IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE;
THE HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE
DISTRICT COURT CASE NO. CV20-00866

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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 so the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of respondent's stock: None.

2. Names of all law firms whose attorneys have appeared for respondent (including proceedings in the district court) who are expected to appear in this court:

LEMONS GRUNDY & EISENBERG

3. If using a pseudonym, the litigant's true name: None.

DATED: August 2, 2021

/s/ Alice Campos Mercado

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JURISDICTIONAL STATEMENT

This is an appeal from an Order dismissing pro se appellant David Ventura's Complaint against respondents John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith, a Professional Corporation for failure to comply with NRS 41A.071 and his claim was not subject to the *res ipsa loquitur* exception in NRS 41A.100(1)(a). *J.App. 091-097*. The dismissal order disposed of all claims and all parties and is thus a final judgment pursuant to NRAP 3A(b)(1). Notice of Entry was served on September 8, 2020. *J.App. 098-100*. Appellant filed a timely Notice of Appeal on September 24, 2020, in accordance with NRAP 4(a)(1). *J.App. 107*.

ROUTING STATEMENT

This is an appeal from an order of dismissal pursuant to NRS 41A.071 in a medical negligence case. This appeal does not raise a principal issue of first impression, as similar issues have previously been addressed by this Court. *See, e.g.*, *Peck v. Zipf*, 133 Nev. 890, 407 P.3d 775 (2017). This appeal does, however, raise as a principal issue a question of statewide importance in professional negligence actions. *See* NRAP 17(a)(12). This appeal involves the applicability of NRS 41A.071 and NRS 41A.100(1)(a) in an action filed against health care providers without an expert affidavit based on the belated assertion that the *res ipsa loquitur* statute exempted plaintiff from complying with NRS 41A.071.[1]

Accordingly, the issues in this case are properly heard and decided by the Supreme Court.

[1] Contrary to appellant's assertion, this case does not implicate the Nevada Rules of Professional Conduct, as will be shown herein. Thus, NRAP 17(a)(4) is inapplicable for routing purposes.

I.

STATEMENT OF ISSUES

Whether the district court correctly determined that the res ipsa loquitur statute, NRS 41A.100(1)(a), was inapplicable and thus properly dismissed this professional negligence action without prejudice and without leave to amend because the complaint was not supported by an expert affidavit as required by NRS 41A.071.

II.

STATEMENT OF THE CASE[2]

On January 13, 2020, plaintiff/appellant DAVID ALVAREZ VENTURA filed a "Civil Complaint," purportedly pursuant to NRS 41.0322 ("Actions by persons in custody of the Nevada Department of Corrections to recover compensation for loss or injury"). The complaint names JOHN GANSER, M.D., and his medical practice, GOMEZ, KOZAR, MCELREATH AND SMITH, A PROFESSIONAL CORPORATION, DBA

[2] The Court permitted, but did not require, the parties to cite the Record on Appeal ("ROA") transmitted by the district court clerk. For ease of reference, a single-volume Joint Appendix has been prepared. This brief will cite to the Joint Appendix, which will be cited as "*J.App*." followed by the page number, except to the extent a document from the Record on Appeal is not contained in the appendix. To the extent cross-referencing is necessary, the pages of the appendix contain the volume and page number of the Record on Appeal. Appellant's Opening Brief, filed on June 1, 2021, will be cited as "*AOB*."

WESTERN SURGICAL GROUP (collectively, "DR. GANSER"); it is based upon a surgery Dr. Ganser performed on October 24, 2016. *J.App. 001-02.*

Ventura filed this action in the Eighth Judicial District Court. *J.App. 001*. On June 5, 2020, upon Dr. Ganser's motion for change of venue, the action was transferred to the Second Judicial District Court. *2 ROA 1-2.* The complaint alleged claims for medical malpractice. *J.App. 007-008*. The complaint was filed with copies of Ventura's medical records, but it was not accompanied by an expert affidavit as required by NRS 41A.071. *J.App. 012-019.*

Accordingly, on June 8, 2020, after the case was transferred to the Second Judicial District Court, Dr. Ganser filed a motion to dismiss for failure to comply with NRS 41A.071. *J.App. 032-035*. On June 22, 2020, Ventura filed *Plaintiff's Motion Seeking that Court Defer Consideration of Defendant's Motion to Dismiss Pending Restoration of Normal Prison Operations*. *J.App. 037-038.* Dr. Ganser opposed the motion because it sought an indefinite extension for Ventura to respond to Dr. Ganser's motion to dismiss, which would unreasonably and indefinitely delay the adjudication of this matter. *J.App. 040-041*. Ventura replied on July 16, 2020, indicating that a 45-day extension would be reasonable. *J.App. 056-075*. On July 31, 2020, the district court granted Ventura's motion and granted him a 45-day extension to respond to Dr. Ganser's motion to dismiss. *J. App. 059-063*.

On August 5, 2020, Ventura filed an opposition to Dr. Ganser's motion to dismiss. *J.App. 065*. Dr. Ganser filed his reply on August 13, 2020. *J.App. 077*.

On September 4, 2020, the district court entered an *Order Granting Motion to Dismiss without Prejudice*. *J.App. 091-095*. Notice of entry of the order granting Dr. Ganser's motion to dismiss was served on September 8, 2020. *J.App. 098-100*. The *Notice of Appeal* was filed on September 24, 2020. *J.App.107*.

III.

STATEMENT OF FACTS

In describing the underlying medical facts, Appellant's Statement of Facts simply quotes excerpts of the pro se complaint, while ignoring the contents of the medical records attached as exhibits to the complaint. *AOB 2-3*. By so doing, appellant is omitting *all* of the facts that were before the district court. This omission deprives this court of critical facts on which the district court relied in rendering its findings regarding the inapplicability of the res ipsa loquitur statute and in concluding that dismissal was required by NRS 41A.071 because no expert affidavit was filed in support of Ventura's medical malpractice claims. *J.App. 093-95*. Because of their import to the issues in this appeal, respondents Statement of Facts will include a discussion of the contents of the medical records attached to the complaint.

A. MEDICAL FACTS

The first page of the "Civil Complaint" reflects that appellant, David Alvarez Ventura, an inmate at High Desert State Prison ("HDSP") in Indian Springs, Nevada, filed this professional negligence action pro se on January 13, 2020. *J.App.001*. The records proffered by Ventura reflect that in October 2016, he was an incarcerated 36-year-old male who had progressive dysphagia over the last three years. Extensive outpatient workup revealed achalasia. *J.App.070.* The complaint alleges that Ventura underwent surgery on October 24, 2016, by respondent, John Ganser, M.D., at Renown Regional Medical Center.[3] *J.App. 002, ¶3; J.App. 014*. The procedure was a DaVinci assisted robotic Heller esophagomyotomy with anterior fundoplication.[4] *J.App. 014, 070.* The surgery was laparoscopic (as compared to open surgery).

[3] Appellant evidently takes issue with the word "allegedly, attributing some nefarious motive to respondent's counsel. *AOB 2, fn. 5*. As appellant acknowledges, however, the word "allegedly" was used because the patient's name in the 2016 operative report attached to the complaint is not Ventura's. *J.App.014; 2 ROA 69.* Ventura subsequently filed an "errata" explaining that he was admitted under a pseudonym due to "security concerns." *J.App. 088; 2 ROA 184.*

[4] The Heller Myotomy is "a laparoscopic (minimally invasive) surgical procedure used to treat achalasia. Achalasia is a disorder of the esophagus that makes it hard for foods and liquids to pass into the stomach. The Heller myotomy is essentially an esophagomyotomy, the cutting the esophageal sphincter muscle, performed laparoscopically." www.surgery.ucsf.edu.

