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
(Dist. Court Case No. CV20-00866)

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

ANSWER TO PETITION FOR REHEARING

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Respondents, JOHN GANSER, M.D., and GOMEZ, KOZAR, MCELREATH AND SMITH, A PROFESSIONAL CORPORATION, DBA WESTERN SURGICAL GROUP (collectively, "DR. GANSER"), hereby answer Appellant DAVID VENTURA's Petition for Rehearing.

I.

SUMMARY OF ARGUMENT

David Ventura's petition for rehearing essentially argues one point: The panel misapplied *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005) and "re-wrote the rules of pleading" for professional negligence cases.[1] The petition is wrong.

As demonstrated below, it is clear that the panel majority reviewed the record, understood the issues involved in this appeal, and correctly applied the law governing this professional negligence action. Contrary to appellant's assertion, the majority did not rewrite the rules of pleadings or create a heightened pleading standard. Rather, the majority applied the standard set forth in *Szydel*, which established prima facie requirements to be met early in the litigation of professional negligence actions filed under Nevada's *res ipsa loquitur* statute.

In addition to being founded on an erroneous premise, the petition reargues matters that were argued in the briefs and during oral argument. As demonstrated in

[1] The petition also speculates about what the majority "appears" to have done or not done, including that "the majority *may have* overlooked" some of the cases cited in Ventura's briefs. *Pet., pp. 6-8.*

the briefing, at oral argument, and herein, Ventura's arguments are insufficient to warrant rehearing of the Order of Affirmance.

II.

ARGUMENT

A. STANDARDS OF REVIEW FOR REHEARING

Under NRAP 40, rehearings are extremely limited. The court may consider rehearings only when the court has overlooked or misapprehended a material fact in the record or a material question of law, or when the court has overlooked or misapplied a controlling statute, rule, regulation or decision. NRAP 40(c)(2). Matters presented in the briefs and oral arguments may not be reargued in a petition for rehearing, and no point may be raised for the first time. NRAP 40(c)(1). Any claim that the court has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue. NRAP 40(a)(2).

Rehearings are not granted to review matters that are of no practical consequence. "'[A] petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice.'" *Bahena v. Goodyear Tire & Rubber Co*., 126 Nev. 606, 609, 245 P.3d 1182, 1184 (2010), quoting *Gordon v. District Court*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998) (internal quotation marks omitted).

Respondents submit that the petition fails to meet the exacting standards of NRAP 40.

B. THE MAJORITY DID NOT MISAPPLY *SZYDEL* OR OVERLOOK CONTROLLING AUTHORITY

Ventura's first contention on rehearing is that the majority misapplied *Szydel v. Markman, supra*. He asserts that the panel majority "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. *Pet., p. 4.*

The argument should be rejected because it is premised on Ventura's own misinterpretation of *Szydel* and of the Order of Affirmance. Contrary to Ventura's assertion, the majority did not misapply *Szydel* or re-write the rules of pleading. Rather, the majority applied the standard set forth in *Szydel* to the facts of this case and correctly concluded that Ventura had not met that standard:

> 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). The district court here correctly applied the *Szydel* standard by first examining Ventura's complaint, including the attached medical records, and then considering the contents of those records to determine whether he had made a prima facie showing that his case is one for *res ipsa loquitur.*

Order of Affirmance, p. 2. The majority's analysis is consistent with *Szydel.*

Szydel addressed a conflict between NRS 41A.100(1), which permits a jury to infer negligence without expert testimony at trial, and NRS 41A.071, which requires dismissal whenever the expert affidavit requirement is not met. 121 Nev. at 458-59, 117 P.3d at 203-04. *Szydel* reconciled the conflict by applying NRS 41A.100(1)'s rule of evidence to the jurisdictional requirement of NRS 41A.071, which is raised at the pleading stage. The court thus created an exception to the affidavit requirement for *res ipsa loquitur* claims where evidence is presented that the healthcare provider caused injury under one of the circumstances enumerated in NRS 41A.100(1).[2] *Id*. In so doing, *Szydel* imposed the following heightened standard for actions pleading a *res ipsa loquitur* claim:

> [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). . . . [W]e 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.

