

1 NOT
2 KIRK T. KENNEDY, ESQ.
3 Nevada Bar No: 5032
4 815 S. Casino Center Blvd.
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6 (702) 385-5534
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8 Attorney for Plaintiff

Electronically Filed
Sep 18 2018 03:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

6 **DISTRICT COURT**
7 **CLARK COUNTY, NEVADA**

8 MELISSA CUMMINGS,
9 Plaintiff,

Case No: A-15-729065-C
Dept. No: I

10 vs.

11 ANNABEL BARBER, M.D., et al.,
12 Defendants.

13 **PLAINTIFF'S NOTICE OF APPEAL**

14 NOTICE IS HEREBY GIVEN that the Plaintiff, MELISSA CUMMINGS, by and
15 through her undersigned counsel, KIRK T. KENNEDY, ESQ., files this notice of appeal
16 to the Nevada Supreme Court from the notice of entry of order and order granting
17 summary judgment for Defendants Barber and University Medical Center, said notice and
18 final judgment filed August 15, 2018. See Attached.

19 Dated this 12th day of September, 2018.

20 /s/Kirk T. Kennedy
21 KIRK T. KENNEDY, ESQ.
22 Nevada Bar No: 5032
23 815 S. Casino Center Blvd.
24 Las Vegas, NV 89101
25 (702) 385-5534
26 Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby affirm that on this 12th day of September 2018, I mailed via first class U.S. Mail a copy of the foregoing to the Defendant at the address below:

Heather S. Hall, Esq.
8329 W. Sunset Road, Ste. 260
Las Vegas, NV 89113

Jeffrey I. Pitegoff, Esq.
7765 W. Rosada Way
Las Vegas, NV 89149

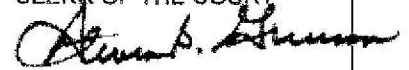
/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy

AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that the foregoing contains no social security numbers.

Dated this 12th day of September, 2018.

/s/Kirk T Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Plaintiff



1 **NEO**
2 ROBERT C. MCBRIDE, ESQ.
3 Nevada Bar No.: 7082
4 HEATHER S. HALL, ESQ.
5 Nevada Bar No.: 10608
6 CARROLL, KELLY, TROTTER,
7 FRANZEN, McBRIDE & PEABODY
8 8329 W. Sunset Road, Suite 260
9 Las Vegas, Nevada 89113
10 Telephone No. (702) 792-5855
11 Facsimile No. (702) 796-5855
12 E-mail: rcmcbride@cktfmlaw.com
13 E-mail: hshall@cktfmlaw.com
14 Attorneys for Defendant
15 *Annabel E. Barber, M.D.*

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

12 MELISSA CUMMINGS.

13 Plaintiffs,

14 vs.

15 ANNABEL E. BARBER, M.D., individually;
16 UNIVERSITY MEDICAL CENTER; a Nevada
17 entity; DOES 1-10; ROE Corporations 1-10,

18 Defendants.

CASE NO.: A-15-729065-C
DEPT NO.: XX

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT ANNABEL E.
BARBER, M.D.'S MOTION FOR
SUMMARY JUDGMENT**

19 PLEASE TAKE NOTICE that an Order Granting Defendant Annabel E. Barber, M.D.'S
20 Motion For Summary Judgment was entered and filed on August 13, 2018, a copy of which is
21 attached hereto.

22 DATED this 15th day of August, 2018.

23 CARROLL, KELLY, TROTTER,
24 FRANZEN, McBRIDE & PEABODY

25 /s/Heather S. Hall

26 ROBERT C. MCBRIDE, ESQ.
27 Nevada Bar No.: 7082
28 HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Defendant
Annabel E. Barber, M.D.

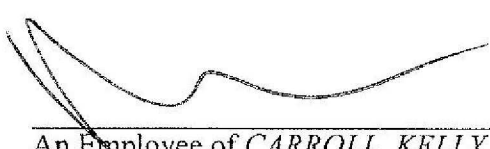
1 **CERTIFICATE OF SERVICE**

2
3 I HEREBY CERTIFY that on the 15th day of August, 2018, I served a true and correct
4 copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT**
5 **ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT** addressed to
6 the following counsel of record at the following address(es):
7

- 8 ☒ **VIA ELECTRONIC:** by mandatory electronic service (e-service), proof of e-service
9 attached to any copy filed with the Court; or
10 ☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with
11 postage thereon fully prepaid, addressed as indicated on the service list below in the
12 United States mail at Las Vegas, Nevada
13 ☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number
14 indicated on the service list below.

14 Kirk T. Kennedy, Esq.
15 815 S. Casino Center Blvd.
16 Las Vegas, Nevada 89101
17 Attorneys for Plaintiffs

Christopher A. Turtzo, Esq.
MORRIS SULLIVAN
LEMKUL & PITEGOFF
3770 Howard Hughes Parkway, Suite 170
Las Vegas, Nevada 89169
Attorneys for Defendant
University Medical Center

18
19
20
21 
22 An Employee of *CARROLL, KELLY, TROTTER,*
23 *FRANZEN, McBRIDE & PEABODY*
24
25
26
27
28

Steven D. Grierson

ORDER

ROBERT C. MCBRIDE, ESQ.
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HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
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FRANZEN, McBRIDE & PEABODY
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E-mail: rcmcbride@cktfmlaw.com
E-mail: hshall@cktfmlaw.com
Attorneys for Defendant
Annabel E. Barber, M.D.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MELISSA CUMMINGS.

Plaintiffs,

vs.

ANNABEL E. BARBER, M.D., individually;
UNIVERSITY MEDICAL CENTER; a Nevada
entity; DOES 1-10; ROE Corporations 1-10,

Defendants.

CASE NO.: A-15-729065-C
DEPT NO.: I

**ORDER GRANTING DEFENDANT
ANNABEL E. BARBER, M.D.'S MOTION
FOR SUMMARY JUDGMENT**

Defendant ANNABEL BARBER, M.D.'s Motion for Summary Judgment and Defendant University Medical Center's Joinder to the Motion came on for hearing on June 5, 2018. Defendant Annabel Barber, M.D. appeared by and through her counsel of record, HEATHER S. HALL, ESQ. of the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY. Plaintiff Melissa Cumming appeared by and through her counsel of record, KIRK T. KENNEDY, ESQ. of the law firm of KENNEDY LAW FIRM.

This matter was taken under advisement and the parties were invited to provide any additional case law in support of their respective positions. A status check hearing on the Motion for Summary Judgment was held on July 18, 2018. At that hearing, all parties were

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 present by and through their counsel of record.

2 The Court, having reviewed all submitted briefs and hearing oral argument from counsel,
3 and for good cause showing, finds as follows:

4 I.

5 **FINDINGS OF FACT**

6 1. The Complaint in this matter was filed on December 16, 2015, wherein Plaintiff
7 alleges that during the course of removing a gastric pacemaker for Ms. Cummings on June 6,
8 2014, Defendant Dr. Barber overlooked or unintentionally left surgical clips in her abdomen. *See*
9 Plf's Comp., para. 6 – 11.

10 2. By Stipulation, Initial Expert Disclosures in this case were due on May 19, 2017.

11 3. Rebuttal Expert Disclosures were due in this case on June 19, 2017.

12 4. On May 19, 2017, Dr. Barber served her Initial Expert Disclosure in this case,
13 providing the curriculum vitae, fee schedule, testimonial history and initial expert report of Dr.
14 Andrew Warshaw, who opines that Dr. Barber met the standard of care in her treatment of
15 Plaintiff.

16 5. Plaintiff did not provide an Initial Expert Disclosure and the deadline for doing so
17 has passed.

