

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.

Supreme Court Case No. : 76121

Case No. : 70121
Electronically Filed

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Appeal from District Ct. Elizabeth

Elizabeth A. Brown
Case No. A-18-0770951-6

Case No. A-18-770951-C
Clerk of Supreme Court

PETITION FOR REHEARING

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Pursuant to NRAP 40(c)(2)(A) and (B), Respondent petitions for rehearing and hereby requests withdrawal or modification of *Marcus A. Reif vs. Aries Consultants, Inc.*, 135 Nev. Adv. Op. 51 (October 10, 2019) (hereinafter the “Decision”) and entry of a new opinion that affirms the trial court’s order dismissing the first amended complaint, on the grounds that the Court’s Decision misapprehended or overlooked certain material questions of fact and or arguments set forth in the briefs.

I. INTRODUCTION AND OVERVIEW

Aries’ Petition for Rehearing should be granted because this Court’s analysis rests on a fundamental misapprehension of a critical fact: the first amended complaint that this Court considered to be the “first pleading” against Aries was actually the third-pleading against Aries, and the first pleading was actually filed and served on Aries. In that the aforementioned Decision relies heavily – if not exclusively – on the misunderstanding that the first pleading was not actually served, it would serve the interests of efficiency to consider the issue in a rehearing.

This Court also seemingly failed to consider or inadvertently overlooked the argument presented in Aries’ brief that the attorney affidavit submitted by Reif with his amended complaint was prepared by an attorney that was neither licensed in Nevada nor admitted pro hac vice in the case below. As such, the attorney

affidavit was not prepared by the “attorney for the claimant” as required by NRS 11.258(1)(d).

II. ARGUMENT IN SUPPORT OF REHEARING

A. The Pleading that this Court Considered to be the “Initial Pleading” was Actually Reif’s Third Pleading.

Aries’ Petition should be granted because this Court misapprehended or misconstrued the document that served as Reif’s “first pleading” in his claims against Aries.

We therefore take this opportunity to correct *Otak* and clarify that that a pleading is void ab initio under NRS 11.258(1) only where the pleading is *served* without a concurrent filing of the required attorney affidavit and expert report, not where the pleading is merely *filed*.

Because Reif’s initial pleading was never served, it should not have been dismissed under NRS 11.259.

(Decision, pg. 4) (Emphasis added).

1. Reif’s initial pleading against Aries.

On March 14, 2017, Reif filed a complaint in District Court Department 30 (Case no. A-17-752432-C) 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). ***Reif’s complaint (his “initial pleading” against Aries) in that case was served on Aries without 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 Reif’s complaint in the Department 30 action for failure to comply with NRS § 11.258. (AA 13). Reif filed an Opposition to Aries’ motion in which he 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).

2. Reif’s *second* pleading against Aries.

On November 7, 2017, Reif filed a motion to amend complaint in the Department 30 action “...primarily to substitute Cindy Reif [Reif’s mother] as Conservator of the person and estate of [Reif]...and add Barker Drott Associates, LLC (“BDA”) and related causes of action.” (RA, Vol. I, 12).

However, Reif had an ulterior motive for his amended complaint in the initial Department 30 action. Reif’s proposed “First Amended Complaint and Demand for Jury Trial” submitted with his motion to amend included an attorney affidavit and expert 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 Reif’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 Reif's motion to amend in which it requested that its arguments regarding Reif's non-compliance with NRS § 11.258 be preserved. (RA, Vol. I, 76). On November 28, 2017, Department 30 granted Reif's motion to amend his initial pleading. (AA 82-83). The Court's Order specifically preserved Aries' objections regarding Reif's initial non-compliance with NRS § 11.258. (AA 83).

3. The subject complaint was Reif's *third* pleading against Aries.

Reif eventually acknowledged that Aries was a design professional. On March 12, 2018, *while Reif's initial and amended pleading against Aries was still pending in Department 30*, Reif filed a third, separate complaint (third pleading) against Aries based on the exact same facts and alleging the same causes of action as alleged in the Department 30 action. (AA 96 - 101). Reif's third pleading against Aries was assigned case number A-18-770951-C before the Honorable Susan Johnson in Department 22. (AA 96) (the action from which the instant appeal originated). In his Opening Brief, Reif described the purpose of his third pleading against Aries as follows:

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.

(Reif's Opening Brief, pg. 5) (Emphasis added).

On April 3, 2018, Aries filed a motion to dismiss Reif's complaint in the case below (third pleading) for numerous reasons, including failure to comply with NRS § 11.258. (AA 143-152). At the hearing on Aries' motion to dismiss, Reif's counsel acknowledged that the first pleading filed and served on Aries did not comply with NRS 11.258:

[Reif's Counsel]: -- in the Department 30 action based on our limited knowledge of Aries *we didn't see them as a design professional so we moved ahead with that*. And Judge Wiese agreed with us in the extent that he allowed us to complete discovery and then to address the issue later but through discovery they produced some documents that confirmed with us, *okay, they are in fact the design professional, but the issue of 11.258 is we aren't allowed to amend the complaint*. So, what other option will we have? We couldn't just simply let the statute run so we, you know, filed another action in this court.

(AA 187-188) (Emphasis added).

On May 11, 2018, the District Court issued its Order Granting Aries' motion to dismiss Reif's complaint (the Order from which Reif appealed). (AA 196-202). The dismissal was based on the District Court's finding that Reif'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).

