IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ALVAREZ VENTURA, *Appellant*, vs. **JOHN H. GANSER, M.D. LIC #9279; GOMEZ KOZAR; AND MCELREATH AND SMITH, A PROFESSIONAL CORPORATION,** *Respondents*.	No.: **81850**

APPEAL FROM
ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE
SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY, STATE OF NEVADA
HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE

*****

APPELLANT'S OPENING BRIEF

Signed: June 1, 2021

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

David Alvarez Ventura – a natural person	Plaintiff-Appellant
Neal S. Krokosky of Caesars Enterprise Services, LLC	Counsel for Plaintiff-Appellant

Though not specifically required, Caesars Enterprise Services, LLC is a limited liability company with two members, CEOC, LLC and Caesars Resort Collection, LLC. CEOC, LLC is a limited liability company with a single member,

Caesars Resort Collection, LLC, a limited liability company with a single member, Caesars Growth Partners, LLC, a limited liability company with a single member, Caesars Holdings, Inc., a corporation owned by Caesars Entertainment, Inc. No "parent" corporation owns Caesars Entertainment, Inc. Presently, no publicly held company owns 10% or more of the stock issued by Caesars Entertainment, Inc.

Signed: June 1, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

"A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order . . . ." NRAP 3A(a). "A party is 'aggrieved' within the meaning of NRAP 3A(a) 'when either a personal right or right of property is adversely and substantially affected' by a district court's ruling." *Valley Bank v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (citation omitted).

On September 4, 2020, the district court entered an order dismissing this matter without prejudice and without leave to amend. (J.App.091-J.App.097.)[1] On September 8, 2020, counsel for the defendants-respondents, John H. Ganser M.D. and Gomez, Kozar, McElreath and Smith, a Professional Corporation (individually, "Gomez;" collectively with Ganser, "G&G"),[2] served a Notice of Entry of Order of the dismissal. (J.App.098-J.App.106.) Accordingly, the plaintiff-appellant, David Alvarez Ventura, was permitted to file a notice of appeal on or before October 8, 2020. *See* NRAP 4(a)(1).

On September 24, 2020, Ventura filed a timely notice of appeal. (J.App.107-J.App.108.) Although the district court claimed to dismiss the matter "without

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[1] "J.App.__" refers to page numbers of the Joint Appendix filed herewith.

[2] The caption in this appeal currently reads: "JOHN H. GANSER, M.D. LIC #9279; GOMEZ KOZAR; AND MCELREATH AND SMITH, A PROFESSIONAL CORPORATION." The second semicolon suggests that there are three defendants-respondents. In fact, there are only two. The Court may want to correct the caption to read: "JOHN H. GANSER M.D. LIC #9279; GOMEZ, KOZAR, MCELREATH AND SMITH, A PROFESSIONAL CORPORATION."

prejudice," the effect of its order – in which it concluded that Ventura's complaint was fatally deficient because it did not include an expert affidavit and, separately, because it prohibited Ventura from filing an amended complaint – was a dismissal *with* prejudice. *See Valley Bank*, 110 Nev. at 445, 874 P.2d at 733 (citation omitted) ("This court determines the finality of an order or judgment by looking to what the order or judgment actually *does*, not what it is called.") Therefore, the dismissal is an appealable order. *See* NRAP 3A(b)(1). *Cf. Bergenfield v. BAC Home Loans Servicing, LP*, 131 Nev. 683, 686, 354 P.3d 1282, 1284 (2015) (italics added) ("a district court order dismissing a complaint *with* leave to amend is *not* final and appealable").

ROUTING STATEMENT

The Supreme Court should decide this appeal. Each issue is "a question of statewide public importance . . . ." NRAP 17(a)(12). Moreover, at least one of the issues – the first issue – presents an opportunity for the Court to discuss Nevada Rules of Professional Conduct 3.3(a)(1)-(2) using the unfortunate events that occurred in the district court to underscore the importance of those rules. *See id.*[3] Finally, the second and third issues may be considered "question[s] of first impression . . . ." *Id.* at 17(a)(11) (alteration in brackets).

[3] This "case" does not "involv[e] attorney admission, suspension, discipline, disability, reinstatement, [or] resignation." NRAP 17(a)(4) (alterations in brackets). However, the Court has reminded – and should remind – a litigant of "its obligation to disclose to a tribunal legal authority in the controlling jurisdiction known by the [litigant] to be directly adverse to its position and not disclosed by opposing counsel." *Archanian v. State*, 122 Nev. 1019, 1039-40, 145 P.3d 1008, 1023 (2006) (alteration in brackets) (citing RPC 3.3(a)(2))).

STATEMENT OF ISSUES

Issue No. 1: In this retained object lawsuit brought pursuant to NRS 41A.100(1), did the district court error in dismissing the Complaint for want of an expert affidavit, considering that the Court has held "that the expert affidavit requirement in NRS 41A.071 *does not apply* to a res ipsa loquitur case under NRS 41A.100(1)[?]" *Szydel v. Markman*, 121 Nev. 453, 461, 117 P.3d 200, 205 (2005) (italics added) (alteration in brackets).[4]

Issue No. 2: Did the district court error in dismissing the Complaint under NRCP 12(b)(5) based on unstated, unsupported assumptions about surgery and human anatomy?

