

**IN THE COURT OF APPEALS FOR THE STATE OF NEVADA**

MELISSA CUMMINGS,

Appellants,

VS.

DR. ANNABEL BARBER, M.D.;

UNIVERSITY MEDICAL

CENTER,

Respondents.

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No. 76972

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Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT’S OPENING BRIEF**

KIRK T. KENNEDY, ESQ.

Nevada Bar No: 5032

815 S. Casino Center Blvd.

Las Vegas, NV 89101

(702) 385-5534

Attorney for Appellant

## **RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to NRAP 26.1, the Appellant hereby certifies that there are no persons or entities that must be disclosed, other than the Appellant and her undersigned counsel, as set forth herein. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 13<sup>th</sup> day of March, 2019.

/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 Appellant

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**1. JURISDICTIONAL STATEMENT:**

Pursuant to Nevada Constitution, Article 6, section 4, the Supreme Court has appellate jurisdiction over the within appeal in that it arises from a civil action before the District Court.

The district court entered a final order granting the Respondents' summary judgment motion on August 13, 2018. This is a final order subject to direct appellate review under NRAP 3 and 4.

**2. STATEMENT OF ISSUES PRESENTED FOR REVIEW:**

a. Whether the district court erred in granting the Respondents' motion for summary judgment regarding the application of N.R.S. 41A.100.

**3. ROUTING STATEMENT:** This case should be assigned to the Court of Appeals under NRAP 17(b) as it does not fit the criteria set forth in NRAP 17(a) for appeals to be presumptively assigned to the Supreme Court.

#### **4. STATEMENT OF THE CASE**

Melissa Cummings filed her complaint alleging a sole claim for res ipsa medical negligence on December 16, 2015. App., 1, Complaint. The named Defendants were University Medical Center and Dr. Annabel Barber, M.D. Id. After answering the complaint, discovery commenced between the parties.

On May 4, 2018, Dr. Annabel Barber filed her motion for summary judgment. App., 26, Defendant Annabel Barber M.D.'s Motion for Summary Judgment. University Medical Center joined in the summary judgment effort. App., 170.

On May 21, 2018, Cummings filed her opposition to the summary judgment motion. App., 173, Plaintiff's Opposition to Defendant Barber's Motion for Summary Judgment. Dr. Barber filed a reply brief on May 29, 2018. App., 217, Reply in Support of Motion for Summary Judgment.

The first hearing on the motion was June 5, 2018. App., 223, Transcript June 5, 2018. The district court allowed further supplementation of the record by the parties and then a final hearing was held on July 18, 2018. App., 239, Transcript, July 18, 2018. The district court granted the summary judgment motion at that final hearing. Id.

The district court's written order was filed on August 13, 2018, and served

by a filed notice of entry of order on August 15, 2018. App., 243, Order Granting Summary Judgment.

Cummings timely filed her notice of appeal on September 12, 2018. App., 251, Notice of Appeal.

## **5. STATEMENT OF THE FACTS:**

Cummings Complaint set forth the following initial factual allegations:

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

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

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

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

8. Subsequent to the surgical procedure, Plaintiff developed ongoing pain in the same abdominal area which resulted in her being referred for a CT scan of her abdomen on

December 23, 2014, at United Medical Imaging of Irvine in Irvine, California.

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

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

11. Plaintiff had no previous history of stomach based pain which was related to the presence of surgical clips in her abdomen area and it is alleged that the Defendants left, 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." App., 2-3, Complaint.



During discovery in this case, Cummings further clarified her claims in her answers to the Respondents' interrogatories:

“INTERROGATORY NO. 1:

State specifically when your abdominal pain started as a result of the “clips” you claim are in your abdomen?

ANSWER TO INTERROGATORY NO. 1:

November 2014. Sever pain felt after stopped drug/alcohol abuse in 2014. My surgery at UMC with Dr. Barber occurred in June, 2014. There was no other intervening surgery or medical condition between the time of the June, 2014, surgery and when I first felt the onset of pain in my abdomen.

INTERROGATORY NO. 2:

State specifically what UMC did or did not do that forms the basis of your claim against UMC?

