

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.

Electronically Filed
Dec 06 2018 02:02p.m.
Elizabeth A. Brown
Appeal from District Ct. Case No.
A-18-770951-C
Clerk of Supreme Court

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

ARIES CONSULTANTS, INC. does not have a parent corporation. No company owns stock in ARIES CONSULTANTS, INC.

ARIES CONSULTANTS, INC. is represented in the District Court and in this Court by Craig Mariam, Robert Schumacher and Brian Walters of the law firm Gordon Rees Scully Mansukhani, LLP.

Dated: December 6, 2018

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ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: In an action alleging nonresidential construction design malpractice, does a second “amended” pleading that contains an attorney affidavit and expert report comply with NRS 11.258 if the first pleading did not include those documents and was not served?

ISSUE NO. 2: Can an attorney affidavit submitted in support of NRS 11.258 in one case satisfy the statute if it is submitted in a different case with the same underlying facts?

ISSUE NO. 3: Does an affidavit signed by an attorney not admitted to practice in Nevada satisfy NRS 11.258’s requirement that the affidavit be submitted by “the attorney for the complainant?”

STATEMENT OF THE CASE

This appeal stems from an action for personal injuries suffered by Plaintiff/ Appellant Marcus Reif (“Appellant”) against Defendant/ Respondent Aries Consultants, Inc. (“Aries”), a Nevada design professional. Appellant first filed suit against Aries and two other defendants (the “First Action”). Appellant failed to file an attorney affidavit and expert report in compliance with NRS § 11.258, maintaining that Aries was not a design professional and therefore not subject to the requirements of the statute. Although Aries’ motion to dismiss the initial action was denied without prejudice, Appellant eventually realized that Aries is in fact a Nevada design professional subject to the requirements of NRS § 11.258. Appellant moved to amend his Complaint in the First Action, with the stated purpose of naming another design professional. However, Appellant obtained an attorney affidavit and expert report purportedly implicating Aries. Appellant filed his Amended Complaint in the First Action with the attorney affidavit and expert report.

Realizing that his claims against Aries in the First Action were in jeopardy, Appellant initiated a new lawsuit against Aries (the “Second Action”).¹ However, Appellant once again failed to comply with NRS § 11.258 when his first pleading in the new lawsuit did not include the required attorney affidavit and expert report. Rather than filing and serving his first pleading then filing the attorney affidavit

¹ The First Action is still pending against Aries and other defendants.

and expert report concurrently with service, Appellant filed and served a second “amended” pleading enclosing the required documents. The second “amended” pleading improperly repurposed the attorney affidavit from the First Action that was signed by an attorney not admitted to practice in the Second Action.

Aries moved to dismiss Appellant’s second lawsuit based on his numerous failures to comply with NRS § 11.258. The District Court granted Aries’ motion. Appellant sought reconsideration of the District Court’s Order. The District Court denied Appellant’s motion for reconsideration. This appeal followed.

STATEMENT OF FACTS

A. The Underlying Incident.

This matter relates to claims for personal injuries suffered by Appellant when he drove his vehicle through a wall on an upper level floor of a parking structure at the Edgewater Hotel in Laughlin, Nevada. (Appellant's Appendix ("AA") 3-4). The subject wall was included in structural enhancements made to the parking structure approximately one year prior to the incident. (*See* AA 33-37). The enhancements generally included installation of new pre-cast spandrel walls and epoxy anchoring of existing spandrel walls. (AA 34).

Aries, a quality assurance inspection agency approved by Clark County, Nevada, was hired by the property owner to serve as a third-part quality assurance inspector in relation to the structural enhancements. (*See* AA 26). Aries' scope of services included observation and inspection of concrete placement, reinforcing steel, structural welding, and epoxy anchor embedment performed by Gillett Construction, LLC, the contractor that performed the structural enhancement work. (AA 26, 33, 67-70).

B. Appellant's First Failure to Comply with NRS 11.258: The First Action Against Aries (A-17-752432-C).

On March 14, 2017, Appellant filed a Complaint against Aries and two other defendants alleging causes of action for (1) negligence, (2) negligence *per se* and (3) negligent performance of an undertaking. (AA 1). This First Action was

assigned case number A-17-752432-C before the Honorable Jerry Wiese in Department 30. (AA 1). Appellant's complaint filed in the First Action did not include an attorney affidavit or expert report as required by NRS 11.258. (AA 1-10).

