

**RPLY**

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**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.: 1

DATE OF HEARING: 6/5/2018  
TIME OF HEARING: 9:00 AM

**DEFENDANT ANNABEL E. BARBER, M.D.'S REPLY IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

COMES NOW, Defendant, ANNABEL E. BARBER, M.D., by and through her counsel  
of record, ROBERT C. McBRIDE, ESQ. and HEATHER S. HALL, ESQ. of the law firm of  
CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY, and hereby submits  
her Reply in Support of Defendant's Motion for Summary Judgment.

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1 This Motion is made and based upon the attached Memorandum of Points and  
2 Authorities, the papers and pleadings on file herein, and any oral argument made at the time of  
3 the hearing of this matter.

4 DATED this 29 day of May, 2018.

CARROLL, KELLY, TROTTER,  
FRANZEN, McBRIDE & PEABODY

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### INTRODUCTION

Plaintiff bases their sole theory of Res Ipsa on the now disproven assumption that Dr. Barber unintentionally left surgical clips in Plaintiff. As evidenced by the Affidavit of Dr. Barber, the surgical clips were intended to be left in the patient thereby rendering NRS 41A.100(1)(a) inapplicable.

Any presumption of negligence provided by Plaintiff's Res Ipsa theory was rebutted through discovery in this case and the expert opinions of Dr. Warshaw that Dr. Barber complied with the standard of care. As a result, Plaintiff is required to demonstrate, via medical expert testimony, that Dr. Barber fell below the standard of care. Given that Plaintiff does not have the necessary expert support to establish liability and causation summary judgment is appropriate.

### II.

#### ARGUMENT

##### **A. PLAINTIFF HAS INSUFFICIENT EVIDENCE TO SUPPORT THE FACTUAL PREDICATE PURSUANT TO NRS 41A.100(1)(a).**

The Nevada Supreme Court held that "any res ipsa claim filed without an expert affidavit must, when challenged by the defendant in a pretrial or trial motion, meet the prima facie requirements for a res ipsa loquitur case." See *Szydel v. Markman*, 121 Nev. 453, 460, 117 P.3d 200, 205 (Nev. 2005). The Court further held that fairness requires plaintiffs "to show early in the litigation process that his or her action actually meets the narrow res ipsa requirements" of NRS 41A.100(1)(a)-(c). *Id.*

Plaintiff asserts their Res Ipsa Loquitur claim pursuant to NRS 41A.100(1)(a) under the theory that Dr. Barber unintentionally left surgical clips within the body of Ms. Cummings following surgery. Plaintiff's claim for Res Ipsa relies solely upon the allegations within the complaint, and she has not presented any additional evidence sufficient to demonstrate that her action meets the narrow requirements of NRS 41A.100(a). The absence of additional facts to support Plaintiff's claim, in conjunction with the affidavit of Dr. Barber stating that she

1 intentionally left the foreign substance behind, evidences that this case does not satisfy the  
2 factual predicate set forth by NRS 41A.100(1)(a). Accordingly, Plaintiff fails to state a claim for  
3 Res Ipsa and summary judgment is appropriate.

4 **B. EVEN IF PLAINTIFF PRESENTED A VIABLE RES IPSA CLAIM,**  
5 **DEFENDANT REBUTTED THE PRESUMPTION OF NEGLIGENCE WITH**  
6 **SUFFICIENT AND ADMISSIBLE EVIDENCE**

7 NRS 41A.100(1)(a) creates a rebuttable presumption that the alleged injury was caused by  
8 defendant's negligence where evidence is presented that the injury was due to a foreign  
9 substance left unintentionally within the body of a patient following surgery. However, once the  
10 defendant presents evidence that rebuts this presumption, the burden then shifts to plaintiff to  
11 establish professional negligence with medical expert testimony pursuant to NRS 41A.100.  
12 *Ferdinand v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992); *see also, Bronneke v. Rutherford*,  
120 Nev. 230, 235, n.9, 89 P.3d 40, 44, n. 9 (2004).

13 Plaintiff alleges that Dr. Barber unintentionally left surgical clips in her abdomen when  
14 removing Ms. Cummings' gastric pacemaker on June 6, 2014. *See* Plf's Comp., para. 6 – 11.  
15 However, Defendant Dr. Barber subsequently rebutted any presumption of negligence by  
16 demonstrating that she intended to leave the surgical clips (also known as staples) as well as the  
17 small wire fragments that were embedded in Ms. Cummings' stomach wall in place. *See* Exhibit  
18 "II" of Defendant's Motion For Summary Judgment, Affidavit of Annabel Barber, M.D., para. 7,  
19 8, and 10 – 12. NRCP 56(e) provides that such evidence as affidavits may be used in support of  
20 a motion for summary judgment and "an adverse party may not rest on the mere allegations and  
21 denials of pleadings, but must set forth specific facts showing that there is a genuine issue for  
22 trial." *See, Ferreira v. P.C.H., Inc.*, 105 Nev. 305, 306, 774 P.2d 1041, 1042 (Nev. 1989).  
23 Additionally, according to defense expert Andrew Warshaw, M.D., F.A.C.S., FRCS Ed (Hon.),  
24 Dr. Barber's decision to leave the embedded fragments and surgical clips was within the  
25 standard of care. *See* Exhibit "C" of Defendant's Motion For Summary Judgment, WARSHAW  
26 EXPERT REPORT 000001. The Nevada Supreme Court in *Ferreira* held that such supporting  
27 evidence as the affidavit of Dr. Barber is sufficient to support a motion for summary judgment,  
28 and that plaintiffs can't merely rest on their "pleadings and general denials in the face of a



1 documented motion for summary judgment. See *Ferreira* at 306. However, Plaintiff in the  
2 instant action has not designated a single expert to offer opinions on the standard of care, any  
3 alleged breaches, or any alleged injuries. The deadline for doing so has now passed. Where  
4 Plaintiff has not disclosed an expert to testify as to the essential elements of her professional  
5 negligence claim, summary judgment is proper.


6 **III.**

7 **CONCLUSION**

8 Based upon the foregoing, Defendant respectfully requests that this Honorable Court  
9 grant the Motion for Summary Judgment in Dr. Barber's favor. Any presumption of negligence  
10 under Plaintiff's Res Ipsa theory has been rebutted by the defense, and Plaintiff thereafter failed  
11 to satisfy her burden to provide evidence that Dr. Barber fell below the standard of care.  
12 Plaintiff has not designated a single expert to offer opinions on the standard of care and the  
13 deadline for doing so has now passed. Therefore, summary judgment in favor of Dr. Barber is  
14 appropriate.

15  
16 DATED this 29 day of May, 2018.

17 CARROLL, KELLY, TROTTER,  
18 FRANZEN, McBRIDE & PEABODY

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28


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of May 2018, I served a true and correct copy of the foregoing **DEFENDANT ANNABEL E. BARBER, M.D.'S REPLY IN SUPPORT OF 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.

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1 **RTRAN**

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3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 MELISSA CUMMINGS, )

8 Plaintiff, )

9 vs. )

10 ANNABEL BARBER, ET AL., )

11 Defendants. )  
12

CASE NO. A729065  
DEPT. NO. 1

13 BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE

14 TUESDAY, JUNE 5, 2018 AT 9:11 A.M.

15 **RECORDER'S TRANSCRIPT RE:**

16 **DEFENDANT ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY**  
17 **JUDGMENT**

18 **DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT**  
19 **ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT**

20 **APPEARANCES:**

21 **FOR THE PLAINTIFF:**

KIRK T. KENNEDY, ESQ.

22  
23 **FOR THE DEFENDANT BARBER:**

HEATHER S. HALL, ESQ.

24  
25 Recorded by: LISA A. LIZOTTE, COURT RECORDER

1 (TUESDAY, JUNE 5, 2018 AT 9:11 A.M.)

2 THE CLERK: Page 9, Melissa Cummings versus Annabel Barber,  
3 Case Number A729065.

4 MR. KENNEDY: Good morning, Your Honor. Kirk Kennedy for the  
5 plaintiff.

6 THE COURT: Good morning.

7 MS. HALL: Good morning, Your Honor. I think we're still missing  
8 Mr. Pitegoff. I'm not sure if he's going to attend but he did do a joinder, so I don't  
9 know if he was planning --

10 MR. KENNEDY: Your Honor, I don't think we need to wait for him.  
11 He just joined in the motion. He doesn't have any arguments today, he just  
12 joined in their motion, so there's no reason to wait.

13 THE COURT: It's just a -- he had substantively joined them? He  
14 didn't file his own --

15 MS. HALL: I do think it was just a basic joinder. It's the Court's  
16 preference. I just wanted to alert the Court that he's not here yet.

17 THE COURT: All right. All right. Let's go ahead, then.

18 MS. HALL: And, just for the record since I didn't state my  
19 appearance, I'm Heather Hall and I'm for Dr. Barber, the defendant, and this is  
20 my motion, so is it okay if I go first?

21 THE COURT: Yeah.

22 MS. HALL: The basis of the motion, just to kind of sum it up for  
23 Your Honor, is two parts. The first is that this 41A.100 statute, the subsection  
24 that the complaint alleges is met in this case is 41A.100, Subsection 1 -- (a)(1) --  
25 (1)(a), excuse me. That is the section that talks about intentionally leaving a

1 foreign body in a patient unintentionally. Here the evidence that we've presented  
2 by way of our motion for summary judgment is that the two items – again, the  
3 complaint only discusses the surgical clips, and I think in plaintiff's opposition  
4 they concede that the surgical clips were, in fact, intentionally left in the patient,  
5 so that issue I think is now moot by virtue of the opposition that plaintiff filed.

6           The only remaining issue is the fragments, and when I say  
7 fragments I'm talking about nearly microscopic fragments. I'm very bad at  
8 measurements but we're talking millimeters. Two wire fragments were  
9 embedded in the patient's stomach wall. The affidavit that the defense has  
10 presented from Dr. Barber and also the expert report from Dr. Warshaw, who is a  
11 general surgeon with Harvard and Mass General, is that there was no negligence  
12 here and leaving wire fragments that are embedded in a patient's tissue is the  
13 right call. Were you as the surgeon to go digging around in the tissue to try and  
14 find any fragments that might remain from these lead wires, that is far more  
15 detrimental to a patient than it is to leave this that's already encapsulated in the  
16 tissue in the patient.

17           THE COURT: In order to rule on this motion do we have to decide  
18 whether or not it was, in fact, negligence or not or is it more a matter of just the  
19 pleading, whether or not it was intentional or unintentional?

20           MS. HALL: Well, I think there's really two issues for the Court to  
21 decide. The first is whether there's been any evidence presented to the Court  
22 that a reasonable juror could conclude that the wire fragments were  
23 unintentionally left. If the Court were saying – I submit that the Court would  
24 answer that no because there's been no evidence presented by the plaintiff other  
25 than their own bare allegations, and we know under the *Wood v Safeway* case

1 that resting solely on the allegations is not sufficient to overcome a properly  
2 supported motion for summary judgment, but were the Court to answer that  
3 question, yes, that I do find that there's some evidence that might satisfy this  
4 factual predicate and put this case under res ipsa, by virtue of the presentation of  
5 Dr. Warshaw's expert report and the affidavit of Defendant Dr. Barber the  
6 defense has established that any rebuttable presumption that might exist has, in  
7 fact, been rebutted.