Issue No. 3: Did the district court error in denying Ventura leave to amend based on its (mistaken) belief that there were "inconsistencies in Plaintiff's allegations" (J.App.095), considering it was obligated to "freely give leave when justice so requires[?]" NRCP 15(a)(2) (alteration in brackets).

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[4] It is unclear whether this issue should be argued under NRCP 12(b)(1) or NRCP 12(b)(5). *Cf. Peck v. Zipf*, 133 Nev. 890, 892-93, 407 P.3d 775, 778 (2017) (reviewing a district court's grant of a defendant's motion for judgment on the pleadings under NRCP 12(c), due to a plaintiff's failure to attach an expert affidavit, using the standard for a motion to dismiss under NRCP 12(b)(5)).

STATEMENT OF THE CASE

Ventura filed this lawsuit against G&G because they unintentionally left an object in him after performing surgery on him. (J.App.001-J.App.019.) G&G filed a motion to dismiss "pursuant to NRCP 12(b)(5) and NRS 41A.071 . . . ." (J.App.032.) Ventura filed a response. (J.App.065-J.App.076.) G&G filed a reply. (J.App.077-J.App.087.) Ultimately, the district court entered an order dismissing this matter without prejudice and without leave to amend. (J.App.091-J.App.097.) Ventura appeals the dismissal. (J.App.107-J.App.108.)

STATEMENT OF FACTS

I. Ventura alleged that G&G unintentionally left an object in him after performing surgery on him.

On October 24, 2016, G&G performed surgery on Ventura. (J.App.002-J.App.003, ¶3.) In this lawsuit, Ventura alleged that G&G performed surgery on him and unintentionally left an object in him after that surgery:

> 1) . . . David Alvarez Ventura . . . was injured by M.D. John H. Ganser, and a company that is named, Gomez, Kozar, McElreath and Smith a professional corporation, doing business as Western Surgical Group. That defendants injured plaintiff by *leaving surgical instruments within him* that caused extreme pain and suffering, additional surgery was needed to remove part of the instrument to relieve some pain, and additional scarring.
>
> 2) That plaintiff was reasonably diligent in seeking the source of his pain but that *a surgical instrument that Dr. Ganser had left in him* and then concealed . . . caused injury by professional negligence by the provider of health care, to the plaintiff. . . .
>
> 3) On 10-24-16, Surgeon John H. Ganser, M.D., along with surgical staff: Curtis J. Smith, P.A., Circulator: Julie A. Bloos, R.N., Relief Circulator: Marjorie Rowson, R.N. performed laparoscopic surgery on David Alvarez Ventura (herein after Ventura). *During this surgery the above named defendants left a foreign metal object in Ventura's body* . . . .[5]

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[5] The surgery was a "Robotic Heller Esophagomyotomy, Anterior Fundoplication." (J.App.003, ¶5, referring to J.App.013-J.App.014.) On March 19, 2020, Ganser authenticated the medical record containing this description. (J.App.025, ¶4) ("Exhibit 2 to Plaintiff's Complaint . . . is a copy of a page from Mr. Ventura's medical chart . . . .") Yet, five months later, the lawyers for G&G suggested that the medical record – previously authenticated by their client – may not pertain to Ventura. (J.App.078, lines 25-27) (citation omitted) ("The word 'allegedly' is used because the operative report attached to plaintiff's Complaint for the procedure performed by Dr. Ganser identifies a patient other than plaintiff.")

> 9) . . . Thus the doctrin [sic] of Res Ipsa Loquitur applies as the aforementioned defendants [sic] actions, error or ommission [sic] upon which this action is based was consealed [sic] from plaintiff. . . .
>
> 15) *Dr. Ganser left foreign* [sic] *metal object in Ventura's body* . . . .
>
> 16) Defendants, Gomez, Kozar, McElreath and Smith, a professional corporation, doing business as Western Surgical Group, did on 10-24-16 failed [sic] in their duty to antisipate [sic] or guard against injury to plaintiff by failing to use reasonable care to supervise the conduct of Dr. Ganser *and* make sure all surgical instruments were accounted for during and after Ventura's surgery. This resulted in the actual and reasonable [sic] probable causes to which plaintiff's injuries, pain, suffering, and additional surgery was needed [sic].

(J.App.001-J.App.008, ¶¶1-3, 9, 15-16) (italics added) (internal footnote added).

