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

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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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 En Banc Reconsideration.[1]

I.

INTRODUCTION

Appellant David Ventura filed a Petition for Rehearing following an Order of Affirmance by a two-justice majority ("the majority"). That petition argued that the majority misapplied *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005), and overlooked several cases in rendering its decision. The Petition for Rehearing was unanimously denied. Appellant's Petition for En Banc Reconsideration recasts the arguments asserted in the Petition for Rehearing in NRAP 40A nomenclature in an attempt to show that the Order of Affirmance is contrary to the precedent of this Court. The petition does not meet the stringent requirements of NRAP 40A(a) or (c) for the following reasons:

First, the petition does not demonstrate that the Order of Affirmance is contrary to the prior published opinions of this Court or the Court of Appeals. Contrary to appellant's assertion, the majority did not misapply *Szydel* or otherwise

[1] Appellant states he is not addressing the affirmance of the dismissal of his claim against Western Surgical Group. *Pet. 5, fn. 2.* Thus, the propriety of the panel's decision affirming the dismissal of Western Surgical Group need not be revisited.

issue a decision that is inconsistent with this Court's precedent. 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. Therefore, review by the full court is not necessary to preserve precedential uniformity.

Second, appellant's petition does not demonstrate that this proceeding involves a substantial precedential, constitutional, or public policy issue. Although appellant's introduction asserts that this proceeding involves a substantial precedential issue, the Points and Authorities do not demonstrate that this appeal implicates important precedential issues.

Third, appellant's petition, which cuts-and-pastes from his Petition for Rehearing, improperly reargues matters that were argued in the briefs and during oral argument, violating NRAP 40A(c).

II.

ARGUMENT

A. APPELLANT'S PETITION DOES NOT MEET THE LIMITED PURPOSE OF EN BANC RECONSIDERATION

En banc reconsideration of a decision of a panel of the Supreme Court is disfavored; reconsideration by the full court is appropriate only when necessary to secure or maintain uniformity of decisions of this Court or the Court of Appeals, or

where the proceeding involves a substantial precedential, constitutional or public policy issue. NRAP 40(A)(a); *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 201, 322 P.3d 429, 432 (2014).

The petition fails to meet these exacting standards. Appellant simply rehashes the arguments made in his Petition for Rehearing, in his briefs and in oral argument, recasting them in NRAP 40A's nomenclature. As will be shown below, his arguments are still meritless.

B. RECONSIDERATION IS NOT NECESSARY TO PRESERVE PRECEDENTIAL UNIFORMITY

Appellant contends that the panel misinterpreted *Szydel* by finding it created a heightened pleading requirement, and "thereby issued a decision contrary to prior published opinions of the Supreme Court." *Pet. 1.* Appellant lists 10 cases to which the Order of Affirmance purports to be contrary. *Pet. 1-2.* He does not, however, demonstrate how the majority's decision is contrary to prior, published opinions of this Court or the Court of Appeals, as required by NRAP 40A(c). Reconsideration by the full court is not necessary because the Order of Affirmance issued by the two-justice majority is consistent with Nevada precedent.

1. The Order of Affirmance is not contrary to Szydel

Ventura contends that reconsideration is necessary to secure and maintain the uniformity of this Court's decisions because the majority's interpretation of *Szydel*

"is contrary to prior, published opinions of the Supreme Court." *Pet. 1-2.* Ventura's argument is fundamentally flawed because the majority did not misapply *Szydel*, nor is the majority's decision contrary to its holding.

Szydel is a medical malpractice action in which the defendant challenged a complaint that lacked the expert affidavit required by NRS 41A.071. The facts specifically showed that in performing a mastopexy, the physician unintentionally left a surgical needle in the patient's breast. This was among the circumstances enumerated in NRS 41A.100(1) for which no expert is required.[2]

The Court reconciled the tension between the two statutes by applying NRS 41A.100(1)'s rule of evidence to the threshold pleading requirement of NRS 41A.071. *Szydel* thus created an exception to NRS 41A.071's affidavit requirement for *res ipsa loquitur* claims where the facts *show* the claimed injury occurred in the circumstances enumerated in NRS 41A.100(1)(a)-(e). In such cases, *Szydel* imposed the following heightened standard for medical malpractice actions that plead a *res ipsa loquitur* claim:

[2] Under NRS 41A.100(1) "[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.