J.App. 002, ¶*3.* The operative report attached to the Complaint reflects that there were no complications during the surgery. *J.App. 014.*

After the procedure, Ventura was placed in the general surgical unit in stable condition. His vital signs were stable, and he was afebrile (without fever). He was tolerating clear liquids well without dysphasia, regurgitation, or reflux. He was ambulatory, his abdomen was soft and his wounds were clear. He was discharged on or about October 26, 2016, with after-care and follow-up instructions. *J.App. 070.*

Ventura alleges that a foreign metal object was left in his body during the 2016 laparoscopic surgery. *J.App. 002,* ¶*3.* Rather than support his allegations, the medical records attached as exhibits to his complaint refute that "surgical instruments" were left in his body after the 2016 surgery. *J.App. 012, 016 and 018.*

Specifically, the complaint and "Plaintiff's Exhibit 3" thereto reflect that Ventura underwent an ultrasound of his abdomen on September 15, 2017 -- nearly a year after the subject 2016 surgery -- to address right upper quadrant pain. The imaging was found to be "unremarkable," *i.e.*, it showed no abnormality. *J.App. 003,* ¶*6; J.App. 016.*

The complaint and "Plaintiff's Exhibit 4" thereto reflect that on November 30, 2018 – more than two years after the 2016 surgery – Ventura underwent an imaging study of the pelvis area. *J.App. 018.* That study showed a "linear foreign body" around the left iliac crest (hip bone); the imaging report indicated that the foreign

body was *not* attributed to the 2016 surgery. *J.App. 018.* Quite to the contrary, the 2018 study states that the foreign body "does **not** appear to represent a hypodermic needle" and "seems **unlikely** to be related to the patient's history of previous esophageal surgery." *J.App. 018 (emphasis added); see also J.App. 004, ¶7.*

"Plaintiff's Exhibit 1" reflects that on March 28, 2019 – two and a half years after the October 2016 laparoscopic surgery -- Ventura underwent surgery at Desert Springs Hospital Medical Center, during which most of the foreign object was removed. The operative report of that surgery reflects that nothing was seen in the upper abdomen and hiatus region. Upon going into the lower abdomen, the physician identified "what appeared to be a straight metallic object in his left hip area near the anterior superior iliac spine". *J.App. 012 (emphasis added).*

In short, none of the medical records attached to the complaint indicated a foreign object in or around the surgical site and, most importantly, none attribute the foreign object that was seen in 2018 to the October 24, 2016 laparoscopic surgery.

B. PROCEDURAL FACTS

1. The Complaint and Exhibits Thereto

Ventura filed this professional negligence action on January 13, 2020 – more than three years after the October 24, 2016 surgery. *J.App. 001.* His complaint alleged "professional negligence" and asserted two claims for "medical malpractice." *J.App. 002, ¶2; 007-08.* The first claim was against Dr. Ganser for

allegedly leaving a foreign object in Ventura's body. *J.App. 007.* The second claim was against Dr. Ganser's medical group for alleged negligent supervision of Dr. Ganser during the surgery. *J.App. 008.*

The complaint was filed with copies of medical records, but it was not accompanied by an expert affidavit as required by NRS 41A.071. *J.App. 012-019.* Ventura evidently recognized that an expert affidavit was required by NRS 41A.071. *J.App. 005, ¶9.* He did not allege, however, that an affidavit was not required because of the res ipsa loquitur exception; instead, he alleged he could not obtain an affidavit because "defendant intentionally withheld information" and "this withholding could have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *J.App. 005, ¶9.* As can be seen from the complaint, Ventura recognized his claim was filed long after the statute of limitations had expired so he spent considerable time trying to establish that he was "reasonably diligent," and that the limitations period was tolled because of alleged concealment. *J.App. 002-006, ¶¶2-11.* It was in the context of arguing that the limitations period was tolled that Ventura mentioned "the doctrine of res ipsa loquitur." *J.App. 005, ¶9 ("Thus, the doctrine of res ipsa loquitur applies to the aforementioned defendants [sic] actions, error or ommission [sic] upon which this action is based was consealed [sic] from plaintiff.")*

Dr. Ganser and Gomez, Kozar, McElreath and Smith, PC, were served with the summons and complaint on March 13, 2020. *J.App. 030-31*. The case was transferred to the Second Judicial District Court on June 5, 2020. *2 ROA 1-2.*

2. Defendants' Motion to Dismiss under NRS 41A.071

On June 8, 2020, on the authority of *Washoe Medical Center v. District Court*, 122 Nev. 1298, 148 P.3d 790 (2006), defendants filed a motion to dismiss for failure to comply with NRS 41A.071. *J.App. 032-035*. The motion showed that the complaint alleged claims for medical malpractice but it was filed without the expert affidavit required by NRS 41A.071. *J.App. 034-035.*

While not an issue raised below, Ventura contends that the motion did not cite to specific allegations in the complaint; Ventura is also critical of the use of the words "mandatory," "absolutely mandatory," and "required" in the motion in reference to the affidavit requirement. *AOB 4.* Although the basis or import of Ventura's criticisms are unclear, Dr. Ganser will address each of them.

First, no rule requires references to "specific allegations" in the complaint where, as here, the allegations throughout the complaint (not just the headings) plainly assert claims for medical malpractice – and only medical malpractice. *J.App. 002-08.* In this regard, this case is unlike *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 403 P.3d 1280 (2017), in which various claims, including non-medical negligence claims, were asserted. Still, defendants' motion

argued that to the extent the allegations were an attempt to state other causes of action, "the overall object of the action, and of the Complaint, is medical malpractice and thus requires an expert affidavit." *J.App. 034-35, citing Szymborski.*

Next, Ventura's criticism of defendants' use of the words "mandatory," "absolutely mandatory," and "required" omits that defendants' motion to dismiss cited to *Washoe Medical Center v. District Court,* 122 Nev. 1298, 148 P.3d 790 (2006) in support of their argument. *J.App. 034.* Appellant's argument evinces his lack of understanding that a medical expert affidavit is *required* and statutorily *mandated* in professional negligence cases (with some exceptions not applicable here).[5] As plainly stated by this court: "NRS 41A.071 states that a complaint filed without an expert affidavit *shall* be dismissed. . . . "[S]hall is mandatory and does not denote judicial discretion." *Washoe Medical Center,* 122 Nev. at 1303, 148 P.3d at 793 (italics in original; underline added).[6]

[5] Exceptions to the affidavit requirement are discussed in *Szymborski* and later in *Estate of Curtis v. South Las Vegas Medical Investors, LLC,* 136 Nev. 350, 466 P.3d 1263 (2020). Parenthetically, Appellant's criticism that Dr. Ganser did not cite *Estate of Curtis* in the motion [*AOB 4, fn. 7*] overlooks that the motion to dismiss was filed before *Estate of Curtis* was decided, as will be discussed more fully below in response to appellant's spurious allegations of ethical violations.

[6] Appellant is also critical that defendants equate "medical malpractice" with "professional negligence." *AOB 4, fn. 7.* Appellant's criticism is baffling, especially since Ventura's complaint seems to equate both terms, *J.App. 002, ¶2 and J.App. 007-08,* and because this court has recognized that professional negligence and

Appellant's final attack on defendants' motion to dismiss (and on respondents' counsel) argues that the motion did not cite *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005), implying that respondents' attorneys had an ethical duty to do so. *AOB 5, fn. 8, citing Nevada Rules of Professional Conduct ("RPC") 3.3(a)(1)-(2).* This criticism is unfounded. As will be discussed more fully in the argument section, a lawyer is duty bound to cite legal authority in the controlling jurisdiction *known* to be directly adverse to the client *and not disclosed* by the opposing attorney. *See* RPC 3.3(a)(2) (emphasis added). Here, *Szydel* was disclosed by the plaintiff *and* was cited in Dr. Ganser's reply. As importantly, *Szydel* is not known or even believed to be adverse to respondents. As discussed in Dr. Ganser's reply in support of the motion to dismiss, *Szydel* is completely distinguishable from this case, and thus is not adverse to Dr. Ganser. *See J.App. 084.* Moreover, whether the res ipsa loquitur doctrine applies is an issue in this appeal.

3. Plaintiff's Motion to Defer Ruling on Defendants' Motion to Dismiss, Defendants' Opposition, and the District Court's Order Thereon

On June 22, 2020, instead of filing a timely opposition to the motion to dismiss, Ventura made a motion to defer consideration of the motion to dismiss until "normal prison operations" resumed. *J.App. 037.* Citing to his status as "a state

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medical malpractice are used interchangeably. *Tam v. District Court,* 131 Nev. 792, 802, 358 P.3d 234, 241 (2015).

prisoner confined within the NDOC" and the COVID-19 pandemic, Ventura argued that he lacked access to the prison law library and thus could not conduct research or draft his opposition to the motion to dismiss. *J.App. 038.*

While Dr. Ganser did not object to a reasonable extension, he opposed Ventura's motion for an indefinite extension to file an opposition. *J.App. 041-43.* Dr. Ganser pointed out that Ventura could not justify an indefinite extension to file his opposition to Dr. Ganser's motion to dismiss based on COVID because he had filed this action in January 2020 -- before the pandemic was declared – so he knew or should have known of the expert requirement when he filed his complaint. Dr. Ganser's opposition also showed that an indefinite delay was unnecessary because his motion to dismiss was based on the long-standing statutory mandate of NRS 41A.071, which had been quoted in the motion to dismiss and which had been interpreted by this court years earlier, in *Peck v. Zipf*, 133 Nev. 890, 407 P.3d 775 (2017), to apply to incarcerated plaintiffs. *J.App. 042.* A copy of the *Peck* case accompanied Dr. Ganser's opposition. *J.App. 047-55.* Ventura replied that a 45-day extension would be reasonable. *J.App. 056-075*.