After the surgery, Ventura underwent several imaging studies. *See infra.*

"On 9-15-17 a radiology report by Dr. Kim Adamson was done and the findings were 'unremarkable.'" (J.App.003, ¶6.) However, "On 11-30-18 Dr. Leon Jackson M.D., NNCC issued a report that discovered a foreign body; a linear metal object that inside [sic] Ventura's body[.]" (J.App.004, ¶7) (alteration in brackets).[6] Ultimately, "this foreign metal object that was left in Ventura's body during surgery was removed by Dr. Peter A. Caravella during a later surgery on 3-28-19." (J.App.002-J.App.003, ¶3.) Ventura alleged that the object was "a hypodermic needle in contradiction to Dr. Jackson's report dated 11-30-18." (J.App.006, ¶11.)

[6] Dr. Jackson stated: "'This seems unlikely to be related to the patient's history of previous esophageal surgery.'" (J.App.004, ¶7.)

Based on these events, Ventura sued G&G for damages. (J.App.001-J.App.019.) G&G moved to dismiss the Complaint. (J.App.032-J.App.036.)

II. G&G filed a motion to dismiss because Ventura did not attach an expert affidavit to the Complaint.

On June 8, 2020, G&G filed a motion to dismiss "pursuant to NRCP 12(b)(5) and NRS 41A.071 . . . ." (J.App.032, line 25.) They made *one* argument: "Although Plaintiff's Complaint purports to allege a claim for medical malpractice, it is unaccompanied by a medical expert's affidavit, as mandated by NRS 41A.071. and must be dismissed without prejudice and without leave to amend." (J.App.033, lines 7-10.) Throughout their opening brief, G&G told the district court – without a single reference to a specific allegation in the Complaint – that the affidavit requirement was "mandatory" (J.App.033, line 20), "absolutely mandatory" (J.App.034, line 14), and "require[d]." (J.App.035, line 9) (alteration in brackets).[7]

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[7] G&G did not inform the district court that the Court had previously-rejected their oversimplified classification-dictates-requirement approach in other matters. In the Complaint, Ventura referred to "Count One, Medical Malpractice" and "Count Two, Medical Malpractice." (J.App.007-J.App.008.) However, those headings did not automatically trigger the expert affidavit requirement. *See Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 642-43, 403 P.3d 1280, 1285 (2017). Even if G&G intended their argument to be slightly more complex, first equating "medical malpractice" with "professional negligence," then suggesting that a plaintiff pursuing a claim for "professional negligence" must attach an expert affidavit to the Complaint, the Court previously rejected this one-size-fits-all approach. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Rep. 39, 466 P.3d 1263, 1268 n.4 (2020). Notably, G&G did not cite *Estate of Curtis* in their opening brief. *Cf.* NRPC 3.3(a)(1).

G&G made this argument without specifically alerting the district court to *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200, not once referencing that decision in their opening brief. (J.App.032-J.App.036.)[8]

On August 5, 2020, Ventura filed Plaintiff's Opposition to Defendants' Motion to Dismiss. (J.App.065-J.App.076.)[9] Ventura argued: "The facts as alleged in Plaintiff's verified transferred complaint clearly allege facts, which if proven

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[8] Presumably, counsel for G&G knew about *Szydel* when they filed their opening brief. *Cf.* NRPC 3.3(a)(1)-(2). In their opening brief, G&G cited *Zohar v. Zbiegien*, 130 Nev. 733, 334 P.3d 402 (2014) (J.App.034, lines 19-20), which referred to *Szydel*; they also cited *Szymborski*, 133 Nev. 638, 403 P.3d 1280. (J.App.035, lines 1-2.) In *Szymborski*, the Court cited *Szydel* for the following: "an NRS 41A.071 medical expert affidavit is not required when the claim is for one of the res ipsa loquitur circumstances set forth in NRS 41A.100[.]" 133 Nev. at 643, 403 P.3d at 1285 (alteration in brackets). In fact, counsel for G&G cited *Szydel* in a different case, more than a year earlier. *See* Respondent's Answering Brief 22-23, 30, *Jaramillo v. Ramos*, Supreme Court of the State of Nevada, Case No. 77385 (available at https://nvcourts.gov/Supreme/How_Do_I/Find_a_Case/). The Court issued its decision in that case (*Jaramillo v. Ramos*, 136 Nev. Adv. Rep. 17, 460 P.3d 460 (2020)) approximately two months before G&G filed their motion to dismiss in this case. In *Jaramillo*, the Court reiterated: "we have held that NRS 41A.100(1) expressly excuses a plaintiff from the requirement to submit an expert affidavit with a medical malpractice complaint." 136 Nev. Adv. Rep. 17, 460 P.3d at 463 (citing *Szydel*, 121 Nev. at 459, 117 P.3d at 204).

[9] The district court provided Ventura extra time to serve his opposition. (J.App.059-J.App.064.) In its Order Granting Plaintiff's Request for Extension of Time and Holding in Abeyance Defendant's Motion to Dismiss and Motion to Defer Consideration of Normal Prison Operations, the district court recognized the existence of "'enumerated res ipsa loquitur exceptions' to the expert affidavit requirement of NRS 41A.071." (J.App.063) (citation omitted). Even then, counsel for G&G failed to immediately apprise the district court of legal authorities they (presumably) knew about, which were "directly adverse to the position" they took on behalf of G&G in their opening brief. Nev. R. of Prof'l Conduct 3.3(a)(1)-(2).

true, entitle Plaintiff to relief under applicable law and the ambit of res ipsa loquitur exemptions codified at NRS §§ 41A.071 and 41A.100(1)(A)." (J.App.066.) Thereafter, Ventura discussed the surgery he underwent and the "foreign body negligently abandoned in his person during the course of surgical procedures[,]" all as alleged in the Complaint. (J.App.068) (alteration in brackets).