On July 11, 2017, Aries filed a motion to dismiss Appellant's complaint in the First Action for failure to comply with NRS § 11.258. (AA 13). Appellant filed an Opposition to Aries's motion in which it argued that Aries was not a design professional and therefore the attorney affidavit and expert report requirements set forth in NRS § 11.258 did not apply. (Respondent's Appendix ("RA"), Vol. I, 1-8). Aries' motion was denied *without prejudice* pursuant to NRCP 56(f). (AA 78-79).

C. Appellant Attempts to Belatedly Comply with NRS 11.258 in the First Action.

On November 7, 2017, Appellant filed a motion to amend complaint "...primarily to substitute Cindy Reif [Appellant's mother] as Conservator of the person and estate of [Appellant]...and add Barker Drott Associates, LLC ("BDA")² and related causes of action." (RA, Vol. I, 12).

However, Appellant had an ulterior motive for his amended complaint. Appellant's proposed "First Amended Complaint and Demand for Jury Trial" submitted with his motion to amend included an attorney affidavit and expert

² BDA was the structural engineering firm hired by the owner to design the structural enhancements for the parking garage. (See AA 66-70; 125).

report purporting to implicate Aries in an improper effort to satisfy the requirements of NRS § 11.258 *after the fact*. (See RA, Vol. I, 27). The attorney affidavit contained the following statement evidencing Appellant's belated effort to comply with the statute:

[T]his Affidavit and attached expert report comport with the spirit and legislative intent of NRS 11.256 *et seq.* such that Aries' pending motion to dismiss will become moot upon the filing and service of Plaintiff's First Amended Complaint.

(RA, Vol. I, 27).

Aries filed a Limited Opposition to Appellant's motion to amend in which it requested that its arguments regarding Appellant's non-compliance with NRS § 11.258 be reserved. (RA, Vol. I, 76). On November 28, 2017, the Court granted Appellant's motion to amend in the First Action. (AA 82-83). The Court's Order granting Appellant's motion to amend specifically reserved Aries' objections regarding Appellant's non-compliance with NRS § 11.258. (AA 83).

D. Appellant's Second Failure to Comply with NRS 11.258; The First Amended Complaint in the First Action.

On December 28, 2017, Appellant filed his first amended complaint in the First Action. (AA 84-95). Significantly, Appellant's first amend complaint was filed and served without the attorney affidavit and expert report submitted with his motion to amend.³ (AA 84-95).

³ In his Opening Brief, Appellant points out that "...Respondent [Aries] did not move for dismissal pursuant to NRS 11.259, but instead filed its answer

On February 2, 2018, BDA filed a motion to dismiss the amended complaint for failure to comply with NRS § 11.258. (RA, Vol. I, 78-111). On February 20, 2018, Appellant filed an opposition to BDA's motion, in which it explained its non-compliance with NRS § 11.258 as follows:

Plaintiff filed the FAC on December 29, 2017. However, *due to a clerical error*, Plaintiff inadvertently failed to include the Attorney's Affidavit and Expert Report in the amended filing.

(RA Vol. I, 117).

On March 8, 2018, the Court granted BDA's motion to dismiss due to Appellant's failure to comply with NRS § 11.258. (RA, Vol. II, 370-372). The Order dismissing BDA was entered on March 28, 2018. (RA, Vol. II, 367-369). The First Action proceeded without BDA.

E. Appellant's Third Failure to Comply with NRS 11.258: The Present, Second Action Against Aries (A-18-770951-C).

On March 12, 2018, Appellant filed a second, separate lawsuit against Aries based on the same facts and alleging the same causes of action as alleged in the First Action. (AA 96 - 101). The Second Action was assigned case number A-18-770951-C before the Honorable Susan Johnson in Department 22. (AA 96).

Significantly, the Complaint filed by Appellant in the Second Action was once

accordingly." (Opening Brief, pg. 5). As discussed *supra*, Aries' previous motion to dismiss pursuant to NRS 11.258 was denied pursuant to NRCP 56(f) to allow additional discovery on the question of whether Aries was a design professional and subject to the statute. (See AA 78-81). Aries' objections regarding Appellant's noncompliance with NRS § 11.258 were expressly reserved in the court's order granting Appellant's motion to amend. (AA 82-83).

again filed without an attorney affidavit or expert report as required by NRS § 11.258.⁴ (AA 96 - 101). The Complaint also did not include an affidavit of counsel “stating the reason for failing to comply with subsection 1” of NRS § 11.258.⁵ (AA 96 - 101).

