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**	Electronically Filed Aug 30 2021 08:31 a.m. Elizabeth A. Brown Clerk of Supreme Court

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

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APPELLANT'S REPLY BRIEF

Signed: August 28, 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: August 28, 2021

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INTRODUCTION

This lawsuit involves Ventura's *pro se* complaint that G&G unintentionally left an object in him during surgery they performed on him. (J.App.001-008, ¶¶1-3, 9, 15-16.)[1] In the RAB, G&G acknowledge: "Ventura alleges that a foreign metal object was left in his body during the 2016 laparoscopic surgery." (RAB 5) (citing J.App.002, ¶3.) G&G also acknowledge Ventura's allegation that: "Dr. Ganser left a surgical instrument in his body during the October 2016 surgery . . . ." (RAB 20.)

Under *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005), which the Court most recently applied in *Jaramillo v. Ramos*, 136 Nev. Adv. Rep. 17, 460 P.3d 460 (2020), Ventura was not required to file an expert affidavit with his complaint. Rather than pursue their original classification-dictates-requirement argument, G&G focus all attention on the new arguments they first made in their reply in support of their motion to dismiss: (1) Ventura was required to more specifically allege that he was relying on the statutory *res ipsa loquitur* exception in his complaint; and (2) the documents Ventura attached to his complaint contradict/refute the allegations in the complaint. It also appears G&G is now pushing the argument that Ventura was obligated to submit evidence to defeat G&G's motion to dismiss. Each argument fails under established precedent.

[1] The abbreviations used herein have the same meanings ascribed to them in the prior briefs. "RAB" refers to Respondents' Answering Brief.

ARGUMENT

I. G&G have effectively conceded their classification-dictates-requirement argument fails.

G&G made one argument in their opening brief in support of their motion to dismiss. G&G argued: Complaint = "Medical Malpractice." "Medical Malpractice" = Affidavit. No Affidavit = Dismissal. (AOB 4-5.) If the district court had confined its review to this one oversimplified argument, it should have denied the motion under *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 642-43, 403 P.3d 1280, 1285 (2017) and *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. Adv. Rep. 39, 466 P.3d 1263, 1268 n.4 (2020). (AOB 4 n.7.)[2] In each case, the Court rejected the same oversimplified approach G&G attempted to use in the district court, a fact G&G does not contest and, therefore, concedes. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984).

The RAB does not tie the sole argument G&G made in their opening brief, i.e., classification-dictates-requirement (J.App.032-J.App.036), to the new arguments they advanced in their reply, i.e., Ventura was required to more specifically allege that he was relying on the statutory *res ipsa loquitur* exception in his complaint and the documents Ventura attached to his complaint

[2] G&G correctly note the undersigned erred in suggesting they should have cited *Estate of Curtis* in their opening brief in support of their motion to dismiss. (RAB 9 n.5, 16, 23-24.) The undersigned apologizes for that error.

contradict/refute the allegations in the complaint. (J.App.077-J.App.087.) Instead, G&G seem to argue for an expansive, unrecognized approach to motion practice under Nevada Rule of Civil Procedure 12(b)(5). G&G seem to argue that the mere filing of a Rule 12(b)(5) motion permitted them to make any argument regarding supposed deficiencies in the complaint at any point during briefing on that motion, and the district court could consider all such arguments regardless of when G&G first made them. (RAB 35.) G&G argue this was acceptable because: "Ventura was an incarcerated plaintiff, and the courts were closed due to the COVID-19 pandemic" (RAB 37-38),[3] Ventura could have asked for leave to file a sur-reply, and his "errata" was "effectively a sur-reply" in any event. (RAB 38-39.)[4]

The Court should reject the "shoot first, figure out why, later" approach that G&G are asking the Court to ratify. The district court's failure to permit Ventura an opportunity to address the new arguments G&G first made in their reply

[3] The district court was not required to set the motion for oral argument. *See* WDCR 12(5) ("Decision shall be rendered without oral argument unless oral argument is ordered by the court . . . .")

