

1 KIRK T. KENNEDY, ESQ.
2 Nevada Bar No: 5032
3 815 S. Casino Center Blvd.
4 Las Vegas, NV 89101
(702) 385-5534
Attorney for Appellants

Electronically Filed
Oct 04 2018 08:25 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

6 MELISSA CUMMINGS,

No.: 76972

7 Appellant,

8 vs.

9 ANNABEL E. BARBER, M.D.;
10 UNIVERSITY MEDICAL CENTER,

11 Respondents.

12 **DOCKETING STATEMENT**

13 1. Judicial District: Eighth Department: 1 County: Clark

14 Judge: Kenneth Corey

15 District Court Docket No: A-15-729065-C

16 2. Attorney filing this docket statement:

17 Kirk T. Kennedy, Esq.

18 815 S. Casino Center Blvd.

19 Las Vegas, NV 89101

20 (702) 385-5534

21 Attorney for Appellant Melissa Cummings

22 3. Attorney representing respondent:

23 a. Heather S. Hall, Esq., Carroll, Kelly, Trotter, Franzen, McBride & Peabody, 8329 W.

24 Sunset Road, Ste. 260, Las Vegas, NV 89113, 702-792-5855- Attorney for Respondent

25 Dr. Annabel E. Barber, M.D.

26 b. Jeffrey I. Pitegoff, Esq., 330 E. Charleston Blvd., Ste. 100, Las Vegas, NV 89104-

27 702-808-7976, -Attorney for Respondent University Medical Center

1
2 4. Nature of disposition below:

3 ___ Judgment after bench trial ___ Grant/Denial of NRCP 60(b) relief
4 ___ Judgment after jury verdict ___ Grant/Denial of injunction
5 _X Summary Judgment ___ Grant/Denial of declaratory relief
6 ___ Default Judgment ___ Review of agency determination
7 ___ Dismissal ___ Divorce decree
8 ___ - other disposition:

9 5. This appeal does not raise any issues regarding child custody, venue, adoption,
10 termination of parental rights, the grant/denial of an injunction or TRO, or juvenile
11 matters.

12 6. Pending and prior proceedings in this court. None.

13 7. Pending and prior proceedings in other courts: None.

14 8. Nature of this action: Appellant filed a lawsuit claiming res ipsa medical negligence
15 against Respondents related to a surgery in June, 2014. The district court granted the
16 Respondents joint motion for summary judgment and this appeal now follows.

17 9. Issues on appeal:

18 a. Whether the district court erred in granting summary judgment based on de novo
19 review.

20 10. Pending proceedings in this court raising the same or similar issues: None.

21 11. Constitutional issues: None

22 12. Other issues: None.

23 13. Assignment to the Court of Appeals or retention in the Supreme Court: This case
24 may be presumptively assigned to the Court of Appeals under NRAP 17(b) as this case
25 involves a judgment not in excess of \$250,000.

26 14. Trial: N/A

27 15. Judicial disqualification: N/A
28

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from: August 13, 2018. A copy is attached.

17. Date written notice of entry of judgment or order served: August 15, 2018.. A copy is attached with proof of service by mail.

18. If the time for filing the notice of appeal was tolled by a post-judgment motion? No.

19. Date notice of appeal was filed: September 12, 2018.

20. Specify statute or rule governing the time limit for filing the notice of appeal: NRAP Rule 4(a)(1).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from: NRAP 3A(b)(1).

Explain how the authority provides a basis for appeal from the judgment or order:

This is an appeal from a final judgment of the district court. Direct appellate review is permissible.

22. List of all parties involved in the action in the district court:

Plaintiff: Melissa Cummings

Defendants: Dr. Annabel E. Barber, M.D. and University Medical Center

(a) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal: None.

23. Give a brief description of each party's claims: Appellant Cummings filed suit claiming that certain foreign items were left inside her body following surgery performed by Dr. Barber at University Medical Center in June, 2014. Cummings claimed this amounted to a res ipsa medical negligence case under NRS 41A.100. The Defendants denied the claims for relief and ultimately filed a motion for summary judgment which was granted by the district court. This appeal seeks review of that final decision.

1 24. Did the judgment or order appealed from adjudicate all the claims alleged below and
2 the rights and liabilities of all the parties to the action below: Yes.