8           And what the case law that we cite in the motion says is once  
9 the defense rebuts the presumption the onus, the burden is now on the plaintiff to  
10 show the Court and the jury that there's evidence of negligence. Here in  
11 response to this motion the only thing that was presented was the written  
12 discovery responses from Ms. Cummings who's not a medical provider. There's  
13 nothing at all, any evidence that would say this was unintentionally left, number  
14 one, and there's also no evidence to establish negligence on the part of Dr.  
15 Barber. Were the Court to find 41A.100 does apply, the next question is have we  
16 rebutted that presumption and what does plaintiff have in response.

17           And as you can see from the opposition there's been --  
18 discovery is closed. There's been no expert disclosures from the plaintiff.  
19 There's nothing from the plaintiff -- now that the defense has rebutted any  
20 presumption the Court might believe exists there's nothing from the plaintiff to  
21 now establish any negligence on the part of Dr. Barber, and the only evidence  
22 that has been presented is the expert report of Dr. Warshaw wherein he talks  
23 about the fact that -- at Page 1 of his report he talks about the fact that these  
24 residual wire fragments are innocent and most definitely not the cause of pain.  
25

1 At Page 2 of his report he talks about how he sees no  
2 evidence of negligence, and he finds that after reviewing all of the materials in  
3 this case there's no standard of care violations by Dr. Barber. That coupled with  
4 Dr. Barber's affidavit where she says that when you have – and, again, Your  
5 Honor, she wasn't deposed in this case so unfortunately I don't have the benefit  
6 of her deposition testimony, but the *Ferreira* case that we cited in reply shows  
7 that it's appropriate for the defense to rely upon affidavits and that's what we've  
8 done here because we don't have deposition testimony from Dr. Barber, but she  
9 says in that affidavit that here it's far – I used my medical judgment and decided  
10 that digging around in the tissue, the lining of her stomach to locate fragments of  
11 any lead wires would not have been appropriate.

12 That would have been – that would have been below the  
13 standard of care, that would have been detrimental to the patient, so that's what  
14 the Court has in terms of competent evidence before it, and if you look at all  
15 those things plaintiff hasn't presented any relevant evidence that the jury could  
16 reply upon to find Dr. Barber negligent in this case, so – go ahead, Your Honor.

17 THE COURT: When we're determining – on the first – first prong of  
18 your argument when we're determining whether something was unintentionally  
19 left inside a patient's body, is that a judgment which we are supposed to make  
20 after discovery closes and based upon summary judgment motions such as  
21 you've filed here or is that something that – I mean what did the legislature intend  
22 with this? I've always thought that that – that caveat to the necessity for a – an  
23 affidavit from an expert is that there's an area that if you're going to go on res  
24 ipsa then you just don't have to have the affidavit. You still would have the issue  
25



1 of whether or not it amounts to negligence or not but you simply don't have to  
2 have the affidavit on the front end of the case.

3               So I'm -- I'm a little bit concerned about trying to resolve that  
4 first issue at the back end of the case after all the evidence is in. It seems to me  
5 it kind of does away with any purpose that the legislature would have had in  
6 creating any kind of a caveat for res ipsa, so I'm concerned most with that part of  
7 your argument, however, I think I'm -- how can I put this, I'm much less  
8 concerned with the second prong of your argument that now you have presented  
9 evidence that rebuts the presumption and look to the plaintiff and say, well, what  
10 you got, so anything more based on that guidance that you want to say?

11              MS. HALL: Just one thing if I could add. I think your point is well  
12 taken with respect to what is the purpose of that statute. You're absolutely right  
13 that it's -- it's for purposes -- the threshold of filing the medical malpractice claim,  
14 41A.100, as a plaintiff if you allege it meets one of those predicates you don't  
15 have to attach an expert affidavit in order to file your medical malpractice claim.  
16 Certainly there's nothing in that statute that prevents a plaintiff from -- as  
17 discovery progresses and initial expert disclosures occur nothing in that statute  
18 prevents the plaintiff from disclosing an expert, and I have never -- even in a  
19 case where res ipsa was alleged I've never seen a situation where plaintiff did  
20 not disclose an expert at that point and that's because I'm sure most plaintiffs  
21 can anticipate that the defense is going to have an expert to comment on  
22 whether the standard of care was met and causation, et cetera.

23              So even if the Court is concerned about the first prong or the  
24 first question that needs to be answered, were the Court to decide that it's really  
25 a question for the jury as to whether this meets the predicate or even if the Court

1 were to decide it's met, I think there's enough here that it is arguable that the  
2 statute applies. There's no disputing the second analysis, which is that here no  
3 evidence from plaintiff has been presented to establish any negligence, and the  
4 only way to do that is -- you know, it's a little different analysis because it's a res  
5 ipsa case, but certainly if they had deposition testimony from the treating surgeon  
6 who removed the fragments and the clips secondarily to that appendicitis, if they  
7 had some testimony from him that, oh, this was, you know, below the standard of  
8 care that might be sufficient. That's not what's been presented. In fact, that  
9 treating provider said it's my understanding that surgical clips are left in all the  
10 time and then with regard to the fragments he said I can't -- I don't place these  
11 gastric stimulators, I can't comment on what is routinely left material-wise  
12 following that procedure or removal of that device.

13               So really the only thing that the Court has is what's been  
14 presented by the defense and there's nothing to counter that from the plaintiff's  
15 perspective. Certainly I'm not challenging the filing of the complaint. You know, I  
16 agree with the Court and I think the statute is clear that that's the purpose of the  
17 statute. You get to bring a medical case without attaching an expert affidavit to  
18 your complaint. That doesn't mean that as the case progresses you are not  
19 required to develop evidence to support your theory, and once the defense has  
20 presented expert testimony rebutting any presumption the burden is now back to  
21 the plaintiff and that's not been met and that's why we've asked for summary  
22 judgment.

23               THE COURT: All right.

24               MS. HALL: Thank you, Your Honor.

25               THE COURT: Mr. Kennedy?

1 MR. KENNEDY: Your Honor, when you look at the case law I cited  
2 and the purpose behind 41A.100 the Supreme Court has looked at this  
3 repeatedly in the cases -- they're all the way up to the stage of jury selection and  
4 jury instructions, and it's for the trier of fact -- not for you but the trier of fact to  
5 decide whether the factual predicate is met, so to get the trier of fact we're at trial  
6 for that to occur.

7 THE COURT: So you're not -- you're not -- you're not on the first  
8 prong, you've gone to the second prong of whether you have to --

9 MR. KENNEDY: Well, I think it needs to be addressed, and on the  
10 first part I do have some other arguments, but what the Supreme Court has said,  
11 the whole purpose of this statute is you can have an entire case that meets one  
12 of these factual predicates go all the way to a jury resolution and it's for a jury to  
13 decide whether one of those four or five factual predicates are met, so if it's for a  
14 jury to decide --

15 THE COURT: So --

16 MR. KENNEDY: -- then we don't get here with this --

17 THE COURT: -- you have no -- you're not arguing about what the  
18 intent of the statute is, you're talking about under our case law and involving res  
19 ipsa at what point it must be determined whether or not the defense has rebutted  
20 -- provided some rebuttal to the presumption, correct?

21 MR. KENNEDY: Well --

22 THE COURT: You're just saying that that has to happen at trial, not  
23 in a pretrial motion?

24 MR. KENNEDY: Correct. Correct. Because based on what I'm  
25 seeing from the Supreme Court they are leaving this issue for the jury to decide.

1 A jury – at trial they could present their experts who they paid for who will say  
2 exactly what they said in their affidavits and if a jury believes them then the jury  
3 rules for the defense and case closed, but this is not an issue for summary  
4 judgment though.

5 THE COURT: Let me ask you -- I didn't check this out. Do any of  
6 the authorities that you cite get you across the finish line that way?

7 MR. KENNEDY: Well –

8 THE COURT: In any of these – in other words, in any of these was  
9 it raised pretrial in a summary judgment and the Court said, no, no, that's just a  
10 trial question?

11 MR. KENNEDY: I'm not sure, Your Honor. I mean obviously every  
12 one of them ended up on appeal so that may answer part of the question, so –  
13 but almost – of the cases I've cited, the *Szydel case versus Markman, Born*  
14 *versus Eisenman, Johnson versus Eqtedar*, they're all talking about situations  
15 where the res ipsa loquitur doctrine jury instructions provide it. They're talking  
16 about the scenario where it's left to the jury to decide whether the plaintiff has  
17 met that factual predicate, so if that's the case then these cases are specifically  
18 intended by the legislature, this narrow exception that it's something so common  
19 that even a lay person can decide whether there's negligence or not. That's the  
20 very purpose behind these factual predicates. There's four different examples of  
21 it. We have one of them we believe of something unintentionally left inside the –

22 THE COURT: Well, is the precise – isn't the precise question that  
23 we wind up, whether it was framed that way by the movant, is that question the  
24 point that you just raised, isn't that what we really should be focusing on because  
25 clearly if they can trigger it, if they can satisfy the presumption by some pretrial

1 motion with evidence why wouldn't our general case law require that at least the  
2 other side, the non-movant at least show us that it is a jury question by having  
3 some rebuttal, in other words, by putting forth some evidence to make it a jury  
4 question?

5 MR. KENNEDY: Well, but -- let me -- let me step back for a minute  
6 real quick. You know, the evidence in this case -- assuming they're correct,  
7 assuming they had their expert witness, they have the affidavit of Dr. Barber and  
8 they say she intentionally left these things in there so it was intended, so that  
9 doesn't meet the factual predicate, now the burden shifts to me. Well, as you  
10 saw from my response Dr. Barber's actual surgery report in June 2014 she states  
11 in her own language that was dictated into her own report, there's no doubt about  
12 being authentic, that she successfully removed the gastric stimulator and the  
13 lead wires.

14 Now, she does mention she put -- she intentionally put in the  
15 surgical clips, I give you that, that's actually referenced in the report, but if you  
16 read her report she says she removed all of that stuff and now four years later in  
17 the self-serving affidavit she says, oh, no, I intentionally left the wires in there but  
18 four years earlier she says she removed all those wires, so I mean that right  
19 there what -- you have a misleading affidavit from the defendant herself saying,  
20 oh, I intended to leave all those wires in there, and I have the wires at my office.  
21 They've actually seen them. They're actually bigger than a few millimeters. It's  
22 not some sort of microscopic thing. They're in little canisters sealed with a  
23 biohazard bag and they're actually wires that were pulled out of my client's  
24 stomach wall by Dr. Horsley.

25 THE COURT: Any other interesting things at your office?

1 MR. KENNEDY: I got all kinds of cool stuff. You should come over  
2 some time. But, Your Honor, on this case Dr. Barber's affidavit directly  
3 contradicts her own -- her own surgery report. They haven't even met -- their  
4 whole theory of their motion is that she intentionally left the surgical clips,  
5 intentionally left the wires and because it was intentional case closed, see you  
6 later, summary judgment, goodbye, but that's not the case.

7 THE COURT: Well, here's the way I took it. Here's the way I took it  
8 before she jumps up. You've got Dr. Barber's affidavit and if you just toss it out  
9 and say, well, look, she's not worthy of belief because she's got conflicting  
10 statements between her surgery report and her affidavit they still got an expert,  
11 don't they, that renders this opinion?

12 MR. KENNEDY: An expert who read the records who never met  
13 with my client, conducted an evaluation of her.

14 THE COURT: Well, sure, but that's more than you have on your  
15 side, so --

16 MR. KENNEDY: But then --

17 THE COURT: -- where am I to go with that?

18 MR. KENNEDY: -- ah, but you see, now you're going down the path  
19 of requiring the plaintiff to present more than the legislature intended. The whole  
20 purpose behind 41A.100 is not just to get in the door whether you need expert  
21 witness affidavit or not, you can run all the way through to the very end to a jury's  
22 final decision without an expert. That was the intent of the legislature in that  
23 statute.