Rather than serving the first pleading then filing the attorney affidavit and expert report concurrently, on March 13, 2018, Appellant filed a second pleading entitled “Amended Complaint” against Aries. (AA 102 - 142). Appellant’s Amended Complaint was identical to the initial Complaint (AA 96 - 101), but added an attorney affidavit and expert report. (AA 102 - 142).

However, the attorney affidavit and expert report attached to Appellant’s Amended Complaint in the Second Action (AA 109-142) were the same documents submitted with Appellant’s motion to amend Complaint in the First Action. (RA, Vol. I, 27-60). In other words, Appellant repurposed his attorney affidavit and expert report utilized in the First Action for the Second Action.

On April 3, 2018, Aries filed a motion to dismiss Appellant’s Complaint in the Second Action. (AA 143-152). In its motion, Aries argued that Appellant’s

⁴ Appellant acknowledged that the Second Action was initiated in an effort to avoid dismissal for its failure to comply with NRS § 11.258 in its claim against Aries in the First Action. (See AA 187-188).

⁵ “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 and the attorney shall consult with an expert and file the affidavit required pursuant to subsection 1 not later than 45 days after filing the action.” NRS 11.258 (2).

attorney affidavit did not comply with NRS § 11.258 and that the Second Action should be dismissed based on the “Single Cause of Action Rule.”⁶ (AA 143-152). On April 20, 2018, Appellant filed an opposition to Aries’ motion. (AA 153-162). On May 2, 2018, Aries filed its reply in support of motion to dismiss. (AA 163-177).

On May 10, 2018, the hearing on Aries’ motion to dismiss took place. (AA 178). On May 11, 2018, the District Court issued a written Order Granting Aries’ motion to dismiss Appellant’s complaint. (AA 196-202).⁷ The dismissal was based on the District Court’s finding that Appellant’s first pleading against Aries was filed “...without concurrently filing the required attorney affidavit and expert report in direct violation of NRS 11.258.” (AA 201). The District Court found that the first pleading was therefore “...void *ab initio* and of no legal effect.” (AA 201). Citing to *Otak Nev., LLC v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011), the District Court ultimately determined that Appellant’s “...failure to comply with NRS § 11.258 cannot be cured by

⁶ See *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) citing *Reno Club v. Harrah Et Al.*, 70 Nev. 125, 260 P.2d 304 (1953) (“As a general proposition, a single cause of action may not be split and separate actions maintained.”)

⁷ Appellant’s Appendix does not include the Notice of Entry of Order of the District Court’s May 11, 2018 Order Granting Aries motion to dismiss Appellant’s Complaint. NRAP 30(b)(2)(J)(ii) provides that the Appendix “shall contain” “Proof of service, if any, of...written notice of entry of the judgment or order appealed from.”

amendment” and that it had “...no discretionary authority to allow [Appellant] to amend his pleading.” (AA 201).

On May 22, 2018, Appellant filed a motion for reconsideration challenging the District Court’s Order granting Aries’ motion to dismiss. (AA 203-212). In support of his motion for reconsideration, Appellant submitted an affidavit from his counsel’s paralegal which stated that a “computer system error” prevented Appellant’s counsel from filing the attorney affidavit and expert report with the complaint. (AA 211-212).

The affidavit further stated that the District Court clerk directed Appellant’s counsel to file an amended complaint with the attorney affidavit and expert report. (AA 211-212). However, the affidavit contained no explanation as to why or how the complaint successfully uploaded while only the attorney affidavit and expert report “did not upload.” (AA 211-212). Other than the affidavit, no other evidence was submitted by Appellant to evidence any type of “computer system error.” (AA 203-212). The District Court denied Appellant’s motion for reconsideration. (AA 215-216). This appeal followed. (AA 217-218).

SUMMARY OF THE ARGUMENT

The plain language of NRS § 11.258 requires a first pleading in an action involving nonresidential construction against a design professional to include an attorney affidavit and expert report that comply with the statute. This Court has made clear that a first pleading filed without the required attorney affidavit and

expert report is void *ab initio* and incapable of amendment. Failure to file the required attorney affidavit and expert report with the first pleading is a jurisdictional defect, justifying a District Court's dismissal of a deficient first pleading *sua sponte*. Appellant never served his first pleading and therefore failed to file the required attorney affidavit and expert report. Appellant likewise failed to file an affidavit concurrently with the service of the first pleading stating the reason for failing to comply with the statute.