Szydel, 121 Nev. at 460-61, 117 P.3d at 205 (emphasis added).

[2] NRS 41A.100(1) states in relevant part: "[A] rebuttable presumption that the personal injury or death was caused by negligence arises *where evidence is presented* that the personal injury or death occurred in any one or more of the following circumstances: [¶] (a) A foreign substance . . . was unintentionally left within the body of a patient following surgery; . . .." Emphasis added.

The Order of Affirmance and the district court's order of dismissal appropriately applied the standard in *Szydel* in concluding that the complaint and the exhibits incorporated therein[3] did not make the necessary prima facie showing to proceed in a *res ipsa* case. *See Order of Affirmance, pp. 2-3; see also J.App. 093.* The district court determined that Ventura had not presented any such evidence to support the application of NRS 41A.100(1)(a). *J.App. 093.* Applying the *Szydel* standard, the majority correctly determined that the district court had not erred in so finding.[4] *Order of Affirmance, pp. 2-3.*

In furtherance of his argument that the majority "re-wrote" the rules of pleading and created a "heightened pleading requirement," Ventura contends that "*Szydel* did not involve the sufficiency of the plaintiff's allegations" or "modify" NRCP 8. *Pet., pp. 2-5.* Ventura's contentions defy logic and Nevada law.

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[3] *See* NRCP 10(c) ("A copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes."); *see also Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (providing that a district court may consider both the complaint and any exhibits attached thereto when ruling on a motion to dismiss).

[4] Ventura asserts that the court "may have overlooked" the 75-year-old case of *Las Vegas Hosp. Ass'n v. Gaffney*, 64 Nev. 225, 180 P.2d 494 (1947), which he cited in his reply brief for the proposition that the *res ipsa loquitur* doctrine is not a rule of pleading, "but rather an inference aiding in the proof." *Pet., p. 4, fn. 5, citing ARB 9.* The *Gaffney* case predates NRS 41A.071 and NRS 41A.100(1) by more than 50 years. Thus, it has no bearing on the issues in this medical malpractice case and is certainly not controlling authority that the panel overlooked.

Importantly, the Order of Affirmance did not modify the standards for pleadings. NRCP 8(a)(2) provides: "A pleading that states a claim for relief must contain a short and plain statement *showing* that the pleader is entitled to relief" (emphasis added). The purpose of a complaint is to give fair notice of the nature and basis of a *legally sufficient* claim and the relief requested. *See Zohar v. Zbiegin*, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014), *citing Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993).

Pleadings in professional negligence cases are legally sufficient when they comply with NRS 41A.071's affidavit requirement or fall within an exception to the affidavit requirement. *See, e.g., Szydel* (res ipsa exception); *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 403 P.3d 1280 (2017) (non-medical claims); *Est. of Curtis v. S. Las Vegas Med. Investors, LLC*, 136 Nev. 350, 353, 466 P.3d 1263, 1266-67 (2020) (common knowledge exception). The defendant in *Szydel* challenged the sufficiency of the complaint when he moved to dismiss the complaint for failing to comply with NRS 41A.071. *Szydel*, 121 Nev. at 456, 117 P.3d at 202.

Indeed, the purpose of a motion to dismiss under NRCP 12(b)(5) is to challenge the legal sufficiency of a complaint. *See, e.g., Szymborski*, 133 Nev. at 640, 403 P.3d at 1283 (the court's review of an order granting an NRCP 12(b)(5) motion to dismiss is to determine whether the allegations are sufficient to state a

claim for relief). In professional negligence cases, a motion to dismiss under NRCP 12(b)(5) is the proper procedural vehicle to challenge a complaint that does not comply with NRS 41A.071. *See Washoe Medical Center v. District Court*, 122 Nev. 1298, 148 P.3d 790 (2006). Under *Szydel*, a complaint asserting a *res ipsa loquitur* claim 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.