On July 31, 2020, the district court granted Ventura's motion to defer consideration of Dr. Ganser's motion to dismiss and granted him a 45-day extension to respond to the motion. *J.App. 059-063*.

In describing the district court's order, appellant asserts that the district court "recognized the existence of 'enumerated res ipsa loquitur exceptions' to the expert affidavit requirement of NRS 41A.071" and again accuses defense counsel of "fail[ing] 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." *AOB 5, fn. 9, citing RPC 3.3(a)(1)-(2).* Appellant's assertion is specious on both counts.

First, appellant mischaracterizes the district court's statement and its context. The district court did not "recognize[] the existence" of the res ipsa exceptions as applicable to this action, as appellant asserts. Instead, the district court, in explaining why it was granting the 45-day extension, wrote:

> "Moreover, the Court recognizes the potential for further arguments as *Peck v. Zipf*, cited by parties, mentions 'enumerated res ipsa loquitur exceptions' to the expert affidavit requirement of NRS 41A.071." Because this argument remains marginally unexplored, the Court finds that its decision to grant Ventura an additional 45-days to file his opposition is consistent with NRCP 6 and the Nevada Supreme Court's long recognized and 'basic underlying policy to have each case decided upon its merits."

J.App. 063 (footnote and citations omitted).

Secondly, the district court's statement did not impose an ethical duty upon defense counsel to "immediately apprise" the district court of legal authorities that were "adverse" to defendants' position. As shown above, *Szydel* was not controlling

legal authority, but even if it were, *Szydel* was discussed in Ventura's opposition and in Dr. Ganser's reply in support of his motion to dismiss, as was *Estate of Curtis.* Both documents were filed within weeks of the district court's order and before it ruled on the motion to dismiss. *See J.App. 068 (plaintiff's opposition) and J.App. 084-085 (defendants' reply).* Indeed, the district court cited and distinguished *Jaramillo v. Ramos* – a more recent res ipsa case which cited *Szydel* – and thus was evidently aware of *Szydel* and the legal principles stated therein. *J.App. 093, fn. 2, citing Jaramillo v. Ramos, 136 Nev. Adv. Op. 17 (2020).*

4. Ventura's Opposition to Defendants' Motion to Dismiss

Mere days after the district court had granted the 45-day extension, Ventura filed an opposition to Dr. Ganser's motion to dismiss. *J.App. 065*. Ventura's opposition was accompanied by several pages of medical records and a drawing of a torso. *J.App. 069-74.* Although Dr. Ganser's motion to dismiss had been made pursuant to NRCP 12(b)(5), Ventura's opposition argued that defendants were "not entitled to judgment on the pleadings." *J.App. 066*.

Ventura proceeded to argue, for the first time, that he was exempt from NRS 41A.071's affidavit requirement because of the "res ipsa loquitur exemption codified at NRS §§41A.071 and 41A.100(1)(A)." *J.App. 066, 068,* citing *Szydel v. Markman, supra*. Instead of attempting to show that the res ipsa loquitur statute applied, however, the bulk of Ventura's opposition to defendants' motion to dismiss

was devoted to distinguishing his case from the *Peck* case, which had little factual application to his own case, as he readily acknowledged. *J.App. 066-68*.

5. Defendants' Reply in Support of the Motion to Dismiss

Dr. Ganser filed his reply on August 13, 2020. *J.App. 077*. The reply addressed issues and arguments Ventura had raised in his opposition.

For example, Dr. Ganser's reply addressed the medical facts to respond to the factual assertions in Ventura's opposition and to refute his arguments regarding the application of the res ipsa loquitur statute to avoid the affidavit requirement. *J.App. 078-080*. Dr. Ganser's reply next showed that Ventura's opposition employed the wrong legal standards and had not even mentioned, much less addressed, the legal standards for motions to dismiss for failure to comply with NRS 41A.071, as set forth in *Washoe Medical Center* and its progeny. *J.App. 080.*

Next, and of greatest significance to this appeal, Dr. Ganser's reply showed Ventura's opposition was impermissibly advancing the new contention that he was exempt from the affidavit requirement of NRS 41A.071 because of the foreign substance exception in NRS 41A.100(1)(a). *J.App. 082-83*. The reply further showed that not only was this newly asserted theory not alleged in the complaint, but the complaint also lacked allegations sufficient to show Ventura was entitled to relief under NRS 41A.100(1)(a)'s res ipsa loquitur theory. *J.App. 083*. Dr. Ganser showed that the complaint and the medical records attached to it refuted the

allegation that a foreign object was left in plaintiff's body during the 2016 surgery, and instead indicated that the foreign object observed in the 2018 imaging study was unrelated to the 2016 surgery. *J.App. 083.* Dr. Ganser's reply thus established that because the complaint refuted the existence of the facts giving rise to the presumption in NRS 41A.100(1)(a), Ventura could not avoid compliance with the expert affidavit requirement of NRS 41A.07 through the application of NRS 41A.100(1)(a)'s res ipsa doctrine.[7] *J.App. 083.*

Next, Dr. Ganser's reply addressed Ventura's argument in which he sought to distinguish *Peck* to avoid the application of NRS 41A.071. The reply pointed out the irrelevance of Ventura's argument, noting that Dr. Ganser did not even rely on *Peck* in his motion to dismiss. *J.App. 084.*

Dr. Ganser then replied to Ventura's citation to *Szydel*, showing that the facts of *Szydel* were distinguishable from the facts of this case. Further referencing *Szydel*, Dr. Ganser's reply quoted the court's instruction 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," and that

[7]Ventura's contention that these arguments were made "for the first time" in defendants' reply disregards that Dr. Ganser was responding to an issue Ventura had raised for the first time in opposition to the motion to dismiss. As previously stated, Ventura's complaint did not allege he was exempt from the affidavit requirement because of the res ipsa loquitur exception in NRS 41A.100(a)(1); res ipsa was referenced in the complaint in relation to the statute of limitations. *J.App. 005, ¶9.*

"the plaintiff must present facts and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e)." *J.App. 084, quoting Szydel,* 121 Nev. at 460, 117 P.3d at 205. Dr. Ganser proceeded to show that Ventura, unlike *Szydel,* had not alleged any facts to meet the *prima facie* requirements of any provision of the res ipsa loquitur statute because the complaint and its exhibits did not contain facts which implicated NRS 41A.100(1)(a), but instead showed that the foreign object observed in the November 2018 imaging study did not appear to represent a hypodermic needle and that the foreign object was not likely related to the 2016 surgery. *J.App. 084, citing Exhibit 4 to the complaint (J.App. 014).*

The final argument raised in Dr. Ganser's reply demonstrated that Ventura's negligent supervision claim against Western Surgical Group, which was effectively a vicarious liability claim, required dismissal because Ventura had not complied with NRS 41A.071's affidavit requirement and the res ipsa loquitur doctrine did not apply to that claim. Relying on a then-newly issued Nevada Supreme Court opinion, defendants' reply showed that claims against health care providers for negligent supervision that are premised on medical care require compliance with NRS 41A.071. *J.App. 085, citing Estate of Curtis, supra*. Notably, *Estate of Curtis* was decided on July 9, 2020 – *after* Dr. Ganser's Motion to Dismiss was filed but before the filing of his reply.

6. The District Court's Order Granting the Motion to Dismiss Without Prejudice and Without Leave to Amend

On September 4, 2020, the district court entered an *Order Granting Motion to Dismiss without Prejudice*. *J.App. 091-095*. Initially, the district court addressed the legal standards, noting that its task in ruling on a motion to dismiss is "to determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." *J.App. 092, citing Edgar v. Wagner*, 101 Nev. 226, 227 (1985). While recognizing that it must accept the allegations in the complaint as true and draw every fair intendment in favor of the plaintiff, the district court noted that it need not "blindly accept conclusory allegations," nor was it "required to accept as true allegations contradicted by the exhibits attached to the complaint." *J.App. 092, citing Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

The district court then proceeded to discuss the parties' substantive arguments. It observed that defendants sought dismissal under NRS 41A.071 because plaintiff had failed to include an expert affidavit with his complaint, and plaintiff's counterargument was that he was exempt from the affidavit requirement because his claim fell under the res ipsa loquitur exception of NRS 41A.100(1)(a). *J.App. 092-93*. Citing to the complaint and its exhibits, the district court found that plaintiff's allegations were unsupported and insufficient to meet the res ipsa loquitur

exception to NRS 41A.071, so the complaint was subject to NRS 41A.071's affidavit requirement. And, because plaintiff failed to provide the required affidavit, the district court concluded that it must dismiss the complaint without prejudice. *J.App. 093.* The district court's ruling was supported by the following legal reasoning:

> The *res ipsa loquitor* 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 on a motion to dismiss, Plaintiff's pleadings fail to logically support a viable claim under the *res ipsa loquitor* exception. For instance, Plaintiff alleges that a surgical instrument was left in his body by *[sic]* during 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 October 24, 2016 surgery]." These contradictions suggest Plaintiff's allegations are unsupported and insufficient to meet the *res ipsa loquitor* exception. Unable to meet the *res ipsa loquitor* exception, Plaintiff is subject to the affidavit requirements. [Footnote omitted]. 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). [Footnote omitted.]

