a matter of law because he has failed to comply with the expert affidavit requirement of NRS 41A.071.

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///

1           **II.     STATEMENT OF FACTS**

2           Plaintiff was transferred from High Desert State Prison to Valley Hospital on December  
3 31, 2013 with meningitis. (See Nevada Department of Corrections Medical Kite and/or Service  
4 Report, attached as **Exhibit A**; see also Complaint filed on October 13, 2014 ("Compl.") at ¶ 1.)  
5 He was discharged from Valley Hospital on January 17, 2014. (Compl. at ¶ 2.) Over a month  
6 after his discharge from Valley Hospital, on February 18, 2014, Plaintiff alerted prison staff that  
7 there may have been a problem with his left hand, stating "something possibly a needle is just  
8 under the skin in my left hand." (See **Exhibit A**; see also Compl. at ¶ 3.) Dr. Suwee, a physician  
9 at the High Desert State Prison, ordered an x-ray of Plaintiff's left hand to rule out the presence  
10 of a foreign object. (See Nevada Department of Corrections Physicians' Orders Form, attached as  
11 **Exhibit B**.) An x-ray of Plaintiff's left hand was taken on March 8, 2014. The x-ray did not  
12 identify a foreign object and was read as "negative left hand." (See Quality Medical Imaging  
13 Radiology Interpretation, attached as **Exhibit C**.)

14           **III.    LEGAL STANDARD**

15           Pursuant to NRCP 12(c), "[a]fter the pleadings are closed but within such time as not to  
16 delay the trial, any party may move for judgment on the pleadings." The standard of review is  
17 equivalent to a Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can  
18 be granted. See *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

19           In reviewing such a motion, the Court must determine whether the challenged pleading  
20 sets forth allegations sufficient to satisfy the elements of a legally cognizable claim for relief.  
21 *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). Generally, the Court should  
22 recognize the factual allegations in Plaintiff's Complaint as true. *Buzz Stew, LLC v. City of N Las*  
23 *Vegas*, 124 Nev. Adv. Rep. 21, 181 P.3d 670, 672 (2008). However, the Complaint should be  
24 dismissed if the factual allegations of the Complaint, if accepted as true, are insufficient to  
25 establish the essential elements of a claim for relief. *Edgar*, 101 Nev. at 228, 699 P.2d at 112.

26           Generally, when ruling on a motion for judgment on the pleadings, matters outside the  
27 complaint will not be considered. However, "the court may take into account matters of public  
28 record, orders, items present in the record of the case, and any exhibits attached to the complaint

1 when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted.”  
2 *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). The  
3 *Breliant* court also cited to other cases wherein the pleadings, on file, were referenced and  
4 documents that were referenced in the complaint, in determining the sufficiency of a plaintiff’s  
5 complaint. *Id.*; citing *Hollymatic Corp. v. Holly Sys., Inc.*, 620 F.Supp. 1366, 1367  
6 (D.C.II.1985) (court considered contract attached to complaint and admissions in answer and in  
7 reply to counterclaim); *Berk v. Ascott Inv. Corp.*, 759 F.Supp. 245, 249 (D.C.Pa.1991) (court may  
8 consider document incorporated by reference into the complaint).

9  
10 IV. LEGAL ARGUMENT

11 A. THE COMPLAINT DOES NOT MEET THE REQUIREMENTS OF NRS  
12 41A.071 AND MUST BE DISMISSED.

13 The Complaint in this matter alleges Defendants “deviat[ed] from the accepted standard  
14 of medical care or practice.” Thus, this action falls within the scope of NRS 41A.071. *See* NRS  
15 41A.009. NRS 41A.071 provides:

16 If an action for medical malpractice or dental malpractice is filed in  
17 the district court, the district court shall dismiss the action, without  
18 prejudice, if the action is filed without an affidavit, supporting the  
allegations contained in the action, submitted by a medical expert  
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  
malpractice.

19 The expert affidavit requirement of NRS 41A.071 is designed to ensure that the “parties file  
20 malpractice cases in good faith, i.e., to prevent the filing of frivolous lawsuits,” and to ensure that  
21 the case is meritorious. *Washoe Medical Center v. Second Judicial District Court*, 122 Nev. Adv.  
22 Rep. 110, 148 P.3d 790, 794 (2006); *Borger v. Eighth Judicial District Court* 120 Nev. 1021,  
23 1026, 102 P.3d 600, 604 (2004). A medical malpractice complaint that is filed without an expert  
24 affidavit is *void ab initio*, shall be dismissed by the District Court without prejudice, and cannot  
25 be amended. *Washoe* at 793-794; *Borger* at 1029-1030. In the instant case, the Complaint was  
26 filed without an expert affidavit and should therefore be dismissed without leave to amend.

27 ///

28 ///



1 B. PLAINTIFF CANNOT SHOW THE ALLEGED ACCIDENT IS ONE THAT  
2 DOES NOT ORDINARILY OCCUR ABSENT NEGLIGENCE, THUS *RES*  
3 *IPSA LOQUITUR* IS NOT APPLICABLE.

4 Plaintiff contends this case falls within NRS 41A.100(1)(a), which enumerates a *res ipsa*  
5 *loquitur* exception to the expert affidavit requirement where "a foreign substance other than  
6 medication or a prosthetic device was unintentionally left within the body of a patient following  
7 surgery." Plaintiff must meet each element of 41A.100(1)(a) to receive the benefit of the *res ipsa*  
8 *loquitur* exception. In fact, Plaintiff's ability to meet these elements must be carefully and  
9 narrowly metered by the Court early in the litigation.

10 ... the plaintiff must present facts and evidence that show the  
11 existence of one or more of the situations enumerated in NRS  
12 41A.100(1)(a)-(e). While the dissent disapproves this procedure  
13 because it is not specifically set forth in the statute, we believe it is  
14 only fair that a plaintiff filing a *res ipsa loquitur* case be required  
15 to show early in the litigation process that his or her action actually  
16 meets the *narrow res ipsa requirements*. *Szydel v. Markman*, 121  
17 Nev. 453, 460-461, 117 P.3d 200, 205 (2005) (emphasis added).

18 If Plaintiff cannot meet each element, the *res ipsa loquitur* exception does not apply, the  
19 Complaint is *void ab initio*, must be dismissed without prejudice, and cannot be amended.  
20 *Washoe* at 793-794.

21 NRS 41A.100(1)(a) clearly enumerates two conditions which must occur for it to be  
22 applicable. First, a foreign object must be **unintentionally** left in a patient's body. Second, the  
23 foreign body must be left following **surgery**. The classic scenario invoking this exception is  
24 when a surgical sponge or instrument is left in a patient following surgery. Courts have not  
25 applied the *res ipsa loquitur* doctrine to cases where a foreign object is intentionally left in a  
26 patient. For example, in *Gilbert v. Campbell*, multiple Penrose drains (surgical rubber tubes  
27 placed in a wound to drain fluid) were inserted several months after the plaintiff, Mr. Gilbert,  
28 underwent a surgical colon resection to remove a tumor. 440 So.2d 1048, 1048-1049 (1983).  
The drains were intended to drain infected material from a pelvic abscess. *Id.* at 1049. Almost a  
year later, and long after removal of the drains, a piece of a drain was found inside the body of  
Mr. Gilbert. *Id.* The Supreme Court of Alabama determined that the *res ipsa loquitur* doctrine  
did not apply because expert medical testimony was required to describe the proper use, purpose,

1 insertion, and removal of a Penrose drain, and without such testimony there was no evidence that  
2 the defendant physician was negligent. *Id.*

3 Similarly, in *Scott v. Rayhrer*, the court held the retention and removal of a Penrose drain  
4 involved complex medical procedures beyond the comprehension of a layperson. 185  
5 Cal.App.4th 1535 (2010). The plaintiff in *Scott* underwent surgery for colorectal cancer in  
6 September 2002, and after he experienced postoperative complications, one of the defendant  
7 physicians placed two Penrose drains in the wound, located in the presacral space, on September  
8 9, 2003. *Id.* at 1538-1539. The second defendant physician removed the drains on September 22,  
9 2003. *Id.* at 1539. However, a May 3, 2005 fistulogram showed a drain or a portion of a drain,  
10 and the patient underwent surgery that same day to remove it. *Id.* The *Scott* Court noted the  
11 presence of the drain in the patient's body was superficially similar to a retained sponge, but, as in  
12 the instant case, the drain was not inadvertently left during surgery. *Id.* at 1547. Instead, it was  
13 purposely inserted and **was meant to be retained temporarily**. *Id.* Therefore, expert medical  
14 testimony was needed to prove the physician who inserted the drains was negligent. *Id.* at 1548.

15 Like *Gilbert* and *Scott*, this case does not involve a foreign object that was  
16 **unintentionally** left within the body of a patient following surgery. Similar to the  
17 aforementioned cases, Plaintiff alleges a foreign object was left in his body. Just as in the *Gilbert*  
18 and *Scott* cases, the foreign object, an IV needle or catheter, was initially **intentionally** left in  
19 Plaintiff's hand. Thus, Plaintiff's contention is not that a foreign object was unintentionally left  
20 during surgery. Rather, his contention is that Defendants failed to remove a foreign object, an IV  
21 needle or catheter, when he was discharged from Valley Hospital. This is analogous to the claims  
22 in *Gilbert* and *Scott* wherein the plaintiffs claimed that the Penrose drains were not properly  
23 removed. As was the case in *Gilbert* and *Scott*, the doctrine of *res ipsa loquitur*, as codified in  
24 NRS 41A.100(1)(a) is inapplicable here and Plaintiff must also use a medical expert to describe  
25 the proper use, purpose, insertion, and removal of an IV catheter. Nevertheless, Plaintiff has  
26 failed to provide an expert affidavit. Therefore, he has not met the requirement of NRS 41A.071,  
27 and dismissal of the Complaint, without leave to amend, is the appropriate remedy.

28

## 1 C. RES IPSA LOQUITUR DOES NOT APPLY TO DR. ZIPF.

2 Nevada's statutory version of the *res ipsa loquitur* doctrine replaces long existing  
3 common law theory. At common law, in order for the doctrine to apply, a plaintiff was required  
4 to demonstrate that the defendant(s) had "exclusive control" of the instrumentality causing the  
5 harm during the period of the injury and was "in a better position to explain the cause of the  
6 accident." See, e.g., *Landmark Hotel & Casino*, 104 Nev. 297, 230, 757 P.2d 361, 363 (1988),  
7 citing *Otis Elevator Co. v. Reid*, 101 Nev. 515, 518, 706 P.2d 1378, 1380 (1985). For the  
8 doctrine to apply fairly, whether at common law or under statute, that element must remain. If  
9 not, a defendant can be found responsible for another's injury simply for being in the vicinity of  
10 the injury. The requirement of "control" ensures that the defendant was an active participant who  
11 was at least a probable reason for the injury. *Id.*

12 In *Fierle v. Perez*, the Nevada Supreme Court confirmed that the concept of exclusive  
13 control remains embedded in the statutory version of *res ipsa loquitur*. 219 P.3d 906, 908 (Nev.  
14 2009). In *Fierle*, the plaintiff underwent a mastectomy and follow-up chemotherapy treatments  
15 for breast cancer. *Id.* at 908. The chemotherapy administration was not performed properly,  
16 resulting in burns to the plaintiff's skin. *Id.* at 909. Plaintiff brought suit under both traditional  
17 negligence and *res ipsa loquitur* theories but failed to attach the affidavit required by statute to  
18 support the negligence claim. *Id.* at 903. The Nevada Supreme Court affirmed the trial court's  
19 dismissal of the negligence claim based on the absence of an affidavit. *Id.* at 912. The Court,  
20 however, allowed plaintiff to proceed with her *res ipsa loquitur* claim, finding that no affidavit  
21 was required under that theory. *Id.* at 913. Importantly, however, was the Court's exclusion from  
22 the *res ipsa loquitur* claim those medical personnel who did not administer (and therefore had no  
23 control over) the medication. As to those individuals, the Plaintiff plead negligent supervision  
24 and training. The Court held that such indirect negligence claims were not subsumed within the  
25 *res ipsa loquitur* doctrine. *Id.*

26 Here, Plaintiff has failed to allege what, if any involvement, Dr. Zipf had in the placement  
27 or removal of the alleged retained IV needle or catheter. Plaintiff does not allege that Dr. Zipf  
28

1 had exclusive control over the IV needle or catheter. In fact, Plaintiff fails to allege how any  
2 Defendant was negligent regarding the alleged retention of the IV catheter. Plaintiff only alleges:

3  
4 . . . that the Defendants' (sic) committed (sic) medical malpractice  
5 by deviating from the accepted standard of medical care or practice  
6 by "leaving a foreign substance in Mr. Peck's Hand" NRS  
7 41A.100(1)(a) (*res ipsa loquitur* doctrine) legally causing the  
8 injury suffered by Plaintiff. Fernandez v. Admirand, 108 Nev.  
9 963, 843 P 2d 354 (1992).

10 The above claim is specific in regard to all the Defendants' named  
11 in this complaint as well as the discoverable names of additional  
12 defendants' (sic)

13 Although Plaintiff alleges his claim is specific as to all Defendants, he fails to describe  
14 how the claims are specific as to each Defendant. In fact, he fails to describe any role that Dr.  
15 Zipf had in his care and treatment at Valley Hospital. As in *Fierle*, Plaintiff has not claimed that  
16 Dr. Zipf improperly inserted or removed the IV needle or catheter, so he cannot claim that Dr.  
17 Zipf had exclusive control over the instrumentality allegedly responsible for his injuries. *Fierle*  
18 unequivocally demonstrates that this type of indirect negligence claim does not fall under the *res*  
19 *ipsa loquitur* statute.