On August 13, 2020, G&G filed their Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss. (J.App.077-J.App.087.) Notwithstanding the district court's explicit recognition of exceptions to the expert affidavit requirement (J.App.063), G&G continued to argue that the Complaint was deficient because Ventura did not attach an expert affidavit to it:

> Nevada law required plaintiff to attach a supporting expert affidavit to his Complaint in compliance with the affidavit requirement of NRS 41A.071. Plaintiff cannot excuse his non-compliance by making a conclusory and unsupported allegation that 'surgical instruments' were left in his body during the 2016 surgery, especially when the exhibits attached to his Complaint contradict his unsupported assertions. For this reason alone, Dr. Ganser's motion should be granted.
>
> Moreover, plaintiff's *res ipsa loquitur* theory is not even arguably applicable to Dr. Ganser's medical practice, Western Surgical Group, against whom plaintiff has alleged negligent supervision, but for which he has failed to provide a supporting medical expert affidavit or any basis for applying *res ipsa loquitur.*

(J.App.079, line 18-J.App.080, line 6) (citation omitted).[10] In fact, G&G went so far as to argue: "there are no facts in the Complaint that implicate the *res ipsa loquitur* doctrine, especially as to Western Surgical Group." (J.App.081, lines 19-21.) Thereafter, G&G argued, *for the first time*, why, in their opinion, "the very documents cited in, and attached to, his Complaint belie the argument in plaintiff's opposition." (J.App.081, lines 21-22.)

On September 4, 2020, the district court entered its Order Granting Motion to Dismiss Without Prejudice. (J.App.091-J.App.097.) The district court explained:

> The *res ipsa loquitur* exception requires '*some evidence*' of one of the factual predicates enumerated in NRS 41A.100(1). *Johnson v. Egtedar*, 112 Nev. 428, 433-34 (1996). Although the Court does not consider matters outside the pleadings when ruling a [sic] motion to dismiss, Plaintiff's pleadings fail to logically support a viable claim under the *res ipsa loquitur* exception.

(J.App.093.) Echoing the argument G&G *first made in their reply*, the district court continued:

> For instance, Plaintiff alleges that a surgical instrument was left in his body by during [sic] a surgery performed by Defendant's [sic] on October 24, 2016. Plaintiff further alleges that an ultrasound performed on September 15, 2017, failed to identify the instrument. A subsequent ultrasound, conducted on November 30, 2018, identified the surgical instrument for the first time. However, the radiology report of ultrasound states that '[it] seems unlikely to be related to the patient[']s history of previous esophageal surgery [referring the [sic] October 24, 2016 surgery].' These contradictions suggest Plaintiff's allegations are unsupported and insufficient to meet the *res ipsa*

[10] G&G later acknowledged that the Complaint could be interpreted to include a claim for vicarious liability against Gomez. (J.App.086, lines 1-3.)

> *loquitur* exception. Unable to meet the *res ipsa loquitur* exception, Plaintiff is subject to the affidavit requirement. Having not provided the required affidavit, this Court must dismiss Plaintiff's complaint without prejudice. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304 (2006).
>
> Furthermore, even in the light most favorable to Plaintiff, the complaint and exhibits' contradictions render Plaintiff's allegations as mere conclusory and based on unreasonable inferences.

(J.App.093-J.App.094) (alterations in brackets; some brackets in original) (internal footnotes omitted) (footnote omitted). Notably, the district court did not address Ventura's allegation that: "The cause was not known until the surgery performed by Dr. Caravella on 3-28-19 when it appeared to be a hypodermic needle in contradiction to Dr. Jackson's report dated 11-30-18. (J.App.006, ¶11.)

Thereafter, the district court denied Ventura leave to file an amended complaint. (J.App.094-J.App.095.) The district court denied leave based on its interpretation of *Washoe Medical Center*, 122 Nev. 1298, 148 P.3d 790, and because, in its view, "no viable amendment would relieve Plaintiff from the affidavit requirement." (J.App.094.) On the latter point, the district court – ostensibly accepting the argument that G&G *first made in their reply* – explained:

> Plaintiff reaches his allegations through the unreasonable inference that Defendants' malpractice is responsible for the presence of the instrument which; (1) was removed from an entirely different area of Plaintiff's body than Defendants' operated on;[11] (2) failed to appear

[11] Although not argued below, possibly due to the district court's order prohibiting amendment, it is interesting that the district court relied on this (supposed) fact when granting G&G's motion to dismiss. *Cf.* NRS 41A.100(1)(d) (providing a

> on an ultrasound performed a year after the surgery; (3) the ultrasound that first identified the instrument occurred two years after the alleged malpractice, and one year after the first ultrasound which failed to identify the instrument; and (4) the report of the second ultrasound states that the presence of the instrument is unlikely related to the surgery performed by Defendants. Because of this unreasonable inference to reach the allegations, the Court finds that any attempt to amend the complaint to demonstrate that an affidavit is not required would be futile.