ANSWER TO INTERROGATORY NO. 2:

UMC's surgical team documented that everything was removed when it was not. Specimen collected states device and two wires were removed and collected. UMC did not inform me that items were left in after surgery. UMC did not document surgical clips used and their implementation or removal.

I believe UMC was responsible, in part, because UMC staff were involved in the

surgical procedure conducted by Dr. Barber in June, 2014.

INTERROGATORY NO. 3:

If you are alleging that UMC breached any standard of care, state what standard of care UMC breached and identify all evidence you rely upon in support of your response.

ANSWER TO INTERROGATORY NO. 3:

CT's/x-rays show two clips and one wire left. I contend UMC breached the standard of reasonable care by allowing foreign objects to remain inside my body from the June, 2014, surgery.

.....

INTERROGATORY NO. 9:

State all physical manifestations of injury of damage resulting from the "clips" you claim were left in your abdomen.

ANSWER TO INTERROGATORY NO. 9:

Pain from wire/clips. Unable to get MRIs of brain/neck for unresolved pain. These foreign objects have caused continual pain and severely impacted my quality of life.

INTERROGATORY NO. 10:

Identify any document from the surgical procedure performed by Dr. Barber

wherein there is any reference to “clips” having been used. Please provide the Bates Number for any such document.

ANSWER TO INTERROGATORY NO. 10:

She failed to document the word “clips.” However, the CT scans and other radiological evidence document the presence of the devices inside my abdomen.” App., 192-193, Plaintiff’s Opposition to Motion for Summary Judgment, Exh. 2, Plaintiff’s Answers to Defendant UMC’s Interrogatories.

On June 6, 2014, Dr. Barber performed a surgery on Cummings at UMC to remove a gastric stimulator device that had been previously placed inside Cummings’ stomach area. App., 202, Plaintiff’s Opposition to Summary Judgment, Exh. 3, Dr. Barber’s Surgery Report, 6/6/14. Dr. Barber’s Report describes the procedure as follows (in relevant part):

“An approximate 4 centimeter incision was made using a 10 blade over the previous incision overlying the gastric stimulator. Once down to subcutaneous fat, Bovie was then used to reach the stimulator at the level of the capsule. The capsule was entered. The stimulator was then able to be removed easily, and the leads were gently tugged, until they were removed from the stomach. Both were removed easily.

Following this, the cavity was then irrigated using normal saline copiously

and two 3-0 Vicryl sutures were then used to reapproximate the subcutaneous fat in an interrupted fashion. 4-0 Monocryl was used to close the skin in a running subcuticular fashion.” Id.

Noticeably absent from Dr. Barber’s report was any reference to leaving lead wires or fragments of wires embedded in Cummings’ stomach area tissue. While Dr. Barber references the lead wire fragments in her self-serving affidavit generated in May, 2018, for summary judgment purposes, her actual surgical report from June, 2014, fails to mention that any lead wires were allowed to remain embedded in Plaintiff’s stomach area. Id.; see also, App., 168-169, Dr. Annabel Barber’s Motion for Summary Judgment Exhibit H, Affidavit of Dr. Barber.

Dr. Barber’s surgical report states that “the leads were gently tugged, until they were removed from the stomach.” App., 202, Plaintiff’s Opposition, Exhibit 3. A close reading of the surgical report indicates that the gastric stimulator, along with the lead wires, were all successfully removed. Id. Yet, in Dr. Barber’s affidavit she now admits that lead wire fragments were left in Cummings’ body because they were “embedded in the tissue.” App., 168, Dr. Barber’s Motion for Summary Judgment, Exh. H-Affidavit of Dr. Barber.

It is clear that Dr. Barber's surgical report also references that two 3-0 Vicryl sutures were placed in the body as well. App., 202, Plaintiff's Opposition, Exh. 3. Dr. Barber's Affidavit indicates that these sutures were necessary to control internal bleeding. App., 168, Dr. Barber's Motion for Summary Judgment, Exh. H.