20 Not only do Plaintiff's allegations as to Dr. Zipf fail to meet the specificity requirements  
21 needed for the *res ipsa loquitur* doctrine to apply, they fail to meet the basic pleading  
22 requirements of NRCP 8. A properly pled complaint must provide "a short and plain statement  
23 of the claim showing that the pleader is entitled to relief." NRCP 8(a); *see also Bell Atlantic*  
24 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (addressing Rule 8 of the Federal Rules of Civil  
25 Procedure). While Rule 8 does not require detailed factual allegations, it demands "more than  
26 labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft*  
27 *v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*citing Papasan v. Aliain*, 478 U.S. 265, 286 (1986)).  
28 "Factual allegations must be enough to rise above the speculative level" *Twombly*, 550 U.S. at  
555. Plaintiff has completely failed to allege how he is entitled to relief based upon any act, or  
failure to act, of Dr. Zipf and his Complaint must be dismissed as a matter of law.

///

///

1 D. EVEN IF PLAINTIFF'S COMPLAINT IS FOUND TO STATE A VIABLE  
2 CAUSE OF ACTION JUDGMENT AS A MATTER OF LAW IS  
3 APPROPRIATE.

4 Even assuming *arguendo* that the *res ipsa loquitur* exception applied, Defendant is  
5 entitled to judgment as a matter of law because x-rays taken on March 8, 2014 do not show a  
6 foreign body was retained in Plaintiff's hand.

7 Generally, when ruling on a motion for judgment on the pleadings or a motion to dismiss,  
8 matters outside the complaint will not be considered. However, "the court may take into account  
9 matters of public record, orders, items present in the record of the case, and any exhibits attached  
10 to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief  
11 can be granted." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261  
12 (1993).

13 Here, Plaintiff references an x-ray taken on March 8, 2014, as confirming the presence of  
14 a foreign object in his hand. However, the radiology report and images do not identify a foreign  
15 object. Although Plaintiffs' allegations are generally accepted as true, that rule gives way when  
16 the allegations are contradicted by the documents on which the Complaint is based, such as the  
17 radiology records in this case. *Breliant*, 109 Nev. at 847, 858 P.2d at 1261 (stating "the court  
18 may take into account matters of public record, orders, items present in the record of the case, and  
19 any exhibits attached to the Complaint when ruling on a motion to dismiss for failure to state a  
20 claim").

21 The documents relied on in Plaintiff's Complaint clearly do not state what he purports  
22 they do. The Court is not required to accept Plaintiff's allegations as true. Instead, the Court  
23 must consider the record that the Complaint was based on, showing that there was no retained  
24 foreign object in Plaintiff's hand. It is axiomatic that if there was no foreign object in Plaintiff's  
25 hand, his claim fails as a matter of law because the only allegations that makes against  
26 Defendants are that they were negligent because a foreign object was left in his hand. Thus,  
27 judgment on the pleadings is appropriate.

28 V. CONCLUSION

Based upon the foregoing, Defendant, DAVID R. ZIPF, M.D. respectfully requests the

LAW OFFICES OF ARTHUR W. TUVerson

A LIMITED LIABILITY PARTNERSHIP  
INCLUSIVE PROFESSIONAL CORPORATION  
7201 WEST LAKE MEAD BOULEVARD, SUITE 570  
LAS VEGAS, NEVADA 89128  
TELEPHONE (702) 631-7855

1 Court grant his Motion for Judgment on the Pleadings in its entirety.

2 DATED: June 17, 2015

LAW OFFICES OF ARTHUR W. TUVerson

3  
4 BY: 

ARTHUR W. TUVerson, ESQ.

Nevada State Bar No. 005156

DANIELLE WOODRUM, ESQ.

Nevada State Bar No. 012902

7201 West Lake Mead Boulevard, Suite 570

Las Vegas, Nevada 89128

(702) 631-7855

Attorneys for Defendant DAVID R. ZIPF, M.D.

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICES OF ARTHUR W. TUVERSON, and that on this 17<sup>th</sup> day of June, 2015, I served a copy of DEFENDANT DAVID R. ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE PLEADINGS AND SUPPORTING AFFIDAVIT OF DANIELLE WOODRUM, ESQ. as follows:

☒ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada: and/or

Frank M. Peck, #57106  
HDSP Box 650  
Indian Springs, NV 89070  
Plaintiff Pro Per

John F. Bernis, Esq.  
Ian M. Houston, Esq.  
HALL PRANGLE & SCHOONVELD, LLC  
1160 N. Town Center Drive, Suite 200  
Las Vegas, NV 89144  
(702) 889-6400  
(702) 384-6025 fax  
Attorneys for Defendant Valley Hospital Medical Center

☒ By Electronic Service through Eighth Judicial District Court to;

David J. Mortensen, Esq.  
Chelsea R. Hueth, Esq.  
ALVERSON TAYLOR MORTENSEN &  
SANDERS  
7401 W. Charleston Blvd.  
Las Vegas, NV 89117  
Facsimile (702) 385-7000  
[efile@alversontaylor.com](mailto:efile@alversontaylor.com)  
[dmortensen@alversontaylor.com](mailto:dmortensen@alversontaylor.com)  
[dkurdziel@alversontaylor.com](mailto:dkurdziel@alversontaylor.com)  
[smasia@alversontaylor.com](mailto:smasia@alversontaylor.com)  
Attorneys for Defendant Michael D. Barnum, M.D.

  
An employee of the  
LAW OFFICES OF ARTHUR W. TUVERSON

---

**EXHIBIT “A”**

**EXHIBIT “A”**



Dr. Jim Holmes

Menenngitis patient  
at Valley Hospital

TOP, UNSHADED PORTION TO BE FILLED OUT BY INMATE PATIENT

Signature

Frank M. Peck

(also print name and DOC # at the bottom of this form)

DOC # 57106

Institution

HDSR

Date Submitted

2-18-14

Unit/House

7-B-2-B

Reason for request:

I was discharged from Valley Hospital on 1-17-14 and something possibly  
A needle is just under the skin in my left hand. It appears that I may have  
permanent nerve damage to both hands possibly from handcuffs.

Per AB 389, there may be a \$4.00 charge for any visit and a \$2.00 charge for any prescription issued.

DO NOT WRITE IN SHADED AREA BELOW

RESPONSE TO KITE:

- ☐ Appointment scheduled for \_\_\_\_\_ Rescheduled for \_\_\_\_\_  
☐ No Visit necessary. See type of service or service provided, below.  
☐ Not entitled to requested care. Reason \_\_\_\_\_  
☐ No show for appointment.  
☐ Refused to be seen. DOC 2523 Release of Liability... filed.

TYPE OF SERVICE:

- ☐ Medical ☐ Dental ☐ Mental Health ☐ Nursing ☐ Other  
☐ Inmate requested, charge \_\_\_\_\_ ☐ Inmate requested, no charge  
☐ Emergency, Charge \_\_\_\_\_ ☐ Emergency, no charge  
☐ Prison required, no charge

WHEN YOUR NAME COMES  
ON THE LIST THE  
DOCTOR WILL SEE YOU

Enter ICD-9 code(s) and/or diagnosis(es)

SERVICE(S) PROVIDED: Check all that apply

VISITS

- ☐ New, minimal  
☐ New, moderate  
☐ New, high  
☐ Established, minimal  
☐ Established, moderate  
☐ Established, high  
☐ Consultation visit  
☐ Intake PE/classification  
☐ Recurrent PE/classification  
☐ Re-classification only  
☐ Nursing assessment

PROCEDURES/  
DIAGNOSTICS

- ☐ Biopsy  
☐ BP  
☐ Ear Lavage  
☐ EKG  
☐ Excision  
☐ Eye Exam  
☐ I & D  
☐ Immunization  
☐ Hepatitis B  
☐ Influenza  
☐ Tetanus  
☐ Other \_\_\_\_\_  
☐ Inhalation Treatment  
☐ PPD  
☐ Spirometry  
☐ Suturing  
☐ Suture removal  
☐ Treadmill

PROCEDURES/  
DIAGNOSTICS, cont'd

- ☐ Whirlpool  
☐ X-ray  
☐ Other \_\_\_\_\_

CHART REVIEW ONLY

- ☐ By medical personnel  
☐ By inmate patient

LABORATORY

- ☐ Venipuncture  
☐ Specimen collection

ITEMS ISSUED

- ☐ Prosthetic  
☐ Eye glasses

☐ Rx REFILL ONLY

SPECIALTY CLINICS

- ☐ Cardiology  
☐ Neurology  
☐ Infectious disease  
☐ Endocrine  
☐ Internal Medicine  
☐ Pulmonary  
☐ Mental Health  
☐ Other \_\_\_\_\_

EMERGENCY SERVICES

- ☐ Mandown  
☐ Non-mandown  
☐ Suicide attempt  
☐ Self-mutilation  
☐ Altercation  
☐ Accident  
☐ Recreational injury

CONTRACT PROVIDERS

- ☐ Physician, gen'l practice  
☐ Neurology  
☐ Ophthalmology  
☐ Orthopedic  
☐ Physical therapy  
☐ Other \_\_\_\_\_

PRESCRIPTIONS:

KOP Medications:

Total #

# to charge

# started by nursing

Non-KOP Medications:

Total #

# to charge

# started by nursing

PLAN:

- ☐ Follow-up appointment ordered ☐ Return if needed ☐ Follow-up not required

FEB 18 2014

Name / Title OR Position #

Date

Time

Name / Title OR Position #

Date

Time

Distribution: ORIGINAL to medical record, COPY to date entry, then to inmate patient if necessary

NEVADA DEPARTMENT OF CORRECTIONS  
MEDICAL KITE and / or  
SERVICE REPORT

NAME

Frank M. Peck

DOC #

57106

DOC 2500 (REV. 7/01)

0020

---

**EXHIBIT “B”**

**EXHIBIT “B”**

DATE ORDERED	<b>ORDERS</b> Leave no blank lines. Carry over orders must be signed and dated on each page.
1/23/14 1000	7 hyp with Provider after 2 weeks Dantrolene / NPC / Myelomax noted Chas 1/23/14
1/23/2014 1430	Continue - Dilantin 300 mg PO aHS x 90 days Diltiazem <sup>ER</sup> 120 mg 1 to PO daily x 90 days Mevacor 20 mg PO daily x 90 days ASA 81 mg PO daily x 90 days <del>Suboxone 8 mg ER</del> <del>Suboxone 8 mg ER</del> noted Chas 1/23/14
3/6/14 53 AM	<del>           Claritin 10 mg 1 po QHS x 30 days            noted Chas 3/6/14         </del>
2/26/14 (31)	<del>           X-ray (L) hand Re: P/o forearm today            lukman 2/26/14         </del>
<b>ALLERGIES:</b>	
<div style="display: flex; justify-content: space-between;"> <div> <b>NEVADA DEPARTMENT OF CORRECTIONS</b>  <b>PHYSICIAN'S ORDERS</b>            (Signature of Physician shall follow each order)         </div> <div> <b>NAME:</b> <u>Peck, Frank</u>            Last First MI  <b>ID#</b> <u>43104</u> </div> </div>	

---

**EXHIBIT “C”**

**EXHIBIT “C”**



## QUALITY MEDICAL IMAGING

PHONE: 866-508-4870 FAX: 866-274-0710

*PEEK*

Radiology Interpretation

PATIENT NAME: PEEK FRANK  
DATE OF BIRTH: ~~REDACTED~~  
RAD NUMBER: 70308  
PHYSICIAN: BERNARDINO, RUSTICA  
FACILITY: HIGH DESERT STATE PRISON  
DATE OF EXAM: 2014-03-08  
PROCEDURES: XR Hand >=3 views  
HISTORY: PAIN IN JOINT; HAND (719.44)

Three views of the left hand.

No acute fractures are seen. Alignment is normal. Soft tissues are unremarkable.

Impression: Negative left hand.