18 6. Defendant Dr. Barber was never deposed in this matter.

19 7. In support of her Motion for Summary Judgment, Dr. Barber provided an
20 Affidavit stating that she intended to leave surgical clips in place during her June 6, 2014
21 procedure to control post-operative bleeding.

22 8. Defendant also stated that she intentionally left small, wire fragments that were
23 embedded in the patient's abdomen at the time of the removal surgery because of the risk
24 associated with removing them.

25 9. Plaintiff has no expert to contradict Dr. Barber's sworn Affidavit or the opinions
26 stated by defense expert Dr. Warshaw.

27 10. In opposing the Motion for Summary Judgment, Plaintiff contended that the res
28 ipsa loquitur claim was based on Dr. Barber's failure to remove pacemaker lead wires that were

1 previously implanted, at the time the pacemaker was placed months before.

2 II.

3 CONCLUSIONS OF LAW

4 1. To establish the elements of a medical malpractice claim, expert testimony is
5 required unless the facts fit the factual scenario of a res ipsa loquitur claim. *See* NRS 41A.100;
6 *See also, Ferdinand v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992); *See also, Bronneke v.*
7 *Rutherford*, 120 Nev. 230, 235, n.9, 89 P.3d 40, 44, n. 9 (2004).

8 2. Plaintiff claims this case falls under NRS 41A.100(1)(a), which creates a
9 rebuttable presumption that the personal injury was caused by negligence where evidence is
10 presented that the personal injury was due to foreign substance left unintentionally within the
11 body of a patient following surgery.

12 3. In *Kinford v. Bannister*, 913 F. Supp. 2d 1010 (Dist. Nev. 2012), the U.S. District
13 Court of Nevada considered whether a plaintiff was permitted to proceed without the expert
14 affidavit required by NRS 41A.071 under a res ipsa loquitur claim.

15 4. As discussed in *Kinford*, NRS 41A.100 sets forth five specific statutory
16 exceptions to the affidavit requirement.

17 5. If the opposing side challenges the viability of res ipsa loquitur allegations, the
18 issue then becomes whether the allegations fall under any of the carefully enumerated
19 circumstances set forth in NRS 41A.100 such that expert testimony is not needed.

20 6. As stated in *Kinford*, "leaving behind a surgical device which the physician used
21 during surgery, is markedly different from not removing previously implanted hardware". *Id.* at
22 1017.

23 7. The *Kinford* Court concluded that such circumstances do not state a viable claim
24 for res ipsa under NRS 41A.100, but could conceivably state a claim for professional negligence.

25 8. Similar to *Kinford v. Bannister*, 913 F. Supp. 2d 1010 (Dist. Nev. 2012), the
26 question this Court must decide is whether Plaintiff's averments constitute viable res ipsa
27 loquitur allegations under NRS 41A.100.

28 9. In making this determination, the Court finds *Kinford* instructive.

1 10. The allegation that Dr. Barber failed to remove previously implanted hardware
2 during the June 6, 2014 surgery does not state a viable claim for res ipsa.

3 11. As a result, Plaintiff was required to present expert testimony that Dr. Barber fell
4 below the standard of care.

5 12. Because Plaintiff did not designate an expert, she cannot prove her case and
6 summary judgment in favor of Defendant Dr. Barber and Defendant University Medical Center
7 is appropriate.

8 For the above reasons, it is hereby **ORDERED** that Defendant Annabel E. Barber,
9 M.D.'s Motion For Summary Judgment and Defendant University Medical Center's Joinder to
10 Defendant Annabel E Barber MD's Motion for Summary Judgment are **GRANTED**.

11 It is further **ORDERED**, that judgment is entered in favor of Defendants and against
12 Plaintiff and that all claims are fully adjudicated

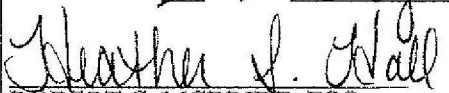
13 **IT IS SO ORDERED.**

14 Dated this 6 day of Aug 2018.

15 
16 HONORABLE KENNETH CORY
17

18 Respectfully Submitted By:

19 DATED this 23rd day of July 2018.

20 

21 ROBERT C. MCBRIDE, ESQ.

22 Nevada Bar No.: 7082

23 HEATHER S. HALL, ESQ.

24 Nevada Bar No.: 10608

25 CARROLL KELLY TROTTER

26 FRANZEN, MCBRIDE & PEABODY

27 8329 W. Sunset Road, Suite 260

28 Las Vegas, Nevada 89113

Attorneys for Defendant

Annabel E. Barber, M.D.

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Approved as to Form and Content:

DATED this 21 day of July 2018.

PITEGOFF LAW OFFICE

By [Signature]
JEFFREY I. PITEGOFF, ESQ.
Nevada Bar No. 005458
330 E. Charleston Blvd., Suite 100
Las Vegas, Nevada 89104
Attorneys for Defendant
University Medical Center

Approved as to Form and Content:

DATED this ___ day of _____ 2018.

KENNEDY LAW FIRM

By REFUSED TO SIGN
KIRK T. KENNEDY, ESQ.
Nevada Bar No.: 005032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August 2018, I served a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT** addressed to the following counsel of record at the following address(es):

☒ VIA ELECTRONIC: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

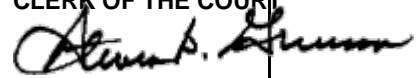
☐ VIA FACSIMILE: By causing a true copy thereof to be telecopied to the number indicated on the service list below.

Kirk T. Kennedy, Esq.
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

Jeffrey I. Pitegoff, Esq.
PITEGOFF LAW OFFICE
7765 W. Rosada Way
Las Vegas, Nevada 89149
Attorneys for Defendant
University Medical Center



An Employee of CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY



CASEAPPSTMT
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
email: ktkennedylaw@gmail.com
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MELISSA CUMMINGS,)	Case No: A-15-729065-C
Plaintiff,)	Dept. No: I
vs.)	
ANNABEL BARBER, M.D., et al.,)	
Defendants.)	

CASE APPEAL STATEMENT

COMES NOW, the Plaintiff, MELISSA CUMMINGS, by and through her undersigned counsel, KIRK T. KENNEDY, ESQ., who files this case appeal statement in accordance with NRAP 3(a)(1):

1. Name of appellant filing this case appeal statement: Melissa Cummings
2. Identify the judge issuing the decision, judgment or order appealed from: Judge Kenneth Corey
3. Identify all parties to this appeal:
 - a. Appellant Melissa Cummings represented by retained counsel Kirk T. Kennedy, Esq., 815 S. Casino Center Blvd., Las Vegas, NV 89101, (702) 385-5534.
 - b. Appellee: Dr. Annabel Barber, M.D., represented by retained counsel, Heather S. Hall, Esq., 8329 W. Sunset Road, Ste. 260, Las Vegas, NV 89113, (702) 792-5855;
 - c. Appellee: University Medical Center, represented by retained counsel Jeffrey I. Pitegoff, Esq, 7765 W. Rosada Way, Las Vegas, NV 89149, phone number unavailable.

4. All designated attorneys in this matter are licensed to practice in Nevada.

5. Indicate whether appellant was represented by appointed or retained counsel in the district court.

Appellant was represented by retained counsel in the district court.

6. Indicate whether the appellant is represented by appointed or retained counsel on this appeal.

Appellant is represented by retained counsel for this appeal.

7. Indicate whether the appellant was granted leave to proceed in forma pauperis and the date of entry of the district court order granting such leave.

None.

8. Indicate the date the proceedings commenced in the district court.

Complaint filed December 16, 2015.

