

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS A. REIF, an incompetent
person by and through his Conservator
CINDY REIF,

Appellant,

vs.

ARIES CONSULTANTS, INC.

Respondent.

Case No.: 76121 Electronically Filed
Nov 06 2018 10:04 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

Glen J. Lerner
Nevada Bar No. 4314
Randolph L. Westbrook, III
Nevada Bar No. 12893

**GLEN LERNER INJURY
ATTORNEYS**

4795 S. Durango Drive
Las Vegas, NV 89147
(702) 877-1500

Counsel for Appellant

Craig J. Mariam, Esq.
Robert E. Schumacher, Esq.
Brian K. Walters, Esq.

**GORDON REES SCULLY
MANSUKHANI, LLP**
300 South Fourth Street, Suite 1550
Las Vegas, NV 89101
(760) 476-1990

*Counsel for Respondent Aries
Consultants, Inc.*

NRAP 26.1 DISCLOSURE STATEMENT

Undersigned counsel hereby certifies that GLEN LERNER INJURY ATTORNEYS has no parent corporations, nor does any publicly held company own 10% or more of its stock. Glen J. Lerner (Nevada Bar No. 4314) and Randolph L. Westbrook, III (Nevada Bar No. 12893) are the only attorneys appearing from the firm on behalf of the Appellant.

In addition, Appellant is represented by co-counsel, NAPOLI SHKOLNIK, PLLC, in a related action currently pending before the District Court. Attorneys from the firm were not admitted to practice in the District Court for the present action and are not expected to appear in Court for this appeal.

The names of the attorneys from NAPOLI SHKOLNIK, PLLC are disclosed herewith. Each attorney has been admitted *pro hac vice* to the District Court in *Reif v. Edgewater Gaming, LLC, et al.*, Case No. A-17-752432-C.

Hunter J. Shkolnik
Joseph P. Napoli
NAPOLI SHKOLNIK, PLLC
360 Lexington Ave., 11th Floor
New York, NY 10017
Telephone: (212) 397-1000

Jennifer Liakos
Christopher L. Schnieders
Melissa A. Agnetti
NAPOLI SHKOLNIK, PLLC
5757 W. Century Blvd., Suite 680
Los Angeles, CA 90045
Telephone: (310) 331-8224

GLEN LERNER INJURY ATTORNEYS

By: /s/ Randolph L. Westbrook
Randolph L. Westbrook, III, Esq.
Nevada Bar No. 12893
4795 South Durango Drive
Las Vegas, Nevada 89147
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	iv
ROUTING STATEMENT	iv
STATEMENT OF THE ISSUES.....	v
STATEMENT OF THE CASE.....	1
STATEMENT OF RELEVANT FACTS	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
A. APPELLANT’S ‘AMENDED’ FILING COMPLIES WITH THE PLAIN LANGUAGE OF NEV. REV. STAT. 11.258 AND AFFIRMS THE LEGISLATURE’S INTENT TO PREVENT MERITLESS CLAIMS AGAINST DESIGN PROFESSIONALS.....	9
B. APPELLANT’S ‘AMENDED’ FILING OF THE COMPLAINT COMPLIED WITH THE REQUIREMENTS OF NEV. REV. STAT 11.258.....	12
1. <i>Appellant’s Complaint and Exhibits Were Filed Concurrently With Service.</i>	12
2. <i>Appellant’s Affidavit Complied with NEV. REV. STAT. 11.258.</i>	13
3. <i>Appellant’s ‘Amended’ Complaint Is Based on Legitimate Expert Findings.</i>	14
CONCLUSION	15
CERTIFICATE OF SERVICE	17
CERTIFICATE OF COMPLIANCE.....	18

