IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ALVAREZ VENTURA, *Appellant*, vs. **JOHN H. GANSER, M.D. LIC #9279; AND GOMEZ, KOZAR, MCELREATH AND SMITH, A PROFESSIONAL CORPORATION,** *Respondents*.	No.: **81850**	Electronically Filed Jul 14 2022 11:32 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT DAVID ALVAREZ VENTURA'S PETITION FOR REHEARING OF THE COURT'S ORDER OF AFFIRMANCE ENTERED JUNE 30, 2022

INTRODUCTION

On June 30, 2022, the Court issued an Order of Affirmance. (22-20693). In that Order, a two-justice majority held: "In *Szydel v. Markman*, this court explained that a plaintiff relying on NRS 41A.100(1)'s exception to the affidavit requirement faces a heightened pleading requirement to demonstrate 'the prima facie requirements for a *res ipsa loquitur* case' to survive a motion to dismiss. 121 Nev. 453, 460, 117 P.3d 200, 205 (2005)." Order at 2. In affirming the district court's dismissal of Ventura's claim against Dr. Ganser, the majority continued:

> Based on our examination of the pleading and attached documentation, we conclude that the trial court correctly dismissed Ventura's pleading as to Dr. Ganser. The complaint alleged that Dr. Ganser left a foreign object in his body, but the exhibits attached thereto revealed that subsequent radiology either failed to show the presence of a foreign object or contained the radiologist's opinion that the object was unrelated to Dr. Ganser's surgery. Thus, Ventura's complaint and exhibits contain inconsistences negating the prima facie showing necessary to proceed in a *res ipsa* case. In light of these inconsistencies, Ventura did not meet his burden under *Szydel* with respect to his claim against Dr. Ganser and was not entitled to rely on the *res ipsa loquitur* exception to NRS 41A.071's affidavit requirement.

Order at 2-3.[1] For the reasons that follow, Ventura petitions for rehearing under Nevada Rule of Appellate Procedure 40.

[1] Based on this reasoning, the majority also affirmed the district court's dismissal of "Ventura's negligent supervision claim against Western Surgical Group . . . ." Order at 3. Justice Stiglich dissented regarding Ventura's claim against Dr. Ganser, but "concur[red] with the majority's holding regarding Ventura's negligent supervision claim." Order at 4 (alteration in brackets).

ARGUMENT

I. *Szydel* did not Impose a "Heightened Pleading Requirement."

Nevada Rule of Civil Procedure 8 provides the general rules of pleading. As relevant to this case, Nevada Rule of Civil Procedure 8(a)(2) provides: "A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

Ventura argued that his Complaint was subject to (and satisfied) Nevada Rule of Civil Procedure 8(a)(2).[2] Ventura also argued: "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 [*Szydel*'s reference to] 'a pretrial . . . motion' as referring to a motion for summary judgment under Nevada Rule of Civil Procedure 56."[3]

Szydel did not modify Nevada Rule of Civil Procedure 8 or Nevada Rule of Civil Procedure 9. *Syzdel* did not reference either rule. In fact, *Szydel* only used the word "pleading" once: "As this court recently noted in *Borger v. District Court*, the plain language of NRS 41A.071 provides a threshold requirement for medical

[2] *See* Appellant's Opening Brief ("AOB")14-19. *See also* Appellant's Reply Brief ("ARB") 7-15.

[3] ARB 20 (alteration in brackets).

malpractice pleadings and does not pertain to evidentiary matters at trial, as does NRS 41A.100(1)." *Szydel*, 121 Nev. at 458, 117 P.3d at 203 (citation omitted).

Szydel did not involve the sufficiency of the plaintiff's allegations.[4] The sole issue was "whether a medical malpractice action filed under Nevada's res ipsa loquitur statute, NRS 41A.100, which does not require expert testimony at trial, must include a medical expert affidavit, as mandated by NRS 41A.071." 121 Nev. at 454, 117 P.3d at 201. Answering "no," the *Szydel* majority conclude[d] that the expert affidavit requirement does not apply when the malpractice action is based solely on the res ipsa loquitur doctrine." *Id.* (alteration in brackets). The *Szydel* majority did not "reach appellant's other arguments[,]" 121 Nev. at 461, 117 P.3d at 205 (alteration in brackets), one of which was his argument "that his actions" did not, "as a matter of law, meet the requirements of res ipsa loquitur under NRS 41A.100(1)(a) . . . ." 121 Nev. at 460 n.32, 117 P.3d at 205 n.32.