Rather than serving his first pleading then filing the attorney affidavit and expert report concurrently with service, Appellant filed a second "amended" pleading which included the attorney affidavit and expert report. Notwithstanding the fact that Appellant's first pleading was void *ab initio* and incapable of amendment, the attorney affidavit attached to Appellant's second "amended" pleading was prepared for a different lawsuit and was signed by an attorney that was not admitted to the State Bar of Nevada nor admitted to practice in the case below. The record demonstrates numerous instances of Appellant's failure to comply with NRS § 11.258, which justified the District Court's Order granting Aries' motion to dismiss. The District Court's Order should therefore be affirmed.

ARGUMENT

A. Appellant's First Pleading Did Not Comply with NRS § 11.258 and was Therefore Void *Ab Initio* and Incapable of Amendment.

1. The plain language of NRS § 11.258 supports the District Court's Order.

Statutory interpretation is a question of law reviewed *de novo*. *Constr. Indus. Workers' Comp. Grp. v. Chalue*, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003). It is well settled that this Court interprets clear and unambiguous statutes based on their plain meaning. *Converse Prof'l Grp. v. Eighth Judicial Dist. Grp. (In re CityCenter Constr.)*, 129 Nev. 669, 673-74, 310 P.3d 574, 578 (2013) citing *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). When the language of a statute is clear on its face, the court will not go beyond the statute's plain language. *See Weinstein v. Fox*, 129 Nev. 377, 381, 302 P.3d 1137, 1140, 2013 Nev. LEXIS 44, *6-8, 129 Nev. Adv. Rep. 39, 2013 WL 2364195. The court avoids statutory interpretation that renders language meaningless or superfluous. *Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009).

The Second Action is an “action involving nonresidential construction,” because it “[i]s commenced against a design professional” (Aries) and it “[i]nvolves the design [or] construction . . . of an alteration of or addition to an existing nonresidential building or structure.” NRS § 11.2565. “[I]n an action involving nonresidential construction, the attorney for the complainant *shall* file an

affidavit with the court concurrently with the service of the *first pleading* in the action,” and the affidavit must contain an expert’s report. NRS § 11.258 (emphasis added).

NRS § 11.258 is clear on its face: “[I]n an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action...” Appellant filed the “first pleading” in this action without the required attorney affidavit and expert report. (AA 96-101). Rather than serving the first pleading then filing the attorney affidavit and expert report concurrently as required by the statute, Appellant filed a second “amended” pleading which included those documents. (AA 102-142).

Pursuant to NRS § 11.259(1), “The court *shall* dismiss an action involving nonresidential construction if the attorney for the complainant fails to...[f]ile an affidavit required pursuant to NRS 11.258“; or “[f]ile a report required pursuant to subsection 3 of NRS 11.258...” (Emphasis added). Since Appellant chose to file a second “amended” pleading rather than serving his first pleading and filing the required affidavit and expert report concurrently, dismissal was proper under the plain language of NRS § 11.258 and NRS § 11.259.

Appellant seems to argue that, because his first pleading was never served, his second (amended) pleading complied with NRS § 11.258 because it included the required attorney affidavit and expert report. (*See* Opening Brief, pg. 12).

However, such an application of NRS § 11.258 would improperly render the phrase “first pleading” meaningless. *See Karcher Firestopping*, 125 Nev. at 113, 204 P.3d at 1263 (“The court avoids statutory interpretation that renders language meaningless or superfluous.”). Allowing Appellant to proceed with a second “amended” pleading when his first pleading did not comply with the statute would have been improper under the plain language of NRS § 11.258.

Appellant’s fatal misstep was his failure to serve the first pleading then file the attorney affidavit and expert report “concurrently.” *See* NRS § 11.258. The statute’s plain language does not contemplate service of a second or amended pleading. *See* NRS § 11.258. The plain language of NRS § 11.258 supports the District Court’s Order.

2. *Otak and In re CityCenter Constr.* support the District Court’s Order.

Not only does the plain language of NRS § 11.258 support the District Court’s Order dismissing Appellant’s Complaint, two decisions issued by this Court interpreting NRS § 11.258 clearly justify affirmation of the District Court’s Order.