[4] The record does not contain any indication the district court permitted Ventura to file a sur-reply, would have permitted Ventura to file a sur-reply, or even considered the "errata" Ventura filed. The limited purpose of the "errata" (2 ROA 184-86) was to address G&G's suggestion that a medical record Ventura attached to the complaint may pertain to someone else. (AOB 2 n.5.) For these reasons, in addition to the Court's plenary authority (AOB 13 n.13), there is no merit to G&G's claim that Ventura waived appellate review of this argument. (RAB 38.)

deprived Ventura of due process. (AOB 13.) Although G&G argue Ventura could have asked for leave to file a sur-reply (RAB 39), he was unable to file one as a matter of course (RAB 38 (citing WDCR 12)), and nothing in the record suggests the district court would have permitted him to do so. *Cf. Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 293 n.6, 357 P.3d 966, 976 n.6 (Ct. App. 2015).[5]

There are also important policy reasons to reject the approach G&G used in this case. A court willing to decide motions based on arguments a litigant first makes in reply disincentivizes lawyers to strictly comply with the Nevada Rules of Professional Conduct and Nevada Rule of Civil Procedure 11, while simultaneously incentivizing those lawyers to practice "gotcha" law, potentially resulting in extended briefing to avoid arguments about waiver in subsequent proceedings.[6] Take this case as an example. At a minimum, G&G should have

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[5] G&G also try to justify their new arguments by claiming that Ventura's citation to NRS 41A.100(1) and *Szydel*, 121 Nev. 453, 117 P.3d 200, in opposition to their motion to dismiss, "was advancing a new contention . . . ." (RAB 36.) However, there is no basis for this argument; it wrongly assumes that Ventura was required to allege more than he did in the complaint. *See infra* at Section II.a. Likewise, there is no merit to G&G's claim that "new documents" Ventura filed with his opposition warranted their new arguments. (RAB 36.) In their reply in support of their motion to dismiss, G&G relied on the "documents cited in, and attached to, his Complaint" (J.App.081, line 21), not the documents that Ventura attached to his opposition to G&G's motion to dismiss.

[6] It would also create an anomalous result: district courts permitting new arguments in reply, a practice the Court does not indulge. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 135 Nev. Adv. Rep. 45, 449 P.3d 461, 466 n.3 (2019). *See also Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 823, 407 P.3d 702, 708 (2017)

cited *Szydel*, 121 Nev. 453, 117 P.3d 200, in their opening brief in support of their motion to dismiss. Presumably, G&G were aware of the Court's holding in *Szydel* before they filed their motion to dismiss. (AOB 5 n.8.)[7] Yet, they waited until after Ventura identified *Szydel* before attempting to distinguish it. (J.App.084, lines 10-25.) As soon as Ventura argued the applicability of NRS 41A.100(1), as discussed in *Szydel*, based on a copy of a prior decision of the Court, which G&G attached to one of the briefs they filed in the district court (J.App.066) ("Plaintiff makes the instant oppositions [sic] based exclusively on Exhibit '1' of Defendants [sic] Oppositions of June 29, 2020, without benefit of library access . . . ."), G&G effectively abandoned their original classification-dictates-requirement argument and made completely new arguments in their reply in support of that same motion, arguments that Ventura did not have a right (or opportunity) to address.

Neither *Panliant Financial Corp. v. ISEE3D, Inc.*, Case No. 2:12-cv-01376-PMP-CWH, 2014 U.S. Dist. LEXIS 98670, 2014 WL 3592718 (D. Nev. July 21,

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(citation omitted) ("Entertaining an argument raised for the first time in this court also deprives the opposing party of the opportunity to 'develop theories and arguments and conduct research on an issue that it otherwise would have had months or years to develop had the issue been raised in the [district] court.'")

[7] G&G tacitly concede they knew about *Szydel*, 121 Nev. 453, 117 P.3d 200, and do not dispute their familiarity with *Jaramillo*, 460 P.3d 460 (a case in which G&G's lawyers were involved), before they filed their motion to dismiss. (RAB 25) ("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.")

2014) nor *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975 (9th Cir. 2006), the cases G&G cite as support for their moving-target approach to argumentation (RAB 36-37), is analogous to this case. In *Panliant Financial Corp.*, the court ruled the defendants' argument, in reply, was directly related to their argument in their opening brief. 2014 U.S. Dist. LEXIS 98670, *21 (italics added) ("Defendant Bay's Reply did not raise new arguments or recite new facts because the Reply responds to arguments about the default raised in Plaintiffs' Opposition to Bay's Motion to Dismiss. *Bay's Reply addresses the timeliness of service, which was the basis of Bay's motion to dismiss . . . .*") Further, the plaintiffs had addressed the defendants' arguments in several other filings. *See id.* This situation is easily distinguishable; here, G&G did not argue the alleged insufficiency of the allegations in their opening brief, and Ventura did not have a right to address this argument that G&G first made in their reply. The non-binding *Miller* case is similarly distinguishable; there, the court allowed the appellants to introduce new *factual* information in reply, to counter a *fact-based* argument in the opposition. 454 F.3d at 979 n.1. Here, G&G jettisoned the sole legal argument they made in their opening brief, in favor of completely new legal arguments in their reply.