J.App. 093. The district court continued that "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."[8] *J.App. 094.*

[8] In a footnote thereto, the district court observed that it "may consider exhibits attached to the pleading and incorporated by reference when ruling on a motion to

Appellant criticizes the district court for not addressing 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.'" *AOB 8, citing J.App. 006, ¶11.* Appellant's criticism is unfounded because the quoted paragraph had no bearing on the affidavit issue. Rather, Ventura's allegation regarding "cause" was made in the context of the statute of limitations and the discovery rule. *J.App. 006, ¶11.* As the statute of limitations issue was *not* before the district court, it had no reason to address this allegation.

Turning to the issue of leave to amend, the district court found that the plaintiff was not entitled to leave to amend under the authority of *Washoe Medical Center* ("A complaint that does not comply with NRS 41A.071 is void and must be dismissed; no amendment is permitted"). *J.App. 094.* The district court further found that amendment would be futile because "no viable amendment would relieve Plaintiff from the affidavit requirement." *J.App. 094.* The district court 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'*[sic]* 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

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dismiss without transposing the motion into a motion for summary judgment." *J.App. 094, fn. 4 (case citations omitted).*

> 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. 094-95. Finding that the inconsistencies in plaintiff's allegations failed to invoke NRS 41A.100(1)'s medical expert affidavit exception and thus failed to overcome Defendants' Motion to Dismiss, the district court granted defendants' Motion to Dismiss and dismissed the case without prejudice. *J.App. 095.*

IV.

SUMMARY OF ARGUMENT

This professional negligence action was properly dismissed without prejudice and without leave to amend on the authority of NRS 41A.071 and *Washoe Medical Center* and its progeny. Ventura's belated invocation of the res ipsa loquitur statute to avoid the affidavit requirement of NRS 41A.071 was correctly rejected by the district court upon finding that Ventura's allegations were insufficient to meet the res ipsa loquitur exception to the expert affidavit requirement. The district court's finding was supported by the evidence before it, which consisted of the complaint and the exhibits thereto. Because Ventura's own pleading contradicted his conclusory allegation that Dr. Ganser left a surgical instrument in his body during the October 2016 surgery, the district court correctly found that Ventura's pleadings

failed to logically support a viable claim under the res ipsa loquitur doctrine. Having so found, the district court was also correct in finding that Ventura's complaint was subject to the requirements of NRS 41A.071 and, because he failed to comply with the statutory requirement, dismissal was mandated.

The district court was also correct in concluding that Ventura was not entitled to leave to amend under the authority of *Washoe Medical Center*, *supra*, which unambiguously directs that a complaint which does not comply with NRS 41A.071 is void ab initio and must therefore be dismissed without leave to amend.

Appellant's Opening Brief has not demonstrated error in the district court's factual findings or legal analysis. Nor has Appellant's Opening Brief shown that the district court committed reversible error in rejecting Ventura's belated attempt to invoke the statutory res ipsa loquitur doctrine to avoid compliance with NRS 41A.071, even though his exhibits contradicted his conclusory allegations about a retained object. Instead, the Opening Brief resorts to specious allegations of ethical violations by respondents' counsel and asserts arguments that are contrary to established Nevada law in professional negligence actions. Because the district court's rulings are consistent with the applicable legal standards for motions to dismiss and established Nevada precedent regarding professional negligence cases, its *Order Granting Motion to Dismiss Without Prejudice* must be affirmed.

V.

ARGUMENT

A. STANDARDS OF REVIEW

This court employs de novo review of a district court order granting an NRCP 12(b)(5) motion to dismiss, "accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Szymborski*,133 Nev. at 640, 403 P.3d at 1283, citing *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 409, 282 P.3d 727, 730 (2012) (internal quotation marks omitted). Questions of statutory construction are likewise subject to de novo review. *Peck*, 133 Nev. at 892, 407 P.3d at 778.

This court generally reviews a district court's decision denying leave to amend for an abuse of discretion; however, "futility is a question of law reviewed de novo." *Anderson v. Mandalay Corp.*, 131 Nev. 825, 832, 358 P.3d 242, 247 (2015) (citations omitted).

B. APPELLANT'S SPURIOUS ALLEGATIONS OF ETHICAL VIOLATIONS BY RESPONDENTS' COUNSEL HAVE NO PLACE IN THIS APPEAL

Preliminarily, respondents are compelled to address the spurious and baseless allegations and/or inferences in Appellant's Opening Brief that respondents' counsel have violated the Nevada Rules of Professional Conduct.

In an apparent attempt to detract from the shortcomings in appellant's position and to prejudice respondents before this court, Appellant's Opening Brief resorts to ad hominem attacks on respondents' counsel. The offensive attacks begin in appellant's Routing Statement, which asserts that this case "presents an opportunity to discuss Nevada Rules of Professional Conduct 3.3(a)(1)-(2) and that this Court "should remind" litigants of their obligation to disclose "legal authority in the controlling jurisdiction known by the [litigant] to be directly adverse to its position and not disclosed by opposing counsel." *AOB at XI, citing Archanian v. State,* 122 Nev. 1019, 1039-1040, 145 P.3d 1008, 1023 (2006).

Going beyond his less-than-subtle implications, appellant, again citing to RPC 3.3(a)(1) later asserts that respondents "did not cite *Estate of Curtis* in their opening brief [motion]," implying that they violated their ethical obligation to do so. *AOB 4, fn. 7.* Appellant repeats his spurious allegations later in the brief, asserting that respondents' counsel knew of, but failed to cite the *Szydel* case, implying that counsel sought to conceal this case from the district court. *AOB 5, fns. 8 and 9, citing* RPC 3.3(a)(1)-(2). The facts and the rules of professional conduct do not support appellant's scandalous and offensive allegations.

RPC 3.3(a)(1) provides that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

RPC 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

While baldly accusing respondents' counsel of making false statements to the court or failing to correct false statements previously made, Appellant's Opening Brief does not identify a single false statement respondents' counsel allegedly made to the district court. Appellant's scandalous rhetoric appears to be based on his misguided and uninformed belief regarding the applicability *and availability* of the cases he claims respondents failed to bring to the district court's attention.

Specifically, appellant's baseless assertion that respondents failed to cite *Estate of Curtis* in their "opening brief" (*i.e.*, motion) demonstrates his gross inattention to important details, like when the case was actually decided. Respondents' counsel did not cite *Estate of Curtis* in the motion to dismiss for a very good reason: ***Estate of Curtis*** **had not yet been decided when the motion to dismiss was filed**! Dr. Ganser's motion to dismiss was filed on June 8, 2020. *J.App. 032.* This court did not issue its opinion in *Estate of Curtis* until July 9, 2020. In his zeal to disparage respondent's counsel, appellant fails to mention that *Estate of Curtis* was discussed in defendants' reply in addressing Ventura's negligent supervision claim against Western Surgical Group. *J.App. 085-86.* The case was, therefore, brought to the district court's attention after it was decided.

Appellant's counsel repeats his spurious assertion on page 5 of Appellant's Opening Brief by asserting that respondents failed to "alert[] the district court to *Szydel v. Markman*," again suggesting that respondents' counsel were ethically obligated to do so. *AOB 5.* This assertion demonstrates a lack of understanding, or the intentional misapplication, of the Rules of Professional Conduct. Either way, the accusations are reprehensible and false.

Contrary to appellant's assertion, respondents' counsel did not violate the Nevada Rules of Professional Conduct by not citing *Szydel* in the motion to dismiss. Respondents had no duty to cite *Szydel* in the motion to dismiss because it was inapplicable to the arguments raised in the motion to dismiss the complaint. As shown in Dr. Ganser's reply, *Szydel* is distinguishable and thus inapplicable. *J.App. 084.* Because *Szydel* is not legal authority that is directly or indirectly adverse to respondents, respondents' counsel had no ethical duty to cite it in their motion to dismiss. *See* RPC 3.3(a)(2).