As Cummings testified to in her interrogatory answers, she was feeling pain in the stomach/abdomen area long after the June, 2014, surgery. App., 193-195, Plaintiff's Opposition to Summary Judgment, Exh. 2. Cummings first discovered the presence of clips and wires in her stomach area when she had a CT Scan performed on December 23, 2014. Id., 205, Exh. 4- CT Scan, United Medical Imaging.

Due to Cummings inability to secure a surgical procedure to remove the foreign materials immediately after their discovery in late 2014, she was forced to endure the associated pain for over three years. However, in October, 2017, Cummings secured the services of Dr. Stephen Horsley M.D. to perform a surgical operation to explore the source of her stomach pain and take appropriate action.

In October, 2017, Cummings presented to Southern Hills Hospital, originally for a planned procedure to resolve her stomach pain issues. However, while there, she suffered increased abdominal pain which was related to the

immediate onset of acute appendicitis.

On October 30, 2017, Cummings underwent surgery to resolve the appendicitis, which had become acute only days before the surgery. App., 154, Dr. Barber's Motion for Summary Judgment, Defendant's Exhibit F-Dr. Horsley's Surgical Report. The report indicated the following:

“ . . The patient was placed in the reverse Trendelenburg and there were retained metallic foreign bodies, which appeared to be pacer wires as well as sheaths and clips and Prolene stitch on the anterior wall of the stomach. . .

The foreign bodies on the anterior wall of the stomach were removed with mild blunt dissection without difficulty and sent off the field.” Id.

Although Cummings' surgery was performed, in part, to resolve an acute appendicitis condition, the procedure also confirmed the presence of pacer wires in her abdomen, along with surgical clips from the June, 2014, surgery. Id.

Dr. Horsley testified at his deposition as follows:

1. Dr. Horsley testified at his March, 2018, deposition that he saw Cummings for her complaints of metallic objects in her stomach area. App., 209-216, Plaintiff's Opposition to Summary Judgment, Exh. 5- Dr. Horsley Deposition Transcript, pgs. 8-9; 25.
2. Dr. Horsely noted his experience that surgical clips left in a patient may cause

pain in some individuals, but not in every case. Id., pg. 11.

3. Dr. Horsley did advise Cummings that he could remove the metallic hardware in her body through surgery. Id., pg. 12.

4. Prior to the surgical procedure, Dr. Horsley did review an X-ray provided by Cummings which showed metallic objects in her abdomen. Id., pgs. 16-17.

5. When he conducted the surgical procedure, Dr. Horsley noted that the metallic objects were partially embedded in the stomach wall. Id., pgs. 17-18.

6. Also, during the surgery, Dr. Horsley removed Cummings' appendix based on its acute condition. Id., pg. 19.

7. Dr. Horsley's records did indicate that Cummings had previous gastric pacemaker removal surgery in 2014. Id, pg. 23.

8. Dr. Horsely testified that an inflamed appendix usually occurs over a matter of days, not months. Id., pg. 25.

Dr. Horsley's surgery successfully removed the wire fragments and surgical clips from Cummings' stomach wall area. Id.

#### **A. District Court Order:**

The district court's final order noted that Cummings did not disclose any expert to support her claims, given her reliance on N.R.S. 41A.100(1)(a), which creates a rebuttable presumption that the claimed injury was due to a foreign

substance being unintentionally left in the patient's body during surgery. App., 246-248, Order.

The district court made findings that Dr. Barber's affidavit supported her claims that she intentionally left small, wire fragments that were embedded in Cummings' abdomen at the time of the gastric stimulator removal surgery in 2014. Id. The order also noted that Dr. Barber intended to leave certain surgical clips in Cummings' abdomen as part of that surgical procedure of June 6, 2014. Id.

The district court found that Cummings had no expert to contradict Dr. Barber's affidavit or the evidence provided by Dr. Barber's disclosed expert witness, Dr. Andrew Warshaw. Id.

In finding that Cummings' did not state a viable claim for res ipsa medical negligence under NRS 41A.100(1)(a), the district court held that Dr. Barber's failure to remove previously implanted hardware in Cummings' stomach wall during the June, 2014, surgery was not in error, nor violative of NRS 41A.100. Id. The district court relied exclusively upon a federal district court case to reach its conclusion.