Even the dissent tacitly recognized *Szydel* did not involve the sufficiency of the plaintiff's allegations. The dissent confirmed that "NRS 41A.100, Nevada's limited codification of res ipsa loquitur, *is a rule of evidence* creating the rebuttable presumption that a defendant is negligent in medical malpractice cases." 121 Nev.

[4] The plaintiff's allegations were essentially identical to what Ventura alleged in this case: "Szydel's complaint alleged that in performing the mastopexy operation, Dr. Markman left a surgical needle inside Szydel's breast and, under Nevada's res ipsa loquitur statute, there is a rebuttable presumption of negligence." 121 Nev. at 456, 117 P.3d at 202.

at 461, 117 P.3d at 205 (Hardesty, J., dissenting) (italics added).[5] The dissent also confirmed that a plaintiff's entitlement to the presumption is a matter for the district court to "*determine during trial*[.]" 121 Nev. at 463, 117 P.3d at 206 (italics added) (alteration in brackets). Finally, the dissent explained: "The approach taken by the majority runs contrary to the goals of NRS 41A.071 because, by the time a decision is made on whether a party is entitled to the res ipsa instruction, a substantial amount of time, energy, and money in discovery *and trial* is expended." 121 Nev. at 463, 117 P.3d at 207 (italics added).

In this case, the majority misapplied *Szydel*'s narrow ruling and re-wrote the rules of pleading when it held "that a plaintiff relying on NRS 41A.100(1)'s exception to the affidavit requirement faces a heightened pleading requirement to demonstrate 'the prima facie requirements for a *res ipsa loquitur* case' to survive a motion to dismiss." Order at 2 (quoting *Szydel*, 121 Nev. at 460, 117 P.3d at 205). Placing the ten-word excerpt back into context, *Szydel* reads:

> When, however, a plaintiff files a res ipsa loquitur claim in conjunction with other medical malpractice claims that do not rely on the res ipsa loquitur doctrine, those other claims are subject to the requirements of NRS 41A.071 and must be supported by an appropriate affidavit from a medical expert. In addition, any res ispa claim filed without an expert affidavit must, when challenged by the

[5] This was consistent with the Court's holding nearly eighty years earlier: "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). Ventura identified this case at ARB 9, though it appears the majority may have overlooked it.

> 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 (internal footnote omitted) (italics added). This passage does not address what a plaintiff must allege in his or her complaint, much less establish any sort of "heightened pleading requirement." Rather, the stated process, i.e., *when* a defendant challenges a plaintiff's reliance on NRS 41A.100(1), *then* "the plaintiff must present facts and evidence[,]" is simply a tailored recitation of how pre-trial motion practice is supposed to proceed under Nevada Rule of Civil Procedure 56.

To the extent any doubt persisted, two years ago, a unanimous panel of the Court confirmed that NRS 41A.100(1) is not a "threshold matter." In *Jaramillo v. Ramos*, the Court, reversing summary judgment for the defendant, explained:

> **The district court misread *Szydel* and erroneously characterized NRS 41A.100(1)'s presumption of negligence as a threshold matter instead of an evidentiary rule.** In *Szydel*, however, we explained that 'the plain language of NRS 41A.071 provides a threshold requirement for medical malpractice pleadings and does not pertain to evidentiary matters at trial, as does NRS 41A.100(1).' 121 Nev. at 458, 117 P.3d at 203. **The phrase 'as does NRS 41A.100(1)' modifies the nearest preceding clause, meaning NRS 41A.100(1), unlike NRS 41A.071, pertains to evidentiary matters at trial.** We further clarified any remaining ambiguity as to NRS 41A.100(1)'s nature throughout the majority and dissenting opinions. *See Szydel*, 121 Nev. at 458, 117 P.3d at 203 ('NRS 41A.100(1) permits a jury to infer negligence without expert testimony at trial . . .'); *see id.* at 461, 117 P.3d at 205 **(Hardesty, J. dissenting) ('NRS 41A.100 . . . is a rule of evidence . . . .')**

136 Nev. Adv. Rep. 17, 460 P.3d 460, 463 n.2 (2020) (3-0 decision) (Hardesty, J., Cadish, J., Parraguirre, J.) (bolding added).[6] In addition to misapplying *Szydel*, it appears the majority may have overlooked *Jaramillo*.[7]

II. It Appears the Majority Failed to Consider the Court's Jurisprudence Regarding Motion Practice Under Nevada Rule of Civil Procedure 12(b)(5), and the Net Effect of a "Contradiction."