Moreover, *Szydel* was disclosed by <u>both parties</u> in the ensuing briefing, further demonstrating the inapplicability of RPC 3.3(a)(2). *See J.App. 068 and 084.* The record reflects that *Szydel* was discussed in Dr. Ganser's reply in in response to Ventura's argument regarding *Szydel's* applicability, showing that *Szydel* is distinguishable and thus inapplicable to Ventura's case. *J.App. 084.* This is in stark contrast to *Archanian*, in which <u>neither party</u> in a criminal case cited applicable legal

authority, prompting the court's reminder to the State of its obligation to disclose legal authority known to be adverse to its position "and not disclosed by opposing counsel." 122 Nev. at 1039-1040, 145 P.3d at 1023 (emphasis added).

In short, appellant and his counsel have absolutely no basis for accusing respondents' counsel of knowingly making false statements to the court, or knowingly concealing controlling legal authority known to be adverse to them. Appellant's scandalous, prejudicial, and reprehensible allegations should, therefore, be stricken from the Opening Brief.

C. STANDARDS APPLICABLE TO MOTION TO DISMISS UNDER NRCP 12(B)(5)[9]

"A complaint should only be dismissed for failure to state a claim if 'it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.'" *Szymborski*, 133 Nev. at 641, 403 P.3d at 1283, quoting *DeBoer*, 128 Nev. at 410, 282 P.3d at 730. "In contrast, NRS 41A.071 provides that '[i]f an action for

[9] Appellant's Opening Brief questions whether the issue of dismissal under NRS 41A.071 should be argued under NRCP 12(b)(1) as a motion for judgment on the pleadings, instead of a motion to dismiss under NRCP 12(b)(5). *AOB XII, fn. 4.* That question has been addressed by this court. In professional negligence actions, a motion to dismiss is the proper procedural vehicle by which to challenge a complaint that fails to satisfy the statutory filing prerequisites of NRS 41A.071. *See, e.g., Washoe Medical Center,* 122 Nev. at 1306 148 P.3d 795 (concluding that the district court erred in denying hospital's motion to dismiss for failure to comply with NRS 41A.071); *Szymborski,* 133 Nev. at 640, 403 P.3d at 1283 (reviewing order dismissing a medical malpractice action under NRCP 12(b)(5)). In any event, "a judgment on the pleadings is reviewed in the same manner as a dismissal under NRCP 12(b)(5)." *Peck*, 133 Nev. at 892, 407 P.3d at 778.

medical malpractice . . . is filed in the district court, the court shall dismiss the action, without prejudice, if the action is filed without a[ ] [medical expert affidavit.'" *Szymborski*, 133 Nev. at 641, 403 P.3d at 1283 (alterations in original; citation and footnote omitted).

Generally, the court may not consider matters outside the pleadings in ruling on a motion to dismiss for failure to state a claim upon which relief can be granted; however, the court may consider exhibits attached to the complaint when ruling on a motion to dismiss. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993); *see also Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (the court may consider documents outside the pleadings in reviewing a motion to dismiss if the complaint refers to the document, the document is central to plaintiff's claim, and no party questions their authenticity).

D. THE DISTRICT COURT PROPERLY DISMISSED THE ACTION FOR LACK OF AN EXPERT AFFIDAVIT BECAUSE THE RES IPSA EXCEPTION WAS INAPPLICABLE

1. The facts support the district court's determination that the res ipsa statute did not apply to excuse compliance with NRS 41A.071

NRS 41A.071 requires a district court to dismiss a plaintiff's professional negligence complaint if it is not accompanied by an expert affidavit. An exception to the affidavit requirement exists for a res ipsa loquitur claim "*where evidence is presented*" that the healthcare provider caused injury under one of the circumstances

enumerated in the statute. *See* NRS 41A.100(1) (emphasis added); *see also Johnson v. Egtedar*, 112 Nev. 428, 433, 915 P.2d 271, 274 (1996), where this court expressed that the "legislature intended NRS 41A.100 to replace, rather than supplement, the classic res ipsa loquitur formulation in medical malpractice cases *where it is factually applicable." Id.* (emphasis added).

In that vein, this court instructs 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." *Szydel,* 121 Nev. at 460, 117 P.3d at 205. In addition, "the plaintiff *must present facts and evidence* that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e)." *Id.* (emphasis added).

Ventura's contention that he did not need to attach an expert affidavit to the complaint simply because he alleged that a foreign substance was left during the 2016 surgery completely disregards the foregoing legal principles and the facts underlying this appeal. *See AOB 11-12.*

Among the facts Ventura ignores is that complaint did not even allege a cause of action under NRS 41A.100(1)(a). In fact, he did not even mention the statute. *J.App. 001-09.* While Ventura mentioned res ipsa loquitur in the complaint, he did not allege that the doctrine exempted him from complying with the affidavit requirement. He only mentioned res ipsa loquitur in reference to his statute of

limitations argument. *J.App. 005,* ¶*9.* Ventura went to great lengths to argue that the statutes of limitations of NRS 41A.097 were tolled, but not once did he allege that the res ipsa loquitur statute excused him from complying with the affidavit requirement. Instead, in furtherance of his "tolling" argument, Ventura alleged that the withholding of information "would have hindered a reasonably diligent plaintiff from procuring an expert affidavit under NRS 41A.071." *J.App. 005,* ¶*9.*

It was not until Ventura filed his opposition to Dr. Ganser's motion to dismiss that he argued NRS 41A.100(1)(a) exempted him from the affidavit requirement. *Compare J.App. 001-09 and J.App. 065-68.* The district court was not required to consider this new argument or the exhibits attached to Ventura's opposition. *See Broam v. Bogan,* 320 F.3d 1023, 1026 n. 2 (9th Cir. 2003) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (citation omitted). Yet, the district court considered Ventura's newly asserted arguments, along with the evidence before it.[10]

[10] The district court correctly observed that it "may consider exhibits attached to the pleadings and incorporated by reference when ruling on a motion to dismiss without transposing the motion into a motion for summary judgment." *J.App. 094, fn. 4, citing Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 847 and *Schmidt v. Washoe Cty.,* 123 Nev. 128, 133, [159 P.3d 1099] (2007), [*abrogated on other grounds in Buzz Stew, LLC v. City of North Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008).

Unlike Ventura's opening brief, the district court did not disregard the legal principles in *Johnson* and *Szydel* in its thorough analysis of the res ipsa statute. Applying applicable Nevada law, the district court aptly noted that the res ipsa loquitur exception to NRS 41A.071 requires "*some evidence*" of one of the factual predicates enumerated in NRS 41A.100(1). *J.App. 093, citing Johnson*, 112 Nev. at 433-34 [915 P.2d at 274]. In determining that Ventura had not presented any such evidence to support the application of NRS 41A.100(1)(a), the district court found that "Plaintiff's pleadings fail to logically support a viable claim under the *res ipsa loquitor* exception." *J.App. 093.*

Expounding on its finding, the district court compared Ventura's conclusory *allegation* that a surgical instrument was left in his body during the 2016 surgery with his contradictory allegations in the complaint and the attached exhibits. Rather than support the application NRS 41A.100(1)(a), the evidence refuted that a foreign object was left during the October 2016 surgery. *J.App. 093.* The district court's findings are supported by the record.

For instance, the district court correctly noted that Ventura had alleged that an ultrasound of his abdomen performed on September 15, 2017 failed to identify the instrument he claimed to have been left behind during the October 2016 surgery. *J.App. 093; compare J.App. 003, ¶6 and J.App. 016.* Indeed, the ultrasound report

attached as Exhibit 3 to the complaint states: "Impression: Unremarkable ultrasound of the abdomen." *J.App. 016.*

The district court next noted that a subsequent ultrasound, conducted on November 30, 2018 [two years post-surgery], identified an object for the first time, but the report of that ultrasound stated "[it] seems unlikely to be related to the patient[']s history of previous esophageal surgery [referring the October 24, 2016 surgery]." *J.App. 093; compare J.App. 004, ¶7 and J.App. 018.* Based on these undisputed contradictions in the body of the complaint and in the exhibits thereto, the district court found that "Plaintiff's allegations are unsupported and insufficient to meet the *res ipsa loquitor* exception." *J.App. 093.* The district court thus ruled:

> Unable to meet the *res ipsa loquitor* exception, Plaintiff is subject to the affidavit requirements. [Footnote omitted]. 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).