For the foregoing reasons, the Court should reject the arguments G&G first made in their reply in support of their motion to dismiss and reverse the dismissal. The classification-dictates-requirement argument fails under existing law.

II. Ventura's complaint contained sufficient allegations to state a claim under Nevada Rule of Civil Procedure 8(a)(2).

The Court first must determine whether the allegations in the complaint trigger the expert affidavit requirement in NRS 41A.071. (AOB 11-12; RAB 26-27.) If the Court holds Ventura was not required to attach an expert affidavit to the complaint, then the Court should perform the traditional "no set of facts" analysis (AOB 14-15; RAB 26), unless the Court refuses to consider the arguments G&G first made in their reply. The Court reviews a district court's dismissal pursuant to Nevada Rule of Civil Procedure 12(b)(5) *de novo*. (AOB 14-15; RAB 22.)

a. Ventura was not required to specifically identify NRS 41A.100(1) in his complaint.

i. G&G did not preserve their "specific identification" argument.

G&G acknowledge this case involves "medical malpractice." (RAB 2.) G&G also acknowledge: "Ventura alleges that a foreign metal object was left in his body during the 2016 laparoscopic surgery." (RAB 5) (citing J.App.002, ¶3.) G&G also acknowledge Ventura's allegation that: "Dr. Ganser left a surgical instrument in his body during the October 2016 surgery . . . ." (RAB 20.) Yet, G&G want the Court to believe they had no idea Ventura may rely on NRS 41A.100(1) because Ventura did not specifically identify that statute in the complaint. Throughout the RAB, G&G argue that Ventura was obligated to specifically identify NRS 41A.100(1) in his complaint. (RAB ix, 7, 14-15, 20-21, 28-29.)

The Court should reject the "specific identification" argument that G&G are attempting to advance because they failed to preserve it below. In briefing their motion to dismiss, all G&G said about Ventura's supposed obligation to specifically identify NRS 41A.100 in his complaint was: "Although he now argues that he did not need an expert affidavit because the *res ipsa* doctrine applied, the Complaint does not allege that an expert affidavit is unnecessary because of the exceptions enumerated in NRS 41A.100." (J.App.082, lines 14-16.) This single line – relegated to the middle of their reply brief – was insufficient to preserve this issue for appeal. *See Coach Servs. v. Source II, Inc.*, 728 Fed. Appx. 416, 418 (6th Cir. 2018) (citation omitted) ("The first mention came too late (a reply brief) and was too brief to count as a preserved argument (a single sentence.")[8]

The Court should also reject the "specific identification" argument because G&G did not cite any authority, then, and has not cited any authority, now, that suggests Ventura was required to specifically identify NRS 41A.100(1) in the complaint. G&G's failure to cite any legal authority should result in the Court summarily disposing of this argument in favor of Ventura. *See, e.g., Edwards v.*

[8] At least five other circuits have held that a single sentence does not preserve an argument for appeal. *See Cribari v. Allstate Fire & Cas. Ins. Co.*, No. 19-1270, No 19-1343, No. 19-1425, __ Fed. Appx. __, 2021 U.S. App. LEXIS 16587, *35-36, 2021 WL 2255008 (10th Cir. 2021); *U.S. v. Patton*, 750 Fed. Appx. 259, 264 n.5 (5th Cir. 2018); *Weber v. Universities Research Ass'n*, 621 F.3d 589, 593 (7th Cir. 2010); *U.S. v. Anthony*, 345 Fed. Appx. 459, 462 n.1 (11th Cir. 2009); *Wal-Mart Stores, Inc. v. Visa U.S.A Inc.*, 396 F.3d 96, 124 n.29 (2nd Cir. 2005).

Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *State Dep't of Motor Vehicles & Pub. Safety v. Rowland*, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991). After all, "It is [respondents'] responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (alteration in brackets) (citations omitted).

ii. The "specific identification" argument is contrary to established precedent.

The district court did not dismiss this case for want of a reference to NRS 41A.100(1) in the complaint. (J.App.091-097.) It would have been error to do so. "The [res ipsa loquitur] doctrine is not a rule of pleading, but rather an inference aiding in the proof." *Las Vegas Hosp. Ass'n v. Gaffney*, 64 Nev. 225, 234, 180 P.2d 594, 599 (1947) (alteration in brackets). *See also Jaramillo*, 460 P.3d at 463 n.2 (alteration in brackets) (holding that NRS 41A.100(1) "pertains to evidentiary matters at trial[;]" NRS 41A.071 is a "threshold requirement"). *See generally Garibaldi Bros. Trucking Co. v. Waldren*, 74 Nev. 42, 47-48, 321 P.2d 248, 251 (1958) (affirming applicability of *res ipsa loquitur* "even though specific and general allegations of negligence were made and found by the court to be true").