TABLE OF AUTHORITIES

CASES

<i>Borger v. Eighth Judicial Dist. Court</i> , 102 P.3d 600, 604 (Nev. 2004)	14
<i>City Plan Dev., Inc. v. Office of Labor Comm'r</i> , 117 P.3d 182, 192 (2005)	9
<i>Converse Prof'l Group v. Eighth Judicial Dist. Group (In re CityCenter Constr.)</i> , 310 P.3d 574 (Nev. 2013)	9, 14
<i>Cromer v. Wilson</i> , 225 P.3d 788, 790 (2010)	9
<i>Great Basin Water Network v. State Eng'r</i> , 234 P.3d 912, 918 (2010)	9
<i>Hardy Cos., Inc. v. SNMARK, LLC</i> , 245 P.3d 1149, 1153 (Nev. 2010)	10
<i>State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.</i> , 116 Nev. 290, 294 (2000)	10
<i>Zohar v. Zbiegien</i> , 334 P.3d 402, 405 (Nev. 2014)	10

STATUTES

NEV. REV. STAT. 11.256, <i>et seq.</i>	4
NEV. REV. STAT. 11.258	iii, 7, 9
NEV. REV. STAT. 11.258(1)	2, 7, 10, 12
NEV. REV. STAT. 11.258(2)	8, 11, 13
NEV. REV. STAT. 11.258(4)	11
NEV. REV. STAT. 11.259	6, 9
NEV. REV. STAT. 41A.071	14
NRAP 17(a)(13,14)	iii

NRAP 28(a)(5)	iv
NRAP 3	3
NRAP 4(a).....	iii

JURISDICTIONAL STATEMENT

This is an appeal from an order of the Eighth Judicial District Court in and for Clark County issued on May 11, 2018, dismissing Appellant's complaint against Respondent, Aries Consultants, Inc., ("Respondent") for failure to comply with NEV. REV. STAT. 11.258. *See* Appellant's Appendix ("Applt. App."), 196. The District Court's Order is appealable pursuant to NRAP 4(a). On June 8, 2018, Appellant timely filed and served a notice of appeal to the Supreme Court. *See* Applt. App. 217.

ROUTING STATEMENT

This case is presumptively retained for the Supreme Court to hear and decide since this matter raises a question of first impression and statewide public importance. NRAP 17(a)(13,14). This action presents the question of whether NEV. REV. STAT. 11.258 requires a plaintiff to file an attorney affidavit and expert report simultaneously with the filing of the original complaint. In addition, where the court's electronic filing system suffers a failure, the question is presented of whether the filer should be punished for failing to comply with NEV. REV. STAT. 11.258. The decision of the District Court, and the ultimate questions presented as a result, raise issues of first impression and public importance for the people of Nevada under this State's Constitution.

This statement is made pursuant to NRAP 28(a)(5).

STATEMENT OF THE ISSUES

At issue before the Supreme Court is whether the District Court in Department 22 erroneously dismissed Appellant's action for failure to comply with NEV. REV. STAT. 11.258 in his initial filing. This issue presents significant concerns of statewide public importance, especially as it relates to the interpretation of the Nevada Revised Statutes.

Appellant respectfully requests this Court to clarify:

1. Whether NEV. REV. STAT. 11.258 requires a plaintiff to file an Attorney Affidavit and Expert Report simultaneously with the filing of the original complaint, and
2. Whether a plaintiff should be punished for failing to comply with NEV. REV. STAT. 11.258 when the alleged non-compliance is the result of a failure in the court's electronic filing system that was corrected pursuant to specific instructions from the Court's clerk.

STATEMENT OF THE CASE

On March 12, 2018, Appellant filed a complaint against Respondent for life-altering injuries sustained as a result of Respondent's failure to perform a proper inspection of the vehicle barrier wall at the Edgewater Hotel and Casino parking structure. *See* Applt. App. 96. The complaint alleged several causes of action against Respondent in its capacity as a quality assurance inspector, specifically for negligence, negligence *per se*, and negligent performance of an undertaking. *See id.*

However, during the process of uploading the attorney affidavit and expert report required under NEV. REV. STAT. 11.258, the documents failed to be filed due to an error in the District Court's electronic filing system. *See* Applt. App. 203. Upon becoming aware that the documents did not upload properly, Appellant refiled the complaint as an 'amended'¹ filing and subsequently served the initial pleading on Respondent. *See* Applt. App. 102, 203.