J.App. 093 (footnote omitted, discussed infra). The district court concluded that "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. 094 (footnote omitted).*

The district court's rulings are consistent with Nevada law, which requires a plaintiff to "present facts and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e)." *Szydel,* 121 Nev. at 460, 117 P.3d

at 205. No such facts or evidence were presented, either in the complaint, its exhibits, or in Ventura's opposition to Dr. Ganser's motion to dismiss. Instead, Ventura simply offered the conclusory allegation that a foreign object had been left in his body during the October 2016 laparoscopic surgery. *See J.App. 001-009*

Appellant's Opening Brief does not demonstrate reversible error in the district court's findings and conclusions. Citing only to the conclusory allegations in the complaint, Ventura simply argues that he did not need to attach an expert affidavit to the complaint "under *Szydel* and its progeny," because Ventura had alleged that "G&G performed surgery on him" and "unintentionally left an object in him after the surgery." *AOB 12.* Neither the law nor the evidence supports Ventura's position.[11]

Rather than support Ventura's overly simplistic argument, *Szydel* and the other cases listed in footnote 12 of the opening brief support the district court's order

[11] Included in the cases that purport to be "progeny" of *Szydel* are *Estate of Curtis* and *Szymborski*. *AOB 12, fn. 12*. Although both cases cite *Szydel,* neither case involves the *res ipsa loquitur* exception to NRS 41A.071. The issue in *Szymborski* was whether asserted claims were for medical malpractice, thus requiring dismissal under NRS 41A.071, or for ordinary negligence or other ostensible tort. 133 Nev. at 643, 403 P.3d at 1285. The primary issue in *Estate of Curtis* was whether a nurse's mistake in administering a drug to the wrong patient and the alleged failure to monitor the patient were matters of professional negligence subject to NRS 41A.071. *Estate of Curtis,* 136 Nev. at 351, 466 P.3d at 1265. Notably, in *Estate of Curtis*, this court ruled that res ipsa loquitur *did not* relief the plaintiff of its duty to file an expert affidavit. 136 Nev. at 358-59, 466 P.3d at 1270. Thus, neither case supports Ventura's argument.

of dismissal. As noted above, *Szydel* plainly states that "the plaintiff *must present facts and evidence* that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e)." *Szydel*, 121 Nev. at 460, 117 P.3d at 205 (emphasis added). Ventura's position also finds no support in *Cummings v. Barber*, 136 Nev. 139, 460 P.3d 963 (2020) because the plaintiff in that case, unlike Ventura, had presented evidence that the physician had left a foreign substance in her body. Indeed, the physician admitted doing so, arguing that she had intentionally done so and it was not negligent for her to have done so. *Cummings*, 136 Nev. at 140-141, 460 P.3d at 965-966.

Similarly, in *Jaramillo v. Ramos*, 136 Nev. 134, 460 P.3d 460 (2020), this court stated in the context of a summary judgment motion that "all a plaintiff must do to survive summary judgment is *present evidence* that the facts giving rise to NRS 41A.100(1)'s presumption of negligence exist—i.e., that at least one of the factual circumstances enumerated in NRS 41A.100(1)(a)-(e) exists." *Jaramillo*, 136 Nev. at 137, 460 P.3d at 464. In that case, rather than baldly allege that a foreign substance had been left behind, the evidence showed that a wire had been left in the patient's breast. *Id.*, at 135, 460 P.3d at 462.

Neither *Jaramillo* nor *Cummings* bear any resemblance to this case, as Ventura seems to suggest. *AOB 16.* Unlike those cases, Ventura has not presented even a scintilla of evidence from which it can reasonably be inferred that *any* foreign

substance was left after the 2016 laparoscopic surgery performed by Dr. Ganser. Indeed, his allegations and exhibits demonstrate otherwise. *J.App. 003, ¶6; J.App. 004, ¶7; J.App. 16 and 18.* As the district court found, Ventura's own allegations and the very medical records attached to his complaint "fail to logically support a viable claim under the *res ipsa loquitor* exception." *J.App. 093.* Not surprisingly, the district court concluded that *Jaramillo* did not compel a different conclusion because "unlike *Jaramillo,* Plaintiff has not pled 'facts entitling [him] to NRS 41A.100(1)(a)'s res ipsa loquitur theory of negligence.' That case is, therefore, readily distinguishable." *J.App. 93, fn. 2.*

Appellant's cursory arguments do not demonstrate error in the district court's determination that Ventura's unsupported allegations were insufficient to meet the res ipsa loquitur exception to the affidavit requirement and that Ventura was therefore required, but failed, to comply with NRS 41A.071. *J.App. 093.*

2. The district court properly considered the arguments in the reply, which responded to those in Ventura's Opposition

Lacking any legal basis for challenging the district court's order, Ventura resorts to mischaracterizing respondents' reply and assailing the district court's understanding of NRCP 12(b)(5). Both of Ventura's arguments are untenable.

a. The reply did not raise new arguments

Ventura is incorrect that the arguments in Dr. Ganser's reply were improperly considered because they were "first made" in the reply. Ventura's assertion that the motion to dismiss did not "discuss a single, specific allegation in the Complaint," or argue that the allegations in the complaint were "legally insufficient," ignores the purpose of a motion to dismiss under NRCP 12(b)(5).

Specifically, the filing of a motion to dismiss calls into question whether the allegations in the complaint assert a claim for relief, *i.e.*, it challenges the sufficiency of the complaint, not necessarily of specific allegations. *See* NRCP 12(b)(5). To resolve the question, courts examine the allegations in the complaint "to determine whether the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." *See Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). It is because the focus of the examination is the complaint that a plaintiff cannot survive a motion to dismiss by making new or alternate allegations in opposition to the motion to dismiss. *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1. (9th Cir. 1998).[12]

[12] *See Exec. Management, Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (federal caselaw interpreting and applying the Federal Rules of Civil Procedure provides strong persuasive authority for this court when interpreting parallel provisions of the Nevada Rules of Civil Procedure).

Yet, that is precisely what Ventura did in this case. Not only did he make new arguments, but he also attached new documents to his opposition. *J.App. 069-74.* Dr. Ganser's motion challenged the allegations in the complaint, none of which claimed that Ventura was excused from complying with NRS 41A.071 because he was making a res ipsa claim under NRS 41A.100(1)(a). *See J.App. 001-009.* It was not until Ventura filed his opposition to Dr. Ganser's motion to dismiss that he raised the issue of the applicability of NRS 41A.100(1)(a) to escape the affidavit requirement of NRS 41A.071. *J.App. 066-68.* In so doing, he cited *Szydel* for the proposition that no affidavit was required because of the res ipsa loquitur doctrine. *J.App. 068.*

Consequently, Dr. Ganser's reply pointed out that Ventura's opposition to defendants' motion to dismiss for failure to comply with NRS 41A.071 was advancing a new contention that he is exempt from the affidavit requirement of NRS 41A.071 because of the foreign substance exception in NRS 41A.100(1)(a). *J.App. 082.* Dr. Ganser objected to consideration of the new arguments and documents but was compelled to respond to them in the event the district court chose to consider them (which it did). *J.App. 082-83.*

Ventura's actions entitled Dr. Ganser to respond accordingly in his reply. *See, e.g., Paniliant Financial Corp. v. ISEE3D, Inc.,* No. 2:12-cv-01376-PMP-CWH, 2014 WL 3592719, *8 (D. Nev. 2014) (defendant's reply did not raise new

arguments or recite new facts because the reply responded to arguments raised in plaintiffs' opposition to the motion to dismiss). Dr. Ganser was entitled to address each of the arguments raised in the opposition to demonstrate that they were incorrect and/or untenable given the facts before the court. Thus, it was not error for the district court to consider each of the arguments in Dr. Ganser's reply in ruling on the motion to dismiss. *See Miller v. Glenn Miller Prods.,* 454 F.3d 975, 979, n.1 (9th Cir. 2006) (holding that the district court did not err in considering evidence first submitted in the moving party's reply to the moving opposition to summary adjudication where the evidence was introduced to counter claims made in the opposition, and the non-moving party could have asked the district court for permission to respond).