In *Otak Nev., LLC v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011), a general contractor filed a third-party complaint against a design professional, alleging professional negligence related to a nonresidential construction project. *Otak*, 127 Nev. at 595, 260 P.3d at 409. Like Appellant’s

first pleading in the case below, no attorney affidavit or expert report was included with the general contractor's third-party complaint or filed with the district court before the complaint's service on the design professional as required by NRS § 11.258. *Id.*

Before the design professional filed a responsive pleading, the general contractor, just like Appellant in this case, filed an amended third-party complaint that included for the first time an affidavit from its attorney in which he stated that the claim had a reasonable basis in fact and law. *Id.* The amended third-party complaint also included an expert report opining that the design professional's engineering services fell below the standard of care. *Id.*

Just as Aries did in this case, the design professional in *Otak* filed a motion to dismiss the general contractor's amended third-party complaint on the grounds that the affidavit and report were not filed concurrently with or before the original third-party complaint, as required by NRS § 11.258. *Id.* The district court denied the design professional's motion, which triggered its petition to this Court for writ relief. *Id.*

This Court framed the issue presented by the design professional as follows:

Is a construction design malpractice pleading void *ab initio* if the statutorily required attorney affidavit and expert report are not *filed* with the court before the initial pleading is served?

Id.

This Court analyzed the issue in light of its previous interpretations of NRS § 41A.071, which requires an attorney affidavit to be filed with an action alleging medical malpractice. *Id.* Specifically, this Court cited to its decision in *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 148 P.3d 790, 794 (2006) in which it held that NRS 41A.071's mandatory language did not give the district court the discretion to allow a party to amend a complaint alleging medical malpractice *that was filed* without the required affidavit. *Washoe Med.*, 122 Nev. at 1303, 148 P.3d at 793-94. (Emphasis added).

This Court then cited to another case interpreting NRS § 41A.071, *Fierle v. Perez*, 125 Nev. 728, 740, 219 P.3d 906, 914 (2009), in which it held that "...because a complaint *filed* under NRS 41A.071 without the required affidavit was void ab initio, '...such complaints may not be amended because they are void and do not legally exist.'" *Otak*, 127 Nev. at 599, 260 P.3d at 411 citing *Fierle*, 125 Nev. at 740, 219 P.3d at 914. This Court summarized its analysis by concluding:

Our analysis in *Washoe Medical* and *Fierle* is equally applicable to the instant case, and thus we now extend our analysis in those cases to cases that are governed by NRS 11.258. *Therefore, we conclude that because a pleading filed under NRS 11.258 without the required affidavit and expert report is void ab initio and of no legal effect, the party's failure to comply with NRS 11.258 cannot be cured by amendment.*

Otak, 127 Nev. at 599, 260 P.3d at 412. (Emphasis added).

Approximately two years later, in *Converse Prof'l Grp. v. Eighth Judicial Dist. Grp. (In re CityCenter Constr.)*, 129 Nev. 669, 672, 310 P.3d 574, 577 (2013), this Court reiterated its holding in *Otak*:

We further conclude that the *Otak* court correctly construed NRS 11.259(1) as requiring the dismissal of an amended pleading—not an entire action—that followed an initial pleading that was *filed* without adhering to NRS 11.258.

(Emphasis added).

The only difference between the facts of this case and the facts of *Otak* is that Appellant never served his first pleading. However, *Otak* indicates compliance with NRS § 11.258 could have been achieved by serving the first pleading as long as Appellant filed his attorney affidavit and expert report “concurrently.” *Id.* (“[the general contractor] served its initial pleading asserting nonresidential construction malpractice claims against [the design professional] *without concurrently filing the required attorney affidavit and expert report* in direct violation of NRS 11.258...” (Emphasis added). Rather than serving the first pleading then filing the attorney affidavit and expert report “concurrently” as contemplated by the statute, Appellant improperly filed a second “amended” pleading with those documents.

Appellant maintains that its “...Complaint and Exhibits were Filed Concurrently with Service.” (Opening Brief, pg. 12). However, this argument fails to acknowledge that the “complaint” that was purportedly served was not the “first pleading” as specifically required by NRS § 11.258 and § 11.259. Additionally, there is nothing in the record presented by Appellant demonstrating service of his “Amended Complaint.”⁸

Appellant’s decision not to serve his first pleading then file the attorney affidavit “concurrently” with the first pleading rendered that pleading void *ab initio* and incapable of amendment. *Otak*, 127 Nev. at 599, 260 P.3d at 412; *In re CityCenter Constr.*, 129 Nev. at 672, 310 P.3d at 577. The District Court lacked discretionary authority to permit Appellant to proceed with his amended pleading. *See Otak*, 127 Nev. at 599, 260 P.3d at 412. This Court should therefore affirm the District Court’s Order granting Aries’ motion to dismiss.