Completed: 2014-03-08 20:45:05 PST

Electronically Signed By: Jon Jaksha MD

*Jonathan Jaksha*

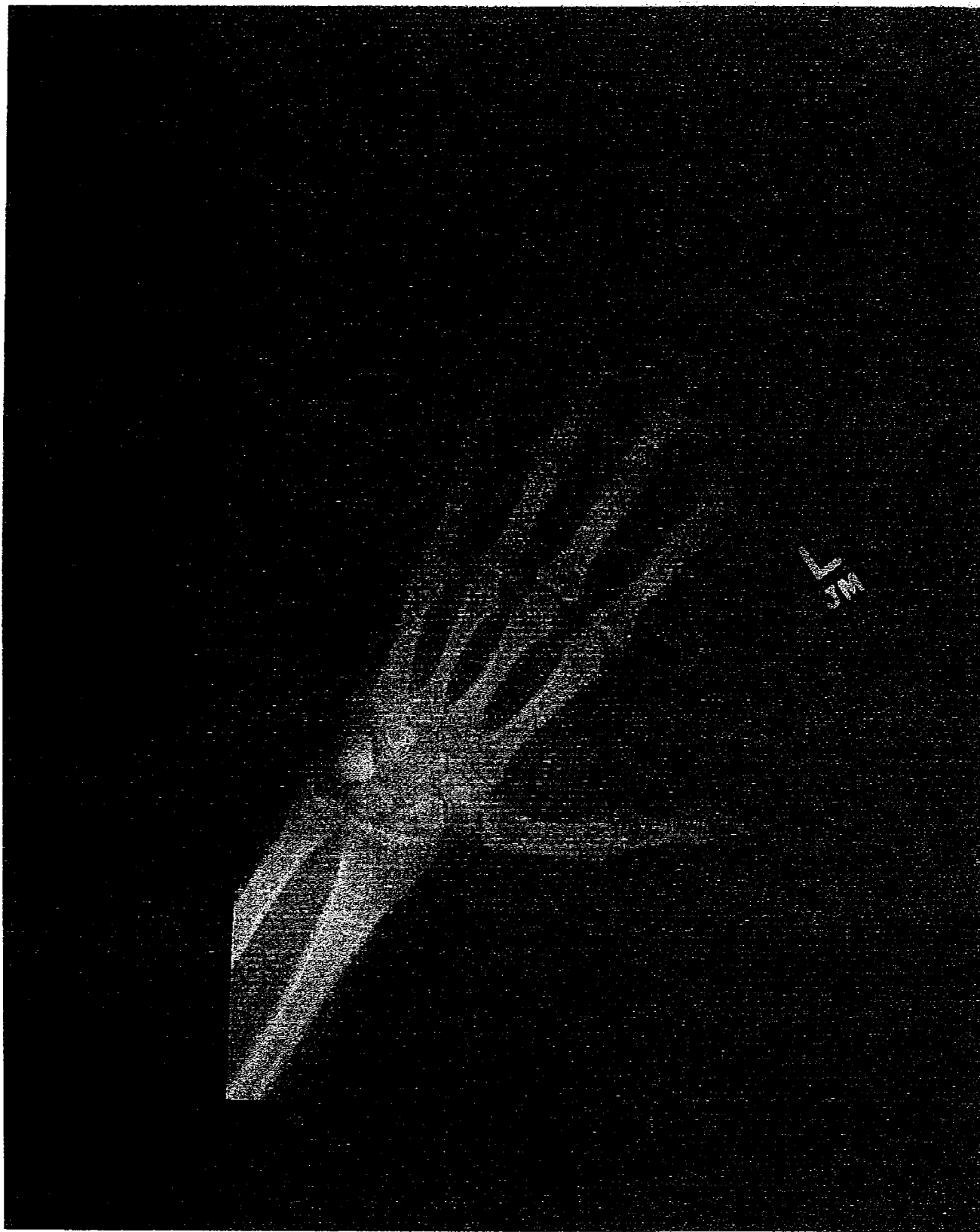
*mw NP-c  
3/14/14*

*FAIR*

Provider: BERNARDINO, RUSTICA

Report Completed: 2014-03-08 20:45:05 PST

This transmission is proprietary, privileged and confidential. It is intended to be communication only for the use of the addressee(s) access to this message by anyone else is unauthorized. If you are not the intended recipient and have received this communication in error, please notify us immediately. Any other action taken, including but not limited to the disclosure, copying or distribution of this communication is prohibited by law.



Patent ID: 70308  
Patent Name: Peck, Frank  
Study Date: 03/08/2014



Patient ID: 70308  
Patient Name: Peck, Frank  
Study Date: 03/08/2014



Patient ID: 70308  
Patient Name: Peck, Frank  
Study Date: 03/08/2014



Frank M. Peck 57106

FILED

HDSP Box 650

JUN 26 2015

Indian Springs, NV, 89070

CLERK OF COURT

Plaintiff, pro se.

DISTRICT COURT CLARK COUNTY, NEVADA

Frank M. Peck,

CASE NO. A-14-708447-C

Plaintiff,

DEPT NO. 3

vs.

Valley Hospital Medical Center, et al,

DATE

Defendants.

TIME

OPPOSITION TO DEFENDANT'S DAVID R. ZIPF MD'S

MOTION FOR JUDGEMENT ON THE PLEADINGS

Comes Now, the Plaintiff, Frank M. Peck pro se herein-  
after Mr Peck with his OPPOSITION TO DEFENDANT DAVID  
R ZIPF'S MD MOTION FOR JUDGEMENT ON THE PLEADINGS:

This OPPOSITION is made and based upon all papers  
and pleadings on file in this case as well as the attached  
points and authorities exhibits and Affidavit of Mr.  
Peck.

Dated 6-19-15

CLERK OF THE COURT

JUN 26 2015

RECEIVED

A-14-708447-C  
OPPS  
Opposition  
4487678



*Frank M. Peck*

Frank M. Peck Plntf pro se

1 of 7

12

### Points and Authorities

Notwithstanding All of the claims that the Defendant makes in his Motion for judgement on the pleadings these facts remain:

#### FACTS

1. Dr. Suwec a MDSP Ordered AN X-RAY based on his 'observation' of AN object just under the skin.
2. Nurse Brenda who is in charge of blood draws KNEW EXACTLY what the object was when she felt Mr. Peck's hand and said, "oh it's probably A needle guide".
3. Needleguides ARE plastic AND do NOT show up on AN X-RAY. (photocopy of X-RAY is USELESS)
4. The only object ruled out by the X-RAYS is A metal surgical needle.
5. The Defendant's (EX-B) is not specific as to where or what to look for and unless specifically instructed, what appeared to be clear plastic would be easily missed.
6. The Defendant's (EX-C) only shows PAIN IN JOINT; HAND (719.44) AS HISTORY and the Negative impression was for Alignment and fractures and soft-tissue and did not address the area where the object is.

7. Mr. Peck was discharged from Valley Hospital with extensive sinusitis and bilateral mastoid fluid levels indicative of mastoiditis. Mastoiditis if left untreated can cause meningitis, leading one to think that the effect was treated but not the cause, however, Mr. Peck (because he is a prisoner) cannot obtain an affidavit from a health care provider to raise the issue. (SEE EX-1).

#### Re: Defts ARGUMENT

A. The Defendant's claim. THE COMPLAINT DOES NOT MEET THE REQUIREMENTS OF NRS 41 A. 071 AND MUST BE DISMISSED.

NRS 41 A. 071 EXPERT AFFIDAVIT REQUIREMENT DOES NOT APPLY. Plaintiff's claim fits squarely under NEVADA'S RES IPSA LOQUITUR statute NRS - 41 A. 100 which does not require expert testimony at trial. A rule of evidence whereby negligence of the alleged wrongdoer may be inferred from the mere fact that the accident happened, provided: (1) the occurrence is the kind of thing that does not ordinarily happen without negligence; (2) The occurrence must have been caused by an agency or instrumentality within the exclusive control of the defendant;

(3) the occurrence was not due to contribution or voluntary action by the plaintiff. Rosser & Keeton, Torts, 243-244 (5th ed 1984). The gist of it, and the key to it, is the inference, or process of reasoning by which the conclusion is reached. This must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion. The effect of invoking the doctrine is to shift the burden of going forward with the evidence which normally attaches to the plaintiff, to the defendant, who is thereby charged with introducing evidence to refute the presumption of negligence which has been created. The Deft's have not met that burden.

B. The Defendants claim. PLAINTIFF CANNOT SHOW THE ALLEGED ACCIDENT IS ONE THAT DOES NOT ORDINARILY OCCUR ABSENT NEGLIGENCE, THUS RES IPSA LOQUITUR IS NOT APPLICABLE

The devise or part thereof that is in Mr Peck's hand is ordinarily removed from the vein in which it is to temporarily reside during treatment.

The Defendants Assertion that a "Penrose drain's" retention and removal is analogous to an IV needle or catheter -

REQUIRES expert medical testimony to describe purpose proper use, insertion and removal "defies common sense and human experience", Szydel v. Markman 121 Nev. 453, 117 P3d 200 2005 Nev. Lexis 62 Aug 11 2005.

C. The Defendants claim. RES IPSA LOQUITUR DOES NOT APPLY TO DR. ZIPF.

Dr. David R. Zipf M.D. is the "ATTENDING DOCTOR," AS SUCH, had "EXCLUSIVE CONTROLL" of Mr. Peck and the instrumentalities causing the harm during the period of the injury and is/WAS "in a better position to explain the cause of the accident," Landmark Hotel & Casino 104 Nev 297, 230, 757 P2d 361 363 (1988) citing Otis Elevator Co v Reid, 101 Nev 515, 518 706 P2d 1378 (1985), (See EX-1).

D. The Defendants claim. EVEN IF PLAINTIFFS COMPLAINT IS FOUND TO STATE A VIABLE CAUSE OF ACTION JUDGEMENT AS A MATTER OF LAW IS APPROPRIATE.

The Defendants assertions are belied by FACTS 2 pg 2-3 # 1-7 And (EX-1).

#### STANDARD OF REVIEW

A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. Simpson v. Mars Inc., 113 Nev 188, 929 P2d 966 (1997). The court must construe the pleading liberally and draw every fair intendment in favor of the non-moving party. Moreover, all factual allegations of the complaint must be accepted as true. Foster v. Washoe County 114 Nev 936, 964 P2d 788 (Nev 1998).

#### CONCLUSION

Therefore, this Honorable Court must DENY the Defendant's MOTION FOR JUDGEMENT ON THE PLEADINGS.

Dated this 20th day of JUNE 2015

Respectfully submitted



Frank M. Peck Plaintiff pro se

\*

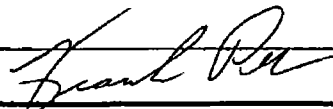
Affidavit, certificate of service and Affirmation

I Frank M. Peck do hereby swear under penalty of perjury that:

1. I AM the Plaintiff in CCDC CASE NO A-14-708447-C.
2. All assertions in the attached OPPOSITION are true based on personal knowledge and information believed to be true, I AM competent to testify to all matters contained therein.
3. I bring this action and opposition in good faith and for NO IMPROPER REASON.
4. SAID object under the skin of my hand is "OBSERVEABLE" as well as the length when moved.  
I attempted to resolve this dispute via letters to Valley Hospital for which I received no response and the decision to file this suit WAS "agonizing" as, Dr. Zipf literally saved my life!
5. A true and correct copy of this OPPOSITION WAS mailed this date to the Clerk of the Court @ 200 LEWIS AVE 3rd floor LAS VEGAS, NV, 89155-1160 for filing AND ELECTRONIC SERVICE / NOTICE ON the Dett's Atty; Danielle Woodrum ESO dwoodrum@aattlawoffice.com pursuant to NEER rule 9(c).

Signed under the penalty of perjury NRS 208.165 and 28 U.S.C. SEC 1746

\* Affirmation: Contains NO social security numbers of any person.



FRANK M. PECK 57106

HDSP BOX 650

Indian Springs, NV 89070

7 of 7 Plaintiff, pro se.

## INDEX OF EXHIBITS

EXHIBIT # 1

Pages 2

Description: Valley Hospital Medical Center

Discharge information.



VHM- Valley Hospital Medical Center  
620 Shadow Lane  
Las Vegas, NV 89106-4184

Patient: PECK, FRANK  
MRN: VHM63538254

Admit: 12/31/2013  
Disch: 1/17/2014 Disch Time: 19:53 PST  
FIN: VHM0000113111371

DOB/Sec: 3/2/1982 / Male

Attending: Zipf MD, David R

Discharge Info

DOCUMENT NAME:  
SERVICE DATE/TIME:  
RESULT STATUS:  
PERFORM INFORMATION:  
SIGN INFORMATION:

Discharge Transfer  
1/14/2014 12:18 PST  
Auth (Verified)  
Zipf MD, David R (1/14/2014 12:02 PST)  
Zipf MD, David R (1/14/2014 13:22 PST)

VH Transfer Summary

DATE OF TRANSFER: 01/17/2014

DISCHARGE DISPOSITION: Back to prison infirmary.

DISCHARGE CONDITION: Stable.

DISCHARGE DIAGNOSES:

1. Resolving acute viral meningitis.
2. Hypertension.
3. Possible underlying type 2 diabetes.
4. Seizure disorder.

TRANSFERRING MEDICATIONS:

1. NovoLog insulin subcutaneous sliding scale per intermediate BMI protocol.
2. Dilantin 300 mg p.o. at bedtime.
3. Cartia XT 120 mg p.o. daily.
4. Mevacor 20 mg p.o. at bedtime.
5. Aspirin 81 mg p.o. daily.

✓ side effects - hair falling out

FOLLOW-UP: The patient will follow up with the prison physician in 1 to 2 days. He will need a front-wheel walker for ambulation.

HOSPITAL COURSE: This is a 51-year-old male who was admitted to Valley Hospital on a 12/31/2013 with altered mental status, combativeness, and fevers. The patient's temperatures in the emergency room were as high as 103 to 104. The patient had a lumbar puncture, which was consistent with viral meningitis. The patient went into an acute respiratory failure, requiring intubation and mechanical ventilation. The patient was maintained on the ventilator by Dr. Stewart of Pulmonary Associates. The patient did have hypertension. This was able to be controlled with Cardizem. He was also tachycardic at the time. He had hyponatremia and hypokalemia. These were replaced. He had mild lactic acidosis. This was corrected. His blood sugars did seem to run elevated throughout his stay. He has been on NovoLog insulin subcutaneous sliding scale. His antibiotics were directed by Dr. Fanning of infectious disease. An EEG did not show what appeared to be a

LEGEND: c=Corrected \* =Abnormal C=Critical L=Low H=High f=Footnote I=Interp Data R=Ref Lab

Medical Record

Print Date/Time 3/5/2014 12:44 PST

Report Request ID: 37327348

Page 1 of 2

VHM- Valley Hospital Medical Center

Patient: PECK, FRANK  
MRN: VHM63538254  
DOB/Sex: 3/2/1982 / Male  
Attending: Zipf MD, David R

Admit: 12/31/2013

Disch: 1/17/2014

FIN: VHM0000113111371

Discharge Info

seizure disorder. He was on antiepileptics as directed by the neurology service. Over time, the patient's mentation seemed to resolve and the patient was able to the extubated. The patient is still weak and debilitated. He is still having some ataxia with walking. He is, however, walking the Valley hallways unassisted with a front-wheel walker. He is able to be transferred back to the prison infirmary to continue PT/OT with assistance of a walker.