> [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).

Precedential uniformity does not require en banc reconsideration because the Order of Affirmance is consistent with *Szydel*. The majority properly applied the standard established in *Szydel* to the facts of this case and correctly concluded that Ventura had not met that standard. The majority agreed with the district court that Ventura had not shown he had met the prima facie requirements for a *res ipsa loquitur* case based on the contents of his complaint and the exhibits incorporated therein. *Order of Affirmance, p. 2.*

Ventura attempts to create a precedential conflict where none exists by contending that the allegations in his complaint were "essentially identical" to those alleged in *Szydel. Pet. 5, fn. 3.* In truth, Ventura's complaint bears no resemblance to *Szydel.* In *Szydel,* the plaintiff specifically alleged that a surgical needle had been unintentionally left in the patient's breast following a mastopexy. In this case, by contrast, the allegations in Ventura's complaint were vague, conclusory and were contradicted by the medical exhibits. Specifically, Ventura alleged that unidentified "surgical instruments" were left during the 2016 laparoscopic surgery. *J.App. 002.*

His complaint *and* his exhibits, however, refuted those allegations. The imaging studies Ventura attached to his complaint showed *no object* in 2017, and an object that was determined in 2018 to be "unlikely" related to the 2016 laparoscopic surgery. *J.App. 003, 004, 016, 018.*

The majority, like the district court, was entitled to consider Ventura's allegations and exhibits in determining whether Ventura met the *res ipsa* requirements established in *Szydel*. *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). Considering the complaint and its exhibits together, and the inconsistencies contained therein regarding whether any object was retained during the 2016 surgery, the majority correctly concluded that dismissal of Ventura's complaint was proper because it did not meet *Szydel's* standard.

Ventura's arguments ignore *Baxter* and NRCP 10(c). He seeks to avoid consideration of the contradictory and vague allegations in his complaint and exhibits by accusing the majority of "re-shaping notice pleading" and modifying NRCP 8(a)(2), NRCP 9 and NRCP 12(b)(5). The record does not support Ventura's assertion.

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) (citation omitted).

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).

Ventura erroneously contends that *Szydel* did not involve the sufficiency of the allegations. *Pet. 5.* In actuality, the defendant challenged the legal 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.

Here, the record showed Ventura's complaint did not meet *Szydel's* standard. Dr. Ganser challenged the legal sufficiency of the complaint under NRCP 12(b)(5) because no affidavit supported the complaint. *J.App. 032-35*. The complaint, when read with its exhibits, was found to be legally insufficient because it did not plead facts sufficient to state a *res ipsa* claim, thus requiring an affidavit. *J.App. 092-95*.

In affirming the district court's order, the majority did not modify NRCP 8 or 9, 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 its exhibits did not make the necessary showing to proceed in a *res ipsa* case; thus, it did not qualify for *Szydel's res ipsa* exception. *Order of Affirmance, pp. 2-3.*

Stated differently, 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.*

At bottom, the Order of Affirmance properly applied *Szydel* to the facts of this case in determining that Ventura was required to comply with NRS 41A.071 because he did not meet the *Szydel* standard. The Order of Affirmance is not legally inconsistent with *Szydel* or its progeny.

2. The majority decision is not contrary to the medical malpractice cases identified by appellant

In addition to *Szydel,* appellant's petition lists four other medical malpractice cases that he claims the majority decision was contrary to: *Born v. Eisenman,* 114 Nev. 854, 961 P.2d 1227 (1998); *Jaramillo v. Ramos,* 136 Nev. 134, 460 P.3d 460, (2020); *Las Vegas Hosp. Ass'n v. Gaffney,* 64 Nev. 225, 180 P.2d 494 (1947); and *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 403 P.3d 1280 (2017). *Pet. 1-2.* The petition does not demonstrate that the majority's decision is contrary to any of these cases.