3. The “technical error” that purportedly prevented Appellant from complying with NRS § 11.258 is irrelevant.

Appellant insists that his compliance with NRS § 11.258 was thwarted by an alleged “technical error” with the District Court’s electronic filing system. (Opening Brief, pg. 6). Appellant raised this issue in his motion for reconsideration:

⁸ Appellant’s Appendix does not include proof of service of the Amended Complaint. NRAP 30(b)(2)(J)(i) provides that the Appendix “shall contain” “Proof of service, if any, of...the summons and complaint.”

Counsel was advised there was a malfunction by the Odyssey System after the documents were uploaded and the Court had not received a copy of the attachments. The Court Clerk requested Plaintiff's Counsel refile the complaint, along with the accompanying attachments as an amended filing and explained that attachments would be related back to the original filing.

(AA 206-207).

Yet the affidavit submitted by Appellant's counsel in support of his motion for reconsideration (the only evidence submitted by Appellant related to the alleged "technical error") does not include the name of the Court Clerk, a statement indicating that the Clerk acknowledged any "malfunction" or a statement that the Clerk represented that the amended filing would "relate back." (AA 210-212). The affidavit likewise included no explanation as to why the complaint uploaded while the attorney affidavit and expert report did not. (AA 210-212). The District Court considered the evidence submitted by Appellant regarding the alleged "technical error" and was not persuaded. (AA 96-101).

Additionally, the "technical error" did not necessarily doom Appellant's first pleading. He could have simply served the first pleading without the attorney affidavit and expert report then filed those documents "concurrently" with service. *See* NRS § 11.258(1). However, when he filed his second "amended" pleading, the first pleading was rendered void. *See Otak*, 127 Nev. at 599, 260 P.3d at 412. ("[B]ecause a pleading filed under NRS 11.258 without the required affidavit and

expert report is void ab initio and of no legal effect, the party's failure to comply with NRS 11.258 cannot be cured by amendment.”).

There is no “technical error” exception to the attorney affidavit and expert report requirements of NRS § 11.258. Even if such an exception existed, Appellant did not present sufficient evidence to the District Court to verify the existence of such an error. The alleged “technical error” does not excuse Appellant's non-compliance with NRS § 11.258. This Court should therefore affirm the District Court's Order granting Aries' motion to dismiss.

4. Appellant's failure to comply with NRS § 11.258 was a jurisdictional defect, which empowered the District Court to dismiss Appellant's Amended Complaint sua sponte.

Appellant suggests that the District Court's Order dismissing his Complaint was somehow improper because the deficiencies with Appellant's first pleading were not specifically briefed or addressed in oral arguments. (*See* Opening Brief, pgs. 2, 5). This argument lacks merit, because the District Court has the authority to dismiss a complaint *sua sponte* for jurisdictional defects.

Similar to the affidavit requirement set forth in NRS § 41A.071 for medical malpractice actions, the attorney affidavit and expert report requirements contained in NRS § 11.258 are mandatory and jurisdictional. *See Szydel v. Markman*, 121 Nev. 453, 461, 117 P.3d 200, 205 (2005)(Hardesty, J., dissenting) (“The affidavit requirement of NRS 41A.071 is jurisdictional in nature.”); *Otak*, 127 Nev. at 599,

260 P.3d at 412 (citing to cases decided by this Court interpreting the mandatory requirements of NRS § 41A.071).

“The Legislature’s use of ‘shall’ in NRS 11.259 demonstrates its intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if the pleading is served without the complaining party concurrently *filing* the required affidavit and report. *Otak*, 127 Nev. at 598, 260 P.3d at 411. (Emphasis added). The District Courts are empowered to examine subject matter jurisdiction *sua sponte*. *E.g. Barber v. State*, 363 P.3d 459, 462 (Nev. 2015). Nevada District Courts are empowered to dismiss *sua sponte* a complaint based on a lack of subject matter jurisdiction. *Royal Ins. v. Eagle Valley Constr.*, 110 Nev. 119, 120, 867 P.2d 1146, 1147 (1994).