His white cell count at this time is 4.8, hemoglobin is 12.2, platelet count of 236. Sodium 140, potassium 3.7, chloride 111, bicarbonate 20, BUN 22, creatinine 0.6, glucose of 170. Temperature is 96.4, pulse 74, respirations 16, blood pressure 129/82. AST and ALT are mildly elevated at 506 and 121. This will need to be monitored while patient is on his Mevacor as well as Dilantin. Mevacor may need to be discontinued should his liver function tests remain elevated. Most recent Dilantin level was 6. MRI of the brain done on January 3rd showed some motion artifact. There is an extensive sinusitis and bilateral mastoid fluid levels indicative of mastoiditis, but there is no evidence of any acute ischemia, masses or abnormality seen in the brain parenchyma.

Please do not hesitate to call 702-450-1717 should you have any questions regarding this patient's hospital stay.

DAVID R ZIPF, MD

D: 10527 / T: 6504311 / DT: 01/14/2014 12:02:36PST / TT: 01/14/2014 12:16:51PST / V: 113111371 / Job# 9935916 / Mod: 01/14/2014 15:16:51

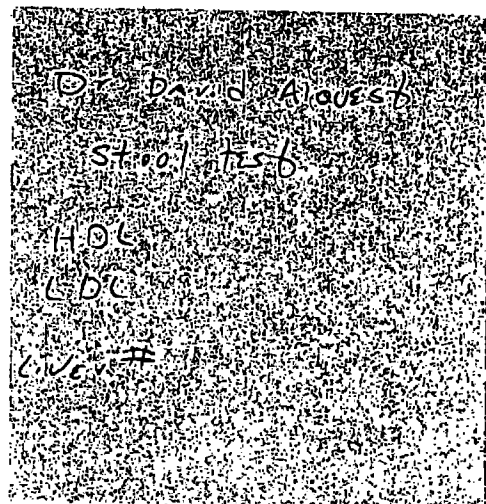
CC:

Electronically Signed By: Zipf, David MD  
On: 01.14.2014 13:22 PST

hyponatremia  
hypo kalemia  
Lactic acidosis  
insulin  
Liver function elevated?

Print Date/TI Dilantin level 6

Brain - motion artifact?  
mastoiditis



Frank M. Peck 57106  
HDSP Box 650  
Indian Springs, Wv 89070

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200 LEWIS AVE, 3rd floor  
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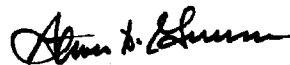
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1 **JMOT**  
2 **ALVERSON, TAYLOR, MORTENSEN & SANDERS**  
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4 Nevada Bar No. 002547  
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7 7401 West Charleston Boulevard  
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10 702-385-7000 (fax)  
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12 **Attorneys for DEFENDANT**  
13 **Michael D. Barnum, M.D.**

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

14 **FRANK M. PECK,**

15 Plaintiff,

16 vs.

17 **VALLEY HOSPITAL MEDICAL CENTER, et al.,**  
18 **DAVID R. ZIPF, M.D., MICHAEL D. BARNUM,**  
19 **M.D., JOHN DOES I - V,**

20 Defendants.

CASE NO: A-14-708447-C  
DEPT NO: III

**DEFENDANT MICHAEL D.**  
**BARNUM, M.D.'S JOINDER TO**  
**DEFENDANT DAVID R. ZIPF, M.D.'S**  
**MOTION FOR JUDGMENT ON**  
**THE PLEADINGS**

Hearing Date: July 22, 2015  
Hearing Time: 9:00 a.m.

21 COMES NOW Defendant MICHAEL D. BARNUM, M.D., through his attorneys of  
22 record, Alverson, Taylor, Mortensen & Sanders, and hereby joins in Defendant David R. Zipf,  
23 M.D.'s Motion for Judgment on the Pleadings. By this Joinder, Defendant MICHAEL D.  
24 BARNUM, M.D. ("Barnum"), adopts all the arguments made therein as his own and such oral  
25 argument as may be entertained by the Court at the time and place of the hearing of this Joinder.  
26  
27  
28

I.

LEGAL STANDARD

Barnum's Joinder in this matter is appropriate. This matter should be dismissed against Dr. Barnum, pursuant to NRCP 12(c). A Rule 12 (c) motion" is designed to provide a means of disposing of cases when material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings." See *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1241 (1987), citing, 5 C Wright and A Miller, Federal Practice and Procedure §1367(1969). "The Motion on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* NRCP 12(b) motions and NRCP 12(c) motions are functionally identical. See *Dworkin V. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9<sup>th</sup> Cir. 1988). "The principle difference between the two motions is the time of filing." *Id.* "The Opposing party cannot defeat the use of a NRCP 12(c) motion by merely alleging that an issue of fact exists." See *Duhamel v. United States*, 119 F. Supp. 192, 195 (1954). "While a motion for judgment on the pleadings admits all facts well pleaded, it does not admit, *inter alia*, facts pleaded which would be inadmissible in evidence at trial." *Id.*

II.

LEGAL DISCUSSION

Plaintiff filed a claim sounding in medical practice. He did not include an expert affidavit with his complaint. Nevada law is very clear that causes of action sounding in medical malpractice are void ab initio and dismissed without prejudice if a medical affidavit is not attached to the complaint when it is filed. See 41A.071.

Plaintiff asserts he did not need to file a medical expert affidavit in this case because it falls under the *res ipsa loquitur* exception, which provides a medical expert affidavit is not

1 needed if a "foreign substance other than medication or a prosthetic devise was unilaterally left  
2 within the body of a patient following surgery." See 41A.100(1)(a). "[A] res ipsa claim filed  
3 without an expert affidavit must, when challenged by the defendant in a pretrial or trial motion,  
4 meet the prima facie requirements for a res ipsa case." *Szydel v. Markman*, 121 Nev. 453, 460,  
5 117 P.3d 200, 205 (2005). A prima facie showing requires a party to make a showing "with  
6 competent evidence of essential facts." Cf. *Viega GmbH v. Eighth Judicial Dist. Court*, 130  
7 Nev. \_\_\_, \_\_\_, 328 P.3d 1152, 1156 (2014). In the instant case, Plaintiff must present facts and  
8 produce evidence "that show the existence of one or more of the situations enumerated in NRS  
9 41A.100(1)(a-e)." *Id.*

11 To survive Defendant Barnum's Joinder, Plaintiff needs to establish with competent  
12 evidence two essential threshold facts[:]" 1. a foreign substance, other than medication or a  
13 prosthetic device, was unintentionally left in his hand. See NRS 41A.100(1)(a); and, 2) the  
14 foreign object was left after surgery. *Id.* In addition to the above, the Nevada Supreme Court  
15 also requires that "the event must be caused by an agency or instrumentality within the exclusive  
16 control of the defendant." See *Woolsey v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317,  
17 321 (2001).

19 Plaintiff cannot meet his burden to make a prima facie showing to move forward with his  
20 res ipsa loquitur case. Plaintiff cannot establish the threshold requirement that a foreign  
21 substance was unintentionally left in his hand. Generally, matters outside the pleadings are not  
22 considered by a court when ruling on a judgment on the pleadings. In this case, however, the  
23 Plaintiff's pleadings should not be accepted as true given that the allegations in his complaint are  
24 contradicted by the very documents that Plaintiff alleges in his complaint form the basis for his  
25 res ipsa claim. See *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d P.2d 1258,  
26 1261 (1993). Mr. Peck's complaint references that Nevada Radiology "took (3) x-rays of Mr.  
27  
28

1 Peck's left hand that clearly showed an object in Mr. Peck's left hand." See Plaintiff's  
2 Complaint at ¶5. His reliance on these X-Rays is misplaced. The Radiologists report states the  
3 following findings after reading the X-Rays of Plaintiff's left: 1) "No acute fractures are seen;"  
4 2) "Alignment is normal;" 3) Soft tissues are unremarkable; and 4) Impression: Negative left  
5 hand." See Defendant Zepf's Motion for Judgment on the Pleadings, Exhibit C.  
6

7 Even if this court were to accept Plaintiff's allegation that a foreign substance was left in  
8 his left hand, which it should not, Plaintiff's allegations also fail to allege that the foreign  
9 substance was left there unintentionally:

10 Plaintiff Peck alleges that the Defendants' (sic) committed medical  
11 malpractice by deviating from the accepted standard of medical  
12 care or practice by 'leaving a foreign substance in Mr. Peck's left  
13 hand' [sic] NRS 41A.100(1)(a)(res ipsa loquitur doctrine) legally  
causing the injury suffered by Plaintiff. Fernandez v. Admirand,  
108 Nev. 963, 843 P.2d 354 (1992).

14 Plaintiff's Complaint at ¶6.

15 Plaintiff cannot establish the second threshold fact necessary to make a prima facie  
16 showing. NRS 41A.100(1)(a) requires that the foreign substance be left during surgery. Plaintiff  
17 has not alleged that there was a surgery. Consequently, even if this court were to accept as true  
18 Plaintiff's allegation that a foreign substance was left in his hand, he has not alleged any facts for  
19 the court to find that the foreign substance was left after Plaintiff was operated on.  
20

21 Plaintiff has alleged no facts to make a prima facie showing that that Dr. Barnum had  
22 exclusive control over the foreign substance allegedly left in Mr. Peck's left hand. See Plaintiff's  
23 Complaint. No facts have been alleged that either directly or even indirectly implicate or infer  
24 that Dr. Barnum had anything to with the alleged placement or removal of the foreign substance  
25 in his left hand, allegedly an IV needle or catheter.  
26  
27  
28



1 Plaintiff's complaint is fatally flawed. Even accepting Plaintiff's allegations as true, to  
2 the extent that they are not contradicted, he cannot make a prima facie showing that a foreign  
3 substance was left in his left hand as a result of a surgery or that the Dr. Barnum had exclusive  
4 control over the instrumentality. In short, Plaintiff's Complaint fails as a matter of law because  
5 he did not have a foreign substance in his hand.  
6


7 III

8 CONCLUSION

9 Based on the foregoing, this court should grant Defendant Dr. Michael D. Barnum,  
10 M.D.'s Joinder to Defendant David R. Zepf, M.D.'s Motion for Judgment on the Pleadings.

11 DATED this 2<sup>nd</sup> day of July, 2015.

12 ALVERSON, TAYLOR,  
13 MORTENSEN & SANDERS

14   
15 DAVID J. MORTENSEN, ESQ.  
16 Nevada Bar No. 002547  
17 R. DOUGLAS KURDZIEL, ESQ.  
18 Nevada Bar No. 004658  
19 7401 W. Charleston Boulevard  
20 Las Vegas, NV 89117-1401  
21 702-384-7000  
22 E-File: [efile@alversontaylor.com](mailto:efile@alversontaylor.com)  
23 Attorneys for DEFENDANT  
24 Michael D. Barnum, M.D.  
25  
26  
27  
28

ALVERSON, TAYLOR, MORTENSEN & SANDERS  
LAWYERS  
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(702) 384-7060

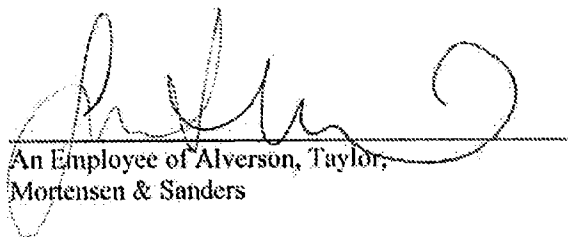
**CERTIFICATE OF SERVICE AND MAILING**

The undersigned hereby certifies that on the 2nd day of July, 2015, the forgoing  
**DEFENDANT MICHAEL D. BARNUM, M.D.'S JOINDER TO DEFENDANT DAVID R.  
ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE PLEADINGS** was served on the  
following by Electronic Service to All parties on the Wiznet Service List, addressed as follows:

Arthur W. Tuverson, Esq.  
Thomas R. Slezak, Jr., Esq.  
Law Offices of Arthur W. Tuverson  
7201 West Lake Mead Boulevard, Suite 570  
Las Vegas, NV 89128  
*Attorney for Defendant  
David R. Zipf, M.D.*

The foregoing **DEFENDANT MICHAEL D. BARNUM, M.D.'S JOINDER TO  
DEFENDANT DAVID R. ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE  
PLEADINGS** was also served by First Class Mail, by placing same in a sealed envelope upon  
which first class postage was prepaid in Las Vegas, Nevada, addressed as follows:

Frank M. Peck, #57106  
HDSP Box 650  
Indian Springs, NV 89070  
*Plaintiff Pro Per*

  
An Employee of Alverson, Taylor,  
Mortensen & Sanders

ALVERSON, TAYLOR, MORTENSEN & SANDERS  
LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

AFFIRMATION  
Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **DEFENDANT MICHAEL D. BARNUM, M.D.'S JOINDER TO DEFENDANT DAVID R. ZIPP, M.D.'S MOTION FOR JUDGMENT ON THE PLEADINGS** filed in District Court Case No. A-14-708447-C.

X Does not contain the social security number of any person.

-OR-

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

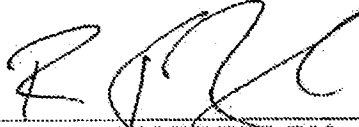
[Insert specific law]

-or-

B. For the administration of a public program or for an application for a federal or state grant.

DATED this 2<sup>nd</sup> day of July, 2015.

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS

  
\_\_\_\_\_  
DAVID J. MORTENSEN, ESQ.  
Nevada Bar No. 002547  
R. DOUGLAS KURDZIEL, ESQ.  
Nevada Bar No. 004658  
7401 West Charleston Boulevard  
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E-File: [cfile@alversontaylor.com](mailto:cfile@alversontaylor.com)  
Attorneys for DEFENDANT  
Michael D. Barnum, M.D.