(J.App.094-J.App.095) (internal footnote added). The district court concluded:

> In sum, the inconsistencies in Plaintiff's allegations fail to invoke NRS 41A.100(1)'s medical expert affidavit exception and overcome Defendants' *Motion to Dismiss*. Moreover, adherence to Nevada Supreme Court precedent, the Court finds the plaintiff is not entitled to leave to amend. The Court further exercises its discretion to find that an amendment demonstrating why there is not a need for an affidavit would be futile.

(J.App.095.) Ventura appeals. (J.App.107-J.App.108.)

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statutory *res ipsa* exception when: "An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto . . . .")

SUMMARY OF THE ARGUMENT

Ventura sued G&G for unintentionally leaving an object in him after surgery they performed on him. Under *Szydel*, 121 Nev. 453, 117 P.3d 200, and its progeny, Ventura did not need to attach an expert affidavit to the Complaint. The district court erred when it dismissed the Complaint for want of an expert affidavit. The district court also erred when it made unstated, unsubstantiated assumptions about surgery and human anatomy before concluding that Ventura's allegations were legally insufficient. The district court compounded its errors by denying Ventura leave to amend. The Court should reverse the district court's order of dismissal and reinstate this matter for further proceedings.

ARGUMENT

I. Ventura did not need to attach an expert affidavit to the Complaint.

"If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit" that satisfies certain conditions. NRS 41A.071. "[U]nder NRS 41A.071, a complaint filed without a supporting medical expert affidavit is void ab initio and must be dismissed. Because a void complaint does not legally exist, it cannot be amended. Therefore . . . an NRS 41A.071 defect cannot be cured through amendment." *Washoe Med. Ctr.*, 122 Nev. at 1300-01, 148 P.3d at 792 (alteration in brackets).

There is an exception to the affidavit requirement. "[R]equiring an expert affidavit in a res ipsa case under NRS 41A.100(1) is unnecessary." *Szydel*, 121 Nev. at 459, 117 P.3d at 205 (alteration in brackets). In other words, a plaintiff need not attach an expert affidavit if he is seeking damages because: "A foreign substance other than medication or a prosthetic device was unintentionally left within [his] body . . . following surgery." NRS 41A.100(1)(a) (alteration in brackets). Though unclear, presumably, the Court performs a *de novo* review of the allegations to determine whether a plaintiff was required to attach an expert affidavit to the complaint. *See Peck*, 133 Nev. at 892-93, 407 P.3d at 778.

Under *Szydel* and its progeny,[12] Ventura was not required to attach an expert affidavit to the Complaint. In the Complaint, Ventura alleged that G&G performed surgery on him (J.App.002-J.App.003, ¶3) and unintentionally left an object in him after that surgery. (J.App.001-J.App.008, ¶¶1-3, 9, 15-16.) This is exactly what Ventura highlighted in his response to G&G's motion to dismiss. (J.App.067-J.App.068.) It is the precise scenario NRS 41A.100(1) contemplates. *See Johnson*, 112 Nev. at 433-34, 915 P.2d 271, 274 (1996) ("Under NRS 41A.100 . . . the presumption automatically applies where any of the enumerated factual circumstances are present. In regard to these factual predicates, the legislature has, in effect, already determined that they ordinarily do not occur in the absence of negligence.") Accordingly, the district court erred in ruling that an expert affidavit was required. Therefore, the Court should reverse the dismissal.

II. The district court erred in dismissing the Complaint based on an argument G&G first made in their reply.

G&G did not discuss a single, specific allegation in the Complaint – or argue that the allegations in the Complaint were legally insufficient – until the reply they

[12] The Court has consistently cited the above-referenced rule from *Szydel*. *See Estate of Curtis*, 136 Nev. Adv. Rep. 39, 466 P.3d at 1264-65, 1268 n.4; *Cummings v. Barber*, 136 Nev. Adv. Rep. 18, 460 P.3d 963, 967 (2020); *Jaramillo*, 136 Nev. Adv. Rep. 17, 460 P.3d at 463; *Peck*, 133 Nev. at 892-93, 407 P.3d at 778, *Szymborski*, 133 Nev. at 643, 403 P.3d at 1285.

filed in support of their motion to dismiss. In their reply, *for the first time*, G&G argued, in essence: it just does not make sense. (J.App.081-J.App.085.)