The majority did not outline exactly what a plaintiff must allege to satisfy its newly-minted "heightened pleading requirement." Order at 2. In ruling that Ventura's Complaint did not meet such requirement, the majority wrote:

> The complaint alleged that Dr. Ganser left a foreign object in his body, but the exhibits attached thereto revealed that subsequent radiology either failed to show the presence of a foreign object or contained the radiologist's opinion that the object was unrelated to Dr. Ganser's surgery. Thus, Ventura's complaint and exhibits contain inconsistences negating the prima facie showing necessary to proceed in a *res ipsa* case. In light of these inconsistencies, Ventura did not meet his burden under *Szydel* with respect to his claim against Dr. Ganser and was not entitled to rely on the *res ipsa loquitur* exception to NRS 41A.071's affidavit requirement.

Order at 2-3. Based on the majority's use of the words "but" and "inconsistencies," it appears the majority passed upon the plausibility of Ventura's Complaint.

It appears the majority accepted that – by itself – Ventura's allegation "that Dr. Ganser left a foreign object in his body" was sufficient to invoke NRS

[6] ARB 9.

[7] *See* ARB 1.

41A.100(1)(a) at the pleading stage. Order at 2 (italics added) ("The complaint alleged that Dr. Ganser left a foreign object in his body, *but* . . . .") *See also* Order at 1 ("Appellant David Alvarez Ventura filed a medical malpractice complaint alleging that respondent John H. Ganser, M.D., left a foreign object in him during a 2016 surgery.")[8] However, if Ventura is incorrect, then the majority may have overlooked *Jaramillo*, in which the Court held that the plaintiff's (essentially identical) allegations were sufficient to invoke NRS 41A.100(1)(a). 136 Nev. Adv. Rep. 17, 460 P.3d at 463 ("In her complaint, she pleaded facts entitling her to NRS 41A.100(1)(a)'s res ipsa loquitur theory of negligence. Specifically, she alleged that Dr. Ramos unintentionally left a wire in Maria's left breast following surgery.")[9] *See also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (citations omitted) (a plaintiff's allegations need only provide "fair notice of the nature and basis of a legally sufficient claim and the

[8] Ventura repeatedly alleged that the sole source of the object was the surgery Ganser and Gomez, Kozar, McElreath and Smith performed. J.App.001-J.App.008, ¶¶1-3, 9, 15-16. Ventura also attached two medical records that indicated a foreign metal object in his person, subsequent to that surgery. *See* J.App.002-003, ¶3 (referring to Exhibit 1, J.App.011-J.App.012), J.App. 004, ¶7 (referring to Exhibit 4, J.App.017-J.App.018). Notably, it appears the majority overlooked Ventura's allegation that Dr. Jackson's opinion that the surgery was "unrelated" to the object was wrong. J.App.006, ¶11.

[9] AOB 16. *See also* ARB 10, 18.

relief requested").[10] *See generally Sorensen v. First Fed. Sav. & Loan Ass'n*, 101 Nev. 137, 139 n.3, 696 P.2d 995, 996 n.3 (1985) ("Although negligence was not expressly pleaded by Sorensen, sufficient allegations were alleged to give First Federal adequate notice of a negligence claim.").[11]

The majority's willingness to accept that certain of Ventura's allegations were sufficient to invoke the application of NRS 41A.100(1)(a) undercuts its subsequent willingness to completely discount those allegations due to supposed "inconsistencies." To reach its conclusion, the majority necessarily had to overlook the Court's jurisprudence regarding Nevada Rule of Civil Procedure 8(a)(2) and Nevada Rule of Civil Procedure 12(b)(5). For example, in holding that certain documents "negated" Ventura's allegations, it appears the majority failed to consider the Court's recent decision in *Harris v. State*, 138 Nev. Adv. Op. 40, *8 (June 2, 2022), which re-affirmed that Nevada state courts should not evaluate the plausibility of a plaintiff's complaint.[12] It also appears that the majority failed to apply a bedrock principle of Nevada law: the Court could affirm dismissal "only if it appear[ed] *beyond a doubt* that [Ventura] could prove no set of facts, which, if

[10] ARB 9.

[11] ARB 10.

[12] *See* Appellant David Alvarez Ventura's Notice of Supplemental Authorities (2022-17803).

true, would entitle [him] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (alteration in brackets) (italics added).[13] *See also Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 644, 403 P.2d 1280, 1286 (2017) ("Regardless, at this stage of the proceedings this court must determine whether there is any set of facts that, if true, would entitle Szymborski to relief and not whether there is a set of facts that would not provide Szymborski relief.")