Equally untenable is Ventura's argument's of "systematic unfairness in the way judicial proceedings are conducted," that the district court violated Ventura's due process rights "and ratified an unmanageable approach to motions." *AOB 13-14.* Ventura had ample opportunity to address the applicability of the res ipsa loquitur exception to the affidavit, of which he was keenly aware as reflected in his opposition. *J.App. 065-68.* In fact, the district court granted Ventura's request for an additional 45 days to prepare and submit his opposition. *J.App. 062-63.*

Ventura's assertion that the district court did not hold a hearing ignores that Ventura was an incarcerated plaintiff, and the courts were closed due to the COVID-

19 pandemic. Similarly unfounded is Ventura's assertion that the district court did not "permit a sur-reply." *AOB 13.* This assertion implies that Ventura asked for a sur-reply and that the district court denied his request. Such an implication is unsupported by the record. Indeed, nowhere in the record is there any indication that Ventura ever asked the district court to file a sur-reply, as evidenced by the lack of a citation in appellant's brief supporting this assertion. *See AOB 13.*

As this issue was not raised below, despite Ventura's opportunity to raise it, it need not be considered on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that this court need not consider an argument not raised below). If considered, it may be summarily rejected as meritless because it is simply false that Ventura was "unable to address G&G's new argument at all." *AOB 13.*

Although WDCR 12 provides that motion practice generally ends with a reply, such was not the case here. The contention that Ventura did not have an opportunity to request a sur-reply or otherwise respond to defendants' reply is belied by the "errata" Ventura filed on August 26, 2020 – approximately two weeks after defendants' reply was filed and before the district court ruled on the motion to dismiss. *J.App. 088.* Ventura's "errata" was effectively a sur-reply in that its only purpose was to address the comment in Dr. Ganser's reply regarding the name of the patient in the operative report. *J.App. 088.* Nowhere in his "errata" did Ventura

object to the arguments in Dr. Ganser's reply, contend that any of the arguments were made "for the first time" in the reply, or ask for a sur-reply. *J.App. 088.*

In short, Dr. Ganser did not raise new arguments for the first time in his reply. Moreover, Ventura had an ample and meaningful opportunity to address the issues and arguments in Dr. Ganser's reply, to present his position and to request a sur-reply. Therefore, none of the cases cited in support of this argument have any application to this case. *See AOB 13-14.* Ventura is simply wrong that the district court committed error by considering the arguments Dr. Ganser's reply and, as importantly, that the district court violated Ventura's due process rights.

b. The district court properly applied NRCP 12(b)(5)

Ventura next assails the district court, contending that the district court's order of dismissal was based on an "erroneous understanding of NRCP 12(b)(5)." *AOB 14.* He disparagingly contends that the district court's "'reasoning,' such as it was" demonstrates that the district court did not the take allegations and inferences in the light most favorable to Ventura. *AOB 16.*

Such an argument can only be made by disregarding the district court's analysis of the facts and the law. Ventura's argument demonstrates that it is appellant, not the district court, who harbors an "erroneous understanding" of NRCP 12(b)(5), particularly in medical negligence cases.

This court instructs that a complaint should only be dismissed for failure to state a claim if "it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Szymborski,* 133 Nev. at 641, 403 P.3d at 1283 (citation and internal quotation omitted). "In contrast, NRS 41A.071 provides that '[i]f an action for medical malpractice . . . is filed in the district court, the court shall dismiss the action, without prejudice, if the action is filed without a[ ] [medical expert affidavit.'" *Szymborski,* 133 Nev. at 641, 403 P.3d at 1283 (alterations in original; citation and footnote omitted).

To reiterate, under NRCP 12(b)(5), the court is required to draw *reasonable* inferences in favor of the non-moving party. *Szymborski*, 133 Nev. at 640, 403 P.3d at 1283 (emphasis added). And, while a court must accept the factual allegations as true and draw all reasonable inferences in favor of the non-moving party, the court need not blindly accept conclusory allegations, unwarranted factual deductions, or unreasonable inferences. *See Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of rehearing on other grounds by Sprewell v. Golden State Warriors*, 275 F.3d 1187 (9th Cir. 2001); *Smith v. Caesars Enter. Corp.*, 2:19-cv-00856-GMN-NJK, 2019 WL 11541601, *3 (D. Nev., Nov. 1, 2019) ("The Court cannot accept as true allegations that are merely conclusory, unwarranted

deductions of fact, or unreasonable inferences.") Nor is the court required to accept as true allegations contradicted by exhibits to the complaint. *Id.*[13]

In this case, the district court was presented with a motion to dismiss based on NRS 41A.071. *J.App. 032.* The district cited and applied the standard that it must accept the factual allegations as true and draw all reasonable inferences in favor of the non-moving party. *J.App. 092.* Ventura's complaint contained conclusory allegations that Dr. Ganser left an object in him after the October 2016 surgery. *J.App. 002.* At the same time, the complaint and its exhibits showed no evidence of a retained object a year after the surgery, and stated that the object seen two years after the 2016 surgery was "unlikely to be related to the patient's history of previous esophageal surgery." *J.App. 003, ¶6 and J.App. 004, ¶7, respectively; see also J.App. 016 and J.App. 018.* Based on the record before it, the district could not draw *reasonable* inferences from Ventura's conclusory and contradictory allegations:

> 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'*[sic]* 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

[13] *See Exec. Management, Ltd.*, 118 Nev. at 53, 38 P.3d at 876 (federal caselaw interpreting and applying the Federal Rules of Civil Procedure provides strong persuasive authority for this court when interpreting parallel provisions of the Nevada Rules of Civil Procedure).

> 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. 094-95.

Consistent with NRCP 12(b)(5)'s standards, the district court found that "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. 094.*

Appellant has not shown error in the district court's application of NRCP 12(b)(5)'s standards. His simply accuses the district court of making assumptions that are either not supported by the record or which are inconsistent with NRCP 12(b)(5)'s standards. *AOB 17-18.*

For example, Ventura contends that the district "necessarily assumed there were no other facts that could be alleged relating the surgery to the object." *AOB 17*. This argument reveals appellant's erroneous understanding of NRCP 12(b)(5)'s standards. In determining the propriety of a motion to dismiss, the court is not supposed to look beyond the complaint or "assume" there are "other facts" elsewhere that might salvage the complaint; it should not even consider allegations in an opposition that are not contained in the complaint. *See Wilson v. Holder*, 7 F.Supp.3d 1104, 1122-23 (D. Nev. 2014) ("Plaintiff cannot attempt to cure defects in her

complaint by including the necessary allegations in her opposition brief."); *see also Broam*, 320 F.3d at 1026 n. 2 ("The allegations that form the basis of a plaintiff's claim for relief must be set out in its pleading).

It bears repeating that because a motion to dismiss calls into question whether the allegations in the complaint assert a claim for relief, the district court looks to the challenged pleading to examine its allegations. *See, Edgar,* 101 Nev. at 227, 699 P.2d at 111 ("[the court's] task is to determine whether the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief.") (emphasis added). There is nothing in the rule or the cases that interpret it which directs a district court to "assume" other facts may exist to cure a defective complaint. Ventura has cited no legal authority to demonstrate otherwise.

Next, Ventura argues that the district court "assumed" the imaging report of September 2017 would have revealed the object that Dr. Caravella removed on March 28, 2019. *AOB 17.* Again, there is nothing in the record that supports this assertion. Ventura's statement reveals that it is he who is assuming the object removed on March 28, 2019 was in any way related to the 2016 surgery. Such an assumption is not only unreasonable it is refuted by the complaint's allegations and exhibits that the object seen in 2018 was "unlikely" related to the 2016 esophageal surgery. *J.App. 004, ¶7; J.App. 018.*

Along the same line, Ventura argues that the district court "weighed the evidentiary value" of Dr. Jackson's statement that the object was unlikely related to the 2016 surgery against Ventura's conclusory allegation. He further contends that the district court "assumed" Dr. Jackson would not have changed his opinion regarding the unlikely relatedness of the object to the 2016 surgery. *AOB 17.* These arguments consist of rank speculation, further revealing appellant's lack of understanding of NRCP 12(b)(5)'s standards. As discussed above, the district court is not required to assume what might occur in the future. Its task is to determine whether the complaint challenged by a motion to dismiss sets forth allegations sufficient to make out the elements of a right to relief. *See*, *Edgar*, 101 Nev. at 227, 699 P.2d at 111.

Ventura is also mistaken that the district court weighed the evidence and accepted the contents of the medical record rather than Ventura's conclusory (and unsupported) allegation that the object found was a hypodermic needle. *AOB 17.* He further contends the contradictions in Ventura's complaint create issues of fact for a factfinder to resolve. *AOB 18, citing Nutton v. Sunset Station, Inc.,* 131 Nev. 279, 357 P.3d 966 (Ct. App. 2015) and *Hendricks v. A-Z Women's Center,* 2:03-cv-1338-RCJ-LRL, 2006 WL 8442727 [2006 U.S. Dist. LEXIS 114893] (D. Nev., March 13, 2006).