The allegations in the complaint gave G&G "fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (citations omitted).

In the complaint, Ventura alleged that G&G performed surgery on him, and unintentionally left an object in him during that surgery. (J.App.001-J.App.008, ¶¶1-3, 9, 15-16.) Ventura's allegations are essentially identical to those the Court found sufficient in *Jaramillo*: "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." 460 P.3d at 463. *See generally Western States Constr. v. Michoff*, 108 Nev. 931, 936-37, 840 P.2d 1220, 1223 (1992) (citing allegations in prior case as support for holding that allegations in present case were sufficient). G&G knew – or should have known – Ventura may rely on the statutory exception to the expert affidavit requirement. *See Sorensen v. First Fed. Sav. & Loan Ass'n*, 101 Nev. 137, 139 n.3, 696 P.2d 995, 996 n.3 (1985).

Even though Ventura was not obligated to specifically identify NRS 41A.100(1) in his complaint, it is worth commenting on G&G's hyper-technical reading of the complaint, that Ventura used the phrase "*res ipsa loquitur*" only in the context of the statute of limitations. (RAB 28-29.)[9] A fair reading of the sentence containing the phrase "res ipsa loquitur" – in the complaint – reveals that

[9] It is interesting that G&G make this argument. At an earlier point in the RAB, G&G argued that the Court should consider the entirety of the complaint, not an isolated allegation. (RAB 8-9.) G&G did not cite a single case that suggests it is appropriate to read a single allegation to the exclusion of all other allegations in the complaint. *Cf. Szymborski*, 133 Nev. at 642-43, 403 P.3d at 1285.

it is used more expansively than G&G suggest; the sentence reads: "Thus the doctrine 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." (J.App.005, ¶ 10) (italics added.) Though possibly inartful, a lack of precision does not equate to legal insufficiency. *See, e.g., Lee v. Va*, Case No. 2:06-cv-0140-LDG-RJJ, 2008 U.S. Dist. LEXIS 138136, *3-4 (D. Nev. Mar. 28, 2008) (refusing to dismiss poorly framed counts because *res ipsa* exception in NRS 41A.100(1) may apply). The Court should liberally interpret Ventura's *pro se* complaint. *See U.S. v. Seesing*, 234 F.3d 456, 462-63 (9th Cir. 2000).

In short, Ventura was not obligated to specifically identify NRS 41A.100(1) in his complaint; the allegations in the complaint – including Ventura's specific reference to "res ipsa loquitur" – gave G&G fair notice of Ventura's claim. The lack of a reference to NRS 41A.100(1) did not – and does not – warrant dismissal.

b. Supposed "contradictions" did not warrant dismissal.

G&G continue to argue that the documents that Ventura attached to the complaint "refute" or "contradict" the allegations in the complaint, rendering the complaint insufficient as a matter of law (RAB 5, 14-15, 18) (refute); (RAB 20-21, 34) (contradict.) Although G&G use the words "refute" and "contradict," their argument is materially different. Basically, G&G argue that the complaint is legally insufficient because the medical records attached to the complaint do not

establish a causal link between the surgery and the foreign object (that is an issue best described as "lack of proof," as opposed to "refutation" or "contradiction"), primarily because one doctor stated: "'This seems unlikely to be related to the patient's history of previous esophageal surgery.'" (J.App.004, ¶7.)

The problem with G&G's refutation/contradiction/lack of proof argument is that they make it without regard for the applicable legal standard. A district court can dismiss a complaint for failure to state a claim "only if it appears beyond a doubt that [a plaintiff] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (alteration in brackets). "In making this determination, the allegations in the complaint *must be taken at* '*face value*' . . . ." *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111 (1985) (italics added) (citation omitted). Stated differently, "*All* factual allegations of the complaint *must be accepted as true*." *Breliant*, 109 Nev. at 845, 858 P.2d at 1260 (italics added) (citation omitted). "As the Supreme Court has stated, 'the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1196 (9th Cir. 1998).

The documents attached to the complaint do not *conclusively* "refute" or "contradict" Ventura's allegations. In the complaint, Ventura alleged that G&G performed surgery on him, and unintentionally left an object in him during that surgery. (J.App.001-J.App.008, ¶¶1-3, 9, 15-16.) Though one doctor stated there was an "unlikely" relationship between the surgery and the foreign object (J.App.004, ¶7.), Ventura *did not* concede the veracity of that opinion. Ventura alleged the opinion was wrong: "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.)[10] In the AOB, Ventura made additional arguments why this single statement was an insufficient basis upon which to grant dismissal. (AOB 16-17.)