9. Brief Description of Action and Result Below: Appellant filed a lawsuit alleging res ipsa medical negligence. The district court granted summary judgment for the Defendants and this appeal now follows.

10. Previous appeals: None.

11. Appeal involving child custody or visitation: No.

12. Possibility of Settlement: No.

Dated this 12th day of September, 2018.

/s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby affirm that on this 12th day of September 2018, I mailed via first class
U.S. Mail a copy of the foregoing to the Defendant at the address below:

Heather S. Hall, Esq.
8329 W. Sunset Road, Ste. 260
Las Vegas, NV 89113

Jeffrey I. Pitegoff, Esq.
7765 W. Rosada Way
Las Vegas, NV 89149

/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy

AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that the foregoing contains no social security numbers.

Dated this 12th day of September, 2018.

/s/Kirk T Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Plaintiff

CASE SUMMARY
CASE SUMMARY
CASE NO. A-15-729065-C

Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

§
§
§
§
§

Location: **Department 1**
Judicial Officer: **Cory, Kenneth**
Filed on: **12/16/2015**
Case Number History:
Cross-Reference Case Number: **A729065**

CASE INFORMATION

Statistical Closures

08/13/2018 Summary Judgment

Case Type: **Malpractice - Medical/Dental**

Case Flags: **Appealed to Supreme Court
Jury Demand Filed
Arbitration Exemption Granted
Med Mal Case**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-15-729065-C
Court Department 1
Date Assigned 07/01/2017
Judicial Officer Cory, Kenneth

PARTY INFORMATION

Plaintiff

Cummings, Melissa

Lead Attorneys

Kennedy, Kirk T
Retained
702-385-5534(W)

Defendant

Barber, Annabel, M.D.

Tan, Gerald L.
Retained
702-792-5855(W)

University Medical Center


Pitegoff, Jeffrey I
Retained
702-808-7976(W)

DATE


EVENTS & ORDERS OF THE COURT

INDEX


12/16/2015

 Complaint With Jury Demand
Filed By: Plaintiff Cummings, Melissa
Complaint with Jury Demand


04/05/2016

 Ex Parte Motion for Enlargement of Time
Filed By: Plaintiff Cummings, Melissa
Ex-Parte Motion for Enlargement of Time to Complete Service of Process of Summons and Complaint














04/08/2016

 Order Enlarging Time to Serve
Filed By: Plaintiff Cummings, Melissa
Order Granting Ex-Parte Motion for Enlargement of Time to Complete Service of Process of Summons and Complaint

06/22/2016













 Affidavit of Service
Filed By: Plaintiff Cummings, Melissa
Affidavit of Service

CASE SUMMARY
CASE SUMMARY
CASE NO. A-15-729065-C

06/22/2016	 Affidavit of Service Filed By: Plaintiff Cummings, Melissa <i>Affidavit of Service</i>
06/22/2016	 Affidavit of Service Filed By: Plaintiff Cummings, Melissa <i>Affidavit of Service</i>
06/23/2016	 Order Setting Medical/Dental Malpractice Status Check <i>Order Setting Medical/Dental Malpractice Status Check and Trial Setting Conference</i>
06/29/2016	 Answer Filed By: Defendant University Medical Center <i>Answer to Complaint</i>
06/29/2016	 Demand for Jury Trial Filed By: Defendant University Medical Center <i>Demand for Jury Trial</i>
07/08/2016	 Initial Appearance Fee Disclosure Filed By: Defendant Barber, Annabel, M.D. <i>Defendant's Initial Appearance Fee Disclosure</i>
07/08/2016	 Answer Filed By: Defendant Barber, Annabel, M.D. <i>Defendant Annabel A. Barber, M.D.'s Answer to Plaintiff's Complaint</i>
07/08/2016	 Demand for Jury Trial Filed By: Defendant Barber, Annabel, M.D. <i>Defendant Anabel E. Barber, M.D.'s Demand for Jury Trial</i>
08/01/2016	 Status Check: Medical/Dental Malpractice (1:00 PM) (Judicial Officer: Wiese, Jerry A.) <i>Parties Present: Attorney Kennedy, Kirk T</i>
08/04/2016	 Commissioners Decision on Request for Exemption - Granted <i>Commissioner's Decision on Request for Exemption - Granted</i>
09/19/2016	 Joint Case Conference Report Filed By: Plaintiff Cummings, Melissa <i>Joint Case Conference Report</i>
10/24/2016	 Notice to Appear for Discovery Conference <i>Notice to Appear for Discovery Conference</i>
11/15/2016	 Discovery Conference (8:55 AM) (Judicial Officer: Bulla, Bonnie) <i>Parties Present: Attorney Kennedy, Kirk T</i> <i>Attorney Petersen, Ryan</i> <i>Attorney Tan, Gerald L.</i>
12/14/2016	 Scheduling Order <i>Scheduling Order</i>
02/06/2017	 Status Check: Medical/Dental Malpractice (1:00 PM) (Judicial Officer: Wiese, Jerry A.)














CASE SUMMARY
CASE SUMMARY
CASE NO. A-15-729065-C

Parties Present: Attorney Kennedy, Kirk T
Attorney McBride, Robert C.
Attorney Pitegoff, Jeffrey I

02/13/2017	 Order Setting Civil Jury Trial <i>Order Setting Civil Jury Trial</i>
03/22/2017	 Stipulation and Order to Extend Discovery Deadlines Filed By: Plaintiff Cummings, Melissa <i>Stipulation and Order to Extend Discovery Deadline Dates (First Request)</i>
04/24/2017	 Stipulation and Order Filed by: Defendant Barber, Annabel, M.D. <i>Stipulation And Order To Extend Discovery Deadlines (Second Request)</i>
04/25/2017	 Notice of Entry of Stipulation and Order Filed By: Defendant Barber, Annabel, M.D. <i>Notice of Entry of Stipulation and Order</i>
07/01/2017	Case Reassigned to Department 1 <i>Civil Case Reassignment to Judge Kenneth Cory</i>
08/07/2017	 Status Check: Medical/Dental Malpractice (1:00 PM) (Judicial Officer: Wiese, Jerry A.) <i>Parties Present: Attorney McBride, Robert C.</i> <i>Attorney Pitegoff, Jeffrey I</i> <i>Attorney Petersen, Ryan</i>
08/21/2017	 Order Scheduling Status Check <i>Order Scheduling Status Check</i>
08/23/2017	 Motion Filed By: Plaintiff Cummings, Melissa <i>Plaintiff's Motion to Extend Discovery Deadline Date and to Continue Trial Date</i>
08/28/2017	 Non Opposition Filed By: Defendant Barber, Annabel, M.D. <i>Defendant Annabel Barber, M.D.'s Non-Opposition to Plaintiff's Motion to Extend Discovery Deadline Date and to Continue Trial</i>
09/12/2017	 Status Check (9:00 AM) (Judicial Officer: Bonaventure, Joseph T.) <i>Status Check: Resetting of Trial Date</i> <i>Parties Present: Attorney McBride, Robert C.</i> <i>Attorney Pitegoff, Jeffrey I</i>
09/25/2017	 Motion to Extend Discovery (3:00 AM) (Judicial Officer: Cory, Kenneth) <i>Plaintiff's Motion to Extend Discovery Deadline Date and to Continue Trial Date</i>
10/12/2017	 Minute Order (7:11 AM) (Judicial Officer: Cory, Kenneth)
10/25/2017	CANCELED Calendar Call (10:45 AM) (Judicial Officer: Johnson, Eric) <i>Vacated</i>
11/07/2017	 Order Filed By: Plaintiff Cummings, Melissa