Since the District Court possessed discretionary authority to dismiss Appellant’s first pleading *sua sponte*, the fact that the deficiencies with Appellant’s first pleading were not specifically briefed or addressed during oral argument is immaterial. Consequently, the District Court’s Order granting Aries’ motion to dismiss should be affirmed.

B. The Attorney Affidavit Submitted by Appellant With His Amended Complaint Did Not Comply With NRS § 11.258.

Even if this Court finds that a first pleading filed without the required attorney affidavit and expert report can be resurrected by a second pleading

containing those documents, dismissal was nevertheless proper because the attorney affidavit attached to the second pleading did not comply with NRS § 11.258. “[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.” *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) *citing* *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

NRS § 11.258 sets forth the following requirements for a complainant that brings an action involving nonresidential construction against a design professional:

1. Except as otherwise provided in subsection 2, in an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney:

- (a) Has reviewed the facts of the case;

- (b) Has consulted with an expert;

- (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and

- (d) Has concluded on the basis of the review and the consultation with the expert that ***the action*** has a reasonable basis in law and fact.

(Emphasis added).

Appellant’s attorney affidavit purportedly served on Aries did not comply with NRS § 11.258 because it was prepared for the First Action, not the Second

Action. Additionally, it was not prepared by the “attorney for the complainant” as required by the statute.

1. Appellant’s attorney affidavit was improperly repurposed from the First Action.

The attorney affidavit relied upon by Appellant did not comply with NRS § 11.258 because it was prepared for the First Action, not the Second Action. The Affidavit is riddled with statements indicating that it was not prepared for the Second Action.

First, Paragraph 2 of the Affidavit states that Appellant’s attorney Phillip Peche has been admitted *pro hac vice* “...for the action *REIF v. EDGEWATER GAMING, LLC et al.*, case number A-17-752432-C.” (AA 109). That is the First Action. Although Mr. Peche was admitted to practice *pro hac vice* in the First Action, he was never admitted to practice in the Second Action. (AA 198). Also, while “Edgewater Gaming, LLC” is a party to the First Action, it is not a party to the Second Action. (*cf.* AA 1 and AA 102).

Further, Paragraph 4 of the attorney affidavit states:

4. I have reviewed the facts of ***this case***, and pursuant to NRS 11.258 requirements for bringing an “Action involving non-residential construction” against a “design professional,” shall file this affidavit concurrently with service of the ***First Amended Complaint, which names design professional BARKER DROTTAR ASSOCIATES, LLC (“Barkar Drottar”)*** as a Defendant in this case. Defendant ***ARIES CONSULTANTS, INC. (“Aries”)*** has moved to ***dismiss the instant action*** against it on the grounds that it is a design professional within the meaning of NRS 11.256 et seq. and that Plaintiff

did not comply with the pre-filing requirements set forth in the same. Independent of the Court's ruling on the pending legal issue, this Affidavit and attached expert report comport with the spirit and legislative intent of NRS 11.256 et seq. such that *Aries pending motion to dismiss* will become moot upon the filing and service of Plaintiff's First Amended Complaint.

(AA 109) (Emphasis added).

- By “this case,” the Affidavit is referring to case number A-17-752432 (the First Action), not the Second Action.

- Barkar Drott Associates, LLC was a defendant in the First Action, but was not a party to the Second Action. (AA 102).

- The Affidavit refers to a “...pending motion to dismiss *the instant action*.” (AA 109, emphasis added). Appellant's attorney affidavit is dated September 28, 2017. (AA 110). Aries' motion to dismiss the Second Action was filed on April 3, 2018. (AA 143). Therefore, Appellant's reference to a “motion to dismiss” is clearly referring to the motion filed by Aries in the First Action. (AA 109).

The fact that Appellant's attorney affidavit was not prepared for the Second Action is dispositive. NRS § 11.258(1) (d) *specifically* requires the attorney affidavit to include a statement from the “attorney for the complainant” that he or she “Has concluded on the basis of the review and the consultation with the expert that ‘*the action*’ has a reasonable basis in law and fact.” (Emphasis added). The term “action” in NRS § 11.258 and NRS § 11.259 is synonymous with “pleading.”