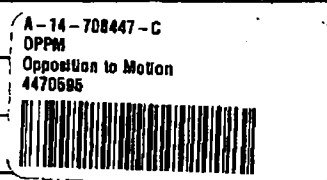
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Frank M. Peck 57106  
H.D.S.P. Box 650  
Indian Springs, NV. 89070  
Plaintiff, prose.

12  
FILED  
JUL - 9. 2015  
CLERK OF COURT

DISTRICT COURT CLARK COUNTY, NEVADA

Frank M. Peck, CASE NO. A-14-708447-C  
Plaintiff, DEPT NO. 111  
vs.  
Valley Hospital Medical Center, et al,  
Defendants.



OPPOSITION TO DAVID R. ZIPF MD'S MOTION TO  
STRIKE PUNITIVE DAMAGES

Comes Now, the Plaintiff, FRANK M. PECK prose  
hereinafter Mr. Peck with the above entitled  
OPPOSITION.

This OPPOSITION is made and based upon all  
papers and pleadings on file in this case as well  
as the attached points and authorities and  
affidavit of Mr. Peck.

Dated 6-29-15

*Frank M. Peck*  
Frank M. Peck Attf prose  
lot

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## Points And Authorities

Firstly in OPPOSITION the Defts' MOTION is pre-mature AS NO MEET & CONFIR hearing has been conducted AND AS A RESULT under the RULES WRCR rule 16.1 NO discovery or discovery plan exists to support Plntf's OPPOSITION AS discovery will provide the requisite information to prove malice, reckless disregard. Plntf filed MOTION FOR MEET AND CONFIR ON April 28 2015 and MOTION for Subpoenas on March 17 2015 and has received NOTHING from the Court re SAME.

Mr. Peck's "CARE records" will prove intentional malice inter alia.

It should be noted that Mr. Peck was incapacitated during the time in question and must be allowed to seek discovery PRIOR to hearing this motion. Mr. Peck is PROSE and cannot be held to the same standard as an attorney.

Mr. Peck has received The order Quashing service on Valley Hospital, THAT IS ALL. Mr. Peck has not received A scheduling ORDER or any such orders.

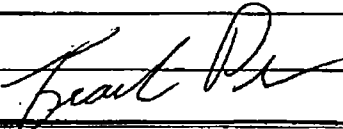
This court should also note that Mr Peck is dealing with nefarious conduct of Prison Staff in the mailroom. Mr Peck was unable to correct the Service Defect on Valley Hospital due to the Mailroom withholding time sensitive service of process of documents that would have enabled Mr Peck to cure the defect in service had the Mail room not withheld Mr Peck's mail for "OVER A MONTH" this ~~more~~ incident is well documented GRIEVANCED and will become A TORT CLAIM against the Prison, NOTWITHSTANDING. Mr. Peck requests "FAIR PROCESS" a rule 16.1 Hearing and a scheduling ORDER.

This is not Mr. Peck's only litigation. Mr. Peck is deeply entrenched in "legal warfare" and this institution refuses to order investigations into the nefarious conduct of officers in the mailroom. (Disposing of mail, Legal or otherwise)

### Conclusion

Therefore, this Honorable Court should ORDER A meet & confer hearing consistent with the NRCP 16.1, AND issue a scheduling ORDER? DENY the Defts' motion.

Dated 6-29-15

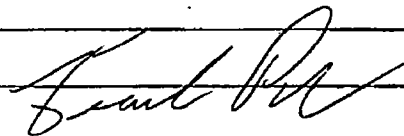
  
301 Frank M. Peck Plntff Drose

Affidavit, certificate of service and Affirmation

I Frank M. Peck do hereby swear under penalty of perjury:

1. I am the Plaintiff in CCDC case NO. A-14-708447-C.
2. All assertions in this OPPOSITION are true based on personal knowledge and I am competent to testify to all matters contained therein.
3. I bring this OPPOSITION in good faith and for no improper reason.
4. A true and correct copy of said OPPOSITION was mailed this date to the Clerk of the Court @ 200 LEWIS AVE 3rd floor LAS VEGAS, NV. 89155-1160 for filing and Electronic Service / Notice per NER rule 9(c) on the parties and Defts Atty Danielle Woodrum Esq @ dwoodrum@awtlawoffice.com
5. Dated done and mailed this 29th day of June 2015.  
Signed under penalty of perjury NRS 208.165,  
28 USC 1746.  
Dated 6-29-15

\* Affirmation contains no social security numbers of any person.



Frank M. Peck 57106

HDSD Box 650

Indian Springs, NV. 89070

Plaintiff, pro se

4.64

Frank M. Peck 57106  
HDSB Box 650  
Indian Springs, NV 89070

THIS WEEK  
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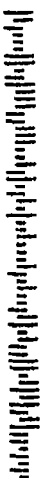
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1 **ROPP**  
ARTHUR W. TUVerson, ESQ.  
2 Nevada State Bar No. 005156  
DANIELLE WOODRUM, ESQ.  
3 Nevada State Bar No. 012902  
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Attorney for Defendant DAVID R. ZIPF, M.D.

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

11 FRANK M. PECK,  
12 Plaintiff,  
13 v.  
14 VALLEY HOSPITAL MEDICAL CENTER,  
et al., DAVID R. ZIPF, M.D., MICHAEL D.  
15 BARNUM, M.D., JOHN DOES I - V,  
16 Defendants.

CASE NO.: A-14-708447-C  
DEPT. NO.: III

**DEFENDANT DAVID R. ZIPF, M.D.'S  
REPLY TO PLAINTIFF'S OPPOSITION  
TO MOTION FOR JUDGMENT ON THE  
PLEADINGS**

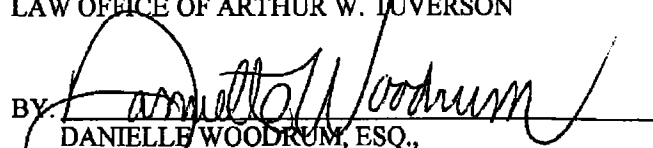
Hearing Date: 7/22/15

17 COMES NOW, Defendant DAVID R. ZIPF, M.D., by and through his attorneys, the  
18 LAW OFFICES OF ARTHUR W. TUVerson, LLP, and hereby submits the following Reply to  
19 Plaintiff's Opposition to Motion for Judgment on the Pleadings.

20 This Reply is made based upon the attached Memorandum of Points & Authorities, the  
21 papers and pleadings on file, and any evidence and/or argument that may be taken at the time for  
22 hearing on this matter.

23 DATED: July 15, 2015

LAW OFFICE OF ARTHUR W. TUVerson

24 BY   
25 DANIELLE WOODRUM, ESQ.,  
26 Nevada State Bar No. 012902  
27 7201 West Lake Mead Boulevard, Suite 570  
Las Vegas, Nevada 89128  
28 (702) 631-7855  
Attorneys for Defendant DAVID R. ZIPF, M.D.

**MEMORANDUM OF POINTS & AUTHORITIES**

**I. INTRODUCTION**

In his Opposition to David Zipf, M.D.'s Motion for Judgment on the Pleadings, Plaintiff concedes that he did not attach an expert affidavit supporting the allegations in his Complaint. Nevertheless, Plaintiff erroneously contends that he was not required to do so because the *res ipsa loquitur* exception embodied in NRS 41A.100 to the expert affidavit is applicable. However, in his Complaint, he has failed to plead facts to support his contention that the *res ipsa loquitur* exception applies. Specifically, Plaintiff has not alleged that a foreign object was unintentionally left inside his body during a surgical procedure.

As an attempt to save his Complaint, Plaintiff alleges new facts in his Opposition. However, when ruling on a motion for judgment on the pleadings, the Court must only consider the pleadings and the documents referenced therein. Thus, the Court may not consider the new, contradictory facts that Plaintiff now alleges. Because Plaintiff has failed to plead facts in his Complaint that would invoke the *res ipsa loquitur* exception to the expert affidavit requirement, he was required to attach to his Complaint a supporting expert affidavit. His failure to do so renders his Complaint *void ab initio* and the Court must dismiss it as a matter of law.

**II. LEGAL ARUGMENT**

**A. PLAINTIFF'S ALLEGATIONS ARE NOT SUPPORTED EXPERT OPINION AND FAIL TO MEET THE MINIMUM PLEADING THRESHOLD OF NRS 41A.071 AND MUST BE DISMISSED.**

In his Opposition, Plaintiff erroneously argues that this case "falls squarely under Nevada's *res ipsa loquitur* statute NRS 41A.100," and therefore does not require a supporting affidavit from an expert pursuant to NRS 41A.071. Despite his assertions that NRS 41A.100 is applicable, Plaintiff does not once cite to NRS 41A.100. Instead, Plaintiff cites to a legal treatise describing the general doctrine of *res ipsa loquitur*. Plaintiff fails to acknowledge that in medical malpractice cases in Nevada, the *res ipsa loquitur* doctrine is codified and only applies in a few, select scenarios. NRS 41A.100(1)(a) states, in pertinent part:

Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert

1 medical testimony, material from recognized medical texts or  
2 treatises or the regulations of the licensed medical facility wherein  
3 the alleged negligence occurred is presented to demonstrate the  
4 alleged deviation from the accepted standard of care in the specific  
5 circumstances of the case and to prove causation of the alleged  
6 personal injury or death, except that such evidence is not required  
7 and a rebuttable presumption that the personal injury or death was  
8 caused by negligence arises where evidence is presented that the  
9 personal injury or death occurred in any one or more of the  
10 following circumstances:

11 (a) A foreign substance other than medication or a prosthetic  
12 device was unintentionally left within the body of a patient  
13 following surgery.

14 As Defendant Dr. Zipf explained in his Motion for Judgment on the Pleadings, NRS  
15 41A.100(1)(a) does not apply here because Plaintiff does not allege that he underwent a surgical  
16 procedure where a foreign object was unintentionally left in his body. In fact, Plaintiff does not  
17 allege that he underwent a surgical procedure at all. Instead, Plaintiff alleges that an IV guide or  
18 catheter was left in his hand. The typical foreign object, *res ipsa loquitur* case involves a  
19 situation where medical equipment, such as a sponge or needle, is used during the course of a  
20 surgical procedure and inadvertently left within the patient's body during the course of that same  
21 surgical procedure. See e.g., Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005); Fierle v.  
22 Perez, 125 Nev. 728, 219 P.3d 906 (2009) (finding that a needle left within a patient's breast  
23 during a breast procedure invoked the doctrine of *res ipsa loquitur*). *Res ipsa loquitur* does not  
24 apply to a situation where a medical device was intentionally left within the patient to serve a  
25 medical purpose, such as in this case. If the foreign substance was an IV needle guide, as  
26 Plaintiff now alleges, it would have been intentionally left in Plaintiff's hand for the  
27 administration of IV medications. This differs markedly from a situation where a foreign object  
28 is unintentionally left in a patient during surgery.

29 It may be true that the allegedly retained IV guide was not intended to be left in Plaintiff  
30 indefinitely and was to be removed at a later date. However, as to Dr. Zipf, there is no claim that  
31 Dr. Zipf placed any object whatsoever inside the Plaintiff's hand during his hospital at Valley  
32 Hospital. This is distinctly different than the factual situation set forth in the Szydel case and the  
33 requirements of NRS 41A.100(1)(a). Thus, the *res ipsa loquitur* exception to the affidavit

1 requirement is inapplicable in this case.

2 Because NRS 41A.100(1)(a) is inapplicable, Plaintiff was required to attach the affidavit  
3 of an expert to his Complaint which supported the allegations therein. Plaintiff concedes that he  
4 failed to do so. Thus, his Complaint is *void ab initio*. Szydel v. Markman, 121 Nev. 453, 117  
5 P.3d 200 (2005); Fierle v. Perez, 125 Nev. 728, 219 P.3d 906 (2009). Moreover, any argument  
6 by Plaintiff that he is excused from doing so because of his status as an inmate, is unfounded.  
7 See *i.e.* Kinford v. Bannister, 2012 WL 6627995 (D. Nev. 2012) (holding that Nevada state  
8 prisoner who brought an medical malpractice action was required to file an expert affidavit in a  
9 case where he alleged a physician failed to remove hardware that had previously been implanted  
10 during surgery).

11 **B. PLAINTIFF'S ALLEGATIONS OF MEDICAL MALPRACTICE ARE NOT**  
12 **SUPPORTED BY COMPETENT EXPERT OPINION AND FAIL TO**  
13 **MEET THE MINIMUM PLEADING THRESHOLD OF NRS 41A.071 AND**  
14 **MUST BE DISMISSED.**

15 In his Opposition, Plaintiff lists facts that directly contradict his Complaint. For instance,  
16 Plaintiff now alleges that the foreign object allegedly left in his hand was a plastic IV guide that  
17 would not show up on an x-ray. However, in his Complaint, Plaintiff states the following: "On  
18 March 8th, 2014, an x-ray technician employed by Desert Radiology took (3) x-rays of Mr.  
19 Peck's left hand that clearly showed an object in Mr. Peck's left hand." (Compl. ¶ 5.) Plaintiff  
20 cannot now plead new facts that directly contradict the allegations made in his Complaint to try  
21 and save his defective Complaint.

22 A motion for judgment on the pleadings must be based on the "pleadings." See Lovelock  
23 Lands, Inc. v. Lovelock Land & Dev. Co., 54 Nev. 1, 7 P.2d 593, 594 (1932) ("upon a motion for  
24 judgment on the pleadings, nothing dehors the complaint or any defense thereto set up in an  
25 answer can be taken into account in disposing of such motion, but the motion is to be determined  
26 upon the same principles as would be a demurrer to the complaint upon the same ground").  
27 NRCP 12(c) itself expressly recognizes only matters in the pleadings should be considered.  
28 However, "the court may take into account matters of public record, orders, items present in the  
record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss

1 for failure to state a claim upon which relief can be granted." Breliant v. Preferred Equities  
2 Corp., 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). Thus, the Court is limited to the facts  
3 alleged in Plaintiff's complaint and the documents relied on therein to support it.