CASE SUMMARY
CASE SUMMARY
CASE NO. A-15-729065-C

Order





11/07/2017	 Stipulation and Order to Extend Discovery Deadlines Filed By: Plaintiff Cummings, Melissa <i>Stipulation and Order to Extend Discovery Deadline Dates (Third Request)</i>
11/13/2017	CANCELED Jury Trial (9:00 AM) (Judicial Officer: Johnson, Eric) <i>Vacated</i> <i>SET DURING MED MAL SWEEPS</i>
11/20/2017	 Motion Filed By: Plaintiff Cummings, Melissa <i>Plaintiff's Second Motion to Extend Discovery Deadline Date</i>
12/12/2017	 Non Opposition <i>Defendant Annabel Barber, M.D. S Notice Of Non-Opposition To Plaintiff's Second Motion To Extend Discovery Deadline</i>
12/12/2017	 Joinder Filed By: Defendant University Medical Center <i>University Medical Center's Joinder to Annabel Barber, MD's Notice of Non-Opposition to Plaintiff's Second Motion to Extend Discovery Deadline</i>
01/04/2018	 Motion to Extend Discovery (3:00 AM) (Judicial Officer: Cory, Kenneth) <i>Plaintiff's Second Motion to Extend Discovery Deadline Date</i>
01/31/2018	 Substitution of Attorney <i>Substitution of Counsel</i>
02/13/2018	 Order Granting Motion Filed By: Plaintiff Cummings, Melissa <i>Order</i>
05/04/2018	 Motion for Summary Judgment Filed By: Defendant Barber, Annabel, M.D. <i>Defendant Annabel E. Barber, M.D. S Motion For Summary Judgment</i>
05/07/2018	 Errata <i>Defendant Annabel E. Barber, M.D.'s Errata to Motion for Summary Judgment</i>
05/14/2018	 Joinder to Motion For Summary Judgment Filed By: Defendant University Medical Center <i>Defendant, University Medical Center's Joinder to Defendant Annabel E. Barber, M.D.'s Motion for Summary Judgment</i>
05/21/2018	 Opposition Filed By: Plaintiff Cummings, Melissa <i>Plaintiff's Opposition to Defendant Barber's Motion for Summary Judgment</i>
05/29/2018	 Reply <i>Defendant Annabel Barber, M.D.'s Reply in Support of Motion for Summary Judgment</i>
05/30/2018	 Joinder <i>Defendant, University Medical Center's Joinder to Defendant Anabel E. Barber, M.D.'s Reply</i>

CASE SUMMARY
CASE SUMMARY
CASE NO. A-15-729065-C

in Support of Motion for Summary Judgment

06/05/2018	Motion for Summary Judgment (9:00 AM) (Judicial Officer: Cory, Kenneth) 06/05/2018, 06/14/2018, 07/18/2018 <i>Defendant Annabel E. Barber, M.D. S Motion For Summary Judgment</i>
06/05/2018	Joinder (9:00 AM) (Judicial Officer: Cory, Kenneth) 06/05/2018, 06/14/2018, 07/18/2018 <i>Defendant University Medical Center's Joinder to Defendant Annabel E Barber MD's Motion for Summary Judgment</i>
06/05/2018	 All Pending Motions (9:00 AM) (Judicial Officer: Cory, Kenneth) <i>DEFENDANT ANNABEL E. BARBER, M.D. S MOTION FOR SUMMARY JUDGMENT</i> <i>DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT ANNABEL E BARBER MD'S MOTION FOR SUMMARY JUDGMENT</i> <i>Parties Present: Attorney Kennedy, Kirk T</i> <i>Attorney Hall, Heather S.</i>
06/14/2018	 All Pending Motions (3:00 AM) (Judicial Officer: Cory, Kenneth) <i>DEFENDANT ANNABEL E. BARBER, M.D. S MOTION FOR SUMMARY JUDGMENT</i> <i>DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT ANNABEL E BARBER MD'S MOTION FOR SUMMARY JUDGMENT</i>
07/18/2018	Status Check (9:00 AM) (Judicial Officer: Cory, Kenneth) <i>STATUS CHECK: RE: PENDING MOTION FOR SUMMARY JUDGMENT</i>
07/18/2018	 All Pending Motions (9:00 AM) (Judicial Officer: Cory, Kenneth) <i>DEFENDANT ANNABEL E. BARBER, M.D. S MOTION FOR SUMMARY JUDGMENT</i> <i>DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT ANNABEL E BARBER MD'S MOTION FOR SUMMARY JUDGMENT</i> <i>Parties Present: Attorney Kennedy, Kirk T</i> <i>Attorney Hueth, Chelsea R</i>
08/13/2018	Summary Judgment (Judicial Officer: Cory, Kenneth) Debtors: Melissa Cummings (Plaintiff) Creditors: Annabel Barber, MD. (Defendant), University Medical Center (Defendant) Judgment: 08/13/2018, Docketed: 08/13/2018
08/13/2018	 Order Granting Motion <i>Order Granting Defendant Annabel E. Barber, MD Motion for Summary Judgment</i>
08/15/2018	 Notice of Entry of Order <i>Notice of Entry of Order Granting Defendant Annabel E Barber MD Motion for Summary Judgment</i>
08/16/2018	CANCELED Pre Trial Conference (9:00 AM) (Judicial Officer: Cory, Kenneth) <i>Vacated - Case Closed</i>
08/20/2018	 Memorandum of Costs and Disbursements <i>Defendant, Annabel E. Barber, M.D. S Verified</i>
08/20/2018	 Motion for Attorney Fees and Costs <i>Defendant, Annabel E. Barber, M.D. S Motion For Attorneys Fees And Costs</i>
08/22/2018	 Memorandum of Costs and Disbursements <i>Filed By: Defendant University Medical Center</i> <i>Defendant, University Medical Center's Memorandum of Costs and Disbursements</i>

CASE SUMMARY
CASE SUMMARY
CASE NO. A-15-729065-C

08/22/2018	 Motion for Attorney Fees and Costs Filed By: Defendant University Medical Center <i>Defendant, University Medical Center's Motion for Attorneys Fees and Costs</i>
08/23/2018	 Motion Filed By: Plaintiff Cummings, Melissa <i>Plaintiff's Motion to Retax Costs</i>
09/04/2018	 Opposition Filed By: Plaintiff Cummings, Melissa <i>Plaintiff's Opposition to Defendant Barber's Motion for Attorneys Fees and Costs</i>
09/10/2018	 Opposition <i>Defendant Annabel E. Barber, M.D. S Opposition To Plaintiff's Motion To Retax Costs</i>
09/11/2018	 Reply in Support <i>Defendant, Annabel E. Barber, M.D.'s Reply in Support of Motion for Attorneys' Fees and Costs</i>
09/12/2018	 Case Appeal Statement Filed By: Plaintiff Cummings, Melissa <i>Case Appeal Statement</i>
09/12/2018	 Notice of Appeal Filed By: Plaintiff Cummings, Melissa <i>Plaintiff's Notice of Appeal</i>
09/17/2018	CANCELED Jury Trial - FIRM (1:30 PM) (Judicial Officer: Cory, Kenneth) <i>Vacated - Case Closed</i>
09/27/2018	Motion for Attorney Fees and Costs (3:00 AM) (Judicial Officer: Cory, Kenneth) <i>Defendant, Annabel E Barber MD's Motion for Attorneys' Fees and Costs</i>
09/27/2018	Motion for Attorney Fees (3:00 AM) (Judicial Officer: Cory, Kenneth) <i>Defendant, University Medical Center's Motion for Attorneys Fees and Costs</i>
09/27/2018	Motion to Retax (3:00 AM) (Judicial Officer: Cory, Kenneth) <i>Plaintiff's Motion to Retax Costs</i>