The district court should not have considered G&G's new argument. In dismissing the case without providing Ventura an opportunity to be heard, the district court violated Ventura's right to due process and ratified an unmanageable approach to motions. *See J.D. Constr., Inc. v. IBEX Int'l Group, LLC*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010) (italics added) (citation omitted) ("Due process is satisfied by giving both parties 'a *meaningful* opportunity to present their case.'") *See also Sicor, Inc. v. Sacks*, 127 Nev. 896, 902, 266 P.3d 618, 622 (2011) (citation omitted) ("In this civil action, appellants' right to a 'fair trial in a fair tribunal' is likewise protected by the Due Process Clause.") Not only was Ventura deprived of an "opportunity to address [G&G's] contention with specificity[,]" *Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998) (alterations in brackets), given that the district court did not hold a hearing or permit a sur-reply, Ventura was unable to address G&G's new argument at all. *See* WDCR 12 (a "reply" is the final brief; oral argument is at the discretion of court). *See generally SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 135 Nev. Adv. Rep. 45, 449 P.3d 461, 466 n.3 (2019) (declining to address new argument made in reply).[13]

[13] Whether the district court acted appropriately in dismissing this lawsuit, based on an argument G&G first made in their reply, without providing Ventura an opportunity to be heard regarding that argument, presents a question of law that

Of course, even if the Court considers the substance of the district court's decision, the Court should reverse the dismissal because it was based on an erroneous understanding of NRCP 12(b)(5). Under NRCP 12(b)(5), a district court may only dismiss a Complaint if the allegations do not "state a claim upon which relief can be granted . . . ." The Court reviews a district court's application of this rule *de novo*. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

G&G's motion to dismiss "under NRCP 12(b)(5) 'is subject to a rigorous standard of review on appeal.'" *Id.* at 227, 181 P.3d at 672. (citation omitted). The Court "recognize[s] all factual allegations in [Ventura's] complaint as true and draws all inferences in [his] favor." *Id.* at 228, 181 P.3d at 672 (alterations in brackets) (citation omitted). The Court should reverse the district court's grant of dismissal unless "it appears beyond a doubt that [Ventura] could prove no set of facts, which, if true, would entitle [him] to relief." *Id.* (alterations in brackets) (citations omitted). *See also Lee v. Va*, 2008 U.S. Dist. LEXIS 138136, *3-4 (D. Nev. Mar. 28, 2008) (refusing to dismiss poorly-formed counts in the complaint because the statutory *res ipsa* exception to the expert affidavit requirement in NRS

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presumably implicates the Court's power of plenary review. *See Levin v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). The "court has the inherent authority to make procedural rules that remedy systematic unfairness in the way that judicial proceedings are conducted." *State v. Second Judicial Dist. Court*, 134 Nev. Adv. Rep. 94, 431 P.3d 47, 51 (2018) (citation omitted).

41A.071 may apply). If a court grants a dismissal under NRCP 12(b)(5), typically, the dismissal should be without prejudice. *See Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 873 n.5, 8 P.3d 837, 839 n.5 (2000).

G&G's argument fails under scrutiny. Initially, the Court should note that G&G did not frame its argument in terms of a specific claim, much less any element(s) of that/those claim(s). Rather, G&G seemingly argued that – because the exhibits attached to the Complaint supposedly "contradicted" the allegations in the Complaint – what Ventura alleged simply could not be true. (J.App.81-J.App.85.) In the Complaint, Ventura alleged:

- October 24, 2016 — G&G performed surgery on Ventura, after which they unintentionally left an object in him. (J.App.001-J.App.008, ¶¶1-3, 9, 15-16.)
- September 15, 2017 — Dr. Adamson performed imaging and the findings were "'unremarkable.'" (J.App.003, ¶6.)
- November 30, 2018 — Dr. Jackson performed imaging and discovered "a linear metal object that inside [sic] Ventura's body." (J.App.004, ¶7.) Dr. Jackson stated: "'This seems unlikely to be related to the patient's history of previous esophageal surgery.'" (J.App.004, ¶7.)

- March 28, 2019 — Dr. Caravella removed the object. (J.App.002-J.App.003, ¶3.) Ventura alleged that the object was "a hypodermic needle[,]" which would be "in contradiction to Dr. Jackson's report dated 11-30-18." (J.App.006, ¶11) (alteration in brackets).

Stated differently: Ventura alleged that G&G unintentionally left an object in him after surgery on October 24, 2016, the object was discovered on November 30, 2018, and the object was removed on March 28, 2019.

The above allegations satisfy NRS 41A.100(1)(a). *Cf. Jaramillo*, 136 Nev. Adv. Rep. 17, 460 P.2d at 463 ("In her complaint, she pleaded facts entitling her to NRS 41A.100(1)(a)'s res ipsa loquitur theory of negligence. Specifically, she alleged that Dr. Ramos unintentionally left a wire in Maria's left breast following surgery.") Nonetheless, the district court got hung-up on the imaging performed on September 15, 2017 (no object identified) and Dr. Jackson's statement on November 30, 2018 ("unlikely" relationship between surgery and object), concluding that these two "facts" meant that Ventura's claim was "unsupported and insufficient to meet the *res ipsa loquitur* exception." (J.App.093.)