Ventura's allegation that one of the medical records was wrong renders this case distinguishable from *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001), which G&G cited without any consideration of whether the facts were analogous. (RAB 17, 40, 45.) In *Sprewell*, the plaintiff attached a copy of a

[10] The district court did not address this allegation in its order dismissing the complaint. G&G argue that the district court correctly ignored this allegation "because the quoted paragraph has 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." (RAB 19) (citation omitted). Here, again, this selective, hyper-technical reading of the complaint is contrary to the applicable law. *See supra* at n.8. Second, this allegation bridges the gap that G&G have so desperately tried to create; it is Ventura proactively alleging that the opinion upon which G&G relies – as dispositive – is inaccurate.

decision from a prior arbitration (to the complaint), which "effectively and persuasively flesh[ed] out the fact that the actions taken by the NBA and the Warriors were motivated solely by Sprewell's misconduct and were not" due to the racial animus Sprewell alleged in the federal lawsuit at issue. 266 F.3d at 989 (alteration in brackets). Here, however, there was no prior proceeding in which findings were made, findings which undermined the current claim. Moreover, a "contradiction" usually creates an issue of fact for a factfinder to resolve. *See Nutton*, 131 Nev. at 293-95, 357 P.3d at 976-77. *See also Hendricks v. A Z Women's Ctr.*, Case No. 2:03-CV-1338-RCJ-LRL, 2006 U.S. Dist. LEXIS 114893, *9-10 (D. Nev. May 2, 2006) (more than one possible source of the foreign substance created an issue of fact). *See generally Born v. Eisenman*, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998) (reversing the district court's ruling that the statutory *res ipsa* exception did not apply, which the district court 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").[11]

[11] G&G take issue with these cases because they were postured differently, two involving summary judgment and one involving a ruling made during a pre-trial conference. (RAB 44-46.) However, the posture is less important than the holding. Each court concluded it could not resolve "contradictions" as a matter of law.

"Inquiries focused on the facts and circumstances of a case are typically factual, not legal." *Anderson v. Mandalay Corp.*, 131 Nev. 825, 829, 358 P.3d 242, 245 (2015) (citations omitted). To the extent there is a "contradiction" between the allegations and the attached documents, such was not a basis upon which the district court could dismiss the complaint. The Court should reverse the dismissal.

III. Ventura was not required to submit evidence to defeat G&G's motion to dismiss.

a. G&G did not preserve their "evidence needed" argument.

G&G did not push the argument that Ventura was required to submit evidence to defeat their motion to dismiss in the briefing below. Below, G&G observed: "Notably, the court also instructed 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.' 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.*" (J.App.084, lines 14-19.) However, in the very next sentence, G&G address the facts that Ventura *alleged*; they did not argue that the district court should dismiss the case due to a lack of *evidence* establishing the applicability of the statutory exception. (J.App.084, lines 20-21.)[12]

[12] G&G focus on Ventura's *allegations* – not a supposed lack of *evidence* –

G&G's passing reference to *Szydel*, below, did not warrant dismissal, then, or preserve this argument for appeal, now. Citing a case – without more – is insufficient to preserve an issue for appeal. *See N. Bottling Co. v. PepsiCo, Inc.*, 2021 U.S. App. LEXIS 21684, *8-9 (8th Cir. 2021) (footnote omitted) ("Happening to cite a case involving the same issue without developing an argument is not enough to preserve an issue for appeal.") *See also Rocafort v. IBM Corp.*, 334 F.3d 115, 121-22 (1st Cir. 2003) (citations omitted) ("Passing reference to legal phrases and case citation without developed argument is not sufficient to defeat waiver.") Moreover, G&G did not even attempt to develop the argument that Ventura was required to present evidence to defeat their motion to dismiss. Even though they cited *Szydel*, 121 Nev. 453, 117 P.3d 200, G&G only discussed the sufficiency of the *allegations* in the complaint; they did not argue Ventura was required to submit evidence to defeat their motion to dismiss. *See generally Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) (citation omitted) ("a party cannot treat the district court as a mere ill-placed bunker to be circumvented on his way to this court where he will actually engage his opponents").