In this case, the record showed that Ventura's complaint fell short of the *Szydel* standard. Dr. Ganser challenged the legal sufficiency of the complaint pursuant to NRCP 12(b)(5) because no affidavit supported the complaint. Based on the entirety of the complaint, including the incorporated exhibits, the district court found it was legally insufficient because it did not plead facts sufficient to state a *res ipsa* claim and thus required an affidavit, which it was lacking. *J.App. 092-95.* In affirming the district court's decision, the majority did not modify Rule 8, create a "heightened pleading requirement," or resolve disputed facts, as Ventura contends.

Rather, consistent with NRCP 8(a)(2), NRCP 12(b)(5), and *Szydel,* the majority concluded that Ventura was not entitled to rely on the *res ipsa* exception to NRS 41A.071 because the complaint and the attached documentation did not make the necessary showing to proceed in a *res ipsa* case and thus did not meet its burden under *Szydel* for the *res ipsa* exception. *Order of Affirmance, pp. 2-3.* In other words,

the complaint and the medical records attached to it did not state a factually or legally sufficient claim. Ventura's conclusory allegation that unspecified "surgical instruments" [*J.App. 002, ¶1*] were left behind following the robotic laparoscopic surgery performed by Dr. Ganser in 2016 were not only insufficient, but they were contradicted by the medical records cited in and attached to the complaint. *J.App. 003-04, ¶¶ 6-7, 016-018.*

The dissent writes that the complaint contained "some evidence" that a foreign object was left in his body, referencing the 2018 record that states the foreign object seen on imaging seemed "unlikely to be related to Ventura's esophageal surgery." *Order of Affirmance, p. 5 (Stiglich, J., dissenting).* Respectfully, the November 2018 report cannot be considered in a vacuum. *See, e.g., Zohar,* 130 Nev. at 739, 334 P.3d at 406, *citing* NRCP 10(c) (concluding that the complaint and the expert affidavit should be read together, and that "exhibits to pleadings are considered part thereof"). The dissent's rationale overlooks the 2017 imaging study which found no evidence of a foreign body one year after the laparoscopic surgery performed by Dr. Ganser. When both studies are read together, along with 2019 operative report that found a foreign body in Ventura's left hip [*J.App. 012*], the 2018 report does not provide "some evidence" that an object was left after the 2016 surgery. Instead, coupled with the 2017 study and the 2019 operative report, the 2018 study negates the conclusory

allegation that surgical instruments were left behind in the course of the 2016 laparoscopic esophageal surgery. *Compare J.App. 003, ¶1 with ¶6 and J.App. 016.*

By contrast, the majority examined the complaint and exhibits together, as dictated by reason and public policy. *See, e.g., Zohar*, 130 Nev. at 739, 334 P.3d at 406 (concluding that reason and public policy dictate that the complaint and expert affidavit be read together). Based thereon, the majority correctly concluded that the inconsistencies in Ventura's complaint and exhibits "negate the prima facie showing necessary to proceed in a *res ipsa* case." *Order of Affirmance, p. 2.*

Ventura purports to express concern that the language in *Szydel* which requires a plaintiff to present facts and evidence that show the existence of one or more of the *res ipsa* situations "does not address what a plaintiff must allege in his complaint." *Pet., p. 5.* Ventura's argument is of no practical consequence to the issue presented by his petition and thus need not be considered. *See Bahena,* 126 Nev. at 609, 245 P.3d at 1184. To the extent it is considered and of legitimate concern, a party may look to recent Nevada Supreme Court opinions which reflect that complaints asserting *res ipsa loquitur* claims need only present *specific* facts, as compared to conclusory allegations, to withstanding summary adjudication.

For example, in *Cummings v. Barber*, 136 Nev. 139, 460 P.3d 963 (2020), the plaintiff presented evidence that the physician had left a foreign substance in her body. 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, 135, 460 P.3d 460, 462 (2020), the plaintiff made specific allegations and presented evidence showing that a wire had been left in the patient's breast following a biopsy. Both cases met the standard set forth in *Szydel* and survived summary judgment.

By contrast, despite the assertion that his allegation was similar to the allegations in *Szydel* and *Jaramillo,* Ventura simply made the conclusory allegation that an unspecified surgical instrument had been left behind after the laparoscopic surgery performed by Dr. Ganser. *See J.App. 002.* Moreover, unlike *Szydel* and *Jaramillo,* Ventura's allegations were contradicted by his own complaint exhibits. As the panel majority correctly concluded, Ventura's complaint and the exhibits thereto did not meet the standard established in *Szydel* as to his claim against Dr. Ganser; therefore, Ventura was not entitled to rely on the *res ipsa loquitur* exception to NRS 41A.071's affidavit requirement. *Order of Affirmance, pp. 2-3.*

In short, the petition for rehearing did not demonstrate that the majority misapplied *Szydel* or that it overlooked any controlling authority. It should, therefore, be denied.

C. THE MAJORITY DID NOT FAIL TO CONSIDER NRCP 12(B)(5) JURISPRUDENCE

Most of Section II of the petition consists of recycled arguments Ventura made in his briefs and at oral argument. Ventura begins this section by contending that the majority did not outline what a plaintiff must allege "to satisfy its newly-minted 'heightened pleading requirement.'" *Pet., p. 6, Section II.* Ventura's assertion may be rejected because it is founded on a false premise. As shown above, the majority did not "mint" a heightened pleading standard. Rather, it applied *Szydel,* which provides that a plaintiff must meet the prima facie requirements for a *res ipsa loquitur* case and must show *early in the litigation process* that the action actually meets the narrow *res ipsa loquitur* requirements. *Szydel*, 121 Nev. at 460-61, 117 P.3d at 205. As the district court and the majority correctly found, Ventura failed to satisfy these requirements. *Order of Affirmance, pp. 2-3; see also J.App. 093.*

Ventura next contends that to reach its conclusion, "the majority necessarily had to overlook the Court's jurisprudence" regarding NRCP 8(a)(2) and NRCP 12(b)(5). *Pet., p. 8.* Just as Ventura accused the district court of not understanding NRCP 12(b)(5) during the briefing of this appeal [*AOB 14-19*], Ventura now accuses the majority of failing to consider the jurisprudence regarding motion practice under NRCP 12(b)(5) and of "empower[ing]" itself to "resolve a factual dispute as a matter of law." *Pet., pp. 6, 9.* As the briefing showed, it is Ventura

who misunderstands the standards for motions to dismiss under NRCP 12(b)(5) and motions for summary judgment under NRCP 56. *See, e.g., RAB pp. 39-47.* His arguments about Rule 56 have no place in this appeal, as this case was not before the court on summary judgment.

Still, Ventura focuses on the majority's reference to the inconsistencies in Ventura's complaint and the exhibits attached thereto to support his argument that the majority "appears" to have passed on the plausibility of the complaint and resolved the "factual dispute as a matter of law." *Pet., pp. 6-10.* Ventura also contends that "it appears the majority failed to consider" *Harris v. State,* 138 Nev. Adv. Op. 40 (June 2, 2022), which he construes as providing that courts should not evaluate the plausibility of a complaint. *Pet., p. 8.* There is no indication in the Order of Affirmance that the majority "passed on the plausibility of the complaint" or overlooked *Harris,* which is not even controlling authority.[5]

The majority decision is clearly based on the standards in NRCP 12(b)(5) and on the case law that has interpreted it over the years, including recent cases that addressed motions to dismiss for failing to comply with NRS 41A.071's affidavit requirement. *See, e.g., Szymborski,* in which the court instructs that a complaint should only be dismissed for failure to state a claim if "it appears beyond a doubt

[5] *Harris* is inapposite as the issue there was the standard for sufficiency in pleading a deprivation-of-rights claim under 42 U.S.C. §1983.

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). Contrary to Ventura's contention, the majority did not "fail[] to apply" this "bedrock principle of Nevada law." *Pet., pp. 8-9.* Moreover, neither the district court nor the majority evaluated the plausibility of Ventura's complaint. Therefore, Ventura's argument is of no practical consequence to the issues and need not be considered. *See Bahena, supra.*

The Order of Affirmance reflects that the majority properly applied NRCP 12(b)(5)'s jurisprudence. Under NRCP 12(b)(5), courts are required to draw *reasonable* inferences in favor of the non-moving party. *Szymborski*, 133 Nev. at 640, 403 P.3d at 1283 (emphasis added). A court need not, however, 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). Nor is the court required to accept as true allegations contradicted by exhibits to the complaint. *Id.*[6]

[6] *See Exec. Management, Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53, 38 P.3d 372, 876 (2002) (federal cases interpreting and applying the Federal Rules of Civil Procedure provide strong persuasive authority when interpreting parallel provisions of the Nevada Rules of Civil Procedure).

It is evident from the reasoning in the Order of Affirmance that the majority did not "fail to consider" NRCP 12(b)(5) jurisprudence or "empower" itself to resolve factual disputes. As the district court found, and as reflected in the Order of Affirmance, Ventura's complaint consisted of conclusory allegations that were contradicted by his own allegations and exhibits. Specifically, while baldly asserting that Dr. Ganser left a foreign object in his body after the 2016 laparoscopic surgery, his conclusory allegation was contradicted by his exhibits. Those exhibits, which are part of the complaint under NRCP 10(c), showed no evidence of a retained object a year after the surgery. *J.App. 016.* The exhibits also showed that the object observed 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.*

The petition is also in error that the majority "empowered" itself to resolve factual disputes as a matter of law. Like the district court, the majority did not resolve any "factual disputes" in reaching its conclusion that Ventura's complaint did not meet *Szydel's* standards. This case was before the court on a motion to dismiss under NRCP 12(b)(5), not on a motion for summary judgment under NRCP 56. Dr. Ganser

did not raise any factual disputes in his motion or reply. He simply pointed out the contradictions in Ventura's pleading and exhibits. *J.App. 032-35; J.App. 077-86.*[7]

Consistent with NRCP 12(b)(5) jurisprudence, the majority panel correctly concluded that Ventura's complaint did not satisfy *Szydel's* requirements. In accordance with the standards for motions to dismiss, the court was not required to accept Ventura's conclusory allegations as true because they were contradicted by the exhibits to the complaint. By including medical records in his complaint that contradicted the complaint allegations, Ventura pleaded himself out of a purported *res ipsa loquitur* claim. *See Sprewell,* 266 F.3d at 988 ("a plaintiff can . . . plead himself out of a claim by including unnecessary details contrary to his claims.").

Ventura's petition also argues that his case is like *Jaramillo, supra*, which he contends the majority "may have overlooked." *Pet., p. 7.* He also contends that it "appears" the majority overlooked cases in which Nevada's appellate courts have held that material factual disputes cannot be resolved as a matter of law, again referencing *Jaramillo.* He cites to *Born v. Eisenman*, 114 Nev. 854, 961 P.2d 1227 (1998), for the proposition that a plaintiff should be given an opportunity to elicit

[7] Ventura suggests he could create a factual dispute by disagreeing with the contents of the exhibits to his complaint, which he contends the majority "appears" to have overlooked. *Pet., p. 7, fn. 8.* His assertion is contrary to established law that a party cannot create a factual dispute by contradicting himself. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 294, 357 P.3d 966, 976 (2015) ("The general rule is that a party cannot defeat summary judgment by contradicting itself in response to an already-pending NRCP 56 motion.").

evidence to satisfy one of the five factual predicates of NRS 41A.100(1)(a)-(e). *Pet., pp. 9-10.* Ventura's arguments are repetitive of those he made during the briefing of this appeal. *See, e.g., AOB 16, 18; ARB 14, 17.* These regurgitated arguments are inappropriate and should not be considered. NRAP 40(c)(1) (matters presented in the briefs and oral arguments may not be reargued in a petition for rehearing).

Should the court consider Ventura's re-arguments, it may nevertheless deny his petition because *Jaramillo* and *Born* are distinguishable from this case. *Jaramillo* involved the application of *res ipsa loquitur* in the context of a summary judgment motion. There, the court held 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, the evidence was undisputed that a wire had been left in the patient's breast during a biopsy.

The issue in *Born* was whether the plaintiff was entitled to a *res ipsa* jury instruction in a case in which the evidence showed that patient suffered an injury to a part of the body not directly involved in the treatment, and that a surgical procedure was performed on the wrong body part. It was in the context of a trial that the court stated the plaintiff should be given the opportunity to elicit evidence during the trial to satisfy one of the factual predicates of NRS 41A.100(1)(a)-(e). *Born,* 114 Nev. at

858-59, 962 P.2d at 1230-31. Research has not revealed a similar pronouncement by Nevada's appellate courts in the context of a motion to dismiss.

Here, unlike *Born* and *Jaramillo*, the question of whether Ventura was entitled to rely on the *res ipsa loquitur* exception to the affidavit requirement arose in the pleading stage, *i.e.*, "early in the litigation process." *See Szydel*, 121 Nev. at 460, 117 P.3d at 205. As such, Ventura was required to show his complaint was legally sufficient and actually met the narrow *res ipsa* requirements. *Id.* He failed to do so.

Unlike *Jaramillo*, Ventura did not present any facts or evidence from which it could reasonably be inferred that a foreign object was left after the 2016 laparoscopic surgery. In fact, his allegations and exhibits contradicted his conclusory allegation. *J.App. 003, ¶6; J.App. 004, ¶7; J.App. 016 and 018.* 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. 093, fn. 2.*

At bottom, Ventura has failed to demonstrate that the majority overlooked or misapplied controlling law governing this professional negligence action, or that it misapplied NRCP 8(a)'s and NRCP 12(b)(5)'s standards. Based on the complete

record, the majority correctly concluded that Ventura's complaint failed to allege a *res ipsa loquitur* claim under NRS 41A.100(1)(a) and that the contradictions within that document negated the prima facie showing necessary to proceed in a *res ipsa loquitur* case. The majority's determinations are supported by the record and consistent with controlling law. Therefore, the petition for rehearing may be denied.

D. AFFIRMANCE OF THE DISMISSAL OF WESTERN SURGICAL GROUP SHOULD NOT BE DISTURBED

The panel determined that Ventura's negligent supervision claim against Western Surgical Group ("WSG") was not exempt from the affidavit requirement because the failure to supervise allegations underlying that claim are inextricably linked to professional negligence. *Order of Affirmance, p. 3, citing Est. of Curtis,* 136 Nev. at 353, 466 P.3d at 1266-67. The dissenting justice concurred in this holding. *Order of Affirmance, p. 4.*

Section III of the petition for rehearing does not include any arguments that the panel misapprehended or misapplied the law in reaching its conclusion regarding WSG. Ventura simply concludes his petition by contending that the panel's reasoning for affirming the dismissal of WSG is "no longer sufficient" if the court grants rehearing. Ventura provides no explanation or analysis to support his contention. His argument may, therefore, be disregarded. *See* NRAP 28(a)(10); *see also 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).

Ventura's argument misapprehends that the dismissal of his direct claim against WSG for negligent supervision is not dependent upon the application of *res ipsa loquitur* to his professional negligence claim against Dr. Ganser. As the panel correctly determined, the negligent supervision claim was inextricably linked to the professional negligence claim and was not exempt from the affidavit requirement. Because the negligent supervision claim was not exempt from NRS 41A.071 and the complaint was unsupported by an expert affidavit, the claim was properly dismissed. For this reason as well, the Order of Affirmance should remain undisturbed.

III.

CONCLUSION

For the foregoing reasons, Respondents request that the petition for rehearing be denied.

DATED: August 10, 2022

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CERTIFICATE OF COMPLIANCE FOR ANSWER TO PETITION FOR REHEARING

I hereby certify that this Answer to Petition for Rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6) and the size limitation in NRAP 40(b)(3), because this answer has been prepared in a proportionally spaced typeface using MS Word in 14-point Times New Roman type style, and the answer contains 4,610 words (not counting the cover page, the certificate of service, or the certificate of compliance).

Dated: August 10, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the within ***Answer to Petition for Rehearing*** 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 10, 2022

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