The district court's "reasoning," such as it was, demonstrates that the district court did not take the allegations (and inferences) in the light most favorable to

Ventura. The district court's decision suffers from at least four material shortcomings. First, the district court necessarily assumed there were no other facts that could be alleged relating the surgery to the object. Second, the district court necessarily assumed that the imaging on September 15, 2017 would have revealed the object that Dr. Caravella removed on March 28, 2019. Third, the district court improperly weighed the evidentiary value of Dr. Jackson's statement on November 30, 2018 and assumed that Dr. Jackson's use of "unlikely" meant that Dr. Jackson would maintain that opinion today, that Dr. Jackson's statement could not be disproven,[14] and that Dr. Jackson's statement carried more weight than Ventura's later allegation that Dr. Jackson's statement was incorrect. Ventura specifically alleged that the object was "a hypodermic needle[,]" which would be "in contradiction to Dr. Jackson's report dated 11-30-18." (J.App.006, ¶11) (alteration in brackets). Finally, even if the Court accepts the premise that the surgery did not implicate the portion of Ventura's body in which the object was discovered (which, itself, may have implicated NRS 41A.100(1)(d)), the district court erred in assuming that the alleged object could not move throughout Ventura's body from the time of the surgery to the time at which Dr. Jackson identified it.

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[14] *Cf. Dutt v. Kremp*, 111 Nev. 567, 574, 894 P.2d 354, 359 (1995) ("It has never been the law that every piece of evidence necessary to prevail at trial must be available to the attorney before suit is filed. That is on the of functions of discovery."), overruled on other grounds, *LaMantia v. Redisi*, 118 Nev. 27, 30-31, 38 P.3d 877, 880 (2002).

There was no legal or factual basis for the district court to make the assumptions it did, which resulted in its erroneous conclusion that the Complaint contained "contradictions" that rendered it legally deficient. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 293-95, 357 P.3d 966, 976-77 (Ct. App. 2015) (a "contradiction" usually creates an issue of fact for a factfinder to resolve). *See generally Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993) (citations omitted) ("Arguments of counsel are not evidence and do not establish the facts of the case.") To the contrary, the district court should have heeded the Court's teaching in *Born v. Eisenman*, wherein the Court reversed the district court's ruling that the statutory *res ipsa* doctrine did not apply, which it made during a pre-trial conference, "because the issue is largely determined on the facts presented and a plaintiff should be given the opportunity of eliciting evidence to satisfy one of the five factual predicates contained in NRS 41A.100." 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998). The court's decision in *Hendricks v. A Z Women's Center*, denying a defendant's motion for summary judgment, is also persuasive:

> The presence of the foreign object establishes a presumption of negligence. Defendant has failed to rebut this presumption. *Since there is more than one possible explanation of the origin of the foreign substance, there remains an unresolved issue of fact relevant to this matter.* Identification of the perpetrator of any medical negligence associated with the plastic tip is a question of fact for the jury. At this juncture, *it is sufficient to note that Boyd had the opportunity to leave the tip inside Hendricks.*

2006 U.S. Dist. LEXIS 114893, *9-10 (D. Nev. May 2, 2006) (italics added). And, in fact, the Court has held that availability of imaging evidence – showing an object that remained after the surgery – was sufficient to satisfy NRS 41A.100(1)(a). *See Jaramillo*, 130 Nev. Adv. Rep. 17, 460 P.2d at 463.

III. The district court erred in denying Ventura leave to amend.

a. The rule in *Washoe Medical Center* does not apply.

The district court ruled that Ventura was required to attach an expert affidavit to the Complaint and, because he did not do so, he could not amend under *Washoe Medical Center*, 122 Nev. 1298, 148 P.3d 790. (J.App.094.) As discussed above, Ventura was not required to file an expert affidavit. *See supra* at pp. 11-12. Therefore, the district court's denial of leave on this ground was an abuse of discretion. *See Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013).

b. The district court erroneously concluded that any amendment would be futile.

"The court should freely give leave when justice so requires." NRCP 15(a)(2). As the Court has explained: "While it is true that the granting of leave to amend a complaint is discretionary with the trial court, it is also true that leave to amend should be permitted when no prejudice to the defendant will result and when justice so requires it." *Fisher v. Executive Fund Life Ins. Co.*, 88 Nev. 704, 705-06, 504 P.2d 700, 702 (1972) (internal citation omitted) (citation omitted).

"Moreover, when a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) (citation omitted).

None of the reasons provided by the district court justified its decision to deny Ventura an opportunity to amend.[15] According to the district court,

> Plaintiff reaches his allegations through the unreasonable inference that Defendants' malpractice is responsible for the presence of the instrument which; (1) was removed from an entirely different area of Plaintiff's body than Defendants' operated on; (2) failed to appear on an ultrasound performed a year after the surgery; (3) the ultrasound that first identified the instrument occurred two years after the alleged malpractice, and one year after the first ultrasound which failed to identify the instrument; and (4) the report of the second ultrasound states that the presence of the instrument is unlikely related to the surgery performed by Defendants. Because of this unreasonable inference to reach the allegations, the Court finds that any attempt to amend the complaint to demonstrate that an affidavit is not required would be futile.