In *Kinford v. Bannister*, 913 F.Supp. 2d 1010 (Dist. Nev. 2012), a case which was never appealed to the Ninth Circuit, the United States District Court in Nevada issued an order which denied the plaintiff's attempt to amend his



complaint to allege a medical malpractice claim. The *Kinford* court held that there is a difference between leaving behind a surgical device which a physician used during surgery verses a surgeon not removing previously implanted hardware from a prior surgical procedure (which is akin to Cummings' situation). Id. *Kinford* held that a viable claim for res ipsa medical negligence under NRS 41A.100 will not lie in the noted circumstance and the district court in this matter agreed. Id.

The district court held, in reliance on *Kinford*, that because Dr. Barber stated she intentionally left the subject previously embedded wire fragments in Cummings' stomach wall area, this does not equate to the res ipsa situation provided for by NRS 41A.100(1)(a). The court stated that there was no evidence Dr. Barber was the one who installed or implanted the wire fragments from a prior medical procedure. Id. Given this circumstance, Cummings was thus required to have medical expert testimony and could not rely on the res ipsa negligence statute. Id.

The district court granted summary judgment based, in large part, on the *Kinford* decision, given the lack of Nevada state case law on this precise issue and circumstance.

## **6. ARGUMENT:**

### **I. The District Court Erred in Its Application of NRS 41A.100 to the Facts of Cummings' Case and Abused Its Discretion in Granting Summary Judgment:**

#### Standard of Review:

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

NRCP 56. This Court reviews de novo a district court's grant of summary judgment. Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005).

Regarding statutory interpretation, this Court reviews questions of law de novo, as well. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

Under NRS 41A.100(1)(a), a party may file a medical malpractice action, without the necessity of an expert witness affidavit under circumstances where a "foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." The statute provides that a rebuttable presumption of negligence arises under the noted circumstances referred to in 41A.100(1)(a), along with other situations described in the statute.

Noticeably absent from the statute is any language from the Legislature that the “foreign substance” must be something left in the body by the doctor performing the surgery procedure verses a “foreign substance” left in the body by a previous physician in a previous procedure and discovered by the physician conducting a subsequent surgical procedure. The timing of the appearance of the foreign substance is not addressed.

In Johnson v. Egtegar, 915 P.2d 271, 274 (Nev. 1996), the Nevada Supreme Court stated that:

“Under NRS 41A.100, however, the presumption automatically applies where any of the enumerated factual circumstances are present. In regard to these factual predicates, the legislature has, in effect, already determined that they ordinarily do not occur in the absence of negligence. Thus, we conclude, all a plaintiff need do to warrant an instruction under the statutory medical malpractice res ipsa loquitur rule is present some evidence of the existence of one or more of the factual predicates enumerated in the statute. If the trier of fact then finds that one or more of the factual predicates exist then the presumption must be applied.”

In the context of issuing jury instructions, the Supreme Court has held that

if a plaintiff presents evidence suggesting one of the factual predicates of NRS 41A.100(1), but a genuine dispute exists regarding whether the factual predicate is met, then a trial court should give a res ipsa loquitur instruction for a jury to determine the presence of that factual predicate. *Id.*; see also Born v. Eisenman, 962 P.2d 1227, 1230 (Nev. 1998).

In Born, the Supreme Court held that the applicability of NRS 41A.100 is “largely determined on the facts presented and a plaintiff should be given the opportunity of eliciting evidence to satisfy one of the five factual predicates contained in NRS 41A.100.” *Id.* at 1230.

In Szydel v. Markman, 117 P.3d 200, 204 (Nev. 2005), the Supreme Court stated:

“Undeniably, the res ipsa loquitur doctrine codified in NRS 41A.100 permits medical malpractice claims to go forward without expert testimony when the plaintiff is able to present some evidence that one or more of the factual situations enumerated in NRS 41A.100(1)(a)-(e) exist. These are factual situations where the negligence can be shown without expert medical testimony, as when a foreign substance is found in the patient’s body following surgery.”