4 As explained in Dr. Zipf's Motion for Judgment on the Pleadings, in his Complaint  
5 Plaintiff claimed the x-rays taken on March 8, 2014 confirmed the presence of the foreign object.  
6 Now that Plaintiff claims that the x-rays support his contention that a foreign object was left in  
7 his hand is demonstrably false, Plaintiff attempts to add new facts in his Opposition to support his  
8 claim. For instance, Plaintiff now alleges that a nurse told him that an IV guide was left in his  
9 hand. Plaintiff further alleges that the IV guide was plastic would not show up on x-ray even  
10 though he claimed in his Complaint that the x-rays confirmed the presence of a foreign object.  
11 Plaintiff cannot now plead new facts to try and save his Complaint. When ruling on this motion  
12 the Court must only consider the facts that Plaintiff has pled in his Complaint and the documents  
13 Plaintiff referenced or incorporated into his Complaint. In doing so, it is clear that Plaintiff's  
14 Complaint fails as a matter of law and must be dismissed.

15 **III. CONCLUSION**

16 Based upon the forgoing points and authorities, Defendants respectfully requests this  
17 Court dismiss Plaintiff's Complaint as a matter of law.

18 DATED: July 5, 2015

LAW OFFICES OF ARTHUR W. TUVERTSON

19  
20 BY: 

ARTHUR W. TUVERTSON, ESQ.

Nevada State Bar No. 005156

DANIELLE WOODRUM, ESQ.

Nevada State Bar No. 012902

7201 West Lake Mead Boulevard, Suite 570

Las Vegas, Nevada 89128

(702) 631-7855

Attorneys for Defendant DAVID R. ZIPF, M.D.

**CERTIFICATE OF SERVICE**

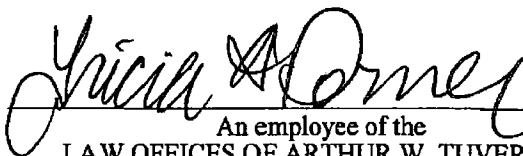
Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICES OF ARTHUR W. TUVERTSON, and that on this 15<sup>th</sup> day of July, 2015, I served a copy of DEFENDANT DAVID R. ZIPF, M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS as follows:

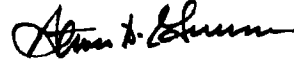
☒ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada: and/or

Frank M. Peck, #57106  
 HDSP Box 650  
 Indian Springs, NV 89070  
 Plaintiff Pro Per

☒ By Electronic Service through Eighth Judicial District Court to;

David J. Mortensen, Esq.  
 ALVERSON TAYLOR MORTENSEN &  
 SANDERS  
 7401 W. Charleston Blvd.  
 Las Vegas, NV 89117  
 Facsimile (702) 385-7000  
[efile@alversontaylor.com](mailto:efile@alversontaylor.com)  
[dmortensen@alversontaylor.com](mailto:dmortensen@alversontaylor.com)  
[dkurdziel@alversontaylor.com](mailto:dkurdziel@alversontaylor.com)  
[smasia@alversontaylor.com](mailto:smasia@alversontaylor.com)  
 Attorneys for Defendant Michael D. Barnum, M.D.

  
 An employee of the  
 LAW OFFICES OF ARTHUR W. TUVERTSON



CLERK OF THE COURT

1 **RPLY**  
2 **ALVERSON, TAYLOR, MORTENSEN & SANDERS**  
3 **DAVID J. MORTENSEN, ESQ.**  
4 Nevada Bar No. 002547  
5 **R. DOUGLAS KURDZIEL, ESQ.**  
6 Nevada Bar No. 004658  
7 7401 West Charleston Boulevard  
8 Las Vegas, NV 89117-1401  
9 702-384-7000  
10 702-385-7000 (fax)  
11 **E-File: efile@alversontaylor.com**  
12 **Attorneys for DEFENDANT**  
13 **Michael D. Barnum, M.D.**

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 **FRANK M. PECK,**

13 **Plaintiff,**

14 **vs.**

15 **VALLEY HOSPITAL MEDICAL CENTER, et al.,**  
16 **DAVID R. ZIPF, M.D., MICHAEL D. BARNUM,**  
17 **M.D., JOHN DOES I - V,**

18 **Defendants.**

CASE NO: A-14-708447-C  
DEPT NO: III

**REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT  
BARNUM'S JOINDER TO DR.  
ZIPF'S MOTION FOR JUDGMENT  
ON THE PLEADINGS**

**Date of Hearing: July 22, 2015**  
**Time of Hearing: 9:00 a.m.**

19  
20 Defendant Dr. Barnum ("Barnum") response to Plaintiff's failure to file an Opposition to  
21 Defendant Barnum's Joinder Dr. Zipf's Motion for Judgment on the Pleadings:

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I.**

24 **INTRODUCTION**

25 Defendant Barnum filed his Joinder to Dr. Zipf's Motion for Judgment on the Pleadings  
26 on July 2, 2015. See Defendant Barnum's Joinder to Dr. Zipf's Motion for Judgment on the  
27  
28

1 Pleadings. Plaintiff was mailed a copy of the pleading through the U.S. Mail. *Id.* Plaintiff's  
2 Opposition was should have been served on Defendant Barnum on July 13, 2015. *See* EJDCR  
3 2.20(e). Plaintiff has failed to file an Opposition. The Nevada Supreme Court has held that an  
4 opposing party's failure to oppose a motion is an admission that the motion is meritorious. *See*  
5 *King v. Carlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162 (2005), citing *Nye County v. Washoe*  
6 *Medical Center*, 108 Nev. 896, 899-900, 839 P.2d 1312, 1314-15 (1992)(affirming district  
7 court's decision granting Plaintiff's unopposed motion for summary judgment); *see also Walls v.*  
8 *Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996)(district court acted properly in  
9 construing Plaintiff's failure to respond to motion to dismiss as admission that the motion was  
10 meritorious). Therefore, the court should grant Defendant Barnum's Joinder because it is an  
11 unopposed motion that should be deemed to be meritorious.

12  
13 Defendant Barnum assumes that if Plaintiff had filed an Opposition to his Joinder, which he  
14 did not, Plaintiff would have raised the same arguments he raised in Opposition to Dr. Zipf's  
15 Motion for Judgment on the Pleadings. In an exercise of caution, Defendant Barnum reply's to  
16 the Opposition to Dr. Zipf's Motion for Judgment on the Pleadings.

## 17 II.

### 18 LEGAL ARGUMENT

#### 19 A. DEFENDANT BARNUM'S JOINDER TO DR. ZIPF'S MOTION FOR 20 JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED BECAUSE 21 PLAINTIFF'S OPPOSITION FAILS TO ESTABLISH HOW HIS COMPLAINT 22 MEETS THE MINIMUM STANDARDS FOR PLEADING RES IPSA LOQUITUR 23 UNDER NRS 49A.100

24 Plaintiff incorrectly informs this court that his pleading "fits squarely under Nevada's res  
25 ipsa loquitur statute NRS 41A.100 which does not require expert testimony at trial." *See*  
26 Plaintiff's Opposition at 3. Plaintiff is woefully misinformed. Plaintiff compounds his mistake  
27



1 by then informing the court about common law res ipsa loquitur claims. Plaintiff fails to grasp  
2 that NRS 41A.100 creates a statutory version of res ipsa loquitur and replaced common law res  
3 ipsa claims for medical malpractice.

4 NRS 41A.100 provides in relevant part:

5  
6 Liability for personal injury or death is not imposed upon any  
7 medical provider of medical care based on alleged negligence in  
8 the performance of that care unless evidence consisting of expert  
9 medical testimony, material from recognized medical texts or  
10 treatises or other regulations of the licensed medical facility  
11 wherein the alleged negligence occurred is presented to  
12 demonstrate the alleged deviation from the accepted standard of  
13 care in the specific circumstances of the case and to prove  
14 causation of the alleged personal injury or death, except that such  
15 evidence is not required and a rebuttable presumption that the  
16 personal injury or death was caused by negligence arises where  
17 evidence is presented that the personal injury or death occurred in  
18 any one or more of the following circumstances:

19 (a) A foreign substance other than medication or a prosthetic  
20 devise was **unintentionally left within the body of a patient**  
21 **following surgery.**

22 See NRS 41A.100 (a) (emphasis added).

23 Nothing in Plaintiff's Opposition addresses the conspicuously absent threshold  
24 requirements missing in Plaintiff's Complaint. Simply stated, Plaintiff has failed to allege in his  
25 Complaint or produce any evidence in his Opposition that the foreign substance allegedly left in  
26 his hand was either left unintentionally and was left during surgery.

27 Plaintiff's reliance on his belief that the burden shifts to Barnum to produce evidence that  
28 will refute the presumption of negligence is misplaced. Plaintiff is missing the point. He alleged  
Nevada's statutory res ipsa loquitur claim for medical malpractice, and not a common law  
variety of res ipsa. See Complaint; see also NRS 41A.100 (a). Threshold requirements have not  
been alleged. Therefore, his Complaint fails as a matter of law.

1 To this end, Plaintiff's only option to resurrect his Complaint is by alleging Dr. Barnum  
2 was negligent, which is a nonstarter because to have a valid claim Plaintiff needed to attach an  
3 expert's affidavit to the Complaint. See NRS 41A.100. Plaintiff admits, however, that he did  
4 not attach an expert's affidavit to his Complaint. Even if Plaintiff's Complaint is viewed as a  
5 negligence claim for medical malpractice, it is *void ab initio* under Nevada law. See *Szydel v.*  
6 *Markman*, 121 Nev. 453, 117 P.3d 200 (2005). Therefore, Barnum's Joinder should be granted  
7 and Plaintiff's Complaint should be dismissed.  
8

9 **B. THE COURT SHOULD DISREGARD PLAINTIFF'S ATTEMPT TO CHANGE**  
10 **THE FACTS HE ALLEGED IN HIS COMPLAINT TO SUIT HIS CURRENT**  
11 **NEEDS**

12 Plaintiff, faced with the reality that the X-rays he maintained in his Complaint were proof  
13 positive that a foreign substance was left in his hand, now contradicts the allegations he raised in  
14 his Complaint by alleging that the foreign substance is probably a plastic needle guide. Mr. Peck  
15 bases this conclusion on a hearsay statement allegedly made by Nurse Brenda and not  
16 admissible. Moreover, Plaintiff then makes the unsupported statement that "[n]eedle guides are  
17 plastic and do not show up on an x-ray." This statement should be discounted because there is  
18 no basis for the court judge the validity of the statement. Simply stated, at best it is an opinion of  
19 a lay witness with no specialized knowledge. For Plaintiff's statement to be even be considered  
20 by the court, an expert's opinion on the matter of whether a plastic foreign substance would be  
21 revealed by an X-ray. Similarly, Plaintiff's unsupported opinion that "[t]he only object ruled out  
22 by the X-rays is a medical surgical needle" should be summarily disregarded for the same  
23 reasons.  
24  
25  
26  
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28

1       1. A Motion for Judgment On the Pleadings Is Based On The Facts Plead In the Complaint

2       Plaintiff is grasping at straws by asserting his unsupported "red herring" arguments  
3       concerning what could and/or could not be seen in an X-ray. The critical fact for the court to  
4       keep in focus is contained in ¶5 of the Plaintiff's Complaint. Plaintiff alleged:

5                       On March 8, 2014 an X-Ray technician (sic) employed by Desert  
6                       Radiology took (3) X-Rays of Mr. Peck's left hand **that clearly**  
7                       **showed an object in Mr. Peck's left hand.**

8       See Complaint at ¶ (emphasis added). Plaintiff's entire argument concerning the alleged plastic  
9       needle guide lacks merit because it is not a fact contained in the original pleading, is not a fact  
10      supported by a proper expert who has the skill, expertise, education and experience to make such  
11      statements and the underlying basis for Mr. Peck's newest position is based on inadmissible  
12      hearsay from Nurse Brenda. Plaintiff's statement in his attached Affidavit that "[a]ll assertions  
13      in the attached Opposition are true based on my personal knowledge and information believed to  
14      be true" is not sufficient to replace expert testimony as to what could be seen in an X-ray. Based  
15      on the foregoing, Mr. Peck's attempt to introduce new facts into the argument should be  
16      summarily denied by this court.

17  
18      2. Plaintiff's Plastic Guide Argument Does Not Resurrect the Fact That He Has Not  
19      Properly Plead Res Ipsa Loquitur, Pursuant to NRS 41A.100.

20      Plaintiff's attempt to raise a "red herring" concerning whether the X-Ray would have  
21      shown a plastic guide line in retained in Plaintiff's hand does not affect in anyway the basis for  
22      Dr. Zipf's Motion for Judgment on the Pleadings and Dr. Barnum's Joinder thereto. Plaintiff has  
23      produced no evidence to establish that the foreign object allegedly retained in his hand was  
24      unintentionally retained during surgery. As such Defendant Barnum's Joinder to Dr. Zipf's  
25      Motion for Judgment on the Pleadings should be granted.  
26  
27  
28

ALVERSON, TAYLOR, MORTENSEN & SANDERS  
LAWYERS  
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LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

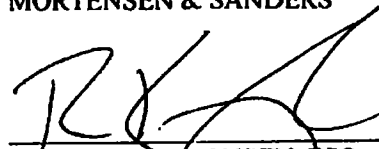
III.

CONCLUSION

Based on the foregoing, Defendant Barnum's Joinder should be granted.

DATED this 17<sup>th</sup> day of July, 2015.

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS



DAVID J. MORTENSEN, ESQ.