DATE	FINANCIAL INFORMATION
	Defendant Barber, Annabel, M.D.
	Total Charges 423.00
	Total Payments and Credits 423.00
	Balance Due as of 9/14/2018 0.00
	Defendant University Medical Center
	Total Charges 200.00
	Total Payments and Credits 200.00
	Balance Due as of 9/14/2018 0.00
	Plaintiff Cummings, Melissa
	Total Charges 294.00
	Total Payments and Credits 294.00
	Balance Due as of 9/14/2018 0.00

DISTRICT COURT CIVIL COVER SHEET

County, Nevada
Case No. A-15-729065-C Dept XX
(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Melissa Cummings

Defendant(s) (name/address/phone):

Dr. Annabel Barber
University Medical
Center

Attorney (name/address/phone):

K. R. Kennedy
815 S. Casino Center
LV NV 89101
702-385-5534

Attorney (name/address/phone):

unk

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

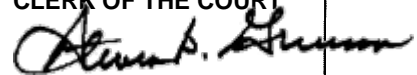
<p style="text-align: center;">Real Property</p> <p>Landlord/Tenant</p> <p><input type="checkbox"/> Unlawful Detainer</p> <p><input type="checkbox"/> Other Landlord/Tenant</p> <p>Title to Property</p> <p><input type="checkbox"/> Judicial Foreclosure</p> <p><input type="checkbox"/> Other Title to Property</p> <p>Other Real Property</p> <p><input type="checkbox"/> Condemnation/Eminent Domain</p> <p><input type="checkbox"/> Other Real Property</p>	<p style="text-align: center;">Negligence</p> <p><input type="checkbox"/> Auto</p> <p><input type="checkbox"/> Premises Liability</p> <p><input type="checkbox"/> Other Negligence</p> <p>Malpractice</p> <p><input checked="" type="checkbox"/> Medical/Dental</p> <p><input type="checkbox"/> Legal</p> <p><input type="checkbox"/> Accounting</p> <p><input type="checkbox"/> Other Malpractice</p>	<p style="text-align: center;">Torts</p> <p>Other Torts</p> <p><input type="checkbox"/> Product Liability</p> <p><input type="checkbox"/> Intentional Misconduct</p> <p><input type="checkbox"/> Employment Tort</p> <p><input type="checkbox"/> Insurance Tort</p> <p><input type="checkbox"/> Other Tort</p>
<p style="text-align: center;">Probate</p> <p>Probate <small>(select case type and estate value)</small></p> <p><input type="checkbox"/> Summary Administration</p> <p><input type="checkbox"/> General Administration</p> <p><input type="checkbox"/> Special Administration</p> <p><input type="checkbox"/> Set Aside</p> <p><input type="checkbox"/> Trust/Conservatorship</p> <p><input type="checkbox"/> Other Probate</p> <p>Estate Value</p> <p><input type="checkbox"/> Over \$200,000</p> <p><input type="checkbox"/> Between \$100,000 and \$200,000</p> <p><input type="checkbox"/> Under \$100,000 or Unknown</p> <p><input type="checkbox"/> Under \$2,500</p>	<p style="text-align: center;">Construction Defect & Contract</p> <p>Construction Defect</p> <p><input type="checkbox"/> Chapter 40</p> <p><input type="checkbox"/> Other Construction Defect</p> <p>Contract Case</p> <p><input type="checkbox"/> Uniform Commercial Code</p> <p><input type="checkbox"/> Building and Construction</p> <p><input type="checkbox"/> Insurance Carrier</p> <p><input type="checkbox"/> Commercial Instrument</p> <p><input type="checkbox"/> Collection of Accounts</p> <p><input type="checkbox"/> Employment Contract</p> <p><input type="checkbox"/> Other Contract</p>	<p style="text-align: center;">Judicial Review/Appeal</p> <p>Judicial Review</p> <p><input type="checkbox"/> Foreclosure Mediation Case</p> <p><input type="checkbox"/> Petition to Seal Records</p> <p><input type="checkbox"/> Mental Competency</p> <p>Nevada State Agency Appeal</p> <p><input type="checkbox"/> Department of Motor Vehicle</p> <p><input type="checkbox"/> Worker's Compensation</p> <p><input type="checkbox"/> Other Nevada State Agency</p> <p>Appeal Other</p> <p><input type="checkbox"/> Appeal from Lower Court</p> <p><input type="checkbox"/> Other Judicial Review/Appeal</p>
<p style="text-align: center;">Civil Writ</p> <p>Civil Writ</p> <p><input type="checkbox"/> Writ of Habeas Corpus</p> <p><input type="checkbox"/> Writ of Mandamus</p> <p><input type="checkbox"/> Writ of Quo Warrant</p> <p><input type="checkbox"/> Writ of Prohibition</p> <p><input type="checkbox"/> Other Civil Writ</p>		<p style="text-align: center;">Other Civil Filing</p> <p>Other Civil Filing</p> <p><input type="checkbox"/> Compromise of Minor's Claim</p> <p><input type="checkbox"/> Foreign Judgment</p> <p><input type="checkbox"/> Other Civil Matters</p>

Business Court filings should be filed using the Business Court civil coversheet.

Date

Signature of initiating party or representative

See other side for family-related case filings.



ORDR

ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
CARROLL, KELLY, TROTTER,
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8329 W. Sunset Road, Suite 260
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Telephone No. (702) 792-5855
Facsimile No. (702) 796-5855
E-mail: rcmcbride@cktfmlaw.com
E-mail: hshall@cktfmlaw.com
Attorneys for Defendant
Annabel E. Barber, M.D.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MELISSA CUMMINGS.

Plaintiffs,

vs.

ANNABEL E. BARBER, M.D., individually;
UNIVERSITY MEDICAL CENTER; a Nevada
entity; DOES 1-10; ROE Corporations 1-10,

Defendants.

**CASE NO.: A-15-729065-C
DEPT NO.: I**

**ORDER GRANTING DEFENDANT
ANNABEL E. BARBER, M.D.'S MOTION
FOR SUMMARY JUDGMENT**

Defendant ANNABEL BARBER, M.D.'s Motion for Summary Judgment and Defendant University Medical Center's Joinder to the Motion came on for hearing on June 5, 2018. Defendant Annabel Barber, M.D. appeared by and through her counsel of record, HEATHER S. HALL, ESQ. of the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY. Plaintiff Melissa Cumming appeared by and through her counsel of record, KIRK T. KENNEDY, ESQ. of the law firm of KENNEDY LAW FIRM.

This matter was taken under advisement and the parties were invited to provide any additional case law in support of their respective positions. A status check hearing on the Motion for Summary Judgment was held on July 18, 2018. At that hearing, all parties were

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 present by and through their counsel of record.

2 The Court, having reviewed all submitted briefs and hearing oral argument from counsel,
3 and for good cause showing, finds as follows:

4 **I.**

5 **FINDINGS OF FACT**

6 1. The Complaint in this matter was filed on December 16, 2015, wherein Plaintiff
7 alleges that during the course of removing a gastric pacemaker for Ms. Cummings on June 6,
8 2014, Defendant Dr. Barber overlooked or unintentionally left surgical clips in her abdomen. *See*
9 *Plf's Comp.*, para. 6 – 11.

10 2. By Stipulation, Initial Expert Disclosures in this case were due on May 19, 2017.

11 3. Rebuttal Expert Disclosures were due in this case on June 19, 2017.

12 4. On May 19, 2017, Dr. Barber served her Initial Expert Disclosure in this case,
13 providing the curriculum vitae, fee schedule, testimonial history and initial expert report of Dr.
14 Andrew Warshaw, who opines that Dr. Barber met the standard of care in her treatment of
15 Plaintiff.