In lieu of submitting an answer, Respondent filed a motion to dismiss on April 3, 2018. *See* Applt. App. 143. In its motion, Respondent alleged that the filed attorney affidavit failed to comply with the requirements of NEV. REV. STAT. 11.258. *See id.* Specifically, Respondent argued that the affidavit, signed by an

¹ Contrary to the District Court's finding, Appellant's second pleading was not an "amended" complaint but an amended filing of a complaint.

attorney not licensed in Nevada,² failed to meet the statute's requirement that it be signed by an "attorney for the complainant." *See id.*; NEV. REV. STAT. 11.258(1).

A hearing on Respondent's motion was held on May 10, 2018, before the Hon. Susan Johnson of the District Court. *See* Applt. App. 178. After listening to the arguments presented by both parties, the District Court issued its order the following day, granting Respondent's motion. *See* Applt. App. 196. The Court, in deciding for Respondent, declined to opine on the sufficiency of Appellant's affidavit. *See id.* Instead, the Court held that since the first pleading filed by Appellant did not contain the necessary affidavit and expert report, the complaint was void *ab initio*, and therefore could not be amended. *See id.* Yet at no time, in either the written briefs or during oral arguments, was Appellant's filing and service placed at issue.

On May 22, Appellant filed a Motion for Reconsideration of the District Court's decision. *See* Applt. App. 203. As a basis, Appellant argued that the District Court, in deciding Defendant's Motion based on evidence outside the pleadings and arguments, failed to consider pertinent facts which would have clarified circumstances surrounding Plaintiff's initial filing of the complaint without the corresponding attorney affidavit and expert report. *See id.* Additionally, the Court erroneously found that Plaintiff's affidavit was not in compliance with

² Appellant's complaint included an affidavit executed and signed by F. Phillip Peche. *See* Applt. App. 11. Mr. Peche was an attorney for the Appellant and admitted *pro hac vice* in the related case, *Reif v. Edgewater Gaming, LLC*, Case No. A-17-752432-C.

NRS 11.258 for failing to include a statement as to why the attachments were not included in the original filing. *See id.* The District Court ultimately rejected Appellant's motion, upholding its original Order. *See* Applt. App. 215. Appellant subsequently filed a notice of appeal on June 8, 2018, pursuant to NRAP 3. *See* Applt. App. 217.

STATEMENT OF RELEVANT FACTS

The comprehensive procedural history of this litigation predates the present action before this Court.

Initial Action, Case No. A-17-752432-C

On March 16, 2016, Appellant suffered catastrophic and life-threatening injuries when the vehicle he was driving fell five stories from the Edgewater Hotel and Casino parking structure, when a barrier wall on the fifth floor gave way upon slight impact. *See* Applt. App. 1.

The following year, on March 14, 2017, Appellant filed suit in Department 30 of the District Court of Clark County, Nevada alleging tort causes of action against several defendants, including Respondent. *See id.* As indicated in the initial complaint, Respondent was responsible for inspecting the nonresidential-construction repairs made to the parking structure in 2015, nearly one year prior to the subject incident. *See id.* Approximately four months later, Respondent filed a Motion to Dismiss pursuant to NEV. REV. STAT. 11.259 for failure to include an

expert report and attorney's affidavit with the filed complaint. *See* Applt. App. 13. After hearing arguments from the parties, the District Court denied Respondent's motion, finding genuine issues of material fact remaining as to the whether Respondent was in fact a design professional under NEV. REV. STAT. 11.256, *et seq.* *See* Applt. App. 78. The parties were thereafter granted time to conduct discovery, pursuant to NRCP 56(f). *See id.*

While conducting initial discovery, Appellant learned that Respondent claimed to have provided special inspection and quality assurance services for nonresidential construction repairs performed to the Edgewater Hotel and Casino parking structure in 2015. *See* Applt. App. 84. Given those claims, Appellant subsequently consulted with an engineering expert to evaluate whether the allegations set forth in the initial complaint had a reasonable basis in law and fact. *See id.* Based upon the findings in the Expert Report, Appellant filed a motion to amend the complaint on November 7, 2017. *See* Applt. App. 82. After fully reviewing the proposed First Amended Complaint, attorney's affidavit and expert report, the District Court granted Appellant's motion. *See id.*

On December 29, 2017, Appellant filed his First Amended Complaint. *See* Applt. App. 84. However, due to a clerical error, Appellant inadvertently failed to include the affidavit and expert report in the amended filing. *See* Applt. App. 84.