Ventura contends that the majority's decision is contrary to *Born* because it did not reverse dismissal and permit the case to proceed, as purportedly occurred in *Born*. *Pet. 10-11*. Ventura's arguments are repetitive of those he made during the briefing of this appeal and in his Petition for Rehearing. *See, e.g., AOB 16, 18; ARB 14, 17; Pet. 9-10.* These regurgitated arguments are inappropriate and should not be considered. NRAP 40A(c).

Even if considered, reconsideration is unnecessary because *Born* bears no resemblance to this case. 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, not a motion to dismiss, 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.

Next, Ventura argues that *Jaramillo* is factually similar to his case, and purportedly requires a court to allow the case to proceed to give the plaintiff an opportunity to present evidence of the factual predicates of NRS 41A.100(1)(a)-(e). *Pet. 3-4, 8, 11-12*. Ventura has not shown the majority decision is inconsistent with

Jaramillo, which is factually distinguishable. *Jaramillo* involved the application of *res ipsa loquitur* in the context of a summary judgment motion after the close of discovery. In reversing summary judgment, 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, unlike this case, the plaintiff had alleged specific facts showing the existence of one of the situations enumerated in NRS 41A.100(1)(a)-(e). In fact, it was undisputed that a wire had been left in the patient's breast during a biopsy.

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

Also unlike *Born* and *Jaramillo,* the question of whether Ventura was entitled to rely on the *res ipsa* 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. Therefore, Ventura was required to show his complaint was legally sufficient and met the *res ipsa* exception to the affidavit requirement. *Id.* He failed to do so,

thus warranting dismissal of his complaint, which was properly affirmed. Thus, the majority's decision is not contrary to *Jaramillo* or *Born.*

Ventura also suggests that the majority's decision is inconsistent with *Las Vegas Hosp. Ass'n v. Gaffney*, 64 Nev. 225, 180 P.2d 494 (1947), which he cites for the proposition that the *res ipsa* doctrine is not a rule of pleading, "but rather an inference aiding in the proof." *Pet. 6, fn. 4.* Ventura makes no effort to show how the majority's decision affirming the dismissal of Ventura's complaint for failure to comply with NRS 41A.071 is inconsistent with *Gaffney.* This may be because *Gaffney* is not controlling or applicable precedent. *Gaffney* was decided decades before the enactment of NRS Chapter 41A. It involved the application of the common law *res ipsa* doctrine, which has been replaced by NRS 41A.100(1)(a)-(e) in professional negligence actions.

Lastly, Ventura contends that the majority decision is contrary to *Szymborski. Pet. 2, 9.* The purported inconsistency is not demonstrated, however. *Pet. 9.* Ventura's argument seems to be that the majority did not apply NRCP 12(b)(5)'s standard for motions to dismiss because it pointed out the inconsistencies between the allegations in Ventura's complaint and the medical findings in the exhibits to his complaint. *Pet. 9.* Ventura is mistaken.

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 has not shown that the majority's decision is contrary to *Szymborski* or any other controlling Nevada precedent. The majority correctly applied *Szydel* in concluding that Ventura's complaint and exhibits did not meet the standard established in *Szydel* and that the *res ipsa loquitur* exception to NRS 41A.071's affidavit requirement was therefore inapplicable. *Order of Affirmance, pp. 2-3.*

3. The non-medical malpractice cases identified by appellant fail to demonstrate precedential inconsistencies

Appellant's petition lists four non-medical malpractice cases that he claims the majority decision was contrary to: *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 181 P.3d 680 (2008); *Dutt v. Kremp,* 111 Nev. 567, 894 P.2d 354 (1995), *overruled by LaMantia v. Redisi,* 118 Nev. 27, 38 P.3d 877 (2002); *Garcia v. Prudential Ins. Co. of Am.,* 129 Nev. 15, 293 P.3d 869 (2013) and *Harris v. State*, 138 Nev. Adv. Op. 40, 510 P.3d 802 (2022).