In this matter below, Respondent Dr. Barber contended in her self-serving

affidavit that she intentionally left the surgical clips and lead wires in Cummings' stomach wall, which does not equate to a res ipsa claim. Dr. Barber argued that her actions were intentional and thus the requirement under NRS 41A.100(1)(a) that the foreign body be "unintentionally" left inside the body is not met.

Cummings contends that genuine issues of material fact exist as to whether Dr. Barber's May, 2018, affidavit negates the language stated in NRS 41A.100(1)(a). As noted above, Dr. Barber's own surgical report from June, 2014, directly contradicts Dr. Barber's Affidavit. The surgical report states that Dr. Barber removed the gastric stimulator device and the lead wires were removed successfully. App., 202, Plaintiff's Opposition to Summary Judgment, Exh. 3. Yet, in Dr. Barber's affidavit she now admits, four years later, that lead wire fragments were left in Cummings' body because they were "embedded in the tissue." App., 168-169, Dr. Barber Motion for Summary Judgment, Exh. H-Affidavit of Dr. Barber.

Dr. Barber's Affidavit is directly contradicted by her own surgical report. The isolated reading of the surgical report from June, 2014, states nothing about the intentional act of leaving lead wire fragments inside Cummings' stomach wall. The surgical report leaves the distinct impression that the stimulator and associated wires were all removed successfully in the June, 2014, procedure.

However, it is clear from the October, 2017, surgery performed by Dr. Stephen Horsley on Cummings, that two lead wire fragments were still embedded in her stomach wall and that Horsley was able to remove the wire fragments without any complications.

Dr. Barber's surgical report did reference placing two surgical clips, i.e. Vicryl sutures, inside the stomach wall area. The placement of the Vicryl sutures was an intentional medical act by Dr. Barber. However, it is also clear from the same report that Dr. Barber unintentionally left lead wire fragments inside Cummings stomach wall, which remained there for over three years.

In this case, Dr. Barber's self-serving Affidavit is contradicted by her own surgical report from June, 2014. The existing evidence states that although Dr. Barber's surgical report indicates she successfully removed the stimulator and the lead wires, it is clear that she did not remove *all* of the lead wires. Dr. Barber's procedure unintentionally left lead wire fragments inside Cummings' stomach wall, which is the core of Cummings' res ipsa based claims.

In *Kinford*, which was relied upon exclusively by the district court below, the plaintiff attempted to assert a res ipsa medical negligence cause of action related to his claim that the defendant doctor failed to remove implants and broken

screws left in plaintiff's face from a previous medical procedure. *Kinsford* at 1015-1016. The federal district court held that if a plaintiff meets one of the exceptions noted in NRS 41A.100, then he is relieved of the requirement to file an expert witness affidavit or have supporting expert testimony at trial. *Id.*

*Kinsford* held in relevant part:

“It is the opinion and conclusion of this court, however, that failing to remove previously implanted hardware, which is the gravamen of Plaintiff's res ipsa claim for relief, differs markedly from the statutory res ipsa circumstance of leaving behind and failing to remove such a device following surgery. . . . However, errantly leaving behind a surgical device which the physician used *during* surgery, is markedly different from not removing previously implanted hardware. While the failure to do so might conceivably constitute professional negligence. . . . such circumstances do not state a viable res ipsa claim under Nev. Rev. Stat. 41A.100(a).” *Id.*, at 1017.

In reaching this conclusion, the federal district court did not rely on any specific Nevada Supreme Court case, rather, the federal court gave its own opinion and conclusion without any basis in state law authority. It appears that the Nevada Supreme Court has not squarely addressed this specific situation wherein a

plaintiff asserts a res ipsa medical negligence claim related to:

- (1) a foreign material left inside a person's body from a previous medical procedure;
- (2) which was discovered during a subsequent surgical procedure; and
- (3) the physician in the subsequent surgical procedure did not remove or attend to the foreign material in the body from the prior procedure.

Under a strict reading and interpretation of NRS 41A.100(1)(a), there is no Legislative guidance indicating that the subject "foreign substance" must have been directly placed in the patient's body and then unintentionally left there by the same physician during the same procedure. The applicable statute only states that it applies to a "foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery."