Respondent did not move for a dismissal pursuant to NRS 11.289, but instead filed its answer accordingly.

Second Action, Case No. A-18-770951-C

In an abundance of caution, Appellant filed a separate, independent complaint against Respondent on March 12, 2018, in Department 22 of the District Court of Clark County, Nevada. *See* Applt. App. 96; 102. Since NEV. REV. STAT. 11.258 does not permit amendments to add design-profession allegations to an existing complaint, Appellant had no choice but to file a new action which would then be consolidated into the initial case. Respondent subsequently filed its motion to dismiss on April 3, 2018, alleging noncompliance with NEV. REV. STAT. 11.258 solely with regard to the contents of Appellant's filed attorney's affidavit. *See* Applt. App. 143. According to Respondents, since the affidavit was signed by a California attorney, neither licensed in Nevada nor admitted *pro hac vice*, the complaint was rendered void *ab initio*. *See id.* At no point did Respondent indicate the procedural filing of the complaint itself was in violation of the requirements of NEV. REV. STAT. 11.258. *See* Applt. App. 143, 163, 178.

After holding a hearing, the District Court granted Respondent's motion on May 11, 2018. *See* Applt. App. 196. However, in its order, the Court explicitly held that since Appellant's original complaint was filed on March 12, 2018 without

the corresponding attorney's affidavit and expert report, any amended filings were void under NEV. REV. STAT. 11.259. *See id.*

This action was not, as indicated in the District Court's order, an 'amended' complaint. On March 12, 2018, Ms. Miriam Alvarez, a paralegal at Glen Lerner Injury Attorneys, uploaded the complaint, along with copies of the attorney's affidavit and expert report. *See* Applt. App. 203. Upon receipt of a conformed copy of the complaint from the Court's electronic filing system, Ms. Alvarez subsequently noticed there had been a technical error and that the filing system did not attach the attorney's affidavit and expert report to the complaint. *See id.* Ms. Alvarez immediately called the District Court to determine whether the attachments had uploaded properly. *See id.* After consultation with the Court Clerk, Ms. Alvarez was instructed to refile the complaint and the corresponding attachments as an 'amended' pleading the following day, March 13, 2018. *See id.* Ms. Alvarez explained the concerns to the District Court and the Court noted that the attachments would be related back to the initial filing. *See id.* Clearly, this information was never relayed to the District Court.

On June 19, 2018, Appellant filed a Motion for Reconsideration regarding this issue, to no avail. *See id.* From that final order, Appellant appeals to the Supreme Court of Nevada seeking a reversal of the District Court's decision. *See* Applt. App. 217.

SUMMARY OF THE ARGUMENT

The Nevada Legislature enacted NEV. REV. STAT. 11.258 with the intent of preventing frivolous litigation against design professionals. Increasingly, however, the statute has been twisted by culpable defendants as a means to circumvent legitimate actions.

For nonresidential construction claims, NEV. REV. STAT. 11.258 instructs the complainant's attorney³ to file an affidavit and expert report confirming that the action has a reasonable basis in law and fact. *See* NEV. REV. STAT. 11.258. Importantly, the statute requires the report and affidavit to be filed “***concurrently with the service of the first pleading*** in the action.” NEV. REV. STAT. 11.258(1). In granting Respondent's dismissal, the District Court reversibly erred since Appellant clearly complied with the statute's requirements. At the time of the initial filing, Appellant had both an expert report and accompanying attorney affidavit as exhibits to the complaint. However, due to an error in the District Court's electronic filing system, the exhibits failed to properly upload with the complaint. By the direction of the District Court's clerk, Appellant refiled the complaint and exhibits as an ‘amended’ filing. Once filed correctly, Appellant