Although G&G spend more time discussing Ventura's supposed obligation to submit evidence in the RAB (RAB 16, 27-28, 30-34), G&G did not argue that

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throughout their reply in support of their motion to dismiss. (J.App.081, lines 13-14, 19-20; J.App.083, lines 12-14, 19-21; J.App.086, lines 8-9.)

an isolated phrase in *Szydel* – "a pretrial . . . motion" – was intended to apply, or should be applied, to a motion to dismiss under Nevada Rule of Civil Procedure 12(b)(5). Instead, G&G make a general argument: "NRCP 12(b)(5) does not require a court to give a non-moving party the 'opportunity to elicit evidence' to establish his claim." (RAB 45.) However, this argument – for which G&G did not cite any authority – is an incorrect statement of the law. *See Dutt v. Kremp*, 111 Nev. 567, 574, 894 P.2d 354, 359 (1995), overruled on other grounds, *LaMantia v. Redisi*, 118 Nev. 27, 30-31, 38 P.3d 877, 880 (2002). *See also Born*, 114 Nev. at 859, 962 P.2d at 1230 ("The district court ruled as a matter of law that the doctrine was inapplicable. This was error 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.") G&G simply did not do enough work – below or in the RAB – such that the Court should address whether "a pretrial . . . motion" includes a motion to dismiss under Nevada Rule of Civil Procedure 12(b)(5). *See U.S. v. Fuqua*, 636 Fed. Appx. 303, 312 (6th Cir. 2016) (citation omitted) ("But 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'")

b. *Szydel* does not apply to a motion to dismiss under Nevada Rule of Civil Procedure 12(b)(5).

In *Szydel*, the Court held: "[A]ny 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. Consequently, 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).” 121 Nev. at 460, 117 P.3d at 205 (alteration in brackets). G&G want the Court to hold that the phrase “a pretrial . . . motion,” 121 Nev. at 460, 117 P.3d at 205, includes a motion to dismiss brought pursuant to Nevada Rule of Civil Procedure 12(b)(5). (RAB 30-34.)

The Court has not held that “a pretrial . . . motion” includes a motion to dismiss brought pursuant to Rule 12(b)(5). It does not appear that the Court intended for that interpretation. *Szydel* – itself – involved a motion to dismiss, and the Court did not direct the district court to consider whether the plaintiff had sufficient evidence to proceed immediately after remand. Moreover, in *Jaramillo*, the Court focused on the allegations in the complaint: “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.” 460 P.3d at 463 (italics added).

The Nevada Rules of Civil Procedure do not require a plaintiff to attach “evidence” to *support* the allegations in a complaint. *See* NRCP 8(a). Rather, in reviewing a Rule 12(b)(5) motion, the Court focuses on the sufficiency of the allegations in the complaint: “In making this determination, the allegations in the complaint *must be taken at* ‘*face value*,’ *California Motor Transport Co. v.*

Trucking Unlimited, 404 U.S. 508, 515 (1972), and must be construed favorably in the plaintiff's behalf." *Edgar*, 101 Nev. at 227-28, 699 P.2d at 111-12 (italics added) (citation omitted). *See Breliant*, 109 Nev. at 845, 858 P.2d at 1260 (citation omitted) ("All factual allegations of the complaint must be accepted as true.")

At the outset of a lawsuit, a plaintiff need not have each fact necessary to prevail at trial. *See Dutt*, 111 Nev. at 574, 894 P.2d at 359, overruled on other grounds, *LaMantia*, 118 Nev. at 30-31, 38 P.3d at 880. A plaintiff is afforded discovery to obtain any necessary facts not in his/her possession. Indeed, this Court has reversed a district court that prematurely dismissed a complaint because the applicability of NRS 41A.100(1) depends on the facts. *See Born*, 114 Nev. at 859, 962 P.2d at 1230 (italics added) ("The district court ruled as a matter of law that the doctrine was inapplicable. This was error 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*.") *See generally Zohar v. Zbiegin*, 130 Nev. 733, 739, 334 P.2d 402, 406 (2014) (rejecting the argument that an affidavit was deficient because it did not identify allegedly negligent actors by name because: "Such 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.")

Rather than create a common law exception to Nevada Rule of Civil Procedure 8(a) through a common law addition to Nevada Rule of Civil Procedure 9, the better approach is to interpret the phrase "a pretrial . . . motion" as referring to a motion for summary judgment under Nevada Rule of Civil Procedure 56. This approach makes sense from an "outcome" perspective. If a plaintiff has insufficient evidence to proceed under NRS 41A.100(1), then a defendant may be entitled to a *final judgment* in his/her/its favor, *Sun v. Dreamdealers USA, LLC*, Case No. 2:13-cv-1605-JCM-VCF, 2014 U.S. Dist. LEXIS 57936, *10-11 (D. Nev. Mar. 20, 2014), rather than a plaintiff obtaining leave to amend. *See Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 873 n.5, 8 P.3d 837, 839 n.5 (2000) (the typical remedy for a successful motion to dismiss is a dismissal without prejudice). *See also Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations omitted) ("And in a line of cases stretching back nearly 50 years, we have held that in dismissing for failure to state a claim under Rule 12(b)(6), 'a district could should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'") The fact that a party can move for summary judgment "at any time until 30 days after the close of all discovery[,]" Nevada Rule of Civil Procedure 56(b)