3 25. If you answered No to the immediately previous question, complete the following:

4 (a) Specify the claims remaining pending below:

5 (b) Specify the parties remaining below:

6 (c) Did the district court certify the judgment or order appealed from as a final judgment
7 pursuant to NRCP 54(b):

8 Yes: ____ No: ____

9 (d) Did the district court make an express determination, pursuant to NRCP 54(b) that
10 there is no just reason for delay and an express direction for the entry of judgment:

11 Yes: ____ No: ____

12 26. If you answered No to any part of question 25, explain the basis for seeking appellate
13 review:

14 27. Attach file stamped copies of the following documents:

15 -latest filed complaint, counterclaims, cross-claims or third party claims

16 -any tolling motions and orders

17 -orders of NRCP 41(a) dismissals formally resolving each claim asserted in action below
18 even if not an issue on appeal

19 -any other order challenged on appeal

20 -notices of entry of each attached order

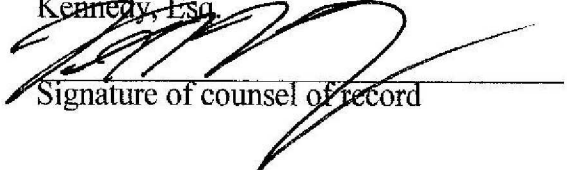
VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of Appellant: Melissa Cummings

Name of counsel of record: Kirk T.
Kennedy, Esq.

Date: 10/4/18


Signature of counsel of record

State and County: Clark County, Nevada

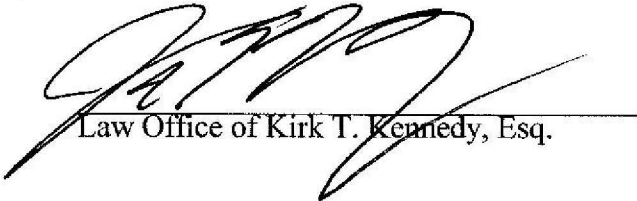
CERTIFICATE OF SERVICE

I hereby affirm that on this 4th day of October, 2018, I mailed a copy via first class U.S. Mail of the foregoing docketing statement to the Respondents and the Settlement Judge at the addresses below:

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

Jeffrey I. Pitegoff, Esq.
330 E. Charleston Blvd., Ste. 100
Las Vegas, NV 89104

M. Nelson Segel, Settlement Judge
6440 Sky Pointe Drive, Ste. 140-238
Las Vegas, NV 89131



Law Office of Kirk T. Kennedy, Esq.

Steven D. Grierson

1 NOT
2 KIRK T. KENNEDY, ESQ.
3 Nevada Bar No: 5032
4 815 S. Casino Center Blvd.
5 Las Vegas, NV 89101
6 (702) 385-5534
7 email: ktkennedylaw@gmail.com
8 Attorney for Plaintiff

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

12 MELISSA CUMMINGS,
13
14 Plaintiff,

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

15 vs.

16 ANNABEL BARBER, M.D., et al.,
17
18 Defendants.

19 **PLAINTIFF'S NOTICE OF APPEAL**

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

25 Dated this 12th day of September, 2018.

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

Exh 1

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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



CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

MELISSA CUMMINGS,
Plaintiff,

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

vs.

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

COMPLAINT
Jury Trial Demanded

COMES NOW, the Plaintiff, MELISSA CUMMINGS, by and through her undersigned counsel, KIRK T. KENNEDY, ESQ., who files this Complaint against the Defendants and would allege as follows:

1. Plaintiff, MELISSA CUMMINGS, is a resident of Clark County, Nevada and did so reside herein during all events complained of in this action.
2. Defendant, DR. ANNABEL BARBER, M.D., is a resident of Clark County, Nevada and did so operate during all events complained of in this action.
3. Defendant, UNIVERSITY MEDICAL CENTER, is a Nevada medical facility and hospital which did so operate herein during all events complained of in this action.
4. Plaintiff is unaware of the true names and capacities of defendants sued herein as Does 1-10 and Roe Corporations 1-10, and will amend his complaint to show their true names and capacities when the same are ascertained. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in

Exh 2

1 some manner for the occurrences herein alleged, and that Plaintiff's injuries as herein
2 alleged were proximately caused by the aforementioned defendants. Plaintiff is further
3 informed and believes and thereon alleges that at all times herein mentioned each and
4 every defendant was the agent and employee of the remaining defendants and, in doing
5 the things hereinafter alleged, was acting within the course and scope of such agency and
6 employment. Each defendant, in doing the acts alleged herein, was acting with the
7 consent, permission and authorization of each of the remaining defendants.

8 5. Both jurisdiction and venue are appropriate as the Defendants operate in Clark
9 County, Nevada; all events complained of occurred in Clark County, Nevada and the
10 amount in controversy exceeds the jurisdictional minimum of the Court.

11 Further, the Plaintiff files this complaint under the authority of N.R.S.
12 41A.100(1)(a), which permits the filing of a res ipsa medical malpractice action without
13 the necessity of an expert witness affidavit at the time of filing.