It is unclear how the majority's decision is contrary to these cases. Citing to *Buzz Stew*, Ventura contends that there was a set of facts which, if true, "would entitle Ventura to relief without expert opinion evidence." *Pet. 4, 9.* Ventura is again

contending that the majority did not apply the standard for motions to dismiss, but instead improperly looked for a set of facts that would not provide Ventura relief. *Pet. 4, 9* citing *Buzz* Stew and *Szymborski*.

Ventura's rehashed arguments virtually mirror the arguments in his Petition for Rehearing that the majority overlooked this Court's jurisprudence regarding NRCP 8(a)(2) and NRCP 12(b)(5). *Pet. for Rehr'g, Section II, pp. 6-11; compare Pet. 8-12.* Ventura's arguments do not, however, demonstrate that the majority decision is contrary to this Court's precedent. His arguments demonstrate that he is relying on concepts that have no bearing on this case.

For example, Ventura cites *Harris v. State*, which addressed the sufficiency of pleading a deprivation-of-rights claim under 42 U.S.C. §1983. Ventura asserts that the majority acted contrary to *Harris* because Nevada has not adopted the federal plausibility standard. *Pet. 10.* This argument does not show that the majority evaluated the plausibility of Ventura's complaint. Indeed, there is no indication in the Order of Affirmance that the majority evaluated the plausibility of the complaint or that its ruling is contrary to *Harris* or *Garcia.*[3]

[3] Ventura asserted that the majority decision is contrary to *Garcia v. Prudential Ins. Co. of Am., supra. Pet. 2.* No showing is made that the majority's decision is inconsistent with *Garcia,* as required by NRAP 40A(c).

Next, engaging in speculation about what discovery *may* show, Ventura contends that the majority's decision is contrary to *Dutt,* which he seemingly cites for the proposition that evidence need not be available before a lawsuit is filed and he should be allowed to conduct discovery. *Pet. 9-10*. Ventura makes no attempt to show how the Order of Affirmance is contrary to *Dutt.* Nor can he because *Dutt* has no application here as it was not a medical malpractice case, nor did it involve dismissal under NRCP 12(b)(5).

The appeal in *Dutt* was from a directed verdict against an attorney who was sued for malicious prosecution and abuse of process after filing a lawsuit against a doctor without an evidentiary basis. It was in that context that the court stated it was not the law that "every piece of evidence necessary to prevail at trial must be available to an attorney before a suit is filed." *Id.* Notably, when *Dutt* was decided in 1995, there was no requirement that an attorney obtain an expert medical opinion before filing a malpractice lawsuit. *Dutt,* 111 Nev. at 574, 894 P.2d at 359. Under current law, malpractice cases must be filed with an expert affidavit, absent an exception, or they must be dismissed without leave to amend. *See* NRS 41A.071 and *Washoe Medical Center*, 122 Nev. at 1304, 148 P.3d at 794. Appellant has not cited any case that allows a malpractice plaintiff who has not complied with NRS 41A.071 to conduct discovery.

Next, Ventura cites NRCP 56 and accuses the majority of "weighing facts and resolving inconsistencies," contrary to *Jaramillo. Pet. 12-13.* His argument is flawed because this case does not involve summary judgment or otherwise implicate Rule 56. Further, the majority did not weigh the evidence or resolve factual disputes as a matter of law. The majority did not have to resolve any factual disputes in determining that Ventura's complaint did not meet *Szydel's* standards because this case was before the court on a motion to dismiss under NRCP 12(b)(5). Dr. Ganser did not raise any factual disputes in his motion or reply. His briefing simply pointed out Ventura's contradictions in showing that the complaint was legally insufficient under NRCP 12(b)(5). *J.App. 032-35; J.App. 077-86.*

The majority's ruling was not inconsistent with or contrary to NRCP 12(b)(5)'s jurisprudence. The record showed that Ventura's complaint consisted of conclusory allegations that were contradicted by his own allegations and exhibits. While baldly asserting that Dr. Ganser left a foreign object in his body after the 2016 laparoscopic surgery, his complaint and exhibits 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, J.App. 004, ¶7, J.App. 016, and J.App. 018.* 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 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.*[4]

Ventura concludes his petition by quoting extensively from Justice Stiglich's dissent that the inconsistencies in Ventura's complaint/exhibits did not negate Ventura's pleading. *Pet. 12-13.* Ventura's argument does not demonstrate that the majority's decision was contrary to existing precedent of this Court or with the Rules of Civil Procedure and the cases interpreting them.[5]

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[4] *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).