Nevada Bar No. 002547

R. DOUGLAS KURDZIEL, ESQ.

Nevada Bar No. 004658

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E-File: [efile@alversontaylor.com](mailto:efile@alversontaylor.com)

Attorneys for DEFENDANT

Michael D. Barnum, M.D.

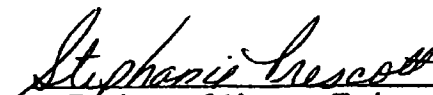
**CERTIFICATE OF SERVICE AND MAILING**

The undersigned hereby certifies that on the 1<sup>st</sup> day of July, 2015, the forgoing **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT BARNUM'S JOINDER TO DR. ZIPF'S MOTION FOR JUDGMENT ON THE PLEADINGS** was served on the following by Electronic Service to All parties on the Wiznet Service List. addressed as follows:

Arthur W. Tuverson, Esq.  
Thomas R. Slezak, Jr., Esq.  
Law Offices of Arthur W. Tuverson  
7201 West Lake Mead Boulevard, Suite 570  
Las Vegas, NV 89128  
*Attorney for Defendant*  
*David R. Zipf, M.D.*

The foregoing **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT BARNUM'S JOINDER TO DR. ZIPF'S MOTION FOR JUDGMENT ON THE PLEADINGS** was also served by First Class Mail, by placing same in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada, addressed as follows:

Frank M. Peck, #57106  
HDSP Box 650  
Indian Springs, NV 89070  
*Plaintiff Pro Per*

  
An Employee of Alverson, Taylor,  
Mortensen & Sanders

ALVERSON, TAYLOR, MORTENSEN & SANDERS  
LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

**AFFIRMATION**  
**Pursuant to N.R.S. 239B.030**

The undersigned does hereby affirm that the preceding **REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT BARNUM'S JOINDER TO DR. ZIPF'S MOTION FOR  
JUDGMENT ON THE PLEADINGS** filed in District Court Case No. A-14-708447-C.

X Does not contain the social security number of any person.

**-OR-**

— Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

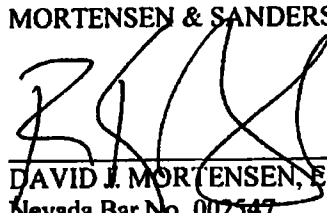
[Insert specific law]

**-or-**

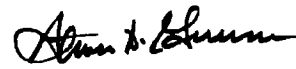
B. For the administration of a public program or for an application for  
a federal or state grant.

DATED this 17<sup>th</sup> day of July, 2015.

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS

  
\_\_\_\_\_  
DAVID J. MORTENSEN, ESQ.  
Nevada Bar No. 002547  
R. DOUGLAS KURDZIEL, ESQ.  
Nevada Bar No. 004658  
7401 West Charleston Boulevard  
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702-384-7000  
702-385-7000 (fax)  
E-File: [efile@alversontaylor.com](mailto:efile@alversontaylor.com)  
Attorneys for DEFENDANT  
Michael D. Barnum, M.D.

n:\david.grp\clients\22098\pleadings\ REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT BARNUM'S JOINDER TO DR. ZIPF'S  
MOTION FOR JUDGMENT ON THE PLEADINGS.docx



CLERK OF THE COURT

1 RTRAN

2  
3  
4 DISTRICT COURT  
CLARK COUNTY, NEVADA

5  
6 FRANK PECK,

7 Plaintiff(s),

8 vs.

9 VALLEY HOSPITAL MEDICAL  
10 CENTER,

11 Defendant(s).

CASE NO. A708447

DEPT. NO. III

12  
13 BEFORE THE HONORABLE DOUGLAS W. HERNDON, DISTRICT COURT JUDGE

14 WEDNESDAY, JULY 22, 2015

15 **RECORDER'S TRANSCRIPT OF**  
16 **DAVID R. ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE PLEADINGS AND**  
17 **SUPPORTING AFFIDAVIT OF DANIELLE WOODRUM, ESQ.,**  
18 **AND DEFENDANT MICHAEL D. BARNUM, M.D.'S JOINDER**

19  
20 APPEARANCES:

21 For the Plaintiff:

No Appearances

22 For Defendant Dr. Zipf:

DANIELLE WOODRUM, ESQ.

23 For Defendant Dr. Barnum:

WILLIAM B. PALMER, ESQ.

24  
25 RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, WEDNESDAY, JULY 22, 2015, 9:59 A.M.

2 \* \* \* \* \*

3 THE COURT: All right and what else? Let's see. How about Peck,  
4 Barnum, Zip, Valley Hospital Medical Center?

5 Morning.

6 MR. PALMER: Good morning, Your Honor, William Palmer on behalf of  
7 Mr. Barnum.

8 MS. WOODRUM: Good morning, Danielle Woodrum on behalf of Dr. Zipf.

9 THE COURT: Thank you. All right, and nobody from Valley was showing  
10 up, they got dismissed out previously, correct?

11 MS. WOODRUM: Correct.

12 THE COURT: Okay . Mr. Peck is not present because he's in the Nevada  
13 Department of Corrections. This is a pro per motion. So I'm just going to rule  
14 on the pleadings without argument. Defendant, Dr. Zipf, filed a motion for  
15 judgment on the pleadings. There was a joinder that was filed. I think  
16 technically the joinder was late, but it really addresses the exact same issue and  
17 would benefit from whatever ruling gets rendered or not, that gets rendered on  
18 behalf of Dr. Zipf. How do I pronounce it?

19 MS. WOODRUM: Zipf.

20 THE COURT: Zipf?

21 MS. WOODRUM: Yeah.

22 THE COURT: Okay. Dr. Zipf. And I'm going to grant the motion as well  
23 as the joinder. Plaintiffs alleged in their complaint that this medical malpractice  
24 action falls under 41A.100(a) and, therefore, he wasn't required to produce an  
25 affidavit or anything. He's alleging some foreign substance was left in his



1 body. However, 41A.100(a) doesn't apply to the instant situation under the  
2 plain language of the statute. It allege -- or it lays out an exception to the  
3 affidavit requirement if a foreign substance is left in a body following --  
4 unintentionally left in a body following surgery. There's been no allegation by  
5 Mr. Peck that he had any surgery at all.

6 The allegation relates to the supposed leaving in his hand of an I.V.  
7 needle. I would agree with the defense position that the evidence so far would  
8 indicate by radiological exam that there wasn't anything left in his hand. But,  
9 nonetheless, most importantly, he's not even alleging that there was ever a  
10 surgery involved such that 41A.100 would even apply.

11 Therefore, having not filed an affidavit with his case, his case must  
12 be dismissed under Nevada law. And as I said, the joinder addresses the same  
13 issue and as a medical professional, Dr. Barnum would have the same right to  
14 have the affidavit filed so he benefits from that ruling as well. Okay.

15 MS. WOODRUM: Thank you.

16 THE LAW CLERK: That closes the case, correct?

17 THE COURT: It does.

18 MR. PALMER: Thank you.

19 THE COURT: You guys good?

20 MS. WOODRUM: Do you want me to prepare the order?

21 THE COURT: Yeah, if you would, please. Thank you.

22 MS. WOODRUM: Thank you.

23 THE LAW CLERK: That means we're going to vacate the August 5<sup>th</sup>  
24 motions and --

25 THE COURT: Yeah.

1 THE LAW CLERK: -- that are on calendar and --  
2 THE COURT: Other motions are vacated because the case is dismissed  
3 now as to the last remaining defendants.

4 THE LAW CLERK: Thank you.

5 PROCEEDING CONCLUDED AT 10:02 A.M.

6 \* \* \* \* \*

7

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20

21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio-video recording of this proceeding in the above-entitled case.

23

24

25



SARA RICHARDSON  
Court Recorder/Transcriber

1 **ORDER**  
2 ARTHUR W. TUVerson, ESQ.  
3 Nevada State Bar No. 005156  
4 DANIELLE WOODRUM, ESQ.  
5 Nevada State Bar No. 012902  
6 LAW OFFICES OF ARTHUR W. TUVerson  
7 A Limited Liability Partnership  
8 Including Professional Corporations  
9 7201 West Lake Mead Boulevard, Suite 570  
10 Las Vegas, Nevada 89128  
11 Telephone: (702) 631-7855  
12 Facsimile: (702) 631-5777  
13 [dwoodrum@awtlawoffice.com](mailto:dwoodrum@awtlawoffice.com)  
14 Attorney for Defendant DAVID R. ZIPF, M.D.

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08/04/2015 03:35:06 PM

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

12 FRANK M. PECK,

13 Plaintiff,

14 v.

15 VALLEY HOSPITAL MEDICAL CENTER,  
16 et al., DAVID R. ZIPF, M.D., MICHAEL D.  
17 BARNUM, M.D., JOHN DOES I - V,

18 Defendants.

CASE NO.: A-14-708447-C  
DEPT. NO.: III

**ORDER**

19 Defendant DAVID R. ZIPF, M.D.'s Motion for Judgment on the Pleadings came on for  
20 hearing on July 22, 2015, at 9:00 a.m., in Department 3 of the Eighth Judicial District Court,  
21 Clark County, Nevada, with the Honorable Douglas W. Herndon presiding. Plaintiff FRANK  
22 PECK, was not present due to his incarceration at the Nevada Department of Corrections;  
23 William B. Palmer, Esq., of ALVERSON TAYLOR MORTENSEN & SANDERS, appeared on  
24 behalf of Defendant MICHAEL D. BARNUM, M.D.; and Danielle Woodrum, Esq., of the LAW  
25 OFFICE OF ARTHUR W. TUVerson appeared for and on behalf of Defendant, DAVID R.  
26 ZIPF, M.D.

27 Having considered the pleadings filed herein and good cause appearing therefor:

28 ///

LAW OFFICES OF ARTHUR W. TUVERTSON

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS  
7201 WEST LAKE MEAD BOULEVARD, SUITE 570  
LAS VEGAS, NEVADA 89128  
TELEPHONE (702) 631-7855

1 IT IS HEREBY ORDERED that Defendant David R. Zipf, M.D.'s Motion for Judgment  
2 on the Pleadings and Defendant Michael D. Barnum's Joinder thereto are GRANTED.


3 IT IS FURTHER ORDERED that all future dates are VACATED and CASE CLOSED.

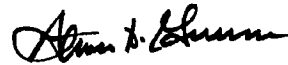
4 Dated this 30 day of July, 2015.

5  
6  
7   
8 DISTRICT COURT JUDGE  
9

9 Respectfully Submitted:

10 LAW OFFICES OF ARTHUR W. TUVERTSON

11  
12 By   
13 ARTHUR W. TUVERTSON, ESQ.  
14 Nevada State Bar No. 005156  
15 DANIELLE WOODRUM, ESQ.  
16 Nevada State Bar No. 012902  
17 7201 West Lake Mead Boulevard, Suite 570  
18 Las Vegas, Nevada 89128  
19 (702) 631-7855  
20 Attorneys for Defendant DAVID R. ZIPF, M.D.  
21  
22  
23  
24  
25  
26  
27  
28



CLERK OF THE COURT

1 NEOJ  
2 ARTHUR W. TUVERSON, ESQ.  
3 Nevada State Bar No. 005156  
4 DANIELLE WOODRUM, ESQ.  
5 Nevada State Bar No. 012902  
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11 Telephone: (702) 631-7855  
12 Facsimile: (702) 631-5777  
13 [dwoodrum@awtlawoffice.com](mailto:dwoodrum@awtlawoffice.com)  
14 Attorney for Defendant DAVID R. ZIPF, M.D.

9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

11 \*\*\*\*\*

12 FRANK M. PECK,  
13 Plaintiff,  
14 v.

CASE NO.: A-14-708447-C  
DEPT. NO.: III

15 VALLEY HOSPITAL MEDICAL CENTER,  
16 et al., DAVID R. ZIPF, M.D., MICHAEL D.  
17 BARNUM, M.D., JOHN DOES I - V,  
18 Defendants.

NOTICE OF ENTRY OF ORDER

19 PLEASE TAKE NOTICE that the Order granting Defendant David R. Zipf, M.D.'s  
20 Motion for Judgment on the Pleadings and Defendant Michael D. Barnum, M.D.'s Joinder  
21 thereto was entered in the above entitled action on the 4<sup>th</sup> day of August, 2015, a copy of which is  
22 attached hereto.

23 DATED: August 6, 2015

LAW OFFICES OF ARTHUR W. TUVERSON

24 BY: /s/ Danielle Woodrum

25 DANIELLE WOODRUM, ESQ.  
26 Nevada State Bar No. 012902  
27 7201 West Lake Mead Boulevard, Suite 570  
28 Las Vegas, Nevada 89128  
Attorneys for Defendant DAVID R. ZIPF, M.D.

LAW OFFICES OF ARTHUR W. TUVERSON

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS  
7201 WEST LAKE MEAD BOULEVARD, SUITE 570  
LAS VEGAS, NEVADA 89128  
TELEPHONE (702) 631-7855

**CERTIFICATE OF SERVICE**

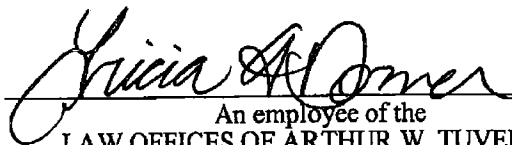
Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICES OF ARTHUR W. TUVERTSON, and that on this 6<sup>th</sup> day of August, 2015, I served a copy of NOTICE OF ENTRY OF ORDER as follows:

☒ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada: and/or

Frank M. Peck, #57106  
HDSP Box 650  
Indian Springs, NV 89070  
Plaintiff Pro Per

☒ By Electronic Service through Eighth Judicial District Court to;

David J. Mortensen, Esq.  
ALVERTSON TAYLOR MORTENSEN &  
SANDERS  
7401 W. Charleston Blvd.  
Las Vegas, NV 89117  
Facsimile (702) 385-7000  
[efile@alversontaylor.com](mailto:efile@alversontaylor.com)  
[dmortensen@alversontaylor.com](mailto:dmortensen@alversontaylor.com)  
[dkurdziel@alversontaylor.com](mailto:dkurdziel@alversontaylor.com)  
[smasia@alversontaylor.com](mailto:smasia@alversontaylor.com)  
Attorneys for Defendant Michael D. Barnum, M.D.