24 THE COURT: But how do we know that?  
25



1 MR. KENNEDY: Well, it's cited in the case law. That was – the  
2 intent was to let the trier of fact decide, and they can at trial present their doctors  
3 and evidence.

4 THE COURT: Is that – are you getting that from *Szydel* or *Born*?

5 MR. KENNEDY: *Johnson versus Eqtedar* which I quoted in my  
6 motion seems to have a good – a good quote there talking about whether it's the  
7 plaintiff's burden to present some evidence of existence of one or more of the  
8 factual predicates enumerated in the statute. If the trier of fact then finds one or  
9 more of the factual predicates exist then the presumption must be applied. This  
10 presumption created by the legislature must apply, the presumption of  
11 negligence apply, verdict for the plaintiff, that's how that's to be read, and so if  
12 that's the purpose of this statute it then – if all a defendant had to do was to bring  
13 in their hired doctors that just refute everything and, oh, there's summary  
14 judgment, then what's the purpose of that statute because one could say almost  
15 every med-mal case you could hire a doctor who is going to say something  
16 contrary to the plaintiff's case in chief you'd never get one of these cases to trial.

17 You'd never have any of these cases because they never  
18 would have got to trial where the plaintiff was asking for a *res ipsa loquitur*  
19 instruction, we wouldn't even have this case law, so it's my contention, not to  
20 belabor the point, we have people here waiting. the doctor has contradicted her  
21 own report so has not clearly met this burden that even changes the presumption  
22 in this case and the case law that I've cited basically sets us on track to go to trial  
23 for a jury resolution, and I'll submit on that.

24 THE COURT: All right. Your motion.  
25



1 MS. HALL: Very briefly, Your Honor. There's one key issue that's  
2 ignored by plaintiff in the argument, that this is a rebuttable presumption. It's not  
3 you give the instruction and case closed, the jury returns a verdict if there is a  
4 presumption applied. The presumption is rebuttable, and what the case law says  
5 if you look at that *Ferdinand versus Admirand* case, *Bronneke versus Rutherford*  
6 case which I cite on Page 4 of my reply, those cases talk about once the  
7 defendant presents evidence that rebuts this presumption the burden then shifts  
8 to plaintiff to establish professional negligence with expert testimony pursuant to  
9 41A.100, so --

10 THE COURT: But that could be prior to trial or it could be at trial, so  
11 the question is in *Ferdinand* was it -- was it prior to trial?

12 MS. HALL: I believe that it was and I don't -- I wish I had a copy of  
13 the case with me. I should have brought that. I think that the way these cases  
14 normally progress certainly you don't have to have an expert to get to the point of  
15 filing, but once you have evidence from the defense that rebuts the presumption  
16 the burden is back on plaintiff. This isn't a presumption that can't --

17 THE COURT: How do we know that?

18 MS. HALL: -- be rebutted.

19 THE COURT: How do we know that? How do I know which of you  
20 is right on at what point the Court is to call it whether or not -- or if the Court is  
21 supposed to ever call it on the issue of whether or not the rebuttable  
22 presumption, that there's been evidence that rebuts the presumption, whether  
23 that's at trial or whether that can be raised in a pretrial motion?

24 MS. HALL: I think it's enough to look at the case law on motions for  
25 summary judgment. What *Wood versus Safeway* says is that once a motion for

1 summary judgment has been brought it's on the non-moving party to present the  
2 Court with – you know, it doesn't have to be an affidavit but that's the preferred  
3 method, affidavits or otherwise in some fashion set forth specific facts  
4 demonstrating the issue of a genuine issue of fact for trial or have summary  
5 judgment entered.

6           The question here that the Court is faced with is what evidence  
7 has been provided from the plaintiff to establish negligence on the part of Dr.  
8 Barber in response to Dr. Warshaw's opinions in this case. You know, even if we  
9 disregard Dr. Barber's affidavit, of course, I disagree that it's inconsistent with her  
10 operative note, but never the less even if we set aside Dr. Barber's affidavit we  
11 have an expert report from Dr. Warshaw, and, no, he didn't do an independent  
12 medical examination, that's not what the purpose of his review was, it was to  
13 provide a standard of care review, that's the only competent evidence that is  
14 going to be presented to the jury. In opposing the motion that's plaintiff's  
15 opportunity to present the defense and this Court with any relevant evidence that  
16 it intends to introduce to establish that and that wasn't met here.

17           THE COURT: Okay. I'm going to – this has really clarified the issue  
18 for me, your arguments today, both of you, but it means that I'm going to need to  
19 take another look at the cases because I could see the law going either way. It  
20 could either be that – that, yes, we're to read *Wood versus Safeway* even that –  
21 that, you know, broadly and if you've got an expert affidavit you don't get to trial  
22 unless you've got – the other side's got one too otherwise we'll hold that the  
23 presumption has been rebutted and that's it, too bad or I could see the law  
24 saying more as Mr. Kennedy has suggested, that in this one area that you don't  
25 even have to have – not only do you not have to have the affidavit to file, you

1 also don't have to worry about getting zipped out with the usual *Wood versus*  
2 *Safeway* standard.

3           So I'm going to take this under advisement. I'm going to take  
4 another look at the cases that you both cited. If either of you in the next, oh, 48  
5 hours comes across a case that clearly demonstrates to me which way our  
6 Supreme Court wants to call it, in other words, that says either that on a *res ipsa*  
7 you get to trial before the – their hammer drops on the presumptions or says, no,  
8 that just means you didn't have to have the expert affidavit in the beginning but it  
9 would side with the defense argument here, we'll put it on the chambers calendar  
10 for next Monday.

11           THE CLERK: The 14<sup>th</sup>.

12           THE COURT: The 14<sup>th</sup>, yeah.

13           MR. KENNEDY: All right. Thank you, Your Honor.

14           MS. HALL: Thank you, Your Honor.

15           THE COURT: All right.

16           MR. KENNEDY: Have a good day.

17           THE COURT: Thank you.

18           (Whereupon, the proceedings concluded.)

19           \* \* \* \* \*

1 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
2 audio/visual proceedings in the above-entitled case to the best of my  
3 ability.

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5 LISA A. LIZOTTE  
6 Court Recorder  
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1 **RTRAN**

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4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 MELISSA CUMMINGS, )  
8 )  
9 Plaintiff, ) CASE NO. A729065  
10 ) DEPT. NO. 1  
11 vs. )  
12 )  
13 ANNABEL BARBER, ET AL., )  
14 )  
15 Defendants. )

16  
17 BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE  
18 WEDNESDAY, JULY 18, 2018 AT 9:03 A.M.

19  
20 **RECORDER'S TRANSCRIPT RE:**  
21 **STATUS CHECK RE: PENDING MOTION FOR SUMMARY JUDGMENT**  
22 **DEFENDANT ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY**  
23 **JUDGMENT**  
24 **DEFENDANT UNIVERSITY MEDICAL CENTER'S JOINDER TO DEFENDANT**  
25 **ANNABEL E. BARBER, M.D.'S MOTION FOR SUMMARY JUDGMENT**

26 **APPEARANCES:**

27 FOR THE PLAINTIFF: KIRK T. KENNEDY, ESQ.

28 FOR THE DEFENDANT BARBER: CHELSEA R. HUETH, ESQ.

29 Recorded by: LISA A. LIZOTTE, COURT RECORDER

1 (WEDNESDAY, JULY 18, 2018 AT 9:03 A.M.)

2 THE CLERK: Page 1, Melissa Cummings versus Annabel Barber,  
3 Case Number A729065.

4 MR. KENNEDY: Kirk Kennedy for the plaintiff.

5 MS. HUETH: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MS. HUETH: Chelsea Hueth on behalf of Dr. Barber.

8 THE COURT: Good morning. I thought you were going to move to  
9 continue.

10 MR. KENNEDY: Well, I am unless you have us a quick ruling. If  
11 you want to do some more arguments I would rather move it to another day. I  
12 wasn't sure what your intention was.

13 THE COURT: Well, it sounds like he wants to get the pain over  
14 with.

15 MR. KENNEDY: I mean if you rule in my favor you can quickly say  
16 motion denied and we can move on. If it's more lengthy and painful then  
17 perhaps we can do it another day.

18 THE COURT: Well, here's what it comes down to, and I – you  
19 know, this is my leaning if anybody wants to talk me out of it. You've heard my  
20 little speech before. I often am – I have my mind changed by the eloquent oral  
21 argument that comes, but at this point I'm inclined to deny it.

22 Oh, wait a minute. I'm sorry, which case did you call?

23 MR. KENNEDY: Cummings versus Dr. Barber.

24 THE CLERK: Page 1.  
25

1 THE COURT: Yeah. Okay. I think that *Kinford* probably disposes  
2 of the issue because it -- according to *Kinford* you can't -- you can't read --  
3 statutorily interpret *res ipsa* under that statute to go as broad as to cover a  
4 situation where it's not the defendant who originally put the -- left the device in  
5 there or put the device in there, and in this case as I read it the lead wires were  
6 left over from the original surgery, were they not?

7 MR. KENNEDY: Well, she -- my client had a gastric stimulator in  
8 her body and in June 2014 Dr. Barber did a procedure to remove it --

9 THE COURT: Right.

10 MR. KENNEDY: -- but that she left some wires in there and that  
11 became the source of the issue in the case.

12 THE COURT: Yeah. So I think -- I don't think that you can interpret  
13 the statute as broadly as the plaintiff would like, so I'm afraid I think that I need to  
14 grant the motion.

15 MR. KENNEDY: All right. I would just like to sign off on the order.

16 THE COURT: Okay.

17 MS. HUETH: Yep, of course.

18 MR. KENNEDY: Thank you, Your Honor. Have a good day.

19 MS. HUETH: Thank you.

20 THE COURT: And you'll doll it up and make it flowery and make it  
21 sound like I know what I'm doing?

22 MS. HUETH: It will -- it will sparkle.

23 THE COURT: Okay.

24 (Whereupon, the proceedings concluded.)

25 \* \* \* \* \*



1 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
2 audio/visual proceedings in the above-entitled case to the best of my  
3 ability.  
4



LISA A. LIZOTTE  
Court Recorder

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*Steven D. Gricson*

NEO  
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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.: XX

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

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

DATED this 15th day of August, 2018.

CARROLL, KELLY, TROTTER,  
FRANZEN, McBRIDE & PEABODY

/s/Heather S. Hall  
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Attorneys for Defendant  
*Annabel E. Barber, M.D.*

*Exh 3*  
*243*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15<sup>th</sup> 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.

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Attorneys for Defendant  
*University Medical Center*

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

*Annabel E. Barber*

ORDER

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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 12, 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 Defect	<input type="checkbox"/> Judgment of Arbitration

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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. 220, 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

Respectfully Submitted By:

DATED this 23<sup>rd</sup> day of July 2018.

  
ROBERT C. MCBRIDE, ESQ.  
Nevada Bar No.: 7082  
HEATHER S. HALL, ESQ.  
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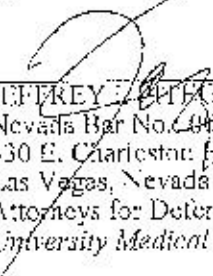
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Approved as to Form and Content:

DATED this 21 day of Dec 2018.

PITEGOFF LAW OFFICE

By

  
JEFFREY PITEGOFF, ESQ.  
Nevada Bar No. 005458  
330 E. Charleston Blvd., Suite 100  
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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 13<sup>th</sup> 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.

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Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

MELISSA CUMMINGS,

Plaintiff,

vs.

ANNABEL BARBER, M.D., et al.,

Defendants.