4. This Court overlooked the fact that the subject complaint was not the “initial pleading” against Aries.

The Court’s Decision misapprehended the fact that Reif’s “initial pleading” against Aries *was* served, albeit in an earlier lawsuit that was still pending when the subject pleading was filed. (AA 1). In its Decision, this Court acknowledged the existence of an initial pleading filed against Aries in the Department 30 action: “The complaint currently before us *followed a complaint filed in the same district court*, which was assigned to a different judge. (Decision, pg. 3, n. 1).

A statute should always be construed to avoid absurd results. *E.g. GES, Inc. v. Corbitt*, 117 Nev. 265, 270, 21 P.3d 11, 14 (2001). NRS § 11.258 mandates the filing of an expert report and attorney affidavit with the court “...concurrently with the service of *the first pleading*...” (Emphasis added). The “first pleading” against Aries was the complaint filed in Department 30, not the complaint that is the subject of this appeal. Any other interpretation would produce an absurd result. *See id.*

B. Reif’s Third Pleading Against Aries was a *De Facto* Attempt to Amend his Initial Non-Compliant Pleading in Violation of *Otak*.

Aries’ Petition should be granted because the Court misconstrued the nature of the subject complaint, which was a transparent effort to essentially amend his

initial pleading. Reif's stated objective behind the second lawsuit (the third pleading against Aries) was to consolidate it with the first pleading in Department 30 thereby curing his initial failure to comply with NRS 11.258 in that case:

[Reif's Counsel]: So, the plan is to, you know, once all procedure issues are determined and sorted out we're gonna consolidate the cases and hear them in front of Judge Wiese...

(AA 187-188).

This is nothing more than a *de facto* attempt to amend the initial non-compliant pleading filed in the Department 30 action. Under this Court's decision in *Otak*, "...***the party's failure to comply with NRS 11.258 cannot be cured by amendment.*** *Otak Nev., LLC v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011). This Court should not countenance Reif's efforts to sidestep its precedent.

This Court acknowledged that the subject complaint "...***followed a complaint filed in the same district court...***" (Decision, Pg. 3, n. 1) (Emphasis added). That pleading did not comply with NRS 11.258. (AA 1-10). Since the Court overlooked this important fact, and because Reif's third pleading was merely an attempt to amend his initial non-compliant pleading in the Department 30 action, Aries' Petition for Rehearing should be granted.

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B. This Court Did Not Consider or Overlooked the Fact that the Affidavit Submitted by Reif in Support of his Amended Complaint was Not Prepared by the “Attorney for the Complainant” as Required by NRS 11.258(1).

Rehearing is proper because the Court neglected to decide an issue presented in Aries’ brief that must be decided in Aries’ favor. *See Am. Cas. Co. v. Hotel & Rest. Emps. & Bartenders Int’l Union Welfare Fund*, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997) (“Because this court's Opinion neglected to decide an issue presented in the briefs, and because that issue must be decided in favor of appellant, we grant rehearing.”). This Court should grant Aries’ Petition because the Court failed to consider or overlooked Aries’ argument that the attorney affidavit submitted by Reif with his Amended Complaint was not prepared by the “attorney for the claimant” as required by NRS 11.258(1). (AA 109-110).

In its Answering Brief, Aries argued:

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.

(Aries’ Answering Brief, pgs. 20-21).

Specifically, Aries argued that dismissal was proper because the affidavit submitted with Reif’s Amended Complaint was not signed by the “attorney for the claimant” as required by NRS 11.258(1):

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 [in Department 30]. Although Mr. Peche was admitted to practice *pro hac vice* in the First Action, he was never admitted to practice in the Second Action [the case below]. (AA 198).

(Aries Answering Brief, pg. 22) (AA 109).¹

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, 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.

(Aries' Answering Brief, pg. 25) (internal footnote omitted and emphasis added).

NRS 11.258(1)(d) obligates the "***attorney for the complainant***" to "...file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney...[h]as concluded on the basis of the review and the

¹ Aries specifically included this argument as one of three "Issues for Review" in its Brief: "*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?'*" (Answering, pg. v).

consultation with the expert that *the action has a reasonable basis in law* and fact.” (Emphasis added).

It is undisputed that the attorney affidavit submitted with Reif’s amended complaint was signed by an attorney that was neither licensed in Nevada nor admitted pro hac vice in the district court case that is the subject of this appeal. (AA 109; 198). Aries’ brief included extensive argument and authorities on this issue. (Aries’ Answering Brief, pgs. 22-25).

This Court declined to entertain this argument on the basis that it was not addressed by the District Court. (Decision, pg. 5, n. 2). However, this Court has held that it “...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).

Because it is undisputed that an attorney that is not licensed in Nevada and not admitted pro hac vice in the district court below prepared the attorney affidavit, it was not prepared by the “attorney for the claimant” as required by NRS 11.258(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.” NRS 11.259(1)(a). Therefore dismissal was

appropriate, albeit for a reason not articulated by the district court. *See id.* As such, this Court should grant Aries' Petition.

III. CONCLUSION

Based on the foregoing, Aries respectfully requests that this Court withdraw or modify its decision in *Marcus A. Reif vs. Aries Consultants, Inc.*, 135 Nev. Adv. Op. 51 (October 10, 2019) and issue a new opinion that affirms the trial court's order dismissing Reif's first amended complaint.

DATED this 28th day of October 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this PETITION FOR REHEARING, 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 N.R.A.P. 28(e), which requires every assertion in 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 12 pages and 2,469 words. NRAP 32(a)(7)(C).

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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 28th day of October 2019.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of October 2019, I served a copy of the foregoing **PETITION FOR REHEARING** 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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