16 5. Plaintiff did not provide an Initial Expert Disclosure and the deadline for doing so
17 has passed.

18 6. Defendant Dr. Barber was never deposed in this matter.

19 7. In support of her Motion for Summary Judgment, Dr. Barber provided an
20 Affidavit stating that she intended to leave surgical clips in place during her June 6, 2014
21 procedure to control post-operative bleeding.

22 8. Defendant also stated that she intentionally left small, wire fragments that were
23 embedded in the patient's abdomen at the time of the removal surgery because of the risk
24 associated with removing them.

25 9. Plaintiff has no expert to contradict Dr. Barber's sworn Affidavit or the opinions
26 stated by defense expert Dr. Warshaw.

27 10. In opposing the Motion for Summary Judgment, Plaintiff contended that the res
28 ipsa loquitur claim was based on Dr. Barber's failure to remove pacemaker lead wires that were

1 previously implanted, at the time the pacemaker was placed months before.

2 **II.**

3 **CONCLUSIONS OF LAW**

4 1. To establish the elements of a medical malpractice claim, expert testimony is
5 required unless the facts fit the factual scenario of a res ipsa loquitur claim. *See* NRS 41A.100;
6 *See also, Ferdinand v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992); *See also, Bronneke v.*
7 *Rutherford*, 120 Nev. 230, 235, n.9, 89 P.3d 40, 44, n. 9 (2004).

8 2. Plaintiff claims this case falls under NRS 41A.100(1)(a), which creates a
9 rebuttable presumption that the personal injury was caused by negligence where evidence is
10 presented that the personal injury was due to foreign substance left unintentionally within the
11 body of a patient following surgery.

12 3. In *Kinford v. Bannister*, 913 F. Supp. 2d 1010 (Dist. Nev. 2012), the U.S. District
13 Court of Nevada considered whether a plaintiff was permitted to proceed without the expert
14 affidavit required by NRS 41A.071 under a res ipsa loquitur claim.

15 4. As discussed in *Kinford*, NRS 41A.100 sets forth five specific statutory
16 exceptions to the affidavit requirement.

17 5. If the opposing side challenges the viability of res ipsa loquitur allegations, the
18 issue then becomes whether the allegations fall under any of the carefully enumerated
19 circumstances set forth in NRS 41A.100 such that expert testimony is not needed.

20 6. As stated in *Kinford*, “leaving behind a surgical device which the physician used
21 during surgery, is markedly different from not removing previously implanted hardware”. *Id.* at
22 1017.

23 7. The *Kinford* Court concluded that such circumstances do not state a viable claim
24 for res ipsa under NRS 41A.100, but could conceivably state a claim for professional negligence.

25 8. Similar to *Kinford v. Bannister*, 913 F. Supp. 2d 1010 (Dist. Nev. 2012), the
26 question this Court must decide is whether Plaintiff’s averments constitute viable res ipsa
27 loquitur allegations under NRS 41A.100.

28 9. In making this determination, the Court finds *Kinford* instructive.

10. The allegation that Dr. Barber failed to remove previously implanted hardware during the June 6, 2014 surgery does not state a viable claim for res ipsa.

11. As a result, Plaintiff was required to present expert testimony that Dr. Barber fell below the standard of care.


12. Because Plaintiff did not designate an expert, she cannot prove her case and summary judgment in favor of Defendant Dr. Barber and Defendant University Medical Center is appropriate.

For the above reasons, it is hereby **ORDERED** that Defendant Annabel E. Barber, M.D.'s Motion For Summary Judgment and Defendant University Medical Center's Joinder to Defendant Annabel E Barber MD's Motion for Summary Judgment are **GRANTED**.

It is further **ORDERED**, that judgment is entered in favor of Defendants and against Plaintiff and that all claims are fully adjudicated

IT IS SO ORDERED.

Dated this 6 day of Aug 2018.


HONORABLE KENNETH CORY
kr

Respectfully Submitted By:

DATED this 23rd day of July 2018.

Heather J. Wall

ROBERT C. MCBRIDE, ESQ.

Nevada Bar No.: 7082

HEATHER S. HALL, ESQ.

Nevada Bar No.: 10608

CARROLL KELLY TROTTER

FRANZEN, McBRIDE & PEABODY

8329 W. Sunset Road, Suite 260

Las Vegas, Nevada 89113

Attorneys for Defendant

Annabel E. Barber, M.D.

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Approved as to Form and Content:

DATED this 23 day of July 2018.

PITEGOFF LAW OFFICE

By 
JEFFREY L. PITEGOFF, ESQ.
Nevada Bar No. 005458
330 E. Charleston Blvd., Suite 100
Las Vegas, Nevada 89104
Attorneys for Defendant
University Medical Center

Approved as to Form and Content:

DATED this ____ day of _____ 2018.

KENNEDY LAW FIRM

By REFUSED TO SIGN
KIRK T. KENNEDY, ESQ.
Nevada Bar No.: 005032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 13th day of August 2018, I served a true and correct
3 copy of the foregoing **ORDER GRANTING DEFENDANT ANNABEL E. BARBER,**
4 **M.D.'S MOTION FOR SUMMARY JUDGMENT** addressed to the following counsel of
5 record at the following address(es):
6

7 ☒ VIA ELECTRONIC: by mandatory electronic service (e-service), proof of e-
8 service attached to any copy filed with the Court; or

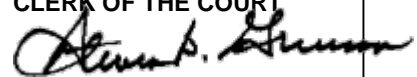
9 ☐ VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope
10 with postage thereon fully prepaid, addressed as indicated on the service list below in the
11 United States mail at Las Vegas, Nevada

12 ☐ VIA FACSIMILE: By causing a true copy thereof to be telecopied to the number
13 indicated on the service list below.

14
15 Kirk T. Kennedy, Esq.
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
16 Attorneys for Plaintiffs

17 Jeffrey I. Pitegoff, Esq.
PITEGOFF LAW OFFICE
18 7765 W. Rosada Way
Las Vegas, Nevada 89149
19 Attorneys for Defendant
University Medical Center
20

21 
22 An Employee of CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY
23
24
25
26
27
28



1 **NEO**
2 ROBERT C. MCBRIDE, ESQ.
3 Nevada Bar No.: 7082
4 HEATHER S. HALL, ESQ.
5 Nevada Bar No.: 10608
6 CARROLL, KELLY, TROTTER,
7 FRANZEN, McBRIDE & PEABODY
8 8329 W. Sunset Road, Suite 260
9 Las Vegas, Nevada 89113
10 Telephone No. (702) 792-5855
11 Facsimile No. (702) 796-5855
12 E-mail: rcmcbride@cktfmlaw.com
13 E-mail: hshall@cktfmlaw.com
14 Attorneys for Defendant
15 *Annabel E. Barber, M.D.*

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

12 MELISSA CUMMINGS.

13 Plaintiffs,

14 vs.

15 ANNABEL E. BARBER, M.D., individually;
16 UNIVERSITY MEDICAL CENTER; a Nevada
17 entity; DOES 1-10; ROE Corporations 1-10,

18 Defendants.

CASE NO.: A-15-729065-C
DEPT NO.: XX

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT ANNABEL E.
BARBER, M.D.'S MOTION FOR
SUMMARY JUDGMENT**

19 PLEASE TAKE NOTICE that an Order Granting Defendant Annabel E. Barber, M.D.'S
20 Motion For Summary Judgment was entered and filed on August 13, 2018, a copy of which is
21 attached hereto.

22 DATED this 15th day of August, 2018.

23 CARROLL, KELLY, TROTTER,
24 FRANZEN, McBRIDE & PEABODY

25 /s/Heather S. Hall
26 ROBERT C. MCBRIDE, ESQ.