(alteration in brackets), allows the Court to maintain uniformity in its jurisprudence regarding Nevada Rules of Civil Procedure 8(a) and 12(b)(5), while addressing the "timing" concern the Court noted in *Szydel*: "we believe it is only fair that a plaintiff filing a res ipsa loquitur case be required to show early in the litigation process that his or her action *actually meets* the narrow res ipsa requirements." 121 Nev. at 460-61, 117 P.3d at 205 (italics added).[13]

c. Nonetheless, Ventura produced sufficient evidence to defeat G&G's motion to dismiss.

In *Jaramillo*, the Court provided guidance regarding the evidence a plaintiff must adduce to proceed to trial under NRS 41A.100(1). 460 P.3d 460. "[A]ll 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." *Id.* at 464. In *Jaramillo*, also a retained object case, the court held the following evidence was sufficient to trigger the presumption:

> In her complaint, Jaramillo alleged that Dr. Ramos unintentionally left a wire in Maria's left breast after surgery. At summary judgment, she supported these allegations with evidence. Specifically, she presented an ultrasound and mammogram report, both of which postdated the surgery and referenced the wire that remained in Maria's left breast.

[13] Nevada Rule of Civil Procedure 56 also has a built-in, established process for addressing a party's claim he/she/it needs additional time to respond to a motion for summary judgment, Nevada Rule of Civil Procedure 56(d), a process which permits a court to balancing competing priorities. *See Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-19, 110 P.3d 59, 62-63 (2005).

Id. Ventura's complaint (with attached exhibits) is functionally identical.

Ventura filed a *verified* complaint to commence this matter. (J.App.009). Consistent with NRS § 53.045, Ventura: "declare[d] under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct." (J.App.009, ¶22) (alteration in brackets.) In the verified complaint, Ventura alleged that G&G unintentionally left an object in him during surgery they performed on him. (J.App.001-008, ¶¶1-3, 9, 15-16.) He supported these allegations by attaching a portion of an operative report for the surgery that occurred on October 24, 2016 (J.App.003, ¶5 (referring to Exhibit 2, J.App.013-J.App.014), and a subsequent imaging report that referenced the presence of a "metallic foreign body . . . ." (J.App.004, ¶7) (referring to Exhibit 4, J.App.017-J.App.018.)[14] Though the imaging report notes "[t]his seems unlikely to be related to the patient's history of previous esophageal surgery[,]" (J.App.004, ¶7 (referring to Exhibit 4, J.App.017-J.App.018) (alterations in brackets)), Ventura alleges – based on an operative report from a subsequent surgery (J.App.002-03, ¶3, J.App.006, ¶11) – that statement was incorrect. (J.App.006, ¶11.) In other words, Ventura supported his allegations with records from two appointments that occurred after G&G performed surgery; each showed a "foreign" object in his body. *Cf. Jaramillo*, 460

[14] Ventura attached two imaging reports to his Complaint. The first imaging report followed an ultrasound. (J.App.015-016.) The second imaging report, the imaging report referred to in the main text, followed x-rays. (J.App.017-018.)

P.3d at 464. Due to his knowledge of these facts, Ventura could cite his verified complaint in opposition to a motion for summary judgment. *See McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987).

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

Ventura was not required to submit an expert affidavit with his complaint. Thus, the traditional rules regarding amendment apply in this case. (AOB 19.)

The Court reviews a district court's decision denying a party leave to amend for abuse of discretion. (AOB 19; RAB 22.) However, as G&G observed in the RAB, the Court reviews a district court's finding of futility *de novo*. (RAB 22.) "[F]utility is a question of law reviewed de novo because it is essentially an NRCP 12(b)(5) inquiry, asking whether the plaintiff *could* plead facts that would entitle her to relief." *Anderson*, 131 Nev. at 832-33, 358 P.2d at 247-48 (alteration in brackets) (italics added) (citations omitted). "Dismissal without leave to amend is proper only in 'extraordinary cases.'" *Broam v. Bogan*, 320 F.3d 1023,1028 (9th Cir. 2003) (citation omitted). *See Schneider*, 151 F.3d at 1197 (italics added) (citation omitted) ("Pursuant to well-established circuit precedent, 'dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint *could not be saved by any amendment*.'"); *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1116 (D. Nev. 2014) (citation omitted) ("Generally, leave to amend is

only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment.")