Both cases cited by Ventura involve summary judgment motions. Ventura is evidently confusing summary judgment standards under NRCP 56 with NRCP 12(b)(5)'s standards. Under Rule 12(b)(5), a court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Sprewell*, 266 F.3d at 988 (citation and internal quotation marks omitted). As pointed out by the court, "a plaintiff can . . . plead himself out of a claim by including unnecessary details contrary to his claims." *Id.* (citation omitted; emphasis added).

Ventura also cites *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227 (1998) for the proposition that the district court "should have heeded the teaching" of that case and given him the "opportunity to elicit evidence" to establish his res ipsa claim. *AOB 18.* Ventura's reliance on *Born* is misplaced. Unlike this case, which is at the pleading stage, *Born* involved the exclusion at trial of evidence to establish the applicability of the res ipsa loquitur doctrine.

Here, the district court relied on the allegations and records presented by plaintiff in his complaint, as it was required to do by NRCP 12(b)(5). *J.App. 092-095*. In contrast to a trial at which evidence is presented, NRCP 12(b)(5) does not require a court to give a non-moving party the "opportunity to elicit evidence" to establish his claim. Under NRCP 8(a)(2), a pleading that states a claim for relief must contain "a short and plain statement of the claim *showing* that the pleader is

entitled to relief." (Emphasis added.) A pleading that does not satisfy that basic standard, as the complaint in this case, may be challenged by a motion to dismiss under NRCP 12(b)(5), upon which the district court's task is to determine whether the pleading sets forth allegations sufficient to make out the elements of a right to relief. *See, Edgar*, 101 Nev. at 227, 699 P.2d at 111. Ventura fell fatally short of that standard, as the district court correctly found.

Finally, Ventura asserts that the district court erred in assuming the object could not have moved in Ventura's body. *AOB 17.* No citation to the record accompanies this speculative assertion. Nor can it because no allegation, evidence or argument to that effect was made in the court below. Certainly, there is nothing in the exhibits from which to draw a reasonable inference that such may have occurred. In fact, Dr. Jackson's statement that the object seen in 2018 was "unlikely" related to the 2016 esophageal surgery dispels any inference that the object was related to the 2016 surgery and somehow "moved" throughout Ventura's body. Not even the operative report of the procedure that removed a "straight metal object" from Ventura's left hip contained the slightest inference that the object was in any way related to the 2016 surgery. *J.App. 012*. Ventura's argument is simply untenable.

In sum, Ventura has failed to demonstrate that the district court erred in dismissing his complaint based on arguments purportedly "first made in the reply,"

or that the district court misunderstood or misapplied NRCP 12(b)(5)'s standards. The complaint not only failed to allege sufficient facts to establish a claim for res ipsa loquitur under NRS 41A.100(1)(a), it did not even attempt to state such a claim. It was not until he opposed Dr. Ganser's motion to dismiss that Ventura sought to invoke NRS 41A.100(1)(a), but the allegations and exhibits refuted the applicability of the res ipsa statute as the district court correctly determined.

The district court's rulings are supported by the record and consistent with applicable law. Therefore, this court may properly affirm the district court's order dismissing this action for failure to comply with NRS 41A.071.

E. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT WITHOUT LEAVE TO AMEND

Having determined that Ventura was subject to the affidavit requirement of NRS 41A.071, but had not provided the required affidavit, the district court concluded that it must dismiss the complaint without prejudice and without leave to amend. *J.App. 093-094.* In ruling that Ventura was not entitled to leave to amend, the district court relied on and quoted *Washoe Medical Center*, 122 Nev. at 1304, 148 P.3d at 794, to wit: "A complaint that does not comply with NRS 41A.071 is void and must be dismissed; no amendment is permitted." *J.App. 094.*

Ventura cannot demonstrate error in the district court's application of *Washoe Medical Center*, so he advances the conclusory argument that Ventura was not

required to attach an expert affidavit and, therefore, *Washoe Medical Center* does not apply and the district court abused its discretion by denying leave to amend on this basis. *AOB 19.* Ventura does not cite a single professional negligence case or any other relevant authority to support this argument. Thus, the court may summarily reject it without consideration. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an argument that is not cogent or lacks relevant, supporting authority).

Lacking any legal basis to challenge the district court's application of the rule in *Washoe Medical Center,* Ventura argues that NRCP 15(a)(2) required the district court to grant leave to amend and that its denial of leave to amend was error. Ventura's argument is irreconcilable with *Washoe Medical Center*, 122 Nev. at 1304, 148 P.3d at 794, the reasoning of which the district court relied in denying leave to amend under NRCP 15(a):

> The Nevada Supreme Court reasons that when a complaint does not comply with NRS 41A.071, the complaint "is void ab initio, it does not legally exist and thus cannot be amended. Therefore, NRCP 15(a)'s amendment provisions, whether allowing amendment as a matter of course or leave to amend, are inapplicable."

J.App. 094, fn. 5, quoting Washoe Medical Center.

Ventura's argument that the district court erred in denying leave to amend under NRCP 15(a) may not only be rejected on the authority of *Washoe Medical Center*, it may also be rejected because Ventura did not request leave to amend in

his opposition to Dr. Ganser's motion to dismiss or after he received Dr. Ganser's reply. *See J.App. 068, 088.* Ventura attempts to excuse this failure by contending that he had no reason or opportunity to request leave before the district court dismissed his case. *AOB 20, fn. 15.* His contention is untrue. In addition to his ability to request leave to amend in his opposition (which he did not do), Ventura had an opportunity to ask for leave to amend when he filed his "errata", which he did *after* he received Dr. Ganser's reply and before the district court ruled on the motion to dismiss. *J.App. 088.* His errata, like his opposition, did not request leave to amend. *Id.* Therefore, his argument that leave to amend was erroneously denied "must fail." *Mills v. Continental Parking Corp.*, 86 Nev. 724, 726, 475 P.2d 673, 674 (1970).

Further, because Ventura did not request leave to amend despite his opportunity to do so, he did not provide any information about the substance of any proposed amendment. Where, as here, "there is no showing of the nature or substance of the proposed amendment or what the appellant expects to accomplish by it, a reviewing court cannot say a trial court abused its discretion in denying leave to amend." *Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 801 (1969). Under these circumstances, this court has "no way of knowing whether or not the underlying facts or circumstances relied upon by the appellant may be a proper subject of relief." *Id.*

In conclusion, Ventura's arguments regarding leave to amend are premised upon the erroneous assertions that he was denied and/or did not have the opportunity to request leave to amend. As shown above, neither assertion is true. *See J.App. 068, 088.* Moreover, none of the cases cited in support of his arguments have any applicability to this professional negligence case. Therefore, in addition to lacking legal support, Ventura's arguments lack any factual foundation whatsoever.

At bottom, Ventura has not shown error in the district court's rationale for dismissing the complaint without leave to amend. The district court found that "no viable amendment would relieve Plaintiff from the affidavit requirement." *J.App. 094.* The district court explained that Ventura's allegations were based on unreasonable inferences based on the content of his complaint and the exhibits thereto. *J.App. 094.* The court thus found "that any attempt to amend the complaint to demonstrate that an affidavit is not required would be futile." *J.App. 094-95.*

Based upon the record and the applicable law, specifically including *Washoe Medical Center,* the district court correctly concluded that Ventura was not entitled leave to amend his Complaint and that amendment would be futile under the facts before the district court. Therefore, the district court's order in this regard should be affirmed.

VI.

CONCLUSION

Based upon the facts and the applicable law discussed herein, the district court correctly concluded that the res ipsa loquitur provision of NRS 41A.100(1)(a) did not apply to Ventura's medical malpractice complaint. Consequently, the district court also correctly found that NRS 41A.071's affidavit requirement applied to Ventura's complaint. Because no expert affidavit supported the complaint, the district court was required to dismiss the complaint without prejudice and without leave to amend.

Accordingly, respondents JOHN GANSER, M.D., and GOMEZ, KOZAR, MCELREATH AND SMITH, A PROFESSIONAL CORPORATION, DBA WESTERN SURGICAL GROUP, respectfully request this court to affirm the district court's order granting their motion to dismiss because Ventura failed to include a medical expert affidavit with his medical malpractice complaint.

DATED: August 2, 2021

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CERTIFICATE OF COMPLIANCE

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 typeface using Word in 14 point Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points, and contains 12,675 words.

3. I further 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 also 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 appropriate references to 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.

DATED: August 2, 2021

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CERTIFICATE OF SERVICE

I hereby certify that the within ***Respondents' Answering Brief*** was filed electronically with the Nevada Supreme Court on this date. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Dated: August 2, 2021

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