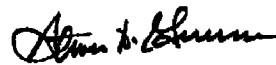
  
An employee of the  
LAW OFFICES OF ARTHUR W. TUVERTSON

LAW OFFICES OF ARTHUR W. TUVERTSON

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS  
7201 WEST LAKE MEAD BOULEVARD, SUITE 570  
LAS VEGAS, NEVADA 89128  
TELEPHONE (702) 631-7855

1 **ORDER**  
2 ARTHUR W. TUVERTSON, ESQ.  
3 Nevada State Bar No. 005156  
4 DANIELLE WOODRUM, ESQ.  
5 Nevada State Bar No. 012902  
6 LAW OFFICES OF ARTHUR W. TUVERTSON  
7 A Limited Liability Partnership  
8 Including Professional Corporations  
9 7201 West Lake Mead Boulevard, Suite 570  
10 Las Vegas, Nevada 89128  
11 Telephone: (702) 631-7855  
12 Facsimile: (702) 631-5777  
13 [dwoodrum@awtlawoffice.com](mailto:dwoodrum@awtlawoffice.com)  
14 Attorney for Defendant DAVID R. ZIPF, M.D.

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

12 FRANK M. PECK,

13 Plaintiff,

14 v.

15 VALLEY HOSPITAL MEDICAL CENTER,  
16 et al., DAVID R. ZIPF, M.D., MICHAEL D.  
17 BARNUM, M.D., JOHN DOES I - V,

Defendants.

CASE NO.: A-14-708447-C  
DEPT. NO.: III

ORDER

18  
19 Defendant DAVID R. ZIPF, M.D.'s Motion for Judgment on the Pleadings came on for  
20 hearing on July 22, 2015, at 9:00 a.m., in Department 3 of the Eighth Judicial District Court,  
21 Clark County, Nevada, with the Honorable Douglas W. Herndon presiding. Plaintiff FRANK  
22 PECK, was not present due to his incarceration at the Nevada Department of Corrections;  
23 William B. Palmer, Esq., of ALVERTSON TAYLOR MORTENSEN & SANDERS, appeared on  
24 behalf of Defendant MICHAEL D. BARNUM, M.D.; and Danielle Woodrum, Esq., of the LAW  
25 OFFICE OF ARTHUR W. TUVERTSON appeared for and on behalf of Defendant, DAVID R.  
26 ZIPF, M.D.

27 Having considered the pleadings filed herein and good cause appearing therefor:

28 ///

LAW OFFICES OF ARTHUR W. TUVERTSON

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATION  
7201 West Lake Mead Boulevard, Suite 570  
LAS VEGAS, NEVADA 89128  
TELEPHONE (702) 631-7855

1 IT IS HEREBY ORDERED that Defendant David R. Zipf, M.D.'s Motion for Judgment  
2 on the Pleadings and Defendant Michael D. Barnum's Joinder thereto are GRANTED.

3 IT IS FURTHER ORDERED that all future dates are VACATED and CASE CLOSED.

4 Dated this 30 day of July, 2015.

5  
6  
7  
8 DISTRICT COURT JUDGE

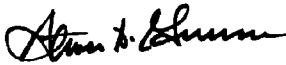
9 Respectfully Submitted:

10 LAW OFFICES OF ARTHUR W. TUVERTSON

11  
12 By 

13 ARTHUR W. TUVERTSON, ESQ.  
14 Nevada State Bar No. 005156  
15 DANIELLE WOODRUM, ESQ.  
16 Nevada State Bar No. 012902  
17 7201 West Lake Mead Boulevard, Suite 570  
18 Las Vegas, Nevada 89128  
19 (702) 631-7855  
20 Attorneys for Defendant DAVID R. ZIPF, M.D.





CLERK OF THE COURT

1 **NEO**  
2 **ALVERSON, TAYLOR, MORTENSEN & SANDERS**  
3 **DAVID J. MORTENSEN, ESQ.**  
4 Nevada Bar No. 002547  
5 **R. DOUGLAS KURDZIEL, ESQ.**  
6 Nevada Bar No. 004658  
7 7401 West Charleston Boulevard  
8 Las Vegas, NV 89117-1401  
9 702-384-7000  
10 702-385-7000 (fax)  
11 **E-File: [efile@alversontaylor.com](mailto:efile@alversontaylor.com)**  
12 **Attorneys for DEFENDANT**  
13 **Michael D. Barnum, M.D.**

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 FRANK M. PECK,

13 Plaintiff,

14 vs.

15 VALLEY HOSPITAL MEDICAL CENTER, et al.,  
16 DAVID R. ZIPF, M.D., MICHAEL D. BARNUM,  
17 M.D., JOHN DOES I - V,

18 Defendants.

CASE NO: A-14-708447-C  
DEPT NO: III

19  
20 **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT**  
21 **MICHAEL D. BARNUM, M.D.'S JOINDER TO DEFENDANT**  
22 **DAVID R. ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE PLEADINGS**

23 PLEASE TAKE NOTICE that an Order granting Defendant Michael D. Barnum, M.D.'s  
24 Joinder to Defendant David R. Zipf, M.D.'s Motion for Judgment on the Pleadings, was entered

25 ///

26 ///

27 ///

ALVERSON, TAYLOR, MORTENSEN & SANDERS

LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

ALVERSON, TAYLOR, MORTENSEN & SANDERS

LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

1 in the above-entitled matter on the 4<sup>th</sup> day of August, 2015, a copy of which is attached hereto.

2 DATED this 6<sup>th</sup> day of August, 2015.

3 ALVERSON, TAYLOR,  
4 MORTENSEN & SANDERS

5 

6 DAVID J. MORTENSEN, ESQ.  
7 Nevada Bar No. 002547

8 R. DOUGLAS KURDZIEL, ESQ.  
9 Nevada Bar No. 004658

10 7401 W. Charleston Boulevard  
11 Las Vegas, NV 89117-1401  
12 702-384-7000

13 E-File: [cfile@alversontaylor.com](mailto:cfile@alversontaylor.com)

14 Attorneys for DEFENDANT  
15 Michael D. Barnum, M.D.

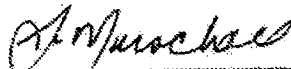
**CERTIFICATE OF SERVICE AND MAILING**

The undersigned hereby certifies that on the 6<sup>th</sup> day of August, 2015, the forgoing  
**NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT MICHAEL D. BARNUM,  
M.D.'S JOINDER TO DEFENDANT DAVID R. ZIPP, M.D.'S MOTION FOR  
JUDGMENT ON THE PLEADINGS** was served on the following by Electronic Service to All  
parties on the Wiznet Service List, addressed as follows:

Arthur W. Tuversen, Esq.  
Thomas R. Slezak, Jr., Esq.  
Law Offices of Arthur W. Tuversen  
7201 West Lake Mead Boulevard, Suite 570  
Las Vegas, NV 89128  
*Attorney for Defendant*  
*David R. Zipp, M.D.*

The foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT  
MICHAEL D. BARNUM, M.D.'S JOINDER TO DEFENDANT DAVID R. ZIPP, M.D.'S  
MOTION FOR JUDGMENT ON THE PLEADINGS** was also served by First Class Mail,  
by placing same in a sealed envelope upon which first class postage was prepaid in Las Vegas,  
Nevada, addressed as follows:

Frank M. Peck, #57106  
HDSP Box 650  
Indian Springs, NV 89070  
*Plaintiff Pro Per*



An Employee of Alverson, Taylor,  
Mortensen & Sanders

ALVERSON, TAYLOR, MORTENSEN & SANDERS

LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(703) 384-7000

**AFFIRMATION**  
Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT MICHAEL D. BARNUM, M.D.'S JOINDER TO DEFENDANT DAVID R. ZIPF, M.D.'S MOTION FOR JUDGMENT ON THE PLEADINGS filed in District Court Case No. A-14-708447-C.

X Does not contain the social security number of any person.

DATED this 6<sup>th</sup> day of August, 2015.

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS




DAVID J. MORTENSEN, ESQ.  
Nevada Bar No. 002547  
R. DOUGLAS KURDZIEL, ESQ.  
Nevada Bar No. 004658  
7401 West Charleston Boulevard  
Las Vegas, NV 89117-1401  
702-384-7000  
702-385-7000 (fax)  
E-File: [cfile@alversontaylor.com](mailto:cfile@alversontaylor.com)  
Attorneys for DEFENDANT  
Michael D. Barnum, M.D.

n:\david gip\clients\22098\pleadings\mco re barnum joinder.docx

1 **ORDR**  
2 ARTHUR W. TUVERTSON, ESQ.  
3 Nevada State Bar No. 005156  
4 DANIELLE WOODRUM, ESQ.  
5 Nevada State Bar No. 012902  
6 LAW OFFICES OF ARTHUR W. TUVERTSON  
7 A Limited Liability Partnership  
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11 Telephone: (702) 631-7855  
12 Facsimile: (702) 631-5777  
13 [dwoodrum@awtlawoffice.com](mailto:dwoodrum@awtlawoffice.com)  
14 Attorney for Defendant DAVID R. ZIPF, M.D.

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08/04/2015 03:35:06 PM

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*\*

12 FRANK M. PECK,  
13 Plaintiff,  
14 v.  
15 VALLEY HOSPITAL MEDICAL CENTER,  
16 et al., DAVID R. ZIPF, M.D., MICHAEL D.  
17 BARNUM, M.D., JOHN DOES I - V,  
18 Defendants.

CASE NO.: A-14-708447-C  
DEPT. NO.: III

**ORDER**

19 Defendant DAVID R. ZIPF, M.D.'s Motion for Judgment on the Pleadings came on for  
20 hearing on July 22, 2015, at 9:00 a.m., in Department 3 of the Eighth Judicial District Court,  
21 Clark County, Nevada, with the Honorable Douglas W. Herndon presiding. Plaintiff FRANK  
22 PECK, was not present due to his incarceration at the Nevada Department of Corrections;  
23 William B. Palmer, Esq., of ALVERTSON TAYLOR MORTENSEN & SANDERS, appeared on  
24 behalf of Defendant MICHAEL D. BARNUM, M.D.; and Danielle Woodrum, Esq., of the LAW  
25 OFFICE OF ARTHUR W. TUVERTSON appeared for and on behalf of Defendant, DAVID R.  
26 ZIPF, M.D.

27 Having considered the pleadings filed herein and good cause appearing therefor:  
28 ///

LAW OFFICES OF ARTHUR W. TUVERTSON

ARTHUR W. TUVERTSON  
DANIELLE WOODRUM  
7201 West Lake Mead Boulevard, Suite 570  
Las Vegas, Nevada 89128  
TELEPHONE (702) 631-7855

1 IT IS HEREBY ORDERED that Defendant David R. Zipf, M.D.'s Motion for Judgment  
2 on the Pleadings and Defendant Michael D. Barnum's Joinder thereto are GRANTED.


3 IT IS FURTHER ORDERED that all future dates are VACATED and CASE CLOSED.

4 Dated this 30 day of July, 2015.

5  
6  
7   
8 DISTRICT COURT JUDGE  
9

9 Respectfully Submitted:

10 LAW OFFICES OF ARTHUR W. TUVERTSON

11  
12 By   
13 ARTHUR W. TUVERTSON, ESQ.  
14 Nevada State Bar No. 005156  
15 DANIELLE WOODRUM, ESQ.  
16 Nevada State Bar No. 012902  
17 7201 West Lake Mead Boulevard, Suite 570  
18 Las Vegas, Nevada 89128  
19 (702) 631-7855  
20 Attorneys for Defendant DAVID R. ZIPF, M.D.  
21  
22  
23  
24  
25  
26  
27  
28

Frank M. Peck 57106

HDSP Box 650

Indian Springs, NV. 89070

Plaintiff, prose

**FILED**

AUG 17 2015

*[Signature]*  
CLERK OF COURT

DISTRICT COURT CLARK COUNTY, NEVADA

Frank M. Peck,

CASE NO. A-14-708447-C

Plaintiff,

DEPT NO. 3

v.

Valley Hospital, et al,

Defendants.

NOTICE OF APPEAL

NOTICE is hereby given that the Plaintiff  
Frank M. Peck prose hereby Appeals to the  
Supreme Court of Nevada from the ORDER  
Granting JUDGEMENT ON THE PLEADINGS entered on  
August 4th 2015 herein.

Dated 8-9-15

Electronically served / NOTICED on the registered parties per  
N.E.C.R. rule 9 (c).

Affirmation contains no social security numbers of any  
person NRS 239B.030.

CLERK OF THE COURT

AUG 17 2015

RECEIVED

A-14-708447-C  
NOA8  
Notice of Appeal  
4478881



*[Signature]*  
Frank M. Peck Plaintiff, pro se.

Frank M. Peak 57106  
HDSB Box 650  
Indian Springs, NV. 89070

LAS VEGAS  
NV 890  
13 AUG '15  
PM 2 L

Hasler 3762  
08/13/2015  
US POSTAGE \$00.48  
ZIP 89101  
01ID12602493

Clerk of the Court  
200 LEWIS AVE 3rd floor  
Las Vegas NV 89155-1160

Confidential legal mail

**CONFIDENTIAL LEGAL MAIL**