Based on these standards, the district court erred in denying Ventura an opportunity to amend.[15] The district court did not identify anything "missing" from the amended complaint. Rather, the district court simply echoed G&G's refutation/contradiction argument; this argument did not merit dismissal in the first instance, let alone provide a sufficient basis upon which to deny amendment. (AOB 19-22.) To the extent Court now holds Ventura was obligated to specifically identify NRS 41A.100(1) in his complaint, Ventura could easily do so – and should be permitted to do so – in an amended complaint. *See Sorensen*, 101 Nev. at 139 n.3, 696 P.2d at 996 n.3. Likewise, if the Court holds Ventura was obligated to submit evidence to defeat G&G's motion to dismiss – more evidence than he attached to the Complaint – the Court should permit him an opportunity to do so.

Rather than arguing that amendment would be futile, as the district court ruled, G&G urge the Court to hold that Ventura waived his right to seek amendment, citing *Adamson v. Bowker*, 85 Nev. 115, 450 P.2d 796 (1969) and *Mills v. Continental Parking Corp.*, 86 Nev. 724, 475 P.2d 673 (1970) (RAB 48-

[15] G&G do not cite any legal authority – nor is the undersigned aware of any – in which the Court held that a plaintiff like Ventura – relying on the statutory *res ipsa loquitur* exception – was obligated to cite a professional negligence case as a condition precedent to filing an amended complaint. (RAB 48.)

49.) Although the decision in *Adamson* is sparse, it appears distinguishable insofar as it seems the lower court had granted leave at least once before it denied leave. 85 Nev. at 120, 450 P.2d at 800 (italics added) ("We now consider appellant's contention that the lower should have granted him leave to *further* amend his pleadings.") Similarly, it appears that the issue in *Mills* was purely legal – "whether the heirs of a pedestrian who was killed by a car driven by a drunken driver have a claim for relief for wrongful death against the operator of a parking lot who surrendered the car to the inebriate with knowledge of his drunken condition[.]" 86 Nev. at 725, 475 P.2d at 674 (alteration in brackets). There was no indication that the plaintiffs could allege any additional *facts* that could overcome the *legal* issue that the court addressed. Here, in contrast, Ventura did not have reason (or opportunity) to seek leave before the district court granted dismissal *without leave to amend*. (AOB 20 n.15.)[16]

G&G do not challenge (or even mention) the Court's decisions in *Fisher v. Executive Fund Life Insurance Co.*, 88 Nev. 704, 504 P.2d 700 (1972) or *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003) – each of which the Court

[16] The district court's dismissal without leave to amend renders G&G's argument that Ventura could have requested leave in the errata he filed (RAB 49) a red herring. At that point, the errata – which there is no evidence the district court considered, and G&G have not argued the district court should have considered – was a spurious filing without material effect.

decided after *Adamson* and *Mills*. (AOB 19-22.)[17] The Court's analysis in *Fisher* highlights the district court's error in this case: "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 . . . ." 88 Nev. at 705-06, 504 P.2d at 702. This case is in the exact same posture. G&G would not be prejudiced if Ventura was afforded leave to file an amended complaint. *See Cohen*, 119 Nev. at 22, 62 P.3d at 734. Therefore, the district court erred in denying Ventura that opportunity.

CONCLUSION

Ventura was not obligated to attach an expert affidavit to the complaint. The district court erred in ruling otherwise. The district court also erred in dismissing this case under Nevada Rule of Civil Procedure 12(b)(5). Ventura alleged that G&G performed surgery on him and unintentionally left an object in him during that surgery. Although not required, Ventura attached medical records that

[17] To the extent the Court perceives a conflict between the four cases, the Court should favor and apply the more modern rules expressed in *Fisher* and *Cohen*. *See Gaudin Motor Co. v. Wodarek*, 76 Nev. 415, 417, 356 P.2d 638, 639 (1960). *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 a 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.")

corroborated his allegations. To the extent the medical records "contradicted" the allegations, such a contradiction created a question of fact, a question that the district court could not answer as a matter of law. The district court compounded these errors by denying Ventura leave to amend. For these reasons, the Court should reverse the dismissal and reinstate this matter for further proceedings.

Signed: August 28, 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 6,986 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: August 28, 2021

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Pursuant to NRAP 25(c)(1)(E), on August 28, 2021, the undersigned electronically filed (through the Supreme Court of Nevada's eFlex system) the attached Appellant's Reply Brief, thereby providing a copy to the following individuals:

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