In re CityCenter Constr., 310 P.3d at 580 (Nev. 2013). Therefore, each “action” (pleading) must be supported by its own attorney affidavit under NRS § 11.258. The “attorney for the complaint” must review the specific pleading being referenced by the affidavit.

Here, Paragraph 7 of Appellant’s attorney affidavit contains a statement that “...*the instant action* has a reasonable basis in law and fact.” As discussed *supra*, “the instant action” referenced in the affidavit refers to the complaint filed in the First Action, not the Second Action. Therefore, Appellant did not comply with NRS § 11.258 (1)(d) because there is no statement from an attorney for the complainant that “...*the action* [this case] has a reasonable basis in law and fact.” In other words, Appellant’s affidavit attests to the legal and factual merits of the First Action, not the Second Action. There was a different legal basis for filing the second action (failure to comply with NRS § 11.258 in the First Action), therefore, a new attorney affidavit should have been provided.

NRS § 11.259 (1) provides that the district court “*shall* dismiss an action involving nonresidential construction” where the complainant fails to comply with NRS 11.258’s attorney affidavit and expert report requirements. *In re CityCenter Constr.*, 310 P.3d at 580 (Emphasis added). The Legislature’s use of “shall” in NRS § 11.259 demonstrates its intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if the pleading is served without the complaining party concurrently filing the required affidavit and report. *Otak*, 127

Nev. at 598, 260 P.3d at 411. Appellant's affidavit was not prepared for the Second Action and therefore does not comply with NRS § 11.258. Consequently, the District Court's Order granting Aries' motion to dismiss should be affirmed.

2. Appellant's attorney affidavit was not submitted by the "attorney for the complainant."

NRS § 11.258 (1) obligates "...the attorney for the complainant..." to submit the required affidavit. However, Appellant's attorney affidavit was executed by California attorney Philip Peche, who is neither licensed to practice law in Nevada nor admitted *pro hac vice* in the case below. (AA 198). According to his affidavit, Mr. Peche was admitted *pro hac vice* in the First Action. (AA 109). However, neither Mr. Peche nor his firm were admitted *pro hac vice* in the Second Action at the time his affidavit was submitted to the District Court in this matter. (AA 96 and 198).

Since Mr. Peche is not a member of the State Bar of Nevada and because he was not admitted *pro hac vice* in this case,⁹ Mr. Peche cannot be "the attorney for the complainant" in this case as required by NRS § 11.258. Since Appellant's Complaint did not include an affidavit from "the attorney for the complainant" as required by NRS § 11.258, the District Court's Order granting Respondent's Motion to Dismiss should be affirmed.

⁹ Nevada Supreme Court Rule ("SCR") 42(5) provides: "An applicant *shall not* appear in a proceeding subject to this rule until the court, arbitrator, mediator, or administrative or governmental agency where the action is pending enters an order granting the motion to associate." SCR 42(5) (Emphasis added).

C. The Findings of Appellant’s Paid Expert are Completely Immaterial to the Issues Before the Court.

Appellant dedicated a portion of his Opening Brief to summarizing the alleged “Legitimate Expert Findings” implicating Aries. (Opening Brief, pgs. 14-15). However, the findings of Appellant’s expert are completely immaterial to the issues before this Court and should be disregarded.

CONCLUSION

Appellant failed to file the required attorney affidavit and expert report with his “first pleading” against Aries as mandated by NRS § 11.258. His first pleading was consequently void *ab initio* and incapable of amendment. The District Court’s Order dismissing Appellant’s action was supported by the plain language of NRS § 11.258 as well as previous decisions issued by this Court interpreting the statute. On top of that, the affidavit submitted with his second pleading was deficient in that it was not signed by the “attorney for the complainant” and was repurposed from another lawsuit. Accordingly, Aries respectfully requests that this Honorable

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Court affirm the District Court's Order granting Aries' motion to dismiss.

Dated: December 6, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing RESPONDENT'S ANSWERING 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), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

The brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and uses a 14 point proportionally spaced Times New Roman font and consists of 28 pages and 6,127 words. 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: December 6, 2018

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CERTIFICATE OF SERVICE

I certify that on the 6th day of December, 2018, I served a copy of the foregoing RESPONDENT’S ANSWERING BRIEF upon all counsel of record:

___ By personally serving it up on him/her;

___ By mailing it by first class mail with sufficient postage prepaid to the following address(s); or

X Transmitted by electronic means through the Nevada Supreme Court e-filing service to the person listed as follows:

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