27 Nevada Bar No.: 7082
28 HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Defendant
Annabel E. Barber, M.D.

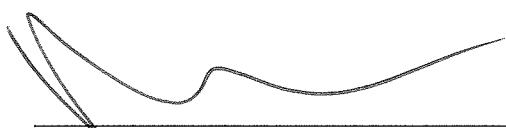
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2
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4 copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT**
5 **ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT** addressed to
6 the following counsel of record at the following address(es):

- 7
8 ☒ **VIA ELECTRONIC:** by mandatory electronic service (e-service), proof of e-service
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14 Kirk T. Kennedy, Esq.
15 815 S. Casino Center Blvd.
16 Las Vegas, Nevada 89101
17 Attorneys for Plaintiffs

Christopher A. Turtzo, Esq.
MORRIS SULLIVAN
LEMKUL & PITEGOFF
3770 Howard Hughes Parkway, Suite 170
Las Vegas, Nevada 89169
Attorneys for Defendant
University Medical Center

18
19
20
21 
22 An Employee of *CARROLL, KELLY, TROTTER,*
23 *FRANZEN, McBRIDE & PEABODY*
24
25
26
27
28

Steven D. Grierson

ORDR

ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
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Attorneys for Defendant
Annabel E. Barber, M.D.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MELISSA CUMMINGS.

Plaintiffs,

vs.

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**CASE NO.: A-15-729065-C
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2 **II.**

3 **CONCLUSIONS OF LAW**

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17 5. If the opposing side challenges the viability of res ipsa loquitur allegations, the
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21 during surgery, is markedly different from not removing previously implanted hardware”. *Id.* at
22 1017.

23 7. The *Kinford* Court concluded that such circumstances do not state a viable claim
24 for res ipsa under NRS 41A.100, but could conceivably state a claim for professional negligence.

25 8. Similar to *Kinford v. Bannister*, 913 F. Supp. 2d 1010 (Dist. Nev. 2012), the
26 question this Court must decide is whether Plaintiff’s averments constitute viable res ipsa
27 loquitur allegations under NRS 41A.100.

28 9. In making this determination, the Court finds *Kinford* instructive.

10. The allegation that Dr. Barber failed to remove previously implanted hardware during the June 6, 2014 surgery does not state a viable claim for res ipsa.

11. As a result, Plaintiff was required to present expert testimony that Dr. Barber fell below the standard of care.

12. Because Plaintiff did not designate an expert, she cannot prove her case and summary judgment in favor of Defendant Dr. Barber and Defendant University Medical Center is appropriate.

For the above reasons, it is hereby **ORDERED** that Defendant Annabel E. Barber, M.D.'s Motion For Summary Judgment and Defendant University Medical Center's Joinder to Defendant Annabel E Barber MD's Motion for Summary Judgment are **GRANTED**.

It is further **ORDERED**, that judgment is entered in favor of Defendants and against Plaintiff and that all claims are fully adjudicated

IT IS SO ORDERED.

Dated this 6 day of Aug 2018.

Kenneth Cory
HONORABLE KENNETH CORY
ur

Respectfully Submitted By:

DATED this 23rd day of July 2018.

ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
CARROLL KELLY TROTTER
FRANZEN, MCBRIDE & PEABODY
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Defendant
Annabel E. Barber, M.D.

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<p>Approved as to Form and Content:</p> <p>DATED this <u>21</u> day of <u>July</u> 2018.</p> <p>PITEGOFF LAW OFFICE</p> <p>By <u>[Signature]</u> JEFFREY L. PITEGOFF, ESQ. Nevada Bar No. 005458 330 E. Charleston Blvd., Suite 100 Las Vegas, Nevada 89104 Attorneys for Defendant <i>University Medical Center</i></p>	<p>Approved as to Form and Content:</p> <p>DATED this ___ day of _____ 2018.</p> <p>KENNEDY LAW FIRM</p> <p>By <u>REFUSED TO SIGN</u> KIRK T. KENNEDY, ESQ. Nevada Bar No.: 005032 815 S. Casino Center Blvd. Las Vegas, NV 89101 Attorneys for Plaintiff</p>
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August 2018, I served a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT** addressed to the following counsel of record at the following address(es):

☒ VIA ELECTRONIC: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ VIA FACSIMILE: By causing a true copy thereof to be telecopied to the number indicated on the service list below.

Kirk T. Kennedy, Esq.
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

Jeffrey I. Pitegoff, Esq.
PITEGOFF LAW OFFICE
7765 W. Rosada Way
Las Vegas, Nevada 89149
Attorneys for Defendant
University Medical Center


An Employee of CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

August 01, 2016

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

**August 01, 2016 1:00 PM Status Check:
Medical/Dental
Malpractice**

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Alice Jacobson
Olivia Black
Kory Schlitz

RECORDER:

REPORTER:

PARTIES

PRESENT: Kennedy, Kirk T Attorney

JOURNAL ENTRIES

- Robert McBride Esq. also present.

The Med-Mal Status Check was conducted by Judge Jerry A. Wiese II. Mr. Kennedy advised a Defendant recently filed an answer in this case. COURT ORDERED, matter CONTINUED to the next Med-Mal Status Check.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

November 15, 2016

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

November 15, 2016 8:55 AM Discovery Conference

HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT:	Kennedy, Kirk T	Attorney
	Petersen, Ryan	Attorney
	Tan, Gerald L.	Attorney

JOURNAL ENTRIES

- Dept. 20. No Trial date set. Commissioner Bulla will hear discovery matters. Counsel anticipate 3 to 5 days for trial re: Medical malpractice. COMMISSIONER RECOMMENDED, discovery cutoff is 6/19/17; adding parties, amended pleadings, and initial expert disclosures DUE 3/21/17; rebuttal expert disclosures DUE 4/20/17; FILE dispositive motions by 7/19/17. Trial ready 9/5/17. Scheduling Order will issue.

Insurance and medical authorizations were exchanged. No Medicare / Medicaid. No wage loss issues.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

February 06, 2017

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

**February 06, 2017 1:00 PM Status Check:
Medical/Dental
Malpractice**

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Alice Jacobson
Fernanda Kriese
Denise Duron
Cassidy Wagner

RECORDER:

REPORTER:

PARTIES

PRESENT: Kennedy, Kirk T Attorney
McBride, Robert C. Attorney
Pitegoff, Jeffrey I Attorney

JOURNAL ENTRIES

- Colloquy regarding status of the case, counsel estimates the trial will last 3-5 days. COURT ORDERED, trial date STANDS, matter SET on next Med-Mal Status Check.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

August 07, 2017

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

**August 07, 2017 1:00 PM Status Check:
Medical/Dental
Malpractice**

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Alice Jacobson
Katrina Hernandez
Keri Cromer

RECORDER:

REPORTER:

PARTIES

PRESENT: McBride, Robert C. Attorney
Petersen, Ryan Attorney
Pitegoff, Jeffrey I Attorney

JOURNAL ENTRIES

- The Med-Mal Status Check was conducted by Judge Jerry A. Wiese II. Counsel anticipated 3-5 days for trial. COURT ORDERED, trial date STANDS.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

September 12, 2017

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

September 12, 2017 9:00 AM Status Check

HEARD BY: Bonaventure, Joseph T. **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: McBride, Robert C. Attorney
 Pitegoff, Jeffrey I Attorney

JOURNAL ENTRIES

- Counsel advised five (5) days for trial. COURT ORDERED, Trial date VACATED and a FIRM TRIAL DATE SET.