*Kinford* created a new interpretation of NRS 41A.100(1)(a), by stating that it can only apply to situations where a foreign substance is unintentionally left in the patient's body by the same doctor during the same procedure. Under *Kinford's* unsupported holding, the physician has no liability under a res ipsa theory for foreign substances left in a patient's body from a prior procedure, even though the physician discovers or observes the subject foreign substance and does nothing



about it.

The *Kinford* approach ignores the Nevada Supreme Court's strict statutory interpretation requirement. The Court has stated that the goal of statutory interpretation "is to give effect to the Legislature's intent." *Williams v. State*, 402 P.3d 1260, 1262-63 (Nev. 2017), citing to *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). To ascertain the Legislature's intent the Court looks to the plain language of the statute. *Id.* "When a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Id.*, citing to *Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003).

The statutory construction of NRS 41A.100(1)(a) indicates that it applies to situations where a foreign substance is left in a patient's body during a surgery. This Court has never squarely addressed the circumstance that a doctor, while conducting a surgery, finds a foreign substance from a previous procedure, which is then left in the body after the surgery is concluded. Under NRS 41A.100(1)(a), there is no qualifying language indicating that the foreign substance must be a substance left in the body by the same physician during the same surgical procedure. Given the absence of such qualifying language, NRS 41A.100(1)(a) is clear and unambiguous and it would apply to Cummings' *res ipsa* situation.

In the district court below, Dr. Barber drew a further distinction regarding the interpretation of NRS 41A.100(1)(a), because she claims in her filed affidavit, which was drafted four years after the 2014 surgery to support her summary judgment motion, that the wire fragments were “intentionally” left in Cummings stomach wall. Dr. Barber contends that because she “intentionally” left the wire fragments in the stomach wall, then NRS 41A.100(1)(a) is inapplicable due to its statutory requirement that the foreign substance be “unintentionally” left in the body.

Under a de novo review, Dr. Barber’s clever use of an affidavit drafted four years after the surgery at issue to provide her cover under the statute is unavailing and specious in form. Dr. Barber’s actual surgery report from June, 2014, makes no mention of “intentionally” leaving wire fragments in Cummings stomach wall area. App., 202, Plaintiff’s Opposition to Summary Judgment, Exh. 3. The 2014 surgery report makes no mention, at all, of the wire fragments, yet, four years later on summary judgment, Dr. Barber provides herself an alibi of sorts by explaining her “intentional” conduct.

The contradiction noted above between the surgery report and Dr. Barber’s affidavit constitutes material and disputed issues of fact, which are clearly the province of the fact finding jury, not the district court on summary judgment.

Given the district court's reliance on an ill-founded federal court *Kinford* decision and with due regard to the actual statutory construction of NRS 41A.100(1)(a) as it applies to Cummings' res ipsa claims, the granting of summary judgment was in error and should be reversed by this Court.

## **7. CONCLUSION:**

For all the foregoing reasons, the summary judgment order should be reversed and the case remanded for trial.

Dated this 13<sup>th</sup> day of March, 2019.

/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 Appellant

## **8. CERTIFICATE OF COMPLIANCE WITH NRAP 28.2 AND NRAP 32:**

As undersigned counsel for the Appellant, I hereby certify as follows:

1. I have prepared and read the foregoing opening brief;
2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. I certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and
4. I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the page and/or type volume limitations stated in Rule 32 (a)(7).
5. I hereby further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) as it utilizes times new roman type face with a 14 point type style. Further, this brief is in compliance with the type-volume

limitations as it contains less than 14,000 words and has a word count of 5,134 words in the countable sections of the brief.

Dated this 13<sup>th</sup> day of March, 2019.

/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 Appellant

**9. CERTIFICATE OF SERVICE:**

I hereby affirm that on this 13<sup>th</sup> day of March, 2019, I served via electronic service and U.S. Mail a copy of the foregoing brief to the Respondents at the addresses below:

Heather S. Hall, Esq.  
Carroll, Kelly, Trotter, Franzen, McBride & Peabody  
8329 W. Sunset Road, Ste. 260  
Las Vegas, NV 89113

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

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