The majority did not cite any legal authorities in which a court held that it was empowered to resolve a factual dispute as a matter of law. To the contrary, it appears the majority overlooked the cases in which the Court (and the Court of Appeals) have held that material factual disputes cannot be resolved as a matter of law.[14] The Court's reasoning in two cases is particularly compelling. In *Born v. Eisenman*, the Court reversed a district court's pre-trial ruling precluding a *res ipsa loquitur* instruction. 114 Nev. 854, 859, 962 P.2d 1227, 1230-31 (1998). In reversing the district court, the Court explained:

> The respondents claimed that the doctrine of res ipsa loquitur did not apply and the issue was argued at a pre-trial conference. 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

[13] AOB 14. *See also* ARB p.7

[14] AOB18-19. *See also* ARB 11-15.

> 41A.100. From the facts presented in the pre-trial memorandum, it would appear that subsection (e) had been satisfied. . . .
>
> Because it was shown that the factual predicate existed for the admission of the res ipsa loquitur instruction, the district court was obligated to give the instruction, and the entry of the order precluding the applicability of the doctrine in this case was reversible error.

114 Nev. at 859, 962 P.2d at 1230-31.[15] The Court echoed this analysis in *Jaramillo*, which involved the more exacting summary judgment standard:

> The question thus becomes whether Jaramillo presented sufficient evidence that the facts giving rise to NRS 41A.100(1)'s presumption existed. We conclude that she did. **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.** Dr. Ramos did not dispute this evidence or argue that she intentionally left the wire in Maria's body. Thus, the undisputed facts directly parallel the factual circumstances enumerated in NRS 41A.100(1)(a), which establishes a presumption of negligence where '[a] foreign substance . . . was unintentionally left within the body of a patient following surgery.' Jaramillo thus successfully established that NRS 41A.100(1)'s rebuttable presumption of negligence applies.
>
> **That Dr. Ramos presented direct evidence in the form of an expert declaration to rebut the presumption of negligence does not entitle her to summary judgment as a matter of law. Such evidence instead created a factual question as to the existence of negligence, which is to be determined by the jury.** *See* NRS 47.200 (listing different jury instructions depending on the strength of the direct evidence); *see also Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007) (observing that summary judgment is seldom affirmed in negligence cases 'because, generally the question of whether a defendant was negligent in a particular situation is a

[15] AOB18. *See also* ARB 14, 19.

> question of fact for the jury to resolve'). **Further, such evidence did not shift the burden of proof back to Jaramillo to present additional evidence.** The Legislature has expressly determined that evidence establishing one of the five factual circumstances enumerated in NRS 41A.100(1)(a)-(e), which Jaramillo provided, is sufficient for the jury to presume that the injury or death was caused by negligence, even in the absence of expert testimony. NRS 41A.100(1); *see Johnson*, 112 Nev. at 434, 915 P.2d at 274 (explaining that in these five factual circumstances, 'the legislature has, in effect, already determined that [such circumstances] ordinarily do not occur in the absence of negligence').

136 Nev. Adv. Rep. 17, 460 P.3d at 464.[16] Ultimately, the Court reversed summary judgment for the defendant because "the expert declaration Dr. Ramos presented to support her summary judgment motion did not *conclusively negate* the statutory presumption of negligence or show a lack of evidence for the presumption to apply. It merely created a material factual dispute for trial on the issue of negligence, which would otherwise be presumed." *Id.* at 465. In this case, Ventura provided the exact same evidence. *See supra* 7 n.8.

III. The Panel Should Reinstate Ventura's Complaint against Gomez, Kozar, McElreath and Smith.

The majority affirmed dismissal of Ventura's Complaint against Gomez, Kozar, McElreath and Smith solely because "the failure-to-supervise allegations underlying that claim are 'inextricably linked to professional negligence.'" Order at 3 (citation omitted). Justice Stiglich joined the majority in affirming dismissal of

[16] AOB19. *See also* ARB 21-23.

this part of Ventura's Complaint. *See* Order at 4. Briefly, if the Court grants rehearing, concludes that Ventura was not obligated to file a supporting affidavit, and reverses the dismissal of Ventura's Complaint against Ganser, then the Court's reasoning regarding Ventura's claim against Gomez, Kozar, McElreath and Smith is no longer sufficient to affirm dismissal. In that case, the Court should reverse dismissal of Ventura's Complaint against Gomez, Kozar, McElreath and Smith.

Signed: July 14, 2022

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word.

2. I further certify that this brief complies with the type-volume limitations or NRAP 40 because it is proportionally spaced, has a typeface of 14 points, and contains 3,071 words.

Signed: July 14, 2022

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(E), on July 14, 2022, the undersigned electronically filed (through the Supreme Court of Nevada's eFlex system) the attached, Appellant David Alvarez Ventura's Petition for Rehearing of the Court's Order of Affirmance Entered June 30, 2022, thereby providing a copy to the following individuals:

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