³ Pursuant to NEV. REV. STAT. 11.258, an “attorney for the complainant” must file the affidavit and expert report along with service of the initial pleading. *See* NRS 11.258(1). As evidenced by the filing on March 13, 2018, the complaint was signed and filed by Nevada-licensed attorney Glen J. Lerner, State Bar No. 4314. Moreover, in accordance with NRCP 10, all exhibits to a pleading are a part thereof; therefore, since the affidavit was attached as an exhibit to the complaint, the statements within the affidavit were adopted by reference to the pleading itself. *See* N.R.C.P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.”)

served the complaint and exhibits on Respondent. At no time was an incomplete complaint served on Respondents.

Further, the District Court's decision to dismiss Appellant's complaint was erroneous since both the expert report and affidavit submitted complied with NEV. REV. STAT. 11.258's requirements. In its Order, the District Court held that Appellant's affidavit submitted with the 'amended' filing did not offer an explanation as to the purported failure to comply with the statute. Yet the District Court's reading of the statute is misguided. Although NEV. REV. STAT. 11.258 allows for a cure in deficient filings, the statute's subsection does not apply to Appellant's filing. *See* NEV. REV. STAT. 11.258(2) ("If the attorney must submit the affidavit late, the attorney shall file an affidavit concurrently with the service of the first pleading in the action stating the reason for failing to comply with subsection 1"). Appellant did in fact contact an expert prior to filing the complaint in this action. Moreover, the findings in the expert's report—that Respondent, as a design professional, was responsible for Appellant's injuries—confirmed the reasonableness of the filing of this complaint.

Based on the aforementioned reasons, Appellant requests that this Court reverse the District Court's Order granting dismissal of this action.

ARGUMENT

Courts in Nevada interpret statutes in order to conform “to reason and public policy,” in order to “effectuate the Legislature's intent.” *Converse Prof'l Group v. Eighth Judicial Dist. Group (In re CityCenter Constr.)*, 310 P.3d 574, 578 (Nev. 2013) (citing *Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 918 (2010)). In so doing, courts avoid vastly narrow interpretations that lead to “absurd results.” See *In re CityCenter Constr.*, 310 P.3d at 581; *City Plan Dev., Inc. v. Office of Labor Comm'r*, 117 P.3d 182, 192 (2005)).

According to this Court, “the apparent intent of NRS 11.259(1) and NRS 11.258 is to advance judicial economy and prevent frivolous suits against design professionals.” *In re CityCenter Constr.*, 310 P.3d at 581; see NEV. REV. STAT. 11.258, NEV. REV. STAT. 11.259. Appellant’s allegations, however, are based on sound expert findings. Upholding the District Court’s dismissal of Appellant’s complaint would not only go against public policy but would effectively allow a culpable design professional to be dismissed on a procedural technicality based on an internal court-system-filing error.

A. APPELLANT’S ‘AMENDED’ FILING COMPLIES WITH THE PLAIN LANGUAGE OF NEV. REV. STAT. 11.258 AND AFFIRMS THE LEGISLATURE’S INTENT TO PREVENT MERITLESS CLAIMS AGAINST DESIGN PROFESSIONALS

In Nevada, courts “interpret clear and unambiguous statutes based on their plain meaning.” *Cromer v. Wilson*, 225 P.3d 788, 790 (2010); *Zohar v. Zbiegien*,

334 P.3d 402, 405 (Nev. 2014). However, when a statute is ambiguous, consideration is given to other sources in order to “identify and give effect to the Legislature's intent.” *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294 (2000); *Hardy Cos., Inc. v. SNMARK, LLC*, 245 P.3d 1149, 1153 (Nev. 2010) (“The Legislature's intent is the primary consideration when interpreting an ambiguous statute”).

