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 Sep 12 2022 11:28 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT DAVID ALVAREZ VENTURA'S PETITION FOR *EN BANC* RECONSIDERATION OF THE PANEL'S ORDER OF AFFIRMANCE

Signed: September 12, 2022

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INTRODUCTION

This case involves David Alvarez Ventura's claim that John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith, P.C. (collectively with Ganser, "G&G") committed medical malpractice by unintentionally leaving a foreign object in him during surgery. In a split decision, a two-justice majority affirmed the district court's dismissal of Ventura's Complaint against Ganser because it did not satisfy a "heightened pleading requirement," which the Court purportedly created in *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005).

The majority erred in affirming the dismissal. Specifically, the majority erred in its interpretation of *Szydel*; in committing that error, the majority issued a decision "contrary to prior, published opinions of the Supreme Court . . . ." NRAP 40A(c). Specifically, the majority's decision was contrary to the following:

- *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227 (1998);
- *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008);
- *Dutt v. Kremp*, 111 Nev. 567, 894 P.2d 354 (1995);
- *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 293 P.3d 869 (2013);
- *Harris v. State*, 138 Nev. Adv. Op. 40 (2022);[1]
- *Jaramillo v. Ramos*, 136 Nev. Adv. Rep. 17, 460 P.3d 460 (2020);
- *Las Vegas Hosp. Ass'n v. Gaffney*, 64 Nev. 225, 180 P.2d 594 (1947);

[1] Ventura previously filed a copy of this decision. *See* 22-17803.

- *Szydel*, 121 Nev. 453, 117 P.3d 200; and,
- *Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 403 P.2d 1280 (2017).

Therefore, "reconsideration is necessary to secure and maintain uniformity of decisions of the Supreme Court . . . ." NRAP 40A(c). *See also* NRAP 40A(a).

The Court should also grant *en banc* reconsideration because this "proceeding involves a substantial precedential . . . issue . . . ." NRAP 40A(a). The Court should address whether *Szydel* created a "heightened pleading requirement," considering the opinion does not contain that phrase or reference a similar concept.

The majority did not define the "heightened pleading requirement" or what a plaintiff must allege to satisfy it. Without that explanation, Ventura is left to wonder why he lost his case and all medical malpractice litigants who rely on Nevada Revised Statute 41A.100(1) are left to guess whether they should still file an expert affidavit with their complaints. Whether considered in terms of subject matter jurisdiction or failure to state a claim, it is possible that a district court may not consider the affidavit issue until the time of trial. *See* NRCP 12(h)(2)-(3).

It is also likely that the majority's decision will transcend the medical malpractice space and become a focus in all civil proceedings. Although Ventura believes the Court most recently addressed the issue in *Harris*, 138 Nev. Adv. Op. 40, in the interest of completeness, until the majority decision in this case, no

(known) decision from the Court or the Court of Appeals authorized a district court to dismiss a case based on "inconsistencies" in a plaintiff's complaint. Given the majority's decision, which modified the Court's interpretation of Nevada Rules of Civil Procedure 8(a)(2) and 12(b)(5), re-shaping "notice pleading" and making a common law amendment to Nevada Rule of Civil Procedure 9, the full Court should consider the propriety – and effect – of that fundamental change.

POINTS AND AUTHORITIES

The majority acknowledged "David Alvarez Ventura filed a medical malpractice action alleging that respondent John H. Ganser, M.D. left a foreign object in him during a 2016 surgery." Order of Affirmance at 1. The majority also acknowledged Ventura's allegation that Gomez, Kozar, McElreath and Smith, P.C. "failed to properly supervise Dr. Ganser." Order at 1. The Court has held similar allegations sufficient to invoke Nevada Revised Statute 41A.100(1)(a), which Ventura relied on to obviate the expert affidavit requirement in Nevada Revised Statute 41A.071. *See Jaramillo*, 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.")

The majority's recognition that Ventura's claims arose from Ganser unintentionally leaving a foreign object in him during surgery required the Panel to

reverse the dismissal. At that point, just like in *Jaramillo*, there was a set of facts, which, if true, would entitle Ventura to relief without expert opinion evidence. *Cf. Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672 (citation omitted) (italics added) ("Buzz Stew's complaint should be dismissed only if it appears *beyond a doubt* that it could prove *no set of facts*, which, if true, would entitle it to relief.")

Rather than reverse the dismissal, the majority improperly looked for "a set of facts that would not provide [Ventura] relief." *Szymborski*, 133 Nev. at 644, 403 P.2d at 1286 (alteration in brackets). To create that scenario, the majority first declared: "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. Thereafter, the majority explained:

> 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.[2] The majority did not cite any opinions in support of its approach.

I. Each Aspect of the Majority's Analysis Was Contrary to at Least One Published Opinion of the Court.

a. *Szydel* did not Create a "Heightened Pleading Requirement."

Syzdel does not contain the phrase "heightened pleading requirement" or reference a similar concept. In fact, in *Szydel*, the Court 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 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/content of the plaintiff's allegations.[3] 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

[2] 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. Therefore, Ventura will not separately address the district court's dismissal of that claim. 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).

[3] Notably, though, 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.

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/content 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. at 461, 117 P.3d at 205 (Hardesty, J., dissenting) (italics added).[4] 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

[4] 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*, 64 Nev. at 234, 180 P.2d at 599.

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.