14 6. On or about June 6, 2014, Plaintiff underwent a surgical procedure at Defendant
15 University Medical Center in Las Vegas, Nevada, wherein Defendant Dr. Annabel Barber
16 performed a procedure to remove a gastric stimulator from Plaintiff's abdomen.

17 7. Plaintiff had a previous history of gastroparesis which had necessitated the previous
18 insertion of a gastric stimulator in her abdomen area.

19 8. Subsequent to the surgical procedure, Plaintiff developed ongoing pain in the same
20 abdominal area which resulted in her being referred for a CT scan of her abdomen on
21 December 23, 2014, at United Medical Imaging of Irvine in Irvine, California.

22 9. The CT Scan performed on December 23, 2014, revealed that surgical clips were
23 noted adjacent to the stomach.

24 10. The first time Plaintiff learned and/or discovered the existence of surgical clips in her
25 stomach area was the CT scan on December 23, 2014.

26 11. Plaintiff had no previous history of stomach based pain which was related to the
27 presence of surgical clips in her abdomen area and it is alleged that the Defendants left,
28 overlooked or unintentionally left the surgical clips within Plaintiff's abdomen as a result
of the surgery on June 6, 2014.

12. At all times, the Defendants maintained a duty and obligation to provide adequate, reasonable and appropriate medical care and medical services for the Plaintiff and the Defendants breached this duty and obligation by engaging in negligent, reckless and careless conduct and actions which caused and/or contributed to the presence of surgical clips remaining in Plaintiff's abdomen after the June 6, 2014, procedure referenced herein, said surgical clips causing Plaintiff pain and discomfort in her abdomen.

13. As a direct and proximate result of Defendants' actions, Plaintiffs suffered harm and damages in an amount in excess of \$10,000.

FIRST CLAIM FOR RELIEF

MEDICAL NEGLIGENCE- RES IPSA

14. Plaintiff realleges, readopts and reincorporates the allegations contained in paragraphs 1 through 13 as though fully set forth herein.

15. The Defendants, and each of them, maintained a duty and obligation to provide adequate, reasonable and appropriate medical care and services to the Plaintiff.

16. Defendants breached this duty and obligation by engaging in negligent, reckless and careless conduct and actions which caused and/or contributed to the presence of surgical clips remaining in Plaintiff's abdomen after the June 6, 2014, procedure.

17. Plaintiff was not aware of nor on inquiry notice of the source of her abdomen pain until the CT scan of December 23, 2014, which revealed the presence of surgical clips remaining in her abdominal area.

18. Pursuant to N.R.S. 41A.100, the presence of a foreign substance left within the Plaintiff's body following her surgical procedure equates to a res ipsa basis of liability which does not require an expert witness affidavit to proceed with this action.

19. The Defendants' negligent conduct was the direct and/or proximate cause of the surgical clips remaining unnecessarily and/or inappropriately in the Plaintiff's body following the June 6, 2014 procedure, which was not discovered by the Plaintiff until the CT scan of December 23, 2014.

20. As a direct and proximate result of Defendants' actions, Plaintiffs suffered harm and damages in an amount in excess of \$10,000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. For general damages in excess of \$10,000.
2. For special damages in excess of \$10,000.
3. For reasonable attorney's fees incurred herein.
4. For costs of suit and prejudgment interest.
5. For such other and further relief deemed appropriate by this Court.

Dated this 16th day of December, 2015.

/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

JURY TRIAL DEMAND

Pursuant to NRCP 38, Plaintiff does hereby demand a trial by jury of all issues and claims raised in this Complaint.

Dated this 16th day of December, 2015.

/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

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AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

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

Dated this 16th day of December, 2015.

/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

Steven D. Grierson

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.*

DISTRICT COURT
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.

Exh 3

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of August, 2018, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF 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

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


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

Steven D. Grierson

1 **ORDER**

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.*

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 MELISSA CUMMINGS,

19 Plaintiffs,

20 vs.

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

24 Defendants.

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

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

28 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 PIF'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

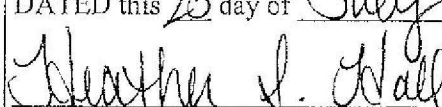
13 **IT IS SO ORDERED.**

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 
ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
21 HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
22 CARROLL KELLY TROTTER
FRANZEN, McBRIDE & PEABODY
23 8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
24 Attorneys for Defendant
Annabel E. Barber, M.D.

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<p>Approved as to Form and Content:</p> <p>DATED this <u>23</u> day of <u>July</u> 2018.</p> <p>PITEGOFF LAW OFFICE</p> <p>By <u></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>
--	--

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.

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