Notwithstanding any ambiguity, a plain reading of the statute underscores Appellant’s compliance. As a threshold requirement, an attorney must “file an affidavit with the court *concurrently with the service of the first pleading* in the action.” NEV. REV. STAT. 11.258(1) (emphasis added). In Appellant’s argument before the District Court concerning the Motion for Reconsideration, evidence was presented that both the attorney affidavit and expert report were already on file at the time Respondent was first served. *See* Applt. App. 203. Once Appellant became aware that the exhibits had failed to upload, a call was immediately made to the District Court. *See id.* Per instructions from the Court Clerk, Appellant refiled the complaint as an ‘amended’ pleading. *See id.* Despite the fact that Appellant had already consulted with an expert and had an affidavit and report prepared, the District Court, in focusing on the word ‘amended,’ blindly dismissed the action as void.

Furthermore, NEV. REV. STAT. 11.258 provides for cures in deficiencies, if (1) there is a failure to obtain an expert report or (2) the expert report obtained lacks legally sufficient conclusions. NEV. REV. STAT. 11.258(2); NEV. REV. STAT. 11.258(4). However, the statute is silent as to clerical errors and procedural deficiencies in the filing itself. This silence emphasizes the notion that the Legislature, in establishing NEV. REV. STAT. 11.258, did not contemplate dismissals where expert reports have already been obtained, vetted by a court, and unintentionally omitted from a filing due to a filing system error.

The overall purpose of this statute is to protect design professionals from meritless claims. Understandably, an affidavit and expert report are required in order to provide a reasonable basis with which to initiate litigation. To assume, however, that this statute would apply to an affidavit and properly vetted expert report that were, through no fault of Appellant, left out of an otherwise proper filing, would go against public policy and effectively allow a culpable design professional to evade liability. Moreover, to allow this to occur when the required documents were already on file in a related action, prior to service upon Respondent, would be a gross injustice.

**B. APPELLANT’S ‘AMENDED’ FILING OF THE COMPLAINT
COMPLIED WITH THE REQUIREMENTS OF NEV. REV. STAT
11.258**

Although courts have the ability to examine subject-matter jurisdiction and dismiss a complaint for lack thereof, dismissal in this matter was improper since Appellant’s complaint was free from jurisdictional defects and thus valid under NEV. REV. STAT. 11.258.

1. Appellant’s Complaint and Exhibits Were Filed Concurrently With Service.

In the Order filed on May 11, 2018, the District Court dismissed Appellant’s action for failure to attach the attorney affidavit and expert report to the initial complaint filed. *See* Applt. App. 196. However, Appellant did in fact comply with NEV. REV. STAT. 11.258 and would have been able to provide evidence to this fact if questioned by the Court during the hearing on Respondent’s motion. Under NEV. REV. STAT. 11.258, “the attorney for the complainant shall file an affidavit with the court *concurrently with the service of the first pleading* in the action.” NEV. REV. STAT. 11.258(1) (emphasis added). Implicitly, the language of the statute suggests that so long as the attorney files an affidavit and expert report prior to serving the complaint, NEV. REV. STAT. 11.258 is satisfied. Appellant did in fact adhere to the language of the statute; on March 12, 2018, Appellant filed the original complaint at 5:10 p.m. *See* Applt. App. 96, 203. At that time, the District Court’s filing system failed to upload both the attorney affidavit and expert report. After

noticing the error and speaking with the Court, Appellant refiled the complaint, along with a copy of the affidavit and report the next morning at 9:09 a.m. *See* Applt. App. 102, 203. Respondent was served a copy of the amended filing on March 14, 2018. *See* Applt. App. 203. At no point in time was a deficient complaint served upon Respondent. Therefore, Appellant's complaint complied with the requirements of NEV. REV. STAT. 11.258.