Nothing in *Szydel* supports the majority's decision "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). Although the majority accurately quoted *Szydel*, it took the quote out of context. Placing the quote into its original 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 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/her complaint, much less establish any sort of "heightened pleading requirement." Considering that a plaintiff need not submit evidence with his/her complaint, Nevada Rule of Civil Procedure 8(a)(2), and a motion to dismiss under Nevada Rule of Civil Procedure 12(b)(5) tests the sufficiency of a plaintiff's allegations, *Buzz Stew, LLC*, 124 Nev. at 227-28, 181 P.3d at 672, 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[,]" can only be interpreted as 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, the Court recently confirmed that Nevada Revised Statute 41A.100(1) is not a "threshold matter." In *Jaramillo*, the Court 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 at 463 n.2 (2020) (bolding added). Simply, *Szydel* did not modify Nevada Rule of Civil Procedure 8(a)(2), Nevada Rule of Civil Procedure 9, or otherwise establish a "heightened pleading requirement."

b. The Majority Opinion Implicitly Adopted the Federal "Plausibility" Standard, Which the Court Has Rejected.

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 Nevada

Revised Statute 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* . . . .") Nonetheless, the majority held that certain medical records that Ventura attached to his Complaint created "inconsistencies" that precluded him from relying on that statute. *See* Order at 2-3. The "inconsistencies" consisted of two facts: (1) one medical record did not reference the foreign object (but two others did); and, (2) a treating physician offered an unsworn, non-probabilistic opinion that it was "unlikely" the foreign object was related to the surgery. Order at 2.[5]

The majority's decision was contrary to the Court's opinions in *Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672, and *Szymborski*, 133 Nev. at 644, 403 P.2d at 1286. There were several scenarios in which Ventura could challenge/undermine the above facts. For example, during discovery, the one radiologist may admit he saw the object but did not reference it in the record; the other may recant his opinion. Or, the radiologist who read the film, but did not reference the object in his record, may admit the machine malfunctioned, rendering the object unidentifiable; the other may admit he had no idea how Ventura's surgery was performed. "It has never been the law that every piece of evidence necessary to prevail at trial must be available to the attorney before suit is filed. That is one of

[5] The medical records can be found at J.App.012, 016, and 018 (21-15481).

the functions of discovery." *Dutt*, 111 Nev. at 574, 894 P.2d at 359, overruled on other grounds, *LaMantia v. Redisi*, 118 Nev. 27, 30-31, 38 P.3d 877, 880 (2002).

The majority acted contrary to established precedent when it decided which facts (in its opinion) made sense and which did not. As the Court has explained:

> Nevada has not adopted the federal 'plausibility' standard for assessing a complaint's sufficiency, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), instead following the rule that a 'complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove not set of facts [that], if accepted by the trier of fact, would entitle him to relief.' *Washoe Med. Ctr., Inc. v.. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996) (citation omitted).

Dezzani, 134 Nev. Adv. Op. 9, 412 P.3d 56, 64 (Pickering, J., dissenting). *See also Harris*, 138 Nev. Adv. Op. 40, *8 n.6 (2022) (citing *Garcia*, 129 Nev. at 18 n.2, 293 P.3d at 871 n.2 ("Contrary to Williams's suggestion, our notice-pleading standard is not analogous to the federal plausibility standard for a motion to dismiss for failure to state a claim. We have not adopted the federal standard."); *McGowen v. Second Judicial District*, 134 Nev. Adv. Op. 89, 432 P.3d 220, 225 (Pickering, J., dissenting) ("Nevada has not adopted the federal 'plausibility' pleading standard").

Rather than resolving the factual "inconsistencies" as a matter of law, the majority should have reversed the dismissal and permitted the matter to proceed. This was the required result, as evidenced by two topical examples. In *Born*, the

Court reversed a district court's pre-trial ruling precluding a *res ipsa loquitur* instruction. 114 Nev. at 859, 962 P.2d at 1230-31. 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 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.

Id. (italics added). The Court reached a similar result 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 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 (bolding added). Ultimately, the Court reversed the district court's grant of 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 (italics added).

The two facts the majority cited did not "conclusively negate" Ventura's claims against G&G. As Justice Stiglich explained in her concurrence/dissent:

> True, Ventura's complaint and accompanying exhibits contain *some evidence*-such as a physician's' opinion that the foreign object 'seems unlikely to be related' to Ventura's esophageal surgery-that may undermine his reliance on the res ipsa loquitur exception. But this potential inconsistency does not negate Ventura's pleadings nor the fact that *some evidence*-for example, the ultrasound report that showed the presence of the foreign object-supports a res ipsa loquitur determination. *See id.* at 459, 117 P.3d at 204; *see also* NRS 41A.100(1)(a) (providing that the res ipsa loquitur exception may apply when the provider of care leaves a foreign object in the patient's body following surgery). Furthermore, the inconsistences to which the majority alludes are factual in nature 'to be determined by [a] jury,' not a judge, on a motion to dismiss. *Jaramillo v. Ramos*, 136 Nev. 134, 138, 460 P.3d 460, 464 (2020).

Order at 5. By acting as a factfinder, weighing facts and resolving perceived inconsistencies, the majority acted contrary to numerous published opinions of this Court, including those refenced herein.

CONCLUSION

Based on the foregoing, the Court should grant *en banc* reconsideration, withdraw the Panel's decision, and reverse the dismissal of Ventura's claims.

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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 3,528 words.

Signed: September 12, 2022

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(E), on September 12, 2022, the undersigned electronically filed (through the Supreme Court of Nevada's eFlex system) the attached, Appellant David Alvarez Ventura's Petition for *En Banc* Reconsideration of the Panel's Order of Affirmance, thereby providing a copy to the following individuals:

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