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[15] G&G first challenged the sufficiency of the allegations in the reply that they filed in support of their motion to dismiss. Ventura had no reason to believe that the Court would entertain that new argument, much less that the district court would base its decision on that new argument. Moreover, the insufficiency argument was untenable under the case law discussed herein. Ventura did not have reason to, much less an opportunity to, request leave before the district court erroneously dismissed this case. *Cf. Adamson v. Bowker*, 85 Nev. 115, 120-22, 450 P.2d 796, 800-01 (1969) (italics added) (affirming denial of "leave" for plaintiff to "*further* amend his pleadings") *and Mills v. Continental Parking Corp.*, 86 Nev. 724, 726, 475 P.2d 673, 674 (1970) ("Although plaintiffs-appellants assert that the district court erred in refusing leave to amend their complaint, the record fails to show leave of court to amend was requested. NRCP 15(a). This claim of error, therefore, must fail.") *with Thiess v. Rapaport*, 57 Nev. 434, 444-45, 66 P.2d 1000, 1004 (1937) (amendment should have been allowed as a matter of course; the denial of an opportunity to amend was prejudicial error).

(J.App.094-J.App.095.) As argued *supra*, the district court's reasoning is based on unstated, unsubstantiated assumptions.

The district court seemingly, if only implicitly, acknowledged that Ventura adequately alleged that there was a metal object in his body. Thus, the only issue is whether the district court appropriately ruled that Ventura's allegations regarding the source of the metal were insufficient and, if so, could not be fixed.

It is difficult to understand how the district court reasoned to its conclusion on the amendment issue. The sole source of the object – which Ventura repeatedly alleged through the Complaint – was the surgery G&G performed. (J.App.001-J.App.008, ¶¶1-3, 9, 15-16.) Nonetheless, if the district court desired more details, the district court should have given Ventura an opportunity to remedy the perceived deficiencies in the allegations. For example, if the district court had afforded Ventura an opportunity to amend, Ventura could have provided additional details regarding the nature of the surgery and his scars, potentially eliminating the district court's concern about the location of the object. Ventura also could have alleged that the surgery performed by G&G was his first surgery and the only possible source of the object. Simply, the district court should have permitted Ventura an opportunity to allege additional facts, further linking the surgery that G&G performed and the metal object in his body, rather than making a decision based on its unstated, unsubstantiated assumptions about surgery and human

anatomy. *Cf. Zohar*, 130 Nev. at 739, 334 P.2d at 406 (rejecting the argument that an affidavit was deficient because it did not identify allegedly negligent actors by name because "[s]uch a harsh interpretation would undoubtedly deny many litigants the opportunity to recover against negligent parties when the medical records available to the plaintiff do not identify a negligent actor by name – especially in res ipsa loquitur cases in which the parties are simply unable to identify the negligent actor"). There was simply no reason for the district court to deny Ventura an opportunity to amend; it was error to do so. *See Fisher*, 88 Nev. at 705-06, 504 P.2d at 702 ("We believe that under the posture of the instant case, such leave to amend should have been granted to Fisher. Executive Fund had not filed an answer; no discovery proceedings or trial preparation had been made. We fail to find any cause for not allowing Fisher an opportunity to amend her complaint . . . .") *See generally Orcutt v. Miller*, 95 Nev. 408, 412, 595 P.2d 1191, 1193 (Nev. 1979) (In accepting a tardy expert affidavit, the court explained: "A claimant's day in court and right to trial on the merits are too vital to be lost the [sic] result of circumstances such as those presently before us, especially in light of the preliminary, yet harsh, nature of the summary judgment herein imposed and the failure on the part of the respondent to demonstrate any prejudice.") Therefore, the Court should reverse the dismissal and reinstate this matter for further proceedings.

CONCLUSION

The district court erred in dismissing the Complaint without leave to amend. Based on the foregoing, the Court should reverse the dismissal and order the district court to reinstate the Complaint for further proceedings.

Signed: June 1, 2021

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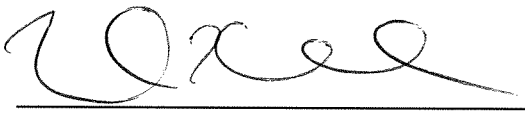
CERTIFICATE OF COMPLIANCE (BASED ON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced font using Microsoft Word in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 6,298 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Signed: June 1, 2021



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(B) and NRAP 25(c)(1)(E), on June 1, 2021, the undersigned mailed and electronically filed (through the Supreme Court of Nevada's eFlex system) the attached Appellant's Opening Brief, thereby providing a copy to the following individuals:

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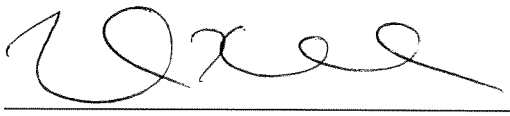

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