2. Appellant's Affidavit Complied with NEV. REV. STAT. 11.258.

Before dismissing the complaint, the District Court looked at the sole remedy afforded under NEV. REV. STAT. 11.258 for failure to attach the required exhibits to the complaint. *See* Applt. App. 196. In arriving at its decision to dismiss, the Court concluded that Appellant's attorney affidavit failed to provide a statement as to why the Expert Report was not included in the initial filing. *See id.* ("While there is an affidavit submitted with the amended complaint filed the following day, the September 28, 2017 document does not set forth the reason for California lawyer's failure to comply with NRS 11.258(1) when the original complaint was filed in this case"). However, a closer reading of NEV. REV. STAT. 11.258 reveals that a statement in the affidavit is only necessary if the attorney could not contact an expert and obtain a report prior to filing the complaint. *See* NEV. REV. STAT. 11.258(2) ("The attorney for the complainant may

file the affidavit required pursuant to subsection 1 at a later time if the attorney could not consult with an expert . . . stating the reason for failing to comply . . .”).

Expert-affidavit requirements were not designed to ensnare plaintiffs, whereby legitimate complaints filed would be dismissed even when the party filed its claims in good faith and with an expert affirming the validity of those claims. *See Borger v. Eighth Judicial Dist. Court*, 102 P.3d 600, 604 (Nev. 2004) (as applied to the comparable medical malpractice statute, NEV. REV. STAT. 41A.071). On the contrary, the legislative intent behind NEV. REV. STAT. 11.258 is to prevent meritless claims from being alleged against design professionals. *See Converse Prof'l Group v. Eighth Judicial Dist. Group (In re CityCenter Constr.)*, 310 P.3d 574, 581 (Nev. 2013). Since Appellant's complaint was based on his expert's findings, the affidavit adhered to the requirements of NEV. REV. STAT. 11.258. Appellant's complaint, therefore, should not have been dismissed.

3. Appellant's 'Amended' Complaint Is Based on Legitimate Expert Findings.

At its core, NEV. REV. STAT. 11.258 seeks to prevent frivolous litigation from flooding the judicial system. Appellant sought the advice of engineering expert Jerry L. Miles of Bert L. Howe & Associates, Inc. after initial discovery unveiled clear evidence of liability on the part of Respondent, who was then alleging they were a special inspection and quality assurance agency protected by the statute. *See* Applt. App. 82, 84. Appellant's expert performed an evaluation of,

the nonresidential construction of Edgewater's parking structure. *See* Applt. App. 84. In September 2017, an expert report was obtained, specifically evaluating the failure of anchors in the parking garage's fifth floor spandrel wall. *See id.*

According to the expert's findings, Respondent:

Observed and measured embedment depths on the connection anchors installed on the spandrel panel involved in the Reif crash incident [that] did not meet the modified repair plans' specified 4" embedment depth.

[F]ailed in their duty to ensure that these anchors were installed with the minimum specified embedment depth.

See id. This report was created to assess Respondent's culpability and was in Appellant's possession at the time of filing the original complaint. *See id.*

Accordingly, the allegations as set forth in Appellant's amended filing of the complaint have a reasonable basis in law and fact and were brought by Appellant in good faith.

CONCLUSION

Dismissal under NRS 11.259 is unwarranted when a procedural technicality prevents an attorney affidavit and properly-vetted expert report from being filed along with the original pleading. For the foregoing reasons, Appellant respectfully requests that this Court reverse the District Court's order granting dismissal of this action.

Respectfully submitted,

GLEN LERNER INJURY ATTORNEYS

By: /s/ Randolph L. Westbrook
Randolph L. Westbrook, III, Esq.
Nevada Bar No. 12893
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500
Email: rwestbrook@glenlerner.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on November 5, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Craig J. Mariam, Esq.
Robert E. Schumacher, Esq.
Brian K. Walters, Esq.

GORDON REES SCULLY MANSUKHANI, LLP
300 South Fourth Street, Suite 1550
Las Vegas, NV 89101
(760) 476-1990

/s/ Miriam Alvarez

An employee of GLEN LERNER INJURY ATTORNEYS

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared and proportionally spaced typeface using Microsoft Word 2010, 14 pt. Times New Roman type style.
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,799 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of November, 2018.

GLEN LERNER INJURY ATTORNEYS

By: /s/ Randolph L. Westbrook
Randolph L. Westbrook, III, Esq.
Nevada Bar No. 12893
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500

Counsel for Appellant