[5] Ventura relies on that portion of the dissent which states 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." *Pet. 13, citing Order, p. 5.* The November 2018 report cannot, however, be considered in a vacuum. *See, e.g., Zohar*, 130 Nev. at 739, 334 P.3d at 406, *citing* NRCP 10(c). This argument overlooks that the 2017 imaging study found no evidence of a foreign body one year after the subject laparoscopic surgery. Reading both studies 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 during

In sum, consistent with NRCP 12(b)(5) jurisprudence, the majority correctly concluded that Ventura's complaint did not satisfy *Szydel's* requirement to qualify for an exception to NRS 41A.071's affidavit requirement. Ventura has not demonstrated otherwise.

C. THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL PRECEDENTIAL ISSUE

Appellant purports to seek en banc reconsideration based on the assertion that this proceeding involves a substantial precedential issue. *Pet. 2.*

A petition for en banc reconsideration made on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue "shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." NRAP 40A(c). Appellant's petition fails to meet this requirement.

Although not clear from the cursory argument in the Introduction section of the petition, the substantial precedential issue this case purportedly involves is "whether *Szydel* created a 'heightened pleading requirement'" (in contrast to his previous argument that the majority *created* a heightened pleading requirement). *Pet. 2; compare Petition for Rehearing, pp. 2-4.* Appellant reargues that this Court must resolve this issue because the phrase "heightened pleading requirement" was

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the 2016 laparoscopic esophageal surgery. *Compare J.App. 003, ¶1 with ¶6 and J.App. 016.*

not defined by the panel and is not addressed in *Szydel,* leaving medical malpractice plaintiffs who rely on NRS 41A.100(1) to "guess whether they should file an expert affidavit with their complaints." *Pet. 2.* Appellant speculates that the Order of Affirmance may "transcend the medical malpractice space and become a focus in all civil proceedings." *Pet. 2.* Appellant fails to show how the panel's decision will affect future cases and fails to identify any harm.

Reconsideration is unnecessary because this case does not involve a substantial precedential issue. The Order of Affirmance does not leave litigants to wonder what they must allege in a medical malpractice complaint to invoke NRS 41A.100(1)(a)-(e). This Court's published opinions have repeatedly instructed what must be alleged in a medical malpractice complaint and when an expert affidavit is or is not required. The issue was addressed in *Szydel,* which requires a plaintiff to present facts and evidence that show the existence of one or more of the *res ipsa* situations when challenged in pretrial motions. *Szydel,* 121 Nev. at 460-61, 117 P.3d at 205.

Additionally, this Court's recent published opinions instruct 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,* the plaintiff made specific allegations and presented evidence showing that a wire had been left in the patient's breast following a biopsy. 136 Nev. at 135, 460 P.3d at 462. Both cases survived summary judgment.

Because appellant has not shown that this appeal involves a substantial precedential issue, en banc reconsideration is not appropriate.

III.

CONCLUSION

En banc reconsideration is not warranted to preserve precedential uniformity or to resolve a substantial precedential issue. Accordingly, the Petition for En Banc Reconsideration may properly be denied.

DATED: October 11, 2022

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CERTIFICATE OF COMPLIANCE FOR ANSWER TO PETITION FOR EN BANC RECONSIDERATION

I hereby certify that this *Answer to Petition for En Banc Reconsideration* 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 4,628 words (not counting the cover page, the tables, the certificate of compliance or the certificate of service).

Dated: October 11, 2022

/s/ Alice Campos Mercado

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CERTIFICATE OF SERVICE

I hereby certify that the within *Answer to Petition for En Banc Reconsideration* 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: October 11, 2022

/s/ Margie Nevin
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