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

PLAINTIFF'S NOTICE OF APPEAL

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

Dated this 12<sup>th</sup> day of September, 2018.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
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Attorney for Plaintiff

*Exh 1*

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**CERTIFICATE OF SERVICE**

I hereby affirm that on this 12<sup>th</sup> 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 L. 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 12<sup>th</sup> day of September, 2018.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
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Attorney for Plaintiff

2

252

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

MELISSA CUMMINGS,

Appellants,

vs.

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

Respondents.

No. 76972

Electronically Filed  
Mar 14 2019 08:24 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

APPELLANT'S APPENDIX, VOLUME 2

KIRK T. KENNEDY, ESQ.  
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Attorney for Appellant

## TABLE OF CONTENTS

### PAGE:

6. Plaintiff Cummings' Opposition to Motion for Summary Judgment, 5/21/18	173
7. Dr. Barber's Reply In Support of Motion for Summary Judgment, 5/29/18	217
8. Transcript of Hearing, 6/5/18	223
9. Transcript of Hearing, 7/18/18	239
10. Notice of Entry of Order and Order Granting Summary Judgment, 8/15/18	243
11. Notice of Appeal, 9/12/18	251

## **CERTIFICATE OF SERVICE**

I hereby affirm that on this 14<sup>th</sup> day of March, 2019, I mailed via first class U.S. Mail a copy of the foregoing appendix to the Respondents at the address below:

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

MELISSA CUMMINGS,

Plaintiff,

vs.

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

Defendants.

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

**PLAINTIFF'S OPPOSITION TO DEFENDANT BARBER'S MOTION FOR  
SUMMARY JUDGMENT**

COMES NOW, the Plaintiff, MELISSA CUMMINGS, by and through her undersigned counsel, KIRK T. KENNEDY, ESQ., who files this opposition to the Defendant Dr. Barber's motion for summary judgment.

In support hereof, Plaintiff relies on the following points and authorities and exhibits on file herein.

Dated this 21<sup>st</sup> day of May, 2018.

/s/ Kirk T. Kennedy  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

MELISSA CUMMINGS,  
  
Plaintiff,  
  
vs.  
  
DR. ANNABEL BARBER, M.D.;  
UNIVERSITY MEDICAL CENTER;  
  
Defendants.

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

**PLAINTIFF'S OPPOSITION TO DEFENDANT BARBER'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, the Plaintiff, MELISSA CUMMINGS, by and through her undersigned counsel, KIRK T. KENNEDY, ESQ., who files this opposition to the Defendant Dr. Barber's motion for summary judgment.

In support hereof, Plaintiff relies on the following points and authorities and exhibits on file herein.

Dated this 21<sup>st</sup> day of May, 2018.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
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Attorney for Plaintiff

## POINTS AND AUTHORITIES

### **I. Relevant Disputed Factual Background:**

Plaintiff Melissa Rugoletti (formerly known as Melissa Cummings) filed her Complaint alleging a sole claim of res ipsa medical negligence on December 16, 2015.

Exh 1. Complaint. The Complaint set forth the following 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." Exh. 1.

During discovery in this case, Plaintiff further clarified her claims in her answers to the Defendants' 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. Severe 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 or 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." Exh. 2, Plaintiff's Answers to Defendant UMC's Interrogatories.

On June 6, 2014, Dr. Barber performed a surgery on Plaintiff at UMC to remove a gastric stimulator device that had been previously placed inside Plaintiff's stomach area. Exh. 3, Dr. Barber's Surgery Report, 6/6/14 (Also produced in Defendant Barber's 16.1 Initial Production at Bates 000117-118). 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.

1           Following this, the cavity was then irrigated using normal saline copiously and  
2           two 3-0 Vicryl sutures were then used to reapproximate the subcutaneous fat in an  
3           interrupted fashion. 4-0 Monocryl was used to close the skin in a running subcuticular  
4           fashion." Exh. 3.

5           Noticably absent from Dr. Barber's report was any reference to leaving lead  
6           wires or fragments of wires embedded in Plaintiff's stomach area tissue. While Dr.  
7           Barber references the lead wire fragments in her self-serving affidavit generated in May,  
8           2018, her actual surgical report from June, 2014, fails to mention that any lead wires were  
9           allowed to remain embedded in Plaintiff's stomach area. Exh. 3; Def. Exh. 11.

10          Dr. Barber's surgical report states that "the leads were gently tugged, until they  
11          were removed from the stomach." Exh. 3. A close reading of the surgical report  
12          indicates to the Plaintiff that the gastric stimulator, along with the lead wires, were all  
13          successfully removed. Yet, in Dr. Barber's affidavit she now admits that lead wire  
14          fragments were left in Plaintiff's body because they were "embedded in the tissue."  
15          Defendant's Exh. H-Affidavit of Dr. Barber.

16          It is clear that Dr. Barber's surgical report also references that two 3-0 Vicryl  
17          sutures were placed in the body as well. Exh. 3. Dr. Barber's Affidavit indicates that  
18          these sutures were necessary to control internal bleeding. Def. Exh. 11.

19          As Plaintiff testified to in her interrogatory answers, she had been feeling pain in  
20          the stomach/abdomen area long after the June, 2014, surgery. Plaintiff first discovered  
21          the presence of clips and wires in her stomach area when she had a CT Scan performed  
22          on December 23, 2014. Exh. 4- CT Scan, United Medical Imaging.

23          Due to the Plaintiff's inability to secure a surgical procedure to remove the foreign  
24          materials immediately after their discovery in late 2014, Plaintiff was forced to endure the  
25          associated pain for over three years. However, finally, in October, 2017, Plaintiff  
26          secured the services of Dr. Stephen Horsley to perform a surgical operation to explore the  
27          source of Plaintiff's stomach pain and take appropriate action.

28          In October, 2017, Plaintiff presented to Southern Hills Hospital, originally for a  
29          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, Plaintiff underwent surgery to resolve the appendicitis, which had become acute only days before the surgery. 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 Plaintiff's surgery was performed, in part, to resolve an acute appendicitis condition, the procedure also confirmed the presence of pacer wires in Plaintiff's 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 Plaintiff for her complaints of metallic objects in her stomach area. Exh. 5- Dr. Horsley Deposition Transcript, pgs. 8-9; 25.
2. Dr. Horsley 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 Plaintiff 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 Plaintiff 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 Plaintiff's appendix based on its acute condition. Id., pg. 19.
7. Dr. Horsley's records did indicate Plaintiff's previous gastric pacemaker removal surgery in 2014. Id., pg. 23.
8. Dr. Horsley 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 Plaintiff's stomach wall area. Defendant's Exh. F.

## II. Argument:

Dr. Barber seeks an order of summary judgment against Plaintiff's claims. Dr. Barber's Affidavit contends that she "intentionally" left the pacer wires and the surgical clips in Plaintiff's stomach wall. Def. Exh. II.

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. The initial burden is on the moving party to show that there is an absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, then the non-moving party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In deciding a motion for summary judgment, the court views the evidence of the non-movant in the light most favorable to that party, and all justifiable inferences are also to be drawn in its favor. *Id.* at 255.

Nevada has adopted these Supreme Court standards with the case of Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005).

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.

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



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

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

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

19           In Szydel v. Markman, 117 P.3d 200, 204 (Nev. 2005), the Supreme Court stated:  
20           “Undeniably, the res ipsa loquitur doctrine codified in NRS 41A.100 permits medical  
21           malpractice claims to go forward without expert testimony when the plaintiff is able to  
22           present some evidence that one or more of the factual situations enumerated in NRS  
23           41A.100(1)(a)-(c) exist. These are factual situations where the negligence can be shown  
24           without expert medical testimony, as when a foreign substance is found in the patient’s  
25           body following surgery.”



1 In this matter, the Defendant misconstrues the evidence and the focus of NRS  
2 41A.100. The Defendant contends that because Dr. Barber's self-serving affidavit states  
3 that she intentionally left the surgical clips and lead wires in Plaintiff's stomach, that the  
4 Plaintiff's claim fails. The Defendant argues that Dr. Barber's actions were intentional  
5 and thus the requirement under NRS 41A.100(1)(a) that the foreign body be  
6 "unintentionally" left inside the body is not met.

7 Genuine issues of material fact exist as to whether Dr. Barber's May, 2018,  
8 affidavit negates the language stated in NRS 41A.100(1)(a). As noted above, Dr.  
9 Barber's surgical report from June, 2014, directly contradicts Dr. Barber's Affidavit. The  
10 surgical report states that Dr. Barber removed the gastric stimulator device and the lead  
11 wires were removed successfully. Exh. 3. Yet, in Dr. Barber's affidavit she now admits  
12 that lead wire fragments were left in Plaintiff's body because they were "embedded in the  
13 tissue." Defendant's Exh. 11-Affidavit of Dr. Barber.

14 Dr. Barber's Affidavit is directly contradicted by her own surgical report. The  
15 isolated reading of the surgical report from June, 2014, states nothing about lead wire  
16 fragments being left inside Plaintiff's stomach wall. The surgical report leaves the  
17 distinct impression that the stimulator and associated wires were all removed  
18 successfully, as was Dr. Barber's intention. However, it is clear from the October, 2017,  
19 surgery performed by Dr. Stephen Horsley, that two lead wire fragments were still  
20 embedded in Plaintiff's stomach wall and that he was then able to remove the wire  
21 fragments without any complications.

22 Dr. Barber's surgical report did reference placing two surgical clips, i.e. Vicryl  
23 sutures, inside the Plaintiff's stomach wall area. Plaintiff agrees that the placement of the  
24 Vicryl sutures was intentional by Dr. Barber. However, as the evidence has developed in  
25 this case, it is clear that Dr. Barber unintentionally left lead wire fragments inside  
26 Plaintiff's stomach wall, which remained there for over three years. Plaintiff has suffered  
27 ongoing stomach based pain for all of the last three years, until the final removal of the  
28 foreign materials in October, 2017.

1 The Defendant's contention that the Plaintiff has failed to meet her burden and  
2 failed to offer any medical expert testimony to support her claim attempts to twist and  
3 ignore the factual disputes in this case. Plaintiff is not required to offer any medical  
4 expert testimony given the applicability of NRS 41A.100(1)(a). The purpose of that  
5 statute is quite clear that when some evidence of the factual predicates exist, then there is  
6 no expert witness requirement at all.

7 In this case, the Dr. Barber's self-serving Affidavit is contradicted by her own  
8 surgical report from June, 2014. The existing evidence indicates that although Dr.  
9 Barber's surgical report indicates that she successfully removed the stimulator and the  
10 lead wires, it is clear that she did not remove *all* of the lead wires. Dr. Barber's procedure  
11 unintentionally left lead wire fragments inside the Plaintiff's stomach wall. Given this  
12 event, there is no burden shifting as alleged by the Defendant and no requirement that  
13 Plaintiff present any medical expert testimony.

14 Genuine issues of material fact exist which preclude summary judgment at this  
15 time. Plaintiff's *res ipsa loquitur* case should be allowed to continue to trial.

16 Dated this 21<sup>st</sup> day of May, 2018.

17 /s/Kirk T. Kennedy  
18 KIRK T. KENNEDY, ESQ.  
19 Nevada Bar No: 5032  
20 815 S. Casino Center Blvd.  
21 Las Vegas, NV 89101  
22 (702) 385-5534  
23 Attorney for Plaintiff  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby affirm that on this 21<sup>st</sup> day of May, 2018, I mailed via first class  
U.S. Mail a copy of the foregoing to the Defendants at the addresses below:

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

Robert C. McBride, Esq.  
Deather S. Hall, Esq.  
8329 W. Sunset Road, Ste. 260  
Las Vegas, NV 89113

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

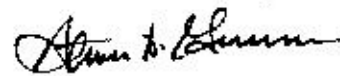
**AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS**

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

Dated this 21<sup>st</sup> day of May, 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

# **EXHIBIT 1**



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,

vs.

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

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

**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

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

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.

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 16<sup>th</sup> 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 16<sup>th</sup> 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



1  
2  
3 **AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS**

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

5  
6 Dated this 16<sup>th</sup> day of December, 2015.

7 /s/Kirk T. Kennedy  
8 KIRK T. KENNEDY, ESQ.  
9 Nevada Bar No: 5032  
10 815 S. Casino Center Blvd.  
11 Las Vegas, NV 89101  
12 (702) 385-5534  
13 Attorney for Plaintiff  
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## EXHIBIT 2

ANSINTERG  
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,  
Individually,  
  
Plaintiff,

Case No: A-15-729065-C  
Dept. No: 1

vs.

DR. ANNABEL E. BARBER, M.D.,  
Individually; UNIVERSITY MEDICAL  
CENTER: a Nevada entity; DOES 1-10;  
ROF CORPORATIONS 1-10,  
  
Defendant.

**PLAINTIFF'S ANSWERS TO DEFENDANT UNIVERSITY MEDICAL  
CENTER'S FIRST SET OF INTERROGATORIES**

The Plaintiff, MELISSA CUMMINGS, answers the Defendant UNIVERSITY  
MEDICAL CENTER'S first set of interrogatories under oath as follows:

**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. Severe 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. 4:

State if you have sought or treated with any mental health care specialist (counselor, doctor, psychologist, clergy, psychiatrist, social worker) in regard to any of your claims of emotional distress, anxiety, emotions or fear related to the claims in this case. In doing so, identify each person by name and provide addresses and phone numbers for each.

ANSWER TO INTERROGATORY NO. 4:

Glovensky, Psychologist, 1919 S. Jones Ste. D, Las Vegas, NV 89146, 702-362-7785

Erin Maltera, Therapist, 9418 W. Lake Mead Blvd., Las Vegas, NV 89134, 702-830-7592

Scott Rubin, Psychiatrist, 5440 W. Sahara Ave., Las Vegas, NV 89146, 702-380-8200

INTERROGATORY NO. 5:

Provide the name, address and phone number of your ex-spouse.

ANSWER TO INTERROGATORY NO. 5:

Jeff Cummings, 504 Chestnut, Henderson NV 89052, 702-494-8162

INTERROGATORY NO. 6:

Provide the name, address and phone numbers of any of your boyfriends from the time you treated with Dr. Barber to the present

ANSWER TO INTERROGATORY NO. 6:

Matthew Loskowsky - unknown

Walter Rugoletti, 8684 Buttercreek Way, Las Vegas, NV 89117, 702-373-8380 (October 2014-present)

INTERROGATORY NO. 7:

Attached hereto are CT scans of your abdomen. Please circle the "clips" you claim were left in your abdomen. In addition, if you know, state what else was left in your abdomen that can be seen in the CT scan, if anything.

ANSWER TO INTERROGATORY NO. 7:

See attached. Also note that there were wires left inside my abdomen area.

INTERROGATORY NO. 8:

Has anyone ever told you personally, that what is shown on the CT scan are "clips"? If so, identify the person by name and include contact information as well as the date you were told.

ANSWER TO INTERROGATORY NO. 8:

Dr. Yu, Irvine, CA, December 2016 when he read report from tests done which indicated the items inside my body. His address is 15825 Laguna Canyon Rd. #106, Irvine, CA 92618, 949-679-0000

INTERROGATORY NO. 9:

State all physical manifestations of injury or 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 Dates 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.

INTERROGATORY NO. 11:

State whether you have any information or understanding as to whether "clips" are used in the type of procedure that Dr. Barber performed and from where you obtained this information or understanding.

ANSWER TO INTERROGATORY NO. 11:

See attached documentation.

INTERROGATORY NO. 12:

State whether the UMC staff assisting Dr. Barber was negligent in either performing counts, following policy and procedure or for any other reason and state the basis thereof.

ANSWER TO INTERROGATORY NO. 12:

Yes. Specimen collected states two wires and there were only two and one is still in abdomen. I contend that this evidences negligence on the part of both Defendants in this matter.

INTERROGATORY NO. 13:

If you are alleging that "clips" were used by Dr. Barber during the surgery performed at UMC, state your basis and all evidence to support your contention.

ANSWER TO INTERROGATORY NO. 13:

They weren't in prior to implantation. See x-ray attached from 2012, 2013, 2015, 2017. The devices only appeared after my June, 2014, surgery.

INTERROGATORY NO. 14:

State, why, to date, there has not been any surgery to remove the alleged "clips"?

ANSWER TO INTERROGATORY NO. 14:

I have been unable to find qualified surgeon for consult with in Las Vegas. I want Barber/UMC to pay for it due to high cost. My insurance shouldn't have to pay.

INTERROGATORY NO. 15:

State everyone you consulted or treated with who told you that your abdominal pain is related to the "clips." Provide the name and addresses of each person.

ANSWER TO INTERROGATORY NO. 15:

UMI of Irvine - radiology report

Dr. Frank Yu - 15825 Laguna Canyon Rd. #106, Irvine, CA 92618, 949-679-0000

Desert Radiology - reports from CT

Dr. Babuk Ghuman, NV Spine Clinic

INTERROGATORY NO. 16:

State everyone you treated or consulted with who told you that there are actually "clips" in your abdomen. Provide the names and addresses of each.

ANSWER TO INTERROGATORY NO. 16:

UMI of Irvine - radiology report

Dr. Frank Yu - 15825 Laguna Canyon Rd. #106, Irvine, CA 92618, 949-679-0000

Desert Radiology - reports from CT

Dr. Babuk Ghuman, NV Spine Clinic

INTERROGATORY NO. 17:

State why you believe "clips" would be used in the type of surgery performed by Dr. Barber and your basis for such contention.

ANSWER TO INTERROGATORY NO. 17:

Holds wires in pace for stimulator. See attached.

INTERROGATORY NO. 18:

State whether you have any facts or evidence to contradict the opinions of Dr. Andrew Warshaw. In doing so, state all of these facts and identify the evidence by Bates Number, if applicable.

ANSWER TO INTERROGATORY NO. 18:

The attached evidence and the evidence submitted in Plaintiff's 16.1 production supports the Plaintiff's contentions in this matter. Dr. Warshaw was paid to provide a report and the Defendants got what they paid for.

INTERROGATORY NO. 19:

State whether you have any facts or evidence to contradict the opinions of Karen Loch, R.N. In doing so, state all of these facts and identify the evidence by Bates Number, if applicable.

ANSWER TO INTERROGATORY NO. 19:

The attached evidence and the evidence submitted in Plaintiff's 16.1 production supports the Plaintiff's contentions in this matter. Nurse Loch was paid to provide a report and the Defendants got what they paid for.

INTERROGATORY NO. 20:

Identify all witnesses you will rely upon, or may rely upon, at the time of trial.

ANSWER TO INTERROGATORY NO. 20:

All those witnesses designated by the Plaintiff's 16.1 document production and any supplements, all previously served on the Defendants, including:

1. Melissa Cummings, c/o Kirk T. Kennedy, Esq., 815 S. Casino Center Blvd., Las Vegas, NV 89101- Plaintiff will testify regarding facts and circumstances of her complaint.
2. Dr. Annabel Barber, M.D., c/o Robert C. McBride, Esq., Ashley A. Balducci, Esq., 8329 W. Sunset Road, Ste. 260, Las Vegas, NV 89113- Defendant will testify regarding facts and circumstances of the complaint.
3. PMK University Medical Center, c/o Jeffrey L. Pitegoff, Esq., 3770 Howard Hughes Pkwy., Ste. 170, Las Vegas, NV 89169- Witness will testify regarding facts and



circumstances of the complaint.

4. Dr. Richard Chai, M.D., Radiologist with United Medical Imaging of Irvine, 15825 Laguna Canyon Road, Ste. 101, Irvine, CA 92618- Witness will testify regarding facts and circumstances of the complaint.

5. Walter Rugoletti, c/o Kirk T. Kennedy, Esq., 815 S. Casino Center Blvd., Las Vegas, NV 89101- Witness will testify regarding facts and circumstances of the complaint.

6. Dr. Fang Frank Yu, M.D., Ph.D, Gastroenterology & Hepatology, 15825 Laguna Canyon Road, Ste. 106, Irvine, CA 92618, office: (949) 679 0000- Dr. Yu will testify as to medical treatment and condition of the Plaintiff.

7. Dr. Babuk Ghuman, M.D., Nevada Spine Clinic, 7140 Smoke Ranch Road, Ste. 150, Las Vegas, NV 89128, office: (702) 320-8111- Dr. Ghuman will testify a to medical treatment and condition of the Plaintiff.

8. Dr. Clifford Carrol, M.D. Las Vegas Gastroenterology Associates, LLC, 3150 N. Tenaya Way, #525, Las Vegas, NV 89128, office: (702) 220-9865- Dr. Carrol will testify as to medical treatment and condition of the Plaintiff.

9. PMK, Specialty Surgery Center, 7250 Cathedral Rock Drive, Las Vegas, NV 89128 AND 15825 Laguna Canyon Road, Ste. 200, Irvine, CA 92618- Witness will testify regarding medical treatment and services at their facilities.

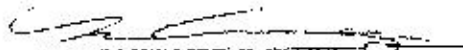
#### INTERROGATORY NO. 21:

For each Request for Admission served contemporaneously with these Interrogatories that you responded to in any way other than an unqualified admission, please describe the basis for each such denial.

ANSWER TO INTERROGATORY NO. 21:

The denials submitted in the Plaintiff's answers to the requests for admission were all based on the Plaintiff's interpretation of her 16.1 document production, as well as the disclosures submitted by the Defendants in this matter.

Dated this 13 day of September, 2017.

  
MELISSA CUMMINGS

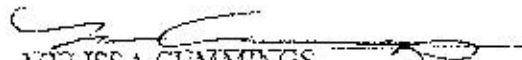
VERIFICATION

STATE OF NEVADA

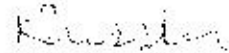
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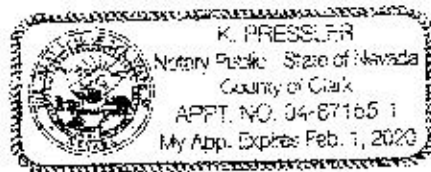
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SS.  
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Under penalties of perjury, I, Melissa Cummings, affirm under oath that I have read the foregoing answers to interrogatories and I believe them to be true and as to those matters stated on information and belief, I also believe them to be true.

  
MELISSA CUMMINGS

State of Nevada  
County of Clark  
SUBSCRIBED TO AND SWORN  
before me on this 13 day of September, 2017  
by Melissa Cummings

  
NOTARY PUBLIC for this State

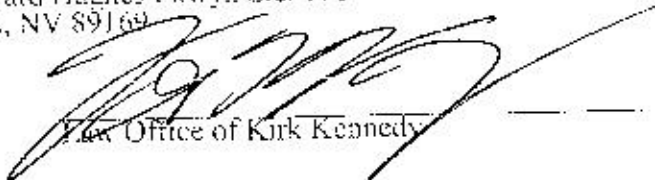


CERTIFICATE OF SERVICE

I hereby affirm that on this 13 day of September, 2017, I mailed a copy of the foregoing via U.S. Mail to the Defendants below:

Heather Hall, Esq.  
Carroll, Kelly Trotter  
8329 W. Sunset Road, Ste. 260  
Las Vegas, NV 89113

Jeffrey J. Pitegoff, Esq.  
Morris Sullivan  
3770 Howard Hughes Pkwy., Ste. 170  
Las Vegas, NV 89169

  
Law Office of Kirk Kennedy

# EXHIBIT 3

UNIVERSITY MEDICAL CENTER  
1800 West Charleston Boulevard  
Las Vegas, Nevada 89102

DATE OF SERVICE: 06/06/2014

SURGEON: Amrabel Barber, MD

PARTICIPATING SURGEON: Carlisle Berger, MD Resident

ANESTHESIOLOGIST: Todd

PREOPERATIVE DIAGNOSIS: Gastric stimulator and resolution of  
gastroparesis.

POSTOPERATIVE DIAGNOSIS: Gastric stimulator and resolution of  
gastroparesis.

PROCEDURE: Removal of gastric stimulator.

ANESTHESIA: General endotracheal anesthesia.

FINDINGS: Well-encapsulated stimulator.

COMPLICATIONS DUE TO PROCEDURE AND/OR SEDATION: None.

ESTIMATED BLOOD LOSS: 5 cubic centimeters.

SPECIMEN: Stimulator was sent to Pathology as a specimen.

DRAINAGE: None.

INDICATIONS FOR PROCEDURE: The patient is a 38-year-old female with a  
history of gastroparesis. She had previous a gastric stimulator  
placed. Since that time, she has had resolution of her gastroparesis  
with lifestyle measures and device removal. She is brought to the  
operating room today for removal.

DESCRIPTION OF PROCEDURE: The patient was brought back to the  
operating room and positioned on the table supine, after obtaining consent and  
placing in the chart. Appropriate preoperative antibiotics were given, and  
the abdomen was prepped and draped in a sterile fashion.

An approximately 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 in the level of  
the capsule. The capsule was entered. The stimulator was then able to be  
removed easily, and the leads were gently logged, 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.

0002176218

The area was then wiped clean with a wet lap and then dried, and Barnbond was then applied to the incision. The patient was allowed to emerge from anesthesia. The procedure was without complications, and she was brought back to PACU uneventfully.

RM/medO

DD: 06/06/2014 11:44:02

DT: 06/06/2014 12:11:31

DANIELLE BORDER, MD RESIDENT

ARNABEL BARBER, MD

PATIENT: CUMMINGS, MELISSA ACCOUNT#: 1411301483  
MR#: 0002176218  
ADM DATE: 06/06/2014  
JORG: 694687/613/41486

PHYSICIAN: ARNABEL BARBER, MD  
DICTATED BY: DANIELLE BORDER, MD RESIDENT

OPERATIVE REPORT

Authenticated and Signed by Danielle Border, M.D. On 6/06/14 2:15:19 PM  
Authenticated by Arnabel Barber, MD On 06/06/2014 12:25:40 PM

## **EXHIBIT 4**

yes



PATIENT: Melissa Cummings  
REFERRED BY: Frank F Yu MD  
PATIENT NO: UM2189224

DATE OF EXAM: 12/23/2014  
DOB: 11/02/1975  
FAX: (949) 679-0976

There is no pericecal stranding. The terminal ileum is unremarkable. The appendix is within normal limits.

There is prior fusion at the lumbosacral junction.

IMPRESSION:

1. SURGICAL CLIPS NOTED ADJACENT TO THE STOMACH. CLINICAL CORRELATION WOULD BE HELPFUL.
2. NO EVIDENCE OF ANY SIGNIFICANT LYMPHADENOPATHY WITHIN THE ABDOMEN AND PELVIS.
3. MILD HEPATOMEGALY.

Electronically Signed by Richard Chai, M.D., D.A.B.R.  
RADIOLOGIST

DOI: 10.2302/24 : T : 12:23:2014 by Joy Carvajal

# EXHIBIT 5

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DISTRICT COURT  
CLARK COUNTY, NEVADA

MELISSA CUMMINGS,

Plaintiff,

v.

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. XX

DEPOSITION OF  
STEPHEN HORSELY, M.D.  
LAS VEGAS, NEVADA  
WEDNESDAY, MARCH 14, 2018

Reported By Kelo R. Smith, NV CUR No. 672, CA CSR No.  
13405

Job No.: 456363

Page 2		Page 4	
1	DEPOSITION OF STEPHEN HORSELY, M.D.,	1	LAS VEGAS, NEVADA: WEDNESDAY, MARCH 14, 2018
2	taken at 8209 West Sunset Road, Suite 260, Las Vegas,	2	5:45 A.M.
3	Nevada, on Wednesday, March 14, 2018, at 9:16 a.m.	3	-END-
4	before Kate R. Smith, Qualified Court Reporter, in and	4	(The Reporter was relieved of her duties
5	in the State of Nevada.	5	under NCP 30.02(4)(i)
6		6	shortest,
7	APPEARANCES:	7	STEPHEN HORSELY, M.D.,
8	For the Plaintiff:	8	having first been called as a witness, who duly sworn
9	TAM OFFICE OF KIRK T. KENNEDY	9	and testified as follows:
10	BY: KIRK T. KENNEDY, ESQ.	10	
11	815 South Carson Center Boulevard	11	EXAMINATION
12	Las Vegas, Nevada 89101	12	
13	(702) 365-1534	13	BY MR. KERRIDGE:
14	For the Defendant Annabel E. Barber, M.D.:	14	Q. Could you please state and spell your full name
15	CARROLL KELLY "MOTTER" FRANZEN MORRIS &	15	for the record?
16	THURMOND	16	A. Stephen Horsely, S-T-E-P H E-R-S-E, H-O-R-S-E-L-Y.
17	BY: ROBERT MORRIS, ESQ.	17	Q. And, sir, what is your profession?
18	8529 West Sunset Road	18	A. I'm a general surgeon.
19	Suite 260	19	Q. Very briefly, could you give me a thumbnail
20	Las Vegas, Nevada 89117	20	sketch of your background? Educational background and
21	(702) 792-1818	21	training.
22	For the Defendant University Medical Center:	22	A. Sure. I completed my residency at the University
23	FORNICOFF LAW OFFICES	23	of Arizona in general surgery in 2007, and I moved to
24	BY: JEFFREY FORNICOFF, ESQ.	24	Las Vegas subsequently.
25	3135 Camino Al Norte	25	Q. Where did you go to med school? U of A?
	North Las Vegas, Nevada 89031		A. No. I went to the Autonoma in Guadalajara and
	(702) 508-7976		
Page 3		Page 5	
1	T N B S X	1	then New York Medical College, and before that I was at
2		2	Polignac Young University.
3	WITNESS: STEPHEN HORSELY, M.D.	3	Q. Are you board certified?
4		4	A. Yes.
5	EXAMINATION	5	Q. When did you become board certified?
6	By Mr. Kerridge	6	A. I don't remember. A few years after I came to
7	By Mr. Kennedy	7	Town.
8		8	Q. And are you a partner or are you a member of
9		9	Mountain West Surgical?
10	EXHIBITS	10	A. I am. I don't know when the paperwork shows.
11	MARKED	11	Q. Okay. How long have you been a member of
12	Exhibit A Donor's Chart	12	Mountain West Surgical?
13	Exhibit B Records	13	A. I was an employee in transition to partner.
14		14	Since I moved to town, it's been almost 11 years.
15		15	Q. Okay. Doctor, have you ever had your deposition
16		16	taken before?
17		17	A. I have.
18		18	Q. All right. So you're familiar with dispensing
19		19	with the usual admonitions before a deposition?
20		20	A. Yes.
21		21	Q. All right. Are you here under a subpoena from
22		22	our office?
23		23	A. I believe so.
24		24	Q. Okay. And I could show you --
25		25	A. There it is. Right.

209

Page 6

1 Q. That's a letter enclosing the Notice and  
2 Subpoena, which I'll show you and ask does this look  
3 familiar to you?  
4 A. Yes.  
5 Q. Okay. And, Doctor, before today have you spoken  
6 to Melissa Cummings regarding your deposition?  
7 A. No.  
8 Q. Have you spoken to any attorneys who represent  
9 Ms. Cummings?  
10 A. No.  
11 MR. KENNEDY: Well, I said hello.  
12 MR. MURPHY: Okay. All right.  
13 MR. KENNEDY: That's it. He said hello.  
14 MR. WERRIDE: Just like we said hello this  
15 morning, right?  
16 BY MR. WERRIDE:  
17 Q. Did you happen to bring any records with you  
18 today?  
19 A. I have some of the office notes that I reviewed  
20 before I got here.  
21 Q. Okay.  
22 A. It should be what has already been given.  
23 Q. I might have a more complete copy, but just to be  
24 on the safe side, is it okay to make a copy of what you  
25 have here --

Page 7

1 A. Yeah. Sure. Of course.  
2 Q. -- as Exhibit A to the deposition? And so -- but  
3 I'll give you another copy. Exhibit B will be the  
4 records that we received.  
5 A. Okay.  
6 Q. So we can use that -- actually, let me give  
7 you -- when she marks this, I'll give you that copy.  
8 (Exhibit B was marked.)  
9 BY MR. WERRIDE:  
10 Q. Just take a second to glance through this and  
11 tell me if this appears to be records from your office,  
12 Mountain West Surgical.  
13 A. Yeah. Some of these are repeated in a different  
14 format.  
15 Q. Right. I have noticed that too. So we'll  
16 briefly --  
17 A. Got you. These appear to be things that I have  
18 sent before from my office.  
19 Q. Okay. Perfect. Just for the record, it's noted  
20 that the patient's name is Melissa A. Rigoletti. At the  
21 time you were treating her, did you understand that to  
22 be her name?  
23 A. I don't.  
24 Q. Do you recall her ever referring to herself as  
25 Melissa Cummings?

Page 8

1 A. I can't recall a difference, to be honest.  
2 Q. I'll represent to you it's the same patient, but  
3 I just wanted to --  
4 A. Her driver's license, when she came in, was  
5 Rigoletti. I see Rigoletti many times here.  
6 Q. Right. In response to our request for records  
7 for Melissa Cummings, you would agree these were the  
8 records that were produced?  
9 A. Sure. Yes.  
10 Q. Okay. Do you have an independent recollection  
11 of -- I'm going to refer to her as Ms. Cummings. Do you  
12 have an independent recollection of her?  
13 A. What do you mean by that?  
14 Q. Anything about her? Do you remember her, what  
15 she looked like? Without looking at any records, do you  
16 remember what she came in for, what you did?  
17 A. If prompted, I do remember.  
18 Q. Okay. So you would need some records to refresh  
19 your recollection or some information to refresh your  
20 recollection?  
21 A. I would, or if you told me the diagnosis or the  
22 chief complaint, I might be able to remember, but just  
23 based on our name, probably not.  
24 Q. Do you remember seeing a patient who came to you  
25 for complaints of having metallic staples and wires?

Page 9

1 A. I do.  
2 Q. And you went in and did a laparoscopic procedure  
3 to remove that?  
4 A. I went to do a laparoscopic procedure, and in the  
5 course of that did remove that.  
6 Q. We'll go through some of the records. Looking at  
7 the first page, and if you look down at the bottom of  
8 the records, you'll see the Bates stamp numbers. We'll  
9 refer to those. We're not going to go through all of  
10 those. August 22nd, 2017 appears to be the first date  
11 that you saw Ms. Cummings. Would you agree with that?  
12 A. Yes.  
13 Q. All right. And the chief complaint was a consult  
14 for clips in the abdomen. Is that right?  
15 A. That's what I have documented, yes.  
16 Q. Is that something that you get the chief  
17 complaint from the patient herself?  
18 A. Yes. That's entered by my staff, and if I  
19 believe it's inappropriate, I would edit it, but that is  
20 entered by my staff as the chief complaint.  
21 Q. Did you have an understanding that Ms. Cummings  
22 was aware that she had clips -- retained clips in her  
23 stomach or her abdomen?  
24 A. Yes. I was.  
25 Q. Did she tell you how she learned that

Page 10

1 information?

2 A. I believe she told me she had an X ray that

3 showed the clips were there.

4 Q. Did she tell you which doctor did that X ray?

5 A. She did not.

6 Q. Did she tell you anything about the surgery that

7 she had with Dr. Annabel Barber for the gastric

8 pacemaker removal?

9 A. She did not give details about that operation.

10 Q. Okay.

11 A. To my recollection.

12 Q. Okay. In looking through the chart, I did not

13 see any records from Dr. Barber regarding -- or the

14 hospital where that was performed. Do you remember if

15 at any point in time before today you've seen any of

16 those records?

17 A. I don't believe I have.

18 Q. Do you know where that surgery was performed?

19 A. I do not.

20 Q. If you look at the surgical HPI, up at the top it

21 says "she is having LUQ" -- that means left upper

22 quadrant pain?

23 A. It does.

24 Q. -- "that she believes may be related to this."

25 Did you make any determination at this visit

Page 11

1 whether or not the clips or the retained wire were the

2 cause of her left upper quadrant pain?

3 A. I did not.

4 Q. In your practice over the years, have you had

5 patients who you have seen who have had surgical clips

6 left in their body following various surgical

7 procedures?

8 A. Yes.

9 Q. Okay. In your experience, have those surgical

10 clips -- are those surgical clips intended to be left in

11 the body?

12 A. Some clips are meant to be left in the body, yes.

13 Q. Okay. And are those surgical clips, are those

14 routinely the cause of any pain?

15 A. That's hard to comment on.

16 Q. Okay. Is it an individual patient situation?

17 A. It gets -- it's individual where the clips are,

18 what kind of clips they are.

19 Q. All right.

20 A. That's a more individual situation.

21 Q. Okay. Fair enough.

22 She also noted to you she was told she can't have

23 an MRI for her neck because of the retained wire. Do

24 you recall her commenting on that?

25 A. I recall her telling me that that's why it's

Page 12

documented there.

2 Q. In your experience, would that be something, to

3 your knowledge, that would have prevented an MRI,

4 because of this retained metallic clip?

5 A. Radiologists differ in their opinion about

6 whether to do an MRI or not. Every piece of metal left

7 in the body is different. Every radiologist is

8 different. It would be difficult to tell whether that

9 had been told her or not.

10 Q. She came in and the main purpose of her seeing

11 you that day was to have the retained wire and retained

12 clips removed. Correct?

13 A. To ask my opinion about whether that was

14 something that could be done or not.

15 Q. What did you advise her?

16 A. I advised her that she should consider it, what

17 the risks and benefits and alternatives were, including

18 leaving them there, taking them out. We had a

19 discussion about what it would entail to consider that,

20 what could or couldn't be done.

21 Q. You did give her an option of leaving the clips

22 there. Is that right?

23 A. I don't have a recollection of exactly what I

24 discussed with her, but my standard practice would be to

25 discuss nonoperative and operative management of what

Page 13

1 people come in to talk to me about.

2 Q. In your view, with this visit was there any

3 emergency need to remove these clips?

4 A. No.

5 Q. Okay. Before -- or excuse me.

6 At the conclusion of your examination of

7 Ms. Cummings on August 29, 2017, did you determine what

8 the cause of her left upper quadrant pain was?

9 A. No.

10 Q. Okay. And you note there's going to be a

11 possible diagnostic laparoscopy. Correct?

12 A. Yes. That was something we considered.

13 Q. All right. And she was going to consider that.

14 Was she supposed to return to your office after she made

15 the determination as to whether to go forward with the

16 surgery?

17 A. I put "Follow up four weeks."

18 Q. Okay. If you look at the next -- Page 4 at the

19 bottom there, you see October 20, 2017. Does that

20 appear to be the next time you saw her?

21 A. Yes.

22 Q. And, again, for a follow up. Correct?

23 A. Yes.

24 Q. She noted again it looks like the first paragraph

25 here is something of a repeat of the prior surgical

Page 14

1 history you had taken on August 22, 2017. Will you  
2 agree with that?  
3 A. Yes. It appears I only added one line to the  
4 bottom.  
5 Q. Okay. To your knowledge, was she having any  
6 other symptoms or increase in pain in the left upper  
7 quadrant?  
8 A. To my knowledge, no.  
9 Q. To your knowledge, did she ever tell you that  
10 this left upper quadrant pain was causing her any  
11 problems? In other words, was it preventing her from  
12 working at all?  
13 A. No. I noted that she couldn't get an MRI, but I  
14 didn't note any troubles with employment here.  
15 Q. Or any other problems that were -- she was  
16 prevented from doing housework or anything else --  
17 A. I did not note.  
18 Q. If you could, you're anticipating my question.  
19 Wait a second until I finish. Sometimes my questions  
20 kind of go on for a little bit. That way we'll have a  
21 clear record.  
22 A. Okay.  
23 Q. Was there anything significant about this visit  
24 other than that it was a follow-up visit? Anything that  
25 you can recall?

Page 15

1 A. No.  
2 Q. All right. At this point it looks like she had  
3 made the decision to go forward with a diagnostic  
4 laparoscopy with possible removal of foreign body.  
5 True?  
6 A. True.  
7 Q. What were the risks, benefits, and alternatives  
8 that you gave her of that procedure?  
9 A. I don't have that listed. I don't have them  
10 listed.  
11 Q. Do you have a standard sort of informed consent  
12 that you give to patients for this type of procedure?  
13 A. Each procedure's different.  
14 Q. Do you remember telling her what the benefit of  
15 the procedure would be?  
16 A. I do not.  
17 Q. Okay. If you look at the next -- it's 6 at the  
18 bottom there, and looks like November 7, 2017. This  
19 appears to be the postoperative visit in your office.  
20 True?  
21 A. True.  
22 Q. Okay. And I'll get to the operative report here  
23 in a second, but at that time you noted that the -- she  
24 complained of minimal drainage from a drain and her pain  
25 was manageable. True?

Page 16

1 A. That's what I wrote.  
2 Q. It says there, "status post diagnostic  
3 laparoscopy, laparoscopic appendectomy, and removal of  
4 foreign body on October 30, 2017 at Southern Hills."  
5 Does that refresh your recollection that that occurred  
6 then?  
7 A. Uh-huh, yes.  
8 Q. All right. If you look at Page 0008, this  
9 appears to be a consultation report from Southern Hills  
10 Hospital. Correct?  
11 A. Yes.  
12 Q. And this was dictated to you on or about  
13 October 30, 2017?  
14 A. Yes.  
15 Q. All right. In this you say the History of  
16 Present Illness, "Apparently she has pacer leads from  
17 that gastric pacemaker which was removed. She has  
18 wanted to have an MRI of the neck in the past and  
19 apparently was unable to due to retained leads on  
20 stomach surface. She had increased left upper quadrant  
21 abdominal pain and was admitted to have a normal CT  
22 scan."  
23 Prior to this procedure, did you review any CT  
24 scan or X rays that had been taken previously of  
25 Ms. Cummings?

Page 17

1 A. I had seen an X ray in the office of the metallic  
2 foreign body, and I did review the CT scan at the time  
3 of this consultation.  
4 Q. Okay. Did you have an understanding of how long  
5 ago she had had the pacemaker removed?  
6 A. Several months.  
7 Q. Okay. And then if you look at Page 10 at the  
8 bottom there, is this your operative note?  
9 A. Yes.  
10 Q. And it says the preoperative diagnosis is  
11 abdominal pain, and then postoperative diagnosis is  
12 acute appendicitis and metallic foreign body. Is that  
13 right?  
14 A. Yes.  
15 Q. All right. Did you make any determination as to  
16 what the cause of her acute appendicitis was?  
17 A. No.  
18 Q. It's noted that while looking for these metallic  
19 foreign bodies, which you note in your body of your  
20 procedure -- "which appear to be pacer wires as well as  
21 sheaths and clips and Prolene stitch on the anterior  
22 wall of the stomach" -- were those clips and sheaths,  
23 were they embedded in the stomach lining?  
24 A. I would say they were partially embedded.  
25 Q. In other words, did you see any that were



Page 18

1 free-floating?  
 2 A. No.  
 3 Q. Okay.  
 4 A. Not to my recollection.  
 5 Q. Did you happen to, as part of the laparoscopic  
 6 procedure, take any photographs?  
 7 A. I don't know.  
 8 Q. If you had, would that have been something that  
 9 would be in the Southern Hills Hospital chart?  
 10 A. Maybe.  
 11 Q. Okay. And it states that, "However, I noticed  
 12 there was purulence in the right upper abdomen."  
 13 For the jury, what is purulence?  
 14 A. Pus.  
 15 Q. And was that in the location of the clips?  
 16 A. No.  
 17 Q. Did you make a determination as to where that  
 18 purulence was coming from?  
 19 A. I did.  
 20 Q. And what was that?  
 21 A. The appendix.  
 22 Q. And it indicates that you saw that there was a  
 23 small perforation and acute appendicitis with more  
 24 purulence in the pelvis. True?  
 25 A. True.

Page 19

1 Q. And as a result, you removed the appendix.  
 2 Correct?  
 3 A. Yes.  
 4 Q. As well as the foreign bodies on the anterior  
 5 wall of the stomach?  
 6 A. Yes.  
 7 Q. Those were removed with mild blunt dissection  
 8 without difficulty and sent off the field. True?  
 9 A. True.  
 10 Q. Following this procedure, did you come to the  
 11 conclusion that the cause, the more likely cause of  
 12 Ms. Cummings' abdominal pain was the appendicitis?  
 13 A. The cause of her admission to the hospital  
 14 emergently for surgery, I believe, was appendicitis.  
 15 Q. Okay. Did you form any opinion as to whether or  
 16 not her appendicitis was in any way caused or  
 17 contributed to by those clips or retained wires?  
 18 A. No.  
 19 Q. After this procedure she returned to your office,  
 20 as we already saw in that one office note. True?  
 21 A. Yes.  
 22 Q. If you look at Page 20 and 21 of this document, I  
 23 just wanted to draw your attention to the pathology  
 24 report from Southern Hills. Had you seen this before?  
 25 A. I have.

Page 20

1 Q. And is this the pathology report that's prepared  
 2 after you submit the -- or send off the metallic clips  
 3 and the appendix for examination?  
 4 A. Yes.  
 5 Q. All right. For the jury's sake, it's indicated  
 6 "Final Diagnosis: acute appendicitis and  
 7 periappendicitis." What's periappendicitis?  
 8 A. Inflammation around the appendix.  
 9 Q. Okay. With regard to the gross description here  
 10 in the pathology report of the wires and staples, if you  
 11 look at that real quick, does that seem to correlate to  
 12 what you removed and sent off to pathology?  
 13 A. Yes.  
 14 Q. Okay. From review of this pathology report, was  
 15 there any indication there was any sort of infectious  
 16 material or purulence around these particular items?  
 17 A. No.  
 18 Q. In other words, based on review of this op  
 19 report, is there any way to -- do you believe that the  
 20 wires and staples were causing any sort of infectious  
 21 process?  
 22 A. No.  
 23 Q. Okay. In your opinion, whether or not she had  
 24 these metallic clips present, would Ms. Cummings have  
 25 required surgery to remove her appendix at some point?

Page 21

1 A. I'm not sure I understand your question.  
 2 Q. Was the removal of the appendix necessary during  
 3 your procedure?  
 4 A. Yes.  
 5 Q. If you look at the last page, which is Page 29,  
 6 and I think this is what you were referring to. Some of  
 7 the notes are in different formats, and I notice what we  
 8 first started looking at on the first part of the chart,  
 9 there was a different format for your office  
 10 consultation notes. Right?  
 11 A. Yes.  
 12 Q. This appears to be a visit on December 1, 2017 in  
 13 your office. Is that right?  
 14 A. Yes.  
 15 Q. Okay. And, again, this is a follow-up  
 16 postoperative visit, and at this point she was having  
 17 increased pain and chills, night sweats and some nausea.  
 18 Did you make any determination as to what was  
 19 causing the increased pain and chills or the nausea?  
 20 A. The note said I was concerned there might be an  
 21 abscess.  
 22 Q. Did you make any determination -- well, it says  
 23 the plan was to order a CT scan to look for an abscess.  
 24 Do you know if one was ever performed?  
 25 A. I know one was ordered. I do not if it was



Page 22

1 performed.  
 2 Q. This was the last time you saw Ms. Cummings in  
 3 your office?  
 4 A. To my knowledge, yes.  
 5 Q. And, again, feel free to take a look at any  
 6 records you might have. Do you recall seeing that CT  
 7 scan that you had ordered, any results from that?  
 8 A. I do not.  
 9 Q. But at any rate, you had started her on Augmentin  
 10 875 b.i.d., an antibiotic. Is that true?  
 11 A. I wrote a prescription for that.  
 12 Q. Do you know if she filled that prescription?  
 13 A. I do not know.  
 14 Q. All right. Based on your review of your records  
 15 as well as your examination of Ms. Cummings, do you have  
 16 any opinion as to whether or not she will require any  
 17 future surgery related to the retained wires or clips?  
 18 A. I have no opinion since I haven't seen her.  
 19 Q. All right.  
 20 MR. MCCREED: Doctor, that's all I have.  
 21 THE WITNESS: Okay.  
 22 MR. KENNEDY: I have a few questions for  
 23 you.  
 24 ///  
 25 ///

Page 23

1 EXAMINATION  
 2 BY MR. KENNEDY:  
 3 Q. Doctor, using the same notes, going back to the  
 4 note that ends in Bates No. 002, which was your first --  
 5 I believe this was your first visit August 22nd, 2017.  
 6 Is that correct?  
 7 A. Yes.  
 8 Q. I would note that in the surgical history portion  
 9 of this note it does reference a gastric pacemaker being  
 10 implanted in 2013 and a gastric pacemaker removed in  
 11 2014. Do you see that?  
 12 A. I do.  
 13 Q. You had that history on the first visit that she  
 14 had a gastric pacemaker removed three years before,  
 15 2014. Is that correct?  
 16 A. Yes.  
 17 Q. And she was complaining on this visit and on  
 18 several visits after of left upper quadrant pain. By  
 19 using your own chest as an example, can you place your  
 20 right hand on where is the left upper quadrant?  
 21 A. The left upper quadrant of the abdomen is not the  
 22 chest. It's here.  
 23 Q. For purposes of the transcript, you put your  
 24 right hand underneath your left sternum area. The  
 25 ribcage?

Page 24

1 A. The sternum is the middle. That is the ribcage.  
 2 That's the left upper quadrant.  
 3 Q. Based on your years of experience, would someone  
 4 suffering from an appendicitis -- where is your appendix  
 5 located on the body?  
 6 A. Lower quadrant usually. Not always.  
 7 Q. Where was Ms. Cummings or Ms. Ragoletti's  
 8 appendix located?  
 9 A. Right lower quadrant.  
 10 Q. Is that the normal case?  
 11 A. It is typical, yes.  
 12 Q. Based on your experience, would pain in the  
 13 appendix be felt -- which is in the right lower quadrant  
 14 of the abdomen or near the pelvis, would that be felt in  
 15 the left upper quadrant area? In other words, would you  
 16 have pain complaints from an appendicitis issue in your  
 17 left upper quadrant area?  
 18 MR. MCCREED: Objection. Incomplete  
 19 hypothetical, lacks foundation.  
 20 BY MR. KENNEDY:  
 21 Q. If you understand what I'm saying.  
 22 A. Every appendicitis case is different. Pain is  
 23 felt differently by every person. It's difficult to say  
 24 where they will locate their pain with appendicitis.  
 25 Q. Okay. What's your experience on an appendix, as

Page 25

1 far as it being inflamed and, in this case, ruptured?  
 2 Is there a time frame from start to finish -- in other  
 3 words, can you walk around for years with an inflamed  
 4 appendix?  
 5 A. In general, no.  
 6 Q. Do you have any understanding as to the time  
 7 span, duration of an appendix that becomes inflamed and  
 8 then ruptures?  
 9 A. Every patient is different, but I would say it's  
 10 a matter of days.  
 11 Q. In the history of this case, as we know from your  
 12 records, she came to you August 2017 complaining of  
 13 complaints -- complaining of pain in her upper left  
 14 quadrant, and she told you about some wires and clips  
 15 she wanted to be removed. Is that correct?  
 16 A. Yes.  
 17 Q. And then this proceeded forward with an actual  
 18 plan of voluntary surgery on her part to have you remove  
 19 the surgical clips and wires that she believed were on  
 20 her stomach. Is that correct?  
 21 A. No. I would attempt to.  
 22 Q. Attempt to remove them. Because until you opened  
 23 her up, basically you didn't know whether they were  
 24 implanted in the stomach? You had to actually look at  
 25 it. Is that correct?

Page 26	Page 28
<p>1 A. Correct.</p> <p>2 Q. While she was there at Southern Hills Hospital on</p> <p>3 October 30th, is that when this issue arose --</p> <p>4 A. She came into the emergency room with increased</p> <p>5 pain, to my understanding.</p> <p>6 Q. Okay. All right.</p> <p>7 A. I was called because of my previous relationship</p> <p>8 with her.</p> <p>9 Q. So you had already -- before being notified of</p> <p>10 this potential appendectomy procedure --</p> <p>11 A. There was no potential appendectomy procedure.</p> <p>12 It was a diagnostic laparoscopy.</p> <p>13 Q. Was that surgery originally planned just to look</p> <p>14 at the issue of the wires or was it planned because of</p> <p>15 complaints with the appendix issue?</p> <p>16 A. The surgery was to be performed because she came</p> <p>17 in to the emergency room with increased pain.</p> <p>18 Q. Okay. All right. And so when the surgery was</p> <p>19 conducted and she was opened up, you essentially handled</p> <p>20 two matters at the same time: You handled the</p> <p>21 appendectomy, and you handled the issue with the wires</p> <p>22 as you described in your report. Is that correct?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. Now, I know you were asked by counsel</p> <p>25 about her complaints of pain to you on the previous</p>	<p>1 body?</p> <p>2 MR. KENNEDY: Objection. Incomplete.</p> <p>3 Hypothetical, lacks foundation, assumes facts.</p> <p>4 Go ahead.</p> <p>5 A. Your question is?</p> <p>6 BY MR. KENNEDY:</p> <p>7 Q. Very broad question, but leaving clips -- in this</p> <p>8 case, as you found out, there were clips and wire, some</p> <p>9 of them partially embedded in the stomach lining. Is</p> <p>10 that something that's very common, that you would see --</p> <p>11 something like that for the removal of a gastric</p> <p>12 stimulator?</p> <p>13 MR. KENNEDY: Save objections.</p> <p>14 A. I do not know the process. You're asking</p> <p>15 specifically about gastric pacemakers or in general do</p> <p>16 people leave metal inside the abdomen?</p> <p>17 BY MR. KENNEDY:</p> <p>18 Q. I guess that's two questions. First of all, for</p> <p>19 some clarity, you have no history of installing or</p> <p>20 removing gastric pacemakers. Is that true?</p> <p>21 A. No, sir.</p> <p>22 Q. Okay. I'll leave it alone.</p> <p>23 MR. KENNEDY: Almost done.</p> <p>24 BY MR. KENNEDY:</p> <p>25 Q. Would you consider the treatment that you</p>
Page 27	Page 29
<p>1 visits, the ones she had in August and earlier in</p> <p>2 October with you. Would you agree, based on your</p> <p>3 experience, that pain complaints are generally</p> <p>4 subjective to the patient?</p> <p>5 A. Yes.</p> <p>6 Q. I mean, are there often objective findings of</p> <p>7 pain? Is that something that as a medical professional</p> <p>8 you can objectively find or see pain in a patient?</p> <p>9 A. Pain is very variable.</p> <p>10 Q. Patient to patient. Is that fair to say?</p> <p>11 A. Correct.</p> <p>12 Q. It is something that -- in other words, what may</p> <p>13 hurt someone may not hurt someone else. Is that fair to</p> <p>14 say?</p> <p>15 A. Right.</p> <p>16 Q. Okay. I'm not sure if counsel asked you: Had</p> <p>17 you had any previous patients or procedures where you</p> <p>18 had to remove clips or wires from someone's organ or</p> <p>19 body area?</p> <p>20 A. I have removed smaller foreign bodies before.</p> <p>21 Yes.</p> <p>22 Q. Are leaving things of this type, the clips and</p> <p>23 wires -- I'm using very general terms -- is that</p> <p>24 something that can be common in the medical community?</p> <p>25 Is that something that can be commonly left inside of a</p>	<p>1 rendered for Mrs. Rugoletti as reasonable and necessary</p> <p>2 and appropriate for the surgical treatment you provided</p> <p>3 back in October 2017?</p> <p>4 A. Yes.</p> <p>5 Q. Would you consider that your billing for that</p> <p>6 procedure was reasonable and customary and appropriate</p> <p>7 for the procedure?</p> <p>8 A. I haven't reviewed the billing.</p> <p>9 Q. Do you have any reason to doubt the</p> <p>10 appropriateness of your billing?</p> <p>11 A. I have no reason to doubt the appropriateness of</p> <p>12 my billing.</p> <p>13 Q. Do you know off the top of your head how much was</p> <p>14 billed for surgical fees?</p> <p>15 A. I have not reviewed the billing.</p> <p>16 Q. Would your charges be separate from Southern</p> <p>17 Hills Hospital charges?</p> <p>18 A. Yes.</p> <p>19 Q. Do you know whether or not your office has</p> <p>20 produced your own individual bills in this case?</p> <p>21 A. I have not reviewed the billing.</p> <p>22 Q. Okay. That's fine.</p> <p>23 MR. KENNEDY: That's all. Thank you.</p> <p>24 MR. ALBRECHT: No more questions.</p> <p>25 (Exhibit D was marked.)</p>

Page 30

(Proceedings concluded at 10:23 a.m.)

Page 31

CERTIFICATE OF REPORTER

STATE OF NEVADA )

I, do:

COUNTY OF CLARK )

I, KELE R. SMITH, a Certified Court Reporter in Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of STEPHEN HORSELY, M.D., commencing on Wednesday, March 14, 2018, at 9:45 a.m.

That prior to being deposed, the witness was by me duly sworn to testify to the truth, that I thereafter transcribed my said shorthand notes into typewriting, and that the typewritten transcript is a complete, true, and accurate transcription of said shorthand notes and that witness viewed review and correction of the transcript.

I further certify that I am not a relative or employee or counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand and my office in the County of Clark, State of Nevada, this 24th day of March, 2018.

KELE R. SMITH, My CCR #602, CA #04 #19035