8/16/18 9:00 AM PRETRIAL CONFERENCE

9/4/18 1:30 PM JURY TRIAL - FIRM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

September 25, 2017

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

**September 25, 2017 3:00 AM Motion to Extend
Discovery**

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT ORDERED, Plaintiff's Motion to Extend Discovery Deadline Date and to Continue Trial Date GRANTED. The parties shall submit a Stipulation pursuant to EDCR 2.35, indicating the proposed discovery deadline dates. Trial has been set for September 4, 2018. Mr. Kennedy to prepare the Order and submit a copy to all parties.

CLERK'S NOTE: The above minute order has been distributed to: Kirk Kennedy, Esq. (ktkennedylaw@gmail.com) and Heather Hall, Esq. (hshall@cktfmlaw..com). /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

October 12, 2017

A-15-729065-C	Melissa Cummings, Plaintiff(s)
	vs.
	Annabel Barber, M.D., Defendant(s)

October 12, 2017	7:11 AM	Minute Order
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HEARD BY: Cory, Kenneth	COURTROOM: RJC Courtroom 16A
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COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Please be advised due to a conflict in scheduling with another Medical Malpractice trial, the Firm Jury Trial for this case has been set for 9/17/18 at 1:30 p.m. The Pretrial Conference will remain on 8/16/18 at 9:00 a.m.

8/16/18 9:00 AM PRETRIAL CONFERENCE

9/17/18 1:30 PM JURY TRIAL - FIRM

CLERK'S NOTE: The above minute order has been distributed to: Kirk Kennedy, Esq. (ktkennedylaw@gmail.com), Heather Hall, Esq. (hshall@cktfmlaw.com), and Jeffrey Pitegoff, Esq. (pitegoff@morrisullivanlaw.com). /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

January 04, 2018

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

**January 04, 2018 3:00 AM Motion to Extend
Discovery**

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT ORDERS, Plaintiff's Second Motion to Extend Discovery Deadline Date GRANTED. The deadline to complete discovery is extended to 90 days from the date of this order; the deadline to file dispositive motions is extended to 30 days after the close of discovery; and the dates for trial are maintained. The scope of discovery is limited to medical and billing records in connection with Plaintiff's October medical diagnosis and treatment. Mr. Kennedy to prepare the Order and distribute a copy to all parties.

CLERK'S NOTE: The above minute order has been distributed to: Kirk Kennedy, Esq. (ktkennedylaw@gmail.com), Jeffrey Pitegoff, Esq. (pitegoff@morrisullivanlaw.com), and Robert McBride, Esq. (rcmcbride@cktfmlaw.com). /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental**COURT MINUTES****June 05, 2018**

A-15-729065-C Melissa Cummings, Plaintiff(s)
 vs.
 Annabel Barber, M.D., Defendant(s)

June 05, 2018**9:00 AM****All Pending Motions****HEARD BY:** Cory, Kenneth**COURTROOM:** RJC Courtroom 16A**COURT CLERK:** Michele Tucker**RECORDER:** Lisa Lizotte**REPORTER:****PARTIES**

PRESENT: Hall, Heather S. Attorney
 Kennedy, Kirk T Attorney

JOURNAL ENTRIES

- DEFENDANT ANNABEL E. BARBER, M.D. S MOTION FOR SUMMARY JUDGMENT
 DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT ANNABEL E
 BARBER MD'S MOTION FOR SUMMARY JUDGMENT

Ms. Hall advised the basis for the motion is two parts. The first is 41A.100 statute, the subsection the complaint alleges is met in this case under 41A.100(1) regarding leaving a foreign items in the body. The only remaining issue is the fragments of two wires. The expert reports state there was no negligence and it would be detrimental for a doctor to dig around in the patients body for foreign fragments. Ms. Hall argued any rebuttable presumption has been rebutted; there is no evidence to establish negligence. Statements by the Court. Further arguments by Ms. Hall. Mr. Kennedy argued 41A.100 is for the trier of facts to decide, not for the Court. Mr. Kennedy further argued the doctors surgical report states she removed the gastric simulator and lead wires and is now stating she intentionally left the wires on purpose. Mr. Kennedy advised he has the actual wire and they are not fragments. The doctors affidavit contradicts her report. Mr. Kennedy argued Johnson vs. Egtegar and it is for the trier of fact to decide and the presumption should be applied. Ms. Hall argued Szydel vs. Markman and Ferdinand vs. Admirand. COURT ORDERED, Matter CONTINUED. Court STATED counsel may submit case law in the next 48 hours.

CONTINUED TO: 6/14/18 CHAMBERS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

June 14, 2018

A-15-729065-C	Melissa Cummings, Plaintiff(s)
	vs.
	Annabel Barber, M.D., Defendant(s)

June 14, 2018

3:00 AM

All Pending Motions

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- DEFENDANT ANNABEL E. BARBER, M.D. S MOTION FOR SUMMARY JUDGMENT
DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT ANNABEL E
BARBER MD'S MOTION FOR SUMMARY JUDGMENT

COURT ORDERS, Status Check Set regarding the above referenced motions.

7/18/18 9:00 am STATUS CHECK: REGARDING PENDING MOTIONS FOR SUMMARY
JUDGMENT

CLERK'S NOTE: The above minute order has been distributed to: Kirk Kennedy, Esq.
(ktkennedylaw@gmail.com) and Heather Hall, Esq. (hshall@cktfmlaw.com). /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

July 18, 2018

A-15-729065-C Melissa Cummings, Plaintiff(s)
vs.
Annabel Barber, M.D., Defendant(s)

July 18, 2018

9:00 AM

All Pending Motions

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Hueth, Chelsea R Attorney
 Kennedy, Kirk T Attorney

JOURNAL ENTRIES

- DEFENDANT ANNABEL E. BARBER, M.D. S MOTION FOR SUMMARY JUDGMENT
DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT ANNABEL E
BARBER MD'S MOTION FOR SUMMARY JUDGMENT

Court NOTED Kinford v. Bannister disposes of the issues. Mr. Kennedy gave summary of the surgery. COURT ORDERED, Defendant Annabel E. Barber, M.D. S Motion For Summary Judgment AND Defendant University Medical Center's Joinder to Defendant Annabel E Barber MD's Motion for Summary Judgment GRANTED. Ms. Hueth to prepare the Order.



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

KIRK T. KENNEDY, ESQ.
815 S. CASINO CENTER BLVD.
LAS VEGAS, NV 89101

DATE: September 14, 2018
CASE: A-15-729065-C

RE CASE: MELISSA CUMMINGS vs. DR. ANNABEL BARBER, M.D.; UNIVERSITY MEDICAL CENTER

NOTICE OF APPEAL FILED: September 12, 2018

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT TRANSMITTED HAVE BEEN MARKED:**

- ☒ **\$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)****
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ **\$24 – District Court Filing Fee (Make Check Payable to the District Court)****
- ☒ **\$500 – Cost Bond on Appeal (Make Check Payable to the District Court)****
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ **Case Appeal Statement**
 - NRAP 3 (a)(1), Form 2
- ☐ **Order**
- ☐ **Notice of Entry of Order**

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

PLAINTIFF'S NOTICE OF APPEAL; CASE APPEAL STATEMENT;
DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER GRANTING
DEFENDANT ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT; NOTICE
OF ENTRY OF ORDER GRANTING DEFENDANT ANNABEL E. BARBER, M.D.'S FOR
SUMMARY JUDGMENT; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

MELISSA CUMMINGS,

Plaintiff(s),

vs.

DR. ANNABEL BARBER, M.D.;
UNIVERSITY MEDICAL CENTER,

Defendant(s),

Case No: A-15-729065-C

Dept No: I

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 14 day of September 2018.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk