

Case No. \_\_\_\_\_

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*In the*  
**Supreme Court**  
*of the*  
**State of Nevada**

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Electronically Filed  
Jul 15 2020 11:01 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

DEKKER/PERICH/SABATINI LTD.,  
NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN,  
MELROY ENGINEERING, INC. d/b/a MSA ENGINEERING CONSULTANTS,  
JW ZUNINO & ASSOCIATES, LLC, and  
NINYO & MOORE, GEOTECHNICAL CONSULTANTS,

*Petitioners,*

vs.

THE EIGHTH JUDICIAL DISTRICT COURT,  
STATE OF NEVADA,  
CLARK COUNTY, and  
THE HONORABLE TREVOR ATKIN,

*Respondents,*

CITY OF NORTH LAS VEGAS,

*Real Party in Interest.*

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FROM DECISIONS OF THE EIGHTH JUDICIAL DISTRICT COURT,  
CLARK COUNTY, NEVADA  
CASE NO. A-19-798346-C  
HONORABLE TREVOR ATKIN · DEPARTMENT 8 · PHONE: (702) 671-4338

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**PETITIONERS' APPENDIX TO**  
**PETITION FOR WRIT OF MANDAMUS OR,**  
**ALTERNATIVELY, PROHIBITION**

**VOLUME 20**

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## CHRONOLOGICAL INDEX - APPENDIX OF EXHIBITS

<b>Exhibit:</b>	<b>Volume:</b>	<b>Bates: PET.APP.</b>	<b>Date:</b>	<b>Description:</b>
<b>54</b>	<b>20</b>	<b>003295 – 003307</b>	<b>02/18/2020 3:57 PM</b>	<b>Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants' Reply to City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' and Joinders to Motion to Dismiss on Order Shortening Time</b>
<b>55</b>	<b>20</b>	<b>003308 – 003318</b>	<b>02/18/2020 5:02 PM</b>	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Reply to City of North Las Vegas' Opposition to Its Motion to Dismiss</b>
	20	003319 – 003325	02/12/2020	<u>Exhibit 1</u> – Notice of Entry of Order Granting Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Motion to Dismiss; Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Motion to Dismiss City of North Las Vegas' Complaint
	20	003326 – 003340	11/22/2019	Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Motion to Dismiss City of Las Vegas' Complaint
	20	003341 - 003347	11/06/2019	<u>Exhibit A</u> – City of North Las Vegas' Complaint
	20	003348 – 003353	N/A	<u>Exhibit B</u> – Michael Panish Expert Witness & Consultants Construction Systems Curriculum Vitae
	20	003354 – 003361	03/23/2007	<u>Exhibit C</u> - Legislative History of 11.258 Senate Bill 243
	20	003362 – 003366	12/09/2019	A-19-804979-C Kelli Nash' Opposition to Defendant's Motion to Dismiss its Complaint
	20	003367 – 003373	12/26/2019	A-19-804979 Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Reply to Kelly Nash's Opposition to its Motion to Dismiss Kelly Nash's Complaint
	20	003374 – 003378	10/15/2019	<u>Exhibit 1</u> – Stipulation and Order to Dismiss Kittrell Garlock and Associates, AIA, Ltd.

56	20	003379 – 003384	02/18/2020 5:06 PM	<b>Richardson Construction, Inc. and The Guarantee Company of North America USA's Limited Response to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Times and All Joinder Thereto</b>
57	20	003385 – 003391	02/19/2020 11:29 AM	<b>JW Zunino &amp; Associates LLC's Reply to City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time</b>
58	20	003392 – 003398	02/19/2020 2:56 PM	<b>Ninyo &amp; Moore, Geotechnical Consultants' Reply to City of North Las Vegas Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' and Joinders to Motion to Dismiss on Order Shortening Time</b>
59	20	003399 – 003408	03/16/2020 8:58 AM	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion for Clarification Regarding Court's Minute Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss Brought Pursuant to NRS 11.258, on Order Shortening Time</b>
60	20	003409 – 003413	03/16/2020 4:57 PM	<b>City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion for Clarification Regarding Court's Minute Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss Brought Pursuant to NRS 11.258, on Order Shortening Time</b>
	20	003414 – 003415	03/13/2020	<u>Exhibit 1</u> – Email re Proposed Order Denying MSA's Motion to Dismiss on NRS 11.258
	20	003416 – 003425	Undated	<u>Exhibit 2</u> – Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss
	20	003426 – 003428	03/16/2020	<u>Exhibit 3</u> – Email re Request to Withdraw Motion for Clarification on Order Shortening Time Without Prejudice
61	20	003429 – 003466	03/30/2020 3:09 PM	<b>Court Recorder's Transcript of Hearing re All Pending Motions, March 10, 2020</b>



<b>62</b>	<b>20</b>	<b>003467 – 003470</b>	<b>04/02/2020 4:21 PM</b>	<b>City of North Las Vegas’ Notice of Entry of Decision and Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss</b>
	20	003471 – 003480	04/02/2020	<u>Exhibit 1</u> - Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss
<b>63</b>	<b>20</b>	<b>003481 – 003491</b>	<b>04/10/2020 3:04 PM</b>	<b>Court Recorder’s Transcript of Hearing re All Pending Motions, March 17, 2020</b>

## ALPHABETICAL INDEX - APPENDIX OF EXHIBITS

<b>Exhibit:</b>	<b>Vol.:</b>	<b>Bates: PET.APP.</b>	<b>Date:</b>	<b>Description:</b>
<b>10</b>	<b>11</b>	<b>001560 – 001562</b>	<b>08/20/2019 1:34 PM</b>	<b>City of North Las Vegas’ Appendix of Exhibits to Opposition to Dekker/Perich/Sabatini, Ltd.’s Motion to Dismiss</b>
	11	001563 – 001580	07/11/2019	<u>Exhibit 1</u> – City of North Las Vegas’ Complaint
	11	001581 – 001614	02/07/2007	<u>Exhibit 1</u> – Professional Architectural Services Agreement
	11	001615 – 001680	08/29/2007	<u>Exhibit 2</u> – Ninyo & Moore’s Geotechnical Evaluation
	11	001681 – 001694	01/30/2008	<u>Exhibit 3</u> – City of North Las Vegas’ Letter to Richardson Construction Inc re Construction Contract
	11	001695 – 001696	07/13/2009	<u>Exhibit 4</u> – Notice of Completion
	12	001697 – 001832	12/11/2017	<u>Exhibit 5</u> – American Geotechnical Inc’s Geotechnical Investigation
	12	001833 – 001836	1988 - Present	<u>Exhibit 6</u> – American Geotechnical Inc. Resume of Edred T. Marsh, Principal Geotechnical Engineer
	12	001837 – 001838	07/03/2019	<u>Exhibit 7</u> – Declaration of Edred T. Marsh, P.E.
	12	001839 – 001840	10/17/2007	<u>Exhibit 8</u> – Ninyo & Moore Letter to Dekker/Perich/Sabatini re Review of 95 Percent Bid Set Construction Documents
	13	001841 – 002053	11/02/2007	<u>Exhibit 9</u> - Dekker/Perich/Sabatini’s Structural Calculations
	14	002054 – 002131	11/02/2007	<u>Exhibit 9</u> - Dekker/Perich/Sabatini’s Structural Calculations
	14	002132 – 002210	11/10/2007	<u>Exhibit 10</u> - Plans / Record Drawings
<b>8</b>	<b>7</b>	<b>000847 – 000849</b>	<b>08/20/2019 1:24 PM</b>	<b>City of North Las Vegas’ Appendix of Exhibits to Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultant's Motion to Dismiss or in the Alternative, Motion for Summary Judgment</b>
	7	000850 – 000867	07/11/2019	<u>Exhibit 1</u> – City of North Las Vegas’ Complaint

	7	000868 – 000901	02/07/2007	<u>Exhibit 1</u> – Professional Architectural Services Agreement
	7	000902 – 000967	08/29/2007	<u>Exhibit 2</u> – Ninyo & Moore’s Geotechnical Evaluation
	7	000968 – 000981	01/30/2008	<u>Exhibit 3</u> – City of North Las Vegas’ Letter to Richardson Construction Inc re Construction Contract
	7	000982 – 000983	07/13/2009	<u>Exhibit 4</u> – Notice of Completion
	8	000984 – 001119	12/11/2017	<u>Exhibit 5</u> – American Geotechnical Inc’s Geotechnical Investigation
	8	001120 – 001123	1988 - Present	<u>Exhibit 6</u> – American Geotechnical Inc’s Resume of Edred T. Marsh, Principal Geotechnical Engineer
	8	001124 – 001125	07/03/2019	<u>Exhibit 7</u> – Declaration of Edred T. Marsh, P.E.
	8	001126 – 001127	10/17/2007	<u>Exhibit 8</u> – Ninyo & Moore Letter to Dekker/Perich/Sabatini re Review of 95 Percent Bid Set Construction Documents
	9	001128 – 001340	11/02/2007	<u>Exhibit 9</u> - Dekker/Perich/Sabatini’s Structural Calculations
	10	001341 – 001418	11/02/2007	<u>Exhibit 9</u> - Dekker/Perich/Sabatini’s Structural Calculations
	10	001419 – 001497	11/10/2007	<u>Exhibit 10</u> - Plans / Record Drawings
	10	001498 – 001513	2019	<u>Exhibit 2</u> – Assembly Bill 421 – 80 <sup>th</sup> Session 2019
	10	001514 – 001546	05/15/2019	<u>Exhibit 3</u> - Minutes of the Senate Committee on Judiciary, 80th Legislature
<b>1</b>	<b>1</b>	<b>000001 – 000017</b>	<b>07/11/2019 4:35 PM</b>	<b>City of North Las Vegas’ Complaint Against Defendants – Exempt from Arbitration Under N.A.R. 3(A): Seeks Damages in Excess of \$50,000</b>
	1	000018 – 000051	02/07/2007	<u>Exhibit 1</u> – Professional Architectural Services Agreement
	1	000052 – 000117	08/29/2007	<u>Exhibit 2</u> – Ninyo & Moore’s Geotechnical Evaluation
	1	000118 – 000131	01/30/2008	<u>Exhibit 3</u> – City of North Las Vegas’ Letter to Richardson Construction Inc re Construction Contract
	1	000132 – 000133	07/13/2009	<u>Exhibit 4</u> – Notice of Completion

	2	000134 – 000269	12/11/2017	<u>Exhibit 5</u> – American Geotechnical Inc’s Geotechnical Investigation
	2	000270 – 000273	1988 - Present	<u>Exhibit 6</u> – American Geotechnical Inc. Resume of Edred T. Marsh, Principal Geotechnical Engineer
	2	000274 – 000275	07/03/2019	<u>Exhibit 7</u> – Declaration of Edred T. Marsh, P.E.
	2	000276 – 000277	10/17/2007	<u>Exhibit 8</u> – Ninyo & Moore Letter to Dekker/Perich/Sabatini re Review of 95 Percent Bid Set Construction Documents
	3	000278 – 000491	11/02/2007	<u>Exhibit 9</u> - Dekker/Perich/Sabatini’s Structural Calculations
	4	000492 – 000568	11/02/2007	<u>Exhibit 9</u> - Dekker/Perich/Sabatini’s Structural Calculations
	4	000569 – 000647	11/10/2007	<u>Exhibit 10</u> - Plans / Record Drawings
<b>18</b>	<b>15</b>	<b>002307 – 002312</b>	<b>09/26/2019</b>	<b>City of North Las Vegas’ Limited Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time</b>
	15	002313 – 002318	09/26/2019	<u>Exhibit 1</u> – Register of Actions Case A-19-798346-C
	15	002319 – 002320	09/20/2019	<u>Exhibit 2</u> – Weil & Drage, APC’s Letter to All Counsel re Hearing of Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on September 27, 2019
<b>25</b>	<b>15</b>	<b>002407 – 002421</b>	<b>11/13/2019 11:58 AM</b>	<b>City of North Las Vegas’ Motion to Alter Judgment</b>
	15	002422 – 002430	10/17/2019	<u>Exhibit 1</u> - Notice of Entry of Order Granting Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment and All Joinders to the Same
	15	002431 – 002448	07/11/2019	<u>Exhibit 2</u> – City of North Las Vegas’ Complaint

	15	002449 – 002455	09/30/2019	<u>Exhibit 3</u> - Order Granting Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants' Motion to Change Date
	15	002456 – 002471	2019	<u>Exhibit 4</u> - Assembly Bill 421 – 80 <sup>th</sup> Session 2019
	16	002472 – 002504	05/15/2019	<u>Exhibit 5</u> - Minutes of the Senate Committee on Judiciary – Eightieth Session
	16	002505 – 002510	09/30/2019	<u>Exhibit 6</u> - Richardson Construction, Inc. and The Guarantee Company of North America USA's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	16	002511 – 002514	09/30/2019	<u>Exhibit 7</u> - JW Zunino & Associates LLC's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
<b>6</b>	<b>6</b>	<b>000821 – 000826</b>	<b>08/15/2019 5:02 PM</b>	<b>City of North Las Vegas' Motion to Strike and Opposition to Jackson Family Partnership LLC d/b/a Stargate Plumbing's Motion to Dismiss</b>
	6	000827 – 000828	08/06/2019	<u>Exhibit 1</u> – Affidavit/Declaration of Service to Jackson Family Partnership LLC d/b/a Stargate Plumbing
<b>62</b>	<b>20</b>	<b>003467 – 003470</b>	<b>04/02/2020 4:21 PM</b>	<b>City of North Las Vegas' Notice of Entry of Decision and Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss</b>
	20	003471 – 003480	04/02/2020	<u>Exhibit 1</u> - Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss
<b>66</b>	<b>21</b>	<b>003589 – 003592</b>	<b>05/05/2020 3:48 PM</b>	<b>City of North Las Vegas' Notice of Entry of Decision and Order Denying Richardson Construction, Inc. and The Guarantee Company of North America USA's Motion to Dismiss / Motion for Summary Judgment Based on Laches and All Joinders</b>
	21	003593 – 003597	05/05/2020	<u>Exhibit 1</u> – Court's Decision and Order Denying Richardson Construction, Inc. and The Guarantee Company of North America USA's Motion to Dismiss / Motion for Summary Judgment Based on Laches and All Joinders

46	18	003064 – 003067	01/24/2020 3:55 PM	City of North Las Vegas’ Notice of Entry of Decision and Order Granting Its Motion to Alter Judgment
	18	003068 – 003073	01/23/2020	<u>Exhibit 1</u> – Court’s Decision and Order
9	11	001547 – 001559	08/20/2019 1:34 PM	City of North Las Vegas’ Opposition to Dekker/Perich/Sabatini, Ltd.’s Motion to Dismiss
52	19	003255 – 003274	02/17/2020 4:39 PM	City of North Las Vegas’ Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ and Joinders Motion to Dismiss on Order Shortening Time
60	20	003409 – 003413	03/16/2020 4:57 PM	City of North Las Vegas’ Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion for Clarification Regarding Court’s Minute Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss Brought Pursuant to NRS 11.258, on Order Shortening Time
	20	003414 – 003415	03/13/2020	<u>Exhibit 1</u> – Email re Proposed Order Denying MSA’s Motion to Dismiss on NRS 11.258
	20	003416 – 003425	Undated	<u>Exhibit 2</u> – Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss
	20	003426 – 003428	03/16/2020	<u>Exhibit 3</u> – Email re Request to Withdraw Motion for Clarification on Order Shortening Time Without Prejudice
7	6	000829 – 000846	08/20/2019 1:24 PM	City of North Las Vegas’ Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultant’s Motion to Dismiss or, in the Alternative, Motion for Summary Judgement
45	18	003047 – 003063	12/19/2019 4:59 PM	City of North Las Vegas’ Reply in Support of Its Motion to Alter Judgment

<b>20</b>	<b>15</b>	<b>002326 – 002330</b>	<b>09/27/2019 4:18 PM</b>	<b>City of North Las Vegas’ Surreply to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time</b>
<b>61</b>	<b>20</b>	<b>003429 – 003466</b>	<b>03/30/2020 3:09 PM</b>	<b>Court Recorder’s Transcript of Hearing re All Pending Motions, March 10, 2020</b>
<b>63</b>	<b>20</b>	<b>003481 – 003491</b>	<b>04/10/2020 3:04 PM</b>	<b>Court Recorder’s Transcript of Hearing re All Pending Motions, March 17, 2020</b>
<b>23</b>	<b>15</b>	<b>002339 – 002398</b>	<b>10/10/2019 1:20 PM</b>	<b>Recorder’s Transcript of Hearing Re: All Pending Motions, September 30, 2019</b>
<b>65</b>	<b>21</b>	<b>003541 – 003588</b>	<b>04/21/2020 8:19 AM</b>	<b>Court Recorder’s Transcript of Proceedings re All Pending Motions, February 20, 2020</b>
<b>64</b>	<b>21</b>	<b>003492 – 003540</b>	<b>04/21/2020 8:19 AM</b>	<b>Court Recorder’s Transcript of Proceedings re City of North Las Vegas’ Motion to Alter Judgment, January 21, 2020</b>
<b>29</b>	<b>16</b>	<b>002678 – 002681</b>	<b>11/26/2019 12:35 PM</b>	<b>Dekker/Perich/Sabatini, Ltd.’s Joinder to JW Zunino &amp; Associates LLC’s Opposition to City of North Las Vegas’ Motion to Alter</b>
<b>49</b>	<b>19</b>	<b>003147 – 003154</b>	<b>02/04/2020 3:11 PM</b>	<b>Dekker/Perich/Sabatini, Ltd.’s Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss on Order Shortening Time</b>
<b>3</b>	<b>5</b>	<b>000718 – 000720</b>	<b>08/06/2019 2:44 PM</b>	<b>Dekker/Perich/Sabatini, Ltd.’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, In the Alternative, Motion for Summary Judgment</b>

28	16	002651 – 002660	11/26/2019 12:28 PM	<b>Dekker/Perich/Sabatini, Ltd.’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Opposition to Motion to Alter Judgment; Opposition by Incorporation and Request to Reset Prior Motion to Dismiss</b>
	16	002659 – 002664	10/15/2019	<u>Exhibit 1</u> – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	16	002665 – 002677	08/06/2019	<u>Exhibit 2</u> – Dekker/Perich/Sabatini, Ltd.’s Motion to Dismiss
4	6	000721 – 000735	08/06/2019 2:44 PM	<b>Dekker/Perich/Sabatini, Ltd.’s Motion to Dismiss</b>
	6	000734 – 000751	07/11/2019	<u>Exhibit A</u> – City of North Las Vegas’ Complaint
	6	000752 – 000786	02/07/2007	<u>Exhibit B</u> – City of North Las Vegas’ Complaint <u>Exhibit 1</u> – Professional Architectural Services Agreement
	6	000787 – 000789	07/11/2019	<u>Exhibit C</u> – Affidavit of Aleema A. Dhalla, Esq.
	6	000790 – 000793	1988 – Present	<u>Exhibit D</u> – American Geotechnical, Inc.’s Resume of Edred T. Marsh, Principal Geotechnical Engineer
	6	000794 – 000801	03/23/2007	<u>Exhibit E</u> - Excerpts from Legislative History of N.R.S. 11.258
	6	000802 – 000803	07/03/2019	<u>Exhibit F</u> – Declaration of Edred T. Marsh, P.E.
	6	000804 – 000817	12/11/2017	<u>Exhibit G</u> - American Geotechnical, Inc.’s Geotechnical Investigation
13	14	002219 – 002232	08/28/2019 8:48 AM	<b>Dekker/Perich/Sabatini, Ltd.’s Reply to City of North Las Vegas’ Opposition to Its Motion to Dismiss</b>
53	19	003275 – 003285	02/18/2020 3:00 PM	<b>Dekker/Perich/Sabatini, Ltd.’s Reply to City of North Las Vegas’ Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ and Joinders to Motion to Dismiss on Order Shortening Time</b>
	19	003286 – 003287	07/03/2019	<u>Exhibit A</u> – Declaration of Edred T. Marsh, P.E.



	19	003288 – 003294	07/11/2019	<u>Exhibit B</u> – City of North Las Vegas’ Complaint
12	14	002214 – 002218	08/26/2019 4:15 PM	Jackson Family Partnership LLC d/b/a Stargate Plumbing’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, In the Alternative, Motion for Summary Judgment
36	18	002894 – 002900	12/02/2019 2:22 PM	Jackson Family Partnership LLC d/b/a Stargate Plumbing’s Joinder to JW Zunino & Associates LLC’s Opposition to Motion to Alter Judgment with Supplemental Points and Authorities
7	18	002901 – 002907	12/02/2019 2:22 PM	Jackson Family Partnership LLC d/b/a Stargate Plumbing’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Opposition to City of North Las Vegas’ Motion to Alter Judgment with Supplemental Points and Authorities
2	18	003037 – 003039	12/03/2019 10:01 AM	JW Zunino & Associates LLC’s Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Opposition to Motion to Alter Judgment
50	19	003155 – 003166	02/07/2020 3:04 PM	JW Zunino & Associates LLC’s Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss on Order Shortening Time
22	15	002336 – 002338	09/30/2019 4:35 PM	JW Zunino & Associates LLC’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
31	17	002686 – 002688	11/27/2019 10:43 AM	JW Zunino & Associates LLC’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Opposition to Motion to Alter Judgment
38	18	002908 – 002910	12/02/2019 2:34 PM	JW Zunino & Associates LLC’s Joinder to Richardson Construction, Inc. and The Guarantee Company of North America USA’s Opposition to Motion to Alter Judgment

26	16	002515 – 002527	11/25/2019 5:02 PM	<b>JW Zunino &amp; Associates LLC's Opposition to City of North Las Vegas' Motion to Alter Judgment</b>
	16	002528 – 002530	10/09/2019	<u>Exhibit A</u> – Affidavit of Rita Tuttle
57	20	003385 – 003391	02/19/2020 11:29 AM	<b>JW Zunino &amp; Associates LLC's Reply to City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time</b>
5	6	000818 – 000820	08/08/2019 1:32 PM	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Joinder to Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment</b>
40	18	003029 – 003032	12/02/2019 3:19 PM	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Joinder to JW Zunino &amp; Associates, LLC's Opposition to City of North Las Vegas' Motion to Alter Judgment</b>
41	18	003033 – 003036	12/02/2019 3:19 PM	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Joinder to Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' Opposition to City of North Las Vegas' Motion to Alter Judgment</b>
39	18	002911 – 002936	12/02/2019 3:19 PM	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Opposition to Motion to Alter Judgment</b>
	18	002937 – 002941	10/15/2019	<u>Exhibit 1</u> – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	18	002942 – 002960	08/20/2019	<u>Exhibit 2</u> – City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	18	002961 – 003021	10/10/2019	<u>Exhibit 3</u> – Court Recorder's Transcript of Hearing: All Pending Motions

	18	003022 – 003024	10/15/2019	<u>Exhibit 4</u> – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Haring on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time
	18	003025 – 003028	08/05/2019	<u>Exhibit 5</u> – Cover Sheet Filings of: Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment; Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss; and Melroy Engineering, Inc. d/b/a MSA Engineering Consultants Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
7	18	<b>003074 – 003090</b>	<b>02/04/2020 12:14 PM</b>	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants'</b> <b>Motion to Dismiss on Order Shortening Time</b>
	19	003091 – 003108	07/11/2019	<u>Exhibit A</u> – City of North Las Vegas' Complaint
	19	003110 – 003111	07/11/019	<u>Exhibit B</u> – Affidavit of Aleema A. Dhalla, Esq.
	19	003112 – 003115	1988 - Present	<u>Exhibit C</u> – American Geotechnical Inc's Resume of Edred T. Marsh, Principal Geotechnical Engineer
	19	003116 – 003123	03/23/2007	<u>Exhibit D</u> – Legislative History of 11.258 Senate Bill 243
	19	003124 – 003137	12/11/2017	<u>Exhibit E</u> – American Geotechnical Inc's Geotechnical Investigation
	19	003138 – 003139	07/03/2019	<u>Exhibit F</u> – Declaration of Edred T. Marsh, P.E.
59	20	<b>003399 – 003408</b>	<b>03/16/2020 8:58 AM</b>	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants'</b> <b>Motion for Clarification Regarding Court's Minute Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss Brought Pursuant to NRS 11.258, on Order Shortening Time</b>

55	20	003308 – 003318	02/18/2020 5:02 PM	<b>Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Reply to City of North Las Vegas’ Opposition to Its Motion to Dismiss</b>
	20	003319 – 003325	02/12/2020	<u>Exhibit 1</u> – Notice of Entry of Order Granting Kittrell Garlock and Associates, Architects, AIA, Ltd.’s Motion to Dismiss; Kittrell Garlock and Associates, Architects, AIA, Ltd.’s Motion to Dismiss City of North Las Vegas’ Complaint
	20	003326 – 003340	11/22/2019	Kittrell Garlock and Associates, Architects, AIA, Ltd.’s Motion to Dismiss City of Las Vegas’ Complaint
	20	003341 - 003347	11/06/2019	<u>Exhibit A</u> – City of North Las Vegas’ Complaint
	20	003348 – 003353	N/A	<u>Exhibit B</u> – Michael Panish Expert Witness & Consultants Construction Systems Curriculum Vitae
	20	003354 – 003361	03/23/2007	<u>Exhibit C</u> - Legislative History of 11.258 Senate Bill 243
	20	003362 – 003366	12/09/2019	A-19-804979-C Kelli Nash’ Opposition to Defendant’s Motion to Dismiss its Complaint
	20	003367 – 003373	12/26/2019	A-19-804979 Kittrell Garlock and Associates, Architects, AIA, Ltd.’s Reply to Kelly Nash’s Opposition to its Motion to Dismiss Kelly Nash’s Complaint
	20	003374 – 003378	10/15/2019	<u>Exhibit 1</u> – Stipulation and Order to Dismiss Kittrell Garlock and Associates, AIA, Ltd.
30	16	002682 – 002685	11/26/2019 12:43 PM	<b>Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Joinder to JW Zunino &amp; Associates LLC’s Opposition to City of North Las Vegas’ Motion to Alter</b>
48	19	003140 – 003146	02/04/2020 3:09 PM	<b>Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss on Order Shortening Time</b>

17	15	002282 – 002292	09/18/2019 3:07 PM	Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ <b>Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time</b>
	15	002293 – 002294	08/06/2019	<u>Exhibit A</u> – Clerk of the Court’s Notice of Hearing
	15	002295 – 002296	09/06/2019	<u>Exhibit B</u> – Court’s Notice of Rescheduling Motions to Dismiss and Joinders
	15	002297 – 002202	09/09/2019	<u>Exhibit C</u> – Emails re Rescheduling of Hearing
	15	002203 – 002304	09/10/2019	<u>Exhibit D</u> – Emails re Rescheduling of Hearing
	15	002305 – 002306	N/A	<u>Exhibit E</u> – Las Vegas Law Offices of Snell & Wilmer
2	5	000648 – 000663	08/05/2019 4:15 PM	Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ <b>Motion to Dismiss or, in the Alternative, Motion for Summary Judgment</b>
	5	000664 – 000681	07/11/2019	<u>Exhibit A</u> – City of North Las Vegas’ Complaint
	5	000682 – 000684	07/13/2009	<u>Exhibit B</u> – City of North Las Vegas’ Complaint Exhibit 4 Notice of Completion
	5	000685 – 000690	03/25/2019	<u>Exhibit C</u> - Nevada Legislature Website (80 <sup>th</sup> Session) Concerning the “Effective Date” of the AB 421
	5	000691 – 000693	07/11/2019	<u>Exhibit D</u> – Aleem A. Dhalla, Esq.’s Affidavit of Merit Attached to City of North Las Vegas’ Complaint
	5	000694 – 000707	12/11/2017	<u>Exhibit E</u> - American Geotechnical, Inc’s Geotechnical Investigation
	5	000708 – 000709	07/03/2019	<u>Exhibit F</u> – Declaration of Edred T. Marsh, P.E.
	5	000710 – 000717	03/23/2007	<u>Exhibit G</u> – Excerpts from Legislative History of N.R.S. 11.258
24	15	002399 – 002406	10/17/2019 10:08 AM	Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ <b>Notice of Entry of Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and All Joinders to Same</b>

27	16	002531 – 002558	11/26/2019 11:17 PM	Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ <b>Opposition to Motion to Alter Judgment</b>
	16	002559 – 002563	10/15/2019	<u>Exhibit 1</u> – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	16	002564 – 002582	08/20/2019	<u>Exhibit 2</u> – City of North Las Vegas’ Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	16	002583 – 002643	10/10/2019	<u>Exhibit 3</u> – Court Recorder’s Transcript of Hearing: All Pending Motions
	16	002644 – 002646	10/15/2019	<u>Exhibit 4</u> – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time
	16	002647 – 002650	08/05/2019 08/06/2019 08/08/2019	<u>Exhibit 5</u> - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment Dekker/Perich/Sabatini, Ltd.’s Motion to Dismiss Melroy Engineering, Inc. d/b/a MSA Engineering Consultants Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
19	15	002321 – 002325	09/26/2019 5:16 PM	Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ <b>Reply to City of North Las Vegas’ Limited Opposition to Motion to Change Date of Hearing</b>
54	20	003295 – 003307	02/18/2020 3:57 PM	Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants’ <b>Reply to City of North Las Vegas’ Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ and Joinders to Motion to Dismiss on Order Shortening Time</b>

14	14	002233 – 002249	8/28/2019 9:02 AM	Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ <b>Rely to City of North Las Vegas’ Opposition to Motion to Dismiss or, in the Alternative, Motion for Summary Judgement</b>
	14	002250 – 002255	07/01/019	<u>Exhibit A</u> – Assembly Bill No. 221 – Committee on Judiciary 80 <sup>th</sup> Session (2019)
	14	002256 – 002257	2019	<u>Exhibit B</u> – 80 <sup>th</sup> Session (2019)
	15	002258 – 002271	12/11/2017	<u>Exhibit C</u> – American Geotechnical Inc’s Geotechnical Investigation
35	17	002891 – 002893	12/02/2019 1:54PM	Ninyo & Moore, Geotechnical Consultants’ <b>Joinder to JW Zunino &amp; Associates LLC’s Opposition to City of North Las Vegas’ Motion to Alter Judgment</b>
44	18	003044 – 003046	12/06/2019 10:08 AM	Ninyo & Moore, Geotechnical Consultants’ <b>Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Opposition to Motion to Alter Judgment With Respect to Statute of Repose Arguments</b>
51	19	003167 – 003174	02/07/2020 3:36 PM	Ninyo & Moore, Geotechnical Consultants’ <b>Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Motion to Dismiss on Order Shortening Time</b>
	19	003175 – 003240	08/29/2007	<u>Exhibit A</u> – Ninyo & Moore’s Geotechnical Evaluation
	19	003241 – 003254	12/11/2017	<u>Exhibit B</u> – American Geotechnical Inc’s Geotechnical Investigation
11	14	002211 – 002213	08/23/2019 10:02 AM	Ninyo & Moore, Geotechnical Consultants’ <b>Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, In the Alternative, Motion for Summary Judgment</b>
15	15	002272 – 002274	09/06/2019 12:14 PM	Ninyo & Moore, Geotechnical Consultants’ <b>Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, In the Alternative, Motion for Summary Judgment</b>

<b>34</b>	<b>17</b>	<b>002888 – 002890</b>	<b>12/02/2019 1:54 PM</b>	<b>Ninyo &amp; Moore, Geotechnical Consultants’ Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Opposition to City of North Las Vegas’ Motion to Alter Judgment</b>
<b>58</b>	<b>20</b>	<b>003392 – 003398</b>	<b>02/19/2020 2:56 PM</b>	<b>Ninyo &amp; Moore, Geotechnical Consultants’ Reply to City of North Las Vegas Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ and Joinders to Motion to Dismiss on Order Shortening Time</b>
<b>32</b>	<b>17</b>	<b>002689 – 002693</b>	<b>11/27/2019 1:15 PM</b>	<b>Paffenbarger &amp; Walden, LLC and P &amp; W Bonds, LLC’s Joinder in (1) Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Opposition to Motion to Alter Judgment; and (2) JW Zunino &amp; Associates LLC Opposition to Motion to Alter Judgment</b>
<b>43</b>	<b>18</b>	<b>003040 – 003043</b>	<b>12/04/2019 8:35 AM</b>	<b>Paffenbarger &amp; Walden, LLC and P &amp; W Bonds, LLC’s Joinder in (1) Richardson Construction, Inc. and The Guarantee Company of North America USA’s Opposition to Motion to Alter Judgment; and (2) Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ Opposition to Motion to Alter Judgment</b>
<b>16</b>	<b>15</b>	<b>002275 – 002281</b>	<b>09/13/2019 4:22 PM</b>	<b>Paffenbarger &amp; Walden, LLC and P &amp; W Bonds, LLC’s Limited Joinder in Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment</b>
<b>21</b>	<b>15</b>	<b>002331 – 002335</b>	<b>09/30/2019 11:29 AM</b>	<b>Richardson Construction, Inc. and The Guarantee Company of North America USA’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Dismiss or, in the Alternative, Motion for Summary Judgment</b>



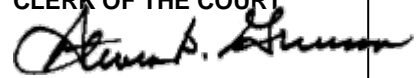
56	20	003379 – 003384	02/18/2020 5:06 PM	<b>Richardson Construction, Inc. and The Guarantee Company of North America USA's Limited Response to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Times and All Joinder Thereto</b>
33	17	002694 – 002887	11/27/2019 4:51 PM	<b>Richardson Construction, Inc. and The Guarantee Company of North America USA's Opposition to Motion to Alter Judgment and Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment</b>
	17	002706 – 002723	07/11/2019	<u>Exhibit A</u> – City of North Las Vegas' Complaint
	17	002724 – 002740	08/05/2019	<u>Exhibit B</u> - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	17	002741 – 002758	07/11/2019	<u>Exhibit A</u> – City of North Las Vegas' Complaint
	17	002759 – 002761	07/13/2009	<u>Exhibit B</u> – City of North Las Vegas' Complaint Exhibit 4 Notice of Completion
	17	002762 – 002767	03/25/2019	<u>Exhibit C</u> – AB421
	17	002768 – 002770	07/11/2019	<u>Exhibit D</u> – Affidavit of Aleema A. Dhalla, Esq.
	17	002771 – 002784	12/11/2017	<u>Exhibit E</u> – American Geotechnical Inc's Geotechnical Investigation
	17	002785 – 002786	07/03/2019	<u>Exhibit F</u> – Declaration of Edred T. Marsh, P.E.
	17	002787 – 002794	03/23/2007	<u>Exhibit G</u> – Senate Bill 243 - 11.258
	17	002795 – 002796	08/06/2019	<u>Exhibit C</u> – Clerk of the Court's Notice of Hearing
	17	002797 – 002815	08/20/2019	<u>Exhibit D</u> – City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	17	002816 – 002822	09/04/2019	<u>Exhibit E</u> – Richardson Construction, Inc.'s and The Guarantee Company of North America USA's Motion to Dismiss

17	002823 – 002824	09/06/2019	<u>Exhibit F</u> – Clerk of the Court’s Notice of Hearing
17	002825 – 002831	11/27/2019	<u>Exhibit G</u> – Register of Actions
17	002832 – 002833	09/10/2019	<u>Exhibit H</u> – Emails re Rescheduling of Hearing
17	002834 – 002846	09/18/2019	<u>Exhibit I</u> - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants’ Motion to Change Date of Hearing of Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
17	002847 – 002848	08/06/2019	<u>Exhibit A</u> – Clerk of the Court’s Notice of Hearing
17	002849 – 002850	09/06/2019	<u>Exhibit B</u> – Court’s Notice of Rescheduling Motions to Dismiss and Joinders
17	002851 – 002856	09/09/019	<u>Exhibit C</u> – Emails re Rescheduling of Hearing
17	002857 – 002858	09/10/2019	<u>Exhibit D</u> – Emails re Rescheduling of Hearing
17	002859 – 002860	N/A	<u>Exhibit E</u> – Las Vegas Law Offices of Snell & Wilmer
17	002861 – 002862	09/20/2019	<u>Exhibit J</u> – Weil & Drage, APC Letter to All Counsel re Hearing of Nevada By Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on September 27, 2019
17	002863 – 002868	09/26/2019	<u>Exhibit K</u> - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Reply to City of North Las Vegas’ Limited Opposition to Motion to Change Date of Hearing
17	002869 – 002871	11/27/2019	<u>Exhibit L</u> – Register of Actions A-19-798346-C
17	002872 – 002874	11/27/2019	<u>Exhibit M</u> – Register of Actions A-19-798346-C
17	002875 – 002880	09/30/3019	<u>Exhibit N</u> – Richardson Construction, Inc. and The Guarantee Company of North America USA’s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment

	17	002281 – 002887	10/17/2019	<u>Exhibit O</u> – Notice of Entry of Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Haring on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time
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**EXHIBIT 54**  
**PETITIONERS' APPENDIX**

**EXHIBIT 54**  
**PETITIONERS' APPENDIX**



**ROPP**

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BY DESIGN ENGINEERING CONSULTANTS

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD.;

RICHARDSON CONSTRUCTION, INC.;

NEVADA BY DESIGN, LLC D/B/A NEVADA BY

DESIGN ENGINEERING CONSULTANTS; JW

ZUNINO & ASSOCIATES, LLC; MELROY

ENGINEERING, INC. D/B/A MSA

ENGINEERING CONSULTANTS; O'CONNOR

CONSTRUCTION MANAGEMENT INC.; NINYO

& MOORE, GEOTECHNICAL CONSULTANTS;

JACKSON FAMILY PARTNERSHIP LLC D/B/A

STARGATE PLUMBING; AVERY ATLANTIC,

LLC; BIG C LLC; RON HANLON MASONRY,

LLC; THE GUARANTEE COMPANY OF NORTH

AMERICA USA; P & W BONDS, LLC;

PAFFENBARGER & WALDEN, LLC; DOES I

through X, inclusive; and ROE CORPORATIONS I

through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

**NEVADA BY DESIGN, LLC D/B/A  
NEVADA BY DESIGN  
ENGINEERING CONSULTANTS'  
REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT  
MELROY ENGINEERING, INC.  
D/B/A MSA ENGINEERING  
CONSULTANTS' AND JOINDERS  
TO MOTION TO DISMISS ON  
ORDER SHORTENING TIME**

Hearing Date: 02/20/20

Hearing Time: 10:00 a.m.



1                                    **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2                                    **I.**

3                                    **LEGAL ARGUMENT**

4                    **A. PLAINTIFF’S OPPOSITION FAILS TO ESTABLISH THAT ITS AFFIDAVIT OF**  
5                    **MERIT AND EXPERT REPORT AGAINST NBD, THE CIVIL ENGINEER,**  
6                    **COMPLIED WITH NRS 11.258**

7                    **i. Plaintiff’s Affidavit of Merit against NBD does not comply with NRS**  
8                    **11.258(1)(c)&(d).**

9                    Plaintiff’s Opposition on Affidavit of Merit argues that all a claimant is required to do to  
10                  comply with NRS 11.258, is to consult with any expert (the discipline of that expert is irrelevant)  
11                  and based on any random opinion from said expert, the Plaintiff has fully complied with NRS  
12                  11.258. *See*, Opposition generally. This argument in NBD’s opinion is absurd and especially falls  
13                  apart when the Plaintiff has elected to sue a myriad of design professionals including the architect,  
14                  structural engineer, mechanical/electrical/plumbing engineer, the geotechnical engineer, civil  
15                  engineer, the landscape architect and a bevy of contractors/subcontractors. The different design  
16                  parties named herein, provided different professional services that are separate. This is important,  
17                  as Plaintiff, per its Complaint, retained American Geotechnical, Inc. (“AGI”) to perform a  
18                  “geotechnical investigation of the site...to evaluate the site geotechnical conditions...” *See*,  
19                  Compl. at Para. 47. Based on its investigation, AGI provided a report in December 11, 2017  
20                  which concluded that the site and surrounding appurtenances were distressed due to “excessive  
21                  differential settlement and expansive soil activity.” *Id.* at Para. 48-49. Therefore, the Plaintiff has  
22                  already admitted that AGI was retained to investigate geotechnical issues and that the report only  
23                  contains conclusions specific to geotechnical issues; no issues with any other areas of the design.

24                  Moreover, in the December 11, 2017 AGI Report there are no opinions critical of NBD’s  
25                  design and services. *See*, AGI Report attached to the Complaint. In fact, the AGI Report even  
26                  concedes that the intent of the report was to advise solely on “geotechnical matters.” *Id.* at Pg. 8  
27                  of the AGI Report, Section 11.0 Remarks. Thus, the report is limited to geotechnical issues; no  
28                  other areas of practice.

Given these factors, it is highly questionable for Plaintiff's attorney to claim that his attorney affidavit complies with "all requirements from NRS 11.258(1) and (3)." *See, Opp.* at Pg. 2<sup>1</sup>. As the master of its claims, the City establishes the claims and issues that are relevant and names the parties relevant to these claims. It is the City which selected and decided to name various design professionals to this action. By naming and asserting claims against its services, the City put into issue NBD's area of practice in civil engineering as shown from the following excerpts from the Complaint:

First Claim for Relief:

**66. *The Design Defendants materially breach* the Design Agreement *by failing to fulfill their obligations* including, among other things, *failing to complete their work in a good and workmanlike manner* as detailed above.**

Third Claim for Relief:

**78. *Defendants each breached their duty* by performing *in a manner unfaithful to the purpose of the Design Agreement* and/or Construction Contract.**

Fourth Claim for Relief:

**84. *Defendants and each of them breached their duty to use due and reasonable care and caution in performing their work* on the Project.**

Fifth Claim for Relief:

**90. *Defendants failed to perform the work on the Project with care, skill, reasonable expediency, and faithfulness, and in a workmanlike manner* as would be expected for this type of work. *See, Excerpts from Complaint* (emphasis added).**

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<sup>1</sup> By extension, Plaintiff's attorney's affidavit fails to comply with NRS 11.258(1)(c), as Plaintiff's attorney has no "reasonable belief" that he consulted with a qualified expert in the discipline provided by NBD or that the expert had any opinions critical of NBD.



1 The City's Prayer of Relief further states:

2 **PRAYER FOR RELIEF**

3 WHEREFORE, the City prays for relief as follows:

4 **ON THE FIRST, SECOND, THIRD, FOURTH, AND FIFTH CLAIMS FOR RELIEF**

- 5 1. *For judgment against named Defendants and in favor of the City* in an amount to be  
6 proven at trial in excess of fifteen thousand dollars (\$15,000)...*Id.* at Prayer.

7  
8 Plaintiff's core argument in the Opposition is that the AGI Report could be used as a "jack  
9 of all trades" report, applicable to any design professional involved in the subject project, whether  
10 the report contains any relevant opinions as to that professional. This sort of tactic is not in  
11 compliance with the letter and spirit of NRS 11.258 and accepting this position would defeat the  
12 purpose behind NRS 11.258, which is to ensure that claims against design professionals have been  
13 examined and reviewed by appropriate experts<sup>2</sup> prior to commencement of the action.

14 In *Otak Nevada, LLC v. Eighth Judicial Distr. Ct.*, the district court allowed several parties  
15 (Pacificap Properties Group, LLC/Pacificap Holdings XXIX, LLC, Chad Rennaker, Jason  
16 Rennakker (collectively, "P&R") and Christopher Watkins ("Watkins")) to rely on the expert  
17 report authored for another party, Pacificap Constr. Services, LLC ("PCS"). 127 Nev. 593, 599-  
18 600, 260 P.3d 408, 412 (2011). The Nevada Supreme Court rejected this allowance holding that  
19 each party must file its own expert report and affidavit which is reasonable "as each party must  
20 justify its claims of nonresidential malpractice based on that party's relationship with the  
21 defendant." *Id.* (emphasis). This language from *Otak* makes it clear that not only each claimant  
22 must file its own affidavit of merit and report, each claimant must also file reports and compliance  
23 statements for each design professional to the extent said professional provided different  
24 professional services. This is necessary so that the claimant can justify its claims of professional  
25 malpractice "based on that party's relationship with the defendant." *Otak, supra* (emphasis

26  
27 <sup>2</sup> In Nevada, there are separate engineering licensures which each applicant must designate as the area where  
28 they desire to be licensed and examined. *See*, NAC 625.220; *see also*, NRS Chapter 625 (NRS 625.520-it is  
unlawful for "[a]ny professional engineer to practice or offer to practice a discipline of professional  
engineering in which the Board has not qualified him or her"). The practice of architecture is governed by a  
wholly separate set of statutes and administrative codes. *See*, NRS Chapter 623 & NAC 623.

1 added). It also makes common sense, as a geotechnical engineer is not able to opine on areas  
2 outside of his knowledge, expertise, licensure, training and experience such as a geotechnical  
3 expert opining on architectural, mechanical engineering matters or electrical engineering, which  
4 are wholly separate disciplines.

5 Plaintiff argues that NBD's position tries to confuse NRS 41A.071 with NRS 11.258. *See*,  
6 Pg. 12 of Opp. This is a false flag, as NBD is not relying on NRS 41A.071. Rather, NBD's  
7 argument utilizes the *Otak* decision and the language in NRS 11.258(1)(c)&(d). As stated in said  
8 statute, Plaintiff's attorney must consult with and possess a "reasonable belief" that the expert  
9 consulted was "knowledgeable in the relevant discipline involved in the action," and has to  
10 "conclude on the basis of the review and the consultation with the expert that the action has a  
11 reasonable basis in law and fact." *See*, NRS 11.258(1)(b),(c)&(d). "Reasonably believes" means  
12 that the actor "believes a given fact or combination of facts exist and the circumstances which he  
13 knows or should know are such as to cause a reasonable man to so believe." *Black's Law*  
14 *Dictionary*, 1265 (6<sup>th</sup> Ed. 1990).

15 Here, Plaintiff sued multiple design professional disciplines (architectural through  
16 mechanical engineering). *See*, Compl. Both the Complaint and AGI Report contain admissions  
17 that the investigation performed by Mr. Marsh, were limited to a geotechnical evaluation.  
18 Accordingly, not only is AGI unqualified to opine on disciplines involved in the actions outside of  
19 geotechnical engineering, AGI's scope did not include investigation of these separate disciplines;  
20 even though Plaintiff named these parties in the action. Once Plaintiff expanded the number of  
21 parties to include those that did not provide geotechnical engineering services, this is where the  
22 Affidavit failed to comply with NRS 11.258(1)(b)&(c), as Plaintiff only consulted with a  
23 geotechnical engineer on geotechnical matters.

24 Plaintiff's counsel's Affidavit also fails to comply with parts of NRS 11.258(1)(d) which  
25 states that counsel, based on his review and consultation with the expert, has a "reasonable basis in  
26 law and fact" for bringing the action. The term "reasonable" means "fair, proper, just moderate,  
27 suitable under the circumstances...having the faculty of reason; not immoderate or excessive,  
28 being synonymous with rational, honest, equitable, fair, suitable moderate and tolerable." *Black's*

1 *Law Dictionary* 1265 (5<sup>th</sup> Ed. 1990). The term “basis” means “the foundation or groundwork of  
2 anything; that upon which anything may rest.” *Id.* at 151. Applying these definitions, if AGI’s  
3 Report is limited to geotechnical matters, is devoid of any conclusions or opinions against NBD,  
4 then there is no possible way for Plaintiff’s counsel to secure a reasonable basis for bringing this  
5 action against NBD as he simply lacks any expert support (to NBD’s knowledge, the Plaintiff’s  
6 counsel is not a civil engineer). Absent said basis, the Affidavit fails to comply with NRS  
7 11.258(1)(d).

8       ii.       **NRS 11.258(3)(d) requires the expert report to include all of his conclusions**  
9               **which would include any opinions relating to NBD and other defendants**  
10              **beyond geotechnical engineering if there were any.**

11       The Plaintiff generally argues that NRS 11.258 does not require its expert to include in his  
12 report, all opinions identifying each defendant for which the Affidavit of Merit is being used  
13 against (essentially prove its entire case). *See*, Pgs. 2, 3 & 4 of the Opposition. This statement is  
14 wholly incorrect.

15       NRS 11.258(3)(d)&(e) state:

16       3. In addition to the statement included in the affidavit pursuant to subsection 1, a report  
17 must be attached to the affidavit. Except as otherwise provided in subsection 4, the report  
18 must be prepared by the expert consulted by the attorney and must include, **without**  
**limitation**:

19       d.       **The conclusions** of the expert and **the basis for the conclusions**; and

20       e.       A statement that the expert has concluded that there is a reasonable basis for filing  
21 the action.

22 (Emphasis added).

23       Section 3(d) expressly requires AGI to put forth its conclusions as well as the basis for  
24 those conclusions. There is nothing in the 3(d) allowing for partial conclusions or reservation of  
25 future conclusions. In fact, the use of the word “the” means: “[i]n construing statute, definite  
26 article ‘the’ particularizes the subject which it precedes and is word of limitation as opposed to  
27 indefinite or generalizing force ‘a’ or ‘an’.” *Black’s Law Dictionary*, 1477 (5<sup>th</sup> Ed. 1990) (*citing*,  
28 *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969)). This means that AGI’s Report must include

1 the conclusions of the expert (all such conclusions; not half, not a quarter) and the basis for same.  
2 If the AGI Report and said conclusions are being used by Plaintiff to justify the Complaint under  
3 NRS 11.258 against NBD (an entity that did not provide geotechnical engineering services), then  
4 there must be conclusions therein relevant to NBD. Otherwise, there is no reasonable basis under  
5 NRS 11.258(1)(d)&3(e) for bringing this Complaint against NBD. This is why claimants in  
6 complex multi-discipline cases have multiple experts and not a single “jack of all trades” expert.

7 In the Opposition, Plaintiff appears confused by arguing that the underlying motion is  
8 trying to expand the requirements of NRS 11.258 when the opposite is the case. The plain reading  
9 of Section 3(d) requires “the” conclusions of the expert; not half, not partial and not future. The  
10 plain reading of Sections 1(d) and 3(e) further require Plaintiff’s attorney and its expert to both  
11 have a reasonable basis in bringing the action **against NBD**; not some random party and not just  
12 one party in the string of defendants listed. This is established by the holding in the *Otak* decision  
13 wherein the Nevada Supreme Court held that each claimant must have separate affidavits of merit  
14 (no bootstrapping onto the affidavit of another party) because it is necessary that each claimant  
15 “justify its claims of nonresidential malpractice **based on that party’s relationship with the**  
16 **defendant.**” 127 Nev. at 599-600, 260 P.3d at 412 (emphasis added). This language, expressly  
17 the terms “the defendant,” means for each and every defendant, not just “a” or “an” defendant in  
18 the action. *Black’s Law Dictionary, supra*. Ultimately, a commonsensical question to ask  
19 applying the above statement from *Otak*, is: How can Plaintiff justify its claims of nonresidential  
20 malpractice based on its relationship with NBD if the AGI Report containing the conclusions of  
21 Plaintiff’s expert has ZERO opinions as to NBD?<sup>3</sup>

22 The Plaintiff’s obsession and comparison of NRS 41A.071 language to NRS 11.258 is a  
23 red herring intended to distract from the actual language and purpose of NRS 11.258. There is no  
24 reason to refer to NRS 41A.071 when NRS 11.258 provides the requirements and by suing a  
25 number of different design professionals, Plaintiff is required to consult different experts; not a

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26 <sup>3</sup> By logical extension, Plaintiff’s argument is that any random, generic expert, whether qualified in the  
27 relevant discipline of a particular defendant design profession or not, can author a generic report discussing  
28 issues that have nothing to do with the services of said design professional and all Plaintiff would be required  
to do is to cut and paste language from the statute to comply with NRS 11.258; whether the report or  
conclusions are even relevant. This would turn the purpose and intent behind NRS 11.258 on its head.

1 single “jack of all trades” geotechnical expert who only investigated one particular professional  
2 discipline. By failing to consult all required experts, the Plaintiff has failed to comply with the  
3 letter and the spirit of NRS 11.258.

4 **iii. It is absolutely appropriate to rely on the Legislative History of NRS 11.258**  
5 **for clarification on the terms “relevant discipline.”**

6 Overall, NBD agrees that NRS 11.258 is clear in its intent and the language therein. Said  
7 statute requires the Plaintiff’s counsel to consult the appropriate experts prior to serving the  
8 Complaint on NBD (and other parties).

9 However, as the Plaintiff is attempting to argue that a geotechnical engineer (or any other  
10 type of expert, such as a landscape architect) can opine on the merit of claims asserted against  
11 various other design professionals, including the architect, structural engineer, civil engineer,  
12 mechanical engineer, plumbing engineering, electrical engineer and the landscape architect, there  
13 is some ambiguity as to the terms “relevant discipline.” Alternatively, the Plaintiff could be  
14 purposefully ignoring these requirements as a means to secure a denial of NBD’s Motion. If the  
15 Plaintiff’s proffered position is the former, then reviewing legislative history is appropriate. If the  
16 Plaintiff’s position is the latter, the Court should proceed with granting NBD’s Motion.

17 In reviewing the legislative history of NRS 11.258, it is patently clear the purpose of the  
18 statute is to prevent exactly what is occurring here. Namely, NRS 11.258 was enacted to ensure  
19 design professionals are not dragged into litigation prior to an expert in the relevant discipline  
20 opining there is a reasonable basis for proceeding against the design professional. The Plaintiff is  
21 attempting to ignore the legislative history because it contradicts the Plaintiff’s argument that a  
22 geotechnical expert should be allowed to opine on issues concerning architecture, structural  
23 engineering, civil engineering, mechanical engineering, electrical engineering, or plumbing  
24 engineering even if said expert admits he is not qualified in these disciplines or was not retained to  
25 examine these issues. Nevertheless, to the extent the Plaintiff concedes “relevant discipline” as  
26 used in NRS 11.258 means that a geotechnical engineer is not qualified to opine on the merit of  
27 claims concerning architecture, structural engineering, civil engineering, mechanical engineering,  
28 electrical engineering, or plumbing engineering, NBD agrees that resorting to the legislative

1 history may not be necessary. Absent such a concession, examination of the legislative history is  
2 appropriate and NBD directs the Court to the specifically cited legislative history in its Motion<sup>4</sup>.

3 **B. PLAINTIFF’S FAILURE TO COMPLY WITH NRS 11.258 WITH RESPECT TO**  
4 **EVERY DESIGN PROFESSIONAL SAVE FOR GEOTECHNICAL**  
5 **ENGINEERING WARRANTS DISMISSAL PURSUANT TO NRS 11.259.**

6 As discussed at length above, the Plaintiff failed to provide an Affidavit of Merit that  
7 complied with NRS 11.258 in all disciplines save for geotechnical engineering. Per NRS  
8 11.258(3)(b), there must be a statement that the expert<sup>5</sup> is “experienced in each discipline” which  
9 is the subject of the report. The Report must include “the conclusions of the expert and the basis  
10 for the conclusions.” NRS 11.258(3)(d). Finally, the expert must issue a statement that concludes  
11 there is a “reasonable basis for filing the action.” NRS 11.258(3)(e). If AGI is a geotechnical  
12 engineering firm, specializing in geotechnical engineering and tasked to and investigate only,  
13 geotechnical matters with conclusions limited to geotechnical issues (as admitted in the Report  
14 and the Complaint), then it is quite clear that the Plaintiff’s Affidavit of Merit failed to comply  
15 with NRS 11.258(3)(b),(d)&(e) with respect to NBD. By extension, the absence of any opinions  
16 or conclusions critical of NBD renders Mr. Marsh’s 11.258(3)(e) statement as to NBD, as non-  
17 compliant.

18 Extending this argument further, Plaintiff’s counsel failed to consult with experts in all  
19 relevant design fields in contradiction of NRS 11.258(1)(c). This means Plaintiff’s counsel has no  
20 reasonable belief that he consulted with an expert in a “relevant discipline” as to the professional  
21

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22 <sup>4</sup> Plaintiff argues in general that the Legislative History does not support NBD’s position because there is not  
23 exact statement that its expert needs to be qualified in every field or needs to include every defendant in the  
24 report. *See, Opp.* Plaintiff’s argument and position are absolutely contradicted by the language expressly  
25 cited in MSA’s Motion. Specifically, the purpose of NRS 11.258 is to ensure that design professional cases  
26 have merit; can provide clarity on legitimate claims; show some reasonable likelihood of the claims meeting  
27 the standard of care burden; and that the “attorney had consulted with an independent design professional in  
28 the appropriate field...” *See, Pgs. 10-11 of MSA’s Motion (emphasis added).*

<sup>5</sup> An expert is a person licensed in Nevada in the practice of professional engineering, land surveying,  
architecture and landscape architecture. NRS 11.258(6). While Mr. Marsh is a professional engineer, he is  
clearly not an architect, surveyor, landscape architect and he is also not a qualified engineer in disciplines  
beyond geotechnical engineering (certainly not in structural engineering, mechanical/electrical/plumbing  
engineering). Moreover, Mr. Marsh even as an engineer cannot practice in other engineering disciplines for  
which he has not been qualified by the Board of Engineering. *See, NRS 625.520(1)(b).*

1 services performed by NBD (or alternatively, Mr. Marsh's scope did not include investigation of  
2 NBD). The Legislative History of NRS 11.258 clearly intended Plaintiff's attorney to consult  
3 with experts in all professional fields involved in this action; which he clearly did not.  
4 Accordingly, the Complaint is void ab initio per the *Otak* decision and NRS 11.259 and dismissal  
5 is required.

6 Plaintiff's Opposition does not dispute NRS 11.259 but instead only presents self-serving  
7 conclusions of compliance. As shown herein and in other papers before the Court, Plaintiff did  
8 not comply and said failure requires dismissal with no right to amend or cure.

9 **II.**

10 **CONCLUSION**

11 Based thereon, NBD contends that Plaintiff failed to comply with NRS 11.258 by using a  
12 single "jack of all trades" expert who provided no opinions as to NBD. As the opinions expressed  
13 in the AGI Report are limited to areas outside of NBD's scope of work, there is no reasonable  
14 basis by Plaintiff's attorney and Plaintiff's expert to certify this action as compliant with NRS  
15 11.258 as against NBD. Any failure to comply with NRS 11.258 results in dismissal under NRS  
16 11.259 without a right to cure or amend. *See, Otak, supra.*

17 DATED this 18<sup>th</sup> day of February, 2020.

18 WEIL & DRAGE, APC

19 /s/ John T. Wendland

20 By: \_\_\_\_\_

21 JOHN T. WENDLAND, ESQ.

22 (Nevada Bar No. 7207)

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25 861 Coronado Center Drive, Suite 231

26 Henderson, NV 89052

27 Attorneys for Defendant,

28 NEVADA BY DESIGN, LLC D/B/A NEVADA

BY DESIGN ENGINEERING CONSULTANTS



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18<sup>th</sup> day of February, 2020, service of the foregoing **NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT MELBROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' AND JOINDERS TO MOTION TO DISMISS ON ORDER SHORTENING TIME** was made this date by electronically serving a true and correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

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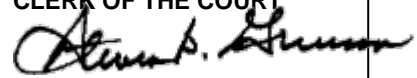
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*/s/ Joanna Medina*

Joanna Medina, an Employee of  
WEIL & DRAGE, APC

**EXHIBIT 55**  
**PETITIONERS' APPENDIX**

**EXHIBIT 55**  
**PETITIONERS' APPENDIX**



**ROPP**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD.;  
RICHARDSON CONSTRUCTION, INC.;  
NEVADA BY DESIGN, LLC D/B/A NEVADA BY  
DESIGN ENGINEERING CONSULTANTS; JW  
ZUNINO & ASSOCIATES, LLC; MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS; O'CONNOR  
CONSTRUCTION MANAGEMENT INC.; NINYO  
& MOORE, GEOTECHNICAL CONSULTANTS;  
JACKSON FAMILY PARTNERSHIP LLC D/B/A  
STARGATE PLUMBING; AVERY ATLANTIC,  
LLC; BIG C LLC; RON HANLON MASONRY,  
LLC; THE GUARANTEE COMPANY OF NORTH  
AMERICA USA; P & W BONDS, LLC;  
PAFFENBARGER & WALDEN, LLC; DOES I  
through X, inclusive; and ROE CORPORATIONS I  
through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

**MELROY ENGINEERING, INC.  
D/B/A MSA ENGINEERING  
CONSULTANTS' REPLY TO  
PLAINTIFF'S OPPOSITION TO ITS  
MOTION TO DISMISS**

Hearing Date: 02/20/2020

Hearing Time: 10:00 a.m.

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1 **MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' REPLY**  
2 **TO PLAINTIFF'S OPPOSITION TO ITS MOTION TO DISMISS**

3 COMES NOW Defendant, MELROY ENGINEERING, INC. D/B/A MSA  
4 ENGINEERING CONSULTANTS ("MSA"), by and through its counsel of record, the law firm  
5 of WEIL & DRAGE, APC, and hereby files its Reply to Plaintiff CITY OF NORTH LAS  
6 VEGAS' (the "City") Opposition to the Motion to Dismiss.

7 This Reply is made and based upon the attached Memorandum of Points and Authorities  
8 submitted herein, all pleadings and papers filed herein, and any oral argument at the time of  
9 hearing on this matter.

10 DATED this 18<sup>th</sup> day of February, 2020.

11 WEIL & DRAGE, APC

12 */s/ Jeremy R. Kilber*

13 By:

14 JEREMY R. KILBER, ESQ.  
15 (Nevada Bar No. 10643)  
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19 MELROY ENGINEERING, INC. D/B/A  
20 MSA ENGINEERING CONSULTANTS  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **LEGAL ARGUMENT**

4 **A. THE CITY FAILED TO COMPLY WITH NRS 11.258 WITH RESPECT TO MSA**

5 The City's Opposition takes the absurd position that a party can sue a mechanical,  
6 electrical, and plumbing (MEP) engineer and meet the requirements of NRS 11.258 by consulting  
7 a geotechnical engineer. The City offers no explanation regarding how a geotechnical engineer  
8 would be qualified to opine on the merit of claims against a MEP engineer. The lack of  
9 explanation by the City stands to reason since the design disciplines of geotechnical engineering  
10 and MEP engineering are not related, and require separate licensure.

11 Simply filing an attorney affidavit and expert report does not mean the City complied with  
12 NRS 11.258. NRS 11.258 sets forth specific requirements that must be met for proper compliance  
13 with the statute. Primary among these is consulting with an "expert" in the "relevant discipline."  
14 NRS 11.258(6) defines "expert" as, "a person who is licensed in a state to engage in the practice  
15 of professional engineering, land surveying, architecture or landscape architecture." The statute  
16 not only requires consultation with a licensed design professional, the licensed design professional  
17 must be licensed in the "relevant discipline." Black's Law Dictionary defines "relevant" as  
18 "Logically connected and tending to prove or disprove a matter in issue[.]" Black's Law  
19 Dictionary (11th ed. 2019). Thus, to comply with NRS 11.258, counsel must consult with an  
20 expert licensed in the discipline logically connected to the discipline of design professional against  
21 whom the expert is offering their opinions, and the opinions must tend to prove or disprove the  
22 matter in issue.

23 There is no logical connection between geotechnical engineering and MEP engineering.  
24 Geotechnical engineering pertains to soils, while MEP engineering pertains to heating and air  
25 conditioning systems, electrical systems, and plumbing systems. These design disciplines are so  
26 unrelated, separate licensure is required to practice in these fields. Given the significant  
27 differences between these design disciplines, and the fact that Mr. Marsh does not have licensure  
28 in MEP engineering design, Mr. Marsh's opinions regarding MEP engineering will not prove or

1 disprove anything. More importantly, there is nothing in Mr. Marsh's report or declaration that  
2 confirms Mr. Marsh did anything to analyze the City's claims with respect to MSA, which stands  
3 to reason since Mr. Marsh is not qualified to perform such analysis.

4 A geotechnical engineer that is not also a licensed MEP engineer cannot legally provide  
5 MEP engineering design services. If the geotechnical engineer cannot legally provide MEP  
6 engineering design services in the absence of proper licensure, they also cannot be deemed an  
7 "expert" under NRS 11.258(6). Such is the case because NRS 11.258(6) requires licensure in the  
8 relevant design discipline to be an expert. If, as the City says, Mr. Marsh is qualified to opine on  
9 MSA's MEP engineering design services, the City can simply produce a copy of Mr. Marsh's  
10 MEP engineering license and this issue will be resolved. Of course, Mr. Marsh has no such  
11 license, so the City failed to consult with a licensed expert in the relevant design discipline related  
12 to MSA's scope of work on the project.

13 **B. NEITHER THE MARSH REPORT, NOR THE CITY'S AFFIDAVIT, ADDRESS**  
14 **MSA DESIGN SERVICES**

15 It is curious that the City's Opposition fails to cite a single statement in Mr. Marsh's report  
16 or conclusions that it relied on to conclude Mr. Marsh is knowledgeable in the field of MEP  
17 Engineering. Throughout the City's Opposition, as well as Mr. Marsh's report and CV, Mr.  
18 Marsh is repeatedly identified as a geotechnical engineer. Conversely, there is not a single  
19 reference anywhere in Mr. Marsh's report related to MEP engineering services, nor is MSA or its  
20 scope of work ever referenced. Mr. Marsh clearly did not analyze the City's claims against MSA,  
21 and the City's Counsel clearly did not consult with Mr. Marsh concerning MSA's scope of work.  
22 Had either Mr. Marsh or the City's Counsel addressed MSA's scope of work, surely there would  
23 have been reference to same in expert report or counsel's affidavit. Such a reference is glaringly  
24 absent from both documents.

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1           **C. THE EIGHTH JUDICIAL DISTRICT COURT HAS ALREADY ADDRESSED**  
2           **THE ISSUE PRESENTLY BEFORE THIS COURT**

3           Unlike the City, which has no basis for its interpretation regarding NRS 11.258, MSA's  
4 position is supported by case law from the Eighth Judicial District Court. The issue before this  
5 Court has already been addressed by the Eighth Judicial District Court in *Nash v. KGA*  
6 *Architecture*, Case No. A-19-804979. In *Nash* the plaintiff attempted to sue an architect. In  
7 support of plaintiff's complaint, plaintiff's counsel filed and served an affidavit of merit and  
8 expert report. However, similar to the facts here, the expert plaintiff's counsel consulted was not a  
9 licensed architect. Consequently, the *Nash* Court concluded that plaintiff's counsel did not  
10 comply with NRS 11.258 because counsel did not consult with an expert in the relevant discipline.  
11 The Court then dismissed the case. See order and associated briefing attached hereto as *Exhibit 1*.

12           **D. THE CITY IS PUTTING THE LEGISLATIVE HISTORY OF NRS 11.258 AT**  
13           **ISSUE, NOT MSA**

14           The City's argument that a review of legislative history is unnecessary is belied by the fact  
15 that the City is offering an alternative interpretation of the term "relevant discipline." The City's  
16 Opposition implies the term "relevant discipline" really means "any discipline." As defendants  
17 read the statute, "relevant discipline" means the expert consulted must be licensed in the same  
18 design discipline as the defendant against whom the expert is offering their opinions. In asking  
19 the Court to interpret "relevant discipline" as "any discipline," Plaintiff is directly arguing  
20 "relevant discipline" is ambiguous. To this end, the legislative history regarding NRS 11.258 is  
21 poignant in determining what qualifications a proposed expert must have to comply with the  
22 statute.

23           It is MSA's position that NRS 11.258 requires the consulting expert to be licensed in the  
24 same discipline as the party against whom the expert is offering their opinions. MSA reaches this  
25 conclusion by reading the black letter law in the statute, which states "the expert who was  
26 consulted is knowledgeable in the relevant discipline involved in the action[.]" NRS 11.258(1)(c).  
27 The City is putting the project's MEP systems at issue in the action by suing MSA, the project's  
28 MEP engineer. Indeed, if the City was not placing MSA's MEP engineering services at issue in

1 the action, there would be no basis for bringing claims against MSA in the first place, as its sole  
2 scope on the project was MEP engineering design. Consequently, the City must consult with a  
3 licensed MEP engineer, as that is the relevant discipline when addressing the claims asserted  
4 against MSA, an MEP engineer.

5 Notwithstanding the foregoing, the City is asking the Court to ignore the term “relevant  
6 discipline” and then errantly concludes that consulting with ANY expert is sufficient to meet the  
7 requirements of NRS 11.258. By making this argument, it is the City that is arguing the statute is  
8 ambiguous. Because of this argument, it is appropriate for the Court to look at what the legislature  
9 actually intended to accomplish by enacting NRS 11.258 (i.e. whether it intended for ANY design  
10 professional to offer opinions on ANY design field, or if it intended like design professionals to  
11 opine on the work of like design professionals). As discussed in MSA’s Motion, the legislature  
12 clearly intended a complainant’s counsel to consult with an expert in the same field of design to  
13 ensure that there is merit to the complainant’s claims right out of the gate, instead of years into the  
14 litigation. Interpreting NRS 11.258 as the City’s requests would gut this aspect of the statute and  
15 NRS 11.258 would no longer have any real purpose.

16 **E. THE CITY’S INTERPRETATION OF NRS 11.258 WOULD RENDER PORTIONS**  
17 **OF THE STATUTE SURPLUS**

18 In Nevada it is axiomatic that “we ‘construe statutes to give meaning to all of their parts  
19 and language[.]’” *Harris Associates v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532,  
20 534 (2003) (internal citations omitted). To this end, the *Harris* Court stated, the Court must “read  
21 each sentence, phrase, and word to render it meaningful within the context of the purpose of the  
22 legislation.’ Further, no part of a statute should be rendered meaningless and its language ‘should  
23 not be read to produce absurd or unreasonable results.’” *Id.*

24 The City’s interpretation of NRS 11.258 would render the term “relevant discipline”  
25 surplus. The City argues that NRS 11.258 allows for any licensed design professional to be  
26 consulted for any scope of work on a project. If that is what the legislature intended, the  
27 legislature would have used the words “any discipline” or would have simply stated the attorney  
28 must consult an expert, with no qualification with respect to the “relevant discipline.”



1 The legislature did not leave the statute open to interpretation. Rather, it specifically  
2 included the term “relevant discipline” to prevent exactly what the City is trying to do here.  
3 Namely, drag a design professional into litigation before vetting the plaintiff’s claims against that  
4 design professional by having an expert in the relevant field verify the merit of the plaintiff’s  
5 claims against that design professional. As the City’s proposed process would render the term  
6 “relevant discipline” as surplus, the Court should reject the City’s interpretation of the statute.

7 The City’s interpretation of NRS 11.258 is also nonsensical and would completely gut the  
8 intended purpose of the statute, which is to ensure the merit of claims against a design professional  
9 before the design professional is dragged into litigation. The only way to ensure there is merit to  
10 the claims asserted against a specific design professional is to consult with an expert practicing in  
11 the same design discipline, as that expert will be aware of the appropriate standard of care and  
12 practice requirements in the relevant discipline. Stated differently, a geotechnical engineer does  
13 not practice MEP engineering, thus, they do not know what the standard of care is, nor do they  
14 know the practice requirements of an MEP engineer. As such, an opinion from a geotechnical  
15 engineer regarding the merit of claims arising from an MEP’s standard of care have no basis (in  
16 fact, it would be akin to asking a geotechnical engineer to opine on an attorney’s standard of care).

17 **F. MSA’S MOTION TO DISMISS IS PROPER GIVEN THE PROCEDURAL**  
18 **POSTURE OF THIS CASE**

19 It seems the City is incapable of reading anything in its totality, be it a statute or a joinder.  
20 The City’s Opposition misrepresents MSA’s joinder to NBD’s prior motion for summary  
21 judgment. MSA’s joinder is comprised of two paragraphs. The first paragraph states, MSA  
22 “hereby joins in the arguments and relief requested by Defendant Nevada By Design, LLC d/b/a  
23 Nevada By Design Engineering Consultants’ (“NBD”) Motion to Dismiss or, in the alternative,  
24 Motion for Summary Judgment.” Despite this clear language, which in no way limits MSA’s  
25 joinder, the City somehow concludes MSA only joined NBD’s Motion as it related to the statue of  
26 repose.

27 ///

28 ///

1 The City's proposed reading of MSA's joinder wholly ignores the language of MSA's  
2 joinder, as well as the fact MSA's counsel argued, at length, for the application of NRS 11.258 at  
3 oral argument on the NBD motion MSA joined. As such, it is completely disingenuous for the  
4 City to now argue MSA did not join the affidavit of merit arguments raised in NBD's motion.  
5 In addition to the foregoing, even if MSA's joinder could somehow be construed as limited to only  
6 joining NBD's statute of repose argument, then the City should have objected to MSA's oral  
7 argument regarding NRS 11.258. Having failed to do so, the City waived its objection to MSA  
8 orally moving for relief pursuant to NRS 11.258 when MSA argued the motion in court.

9 The City provides no case law to support its position that MSA's present motion is  
10 improper. NBD brought a motion to dismiss pursuant to NRS 11.258. MSA unequivocally joined  
11 that motion. The Court found the NRS 11.258 motion was moot, and the Court did not analyze  
12 the motion because it properly dismissed the City's claims pursuant to the statute of repose that  
13 was in effect at the time the City filed its defective and untimely Complaint. Later, the Court  
14 reversed itself allowing the City's claims to proceed. Consequently, the NRS 11.258 issue is no  
15 longer moot. The only way to get that issue in front of the Court is to renew the motion to  
16 dismiss. The City does not get to escape the consequences of failing to comply with NRS 11.258,  
17 just because the Court previously found the issue moot.

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II.

CONCLUSION

The City failed to comply with NRS 11.258. A plain reading of NRS 11.258 establishes the City was required to consult an expert licensed in the field of MEP engineering when asserting claims against MSA, a MEP engineer. The City only offers an affidavit of merit and expert report pertaining to geotechnical engineering. There is zero reference to MEP engineering in either documents. As the City failed to meet a condition precedent to asserting claims against MSA, dismissal of the City's Complaint against MSA is mandated by both statute and binding case law precedence. Therefore, MSA respectfully requests the Court dismiss the City's action against MSA.

DATED this 18<sup>th</sup> day of February, 2020.

WEIL & DRAGE, APC

*/s/ Jeremy R. Kilber*

By:

\_\_\_\_\_  
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Henderson, Nevada 89052  
Attorney for Defendant,  
MELROY ENGINEERING, INC. D/B/A  
MSA ENGINEERING CONSULTANTS

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18<sup>th</sup> day of February, 2020, service of the foregoing  
**MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' REPLY  
TO PLAINTIFF'S OPPOSITION TO ITS MOTION TO DISMISS** was made this date by  
electronically serving a true and correct copy of the same, through Clark County Odyssey  
eFileNV, to the following parties:

Richard C. Gordon, Esq.  
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CITY OF NORTH LAS VEGAS

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GUARANTEE COMPANY OF NORTH  
AMERICA USA

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P & W BONDS LLC

///

///

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4 Henderson, NV 89052  
5 Attorneys for Defendant,  
6 NEVADA BY DESIGN, LLC D/B/A  
7 NEVADA BY DESIGN ENGINEERING  
8 CONSULTANTS

/s/ Joanna Medina

Joanna Medina, an Employee of  
WEIL & DRAGE, APC

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# ***Exhibit 1***

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(Nevada Bar No. 10643)

861 Coronado Center Drive, Suite 231

(702) 314-1905 • Fax (702) 314-1909

Attorney for Defendant,  
KITTRELL GARLOCK AND ASSOCIATES,  
ARCHITECTS, AIA, LTD.

**CLARK COUNTY, NEVADA**

) CASE NO: A-19-804979-C

) DEPT NO.: IV

) **NOTICE OF ENTRY OF ORDER**

ASSOCIATES, ARCHITECTS, AIA, LTD.,

ARCHITECTS; and DOES 1-10, unknown

10, unknown business entities,

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**NOTICE OF ENTRY OF ORDER**

NOTICE IS HEREBY GIVEN that the ORDER GRANTING KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD.’S MOTION TO DISMISS was entered in the above-captioned matter on the 11<sup>th</sup> day of February, 2020. A copy of said ORDER is attached hereto.

DATED this 12<sup>th</sup> day of February, 2020.

WEIL & DRAGE, APC

*/s/ Jeremy R. Kilber*

By: \_\_\_\_\_

JEREMY R. KILBER, ESQ.  
(Nevada Bar No. 10643)  
861 Coronado Center Drive, Suite 231  
Henderson, NV 89052  
Attorney for Defendant,  
KITTRELL GARLOCK AND ASSOCIATES,  
ARCHITECTS, AIA, LTD.



1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 12<sup>th</sup> day of February, 2020, service of the foregoing  
3 **NOTICE OF ENTRY OF ORDER** was made this date by electronically serving a true and  
4 correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

5 Lawrence J. Semenza, Esq.  
6 LAWRENCE J. SEMENZA, LTD.  
7 3753 Howard Hughes Parkway, Suite 200  
8 Las Vegas, Nv 89169  
9 Attorney for Plaintiff,  
10 KELLI NASH

11 */s/ Joanna Medina*

12 \_\_\_\_\_  
13 Joanna Medina, an Employee of  
14 WEIL & DRAGE, APC  
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**ORIGINAL**

*Steven D. Grierson*

OGM  
JEREMY R. KILBER, ESQ.  
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Attorney for Defendant,  
KITTRELL GARLOCK AND ASSOCIATES,  
ARCHITECTS, AIA, LTD.

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

KELLI NASH,	)	CASE NO: A-19-804979-C
	)	
Plaintiff,	)	DEPT NO.: IV
	)	
vs.	)	
	)	<b>ORDER GRANTING KITTRELL</b>
KITTRELL GARLOCK AND	)	<b>GARLOCK AND ASSOCIATES,</b>
ASSOCIATES, ARCHITECTS, AIA, LTD.,	)	<b>ARCHITECTS, AIA, LTD.'S MOTION TO</b>
a Nevada corporation, DBA KGA	)	<b>DISMISS</b>
ARCHITECTS; and DOES 1-10, unknown	)	
individuals; and ROE CORPORATIONS 1-	)	
10, unknown business entities,	)	
	)	
Defendants.	)	

THIS MATTER having come before the Court on January 9, 2020, on Defendant KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD., DBA KGA ARCHITECTS' ("KGA") Motion to Dismiss Plaintiff KELLI NASH's ("Plaintiff") Complaint, the Court having reviewed and considered KGA and Plaintiff's pleadings and oral argument, the Court finds as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NRS 11.258 is applicable to Plaintiff's action naming KGA as a party in the litigation.

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1 IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that NRS 11.258  
2 requires a complainant to file an affidavit of merit and expert report when suing a design  
3 professional for claims related to the design and/or construction of a non-residential construction  
4 project.

5 IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that NRS  
6 11.258 requires a complainant to consult with, and issue an expert report from, a licensed design  
7 professional practicing in the same design discipline as the design professional against whom the  
8 complainant is bring their claims (e.g. a licensed architect must be consulted for claims against an  
9 architect, or a licensed mechanical, electrical, and plumbing (MEP) engineer must be consulted for  
10 claims against an MEP engineer).

11 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to NRS  
12 11.259, a party's failure to comply with NRS 11.258 mandates dismissal of the party's action  
13 against the design professional.

14 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that as NRS 11.258 is  
15 applicable to Plaintiff's claims against KGA, Plaintiff was required to consult with, and provide an  
16 expert report from, a licensed architect.

17 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff did not  
18 comply with NRS 11.258 when it served KGA, an architect, with its Complaint, because the  
19 expert Plaintiff consulted with does not hold a license in the relevant design discipline of  
20 architecture. As such, the expert report and affidavit of merit provided by Plaintiff's counsel did  
21 not meet the requirements of NRS 11.258.

22 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant *Otak Nevada,*  
23 *LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 599, 260 P.3d 408,  
24 412 (2011), because "a pleading filed under NRS 11.258 without the required affidavit and expert  
25 report is void *ab initio* and of no legal effect, the party's failure to comply with NRS 11.258  
26 cannot be cured by amendment."

27 ///

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1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to *Otak*  
2 *Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 260 P.3d  
3 408, (2011), because Plaintiff failed to comply with the requirements of NRS 11.258 when he  
4 filed and served his Complaint, Plaintiff is barred from amending his Complaint to cure his non-  
5 compliance with NRS 11.258.

6 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to NRS  
7 11.259, KGA's Motion to Dismiss Plaintiff's Complaint is GRANTED.

8 \*\*\*

9 ORDER


10 IT IS SO ORDERED.

11 DATED this 10 day of Feb, 2020.

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DISTRICT COURT JUDGE

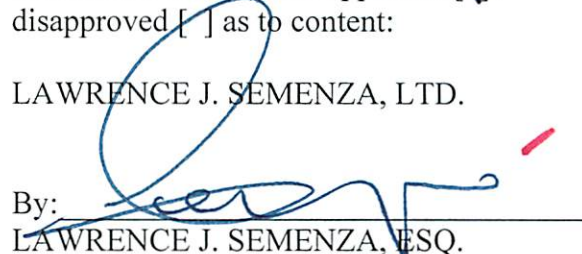
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17 WEIL & DRAGE, APC

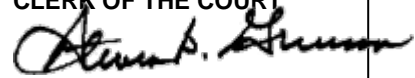
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21 Henderson, NV 89052  
Attorney for Defendant,  
22 KITTRELL GARLOCK AND  
23 ASSOCIATES, ARCHITECTS, AIA, LTD

Reviewed for form, and approved ☒ /  
disapproved ☐ as to content:

14  
15 LAWRENCE J. SEMENZA, LTD.

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17 By:   
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20 3753 Howard Hughes Parkway, Suite 200  
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21 KELLI NASH

22  
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A-19-804979-C



1 MDSM  
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8 [jkilber@weildrage.com](mailto:jkilber@weildrage.com)  
9 Attorney for Defendant,  
10 KITTRELL GARLOCK AND ASSOCIATES,  
11 ARCHITECTS, AIA, LTD.

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 KELLI NASH, ) CASE NO: A-19-804979-C  
11 )  
12 Plaintiff, ) DEPT NO.: IV  
13 vs. ) [HEARING REQUESTED]  
14 )  
15 KITTRELL GARLOCK AND ) KITTRELL GARLOCK AND ASSOCIATES,  
16 ASSOCIATES, ARCHITECTS, AIA, LTD., a) ARCHITECTS, AIA, LTD.'S MOTION TO  
17 Nevada corporation, DBA KGA ) DISMISS PLAINTIFF'S COMPLAINT  
18 ARCHITECTS; and DOES 1-10, unknown )  
19 individuals; and ROE CORPORATIONS 1- )  
10, unknown business entities, ) Hearing Date: \_\_\_\_\_  
20 Defendants. ) Hearing Time: \_\_\_\_\_  
21 )  
22 )

20 **KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD.'S MOTION TO**  
21 **DISMISS PLAINTIFF'S COMPLAINT**

22 COMES NOW Defendant, KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS,  
23 AIA, LTD. ("KGA"), by and through its attorneys of record, the law firm of Weil & Drage, APC,  
24 and hereby moves this Court for dismissal of Plaintiff KELLI NASH's ("Nash") Complaint (the  
25 "Complaint").

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1 This Motion is based on the Memorandum of Points and Authorities submitted herein, all  
2 pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this  
3 Honorable Court will entertain.

4 DATED this 22<sup>nd</sup> day of November, 2019.

5 WEIL & DRAGE, APC

6 */s/ Jeremy R. Kilber*

7 By: \_\_\_\_\_

8 JEREMY R. KILBER, ESQ.

9 (Nevada Bar No. 10643)

10 861 Coronado Center Drive, Suite 231

11 Henderson, NV 89052

12 Attorney for Defendant,

13 KITTRELL GARLOCK AND ASSOCIATES,

14 ARCHITECTS, AIA, LTD.

# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

### INTRODUCTION / FACTS<sup>1</sup>

This matter arises from an injury Nash allegedly suffered while he was at work. Specifically, Nash alleges that on November 30, 2018, he was injured while working at the Las Vegas Convention Center located at Las Vegas Blvd. South and Elvis Presley Way. Nash alleges that through his course of his employment at the Convention Center, he attempted to operate an iron security gate. However, the gate allegedly malfunctioned and fell onto Nash's legs pinning him to the ground. Nash then alleges KGA, an architecture design professional, provided design services for the Convention Center, and baselessly concludes that since KGA provided design services for the construction of the Convention Center, KGA is liable for his injury.

Nash's Complaint alleges claims for Negligence and Negligent Infliction of Emotional Distress against KGA. As the Convention Center involves non-residential construction, and KGA is an architecture design professional, Nash was required to comply with NRS 11.258 when asserting his claims against KGA. Despite Nash alleging he was injured as a result of KGA's negligence related to the construction of a non-residential project, he failed to file and serve an Affidavit of Merit compliant with NRS 11.258. An appropriate Affidavit of Merit is expressly mandated by Nevada statute when claims are asserted against a design professional such as KGA. As Nash failed to comply with NRS 11.258, NRS 11.259 requires dismissal of this matter.

## II.

### LEGAL STANDARD / STANDARD OF REVIEW

NRCP 12(b) authorizes the dismissal of a lawsuit when it fails to state a claim upon which relief may be granted. "When, after construing the pleading liberally and drawing every fair intendment in favor of the plaintiff, no claim has been stated, dismissal is proper."<sup>2</sup> A motion to dismiss is properly granted where the allegations in the challenged pleading, taken at "face value"

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<sup>1</sup> All of the facts set forth in the Introduction / Facts section are based on the contents of Nash's Complaint attached hereto as *Exhibit A*.

<sup>2</sup> *Brown v. Kellar* 97 Nev. 582, 583, 636 P.2d 874, 874 (Nev., 1981).

1 and construed favorably in the plaintiff's behalf, fail to state a cognizable claim for relief.<sup>3</sup>

2 Dismissal is proper where the allegations are insufficient to establish the elements of a claim for  
3 relief.<sup>4</sup>

4 Nevada's Affidavit of Merit statute, NRS 11.258, applies to any/all actions involving  
5 nonresidential construction. Pursuant to NRS 11.258, the attorney for a "complainant" *shall* file  
6 and serve an Affidavit of Merit concurrently with the first pleading in the action when an action is  
7 commenced against a design professional and related to nonresidential construction. The affidavit  
8 **SHALL** state that the attorney:

9 (1) has reviewed the facts of the case;

10 (2) has consulted with an expert;

11 (3) reasonably believes the expert who was consulted is knowledgeable in the relevant  
12 discipline involved in the action; and

13 (4) has concluded on the basis of his review and the consultation with the expert that the  
14 action has a reasonable basis in law and fact. NRS 11.258(1).

15 NRS 11.258(6) defines an "expert" as "a person who is licensed in a state to engage in the  
16 practice of professional engineering, land surveying, architecture or landscape architecture."

17 NRS 11.2565(2)(b), defines "Design professional" as a "person who holds a professional  
18 license or certificate issued pursuant to chapter 623, 623A or 625 of NRS or a person primarily  
19 engaged in the practice of professional engineering, land surveying, architecture or landscape  
20 architecture."

21 In addition to the statements required for the attorney affidavit, an expert report *must* be  
22 attached to the affidavit. The expert report **must include**:

23 (1) the expert's resume;

24 (2) a statement that the expert is experienced in each discipline which is the subject of the  
25 report;

27 <sup>3</sup> *Morris v. Bank of America Nevada*, 110 Nev. 1274, 886 P.2d 454, 456 (1994).

28 <sup>4</sup> *Stockmeier v. Nevada Dept. of Corrections Psych. Rev. Panel*, 183 P.3d 133, 135 (Nev. 2008).



1 (3) a copy of each non-privileged document reviewed by the expert in preparing his report  
2 including, without limitation, each record, report and related document that the expert has  
3 determined is relevant to the allegations of negligent conduct that are the basis for the action;

4 (4) the conclusions of the expert and the basis for the conclusions; and

5 (5) a statement that the expert has concluded that there is a reasonable basis for filing the  
6 action. NRS 11.258(3).

7 Here, Nash is not entitled to the relief sought in the Complaint because Nash failed to  
8 comply with NRS 11.258, a threshold issue when suing a design professional in Nevada.  
9 Therefore, Nash's Complaint fails to state a claim for relief and must be dismissed.

10 **III.**

11 **LEGAL ARGUMENT**

12 **A. NASH FAILED TO COMPLY WITH NRS 11.258, THEREFORE HIS ACTION**  
13 **MUST BE DISMISSED**

14 When a party fails to file and serve an NRS 11.258 compliant Affidavit of Merit and expert  
15 report *concurrently with the first pleading in the action*, the Court *must dismiss the action*  
16 *pursuant to statute*. Specifically, NRS 11.259 states, the "court shall dismiss an action governed  
17 by NRS 11.258" when an action is "commenced against a design professional ...if the attorney for  
18 the [plaintiff] fails to: (a) File an affidavit required pursuant to NRS 11.258; [or] (b) File a report  
19 required pursuant to subsection 3 of NRS 11.258."<sup>5</sup> It is abundantly clear Nash's Complaint is  
20 defective, as Nash did not comply with NRS 11.258 when he commenced his action against KGA.

21 The analysis regarding whether there has been compliance with NRS 11.258 is straight  
22 forward. The statutes provide a would-be complainant (here Nash) clear and unambiguous step-  
23 by-step instructions to follow:

24 **Step One:** Determine whether the party asserting claims is asserting claims against a design  
25 professional and whether the claims involves a nonresidential structure.

26 ///

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<sup>5</sup> See NRS 11.259(1)(a).

- Based upon the allegations in Nash’s Complaint, it is undisputed that Nash’s claims involve a design professional (KGA) and a nonresidential structure (a convention center).

**Step Two:** The attorney for the party asserting claims (the “complainant” – here, Nash) shall file with the Court, *concurrently with the service of the first pleading*, an affidavit stating the attorney has reviewed the facts of the case, that attorney has consulted with an expert in the relevant design discipline, that the attorney reasonably believes the expert is knowledgeable in the relevant design discipline involved, and that the attorney concludes – based upon the consultation with the expert – that the action has a reasonable basis in law and fact.

- Here, Nash filed and served his Complaint, along with an Affidavit of Merit. However, as discussed in further detail below, the Affidavit of Merit is defective inasmuch as the “expert” consulted is not an architect, nor is he a design professional in any design disciplines set forth in NRS 11.258(6).

**Step Three:** The affidavit required in Step Two *must* be accompanied by a report from the expert consulted. The report must include – *without limitation* – the resume of the expert, a statement that the expert has experience in the relevant discipline, a copy of each document reviewed, a conclusion by the expert *and* the basis for the conclusion, and a statement that there is a reasonable basis for the complainant’s claims. The affidavit and expert report are a conjunctive threshold requirement. The complainant cannot commence an action against the design professional without filing an attorney’s affidavit *and* the supporting report, as the affidavit and report are meant to provide verification *to the Court* that the claims against the design professional have merit.

- Nash failed to provide the expert report required in Step Three. KGA served as the architect for the subject project. Therefore, to comply with NRS 11.258(1)(c) requirements as to KGA, Plaintiff’s counsel, Mr. Semenza, was required to consult with an expert “knowledgeable in the relevant discipline.”

Here, the relevant design discipline is architecture. Thus, pursuant to NRS 11.258(6), Mr. Semenza was required to consult with an expert holding a professional license in the field of architecture. Mr. Semenza clearly did not consult with an architect expert. From the Affidavit and the attached curriculum vitae of Michael Panish, it is clear that Plaintiff's sole consulting expert, Mr. Panish, is not an architect, nor a design professional of any kind. Thus, he is not qualified to opine on the professional services provided by KGA or provide standard of care opinions as to these services. *See*, Panish report and curriculum vitae attached hereto as **Ex. B**. Therefore, by failing to consult with an architectural expert (a licensed design professional in the relevant field of design), Plaintiff failed to comply with NRS 11.258(1)(c). Pursuant to NRS 11.258(6), Mr. Panish simply is not qualified to opine in the relevant design field involving KGA's services. Consequently, by extension, Mr. Semenza is unable to conclude, based on his review and consultation with Mr. Panish, that the action has a reasonable basis in law and fact as to KGA. *See*, NRS 11.258(1)(d).

- In light of the foregoing, Nash's Complaint should be dismissed for his failure to comply with NRS 11.258(3), as such failure is tantamount to not providing the required affidavit and expert report.

**Step Four:** If the complainant did not comply with Step Two and/or Step Three, determine whether the complainant complied with NRS 11.258(2), which provides the *only* statutory provision allowing the affidavit (which necessarily includes an expert report) to be provided at a later date. NRS 11.258(2) in pertinent part states:

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 and prepare the affidavit before filing the action without causing the action to be impaired or barred by the statute of limitations or repose, or other limitations prescribed by law. 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). (Emphasis added).

- As the statute cited above states, Nash's counsel may be excused from providing the complete affidavit required in subsection 1 if, AND ONLY IF, Nash's counsel provides an affidavit at the time the Complaint is filed explaining why they are unable to comply with subsection 1. As Nash's counsel did not provide such an affidavit, Nash does not qualify for a waiver regarding the mandatory affidavit.

**Step Five:** Determine impact of NRS 11.258(4). Subsection (4) allows an incomplete expert report to accompany the affidavit of counsel *if* documents cannot be readily obtained prior to the complainant filing its action.

- Here, documents relied upon by the expert were provided.

**Step Six:** If the complainant fails to comply with the requirements of NRS 11.258, NRS 11.259 provides specific instructions for the Court to follow. NRS 11.259 specifically states:

1. *The court shall dismiss* an action involving nonresidential construction *if the attorney for the complainant fails to:*

(a) File an affidavit required pursuant to NRS 11.258;

(b) **File a report required pursuant to subsection 3 of NRS 11.258;** or

(c) Name the expert consulted in the affidavit required pursuant to subsection 1 of NRS 11.258.

NRS 11.259. (Emphasis added).

In line with the statutory provisions of NRS 11.259, the Nevada Supreme Court, in *Otak v. Eighth Judicial District Court*, clearly announced NRS 11.259 does not allow the District Court to exercise discretion. Thus, if counsel fails to comply with any of the three requirements stated in NRS 11.259, dismissal is mandatory. Indeed, the *Otak* Court specifically stated, “‘shall dismiss’ is clear and unambiguous, we must give effect to that meaning and will not consider outside sources

beyond that statute.”<sup>6</sup> Therefore, dismissal of Nash’s Complaint is not discretionary, rather it is mandated by NRS 11.259 – based both on the clear language of NRS 11.258 and NRS 11.259 – as well as the Nevada Supreme Court’s interpretation of same in *Otak*.

By walking through the preceding steps, it is indisputable that Nash’s Complaint must be dismissed. Nash’s Complaint must be dismissed because:

- Nash filed and served a complaint that asserts claims against an architectural design professional, involving the design of a nonresidential structure, but failed to file and serve an expert report from a qualified expert as required by NRS 11.258(3).

Therefore, KGA respectfully requests the Court comply with the mandate of NRS 11.259, as required by Nevada’s case law precedence of *Otak*.

**B. PLAINTIFF’S COMPLAINT WAS VOID AB INITIO WHEN IT WAS FILED WITHOUT THE EXPERT REPORT REQUIRED UNDER NRS 11.258, THEREFORE, IT CANNOT BE AMENDED TO BRING IT INTO COMPLIANCE WITH NRS 11.258**

The legislative history<sup>7</sup> in discussing NRS 11.258 adds further support that the Plaintiff was required to consult with an appropriate expert that is knowledgeable in the field of architecture with respect to the claims against KGA. This is established from the following legislative statements raised during discussions on the enactment of NRS 11.258:

1. A construction defect claim against a design professional, unlike claims against a contractor or subcontractor, is a professional negligence claim. To prove a professional negligence claim, you have to show the design professional failed to meet the standard of care. There is only one way to prove that. You have to bring an expert to the hearing to show the standard of care and that the design professional fell below the standard of care. Attorneys have to find an expert to prove their case. The certificate of merit requires the expert earlier in the proceedings. They review the case **to show merit to a claim and a reasonable basis to proceed with a suit**. See, Legislative History of NRS 11.258 attached hereto as **Ex. C** (handwritten brackets and asterisks).

<sup>6</sup> *Otak v. Eighth Judicial District Court*, 260 P.3d 408, 411, 127 Nev. Adv. Op. 53 (Nev. 2011) citing *City of Reno v. Citizens for Cold Springs*, 126 Nev. —, —, 236 P.3d 10, 16 (2010) (quoting *NAIW v. Nevada Self-Insurers Association*, 126 Nev. —, —, 225 P.3d 1265, 1271 (2010)).

<sup>7</sup> The ultimate goal of interpreting statutes is to effectuate the Legislature’s intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

- 1           2. In general terms, the bill requires an attorney to file an affidavit with its initial pleading.  
2           The affidavit would state that the attorney has consulted with an independent design  
3           professional **in the appropriate field** and upon such consultation and review has  
4           concluded that the complaint **against the design professional** has a reasonable basis in  
5           law and fact. The **affidavit must also contain a report submitted by the**  
6           **independent design professional setting forth the basis for that professional's**  
7           **opinion that there is a reasonable basis for commencing the action against the**  
8           **design professional.** *Id.* (Emphasis added).  
9  
10          3. NRS 11.258 was enacted to ensure that suit filed against a design professional have a  
11          **reasonable basis in law and fact** that merit the expenditure of judicial time and effort.  
12          **The standard of proof for professional negligence requires a finding that the**  
13          **design professional has failed to employ the standard of care and skill exercised**  
14          **by reputable members of the same professional.** This law ensures that actions  
15          brought against that design professional **have a reasonable likelihood of meeting that**  
16          **burden of proof at the time of trial.** *Id.* (Emphasis added).  
17  
18          4. It is also good litigation practice to ensure that professional negligence cases include  
19          analysis generally done before the complaint is filed **so that the complaint can be**  
20          **specific as to the errors alleged.** *Id.* (Emphasis added).  
21  
22          5. It is not a bar to bringing the suit; it accelerates something that is going to happen  
23          anyway in the lawsuit. You cannot typically get to the jury or to the end of one of these  
24          lawsuits **without having an expert opine on the propriety of the conduct of the**  
25          **design professional.** *Id.* (Emphasis added).  
26  
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As shown above, multiple excerpts from the legislative history of NRS 11.258 establish that said statutes were enacted to prevent frivolous suits against design professionals and required the claimant (here, the Plaintiff) to engage and consult with an appropriate expert prior to commencement of the action. NRS 11.258(6) establishes that to qualify as an “expert” for purposes of NRS 11.258 compliance, the “expert” report must be authored by a person who is licensed in a state to engage in the practice of professional engineering, land surveying, architecture or landscape architecture.

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1 The Nevada Legislature was keen on the claimant retaining independent experts, qualified  
2 *in the applicable fields of discipline*, to provide opinions as to the standard of care and any  
3 failures in same. In fact, the Nevada Supreme Court in interpreting the legislative history found  
4 that the intent of NRS 11.258 and 11.259(1) was to "...advance judicial economy and prevent  
5 frivolous suits against design professionals by requiring a complaint to include an expert report  
6 and attorney affidavit regarding the suit's reasonable basis." *In re CityCenter Constr. & Lien*  
7 *Master Litig.*, 129 Nev. 669, 678, 310 P.3d 574, 581 (2013).

8 Here, while Plaintiff's counsel consulted Mr. Panish, he is not an architect. This is  
9 established from Mr. Panish's CV. Therefore, Mr. Panish is not qualified to opine on KGA's  
10 architectural design services. Accordingly, Plaintiff failed to comply with NRS 11.258(1)(c)&(d).

11 **1. Plaintiff's Expert Report fails to Comply with NRS 11.258(3) Requirements:**

12 In addition to Affidavit of Merit, Plaintiff is also required to attach the following to the  
13 Affidavit pursuant to NRS 11.258(3):

14 (a) the expert's resume;

15 (b) a statement that the expert **is experienced in each discipline which is the subject of**  
16 **the report;**

17 (c) a copy of each non-privileged document reviewed by the expert in preparing his report  
18 including, without limitation, each record, report and related document that the expert has  
19 determined is relevant to the allegations of negligent conduct that are the basis for the action;

20 (d) the conclusions of the expert and **the basis for the conclusions;** and

21 (e) a statement that the expert has concluded that there is a reasonable basis for filing the  
22 action. NRS 11.258(3).

23 Here, Mr. Panish's resume establishes that he is not an architect and not qualified to opine  
24 on any design discipline as he is not a licensed design professional. See, **Ex. B.**

25 ///

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1 Nevada Supreme Court case law precedence establishes an action that fails to comply with  
2 an Affidavit of Merit requirement is void *ab initio* and cannot be amended to cure the Affidavit of  
3 Merit / expert report defect.<sup>8</sup> In *Fierle v. Jorge Perez M.D., Ltd.* the Nevada Supreme Court  
4 addressed an Affidavit of Merit statute in the context of a medical malpractice action, which is  
5 analogous to NRS 11.258. In *Fierle*, the plaintiffs filed a complaint against a doctor, his staff, and  
6 his professional medical corporation for alleged medical malpractice. The Court noted that after  
7 initially failing to attach an expert affidavit to the complaint, the plaintiffs filed their “First  
8 Amended Complaint” with an attached medical expert’s affidavit. The defendants moved to  
9 dismiss the complaint and strike the “First Amended Complaint.” The District Court granted the  
10 defendants motion.

11 Subsequently, the plaintiffs appealed to no avail. The Supreme Court held: “We conclude  
12 that medical malpractice and professional negligence claims made in a complaint that becomes  
13 void *ab initio* for lack of the attachment of an expert affidavit **may not be cured** by the  
14 amendment to that complaint, regardless of whether other claims in the original complaint  
15 survive.”<sup>9</sup>

16 In deciding *Fierle*, the Court relied upon its previous decision in *Washoe Med. Ctr. V.*  
17 *Dist. I.*, 122 Nev. 1298, 1300 (2006), in which the Court held that “complaints filed under  
18 41A.071 [the Affidavit of Merit statute for medical malpractice claims] without an affidavit from  
19 a medical expert are void *ab initio* and must be dismissed.”<sup>10</sup> The *Fierle* Court went on to state,  
20 “Under this reasoning, we have concluded that ***such complaints may not be amended because***  
21 ***they are void and do not legally exist.***”<sup>11</sup> “This interpretation is consistent with the underlying  
22 purpose of . . . [41A.071], which is to ensure that such actions be brought in good faith based on  
23  
24

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25 <sup>8</sup> See, *Fierle v. Jorge Perez M.D., Ltd.*, 125 Nev. 728, 219 P.3d 906 (2009).

26 <sup>9</sup> *Id.* at 908. (Emphasis added).

27 <sup>10</sup> *Fierle*, 219 P.3d at 914.

28 <sup>11</sup> *Id.* (Emphasis added).



1 competent expert opinion.’’<sup>12</sup>

2 In *Otak v. Eighth Judicial District*, the Nevada Supreme Court extended the logic of *Fierle*  
3 and *Washoe* to the interpretation of NRS 11.258.<sup>13</sup> Citing *Fierle* and *Washoe*, Nevada’s Supreme  
4 Court found that an action against a design professional *must* be dismissed if the complainant fails  
5 to comply with the requirements of NRS 11.258, because the underlying purpose of statutes such  
6 as NRS 11.258 is to ensure actions are brought in good faith, and based on competent expert  
7 opinion.<sup>14</sup> When a complainant fails to comply with NRS 11.258, the Court has nothing upon  
8 which to determine whether there is an appropriate basis for the claims asserted by the  
9 complainant.

10 It is beyond dispute that Nash is alleging KGA negligently provided architectural design  
11 services on a nonresidential project. Therefore, NRS 11.258 governs Nash’s claims. Nash failed  
12 to provide the appropriate Affidavit of Merit and expert report in support of its claims against  
13 KGA, inasmuch as Nash did not consult with an architectural design professional as required  
14 under NRS 11.258. Thus, Nash’s Complaint must be deemed void *ab initio*. Given the Supreme  
15 Court’s determination that a pleading that is void *ab initio* cannot be amended to bring it into  
16 compliance with the applicable Affidavit of Merit requirements, KGA respectfully requests the  
17 Court grant its Motion to Dismiss Nash’s Complaint, without leave to amend.

18 IV.

19 CONCLUSION

20 Nash unambiguously alleges KGA, an architect, performed professional design services  
21 related to the construction of a nonresidential structure. In making such allegations, Nash  
22 triggered the Affidavit of Merit requirements of NRS 11.258. Nevertheless, Nash failed to comply  
23 with NRS 11.258, as the expert consulted is not a design professional and cannot render opinions  
24 on a design professional’s work or standard of care. NRS 11.259 mandates dismissal of Nash’s  
25

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26 <sup>12</sup> *Id.* (Citing *Borger v. Dist. I.*, 120 Nev. 1021, 1029 (2004)).

27 <sup>13</sup> *Otak*, 260 P.3d at 410.

28 <sup>14</sup> *Otak*, 260 P.3d at 412.

1 Complaint. The Nevada Supreme Court's decision, in *Otak*, unambiguously establishes Nash  
2 cannot amend his Complaint to bring it into compliance with NRS 11.258. Therefore, KGA  
3 respectfully requests an order from the Court dismissing Nash's Complaint, without leave to  
4 amend, and requests the recovery of its attorney's fees due to Nash's clear disregard for NRS  
5 11.258.

6 DATED this 22<sup>nd</sup> day of November, 2019.

7 WEIL & DRAGE, APC

8 /s/ *Jeremy R. Kilber*

9 By: \_\_\_\_\_

10 JEREMY R. KILBER, ESQ.

11 (Nevada Bar No. 10643)

12 861 Coronado Center Drive, Suite 231

13 Henderson, NV 89052

14 Attorney for Defendant,

15 KITTRELL GARLOCK AND ASSOCIATES,

16 ARCHITECTS, AIA, LTD.  
17  
18  
19  
20  
21  
22  
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1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 22<sup>nd</sup> day of November, 2019, service of the foregoing  
3 **KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD.'S MOTION TO**  
4 **DISMISS PLAINTIFF'S COMPLAINT** was made this date by electronically serving a true and  
5 correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

6 Lawrence J. Semenza, Esq.  
7 LAWRENCE J. SEMENZA, LTD.  
3753 Howard Hughes Parkway, Suite 200  
8 Las Vegas, Nevada 89169  
Attorney for Plaintiff,  
9 KELLI NASH

10  
11 */s/ Joanna Medina*

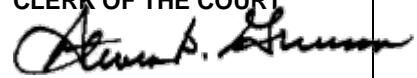
12 \_\_\_\_\_  
13 Joanna Medina, an Employee of  
14 WEIL & DRAGE, APC  
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# **Exhibit A**

# **Exhibit A**

LAWRENCE J. SEMENZA, LTD.  
3753 Howard Hughes Parkway, Suite 200  
Las Vegas, Nevada 89169  
Telephone: (702) 369-6999

Electronically Filed  
11/6/2019 3:11 PM  
Steven D. Grierson  
CLERK OF THE COURT



COMP  
Lawrence J. Semenza, Esq.  
Nevada Bar No. 789  
LAWRENCE J. SEMENZA, LTD.  
3753 Howard Hughes Parkway, Suite 200  
Las Vegas, Nevada 89169  
Telephone: (702) 369-6999  
Facsimile: (702) 995-9036  
  
Email: lsemenza@semenzalawfirm.com

CASE NO: A-19-804979-C  
Department 4

*Attorneys for Kelli Nash*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

KELLI NASH,

Plaintiff,

vs.

KITTRELL GARLOCK AND  
ASSOCIATES, ARCHITECTS, AIA, LTD.,  
a Nevada corporation, DBA KGA  
ARCHITECTS, and DOES 1-10, unknown  
individuals; and ROE CORPORATIONS 1-  
10, unknown business entities,

Defendants.

Case No.:

Dept. No.:

**COMPLAINT**

**Exempt from Arbitration  
Damages in Excess of \$50,000.00**

Plaintiff, KELLI NASH ("NASH") complains against Defendant KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD., a Nevada corporation, DBA KGA ARCHITECTS ("KGA"), as follows:

**PARTIES**

1. NASH is a resident of Clark County, Nevada, and a citizen of the State of Nevada.

2. KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD., is a Nevada corporation, DBA KGA ARCHITECTS and is a licensed Architectural firm, conducting business in the State of Nevada and in Clark County, Nevada.

3. The true names and capacities of the Defendants named herein as DOES 1 through 10, inclusive, are unknown to Plaintiff at this time and Plaintiff therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and therefore alleges, that each of the Defendants designated herein as DOES are responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiff will ask leave of this Court to amend his Complaint to insert the true names and capacities of said DOES when the same become ascertained, and join said Defendants in this action.

4. The true names and capacities of the Defendants named herein as ROE CORPORATIONS 1 through 10, inclusive, are unknown to Plaintiff at this time and Plaintiff therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and therefore alleges, that each of the Defendants designated herein as ROE CORPORATIONS are responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiff will ask leave of this Court to amend his Complaint to insert the true names and capacities of said ROE CORPORATIONS when the same become ascertained, and join said Defendants in this action.

5. Each and every one of the events or omissions giving rise to Plaintiff's claims occurred in Clark County, Nevada.

**FACTS COMMON TO ALL CLAIMS FOR RELIEF**

6. LVCVA created the Las Vegas Convention Center District and the Las Vegas Convention Center District Committee ("LVCCD") which developed the Las Vegas Convention Center District Strategic Masterplan ("Masterplan") in October 2015, identifying an overall

1 budget and created three phases for the program. Phase One consisted of the acquisition of the  
2 Riviera Hotel Acquisition, Demolition and Site Improvements including outdoor exhibition  
3 space.

4 7. LVCCD, on April 12, 2016, awarded RICHARDSON the construction contract for  
5 Phase One of the Masterplan.

6 8. Included in the Masterplan was the design, fabrication and installation of  
7 perimeter fencing and gates surrounding the property, which were specified, designed, and  
8 planned by KGA.

9 9. Upon information and belief, the specs and plans were provided to  
10 RICHARDSON and TIBERTI for fabrication and installation of the fencing and gates  
11 surrounding the property.

12 10. Upon information and belief, TIBERTI, following the design and drawings of  
13 KGA, and under the supervision of RICHARDSON, fabricated and installed the fencing and gates  
14 onto the property at Elvis Presley Way and Las Vegas Blvd. South.

15 11. After installation of the fencing and gates, and completion of Phase One, LVCVA  
16 proceeded with Phase Two of the Masterplan calling for construction of an additional exhibition  
17 hall on space previously used as outdoor exhibition space and parking.

18 12. Martin Harris/Turner was awarded the contract for construction of the Phase Two  
19 improvements and commenced construction of the Phase Two improvements on the site.

20 13. NASH was employed by Security Unlimited, Inc. ("Security Unlimited") to provide  
21 on-site Construction Security Services for the construction site.

22 14. One of the daily Security Guard duties of NASH at the beginning of the project  
23 workday at 5 a.m., was to open the manual rolling iron gates located at Las Vegas Blvd. South  
24 and Elvis Presley Way.

25 15. The rolling iron gate at Elvis Presley Way is approximately 30 to 33 feet in length  
26 and 6 feet in width and weighs approximately 2,000 pounds.

1 16. NASH had, prior to November 30, 2018, reported to the Martin Harris/Turner Site  
2 Superintendent and NASH's employer that the rolling iron gates located at Las Vegas Blvd.  
3 South were malfunctioning and in need of maintenance and/or repair.

4 17. On at least one prior occasion, employees of Martin Harris/Turner utilized a forklift  
5 to dislodge the stuck rolling gate at Las Vegas Blvd. South, and had been informed that the  
6 rolling gates at Elvis Presley Way were malfunctioning.

7 18. On November 30, 2018, at approximately 5:30 a.m., NASH while performing his  
8 assigned duties was unable to roll one of the two rolling iron gates at Elvis Presley Way because  
9 it was stuck.

10 19. Upon information and belief, the Site Supervisor and Site Safety Officer of Martin  
11 Harris/Turner assisted NASH in attempting to open the rolling Iron Gate; one Martin  
12 Harris/Turner employee at the East end of the rolling gate, the other Martin Harris/Turner  
13 employee at the center of the gate and NASH at the West end of the gate.

14 20. As the respective individuals were attempting to roll the Iron Gate, without warning,  
15 the gate fell onto NASH's legs pinning him to the ground under the 2,000 pound Iron Gate.

16 **FIRST CLAIM FOR RELIEF**  
17 **(Negligence)**

18 21. Plaintiff repeats and realleges each and every fact and allegation contained in this  
19 Complaint and incorporates the same herein by reference as though fully set forth herein.

20 22. Plaintiff alleges, upon information and belief, that Defendant KGA breached their  
21 duty to NASH by negligently designing said gates and failed to warn of or remedy such  
22 hazardous and dangerous conditions as to cause Plaintiff's injuries.

23 23. As a result of the Defendant's actions and/or inactions, Plaintiff is entitled to damages  
24 in excess of \$15,000.00.



24. As a result of Defendant's actions, Plaintiff has been forced to retain the undersigned counsel to prosecute this action and Plaintiff is entitled to recover reasonable attorneys' fees and costs.

**SECOND CLAIM FOR RELIEF**  
**(Strict Products Liability)**

26. Plaintiff repeats and realleges each and every fact and allegation contained in this Complaint and incorporates the same herein by reference as though fully set forth herein.

27. Plaintiff alleges, upon information and belief, that Defendant KGA, was the designer of the subject defective rolling gates located on Elvis Presley Way, Clark County, Nevada.

28. Plaintiff, upon information and belief, alleges that the defect existed at the time the design left Defendant's possession.

29. Defendant, KGA's designed rolling gate, if fabricated and installed as designed, would be used in a foreseeable manner as intended for its use.

30. Defendant's defectively designed product caused injuries to Plaintiff.

31. As a result, Plaintiff is entitled to damages in excess of \$15,000.00.

32. As a result of Defendant's actions, Plaintiff has been forced to retain the undersigned counsel to prosecute this action and Plaintiff is entitled to recover reasonable attorneys' fees and costs.

**THIRD CLAIM FOR RELIEF**  
**(Negligent Infliction of Emotional Distress)**

33. Plaintiff repeats and realleges each and every fact and allegation contained in this Complaint and incorporates the same herein by reference as though fully set forth herein.

34. Defendant, KGA's conduct, as described herein, was negligent, causing emotional distress to Plaintiff.

35. Plaintiff suffered severe or emotional distress as the actual or proximate result of Defendants' conduct.

36. As a result of the Defendants' actions and/or inactions, Plaintiff is entitled to damages in excess of \$15,000.00.

1 37. As a result of Defendant's actions, Plaintiff has been forced to retain the undersigned  
2 counsel to prosecute this action and Plaintiff is entitled to recover reasonable attorneys' fees and  
3 costs.

4 WHEREFORE, Plaintiff prays for judgment as follows:

- 5 A. For damages in an amount to be determined at trial, but in excess of \$15,000.00;  
6 B. Attorneys' fees and costs of suit;  
7 C. Prejudgment and post-judgment interest on the amounts owed; and  
8 D. Any further relief this Court deems proper.

9 DATED this 4<sup>th</sup> day of November 2019.

10 LAWRENCE J. SEMENZA, LTD.

11 By: /s/ Lawrence J Semenza  
12 Lawrence J. Semenza, Esq.  
13 Nevada Bar #789  
14 3753 Howard Hughes Parkway, Suite 200  
15 Las Vegas, NV 89169

16 *Attorneys for Kelli Nash*  
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# **Exhibit B**

# **Exhibit B**

# **Michael Panish**

**Expert Witness & Consultant**

## **Construction Systems**

**(888) 902-4272 (Ask for Sharon)**

**General Contractors - Cabinet, Millwork & Paint Contractors**

**Electrical Contractors - Door, Lock & Security Equipment Contractors**

### **Curriculum Vitae**

#### **Consultant, Forensic Analyst, and Expert Witness:**

Michael Panish is an expert witness, forensic analyst, and consultant in the field of construction. Michael has a consistent proven record of success for his clients. He has consulted and testified in deposition and court proceedings in hundreds of personal injury cases pertaining to automatic door, manual door, and gate related issues for both plaintiff and defense. He has consulted on many occasions on premises security issues relating to adult day healthcare centers and long-term care facilities, and has testified both in deposition and court pertaining to abuse in a residential care facility. He has consulted and testified in depositions and trial for cabinetry and architectural millwork product defect and product liability cases for both plaintiff and defense. He has consulted and testified regarding construction defects, product liability, and poor workmanship relating to contractor vs. homeowner disputes, and has been hired by both plaintiff and defense with excellent results for both sides. He has consulted and testified with regard to slip, trip, and fall and building code issues for both plaintiff and defense. To date, Michael has been retained by plaintiff, defense, and co-defense on over 1250 cases across the country since the year 2000.

Michael Panish is licensed in the State of California as a General Building Contractor, Electrical Contractor, Door, Lock & Security Equipment Contractor, Cabinet & Millwork Contractor, and Painting & Finish Specialties Contractor. Michael has over 35 years of hands-on experience in the construction industry. He owns an active general construction company and does not rely upon his expert services for his source of income. Michael Panish has testified in most areas of construction, with emphasis in the categories of construction defects, doors, automatic doors, gates, slip/trip/fall, cabinetry, and architectural millwork. He is a truly unbiased and a highly qualified expert in all professional fields that he practices. Michael has offices in California and New England and is available for nationwide inspection, consultation, forensic analysis, and testimony.

Expert services available for building inspections (all types), site evaluation, product evaluation, analysis of defects, poor workmanship, assessment of building charges, costs and estimates, built per plans verifications, jobsite safety, analysis of improper application, proper installation, product defect or liability. All facets of construction related claim analysis. Expert witness, forensic analysis, evaluation and consultant relating to existing buildings, building components such as cabinetry, finishes, doors, automatic doors, gates, windows, hardware, plumbing, concrete, paint, electrical, roofing, water intrusion and waterproofing issues, acoustical sound isolation and control, heating, air conditioning, video surveillance and security integration for residential, commercial, County and State government facilities. Commercial and industrial construction and project management (all facets) for new and remodel. Construction consultation for existing construction projects of all kinds.

### **General Construction**

Commercial, Industrial, Residential, Multi-Residential, Housing Tract Developments, Condominium, Retail Construction, Shopping Malls and Strip Centers. Chain store and franchised business construction. Healthcare Facilities, Restaurant and food processing facilities. Walk-in refrigeration and cold storage units. Auto malls, car rental facilities, storage and repair facility construction and service maintenance.

### **Cabinets and Millwork**

Custom Fabrication, manufacturing and installation of cabinets, counter tops, furniture, casework, architectural millwork. Wall protection products and railing systems. Historic wainscoting and architectural treatments.

### **Door, Lock and Security**

Doors, door hardware, automatic doors, gates, drop down doors, garage doors, access controls, fire/life safety, ADA (American Disabilities Act) installations/applications. Video and audio surveillance. Themed attractions and integration into historically significant structures.

### **Hospitality Industry**

Hotel concept design construction (model room mock-up), hotel renovation, and new construction. ADA modifications and repurposing of existing rooms and equipment areas.

### **Healthcare Construction**

Hospitals, surgical centers, acute and transitional care, nursing homes and senior housing facilities, senior/adult day care centers, medical offices, labs, pharmacies, medical records storage facilities. X-ray and specialty diagnostic and treatment facilities. Installation of proprietary contract equipment such as Gamma knife, MRI, Magnetic scanners. Installation of security hardware, video surveillance equipment, centralized nurse/patient monitoring stations, card key access systems.

### **Specialty Construction**

Clean rooms, lead lined rooms, air locks, sally ports, psychiatric interlocks, and delayed exiting device installations. Acoustic construction, acoustic isolation for offices, manufacturing facilities, and installation of engineered noise canceling products. Recording studios and sound stages. Acoustically isolated environments and home theatre installations.

### **Historic Preservation**

Historic home renovations and modernization, maintaining the historic fabric and integrity of structural and architectural elements. Fine finish cabinet making, and antique furniture restorations and finishing. Museum quality reproductions and displays.

### **About the Expert**

Mike Panish, president of Construction System has more than 35 years hands-on experience in most construction trades in new construction and remodeling for commercial buildings (interior and exterior), and is an accomplished cabinetmaker, woodworker, and fine furniture craftsman. Mike is a licensed general building contractor, electrical contractor, cabinet and millwork contractor, door, lock & security equipment contractor, and Painting Contractor in the State of California. Mike has a strong engineering background specializing in acoustics and recording studio isolation and engineering design. He is often called upon by organizations to train employees for cabinet fabrication and assembly practices, including layout, design, proper usage of tools and materials, material selection, material quantity, appropriate finish for the application, finishing technique, procedures, and installation.

### **About his Company**

Construction Systems has three separate divisions:

**Construction Systems** is a full service construction company, specializing in residential, commercial, and industrial construction, with emphasis on medical, hospitality, and county facility environments. Mike Panish is a hands-on working owner of this company and is on-site during all projects. Michael Panish is a Consultant, Forensic Analyst and Expert Witness, analyzing commercial, industrial, residential, multi-residential, condominium, and retail applications. The company also specializes in historic properties preservation and current modernization. Construction Systems is proficient in working in high security environments such as jails, holding cells, courthouses, courtroom detention areas, sally ports, county and state penal facilities. Expert in design and installation of video monitoring and surveillance equipment. Construction Systems is approved and registered by the State of California as a vendor and has (AOC) Administrative Office of the Courts clearance to work unattended in the California court systems.

**Cabinet Systems** is a custom cabinet shop specializing in commercial cabinetry, counter tops and furniture for all commercial and residential applications. Cabinet Systems designs, custom fabricates product and installs with their own crews. Cabinet Systems is established as a custom installer for many national cabinet companies. Specialty trades include relamination and refinishing of existing surfaces and extensive use and knowledge of application and relamination of plastic laminate (P-lam) surfaces. Cabinet Systems is a counter top manufacturer/vendor/installer of wood, laminated, solid surface, rock, stone, tile, stainless steel and laboratory surfaces.

Custom fabrication of specialty applications, furniture, and architectural millwork. Fabricator of custom glass display cases and store point of purchase furnishings. Fabricator of glass and Plexiglas store fixtures and custom installations. Furniture, cabinetry, and millwork finishes including antique processes, shellacs, varnishes, faux finishes, historic reproduction surfacing and finishing, paints, lacquers, chemical sealing, clear coats, milk paints, historic stenciling, distressing, sand blasting, surface blemishing, and recreation of aged appearance. Michael Panish is a consultant and expert witness for many aspects of cabinet construction including delamination of surfaces, finishes, quality of work or installation, design defects, and casework failures.

**Door and Hardware Systems** furnishes, installs, and repairs commercial doors, door frames, hardware and locks. Mike Panish founded this division primarily for the purpose of establishing a benchmark for medical, commercial and hotel markets. ADA and Life Safety Compliance, sales and installation of custom fabricated and standard doors, fire doors, frames, hardware, access controls and alarm systems. Hospital Joint Commission (JACHO/OSHPD) site readiness. Schools, churches and public venue service, installation and repair. Michael Panish is a consultant and expert witness for a variety of door, lock and hardware issues involving all types of doors including manual pedestrian doors, gates, automatic doors, revolving doors, swinging doors, fire doors, drop & rollup doors, bi pass doors, sliding doors, garage doors (sectional/drop down/sliding), storefront (metal & wood), laminated, raised panel and french doors. Door frames, all types of locks, door closers, panic devices, exit devices, sensors, access controls, and door hardware. Life safety, fire codes, ADA upgrades, custom concealed usage doorways and openings, and safe room entry devices. Special need entry systems for handicapped usage, themed attraction security concealed devices and entry controls.

**Summary:**

Michael Panish has more than 35 years hands-on experience in new construction, remodel, renovation, consultation, project management, inspection, and analysis for all types of construction. Michael is expert in all facets & trades of (new/remodel construction) for healthcare facilities, commercial, industrial, hotel, casino, institutional, multi-residential, condominium, and residential. Emphasis on door, gate & door hardware issues, custom cabinetry, counter top and furniture fabrication and installation, fire & life safety related access issues, ADA compliance & life safety for all door functions, appropriate door hardware, panic devices, door & door frame installations, proper function of door systems, fire inspection analysis for doors, acoustic applications and electronic systems, data/ phone cabling, healthcare construction requiring clean rooms, labs, negative air, air lock, psychiatric access to secure areas, jails, holding cells, courtrooms and county facility buildings. Michael is expert in all phases of cabinet making, manufacturing, design and installation. Antique restoration and repair of fine cabinetry and architectural millwork in antique homes such as William's Mansions throughout Southern California (Bel-Air and Beverly Hills). He is expert in evaluation with regard to water damage and structural water intrusions. Extensive renovation to historic residences and commercial owned properties through government contracts and county issued jobs. Multi-residential waterproofing issues addressed. Condominiums, hotels, hospital water intrusion problems. Identification of high water table issues and improper basement substructure. Waterproofing of slabs, foundation walls and pool elements in commercial and residential applications. Highly experienced in analyzing water damaged structures of most kinds. Concrete foundation and block wall defects. Dry stacked colonial foundations and walls in historic structures. Contractor and consultant for restoration of historically significant structures in New England, including water intrusion problems with basements, proper and adequate ventilation and rework to existing post and beam structures to preserve the architectural elements and to modernize and update historical buildings for current ADA compliance and current usage. Site evaluation and cost determination for adaptive ADA usage of existing structures (physical injuries requiring long term care and special needs cases). Specialist in concealment of modern elements in historic environments. Commercial construction as a general contractor, cabinet manufacturer and installer, installer of proprietary electronic and acute monitoring systems making use of an electrical background with specialized cabling and isolated wiring system needs. Acoustic design / build and fabrication of

solutions to acute problems relating to sound control and dispersion. Experienced in design and construction of recording studios, sound containment, isolation rooms, and formal training in electro/acoustical specialty design implementation and finish work.

Michael Panish is a licensed General Building Contractor, Electrical contractor, Cabinet and Millwork Contractor, Door, Lock and Security Hardware Equipment Contractor, and Painting Contractor. Michael is a consultant and expert witness for most facets of commercial and residential construction related problems and occurrences relating to defects, poor workmanship, premises liability, product liability, and personal injury. Building foundation and construction analysis. Waterproofing, water damage, water seepage issues. Extensive involvement in most wet environments needing moisture intrusion containment and remediation of mold issues.

California Contractors State License # 519191  
B General Building Contractor  
C-10 Electrical Contractor  
C-6 Cabinetry, Carpentry, Millwork Contractor  
C-28 Door, Lock, Security Equipment Contractor  
C-33 Painting & Decorating Contractor  
Audio and Acoustical Design Engineer  
California Real Estate License #640555  
2010 – 2019 AMBest Recommended Insurance Professional  
AMBest Insurance Law Podcast Online Interviews  
Author of many construction related technical articles, available by request or online.

**Comments:**

Available for nationwide consulting, expert witness assignments, project management, site inspections, and cost analysis. Training and teaching workshops for all aspects of construction and cabinetry. Experienced in consulting with most construction issues for attorney analysis of cases and determination of validity of claim. Extensive experience working for both plaintiff and defendant based on discovery of empirical evidence derived from thorough on-site analysis and document review. Professional inspections, analysis, reports, depositions, arbitrations, mediations, and in court testimony. Michael Panish has been proven to provide highly credible and solid testimony during deposition and court appearances and has been influential and beneficial to the clients he has been asked to support. Michael Panish is dependable, reliable, and has a professional conduct and appearance. Custom fabrication of working demonstration models, demonstration samples, and display models for court presentations.

“Michael Panish is the most effective and straight forward expert you will ever find. He is knowledgeable, thorough and cuts right to the issues. Highly recommend! The expert you need for your case!”

Contact: Sharon (888) 902-4272 (Immediate Response)  
Website: [www.ConstructionWitness.com](http://www.ConstructionWitness.com) Email: [Expert@ConstructionWitness.com](mailto:Expert@ConstructionWitness.com)  
*Offices in California and New England - Available for Nationwide Inspection & Testimony*



# **Exhibit C**

# **Exhibit C**

11.258

**SENATE BILL 243:** Requires an affidavit and a report in an action against certain design professionals involving nonresidential construction. (BDR 2-895)  
I disclose that I am a member of a law firm with members who are registered lobbyists and have worked on S.B. 243. I have filed a disclosure under Nevada Revised Statute (NRS) 281.501 which is on file with the Director of the Legislative Counsel Bureau as a public document. I further disclose that I have not accepted a gift or loan from the client of the law firm on behalf of this. I have no pecuniary interest, nor does the law firm, in the passage or failure of Senate Committee on Judiciary (March 23, 2007 Page 18)

this bill, and I do not have a private capacity to the interest of others with respect to this bill. That is as a result of the application of the Nevada Commission on Ethics Opinion No. 88-58, "In the Matter of the Opinion Request of Bruce L. Woodbury, Clark County Commissioner," where it would not, if passed, affect the clients of the law firm I am affiliated with any differently than other people similarly situated. RUSSELL M. ROWE (American Council of Engineering Companies of Nevada):

I am here on behalf of S.B. 243 which is certificate of merit legislation. A certificate of merit requires an attorney making a claim against a design professional—an architect, engineer, landscape architect or land surveyor—to file an affidavit concurrently with the pleading stating there is a reasonable basis to bring a lawsuit in a nonresidential construction defect matter. This bill mirrors the language already in NRS 40 for residential construction defects and merely expands it to nonresidential construction defect claims, bringing uniformity to Nevada statutes. Thirteen other states have similar laws and none of those states distinguishes between residential and nonresidential construction defects. Those statutes are broader than this bill and apply to any action brought against a design professional for any claim of negligence. This bill only applies to construction defect claims and specifically nonresidential claims.

A construction defect claim against a design professional, unlike claims against a contractor or subcontractor, is a professional negligence claim. To prove a professional negligence claim, you have to show the design professional failed to meet a standard of care. There is only one way to prove that. You have to bring an expert to the hearing to show the standard of care and that the design professional fell below that standard of care. Attorneys have to find an expert to prove their case. The certificate of merit requires the expert earlier in the process. They review the case to show merit to a claim and a reasonable basis to proceed with a suit. The public policy behind this legislation is to limit meritless lawsuits against design professionals but keep access to the courts. This helps the court system because it streamlines cases by clarifying the parties, which results in fewer parties in a case, less discovery, speedier trials and greater chance of settlement, all of which help alleviate the backlog and caseload in our district courts. It does not bar access to the courts, but it does ensure cases have merit. (This bill applies whether you file the claim as a plaintiff or you are a defendant making a third-party complaint.) Senate Committee on Judiciary March 23, 2007 Page 17

TIMOTHY ROWE (Associated General Contractors Nevada Chapter):

The Associated General Contractors (AGC) oppose S.B. 243. There is no crisis in construction defect litigation in commercial settings. These cases do not involve multiple plaintiffs or multiple buildings. They involve an owner, contractor, maybe a design professional and one or two subcontractors. Design professionals are not brought into commercial construction cases with meritless claims. There is at least arguable merit behind the claims. Legislation is not necessary in the area of commercial construction litigation.

Another problem is an affidavit where a report is required to be filed with the court. They become a public record. I cannot understand why any engineer or design professional would want that kind of information in the public record. It will make cases more difficult to settle. From the standpoint of AGC wherein a contractor is involved in a lawsuit and there may be claims of design deficiency, these kinds of lawsuits are more difficult to settle. They often involve complex issues and problems. In some situations, S.B. 243 presents an obstacle in settling those kinds of cases.

GARY E. MILLIKEN (Associated General Contractors Las Vegas Chapter):  
This legislation will significantly delay and increase costs for commercial construction and settlements or decisions as it complicates issues.

FRED L. MILLERBY (American Institute of Architects):

I support S.B. 243. Having expert testimony ahead of time or an affidavit helps clarify a legitimate claim and lead to settlements.

SENATOR CARE:

I am going to incorporate the disclosure I made the second week of the session which is on file with the Legislative Counsel Bureau. Like myself, Mr. Timothy Rowe is a partner in the firm of McDonald Carano Wilson, Limited Liability Partnership.

CHAIR ANODEL:

We will close the hearing on S.B. 243.

We have a bill draft request (BDR) from the Governor's Office with the usual disclaimers on not being obligated to support in Committee or on the floor. Senate Committee on Judiciary March 23, 2007 Page 18



**BILL DRAFT REQUEST 14-1428:** Revises provisions relating to the registration of sex offenders and offenders convicted of a crime against a child. (Later introduced as S.B. 471.)  
SENATOR WASHINGTON MOVED TO INTRODUCE BDR 14-1428.  
SENATOR HORSFORD SECONDED THE MOTION.  
THE MOTION CARRIED. (SENATORS McGINNESS AND NOLAN WERE ABSENT FOR THE VOTE.)

This legislation is often referred to as the certificate of merit legislation. It applies to litigation involving design professionals in their professional capacity and arising out of commercial construction projects. It is essentially the commercial counterpart of legislation previously adopted by the 2001 Legislature relating to actions involving residential projects. Consistent with that earlier legislation, design professionals are identified in this bill as architects and engineers, including landscape architects and land surveyors, who are licensed or certificated by the State of Nevada. In general terms, the bill requires an attorney to file an affidavit with its initial pleading. The affidavit would state that the attorney has consulted with an independent design professional in the appropriate field and upon such consultation and review has concluded that the complaint against the design professional has a reasonable basis in law and fact. The affidavit must also contain a report submitted by the independent design professional setting forth the basis for that professional's opinion that there is a reasonable basis for commencing the action against the design professional.

Why should this legislation be enacted? This legislation does not preclude litigation against the design professional. What it does mean is that those suits that are filed against the design professional have a reasonable basis in law and fact that merit the expenditure of judicial time and effort. The standard of proof for professional negligence requires a finding that the design professional has failed to employ the standard of care and skill exercised by reputable members of the same profession. This law ensures that actions brought against the design professional have a reasonable likelihood of meeting that burden of proof at the time of trial.

As to the design professional who was a defendant in a case, it means that there has been a careful review of that professional's actions and in the opinion of his or her peers there is a reasonable basis to conclude that the design professional has committed an error.

As to the claimant attorney, it is good litigation practice in that it ensures that in professional negligence cases the analysis generally done before the complaint is filed, and accordingly the complaint, can be specific as to the errors alleged. The requirement of an affidavit in actions involving professionally-licensed individuals is not new or unique in the State of Nevada. As stated earlier, such affidavits are already required in affidavits against design professionals in a residential construction setting. Similar types of affidavits are required against other professionals in Nevada such as affidavits used in cases against medical and dental professionals pursuant to NRS 41A.071. Assembly Committee on Judiciary May 14, 2007 Page 14

I am told there are 13 other states that have similar affidavit requirements with respect to design professionals and in each of those states there is no limitation between whether the affidavit applies to either residential or commercial construction projects.

If enacted, this law would merely comport the commercial actions to the same as residential actions in the State of Nevada.

**Chairman Anderson:**

I am a bit concerned over this issue. There are 3,000 to 4,000 homes being constructed in various phases by a large developer, usually offering three or four models. In my early youth I worked for a land surveying company and one of the jobs was to set the pegs where they were going to drill the holes to set the foundation. When you come to a commercial structure, they are usually individually designed and sit in a different format; they are not all "cookie-cutters." How will this work with that kind of situation? There would not be a recurring design flaw in every building and that was one of the things that we were concerned about with home construction. Does this give an unusual protection because of that?

**Bob Crowell:**

It does not give an unusual protection. It extends the concept of an affidavit from residential to commercial projects, and, in general, with commercial projects there are more sophisticated claimants who are participating in that type project. Frankly, although the number of cases involving commercial projects is not as great as in residential, it does have more significance in those cases because they tend to be more engineering-specific and complex. Under those types of cases, this law would require that in complex cases of engineering standards an expert must look at the situation before filing a lawsuit.

**Assemblyman Horne:**

Can you walk us through exactly how this might take place and its follow-through procedure? I have concerns about being able to provide such an affidavit and get an expert to do so for these types of projects which are different from single family homes or large casinos.

**Mark Ferrario, representing the American Council of Engineering Companies:**

I'll use as an example a case that I just arbitrated a few months ago. In that case, I represented an owner of a large condominium project in an arbitration proceeding against the contractor. There were issues that arose in the case as it unfolded involving the plans and conduct of the architect. As those issues matured, and before either side did anything in regard to the architect, we hired Assembly

Committee on Judiciary May 14, 2007 Page 15



experts. I hired an architectural expert and so did the other side. Our respective experts evaluated the plans and drawings before we brought any of those issues into the case. Essentially what you would do in a commercial case—and I want to echo Mr. Crowell, you are dealing typically with very sophisticated litigants—if a design issue is suspected or if it arises, you first evaluate it by bringing in people in the same field to look at the conduct of the design professional. It is exactly what you would do in a medical malpractice case. It is not a bar to bringing the suit; it accelerates something that is going to happen anyway in the lawsuit. You cannot typically get to the jury or to the end of one of these lawsuits without having an expert opine on the propriety of the conduct of the design professional. Basically, you are rolling that up to the front of the lawsuit, and it is not a bar to entry to the courthouse.

**Assemblyman Horne:**

There is a statute of limitations on filing lawsuits; what is it in this type of case? Let us say it is 2 years, and your client-engineer comes to you 18 months out after it has been noticed that there is a problem, leaving you 6 months to file. Do you suppose that six months would be sufficient time to get an expert, have them review the plans, and get you the affidavit in order to file a timely complaint?

**Mark Ferraro:**

Six months would be no problem at all. Where you would be in trouble, which you are anytime you need to get an expert, is if you were right up against the statute of limitations. There is language in this bill that allows the filing of an action without the certificate in those circumstances such that you can toll the statute and then come in later and supplement with an affidavit from an expert. It is not the intent of this bill to preclude legitimate claims against design professionals.

**Assemblyman Horne:**

Have there been a number of these litigations?

**Mark Ferraro:**

We are seeing an increase in the number of commercial lawsuits involving construction-related activities. From my perspective, it appears to be a natural extension of what we saw in the residential arena.

**Chairman Anderson:**

The people involved in this are in a relatively specialized field at the very beginning of the design phase. Do the lawsuits coming forward tend to be in this area, or are they pulled in as a result of other kinds of construction? Assembly Committee on Judiciary May 14, 2007 Page 18





OPPS  
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Email: lsemenza@semenzalawfirm.com

*Attorneys for Kelli Nash*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

KELLI NASH,

Plaintiff,

vs.

KITTRELL GARLOCK AND  
ASSOCIATES, ARCHITECTS, AIA,  
LTD., a Nevada corporation, DBA KGA  
ARCHITECTS, and DOES 1-10, unknown  
individuals; and ROE CORPORATIONS 1-  
10, unknown business entities,

Defendants.

Case No.: A-19-804979-C

Dept. No.: IV

PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT

Date of Hearing: January 9, 2020

Time of Hearing: 9:00 a.m.

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT**

Plaintiff, Kelli Nash, by and through his attorneys of record, Lawrence J. Semenza, Esq.,  
of Lawrence J. Semenza, Ltd. and Opposes Defendant's Motion to Dismiss Plaintiff's  
Complaint.

1 This Opposition is based upon the Memorandum of Points and Authorities submitted  
2 herein, all pleadings on file, any evidence adduced at the hearing, and any oral argument the  
3 Court will entertain.

4  
5 DATED this 9<sup>th</sup> day of December 2019.

6 LAWRENCE J. SEMENZA, LTD.

7 By: Lawrence J. Semenza  
8 LAWRENCE J. SEMENZA, ESQ.  
9 3753 Howard Hughes Parkway Suite 200  
Las Vegas, NV 89169

10 *Attorneys for Kelli Nash*

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I. STATEMENT OF FACTS

13 Plaintiff, Kelli Nash, was seriously injured while employed as a contract security guard  
14 on the Las Vegas Convention and Visitors Authority (“LVCVA”) construction site located at  
15 Elvis Presley Way in Clark County. Plaintiff further alleges that as a part of the Master Plan was  
16 the design, fabrication and installation of perimeter fencing and gates surrounding the property,  
17 which were specified, designed and planned by KGA.

18  
19 Subsequent preliminary investigation discloses that the contract between LVCVA and  
20 KGA was to develop the bid documents for the demolition of the Riviera Hotel and Casino and  
21 site improvements. As of now, it is unknown, and unclear, if KGA, as a design professional,  
22 provided architectural services or provided other unrelated services to LVCVA. It may be that  
23 even though KGA is an architectural firm, when KGA provides services unrelated to its trade, no  
24 Affidavit of Merit pursuant to NRS § 11.258.  
25  
26  
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28

II. LEGAL ARGUMENT

Defendant's analysis of NRS § 11.258 is not flawed, and if the analysis is correct, the Defendant is entitled to have Nash's complaint dismissed.

One issue that must first be resolved is, even though KGA is an architecture design professional, if the services rendered are unrelated to the the field of architecture, is the Affidavit of Merit required. If not, than the case should proceed because the bid documents, including the drawings of the gates as part of the site improvements are unrelated to the practice of architecture, and relate only to the demolition of the Riviera and site improvements.

Should the Court rule that even though services rendered by KGA are unrelated to the field of architecture and that the Affidavit of Merit must be filed to proceed in the litigation, then the Court will probably dismiss Nash's complaint.

The Affidavit of Merit was filed with Plaintiff's complaint, and the single issue is whether the affidavit is sufficient because the expert consulted by the Affiant, who concluded, based upon his experience, that there was negligent design of the gate because of the size of the roller components, the threaded rod attachment of the sliding components and the overall weight and size of the gate created the failure of the gate, was not an architect, nor a design professional in any design disciplines set forth in NRS § 11.258(6).

At this point in the proceedings, and based only upon the sparse drawings of the gate and components available, and the site visit by the retained expert it would appear that the retention of an architect to review the sparse drawings, will be necessary, and in all likelihood, after the retention of the expert, that the expert witness will come to the same reasoned conclusion, that if KGA did the design drawings, they created the dangerous condition that lead to the injuries suffered by Mr. Nash.

1 III. CONCLUSION

2 Based upon the foregoing, Defendant's Motion to Dismiss Plaintiff's complaint should  
3 be denied.

4 DATED this 9<sup>th</sup> day of December 2019.

5 LAWRENCE J. SEMENZA, LTD.

6  
7 By: Lawrence J. Semenza  
8 LAWRENCE J. SEMENZA, ESQ.  
9 3753 Howard Hughes Parkway Suite 200  
10 Las Vegas, NV 89169

11 *Attorneys for Kelli Nash*

12 **CERTIFICATE OF SERVICE**

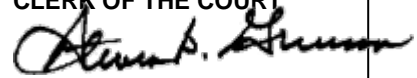
13 Pursuant to NRCP 5(b) and NCFER 9, I hereby certify that on December 9, 2019,  
14 I caused to be sent by electronic transmission through Odyssey's online filing system, a true copy  
15 of PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S  
16 COMPLAINT to the following registered email address:

17 Jeremy R. Kilber, Esq.  
18 Weil & Drage, APC

19 jkilber@weildrage.com

20 /s/ Lawrence J Semenza  
21 Lawrence J Semenza  
22  
23  
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1           2.       I make this Declaration pursuant to NRS § 11.258 in support of Plaintiff's  
2 Complaint filed in this action.  
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1 **RPLY**

2 JEREMY R. KILBER, ESQ.

3 (Nevada Bar No. 10643)

4 WEIL & DRAGE, APC

5 861 Coronado Center Drive, Suite 231

6 Henderson, NV 89052

7 (702) 314-1905 • Fax (702) 314-1909

8 [jkilber@weildrage.com](mailto:jkilber@weildrage.com)

9 Attorney for Defendant,

10 KITTRELL GARLOCK AND ASSOCIATES,

11 ARCHITECTS, AIA, LTD.

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 KELLI NASH,

) CASE NO: A-19-804979-C

)

15 Plaintiff,

) DEPT NO.: IV

)

16 vs.

)

17 ) **KITTRELL GARLOCK AND ASSOCIATES,**

18 ) **ARCHITECTS, AIA, LTD.'S REPLY TO**

19 KITTRELL GARLOCK AND  
20 ASSOCIATES, ARCHITECTS, AIA, LTD.,

) **PLAINTIFF'S OPPOSITION TO ITS MOTION**

21 a Nevada corporation, DBA KGA

) **TO DISMISS PLAINTIFF'S COMPLAINT**

22 ARCHITECTS; and DOES 1-10, unknown

)

23 individuals; and ROE CORPORATIONS 1-10,

) Date of Hearing: January 9, 2020

24 unknown business entities,

)

25 ) Time of Hearing: 9:00 a.m.

26 Defendants.

)

27 )

28 )

29 **KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD.'S REPLY TO**  
30 **PLAINTIFF'S OPPOSITION TO ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

31 COMES NOW Defendant KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS,  
32 AIA, LTD. ("KGA"), by and through its counsel of record, the law firm of WEIL & DRAGE, APC, and  
33 hereby files its Reply to Plaintiff KELLI NASH'S ("Plaintiff" or "Nash") Opposition to KGA's Motion to  
34 Dismiss Plaintiff's Complaint.

35 ///

1 This Reply is made and based upon the attached Memorandum of Points and Authorities  
2 submitted herein, all pleadings and papers filed herein, and any oral argument at the time of hearing on this  
3 matter.

4 DATED this 26<sup>th</sup> day of December, 2019.

5 WEIL & DRAGE, APC

6 */s/ Jeremy R. Kilber*

7 By: \_\_\_\_\_

8 JEREMY R. KILBER, ESQ.

9 (Nevada Bar No. 10643)

10 861 Coronado Center Drive, Suite 231

11 Henderson, NV 89052

12 Attorney for Defendant,

13 KITTRELL GARLOCK AND ASSOCIATES,

14 ARCHITECTS, AIA, LTD.  
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## LEGAL ARGUMENT

Nash's Opposition makes a single argument in opposition to KGA's Motion. Namely, Nash argues (despite the allegations made in his Complaint) he is unsure what KGA's scope of work was on the project. Nash then curiously concludes that inasmuch as he cannot say for certain what KGA's scope of work is, he should not have to comply with the affidavit of merit requirement under NRS 11.258. Nash's position obviously lacks merit.

It is axiomatic that for purposes of deciding a motion to dismiss, the Court must accept as true the allegations set forth in the subject Complaint. Indeed, Nevada’s Supreme Court has specifically found that for purposes of adjudicating a motion to dismiss, “the district court, must accept as true each of the complaint’s particularized factual allegations[.]” *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006). See also, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Therefore, when determining whether Nash is required to comply with NRS 11.258 when asserting claims against KGA, the Court need only review the allegations made in Nash’s Complaint.

As the Court will note, Nash, subject to the penalties of NRCP 11, states the following in his Complaint:

1. “KITRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD., is a Nevada corporation, DBA **KGA ARCHITECTS** and is a licensed **Architectural firm**, conducting business in the State of Nevada and in Clark County, Nevada.”<sup>1</sup>
2. “**Included in the Masterplan was the design, fabrication and installation of perimeter fencing and gates** surrounding the property, **which were specified, designed, and planned by KGA.**”<sup>2</sup>

///

<sup>1</sup> See Nash's Complaint, paragraph 2. (Emphasis added).

<sup>2</sup> *Id.* at paragraph 8. (Emphasis added).



1 3. “TIBERTI, following the design and drawings of KGA, and under the supervision of  
2 RICHARDSON, fabricated and installed the fencing and gates onto the property at Elvis Presley  
3 Way and Las Vegas Blvd. South.”<sup>3</sup>

4 4. “Defendant KGA breached their duty to NASH by negligently designing said gates and  
5 failed to warn of or remedy such hazardous and dangerous conditions as to cause Plaintiff’s  
6 injuries.”<sup>4</sup>

7 5. “Defendant KGA, was the designer of the subject defective rolling gates located on Elvis  
8 Presley Way, Clark County, Nevada.”<sup>5</sup>

9 While KGA denies the gate design was improper, it does confirm gate plans were included in the  
10 project design documents. Consequently, to the extent Nash wishes to assert claims against KGA,  
11 arising from the design of the gate, Nash must comply with NRS 11.258.

12 In addition to the foregoing, Nash’s argument regarding whether an affidavit of merit and expert  
13 report are required is contradicted by Nash’s own actions in this matter. If, as Nash argues, no affidavit  
14 of merit and expert report is required because Nash is unsure of KGA’s scope, it begs the question “why  
15 did Nash attempt to file an attorney affidavit and defective report from a non-design professional when he  
16 commenced his action against KGA?” The simplest answer is, Nash is fully aware he is required to  
17 comply with NRS 11.258 given his allegations and KGA’s project architect status, but he failed to  
18 comply with the requirements of the statute when doing so.

19 Nash’s failure to comply with NRS 11.258 stems from Nash’s attempt to use a non-design  
20 professional expert that does not have an architecture license. This is contrary to the express language of  
21 the statute, which defines an expert as “a person who is licensed in a state to engage in the practice of  
22 professional engineering, land surveying, architecture or landscape architecture.” Upon offering a report  
23 from a non-design professional whom does not have the requisite licensure, the report was *per se* invalid.

24 ///

25  
26 <sup>3</sup> Nash Complaint at paragraph 10. (Emphasis added).

27 <sup>4</sup> *Id.* at paragraph 22. (Emphasis added).

28 <sup>5</sup> *Id.* at paragraph 27. (Emphasis added).

1 As Nash filed and served his Complaint alleging KGA provided architectural design services for  
2 the subject project, and in the Complaint he alleges KGA's design services were negligently performed,  
3 Nash must provide an NRS 11.258 compliant affidavit of merit and expert report. A simple review of the  
4 affidavit and expert report Nash provided establishes Nash did not comply with NRS 11.258(1)(b) and  
5 11.258(3)(b).

6 First, Nash's counsel did not consult with an expert (as defined by NRS 11.258(6)). Second,  
7 the author of the report cannot state he is an expert licensed in the requisite design field, as he does not  
8 hold an architecture license. Consequently, Nash did not comply with NRS 11.258. Therefore, KGA  
9 respectfully requests the Court dismiss Nash's Complaint pursuant to NRS 11.259.

## 10 II.

### 11 CONCLUSION

12 As discussed extensively in KGA's Motion to Dismiss, as well as herein, Nash failed to comply  
13 with NRS 11.258 when he filed and served his Complaint on KGA, an architect. Nash's Complaint  
14 clearly alleges KGA provided architectural design services for a non-residential construction project, and  
15 that said design services were negligently performed. Upon making such allegations, Nash was obligated  
16 to comply with all aspects of NRS 11.258. Nash failed to comply with provisions NRS 11.258(1)(b)  
17 and 11.258(3)(b), inasmuch as Nash's counsel failed to consult a licensed architect, and the individual  
18 authoring the report cannot state they are experienced in the requisite design discipline because they do  
19 not have the licensure required to serve as an "expert" as defined by NRS 11.258(6).

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1 This is now the second time Nash failed to comply with NRS 11.258 when commencing his  
2 action against KGA. In a prior action, Nash's Complaint against KGA was dismissed by stipulation,  
3 pursuant to NRS 11.259. See Stipulation and Order attached hereto as *Exhibit 1*. Upon dismissal of  
4 this action for Nash's failure to comply with NRS 11.258, KGA requests the Court dismiss this matter  
5 with prejudice, pursuant to NRCP 41, barring Nash from making a third attempt to sue KGA for the  
6 same transactions and occurrences.

7 DATED this 26<sup>th</sup> day of December, 2019.

8 WEIL & DRAGE, APC

9 /s/ *Jeremy R. Kilber*

10 By: \_\_\_\_\_

11 JEREMY R. KILBER, ESQ.

12 (Nevada Bar No. 10643)

13 861 Coronado Center Drive, Suite 231

14 Henderson, NV 89052

15 Attorney for Defendant,

16 KITTRELL GARLOCK AND ASSOCIATES,

17 ARCHITECTS, AIA, LTD.

18

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1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 26<sup>th</sup> day of December, 2019, service of the foregoing  
3 **KITTRELL GARLOCK AND ASSOCIATES, ARCHITECTS, AIA, LTD.'S REPLY TO**  
4 **PLAINTIFF'S OPPOSITION TO ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT**  
5 was made this date by electronically serving a true and correct copy of the same, through Clark County  
6 Odyssey eFileNV, to the following parties:

7 Lawrence J. Semenza, Esq.  
8 LAWRENCE J. SEMENZA, LTD.  
3753 Howard Hughes Parkway, Suite 200  
9 Las Vegas, Nv 89169  
Attorney for Plaintiff,  
10 KELLI NASH  
11  
12

13 */s/ Joanna Medina*

14 \_\_\_\_\_  
Joanna Medina, an Employee of  
15 WEIL & DRAGE, APC  
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# **Exhibit 1**

# **Exhibit 1**

ORIGINAL

Electronically Filed  
10/15/2019 11:58 AM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

1 SAO

2 JEREMY R. KILBER, ESQ.  
3 (Nevada Bar No. 10643)  
4 WEIL & DRAGE, APC  
5 2500 Anthem Village Drive  
6 Henderson, NV 89052  
7 (702) 314-1905 • Fax (702) 314-1909  
8 [jkilber@weildrage.com](mailto:jkilber@weildrage.com)  
9 Attorney for Defendant,  
10 KITTRELL GARLOCK AND ASSOCIATES,  
11 ARCHITECTS, AIA, LTD.

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 KELLI NASH,

11 Plaintiff,

12 vs.

13 LAS VEGAS CONVENTION AND  
14 VISITORS AUTHORITY, a Nevada  
15 Governmental Authority; W.A.  
16 RICHARDSON BUILDERS, LLC, a Nevada )  
17 limited liability company; KITTRELL )  
18 GARLOCK AND ASSOCIATES, )  
19 ARCHITECTS, AIA, LTD., a Nevada )  
20 corporation, DBA KGA ARCHITECTS; THE )  
21 TIBERTI COMPANY, LLC, a Nevada )  
22 limited liability company, DBA TIBERTI )  
23 FENCE COMPANY; TURNER MARTIN- )  
24 HARRIS, a Joint Venture, composed of )  
25 TURNER CONSTRUCTION COMPANY, a )  
26 Delaware Corporation Qualified to conduct )  
27 business in Nevada, and MARTIN-HARRIS )  
28 CONSTRUCTION, INC., a Nevada )  
29 Corporation; and DOES 1-10, unknown )  
30 individuals; and ROE CORPORATIONS 1- )  
31 10, unknown business entities, )

Defendants.

) CASE NO: A-19-800028-C

) DEPT NO.: VI

) STIPULATION AND ORDER TO DISMISS  
) DEFENDANT KITTRELL GARLOCK AND  
) ASSOCIATES ARCHITECTS, AIA, LTD.

///

///

{01617976;2}

1 **STIPULATION AND ORDER TO DISMISS DEFENDANT KITTRELL GARLOCK AND**  
2 **ASSOCIATES ARCHITECTS, AIA, LTD.**

3 It is HEREBY STIPULATED AND AGREED by and between KITTRELL GARLOCK  
4 AND ASSOCIATES ARCHITECTS, AIA, LTD. ("KGA"), by and through its undersigned  
5 counsel of record, and Plaintiff, Kelli Nash ("NASH"), by and through his undersigned counsel of  
6 record, that NASH's Complaint and the Causes of Action alleged therein against KGA be  
7 dismissed, without prejudice, and that each party is to bear their own fees and costs of suit,  
8 resulting in a dismissal without prejudice of the action against KGA in Case No. A-19-800028-C.

9 IT IS FURTHER STIPULATED AND AGREED that NASH concedes he failed to comply  
10 with NRS 11.258 when he commenced his action against KGA.

11 IT IS FURTHER STIPULATED AND AGREED that NASH concedes KGA's Motion to  
12 Dismiss is meritorious, thus, in an effort to avoid incurring any further fees and costs related to  
13 opposing said motion and appearing in court for hearing, NASH's action against KGA shall be  
14 dismissed, without prejudice, pursuant to NRS 11.259.

15 IT IS FURTHER STIPULATED AND AGREED that inasmuch as this stipulated  
16 dismissal is pursuant to NRS 11.259, NASH's action against KGA was void *ab initio* under  
17 Nevada case law precedence of *Otak v. Eighth Judicial District*, 260 P.3d 408 (Nev. 2011), thus,  
18 NASH may not amend the present action should he wish to reinstate his claims against KGA.  
19 However, NASH and KGA stipulate and agree that pursuant to *Otak*, NASH may commence a  
20 new, separate, action against KGA should NASH wish to pursue claims against KGA.

21 **IT IS SO STIPULATED.**

22 DATED this 30<sup>th</sup> day of September, 2019.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2019.

23 WEIL & DRAGE, APC

LAWRENCE J. SEMENZA, LTD.

24 By: 

By: 

JEREMY R. KILBER, ESQ.

LAWRENCE J. SEMENZA, ESQ.

(Nevada Bar No. 10643)

(Nevada Bar No. 789)

Attorney for Defendant,

3753 Howard Hughes Pkwy, Suite 200

KITTRELL GARLOCK AND

Las Vegas, NV 89169

ASSOCIATES ARCHITECTS AIA, LTD.

Attorney for Plaintiff, KELLI NASH



1 **STIPULATION AND ORDER TO DISMISS DEFENDANT KITTRELL GARLOCK AND**  
2 **ASSOCIATES ARCHITECTS, AIA, LTD.**

3 It is HEREBY STIPULATED AND AGREED by and between KITTRELL GARLOCK  
4 AND ASSOCIATES ARCHITECTS, AIA, LTD. ("KGA"), by and through its undersigned  
5 counsel of record, and Plaintiff, Kelli Nash ("NASH"), by and through his undersigned counsel of  
6 record, that NASH's Complaint and the Causes of Action alleged therein against KGA be  
7 dismissed, without prejudice, and that each party is to bear their own fees and costs of suit,  
8 resulting in a dismissal without prejudice of the action against KGA in Case No. A-19-800028-C.

9 IT IS FURTHER STIPULATED AND AGREED that NASH concedes he failed to comply  
10 with NRS 11.258 when he commenced his action against KGA.


11 IT IS FURTHER STIPULATED AND AGREED that NASH concedes KGA's Motion to  
12 Dismiss is meritorious, thus, in an effort to avoid incurring any further fees and costs related to  
13 opposing said motion and appearing in court for hearing, NASH's action against KGA shall be  
14 dismissed, without prejudice, pursuant to NRS 11.259.

15 IT IS FURTHER STIPULATED AND AGREED that inasmuch as this stipulated  
16 dismissal is pursuant to NRS 11.259, NASH's action against KGA was void *ab initio* under  
17 Nevada case law precedence of *Otak v. Eighth Judicial District*, 260 P.3d 408 (Nev. 2011), thus,  
18 NASH may not amend the present action should he wish to reinstate his claims against KGA.  
19 However, NASH and KGA stipulate and agree that pursuant to *Otak*, NASH may commence a  
20 new, separate, action against KGA should NASH wish to pursue claims against KGA.

21 **IT IS SO STIPULATED.**

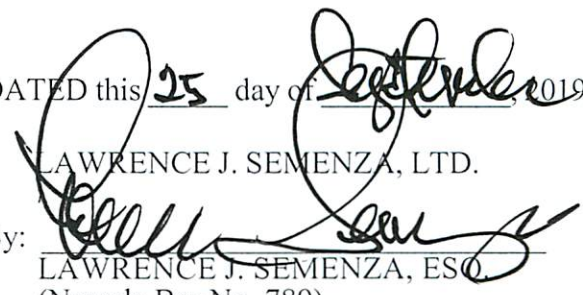
22 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

23 WEIL & DRAGE, APC

24 By:   
25 JEREMY R. KILBER, ESQ.  
26 (Nevada Bar No. 10643)  
27 Attorney for Defendant,  
28 KITTREL GARLOCK AND  
ASSOCIATES ARCHITECTS AIA, LTD.

DATED this 25 day of September, 2019.

LAWRENCE J. SEMENZA, LTD.

By:   
LAWRENCE J. SEMENZA, ESQ.  
(Nevada Bar No. 789)  
3753 Howard Hughes Pkwy, Suite 200  
Las Vegas, NV 89169  
Attorney for Plaintiff, KELLI NASH



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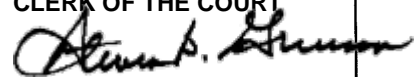
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**PET.APP.003378**

**EXHIBIT 56**  
**PETITIONERS' APPENDIX**

**EXHIBIT 56**  
**PETITIONERS' APPENDIX**



1 **RSPN**  
2 THEODORE PARKER, III, ESQ.  
3 Nevada Bar No. 4716  
4 **PARKER, NELSON & ASSOCIATES, CHTD.**  
5 2460 Professional Court, Suite 200  
6 Las Vegas, Nevada 89128  
7 Telephone: (702) 868-8000  
8 Facsimile: (702) 868-8001  
9 Email: [tparker@pnalaw.net](mailto:tparker@pnalaw.net)

10 *Attorneys for Defendants,*  
11 *Richardson Construction, Inc. and*  
12 *The Guarantee Company of North America USA*

13 **DISTRICT COURT**  
14 **CLARK COUNTY, NEVADA**

15 CITY OF NORTH LAS VEGAS,  
16  
17 Plaintiff,

18 v.

19 DEKKER/PERICH/SABATINI LTD.;  
20 RICHARDSON CONSTRUCTION, INC.;  
21 NEVADA BY DESIGN, LLC D/B/A  
22 NEVADA BY DESIGN ENGINEERING  
23 CONSULTANTS; JW ZUNINO &  
24 ASSOCIATES, LLC; MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS;  
O'CONNOR CONSTRUCTION  
MANAGEMENT INC.; NINYO & MOORE,  
GEOTECHNICAL CONSULTANTS;  
JACKSON FAMILY PARTNERSHIP LLC  
D/B/A STARGATE PLUMBING; AVERY  
ATLANTIC, LLC; BIG C LLC; RON  
HANLON MASONRY, LLC; THE  
GUARANTEE COMPANY OF NORTH  
AMERICA USA; P & W BONDS, LLC;  
PAFFENBARGER & WALDEN, LLC;  
DOES I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C  
DEPT. NO.: VIII

**DEFENDANTS RICHARDSON  
CONSTRUCTION, INC. AND THE  
GUARANTEE COMPANY OF NORTH  
AMERICA USA'S LIMITED RESPONSE  
TO MELROY ENGINEERING, INC.  
D/B/A MSA ENGINEERING  
CONSULTANTS' MOTION TO DISMISS  
ON ORDER SHORTENING TIMES AND  
ALL JOINDER THERETO**

25 COMES NOW, Defendants, RICHARDSON CONSTRUCTION, INC. and THE  
26 GUARANTEE COMPANY OF NORTH AMERICA USA (hereinafter "Defendants"), by and  
27 through their attorney of record, THEODORE PARKER, III, ESQ. of the law firm of PARKER,  
28 NELSON & ASSOCIATES, CHTD., and hereby file this Limited Response to Melroy Engineering,

**PET.APP.003379**

1 Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time and all  
2 Joinders.

3 This Limited Response is made and based upon the pleadings and papers on file herein, the  
4 points and authorities included herewith, and such oral argument as the Court may entertain at the  
5 time of the hearing of this matter.

6 DATED this \_\_\_\_ day of February, 2020.

7 **PARKER, NELSON & ASSOCIATES, CHTD.**

8  
9 THEODORE PARKER, III, ESQ.  
10 Nevada Bar No. 4716  
2460 Professional Court, Suite 200  
11 Las Vegas, Nevada 89128  
*Attorneys for Defendants,*  
12 *Richardson Construction, Inc. and*  
*The Guarantee Company of North America USA*

13  
14 **I.**

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 This matter involves allegations of alleged construction defects at a fire station. Plaintiff,  
17 CITY OF NORTH LAS VEGAS (hereinafter "Plaintiff"), alleges that the fire station is suffering  
18 distress "due to a combination of excessive differential settlement and expansive soil activity." (See  
19 Plaintiff's Complaint, filed on July 11, 2019, at p. 6:25-7:7, a true and correct copy on file herein  
20 with the Court. Dekker/Perich/Sabatini, LTD. (hereinafter "DPS"), served as the design professional  
21 for the fire station and contracted with Plaintiff to serve as such. DPS hired various design  
22 professionals including MELROY ENGINEERING, INC. d/b/a MSA ENGINEERING  
23 CONSULTANTS (hereinafter "MSA"), NEVADA BY DESIGN, LLC d/b/a NEVADA BY  
24 DESIGN ENGINEERING CONSULTANTS, JW ZUNINO & ASSOCIATES, LLC. (hereinafter  
collectively referred to as "Design Defendants".)

25 On February 4, 2020, MSA filed a Motion to Dismiss on Order Shortening Time alleging that  
26 Plaintiff failed to comply with NRS 11.258. The remainder of the Design Defendants, and DPS, filed  
27

1 joinders. Defendants now file the instant Limited Response.

2 Defendant, RICHARD CONSTRUCTION, INC. (hereinafter "RICHARDSON") served as  
3 the general contractor for the fire station. As the general contractor, RICHARDSON relied on the  
4 Design Defendants designs and plans in order to construct the fire station. This would include all  
5 soils and geotechnical engineering and grading reports. To the extent Plaintiff is alleging the design  
6 was improper, or that the geotechnical reports are inaccurate leading to an improper design,  
7 RICHARDSON has no liability. RICHARDSON is not qualified to, nor was RICHARDSON ever  
8 qualified to, perform any soils investigation or geotechnical reports. RICHARDSON cannot be held  
9 responsible for any deficiencies in the design of the fire station.

10 DATED this 16<sup>th</sup> day of February, 2020.

11 **PARKER, NELSON & ASSOCIATES, CHTD.**

12  
13   
THEODORE PARKER, III, ESQ.

14 Nevada Bar No. 4716

2460 Professional Court, Suite 200

Las Vegas, Nevada 89128

15 *Attorneys for Defendants,*

16 *Richardson Construction, Inc. and*

*The Guarantee Company of North America USA*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of the Law Offices of PARKER, NELSON & ASSOCIATES, CHTD., and that on this 18<sup>th</sup>, day of February, 2020 and pursuant to NRCP 5(b), I served a true and correct copy of the foregoing **DEFENDANTS RICHARDSON CONSTRUCTION, INC. AND THE GUARANTEE COMPANY OF NORTH AMERICA USA'S LIMITED RESPONSE TO MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' MOTION TO DISMISS ON ORDER SHORTENING TIMES AND ALL JOINDER THERETO** on the party(s) set forth below by:

- ☐ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Las Vegas, NV, postage prepaid, following ordinary business practices.
- ☐ Facsimile transmission, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26, by faxing a true and correct copy of the same to each party addressed as follows:
- ☐ By E-mail: by electronic mail delivering the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m.
- ☒ By EFC: by electronic filing and service with the Court delivering the document(s) listed above via E-file & E-serve (Odyssey) filing system.

Party	Attorney	E-Mail
Plaintiff	Justin L. Carley, Esq. Aleem A. Dhalla, Esq. SNELL & WILMER L.L.P. 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, NV 89169 (702) 784-5200 Fax: (702) 784-5252	<a href="mailto:jcarley@swlaw.com">jcarley@swlaw.com</a> <a href="mailto:adhalla@swlaw.com">adhalla@swlaw.com</a>
Defendant, Jackson Family Partnership LLC d/b/a Stargate Plumbing	Richard L. Peel, Esq. Ronald J. Cox, Esq. PEEL BRIMLEY LLP 3333 E. Serene Avenue, Suite 200 Henderson, NV 89074-6571 (702) 990-7272 Fax: (702) 990-7273	<a href="mailto:rpeel@peelbrimley.com">rpeel@peelbrimley.com</a> <a href="mailto:rcox@peelbrimley.com">rcox@peelbrimley.com</a>

Party	Attorney	E-Mail
	Shannon G. Splaine, Esq. LINCOLN GUSTAFSON & CERCOS, LLP 3960 Howard Hughes Parkway, Suite 200 Las Vegas, NV 89169 (702) 257-1997 Fax: (702) 257-2203	<a href="mailto:ssplaine@lgclawoffice.com">ssplaine@lgclawoffice.com</a>
	Paul A. Acker, Esq. RESNICK & LOUIS, P.C. 8925 W. Russell Road, Suite 220 Las Vegas, NV 89148 (702) 997-3800 Fax: (702) 997-3800	<a href="mailto:packer@rlattorneys.com">packer@rlattorneys.com</a>
Defendant, Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants	John T. Wendland, Esq. Anthony D. Platt, Esq. WEIL & DRAGE, APC 2500 Anthem Village Drive Henderson, NV 89052 (702) 314-1905 Fax: (702) 314-1909	<a href="mailto:jwendland@weildrage.com">jwendland@weildrage.com</a> <a href="mailto:aplatt@weildrage.com">aplatt@weildrage.com</a>
Defendant, Dekker/Perich/Sabatini, Ltd.	John T. Wendland, Esq. Jeremy R. Kilber, Esq. WEIL & DRAGE, APC 2500 Anthem Village Drive Henderson, NV 89052 (702) 314-1905 Fax: (702) 314-1909	<a href="mailto:jwendland@weildrage.com">jwendland@weildrage.com</a> <a href="mailto:jkilber@weildrage.com">jkilber@weildrage.com</a>
Defendant, Melroy Engineering, Inc. d/b/a MSA Engineering Consultants	Jeremy R. Kilber, Esq. WEIL & DRAGE, APC 2500 Anthem Village Drive Henderson, NV 89052 (702) 314-1905 Fax: (702) 314-1909	<a href="mailto:jkilber@weildrage.com">jkilber@weildrage.com</a>
Defendant, Ninyo & Moore, Geotechnical Consultants	Jorge A. Ramirez, Esq. Jonathan C. Pattillo, Esq. WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP 300 S. Fourth Street, 11th Floor Las Vegas, NV 89101-6014 (702) 727-1400 Fax: (702) 727-1401	<a href="mailto:Jorge.Ramirez@wilsonelser.com">Jorge.Ramirez@wilsonelser.com</a> <a href="mailto:Jonathan.Pattillo@wilsonelser.com">Jonathan.Pattillo@wilsonelser.com</a>

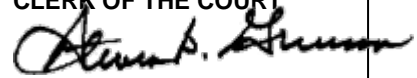
Party	Attorney	E-Mail
Defendants, P & W Bonds, LLC and Paffenbarger & Walden, LLC	Charles W. Bennion, Esq. ELLSWORTH & BENNION, CHTD. 777 N. Rainbow Blvd., Suite 270 Las Vegas, NV 89107 (702) 658-6100 Fax: (702) 658-2502	<a href="mailto:charles@silverstatelaw.com">charles@silverstatelaw.com</a>
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/s/Jeanne L. Calix  
An employee of PARKER, NELSON & ASSOCIATES CHTD.



**EXHIBIT 57**  
**PETITIONERS' APPENDIX**

**EXHIBIT 57**  
**PETITIONERS' APPENDIX**



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*Attorneys for Defendant JW Zunino &  
Associates, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

CITY OF NORTH LAS VEGAS,  
Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD. Et al.,  
Defendants.

CASE NO.: A-19-798346-C

DEPT NO.: VIII

**Hearing Date: February 20, 2020  
Hearing Time: 10:00 a.m.**

**DEFENDANT JW ZUNINO & ASSOCIATES, LLC'S REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT MELROY ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS' MOTION TO DISMISS ON ORDER  
SHORTENING TIME**

COMES NOW Defendant JW ZUNINO & ASSOCIATES, LLC. ("JWZ"), by and through  
its attorneys of record, the law firm of FORAN GLENNON PALANDECH PONZI & RUDLOFF,  
PC, and hereby files its Reply to Plaintiff City of North Las Vegas' ("Plaintiff's") Opposition to  
Defendant Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' ("MSA's") Motion To  
Dismiss On Order Shortening Time.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. LEGAL ARGUMENT**

**A. Plaintiff's Opposition Fails to Establish that its Affidavit of Merit and Expert Report Against JWZ, the Landscape Architect, Complied with NRS 11.258 and Otak**

Plaintiff's Opposition serves as little more than a request for carte blanche to use a meaningless affidavit and expert report to commence an action against various defendants whose work is neither implicated nor considered in blatant violation of well established Nevada law. Not only is the "expert" wholly unqualified to opine as to JWZ's work as a landscape architect, but it is clear that the "expert" did not even attempt to render opinions as to JWZ's work. To support its Opposition, Plaintiff essentially takes the position that each design professional defendant provided the exact same services as every other design professional involved in the project and based thereon, this single expert is enough to the comply with NRS 11.258. That is obviously not permitted as this Court is aware. Nevada law specifically requires that the expert be knowledgeable in the relevant discipline to which he or she is opining. NRS 11.258(1)(c). Only then, can the attorney reasonably conclude, based on review and consultation with the expert, that the action has a reasonable basis in law and fact. NRS 11.258(1)(d). Put simply, Plaintiff was required to either consult with an expert qualified to offer opinions in every discipline at issue in this case or to consult with multiple experts as needed to comply with NRS 11.258(1) for each defendant. Otherwise, Plaintiff has unilaterally rendered the requirement moot.

The whole point of the affidavit and expert report requirement is to "ensure that such actions be brought in good faith based on **competent** expert opinion." *Otak Nevada, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011) (emphasis added) (abrogated on other grounds). The Nevada Supreme Court made it clear that the expert requirement cannot be taken lightly, determining that a complaint filed by one claimant that relied upon the expert report of another failed to meet the requirement, despite the report being made against the same defendant. *Id.* Each claimant must file "a separate expert report and attorney affidavit that are particularized to that party's claims" against each defendant and "each party must justify its claims

1 of nonresidential construction malpractice based on that party's relationship with the defendant.”  
2 *Id.* at 600. 260 P.3d at 412.

3 In this case, the report does not even consider JWZ as a defendant, making Plaintiff’s error  
4 more fatal than the error contemplated in *Otak*. There is no logical connection between  
5 geotechnical engineering and landscape architecture. Geotechnical engineering pertains to the  
6 scientific methods and engineering principles in the use of materials for engineering works.  
7 Landscape architecture is the design of outdoor areas, landmarks, and structures to achieve  
8 environmental, social-behavioral, or aesthetic outcomes. These design disciplines are so unrelated,  
9 separate licensure is required to practice in these fields. *See, e.g.* Nevada State Board of Landscape  
10 Architecture registration requirements, available at <http://nsbla.nv.gov/Registration/>. Given the  
11 significant differences between these design disciplines, and the fact that Mr. Marsh does not have  
12 licensure as a landscape architect, Mr. Marsh’s opinions regarding landscape architecture, even if  
13 he had rendered any, could not prove or disprove any matter related to JWZ. This likely explains  
14 why there is nothing in Mr. Marsh’s report or declaration that confirms Mr. Marsh did anything to  
15 analyze Plaintiff’s claims with respect to JWZ, which stands to reason since Mr. Marsh is not  
16 qualified to perform such analysis.

17 A geotechnical engineer that is not also a licensed landscape architect engineer cannot  
18 legally provide landscape architecture services. If the geotechnical engineer cannot legally provide  
19 landscape architecture design services in the absence of proper licensure, they also cannot be  
20 deemed an “expert” under NRS 11.258(6). Such is the case because NRS 11.258(6) requires  
21 licensure in the relevant design discipline to be an expert. Because Mr. Marsh has no such license,  
22 Plaintiff failed to consult with a licensed expert in the relevant design discipline related to JWZ’s  
23 scope of work on the project. Accordingly, the Complaint must be dismissed with prejudice as it  
24 is void ab initio against JWZ.

25 **B. Neither the Report nor the Affidavit Address JWZ’s Design Services**

26 Plaintiff’s Opposition fails to cite a single statement in Mr. Marsh’s report or conclusions  
27 that it relied on to conclude Mr. Marsh is knowledgeable in the field of Landscape Architecture.  
28

1 Throughout Plaintiff's Opposition, as well as Mr. Marsh's report and CV, Mr. Marsh is repeatedly  
2 identified as a geotechnical engineer.

3 Conversely, there is not a single reference anywhere in Mr. Marsh's report related to  
4 landscape architecture services, nor is JWZ or its scope of work ever referenced. Mr. Marsh clearly  
5 did not analyze Plaintiff's claims against JWZ, and Plaintiff's Counsel clearly did not consult with  
6 Mr. Marsh concerning JWZ's scope of work. Had either Mr. Marsh or Plaintiff's Counsel  
7 addressed JWZ's scope of work, there would have been reference to same in expert report or  
8 counsel's affidavit. Obviously, this is not the case, and its omission is fatal to Plaintiff's Complaint  
9 as it pertains to JWZ.

10 C. **Plaintiff's Constructive Omission of the term "Relevant History" Necessitates**  
11 **this Court's Consideration of the Legislative History.**

12 Plaintiff astonishingly argues that the term "relevant discipline" does not apply to require  
13 that its chosen expert have any sort of knowledge or experience in the field(s) for which each  
14 defendant rendered services. Plaintiff believes that the attorney's "reasonable belief" renders the  
15 expert's actual qualifications meaningless. Essentially, Plaintiff argues that its expert's knowledge  
16 in a discipline is good enough. This argument lacks merit.

17 The only reasonable reading of the statute means that "'relevant discipline" means the  
18 expert consulted must be licensed in the same design discipline as the defendant against whom the  
19 expert is offering their opinions. Plaintiff, itself is the party that is trying to make "relevant  
20 discipline" ambiguous. Due to Plaintiff's attempt to muddy the waters, the legislative history  
21 regarding NRS 11.258 is poignant, and necessary, in determining what qualifications a proposed  
22 expert must have to comply with the statute.

23 NRS 11.258 requires the consulting expert to be licensed in the same discipline as the party  
24 against whom the expert is offering their opinions. The black letter law in the statute, which states  
25 "the expert who was consulted is knowledgeable in the relevant discipline involved in the  
26 action[.]" NRS 11.258(1)(c). Plaintiff is putting landscape architecture at issue in the action by  
27 suing JWZ. Thus, Plaintiff had the legal obligation to consult with an expert qualified in landscape  
28 architecture, the relevant discipline with regards to any claims against JWZ's work.

1 Plaintiff knows that it failed to do its due diligence with regard the non-geotechnical  
2 defendants in this case. That is why it is grasping at a desperate attempt to ignore the parts of the  
3 statute that it does not like. Plaintiff is asking the Court to ignore the term “relevant discipline” so  
4 that the Court will conclude that consulting with any expert is enough. By making this argument,  
5 it is Plaintiff that is arguing the statute is ambiguous, thus it is appropriate for the Court to look at  
6 what the legislature intended to accomplish by enacting NRS 11.258.

7 As discussed in the prior pleadings, there is no doubt that the legislature intended a  
8 complainant’s counsel to consult with an expert in the same field of design to ensure that there is  
9 merit to the complainant’s claims right out of the gate, instead of years into the litigation. The  
10 Nevada Supreme Court said the same thing in *Otak*. 127 Nev. at 599, 260 P.3d at 412. Interpreting  
11 NRS 11.258 as Plaintiff desires would render NRS 11.258 meaningless.

## 12 **II. CONCLUSION**

13 Plaintiff’s expert is not qualified in the “relevant discipline” of landscape architecture. A  
14 competent attorney cannot “reasonably believe” otherwise. Plaintiff’s expert’s report did not  
15 discuss the work performed by JWZ and cannot have provided any basis for Counsel to have  
16 concludes that the claims against JWZ have a “reasonable basis in law and fact.” The expert  
17 provided no statement of his experience in landscape architecture, as his report did not discuss  
18 landscape architecture. The expert provided no conclusion that there was a reasonable basis for  
19 filing the action against JWZ. Accordingly, the Complaint against JWZ must be deemed void ab  
20 initio and dismissed with prejudice.

21 Dated this 19<sup>th</sup> day of February 2020.

22 FORAN GLENNON PALANDECH PONZI &  
23 RUDLOFF PC

24 By: /s/ Lee H. Gorlin

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27 *Attorneys for Defendant JW Zunino &*  
28 *Associates, LLC*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **DEFENDANT JW ZUNINO & ASSOCIATES, LLC'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' MOTION TO DISMISS ON ORDER SHORTENING TIME** was served by the method indicated:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SERVICE:** submitted to the above-entitled Court for electronic service upon the Court's Service List for the above-referenced case.
- ☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

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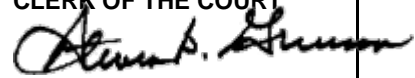
Dated: February 19, 2020.

/s/ Rita Tuttle  
An Employee of Foran Glennon



**EXHIBIT 58**  
**PETITIONERS' APPENDIX**

**EXHIBIT 58**  
**PETITIONERS' APPENDIX**



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Attorneys for Ninyo & Moore, Geotechnical  
Consultants

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD.;  
RICHARDSON CONTRSUTION, INC.;  
NEVADA BY DESIGN, LLC D/B/A  
NEVADA BY DESIGN ENGINEER  
CONSULTANTS; JW ZUNINO &  
ASSOCIATES, LLC; MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS;  
O'CONNOR CONSTRUCTION  
MANAGEMENT INC.; NINYO & MOORE,  
GEOTECHNICAL CONSULTANTS;  
JACKSON FAMILY PARTNERSHIP LLC  
D/B/A STARGATE PLUMBING; AVERY  
ATLANTIC LLC; BIG C LLC; RON  
HANLON MASONRY, LLC; THE  
GUARANTEE COMPANY OF NORTH  
AMERICA USA; P&W BONDS, LLC;  
PAFFENBARGER & WALDEN, LLC;  
DOES I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-19-798346-C

Dept. No. VIII

**NINYO & MOORE, GEOTECHNICAL  
CONSULTANT'S REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANT'S AND  
JOINDERS TO MOTION TO DISMISS ON  
ORDER SHORTENING TIME**

**Hearing Date: February 20, 2020**

**Hearing Time: 10:00 a.m.**

**NINYO & MOORE, GEOTECHNICAL CONSULTANT'S REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT MELROY ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANT'S AND JOINDERS TO MOTION TO DISMISS ON  
ORDER SHORTENING TIME**

COMES NOW Defendant, NINYO & MOORE, GEOTECHNICAL CONSULTANTS (“N&M”), by and through its attorneys of record, the law offices of WILSON, ELSE, MOSKOWITZ, EDELMAN, & DICKER, LLP, hereby its Reply to Plaintiff CITY OF NORTH LAS VEGAS’ (the “City” or “Plaintiff”)’s Opposition to MELROY ENGINEERING, INC.’S (“MSA”) Motion to Dismiss and all Joinders On Order Shortening Time.

This Reply is made and based upon the attached Memorandum of Points and Authorities submitted herein, all pleadings and papers filed herein, and any oral argument at the time of hearing on this matter.

DATED this 19<sup>th</sup> day of February, 2020.

WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER LLP

/s/ *Jorge A. Ramirez*

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Attorneys for Ninyo & Moore, Geotechnical Consultants

1                                    **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2            **I.        LEGAL ARGUMENT**

3            Plaintiff's Opposition to the motion to dismiss for its failure to comply with NRS 11.258,  
4 makes the argument that it can comply with the strict statutory obligations of NRS 11.258 by utilizing  
5 an expert report authored over 1 ½ years before the litigation was ever filed, where the scope and  
6 limitations of the report exclude any analysis or opinions as to whether any design professional fell  
7 below the standard of care, where the report is devoid of any opinion that any expert fell below the  
8 standard of care and citing exculpatory evidence including direct warnings by N&M that the soils were  
9 unsuitable and that all expansive soil underneath any improvement needed to be removed and replaced  
10 with appropriate structural fill. The argument in Plaintiff's opposition is absurd and leads to a  
11 complete gutting of the NRS 11.258. Plaintiff's failure to comply with the strict requirements of NRS  
12 11.258 renders Plaintiff's complaint void ab initio. N&M must be dismissed from this action.

13                    **A. Plaintiff's Affidavit of Merit against N&M fails to comply with the requirements of**  
14                    **NRS 11.258 as it contains no conclusions or basis for any conclusions related to the**  
15                    **design professional services of N&M**

16            Plaintiff conveniently glosses over the requirements of NRS 11.258 and treats them as a  
17 ministerial check list without requiring any substance.

18            NRS 11.258(3)(d)&(e) state:

19            3.        In addition to the statement included in the affidavit pursuant to subsection 1, a report  
20 must be attached to the affidavit. Except as otherwise provided in subsection 4, the  
report must be prepared by the expert consulted by the attorney and ***must include,***  
***without limitation:***

21                    (d)        **The conclusions** of the expert and **the basis for the conclusions;** and

22                    (e)        A statement that the expert has concluded that there is a reasonable basis for  
filing the action.

23            Completely missing from Plaintiff's affidavit of merit is any evidence that Plaintiff met with  
24 American Geotechnical Inc., ("AGI") prior to its report dated December 11, 2017. AGI's report scope  
25 does not include services to provide an analysis of the design services provided by any design  
26 professional on the project. See N&M Joinder, Exhibit B, p.2, §1.0 AGI Report. Nor would it, since  
27 the report was authored over 1 ½ years prior to the filing of the present complaint.

1 N&M submitted a Geotechnical Evaluation on August 29, 2007. The report listed the pre-  
2 construction activities N&M performed: (*See* Ninyo & Moore Joinder, Exhibit “A,” N&M  
3 Geotechnical Evaluation)

- 4 • Coordination and mobilization for subsurface exploration, including clearance of  
5 existing utilities at the site, which was conducted through Underground Service Alert.
- 6 • Drilling, logging, and sampling of four exploratory borings, which were advanced to  
7 depths ranging from approximately 6.5 to 16.5 feet. The borings were performed to  
8 evaluate subsurface soil conditions at the site and to obtain soil samples for laboratory  
9 testing.
- 10 • Performance of laboratory tests on selected soil samples obtained from the exploratory  
11 borings to evaluate the in-place moisture content and dry density, gradation, plasticity,  
12 consolidation characteristics, R-value, sodium content, sulfate content, sodium-sulfate  
13 content, and total salts (solubility).

14 Plaintiff’s expert at American Geotechnical Inc., (“AGI”) in its report dated December 11,  
15 2017, quotes the N&M Report, the warnings contained in that report and then its findings regarding  
16 the subsurface conditions with recommendations. N&M specifically found that the site is underlain  
17 primarily by “quaternary-age alluvium” (native soil). It performed four exploratory borings of the site  
18 to analyze the soil. N&M’s conclusions were that it found no known geotechnical or geological  
19 conditions that would preclude construction of the proposed structure. However, N&M gave the  
20 following opinion and recommendation:

21 “... it is our opinion that the existing fill soils and underlying near surface alluvial  
22 (native) soils, which are moderately porous, highly gypsiferous, and ***have a high***  
23 ***expansion potential***, are not suitable for support of the proposed structures and  
24 improvements in their present condition. ***These soils will need to be removed from***  
25 ***structure and improvement areas and replaced with adequately compacted***  
26 ***structural fill.*** (emphasis added).

1 AGI concedes that N&M advised the City about the expansive soil in the area and  
2 recommended replacing it. N&M recommended placing structural and backfill soils in all areas where  
3 improvements were made. *See* N&M Joinder, Ex B at p. 3

4 Plaintiff's affidavit of merit utilizing the limited purpose AGI report dated December 11, 2017,  
5 contains no opinions critical of N&M's design professional services and recommendations. In fact,  
6 the AGI report quotes the N&M August 29, 2007, report in support of its own analysis. The Nevada  
7 Supreme Court in OTAK specifically held that each party must file its own expert report and affidavit  
8 "as each party must justify its claims of nonresidential malpractice based on that party's relationship  
9 with the defendant." *Otak Nevada, LLC v. Eighth Judicial Distr. Ct.*, 127 Nev. 593, 599-600 P. 3d 408,  
10 412 (2011). That is completely missing in Plaintiff's affidavit of merit and in fact is contravened by  
11 the contents of the AGI report as it relates to N&M.

12 An initial reading of the AGI report was an exculpatory document wherein N&M warned  
13 Plaintiff of the expansive soils condition and recommended that all such soil be removed and replaced  
14 with appropriate structural fill underneath all of the improvements. AGI offers no opinions,  
15 conclusions or a basis in law and fact as required by NRS 11.258 critical of the design professional  
16 services or that N&M fell below the standard of care in any way. AGI's report offers no evidence or  
17 ability for Plaintiff with any reasonable basis in fact and law to conclude that any action is warranted  
18 against N&M. Instead, the affidavit jumps to a conclusion that there is a reasonable basis for filing a  
19 claim against N&M with zero conclusions based on the standard of care and zero discussion as to the  
20 basis of those conclusions. Those failures render the Affidavit of Merit non-compliant and N&M must  
21 be dismissed from this action.

22 **B. Ninyo & Moore's Joinder to Melroy Engineering, Inc.'s Motion to Dismiss is proper**  
23 **and timely filed**

24 The City misreads and misrepresents Ninyo & Moore's joinder to Nevada By Design's prior  
25 motion for summary judgment based on the statute of repose. Ninyo & Moore filed a joinder to  
26 Nevada by Design's motion and the language utilized by Ninyo & Moore in its joinder in no way  
27 limits its ability to join the present motion and bring its NRS 11.258 arguments at this time.

Moreover, City provides no case law to support its position that Ninyo & Moore's present joinder is improper. When the Court found in favor of the parties on the statute of repose argument, this matter was concluded rendering the NRS 11.258 arguments and motions moot. When the Court reversed its decision at a later proceeding, the NRS 11.258 motions became ripe again. Ninyo & Moore's joinder is timely and N&M is entitled to have its position heard in the present motion.

## **II. CONCLUSION**

Plaintiff failed to comply with the stringent requirements of NRS 11.258 and disregards the case law interpreting that statute. Plaintiff only offers an expert report authored over 1 ½ years prior to the complaint, that contains exculpatory language in favor of Ninyo & Moore with no conclusions or basis to conclude in law and fact that any action against Ninyo & Moore is warranted. Given the forgoing, City's failure to comply with NRS 11.258, requires dismissal as to Ninyo & Moore pursuant to NRS 11.259 as City's Complaint is void ab initio.

DATED this 19<sup>th</sup> day of February, 2020.

WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER LLP

/s/ Jorge A. Ramirez

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Attorneys for Ninyo & Moore, Geotechnical  
Consultants

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman &  
3 Dicker LLP, and that on December 6, 2019, I served **NINYO & MOORE, GEOTECHNICAL**  
4 **CONSULTANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT MELROY**  
5 **ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANT'S AND JOINDERS TO**  
6 **MOTION TO DISMISS ON ORDER SHORTENING TIME**

7 as follows:

- 8
- 9 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed  
10 envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- 11 ☒ via electronic means by operation of the Court's electronic filing system, upon each  
12 party in this case who is registered as an electronic case filing user with the Clerk;

13  
14 BY: /s/Annemarie Gourley

15 An Employee of

16 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP  
17  
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**EXHIBIT 59**  
**PETITIONERS' APPENDIX**

**EXHIBIT 59**  
**PETITIONERS' APPENDIX**

**ORIGINAL**

*Steven D. Grierson*

MCLA  
JEREMY R. KILBER, ESQ.  
(Nevada Bar No. 10643)  
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Attorney for Defendant,  
MELROY ENGINEERING, INC. D/B/A  
MSA ENGINEERING CONSULTANTS

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD.;  
RICHARDSON CONSTRUCTION, INC.;  
NEVADA BY DESIGN, LLC D/B/A NEVADA BY  
DESIGN ENGINEERING CONSULTANTS; JW  
ZUNINO & ASSOCIATES, LLC; MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS; O'CONNOR  
CONSTRUCTION MANAGEMENT INC.; NINYO  
& MOORE, GEOTECHNICAL CONSULTANTS;  
JACKSON FAMILY PARTNERSHIP LLC D/B/A  
STARGATE PLUMBING; AVERY ATLANTIC,  
LLC; BIG C LLC; RON HANLON MASONRY,  
LLC; THE GUARANTEE COMPANY OF NORTH  
AMERICA USA; P & W BONDS, LLC;  
PAFFENBARGER & WALDEN, LLC; DOES I  
through X, inclusive; and ROE CORPORATIONS I  
through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

MELROY ENGINEERING, INC.  
D/B/A MSA ENGINEERING  
CONSULTANTS' MOTION FOR  
CLARIFICATION REGARDING  
COURT'S MINUTE ORDER  
DENYING MSA'S MOTION TO  
DISMISS BROUGHT PURSUANT TO  
NRS 11.258, ON ORDER  
SHORTENING TIME

Date of Hearing: \_\_\_\_\_

Time of Hearing: \_\_\_\_\_

///

///

///

1                    **MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS'**  
2                    **MOTION FOR CLARIFICATION REGARDING COURT'S MINUTE ORDER DENYING**  
3                    **MSA'S MOTION TO DISMISS BROUGHT PURSUANT TO NRS 11.258, ON ORDER**  
4                    **SHORTENING TIME**

5                    COMES NOW Defendant, MELROY ENGINEERING, INC. D/B/A MSA  
6 ENGINEERING CONSULTANTS (hereinafter, "MSA"), by and through its attorneys of record,  
7 the law firm of Weil & Drage, APC, and moves this Court to provide clarification regarding the  
8 Court's Minute Order denying MSA's motion for dismissal of Plaintiff, CITY OF NORTH LAS  
9 VEGAS' ("CNLV" or "Plaintiff") Complaint.

10                   This Motion is based on the Memorandum of Points and Authorities submitted herein, all  
11 pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this  
12 Honorable Court will entertain.

13                   DATED this 11<sup>th</sup> day of March, 2020.

14                   WEIL & DRAGE, APC

15                   */s/ Jeremy R. Kilber*

16                   By: \_\_\_\_\_  
17 JEREMY R. KILBER, ESQ.  
18 (Nevada Bar No. 10643)  
19 861 Coronado Center Drive, Suite 231  
20 Henderson, NV 89052  
21 Attorney for Defendant,  
22 MELROY ENGINEERING, INC. D/B/A  
23 MSA ENGINEERING CONSULTANTS  
24  
25  
26  
27  
28

**ORDER SHORTENING TIME**

TO: ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

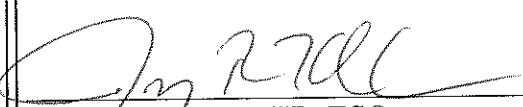
PLEASE TAKE NOTICE that good cause appearing and Pursuant to EJD CR 2.26, therefore, it is hereby ORDERED by the Court that the time and date for the hearing on MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' MOTION FOR CLARIFICATION REGARDING COURT'S MINUTE ORDER DENYING MSA'S MOTION TO DISMISS BROUGHT PURSUANT TO NRS 11.258, ON ORDER SHORTENING TIME shall be shortened and will be heard before the above-entitled Court on the 17<sup>th</sup> day of MARCH, 2020, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

DATED this 12<sup>th</sup> day of March 2020.

  
DISTRICT COURT JUDGE

Respectfully Submitted By:

WEIL & DRAGE, APC

  
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861 Coronado Center Drive, Suite 231  
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Attorney for Defendant,  
MELROY ENGINEERING, INC. D/B/A  
MSA ENGINEERING CONSULTANTS

I, Jeremy R. Kilber, subject to the penalties of perjury under the laws of State of Nevada, hereby declare that the following statements are true and correct to the best of my knowledge and belief:

2. On February 4, 2020, MSA filed its Motion to Dismiss Pursuant to NRS 11.258.

4. The Court's March 6, 2020, minute order does not provide any basis for the Court's denial of MSA's Motion, nor does it address the joinders thereto.

6. As it stands, MSA has appellate rights arising from the Court's decision to amend its Order dismissing Plaintiff's Complaint pursuant to NRS 11.202. MSA has further appellate rights arising from the Court's denial of MSA's NRS 11.258 Motion. As such, MSA is seeking an expedited hearing on the present Motion for Clarification to ensure that MSA can timely bring all relevant appellate issues to Nevada's Appellate Court at the same time, thereby ensuring efficiency in the appeals process.

8. Accordingly, MSA respectfully requests that the hearings on its Motion be scheduled on an expedited basis.

DATED this 11<sup>th</sup> day of March, 2020.

Jeremy R. Kilber

# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

### INTRODUCTION / FACTS

This action arises from a complaint filed by the City of North Las Vegas ("Plaintiff") on July 11th, 2019, against various design professionals and construction entities concerning alleged settlement and expansive soil issues at Fire Station 53 (the "Project"). Plaintiff claims that after completing the Project, it began to notice distress in the building including wall cracks, separation and interior slab cracking. To investigate these issues, Plaintiff hired American Geotechnical, Inc. ("AGI"), a Plaintiff oriented geotechnical firm, to perform a "*geotechnical investigation*" of Fire Station 53. AGI investigated the site and concluded in December 2017 that the distress at Fire Station 53 and surrounding appurtenances arose due to a combination of excessive differential settlement and expansive soil. Thereafter, the Plaintiff implemented repairs to Fire Station 53 and filed this instant lawsuit against every design professional involved with the Project – irrespective of their field of practice or scope of work.

On February 4, 2020, MSA moved to dismiss Plaintiff's Complaint, as to MSA, arguing Plaintiff's Complaint is defective, as it failed to properly comply with the certificate of merit statutes under NRS 11.258. The Court denied MSA's Motion. However, the Court has not provided any reasoning for its denial of MSA's motion, neither in written minute order, nor orally at the hearing on the motion. Consequently, there is no information provided by the Court upon which the Plaintiff can rely in drafting a written Order denying MSA's Motion. Rather, the Plaintiff is being allowed by the Court to create its own reasons of denial in substitute for the Court's analysis.

## II.

### STANDARD OF REVIEW

Nevada's case law precedence, as well as its rules of civil procedure, allows a court to clarify an order if a party moves for such clarification. Motions for interpretation or clarification, although not specifically described in the rules of practice, are commonly considered by trial courts and are procedurally proper. *Bronneke v. Rutherford*, 120 Nev. 230, 89 P.3d 40 (2004)

1 (“the district court ruled directly on Bronneke’s motion for clarification”); *Walsh v. Walsh*, 103  
2 Nev. 287, 738 P.2d 117 (1987) (“District Court ...denied motion for clarification, and appeal was  
3 taken.); *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 128 P.3d 452 (2006)  
4 (“The district court reiterated in its order on the SGIC’s motion for clarification[.]”); *City of Reno*  
5 *v. Lars Andersen and Assoc., Inc.*, (1995) (“The City filed a motion for clarification[.]”).

6 Additionally, the clarification of an order is implied in NRCP 60 (a) & (b), which allow the  
7 Court to modify an order if a party affected by the order seeks clarification by motion. NRCP  
8 60(a) in pertinent states an order “may be corrected by the court at any time ...on the motion of  
9 any party[.]” Finally, NRCP 60(b) states that the court may relieve “a party or a party’s legal  
10 representative from a[n] ...order” when inadvertence occurs.

### 11 III.

### 12 LEGAL ARGUMENT

13 In light of Nevada’s case law and procedural rules indicating clarification of an order is  
14 appropriate, MSA now seeks clarification from this Court regarding the minute order decision  
15 issued from chambers on March 6, 2020. Specifically, MSA requests that the Court  
16 clarify/provide the reasons upon which it determined it was appropriate to deny MSA’s Motion to  
17 Dismiss under NRS 11.258.

18 It is essential that the Court clarify its order. As it stands, the Court is leaving Plaintiff’s  
19 counsel to their own devices to create findings of fact and conclusions of law with no guidance  
20 from the Court regarding the Court’s actual reasons for denying MSA’s Motion. Pursuant to the  
21 Nevada Rules of Civil Procedure, the Court is admonished to articulate its reasons for denying  
22 MSA’s Motion, with NRCP 52(a)(3) stating, “The court is not required to state findings or  
23 conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise,  
24 on any other motion. *The court should, however, state on the record the reasons for granting or*  
25 *denying a motion.*” (Emphasis added).

26 The Court’s March 6, 2020, minute order contains no information regarding the Court’s  
27 reasons for denying MSA’s Motion. Further, the minute order is silent regarding the fate of each  
28 joinder made to MSA’s Motion. Thus, the Court has not stated on the record the reasons for

1 denying MSA's Motion, nor any decision concerning the Joinders thereto. Absent the Court  
2 providing its reasons for denying MSA's Motion, MSA's appellate rights will be impacted. The  
3 same situation would also apply to joining parties. The basis for the above are articulated below:

4 First, if the Order simply states MSA's Motion is denied, the Supreme Court would likely  
5 send the matter back down to the District Court to articulate its reasons for dismissal. That would  
6 be a hugely inefficient, time-wasting, evolution for the Court and the impacted parties. The Court  
7 at a separate hearing on Defendant Richardson's Motion to Dismiss on Laches on March 10, 2020,  
8 conceded on the record that it faced complex legal issues in this action. This statement  
9 incorporates the Court's recent ruling which has greatly impacted how NRS 11.258 is applied in  
10 the State of Nevada and at this juncture, to the prejudice of design professionals. Given the  
11 enormity of the ruling, the Court, respectfully, should provide a detailed explanation as to how it  
12 reached its decision. This is especially true as the Court is aware of the strongly likelihood of  
13 Writs being filed on these issues.

14 Second, if Plaintiff's counsel is solely relied upon to draft the order with no direction from  
15 the Court, counsel will no doubt draft an order overly and unfairly skewed to bias in Plaintiff's  
16 favor. Such is the case because the Court's minute order fails to provide any reason for its denial  
17 of the Motion, and the Court did not provide any reasons for denial during oral argument, instead,  
18 taking the matter under advisement with no ruling on the Motion in open court. Therefore, the  
19 only way to ensure the Order contains the specific reasons the Court relied upon to deny MSA's  
20 Motion is for the Court to state the reasons for its denial of MSA's Motion prior to Plaintiff's  
21 counsel drafting the Order.

22 In light of the foregoing, MSA respectfully requests that the Court issue an order clarifying  
23 the reasons upon which it denied MSA's Motion.

#### 24 IV.

#### 25 CONCLUSION

26 Pursuant to the Nevada Rules of Civil Procedure, it is clear the Court should be stating, on  
27 the record, the reasons it denied MSA's Motion, as well as the joinders thereto. Absent the Court  
28 articulating such reasons, MSA will be prejudiced at the appellate level, as Plaintiff's counsel has



1 been given *carte blanche* to prepare the order. Therefore, to ensure no prejudice to any party is  
2 invited into the drafting of the order, MSA respectfully requests the Court provide its reasons for  
3 denying MSA's Motion. Plaintiff's counsel can then proceed to draft the Order from there.

4 DATED this 11<sup>th</sup> day of March, 2020.

5 WEIL & DRAGE, APC

6 /s/ *Jeremy R. Kilber*

7 By:

JEREMY R. KILBER, ESQ.  
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MSA ENGINEERING CONSULTANTS

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of March, 2020, service of the foregoing **MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' MOTION FOR CLARIFICATION REGARDING COURT'S MINUTE ORDER DENYING MSA'S MOTION TO DISMISS BROUGHT PURSUANT TO NRS 11.258, ON ORDER SHORTENING TIME** was made this date by electronically serving a true and correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

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P & W BONDS LLC

///

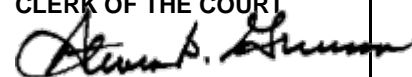
1 John T. Wendland, Esq.  
2 Anthony D. Platt, Esq.  
3 861 Coronado Center Drive, Suite 231  
4 Henderson, NV 89052  
5 Attorneys for Defendant,  
6 NEVADA BY DESIGN, LLC D/B/A  
7 NEVADA BY DESIGN ENGINEERING  
8 CONSULTANTS  
9

/s/ Joanna Medina

Joanna Medina, an Employee of  
WEIL & DRAGE, APC

**EXHIBIT 60**  
**PETITIONERS' APPENDIX**

**EXHIBIT 60**  
**PETITIONERS' APPENDIX**



Richard C. Gordon, Esq.  
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*Attorneys for the City of North Las Vegas*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

City of North Las Vegas,

Plaintiff,

vs.

Dekker/Perich/Sabatini Ltd.; Richardson  
Construction, Inc.; Nevada By Design, LLC  
d/b/a Nevada By Design Engineering  
Consultants; JW Zunino & Associates, LLC;  
Melroy Engineering, Inc. d/b/a MSA  
Engineering Consultants; O'Connor  
Construction Management Inc.; Ninyo &  
Moore, Geotechnical Consultants; Jackson  
Family Partnership LLC d/b/a Stargate  
Plumbing; Avery Atlantic, LLC; Big C LLC;  
Ron Hanlon Masonry, LLC; The Guarantee  
Company of North America USA; P & W  
Bonds, LLC; Paffenbarger & Walden, LLC;  
DOES I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

**THE CITY'S OPPOSITION TO MSA'S  
MOTION FOR CLARIFICATION  
REGARDING COURT'S MINUTE  
ORDER DENYING MSA'S MOTION  
TO DISMISS BROUGHT PURSUANT  
TO NRS 11.258, ON ORDER  
SHORTENING TIME**

The City of North Las Vegas (“City”) opposes Defendant Melroy Engineering, Inc. d/b/a MSA Engineering Consultants’ (“MSA”) motion for clarification regarding court's minute order denying MSA’s motion to dismiss brought pursuant to NRS 11.258, on order shortening time (“Motion”).

## I. ARGUMENT

MSA's Motion is premature and unnecessary; it only serves to increase the cost of litigation and waste the Court's time. With one day's notice, MSA asks the City to appear before the Court for clarification on a simple minute order that does not require clarification.

On March 6, 2020, the Court issued a minute order denying MSA's motion to dismiss based on NRS 11.258 and directed the City to draft the proposed order within 10 days, including circulating the proposed order to opposing counsel for review. On March 13, 2020—7 days after the Court issued its minute order—the City circulated its proposed order to all counsel for their review. *See* Email from A. Dhalla to all counsel, Ex. 1; Proposed order, Ex. 2. Instead of waiting for the City's proposed order as specified in the Court's minutes, MSA petitioned the Court for an order shortening time on the Motion. After reviewing MSA's Motion, the City emailed MSA and requested that it withdraw the Motion without prejudice. *See* Email from R. Gordon, Ex. 3. MSA declined this request.

MSA's Motion is premature and unnecessary because the Court has not yet entered a final order on the underlying motion to dismiss. MSA's request for clarification of the Court's minute order is wasteful and unnecessary because the Court's minutes clearly instruct the City to prepare a proposed order and circulate it for review. If MSA finds that the City's proposed order is unclear or otherwise deficient, MSA is free to offer proposed changes or even submit its own proposed order. Instead of responding to the City with comments to the proposed order, MSA filed the pending Motion, seeking a hearing on shortened time, essentially asking the Court to issue its own order rather than following the process already outlined in the Court's minutes. Indeed, the process outlined by the Court—requiring the prevailing party to prepare a proposed order—is the typical process followed by most departments in the Eighth Judicial District. Additionally, MSA neglects the fact that the Court is free to revise any proposed order as it sees fit. MSA acts as if the Court will simply sign a proposed order without review. This is not the case.

Finally, MSA has again—for the second time in six weeks—improperly sought to have a motion heard on an order shortening time. In his affidavit, MSA's counsel asserts that MSA "has appellate rights arising from the Court's decision to amend its Order dismissing Plaintiffs

1 Complaint pursuant to NRS 11.202. MSA has further appellate rights arising from the Court's  
2 denial of MSA's NRS 11.258 Motion." Mot. 4:16–19. While MSA has appellate rights via writ  
3 relief, there are no looming appellate deadlines requiring the Motion to be heard on shortened time  
4 because denial of a motion to dismiss is not a final judgment under NRAP 3A(b). Therefore, MSA  
5 does not have an automatic right to appeal under the Nevada Rules of Appellate Procedure.  
6 Moreover, any relief MSA chooses to seek via writ relief to the appellate courts does not require  
7 this Motion to be heard on an order shortening time, burdening both the Court and the City. Not  
8 only is the motion premature and unnecessary, asking the Court to hear the motion on shortened  
9 time is needlessly burdensome.

## 10 II. CONCLUSION

11 The Court should deny MSA's motion without prejudice. If MSA subsequently believes  
12 that the Court's ultimate order on the underlying motion requires clarification, MSA can refile.

13  
14 Dated: March 16, 2020.

SNELL & WILMER L.L.P.

15  
16  
17 By: /s/ Aleem A. Dhalla

Richard C. Gordon, Esq. (NV Bar No. 9036)  
Aleem A. Dhalla, Esq. (NV Bar No. 14188)  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, Nevada 89169

*Attorneys for the City of North Las Vegas*

**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **THE CITY'S OPPOSITION TO MSA'S MOTION FOR CLARIFICATION REGARDING COURT'S MINUTE ORDER DENYING MSA'S MOTION TO DISMISS BROUGHT PURSUANT TO NRS 11.258, ON ORDER SHORTENING TIME** by method indicated below:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
- ☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

and addressed to the following:



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*Attorneys for JW Zunino & Associates*

Dated: March 16, 2020.

/s/ D'Andrea Dunn  
An employee of SNELL & WILMER L.L.P.

# EXHIBIT 1

**From:** Dhalla, Aleem  
**Sent:** Friday, March 13, 2020 4:40 PM  
**To:** 'Jeremy Kilber'; 'John T. Wendland'; 'Todd, Dylan P.'; 'Gorlin, Lee H.'; 'Ramirez, Jorge'; 'david.kahn@wilsonelser.com'; 'Shannon Splaine'; 'Welch, Patrick F.'; 'tparker@pnalaw.net'  
**Cc:** Gordon, Richard; Dunn, D'Andrea  
**Subject:** City of North Las Vegas City v Dekker/Perich/Sabatini et al - Proposed order denying MSA's motion to dismiss on NRS 11.258  
**Attachments:** CNLV Fire Station - FOFCOL Order Denying MSA MTD 4843-1151-9159\_2.docx

All Counsel:

Pursuant to the Court's minute order, attached is the City's proposed order denying MSA's motion to dismiss on NRS 11.258.

Kind regards,  
Aleem

Aleem A. Dhalla  
Snell & Wilmer L.L.P.  
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Las Vegas, Nevada 89169  
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Denver, Las Vegas, Los Angeles, Los Cabos, Orange County, Phoenix, Reno, Salt Lake City, Tucson

# EXHIBIT 2

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*Attorneys for the City of North Las Vegas*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

City of North Las Vegas,

Plaintiff,

vs.

Dekker/Perich/Sabatini Ltd.; Richardson  
Construction, Inc.; Nevada By Design, LLC  
d/b/a Nevada By Design Engineering  
Consultants; JW Zunino & Associates, LLC;  
Melroy Engineering, Inc. d/b/a MSA  
Engineering Consultants; O'Connor  
Construction Management Inc.; Ninyo &  
Moore, Geotechnical Consultants; Jackson  
Family Partnership LLC d/b/a Stargate  
Plumbing; Avery Atlantic, LLC; Big C LLC;  
Ron Hanlon Masonry, LLC; The Guarantee  
Company of North America USA; P & W  
Bonds, LLC; Paffenbarger & Walden, LLC;  
DOES I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

**ORDER DENYING MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS'  
MOTION TO DISMISS**

Before the Court is Defendant Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' ("MSA") motion to dismiss on order shortening time (the "Motion"), as well as several joinders ("Joinders") submitted by Dekker/Perich/Sabatini Ltd. ("Dekker"), Nevada By Design, LLC ("NBD"), Ninyo & Moore, Geotechnical Consultants ("Ninyo"), and JW Zunino & Associates, LLC ("JW" and together with MSA, Dekker, NBD, and MSA, "Movants").

1 The Motion was filed on February 4, 2020, was fully briefed, and the Court heard oral  
2 arguments on February 20, 2020 at the hour of 10:00 a.m. in Dept. VIII of the Eighth Judicial  
3 District Court, in and for Clark County, Nevada with Judge Trevor Atkin presiding.

4 The City of North Las Vegas (“City” or “Plaintiff”) appeared by and through its attorneys,  
5 Richard C. Gordon, Esq. and Aleem A. Dhalla, Esq. of Snell & Wilmer L.L.P. Defendant MSA  
6 appeared by and through its attorney, Jeremy R. Kilber, Esq. of the law firm Weil & Drage, APC.  
7 Defendant JW appeared by and through its attorney, Lee H. Gorlin, Esq. of Foran Glennon  
8 Palandech Ponzi & Rudloff. Defendants NBD appeared by and through its attorney John T.  
9 Wendland, Esq. of Weil & Drage, APC. Defendant Ninyo appeared by and through its attorneys,  
10 Jorge A. Ramirez, Esq. and Harry V. Peetris, Esq. of Wilson Elser Moskowitz Edelman & Dicker  
11 LLP.

12 The Court has reviewed and considered the papers and pleadings on file and the oral  
13 arguments of counsel. The Court makes the following Findings of Fact and Conclusions of Law:

#### 14 **FINDINGS OF FACT**

15 1. This case concerns the alleged deficient construction of Fire Station 53 in North Las  
16 Vegas (“Project”). Compl. ¶¶ 22–23.

17 2. The City retained Dekker to provide Professional Architectural Services for the  
18 design of Fire Station 53 (“Property”). *Id.*

19 3. As part of the Design Agreement, Dekker was responsible for the professional  
20 quality, technical accuracy, timely completion, and coordination of all services furnished by Dekker  
21 and its subconsultants. *Id.* ¶¶ 24–25.

22 4. Dekker contracted and worked with several subconsultants on the Project, including  
23 MSA, NBD, JW, and Ninyo. *Id.* ¶ 27.

24 5. Following completion of the design phase, the City awarded the Project to  
25 Richardson Construction. *Id.* ¶¶ 36–38.

26 6. Richardson Construction’s scope of work included site clearing, earthwork,  
27 masonry, structural steel roofing, interior finishes, plumbing, fire protection, heating, ventilating  
28 and air conditioning systems, electrical systems, lighting, power, telephone, data-communications,

1 landscaping, utilities, asphalt/concrete drives, concrete sidewalk and patios, furnishing equipment,  
2 and other work included in the Construction Documents. *Id.* ¶ 39.

3 7. Richardson Construction subcontracted with several companies to perform portions  
4 of its scope of work. *Id.* ¶ 40.

5 8. The Project reached substantial completion on July 13, 2009 when the notice of  
6 completion was recorded. *Id.* ¶ 45 & p. 133.

7 9. After the Project was completed, the City noticed distress to the building including  
8 wall cracks and separations, and interior slab cracking. *Id.* ¶ 46.

9 10. The City retained Edred T. Marsh, P.E. of American Geotechnical, Inc. (“American  
10 Geotechnical”) to perform a geotechnical investigation of the site. *Id.* ¶ 47.

11 11. Mr. Marsh concluded that the distress to Fire Station 53 and surrounding  
12 appurtenant structures was due to a combination of excessive differential settlement and expansive  
13 soil activity. *Id.* ¶ 49. In short, settlement of the building occurred as a result of stresses from the  
14 weight of the structure and self-weight of the earth materials and was aggravated by introduction  
15 of water to the subsoil. *Id.* ¶ 52.

16 12. The City filed its complaint on July 11, 2019, which included its attorney’s affidavit  
17 pursuant to NRS 11.258, along with its expert’s report, a separate statement from its expert, the  
18 documents reviewed by its expert, and several other exhibits. *See generally* Compl.

19 13. On February 4, 2020, MSA filed a motion to dismiss, arguing the City’s complaint  
20 violated NRS 11.258’s expert requirement. *See* MSA’s Motion, filed on February 4, 2020.

## CONCLUSIONS OF LAW

14. In considering a motion to dismiss, the Court “must construe the pleadings liberally and accept all factual allegations in the complaint as true.” *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). “Furthermore, this court must draw every fair inference in favor of the non-moving party.” *Id.*

15. “Nevada has not adopted the federal ‘plausibility’ pleading standard.” *McGowen, Tr. of McGowen & Fowler, PLLC v. Second Judicial Dist. Court*, 134 Nev. Adv. Op. 89, 432 P.3d 220, 225 (2018). Nevada’s notice-pleading standard only “requires plaintiffs to set forth the facts which support a legal theory.” *Liston v. Las Vegas Metro. Police Dep’t*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). “Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party.” *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

16. Under NRCP 12(b)(5), dismissal is only appropriate “if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief.” *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Tr.*, 401 P.3d 1068, 1070 (Nev. 2017) (internal quotations omitted).

17. NRS11.258(1) requires that, before commencing an action against a design professional, claimant’s attorney must consult with a relevant expert, attach an attorney affidavit with the complaint stating that he has consulted with the expert, that he reasonably believes the expert is knowledgeable in the relevant discipline involved in the action, and that the attorney believes—based on his review of the facts and consultation with the expert—that the action has a reasonable basis in law and fact.

18. Specifically, NRS 11.258(1) states:

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.

19. In reviewing the City’s attorney affidavit submitted with its complaint, the Court finds that the City complied with all requirements of NRS 11.258(1).

20. Movants argue that NRS 11.258(1) requires the City’s attorney to consult with an expert that is knowledgeable in the precise discipline or sub-specialty of each design defendant, and that the City’s geotechnical and professional engineer is deficient under NRS 11.258 because he is not qualified in the specialization of each design defendant. The Court finds these arguments unpersuasive.<sup>1</sup>

21. Notably, NRS 11.258(1) uses strictly singular language. It states that that claimant’s attorney must consult with “*an* expert” that the attorney reasonably believes is knowledgeable in “*the* relevant discipline”—not discipline(s). Moreover, this section of the statute states that the attorney must consult with an expert who is “knowledgeable in the relevant discipline *involved in the action*” not the specific sub-discipline of each individual defendant.

22. NRS 11.258(1) states that claimant’s attorney need only have a reasonable belief that the expert is knowledgeable in the relevant discipline involved in the action. The Court finds that the City’s attorney’s belief that the expert he consulted with was knowledgeable in the relevant discipline involved in the action was reasonable under these circumstances. The Court further finds that the City’s expert, Edred T. Marsh, P.E. of American Geotechnical, Inc., is both a licensed professional engineer and an expert in geotechnical engineering.

23. Additionally, the statute defines the term “expert.” NRS 11.258 (6) states that: “As used in this section, ‘expert’ means a person who is licensed in a state to engage in the practice of *professional engineering*, land surveying, architecture or landscape architecture.” (emphasis

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<sup>1</sup> The Court does not intend for this to be an exhaustive list or summary of Movants’ arguments. However, the Court finds it helpful to briefly explain some of Movants’ arguments pertinent to its decision. As is true for this entire Order, the Court has considered all of Movants’ arguments—regardless of whether they are mentioned herein.

1 added). Because the City's expert is a licensed professional engineer in the relevant discipline  
2 involved in the action, the Court finds him to be a qualified expert under NRS 11.258.

3 24. The Court finds that NRS 11.258 is unambiguous on its face. "When a statute is  
4 clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v.*  
5 *Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). As such, it is unnecessary for the Court to  
6 look outside the statutory language in interpreting NRS 11.258. Contrasting NRS 11.258(1) with  
7 the affidavit of merit requirements from NRS 41A.071 in medical malpractice cases further  
8 solidifies the Court's analysis. It is apparent to the Court that the legislature could have required  
9 claimant's expert to practice in an area that is substantially similar to the type of practice engaged  
10 in by each defendant, as required in medical malpractice cases under NRS 41A.071. However, the  
11 Court finds that these requirements are conspicuously absent from NRS 11.258(1).

12 25. In addition to the attorney affidavit, NRS 11.258(3) requires the claimant to attach  
13 the expert's resume, a report that includes his conclusions, each document that he reviewed in  
14 reaching his conclusions, a statement that he is experienced in each discipline that is the subject of  
15 his report, and a statement that he has concluded that there is a reasonable basis for filing the action.

16 26. Specifically, NRS 11.258(3) states:

17 3. In addition to the statement included in the affidavit pursuant to  
18 subsection 1, a report must be attached to the affidavit. Except as  
19 otherwise provided in subsection 4, the report must be prepared by  
the expert consulted by the attorney and must include, without  
limitation:

20 (a) The resume of the expert;

21 (b) A statement that the expert is experienced in each discipline  
22 which is the subject of the report;

23 (c) A copy of each nonprivileged document reviewed by the  
24 expert in preparing the report, including, without limitation, each  
25 record, report and related document that the expert has determined  
is relevant to the allegations of negligent conduct that are the basis  
for the action;

26 (d) The conclusions of the expert and the basis for the  
conclusions; and

27 (e) A statement that the expert has concluded that there is a  
28 reasonable basis for filing the action.

1           27.     The Court finds that the City complied with all requirements of NRS 11.258(3).

2           28.     Movants argue that the City's expert failed to specifically opine on each design  
3 defendants' scope of work and that he did not state that each design defendant specifically breached  
4 the standard of care. The Court finds that these are not requirements of NRS 11.258.

5           29.     The Court also finds that Mr. Marsh's report was sufficiently detailed and included  
6 his conclusions as to the geotechnical and soil issues on the Property. The Court finds that the City  
7 also included a separate statement from Mr. Marsh wherein he stated that he was experienced in  
8 each discipline which is the subject of his report and that he concluded that there is a reasonable  
9 basis for filing the action. The Court also finds that the City attached all necessary documents  
10 required by NRS 11.258(3).

11           30.     "The starting point for determining legislative intent is the statute's plain meaning;  
12 when a statute is clear on its face, a court cannot go beyond the statute in determining legislative  
13 intent." *McNeill v. State*, 132 Nev. 551, 555, 375 P.3d 1022, 1025 (2016) (internal quotations  
14 omitted).

15           31.     No party has identified a specific ambiguity in the statute and the Court finds that  
16 NRS 11.258 is clear on its face. Thus, the Court need not look beyond the statutory language or to  
17 legislative history to interpret NRS 11.258.

18           32.     Accordingly, the Court finds that the City's complaint complies with NRS 11.258  
19 as to all Movants.

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**ORDER**

**IT IS HEREBY ORDERED** that the Motion and all Joinders are DENIED.

**IT IS FURTHER ORDERED** that Movants must file their respective answers within fourteen (14) days of entry of this Order pursuant to NRCP 12(a)(3)(A).

Dated: \_\_\_\_\_, 2020.

\_\_\_\_\_  
THE HONORABLE JUDGE TREVOR L. ATKIN

Respectfully submitted by:

Approved as to Form and Content:

**SNELL & WILMER L.L.P.**

**FORAN GLENNON PALANDECH  
PONZI & RUDLOFF**

By: \_\_\_\_\_  
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By: \_\_\_\_\_  
Lee H. Gorlin, Esq.  
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*Attorney for Defendant JW Zunino &  
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By: \_\_\_\_\_  
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*Attorney for Defendant Nevada By  
Design, LLC d/b/a Nevada by Design  
Engineering Consultants and  
Dekker/Perich/Sabatini, Ltd.*

*Attorney for Defendant MSA Engineering  
Consultants*

1 Approved as to Form and Content:

2 **WILSON ELSEER MOSKOWITZ**  
3 **EDELMAN & DICKER LLP**

4 By: \_\_\_\_\_

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8 300 South 4th Street - 11th Floor  
9 Las Vegas, NV 89101-6014

10 *Attorney for Defendant Ninyo & Moore,*  
11 *Geotechnical Consultants*

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28 4843-1151-9159

# EXHIBIT 3

**From:** Gordon, Richard  
**Sent:** Monday, March 16, 2020 12:51 PM  
**To:** Dhalla, Aleem; 'Jeremy Kilber'; 'John T. Wendland'; 'Todd, Dylan P.'; 'Gorlin, Lee H.'; 'Ramirez, Jorge'; 'david.kahn@wilsonelser.com'; 'Shannon Splaine'; 'Welch, Patrick F.'; 'tparker@pnalaw.net'  
**Cc:** Dunn, D'Andrea  
**Subject:** RE: City of North Las Vegas City v Dekker/Perich/Sabatini et al - Request to Withdraw Motion for Clarification on order shortening time Without Prejudice  
  
**Importance:** High

Hi Jeremy,

I just saw that you a filed a motion for clarification of the Court's minute order this morning on an order shortening time (with a hearing scheduled for tomorrow, March 17<sup>th</sup> at 9:00 a.m.) I'm not sure why you filed the motion at the present time since a final order hasn't been entered yet, and since the Court's minute order was quite clear on the process it wanted to be followed. Pursuant to the minute order, the Court instructed Plaintiff's counsel to prepare a draft order within 10 days of March 6th, present it to opposing counsel for review and approval as to form and content (all of which has occurred), and then for opposing counsel to propose changes to the order that the parties can agree on, or submit a competing order. This is a fairly standard process followed by most of the departments in this district. For this reason, I would request that you withdraw the pending motion (without prejudice to you refiling it in the future) so the Court can actually enter its final order.

Moreover, because the denial of a motion to dismiss is not a final judgment, it doesn't trigger the 30 day deadline to file a notice of appeal. As such, your appellate rights are through writ petition, and you are not burdened by the 30 day rule for appealing a final judgment. For this reason, the rationale for your OST request is not proper and creates an unnecessary burden on both the parties and the Court (particularly in this time of global emergency) to attend hearings that don't require emergency relief. For this additional reason, we would ask that you withdraw the pending motion without prejudice.

Please let me know by 2:00 p.m. today if you are willing to withdraw the motion without prejudice. I'm also available for a call, Jeremy, if you'd like to discuss. My cell number is 702-443-7402.

Thank you in advance for your prompt attention to this matter.

Best,

Rick

Richard C. Gordon, Esq.

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L.L.P.  
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---

**From:** Dhalla, Aleem

**Sent:** Friday, March 13, 2020 4:40 PM

**To:** 'Jeremy Kilber' <jkilber@weildrage.com>; 'John T. Wendland' <jwendland@weildrage.com>; 'Todd, Dylan P.' <dtodd@fgppr.com>; 'Gorlin, Lee H.' <lgorlin@fgppr.com>; 'Ramirez, Jorge' <Jorge.Ramirez@wilsonelser.com>; 'david.kahn@wilsonelser.com' <david.kahn@wilsonelser.com>; 'Shannon Splaine' <ssplaine@lgclawoffice.com>; 'Welch, Patrick F.' <PWelch@jsslaw.com>; 'tparker@pnalaw.net' <tparker@pnalaw.net>

**Cc:** Gordon, Richard <rgordon@swlaw.com>; Dunn, D'Andrea <ddunn@swlaw.com>

**Subject:** City of North Las Vegas City v Dekker/Perich/Sabatini et al - Proposed order denying MSA's motion to dismiss on NRS 11.258

All Counsel:

Pursuant to the Court's minute order, attached is the City's proposed order denying MSA's motion to dismiss on NRS 11.258.

Kind regards,  
Aleem

Aleem A. Dhalla  
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Denver, Las Vegas, Los Angeles, Los Cabos, Orange County, Phoenix, Reno, Salt Lake City, Tucson



**EXHIBIT 61**  
**PETITIONERS' APPENDIX**

**EXHIBIT 61**  
**PETITIONERS' APPENDIX**



1 RTRAN

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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CITY OF NORTH LAS VEGAS CITY,

CASE#: A-19-798346-C

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Plaintiff,

DEPT. VIII

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vs.

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DEKKER/PERICH/SABATINI LTD.,

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Defendant,

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BEFORE THE HONORABLE TREVOR ATKIN, DISTRICT COURT JUDGE

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TUESDAY, MARCH 10, 2020

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**RECORDER'S TRANSCRIPT OF HEARING:  
ALL PENDING MOTIONS**

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APPEARANCES ON PAGE 2:

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RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

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1 APPEARANCES:

2  
3 For the Plaintiff:

4 City of North Las Vegas

RICHARD C. GORDON, ESQ.

5 For the Defendants:

6 Stargate Plumbing

7 SHANNON G. SPLAINE, ESQ.  
BETHANY KIRKNER, ESQ.

8 Ninyo & Moore Geotechnical Construction

9 HARRY V. PEETRIS II, ESQ.  
DOUGLAS ROWAN, ESQ.

10 MSA Engineering Inc.

JEREMY R. KILBER, ESQ.

11 Nevada by Design LLC

12 JOHN T. WENDLAND, ESQ.

13 Richardson Construction Inc.

THEODORE PARKER, ESQ.

14 JW Zunino & Associates LLC

DYLAN P. TODD, ESQ.

15 P&W Bonds LLC

PATRICK F. WELCH, ESQ.

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Las Vegas, Nevada, Tuesday, March 10, 2020

[Case called at 10:49 a.m.]

THE COURT: City of North Las Vegas, twenty minutes late, sorry.

MR. PARKER: Right on time.

THE COURT: Yeah, right on time. This is how jurors feel, five minutes. We'll be back here --

MR. PARKER: I try not --

THE COURT: -- at 1:30 we're going to go and then at 2:00, okay c'mon on in.

MR. PARKER: I try not to keep jurors waiting, Your Honor, it hurts both sides.

THE COURT: It does.

THE RECORDER: We have Patrick Welch on CourtCall. Correct, Mr. Welch?

THE CLERK: Mr. Welch.

THE COURT: Mr. Welch.

MR. PARKER: Going once.

MR. WELCH: Good morning, Your Honor.

THE COURT: Great, I just called your case. You are here on behalf of who?

MR. WELCH: P&W Entities, Your Honor.

THE COURT: Thank you.

MR. WELCH: We filed a joinder in the motion. And I just filed

1 a joinder in the opposition to the motion to strike- -

2 THE COURT: Okay. Thank you.

3 MR. WELCH: --/reply. You're welcome.

4 THE COURT: All right, counsel.

5 MR. PARKER: Your Honor, let me see if I can make this  
6 quick. Well we'll do introductions first.

7 THE COURT: Yes.

8 MR. GORDON: Sure, Richard Gordon, bar number 9036 for  
9 the City of North Las Vegas.

10 MR. WENDLAND: John Wendland, bar number 7207 for  
11 Dekker and Nevada by Design.

12 MR. TODD: Dylan Todd, bar number 10456 for JW Zunino &  
13 Associates.

14 MR. PARKER: Good morning, Theodore Parker on behalf of  
15 Richardson and the Guarantee Company of North America.

16 MR. ROWAN: Good morning, Your Honor, Douglas Rowan  
17 bar number 4736 on behalf of defendant Ninyo and Moore.

18 MR. PEETRIS: Good morning, Your Honor, Harry Peetris, bar  
19 number 6448 here on behalf of Ninyo and Moore.

20 MS. SPLAINE: Good morning, Your Honor, Shannon Splaine,  
21 bar number 8241 on behalf of Stargate Plumbing.

22 MS. KIRKNER: Bethany Kirkner, bar number 13165 also here  
23 on behalf of Stargate Plumbing.

24 MR. KILBER: Good morning, Your Honor, Jeremy Kilber on  
25 behalf of MSA Engineering.

1 THE COURT: Good morning. Okay, Mr. Parker.

2 MR. PARKER: Your Honor, I'm going to see if I can make this  
3 quick or quicker. Quick would be to give some more time to the plaintiffs  
4 because our joinder was filed late. I want to go ahead and own that.  
5 One of -- do you need me at the podium?

6 THE RECORDER: He can hear you better from the podium  
7 on the phone.

8 MR. PARKER: Oh, no worries. All right. So, Your Honor, we  
9 filed our joinder -- I'm sorry, our reply late hour. My association thought  
10 that it had been filed it was not. We discovered that he hadn't filed. So  
11 if the City requires more time we want to give the City more time, that's  
12 number one.

13 So you want more time?

14 MR. GORDON: I don't believe we need any more time.

15 THE COURT: Okay.

16 MR. PARKER: And the reason I bring that up is because  
17 there's another situation where the City did not object but then later  
18 objected to the joinder or whatever. I figured I'd go ahead and remove  
19 that opportunity right now. One more time, he's not -- apparently he  
20 says he doesn't want time.

21 THE COURT: We're good to go.

22 MR. PARKER: Your Honor, I would also point out that I spoke  
23 with the City's counsel regarding the procedural posture of this case and  
24 in particular the timing of our motion. And that's borne out in the  
25 opposition presented by the City. We believe this motion to be taken not

1 only as a motion to dismiss but a motion for summary judgment and that  
2 we've attached certain documents to this motion, something beyond the  
3 pleadings. One of those things would be the actual obituary of our  
4 client, Mr. Richardson. Mr. Richardson passed away last year,  
5 February, I believe 8<sup>th</sup> of last year. And when we pointed out --

6 THE COURT: I'm sorry, Mr. Parker. Mr. Welch, can you put  
7 your phone on the mute when you're not speaking so you're not  
8 interrupting.

9 MR. PARKER: Either that or he's on a treadmill.

10 MR. WELCH: Sorry, Your Honor, I thought I had it on mute. I  
11 apologize.

12 THE COURT: Nah, no, are you okay because it sounds like  
13 you're breathing kind of hard. All right.

14 MR. WELCH: I'm okay, Your Honor, thank you.

15 THE COURT: Sorry. You're cured.

16 MR. PARKER: Okay, so Your Honor, this is -- the long and  
17 short of it is and I'm not going to repeat what's in the brief -- or the briefs  
18 and the joinders. But the City apparently waited and sat on their hands  
19 for approximately two years. And during that two-year period I lost my  
20 client. I lost the person who would have been responsible for the  
21 evaluation of the RFP, the design documentation, the pre-bid walk, who  
22 ran this company, who would have been involved in all of the meetings.  
23 I lost that person. In addition to losing that person all of their employees  
24 who would have been boots on the ground are no longer there. They're  
25 in the official wind up and there's a skeleton crew that's putting to bed

1 remaining invoices. But there's no ongoing construction work there.

2           Additionally, as we pointed out, both the Nevada State  
3 Contractors Board and the Nevada Labor Commissioner only requires  
4 you keep records for two and three years. They're gone. We've tried to  
5 put together, as best we can, a file. But we've lost things that we -- that  
6 are irretrievable. And we would have had those things had the City not  
7 sat on their hands.

8           THE COURT: So classic Laches?

9           MR. PARKER: Classic, Your Honor. And so, I don't know  
10 how the City can explain these two years of time that they just sat there  
11 doing nothing. I don't know if they thought that for over two years of this  
12 the legislature would come back and breathe life into this case through  
13 amendments. What I can say it did not -- the Nevada Legislature did not  
14 change the Nevada Supreme Court's vision of what Laches means and  
15 how it affects this case. Thank you, Your Honor.

16           MS. SPLAINE: Your Honor, Shannon Splaine on behalf of the  
17 Stargate. I joined in Mr. Parker's motion. I just want to point out  
18 because a Laches issue is so important in construction projects. Tom  
19 Marsh, who is plaintiff's one expert that they -- that's the whole affidavit  
20 issue that we've gone through ad nauseum. He started his investigation  
21 in April of 2017. I think that date is important, because they don't file for  
22 two plus more years after he starts his investigation. Which means that  
23 the City had to have known there was issues prior to April of 2017,  
24 because you have to lead up to hiring and expert to start investigating it.

25           Based on other pleadings in this case the City talks about



1 having known about problems for years. You notice that they never  
2 specifically tell you when they started seeing the cracks and the  
3 problems. For a project in North Las Vegas, known by everyone who  
4 does construction --

5 THE COURT: Even I know that.

6 MS. SPLAINE: -- to have adverse soils.

7 THE COURT: They do.

8 MS. SPLAINE: So, the City talks about, in various motions,  
9 you know, huge cracks and eight inches of settlement and all of these  
10 different issues. So, to have known in April of 2017 or earlier and then  
11 to sit on it for two plus years, to not tell any of the defendants hey I think  
12 there might be an issue; please go preserve, please be on notice,  
13 please be aware, allowed for this loss of witnesses, documents, and  
14 evidence. Because people in the normal course got rid of their records  
15 believing the statute was 10 years. But they could have put people on  
16 notice and they didn't. So that timeframe that the City elected to delay is  
17 on them and it's harming the defense.

18 Who did I have a contract with? My client doesn't have any  
19 records. Richardson doesn't have any records. We don't even know  
20 what the allegations are and we're years down the pike. So, these are  
21 harms the City itself caused to the defense. And now the City is saying  
22 well we'll figure that out later. Let's go through discovery.

23 THE COURT: Spoliation in reverse under the doctrine of  
24 Laches.

25 MS. SPLAINE: Essentially yes, so that's the problem. So, I

1 wanted Your Honor to hear those dates because it's not just Tom Marsh  
2 did a report and then we filed a complaint. It's years of that. So, you  
3 had to have known something and they delayed and they did it on  
4 purpose. Thank you, Your Honor.

5 THE COURT: Uh-huh. Thank you.

6 MR. PEETRIS: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. PEETRIS: Harry Peetris here on behalf of Ninyo and  
9 Moore. I have two housekeeping items. We received the Court's denial  
10 of the Melroy motion last Friday. Is there going to be any kind of  
11 findings from the Court on that or we're going to be drawing up  
12 something?

13 THE COURT: No, I want plaintiff's counsel to submit findings  
14 of fact, conclusions of law --

15 MR. PEETRIS: Okay.

16 THE COURT: -- consistent with that denial.

17 MR. PEETRIS: Okay. Your Honor, we've talked a lot today  
18 about dates and dates are very important in this case. Ninyo and Moore  
19 is a little bit of a unique position because actually our substantive joinder  
20 was not opposed. The motion was filed February 7, 2020. Ninyo and  
21 Moore timely filed a substantive joinder on February 12<sup>th</sup>, 2020.  
22 Richardson filed its errata specifying that it was a motion for summary  
23 judgment on February 21. Opposition was filed by City on the same  
24 date. Richardson filed in the morning. The opposition was filed in the  
25 afternoon. Ninyo and Moore filed its reply stating that its substantive

1 joinder had not been opposed and that was on February 23, 2020.

2 I understand there was a late filing last night from City in the  
3 reply brief and there's nothing addressing any of the arguments that  
4 were proffered by Ninyo and Moore in the substantive joinder or the  
5 reply.

6 The critical dates in this case, Your Honor, Ninyo and Moore  
7 authored a report dated August 29<sup>th</sup>, 2007. That was the only work that  
8 Ninyo and Moore was contracted to do and that's the only work they did  
9 do on this project. It is the only defendant in her I believe who actually  
10 wasn't involved in the construction. City decided to take in-house, that  
11 means to the building department, geotechnical services including  
12 compaction testing soil suitabilities testing and insuring compliance of  
13 the contract documents.

14 On March 5, 2008, City issued a notice to proceed on the  
15 project. That was 7 months after Ninyo and Moore did its work. On July  
16 13<sup>th</sup>, 2009 a notice of completion was issue on this project. That is two  
17 years after Ninyo and Moore worked on the project. We now have more  
18 defined dates earlier today about when things were additionally  
19 discovered. With regard to the project, suggestions that April 2017 Mr.  
20 Marsh became involved when the City observed distressed and noticed  
21 there's issues with the buildings. That was 10 years after Ninyo and  
22 Moore performed its work on the project.

23 On December 13, 2017, AGI authored its report that's 124  
24 months after Ninyo and Moore did its work on the project. Mr.  
25 Richardson dies in February of 2019 and the City filed a shotgun

1 complaint in July 11, 2019 which is 12 years after Ninyo and Moore  
2 performed any services on this project and over two years after AGI was  
3 involved in the analysis of what was going on with the project.

4 In our reply -- in our reply brief, Your Honor, we addressed the  
5 issue regarding the motion to strike. The City Office issued and states it  
6 is taking each of movants factual allegations in term below, that's in their  
7 opposition page 7 lines 20 to 21. You should take a look at that  
8 because it says it addresses every other party, but Ninyo and Moore  
9 was never addressed. And we have a very specific analysis and we're  
10 in a pretty unique position where we are exceptionally disadvantaged  
11 from other defendants who were involved in the project.

12 The Court must deny the motion to strike as it violates well  
13 established case law and procedure. Richardson's errata specifies that  
14 with a motion for summary judgment. But irrespective of that, Your  
15 Honor, Your Honor, I've been doing this for 22 years and every time this  
16 situation has come up there's case law. *Stevens versus McGimsey* that  
17 states that a 12(b)(5) is to be treated as an MSJ if outside facts or  
18 documents are brought in. So this is -- you know, that's back in 1983 I  
19 believe that case was decided. So, I mean, it's something that's been  
20 around for quite a while.

21 Ninyo and Moore provided a substantive joinder providing  
22 compelling arguments and facts demonstrating all elements of Laches  
23 had been met including specific facts regarding how a delay specifically  
24 and individually especially prejudiced Ninyo and Moore, especially as  
25 the only part here who was not part of the construction process. Courts

1 are encouraged to grant motions for summary judgment in these  
2 circumstances as it promote judicial economy and reduces litigation  
3 expenses associated with actions that lack merit.

4 We discussed, and I'm sure Your Honor remembers Ninyo  
5 and Moore's argument before in previous hearings, where in Ninyo and  
6 Moore's report we basically -- we told the City hey look these soils are  
7 highly expansive. Take them all out, put in 36 inches of structurally  
8 compacted fill underneath all improvements. That's all we did. I mean,  
9 what more could Ninyo and Moore have done or where could any  
10 liability lie for that when that apparently wasn't even followed.

11 For Laches to apply you'd require three elements, Your  
12 Honor, inexcusable delay in seeking action, two, implied waiver arose  
13 from plaintiff's conduct leading up to a legal action, three defendants  
14 prejudiced by the delay.

15 Ninyo and Moore submits to the Court that element one is  
16 satisfied as of December 2017 and now we heard it goes back to April  
17 when Mr. Marsh became involved as the expert for the City. City  
18 maintains that the statute of repose at that time of the incident occurred  
19 should have applied even back then. As Your Honor recalls and  
20 remembers that when this project was done there was a 10-year statute  
21 of repose and then it became 6 years and then it became 10 years  
22 again. That was the opposition, page 6, lines 22 to 23.

23 While defendants disagree with the City's position on that  
24 saying that 10 years applied all along, it doesn't really matter what we  
25 agree or disagree with. It matters what's in the City's mind. And the

1 City states that it's belief and its ongoing belief that the 10-year statute  
2 of limitations applied all along. So why would you have a delay in filing  
3 this case for another year and a half or two years?

4 Element two, Ninyo and Moore authored its report dated  
5 August 29, 2007. Ninyo and Moore warned of the highly expansive  
6 soils, recommended they all be removed and 36 inches of appropriate  
7 non-reactive compacted structural fill be put in its place. That AGI  
8 Report came 10 years after the Ninyo and Moore report. City waited  
9 another 1 year and 7 months to file, during which time the statute of  
10 repose was changed.

11 Nevada Supreme Court has ruled that knowledge without  
12 appropriate action is an implied waiver. When petitioner lodged a verbal  
13 complaint with respondent, but waited a month before filing an injunctive  
14 petition. It's in building construction trades.

15 There's another court -- the cases are kind of thin but there's a  
16 second case. It was *State versus Eighth Judicial District Court*. In that  
17 particular case the Court said that an eleven-month delay in bringing  
18 and action was improper and subject to Laches.

19 We argue, Your Honor, that element three which is the  
20 prejudice element of the defendant is also satisfied. City was in  
21 possession of the AGI report 123 months after Ninyo and Moore  
22 authored its report and completed its work on the project. City  
23 purposefully sat on its rights another one and a half two years with no  
24 further investigation necessary to bring this action. That's the very  
25 definition of purposeful delay.

1 Due to that dilatory conduct, Your Honor, lost forever and  
2 critical to Ninyo and Moore's defense is testimony of Mr. Richardson and  
3 the prime contractor including, we're learning today, his job file.

4 Whether Ninyo and Moore's recommendation in the August 29, 27 [sic]  
5 report would ever follow. We weren't there to see that or not. We relied  
6 upon documents and testimony of those who were.

7 Also lost forever and critical to the defense of Ninyo and  
8 Moore is testimony regarding the as-built conditions. Testimony, job  
9 filed documents regarding the means, methods, techniques and  
10 sequencing of the project along with the rationale as to why what was  
11 done and what was not done.

12 Your Honor, pursuant to EDCR 2.20 and NRCP 56, Ninyo and  
13 Moore respectfully submits in their reply brief a list of facts that we would  
14 request the Court deemed admitted as having not been opposed. If the  
15 Court would like me to read those into the record I can, but I don't want  
16 to waste your time doing that.

17 THE COURT: No thank you. I appreciate you making the  
18 offer.

19 MR. PEETRIS: Thank you, Your Honor, I appreciate it.

20 THE COURT: Thank you. Anyone here else?

21 MR. PARKER: Can you bring me my pen? My pen.

22 MS. SPLAINE: He wants his pen.

23 MR. PARKER: Did I leave it there?

24 MR. WENDLAND: Your Honor, John Wendland. We joined  
25 the motion. Mr. Peetris' summary is also the same reasons that would

1 apply to my clients as well. The clear issues are if Mr. Richardson's  
2 gone and the job files are missing that could impact our ability to defend  
3 ourselves.

4 The other thing I do want to add in is in the plaintiff's reply  
5 brief they talked about some delay caused by the defendants. I'm not  
6 going to rehash the procedural history of this case, but given that my  
7 clients were involved in two motions before this Court, one being the  
8 statute of repose and certificate of merit, which I believe both are  
9 critically important issues that Your Honor is presented with. I  
10 vehemently disagree with that characterization of a delay caused by the  
11 defendant. That's the only thing I had. Thank you.

12 THE COURT: Thank you.

13 Mr. Gordon, --

14 MR. GORDON: Yes.

15 THE COURT: -- first the countermotion to strike, I'm not going  
16 to do that.

17 MR. GORDON: Sure, no and to the extent that -- exactly, I  
18 mean, the countermotion to strike was merely based exclusively on this  
19 being titled as a motion to dismiss. As a motion to dismiss we think  
20 there is a basis for it, because under 12(b)(5) Laches wasn't raised for  
21 the -- in the first motions. It's very clear.

22 THE COURT: I'm going to --

23 MR. GORDON: No need to --

24 THE COURT: I'm going to hear it. And the Laches is an  
25 interesting --



1 MR. GORDON: Yeah.

2 THE COURT: There's no statutory analysis as I've outlined in  
3 my prior denials of their motions. That was based on that. As one  
4 Judge informed me when I took the bench, the law is your friend.

5 MR. GORDON: Yeah.

6 THE COURT: And you look to the law.

7 MR. GORDON: That's right.

8 THE COURT: And that's what I try to do the best I could all  
9 right. This is a little bit different.

10 MR. GORDON: Yes.

11 THE COURT: So, you've -- you're going to hear this the  
12 whole -- the case. And so, it's --

13 MR. GORDON: That's right.

14 THE COURT: -- why did it take so long, because now this is  
15 classic Laches. How are they supposed to prove their defense when  
16 your client allegedly sat on its hands?

17 MR. GORDON: Right. That is the allegation, Your Honor, so  
18 let me --

19 THE COURT: It is.

20 MR. GORDON: Let me respond.

21 THE COURT: It's the allegations.

22 MR. GORDON: Yeah, let me respond. First, I do think it is  
23 interesting, somewhat ironic that what we are hearing today is -- and it's  
24 understandable why I think Your Honor, did not see any Laches  
25 argument from any defendant in the prior briefing, okay. Because the

1 thrust of -- and you heard lengthy -- you heard lengthy briefs and you  
2 heard lengthy arguments. The thrust of the statute of repose argument  
3 was simply this, City you filed too late.

4 The thrust of a Laches argument is City you didn't file fast  
5 enough. You should have filed sooner. Now, I would suggest, Your  
6 Honor, the defense can't have it both ways. And I think every defendant  
7 -- every defendant here is competent counsel representing their clients  
8 as best they can and I don't --

9 THE COURT: Above competent.

10 MR. GORDON: Yes. Oh, yes.

11 THE COURT: Exemplary, how about that?

12 MR. GORDON: I didn't mean that in any way as disrespectful,  
13 yeah.

14 THE COURT: And likewise, --

15 MR. GORDON: Yeah.

16 THE COURT: -- the City's got its own good attorney.

17 MR. GORDON: Yeah, I think the --

18 THE COURT: So why --

19 MR. GORDON: -- they're good counsel.

20 THE COURT: -- did it take so long when they're on notice of  
21 this issue?

22 MR. GORDON: Well here's -- at the core, Your Honor, let me  
23 just finish this point and then I'm going to address that. That's the thrust  
24 of my argument. But defendant's, if they're honest, and if we did, Your  
25 Honor, what they are in the present motion saying should have

1 happened. City you should have filed December 2017 or early 2018 at  
2 the latest; that's the thrust of this motion. I can assure you and I think  
3 defendants would all agree, because we heard in the first round of  
4 briefing. They would not have complimented the City for the speed of its  
5 filing suit.

6 In fact, they would have immediately filed motions to dismiss  
7 that you subsequently heard, probably seeking in fact, Your Honor, Rule  
8 11 sanctions against the City and its counsel. That was threatened  
9 actually in the last round statute of repose -- had we filed when they  
10 today say we should have filed, you would have seen a sanctions  
11 motion or the City's so transparently filing outside the then existing 6  
12 year statute of repose.

13 They don't really, and this is the crux, they don't really think  
14 we should have filed sooner. They don't really think we had a claim in  
15 2017. They believe, and I think they still believe, that that claim was  
16 dead in 2017. It's a convenient argument now under a Laches, but it is  
17 not what the defendant, any of the defendants, believed or believe that  
18 we should have filed in 2017.

19 And I think it shows, Your Honor, I think this -- why we're here  
20 now in another argument, I think shows you exactly why the Legislature  
21 did what it did. You had situation where discovery of the problem occurs  
22 after the 6-year period that the Legislature changed in 2015 and before  
23 the 10-year period. You see the reason I think in this motion why the  
24 Legislature made this change. Because discovery occurred after the 6-  
25 year statute of repose and the Legislature said in certain instances just

1 like this one that's improper, we're going to fix it and they did.

2           The reason and the questions the Court had the issue posited  
3 by every defendant who spoke, the city delayed. The City sat on its  
4 hands for at least 18 months if not longer. Your Honor, I think just the  
5 opposite is true. What should be striking I think in this case I think is the  
6 City's lack of delay. In fact, the incredible speed with which the City filed  
7 its complaint.

8           Governor Sisolak signed, Your Honor, AB 421 went into law  
9 on June 3<sup>rd</sup> 2019 and within a matter of weeks the City filed its complaint  
10 in this action. That's not excusable delay, Your Honor.

11           THE COURT: But what happened between '17 and '19 when  
12 Sisolak signed that?

13           MR. GORDON: The 6- year statute of repose was arguably in  
14 effect. And so that's the point. So, in other words, the City arguably  
15 under a 6 year statute, you know, we don't concede, Your Honor, we  
16 made arguments in the alternative, so I don't concede that an earlier  
17 statute shouldn't apply. But there's no question that when the City is  
18 evaluating claims and whether it has one, it's going to look at the statute  
19 in place. And so arguably the claim did not arise with discovery in this  
20 instance if, if, a 6 statute of repose as in effect.

21           So, the -- they want to point your attention to discovery and I  
22 don't dispute that we looked at the -- the City looked at this issue in  
23 2017. But that doesn't, in a situation like this, give rise to a claim  
24 necessarily. Which is why if you thought that a statute of repose  
25 precluded the claim -- that's why the City's action which were

1 remarkably quick, remarkably quick once AB 421 was enacted, defeat  
2 the fundamental crow of Laches. There's no inexcusable delay,  
3 because the moment that City saw that a 10-year statute of repose was  
4 back in place officially it acted. And it acted immediately. So as to  
5 excusable delay, Your Honor, there was none. There was none,  
6 because the City acted within weeks of Governor Sisolak signing the bill,  
7 okay.

8           Now the -- whether the Court considers this as a motion to  
9 dismiss or a motion for summary judgment, Your Honor, under either  
10 scenario this -- the motion should be denied under either scenario. As  
11 an MSJ, if the Court so -- is so inclined to consider a summary judgment  
12 it's improper because of disputed facts without evidentiary support that  
13 would require some discovery to even establish it.

14           Hell, we've heard a lot of assertions of counsel as to the facts.

15           THE COURT: I understand that.

16           MR. GORDON: Assertions of counsel are not evidence.

17           THE COURT: I get that.

18           MR. GORDON: Yeah. And so, here's the -- one of the sort of  
19 I think the fundamental things is it really is the leading argument that all  
20 the parties make with regard to prejudice, Mr. Richardson died. Okay,  
21 and there could be -- no one actually says we have no documents, but  
22 they said it's likely, it's possible that documents have been destroyed.  
23 That, Your Honor, does not itself establish prejudice. In fact, it's fairly  
24 typical in litigation, Your Honor, that situations like this where I've had  
25 dozens of cases personally where you've had few witnesses either die

1 or leave the employ of the company, okay.

2 In the 30(b)(6) context this is very common. You know,  
3 companies still under 30(b)(6) notice, still even if the person most  
4 knowledgeable is no longer there or dead or no longer in the  
5 employment of the company, the company still has an obligation to  
6 prepare a witness even if the person isn't the person most  
7 knowledgeable. And this fact I think, Your Honor, is important. Candidly  
8 it is highly unlikely that Mr. Richardson would have been the person  
9 most knowledgeable with regard to Richardson Construction in this  
10 case.

11 The person that the City would want to depose in this case  
12 isn't Mr. Richardson, the owner. It's the project manager who is not Mr.  
13 Richardson. That's the person the City would want to depose. Who  
14 was there day to day on the project? That's the person who is going to  
15 know what Richardson did and what Richardson didn't do, not the owner  
16 of the company.

17 Docs may have been destroyed. That's the language you  
18 hear in the briefing. Again, Your Honor, no one is saying documents  
19 have been destroyed and we haven't done initial disclosures in this  
20 case, so we haven't seen any documents yet. But even if -- even if  
21 there was some destruction of documents that is not grounds for  
22 dismissal of this action. Through discovery we need to see what  
23 documents the parties actually do have. And it's very likely that the  
24 issue of destruction is something that we would bring up on a motion for  
25 spoliation, depending on the circumstances of destruction.

1           In short, Your Honor, even under an MSJ standard they make  
2 no evidentiary showing of actual prejudice. They assert things.  
3 Counsel's assertions is not evidence. We certainly have counter facts  
4 that we would argue that in fact Mr. Richardson isn't the person with all  
5 the knowledge of Richardson. That people closer to the project are  
6 actually the people with the relevant knowledge.

7           And so -- but, Your Honor, to the extent that the Court is at all  
8 inclined to think this motion should be granted, then we would request  
9 56(d) relief so that discovery can be done to establish prejudice at all,  
10 even establish what they need to show would require discovery. That's  
11 why it's just simply premature at a motion to dismiss stage, before any  
12 discovery has been done.

13           And finally, your answer -- Your Honor, the last point is just  
14 this. Regardless, no party has filed an answer in this case, okay. And  
15 as to -- and this is really just going to the parties who did not join the  
16 11.258 motions. Those parties that joined the motion to 11.258 I don't  
17 think their obligation to answer has been triggered yet. Because that  
18 issue, 11.258, was in fact raised properly in the first round of motions to  
19 dismiss. It was just deemed moot by the Court. And then when the  
20 Court granted reconsideration that became a live issue.

21           That is not the case for all the other defendants who didn't join  
22 the 11.258 motion. Their answer clearly per the rules was due 14 days  
23 after the order was entered on reconsideration. That's February 6<sup>th</sup>. We  
24 highlighted this to Mr. Parker in letter form and think that's what  
25 promoted -- we highlighted some of the procedural impropriety in the

1 motion to dismiss and that an answer was still due in letter form to  
2 counsel; that I think prompted the errata. But still no party whose  
3 answer was due has answered. This case needs to proceed, Your  
4 Honor. This case should proceed as to all parties. Discovery needs to  
5 be done.

6           The last thing just to address because it was addressed at  
7 length by counsel for Ninyo and Moore is the suggestion that their  
8 joinder was unopposed. And that's just simply false, Your Honor. You  
9 can take a look at our opposition brief and on the very first page of the  
10 opposition it specifies what we're opposing. And we list of course  
11 Richardson's motion and the various joinders, including Ninyo and  
12 Moore's joinder.

13           Ninyo and Moore, the arguments Ninyo and Moore makes  
14 candidly are the same arguments Richardson makes. Prejudice by lack  
15 of evidence and the like. They cite various specific facts to their work on  
16 the project, but those facts are not relevant to a Laches analysis. When  
17 Ninyo and Moore submitted its report to Dekker is irrelevant to Laches  
18 analysis. That's not a rising of a claim. You know, so when they did  
19 their work that's not relevant to when you start counting the clock for  
20 delay, which is the implication and suggestion they're making.

21           So again, expressly Ninyo and Moore's joinder was opposed.  
22 They're making the same arguments and whether you look at it as a  
23 motion to dismiss or as a motion for summary judgment, Your Honor,  
24 neither standard can be satisfied. There was no inexcusable delay.  
25 Because every one of these parties would have filed the same motion



1 for dismissal under a statute of repose had we done what today they're  
2 saying we should have done. Last months they said that they didn't  
3 think we filed timely then. Now we filed too late. They can't have it both  
4 ways.

5           Discovery needs to be done, even to establish any facts and  
6 to even give the court any evidence which currently nothing is before the  
7 Court an evidentiary basis to show the prejudice. That discovery is  
8 required. That's what need to happen in this case. We ask that Court to  
9 order that the parties who haven't yet to answer those for whom an  
10 answer is due and that the discover process finally begin.

11           THE COURT: Okay, thank you.

12           MR. WELCH: Your Honor, this is Patrick Welch of P&W. I  
13 didn't have an opportunity to address my joinder.

14           THE COURT: Okay, please do so.

15           MR. WELCH: Your Honor, the first point that I'd like to raise is  
16 the fact that under, you know, bench mark surety law principals that the  
17 Nevada Supreme Court has recognized, P&W, their liability is  
18 coextensive with that of the principal to the extent that the Court finds  
19 that the Laches argument is persuasive and grants that motion, that  
20 would also require the court to dismiss P&W Entities as to that same  
21 issue. We cited to the case in our memorandum joinder and also  
22 authorities from the suretyship treatise.

23           With regards to plaintiff's counsel's contention that the other  
24 parties have not timely filed answers, I believe counsel's implication was  
25 that P&W is included in that. The joinder that I filed this morning

1 demonstrates to the Court that P&W has a pending motion to dismiss on  
2 the resident agent issue which was deemed moot by the statute of  
3 repose motion practice. So, I believe that no obligation to file an answer  
4 at this point is on P&W until the motion to dismiss is on the resident  
5 agent issue has been addressed by the Court.

6 In terms of the 30(b)(6) designee obligation that counsel  
7 raised in his argument, that's not the case here. I mean, obligating a  
8 party to designate a person who doesn't have personal knowledge but to  
9 study the file and records certainly applies in a 30(b)(6) designation. But  
10 that's not the case here where the other party in this case the plaintiff  
11 has prejudiced the person whose witness has now died by not filing their  
12 case timely. So, I would disagree with counsel in regards to the analogy  
13 to a 30(b)(6) designee obligation. It's just not appropriate or applicable  
14 in this instance.

15 That's all I have, Your Honor.

16 THE COURT: Thank you. Thank you, Mr. Welch.

17 Mr. Parker.

18 MR. PARKER: May I, Your Honor?

19 THE COURT: Oh yeah, go ahead.

20 MR. PARKER: Thank you. So, Your Honor, I want to try to hit  
21 the high points and in part address some of the either wrong  
22 assumptions made by plaintiff's counsel or simply correct his  
23 misunderstanding of how construction cases go.

24 First and foremost, and I'll address Ninyo and Moore first.  
25 Ninyo and Moore's joinder indicates that they prepared a report.

1 Typically, when you have a geotechnical engineer involved not only do  
2 you get a soils report, geotechnical report. You typically get also  
3 grading observation reports. You get daily reports. You get  
4 correspondence. You get RFIs. You get change orders. You get  
5 amendments. And finally, you get, what I consider to be important,  
6 notices in non-compliance or compliance reports. All indicating that the  
7 grading work that's supposed to be done in the accordance with the  
8 geotechnical documentation has been done correctly.

9 All of those documents and change orders, dailies, RFIs, all of  
10 those things are no longer required to be maintained. And I don't  
11 believe we have any of them. And I don't know if Ninyo and Moore has  
12 any. The same with the grading. The grading contract that we would  
13 have to find, we can find it – would include correspondence, the  
14 contract, any notice of non-compliance, any compliance reports. A  
15 certification that grading was done in compliance with the geotechnical  
16 reports.

17 What we do know is that not only has Mr. Richardson died,  
18 the person who would have been the person who signed all of these  
19 contracts, who would have signed the agreement with the City of North  
20 Las Vegas. But it's my belief that his project manager has also previous  
21 – has also passed away and predeceased Mr. Richardson.

22 So what I don't like is when someone who believes that he  
23 has a strong position based upon how things might be and how things  
24 may not have been affected by their delay, provides arguments wholly  
25 unsupported by the facts in this case. What I've done in our motion,

1 even I think this is why everyone joined in it, because I didn't allege a lot  
2 of facts that are in dispute.

3 My client is gone. The records are gone. The records did not  
4 have to be maintained pursuant to the law in the state of Nevada beyond  
5 certain periods of time. Those are all undisputed. What's also  
6 undisputed is the City waited for over two years to bring this claim,  
7 undisputed. What I don't like and what I think the Court was trying to  
8 focus the City's attorney on is don't make the same arguments you  
9 made in response to the motion to dismiss based on the statute of  
10 repose. That's not before the Court.

11 What I can say however, even if the plaintiff wanted to focus  
12 on that argument, that previous argument, that previous motion, our  
13 positions have been the same. We've maintained the same position.  
14 They waited too long be it based on the statute of limitations, the statute  
15 of repose, or Laches.

16 And when Your Honor said to plaintiff's counsel tell me why  
17 you waited so long, a very direct question. I thought it was somewhat  
18 insulting that he didn't answer it directly. But he never answered it.  
19 What he tried to do is get this Court to strike it by going down the statute  
20 of repose arguments and how they did it as soon as they could after the  
21 Governor signed the amendment. That's not the issue for today. That  
22 time has come. Our position is the same he shouldn't have waited that  
23 long. He should have done it 6 years – within the 6-year statute of  
24 limitation or the statute of repose.

25 But this is a Laches argument. And what he has to admit and

1 which he has conceded in his opposition, I believe it's in his opposition  
2 page 2, line 22, that they retained and had their expert perform and  
3 inspection in 2017. That's the only undisputed fact we need for this  
4 Court to make its decision. And there's no dispute. That's an admission  
5 made by the plaintiff in his brief. He made an artful argument. The  
6 Court can use that alone to make a decision on this case.

7 Now I was surprised plaintiff's counsel didn't bring, you know,  
8 a compliment of dignitaries and officials from the City of North Las  
9 Vegas today. And I think it's because and I think there's a reason here.  
10 I think the reason is when they came before it's because they were  
11 trying to have this Court utilize for its benefit the amendment made by  
12 the Governor or by the Legislature.

13 This is a case where we're pointing out things directly at the  
14 City because they made mistakes. And let me tell you how bad the  
15 mistakes are. Not that it's necessary for the consideration of this  
16 ultimate decision of the Court, but this is how bad it is. Typically, in  
17 these contracts when you see these public works contracts they require  
18 notice. Not just notice in the form of a complaint, but notice to give a  
19 contractor and subcontractors an opportunity to inspect before you do  
20 anything and also the opportunity to cure before you file a lawsuit.

21 It's not exclusive that you have to sue or you have to give  
22 notice. You can do both. You can give notice, allow somebody to  
23 actually address it, be it a general contractor or its subs or perhaps  
24 Ninjo and Moore or the grading contractor. They didn't do any of those  
25 things. Not one thing did they do.

1           And if you want to accept what plaintiff's counsel is telling you,  
2 that they simply waited for the Governor to make a change to the statute  
3 of repose, then they lose on the statute – they lose on Laches, because  
4 they could have given notice as well. And that's something he's missed.

5           He's trying to focus you on that statute of repose argument,  
6 Your Honor, and you started him right out front. You gave him the  
7 opportunity. You said City attorney or attorney on behalf of the City, tell  
8 me why you waited so long. You haven't gotten an answer to that. And  
9 since this is my motion and he has no more opportunity to come back to  
10 the podium, I think he's given this Court no choice but to grant this  
11 motion.

12           Now one thing he said and I thought this was – I think it's not  
13 appropriate given it's not in his moving – his opposition. His opposition  
14 does not include what I would consider the 56(f) request for discovery to  
15 address this motion. He made an oral request, a second ago. But he  
16 didn't line out what he needed to see help him oppose this motion.

17           So, for example, we know Mr. Richardson is dead. That won't  
18 change. He can't tell me who I need to select as my 30(b)(6) or as the  
19 witness who would know the most about this case. So any argument  
20 that he has that right is inappropriate, is improper, and it's just not true.

21           So, this is what I think Your Honor is faced with. They chose  
22 not to give us notice in '17. They chose not to give us notice before  
23 then. If there was any cracks or any concerns, they had an obligation to  
24 do so and they chose not to. So, between '17 and '19 he's given you no  
25 reason why they didn't alert us. I didn't say they had to sue us but they

1 should have given us notice.

2 Everything that's happened in terms of the files and in terms  
3 of witnesses has been prejudice because of their decision not to give  
4 notice. And had they filed back then under -- Richardson is not  
5 protected by 11.258. So, to give us notice and to file the complaint  
6 against us they didn't need to hire an expert to do so. They could have  
7 said: Mr. Richardson, we have a problem with the fire station, please  
8 take a look. That's all they had to do. They did none of those things. At  
9 least that way if they'd given us notice we could have protected those  
10 documents. We could have preserved them.

11 So now, Your Honor, this is what it boils down to. And I won't  
12 say finally three times and then keep going on. Your -- this is what this  
13 boils down to. You have an opposition that does not give you a reason,  
14 a justifiable reason for waiting. That's what you have before in  
15 opposition in terms of writing. In terms of oral argument, counsel for the  
16 plaintiff never addressed your question. And if you want us to throw  
17 counsel -- the plaintiff a life raft, then they should have actually  
18 delineated what discovery would be necessary to oppose the motion  
19 which they did not.

20 So, Your Honor, I think at the very -- I think the motion should  
21 be granted. I believe -- not only do I think that motion be granted, that's  
22 what the case law supports that the motion be granted. If for some  
23 reason you believe that additional discovery is necessary on this  
24 particular issue, then I think it would be relegated to that particular issue,  
25 because we are at a severe disadvantage with having lost the owner of

1 my company. I believe we've lost the project manager and I don't know  
2 how many other losses we've suffered from everyone else who didn't  
3 have to maintain their records or their employees or anything else.

4 Thank you.

5 THE COURT: Thank you, Mr. Parker.

6 MS. SPLAINE: Your Honor, I just want to briefly address the  
7 one issue, because we know that as at least as early as April 2017  
8 plaintiff hires an expert. So, as I said earlier, that means you had to  
9 have known there was an issue before that point in time. It didn't just  
10 suddenly magically happen on that date.

11 You'll notice that plaintiff never addresses anywhere when the  
12 first knew or should have known about an issue. Did it magically  
13 happen in 2017 and there was no notice of any kind prior to 2015 which  
14 would have been the six years back that timeframe? That's important  
15 for the following reason. The defense have never been inconsistent  
16 about the statute of repose issue. We have argued all along that they  
17 blew the deadline under the 6 year and under the 10 year.

18 Plaintiff, the City, let's remember has argued that they believe  
19 that the whole time this statute has been 10 years. They argue they  
20 think it's based on when the contract was signed and the statute in effect  
21 back then. So, you take that argument from the City as true, they could  
22 have filed in 2017 because their argument would have been exactly the  
23 same. I'm allowed to file because I think 10 years applies based on  
24 these contracts. We would have opposed it and it would have had the  
25 same arguments. The only difference that changed for them was later



1 the Governor changed the law. But their argument is still the same  
2 argument.

3 THE COURT: I get it. That's a good point.

4 MS. SPLAINE: So, if you believe all along that --

5 THE COURT: We knew when this contract started it was 10  
6 years.

7 MS. SPLAINE: Yes. So, then you could have filed in 2017.

8 THE COURT: Or '18.

9 MS. SPLAINE: You could have given us notice. You could  
10 have warned us and cautioned us, there's a massive problem going on  
11 out here; everyone save your documents; everyone be on alert. I've got  
12 a problem. I may have -- may not file, but please come out and inspect,  
13 save your documents, preserve witnesses, start doing that. They chose  
14 not to. So, it's the City's consequence is that delay. Because it's their  
15 own argument not mine, because I would have a 100% argued you blew  
16 the statute.

17 The City told Your Honor repeatedly we've always believed it's  
18 10 years based on the contract. Okay. We'll take that as true, and then  
19 why didn't you give us all notice as soon as you knew there was a  
20 problem, whether it be in 2015, 2016, definitely in 2017? But you chose  
21 not to tell any of the defense. You chose to wait and we're being  
22 prejudiced because of your choices.

23 Thank you.

24 THE COURT: Thank you, Ms. Splaine.

25 THE COURT: Anyone else want to reply? Mr. Peetris.

1 MR. PEETRIS: Thank you, Your Honor. City brings up the  
2 fact that they did address Ninyo and Moore in its motion, however they  
3 addressed Ninyo and Moore saying we have your joinder. We think  
4 that, you know, this motion to strike should apply which we opposed.  
5 But when it goes to the arguments of the parties the Court has to turn to  
6 subsection C of their opposition, which begins on page 7. And under  
7 section under C it addresses a set of defendants and joinders. And then  
8 under number two, which continues on page 8, is the remaining  
9 defendants and joinders and Ninyo and Moore is not addressed at all.  
10 So the factual allegations that we had in our unique joinder and the  
11 issues we brought before the Court were never addressed.

12 Moreover, Your Honor, I was interested to hear arguments  
13 today from counsel regarding 56 and 56(d). As Your Honor is well  
14 aware, that was never briefed. That wasn't in any opposition, in any  
15 reply I've seen or anything. It's just this new argument today. And the  
16 compliance with what's required for a 56(d) relief was not provided to the  
17 Court. There's no affidavits, there's no discovery issues that counsel  
18 pointed out earlier.

19 It's our position because it wasn't put in the brief and give us  
20 an opportunity to oppose it and review it and otherwise respond to it, it's  
21 waived. If it was that important for them to have that relief it should have  
22 been briefed and we should have had the opportunity to respond to it.  
23 The fact that it wasn't in the brief.

24 You know, 220 wasn't designed for busheling things like this  
25 where my client has to come in, we provided a subsequent joinder in

1 good faith. Nothing is opposed to about it or the facts, and all of the  
2 sudden they're going to come to court throw their fingers at us saying  
3 we're doing things wrong. And then basically they no briefing on if for us  
4 to respond to. I mean, if a party isn't doing the brief, it's waived.

5 And I don't think it's fair and it's not a matter of good public  
6 policy or inequity or anything else to allow a party to basically sit on its  
7 hands for two years or not brief items and then basically have us  
8 respond to it at a hearing.

9 What I find ironic is that you have all these issues that were  
10 brought -- not only were not brought up in prior briefing, the City in fact  
11 here, you know, we've all established filed too late. It doesn't really  
12 matter what we believe. If we believe the statute of limitations was 10  
13 years or it was 6 years, then it became 10 years again. It doesn't  
14 matter. City in its motions and its various papers to the Court talk about  
15 what their belief is and let's look at their belief. Their belief is that, as  
16 Ms. Splaine said earlier, was that because of the 10-year statute of  
17 repose when the contract was signed, then they believe it was 10 years  
18 throughout. Well so then why wait the year and a half? I think Your  
19 Honor picked up on that issue.

20 Counsel seems to want to have his cake and eat it too as he  
21 likes to put it. He should have tested that theory back right after he got  
22 the report from AGI. But he decided to wait. And, you know, he waited  
23 and Mr. Sisolak -- or Governor Sisolak did sign -- he's my neighbor. I'm  
24 not -- Governor Sisolak signed the law effective October 1, by the way,  
25 changing the statute of repose. And so, by them sitting on their hands

1 and either waiting for the law to change or them sitting on their hands  
2 with their belief that they have a 10-year running all along --

3 THE COURT: I get it. I know this argument.

4 MR. PEETRIS: Well either they blew the statute of repose or  
5 they blew Laches. They don't get it both ways. We're not looking to  
6 have it both ways. We're just looking for relief.

7 My client certainly is one of the more disadvantaged parties as  
8 it was not involved in the construction process at all. It authored its  
9 report. The City took over what normally would be done by a design  
10 professional. So, we're really beholden and left to see what Mr.  
11 Richardson would have said.

12 THE COURT: We're never going to find that out.

13 MR. PEETRIS: Yeah, we're never going to find out. And --

14 THE COURT: Absent a seance under oath. No disrespect to  
15 Mr. Richardson.

16 MR. PARKER: If that works, we're not going to talk about this  
17 construction project.

18 MR. PEETRIS: So, I think you know for these reasons and  
19 everything else I think that, you know, Ninyo and Moore respectfully  
20 request the Court grant it's 56(f) motion, deem the facts admitted.  
21 They're clearly not disputed. They said they had them. But we weren't  
22 addressed in the motion at all. And every other party was.

23 Thank you, Your Honor.

24 THE COURT: Mr. Wendland, do you have anything to add?

25 MR. WENDLAND: Just to say I join in the arguments, Your

1 Honor, seek the same remedy.

2 THE COURT: Thank you. How about you, Mr. Welch?

3 MR. WELCH: Your Honor, same as a Mr. Wendland, join in  
4 the argument that have been made thus far as well.

5 THE COURT: All right.

6 MR. WELCH: Thank you.

7 THE COURT: All right counsel. I'm going to take this under  
8 advisement. My head hurts. It's a tough call. I do have my concerns,  
9 as I discussed, with the City waiting. They didn't know what was going  
10 to happen with the law changing and even if they -- Ms. Splaine makes a  
11 good argument on the 10 years. Mr. Parker makes and an excellent  
12 argument, his client is gone and Peetris same thing.

13 And while I was on the computer I was listening. I was  
14 looking. Something just was sticking in my craw, because I'm not naïve  
15 enough to think this isn't going to go up on a writ perhaps one way or the  
16 other. But was there a change in the court rules that it's almost like a  
17 certification from federal court over to state. Even though it's not a final  
18 decision, can there be an appellate review of something a district court  
19 judge, so that there's not all this work done on a case without having to  
20 wait as opposed to a writ? I'm not sure. I couldn't find it. Maybe I'm  
21 wrong. I don't know, doesn't matter. I haven't made my mind up, but it's  
22 just something sticking. You guys are all smart, maybe there is  
23 something. I don't know.

24 I saved this for 10:30 a reason. I wanted to hear this. And I  
25 wanted to hear from the A team so to speak. The varsity is all here. So,

1 I'll take it under advisement.

2 MR. GORDON: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. PARKER: Your Honor, in terms of the last comment you  
5 made –

6 MR. WELCH: Thank you, Your Honor.

7 MR. PARKER: -- you may want to take a look at that – the  
8 marijuana case. They just did a writ and a stay request. I think the stay  
9 may have been denied. But –

10 THE COURT: Judge Gonzalez?

11 MR. PARKER: Yeah.

12 THE COURT: Okay.

13 MR. PARKER: The Nevada -- Department of Taxation did a  
14 writ against one of my motions that Judge Gonzalez granted and I think -  
15 -

16 THE COURT: Okay.

17 MR. PARKER: -- they set it out on an emergency basis and  
18 within like 3 days of getting it, they sent us a notice saying we had to  
19 answer within 7 days so it's a very quick process.

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THE COURT: Okay. Thank you, counsel.

MR. PARKER: All right. Thank you.

[Hearing concluded at 11:46 a.m.]

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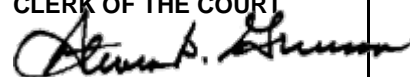
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Jessica Kirkpatrick  
Court Recorder/Transcriber

**EXHIBIT 62**  
**PETITIONERS' APPENDIX**

**EXHIBIT 62**  
**PETITIONERS' APPENDIX**





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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

City of North Las Vegas,

Plaintiff,

vs.

Dekker/Perich/Sabatini Ltd.; Richardson  
Construction, Inc.; Nevada By Design, LLC  
d/b/a Nevada By Design Engineering  
Consultants; JW Zunino & Associates, LLC;  
Melroy Engineering, Inc. d/b/a MSA  
Engineering Consultants; O'Connor  
Construction Management Inc.; Ninyo &  
Moore, Geotechnical Consultants; Jackson  
Family Partnership LLC d/b/a Stargate  
Plumbing; Avery Atlantic, LLC; Big C LLC;  
Ron Hanlon Masonry, LLC; The Guarantee  
Company of North America USA; P & W  
Bonds, LLC; Paffenbarger & Walden, LLC;  
DOES I through X, inclusive; and ROE  
CORPORATIONS I through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

**NOTICE OF ENTRY OF DECISION  
AND ORDER DENYING MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS'  
MOTION TO DISMISS**

1 PLEASE TAKE NOTICE that the Court's *DECISION AND ORDER DENYING MELROY*  
2 *ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS' MOTION TO DISMISS* was  
3 entered in the above-referenced matter on April 2, 2020. A copy of said Decision is attached as  
4 **Exhibit 1.**

5 Dated: April 2, 2020.

SNELL & WILMER L.L.P.

7 By: /s/ Aleem A. Dhalla

8 Richard C. Gordon, Esq. (NV Bar No. 9036)  
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**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF DECISION AND ORDER DENYING MELROY ENGINEERING, INC. D/B/A MSA CONSULTANTS' MOTION TO DISMISS** by method indicated below:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
- ☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

and addressed to the following:

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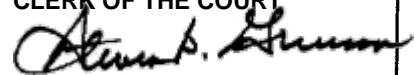
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Dated: April 2, 2020.

/s/ D'Andrea Dunn  
An employee of SNELL & WILMER L.L.P.

# **EXHIBIT 1**



1 **FFCL**

2  
3 **DISTRICT COURT**  
4 **CLARK COUNTY, NEVADA**  
5

6  
7 City of North Las Vegas,

8 Plaintiff,

9 vs.

10 Dekker/Perich/Sabatini Ltd.; Richardson  
11 Construction, Inc.; Nevada By Design, LLC  
12 d/b/a Nevada By Design Engineering  
13 Consultants; JW Zunino & Associates, LLC;  
14 Melroy Engineering, Inc. d/b/a MSA  
15 Engineering Consultants; O'Connor  
16 Construction Management Inc.; Ninyo &  
17 Moore, Geotechnical Consultants; Jackson  
18 Family Partnership LLC d/b/a Stargate  
19 Plumbing; Avery Atlantic, LLC; Big C LLC;  
20 Ron Hanlon Masonry, LLC; The Guarantee  
21 Company of North America USA; P & W  
22 Bonds, LLC; Paffenbarger & Walden, LLC;  
23 DOES I through X, inclusive; and ROE  
24 CORPORATIONS I through X, inclusive,

25 Defendants.  
26  
27  
28

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

**ORDER DENYING MELROY  
ENGINEERING, INC. D/B/A MSA  
ENGINEERING CONSULTANTS'  
MOTION TO DISMISS**

29  
30 **DECISION**  
31

32 Before the Court is Defendant Melroy Engineering, Inc. d/b/a MSA Engineering  
33 Consultants' ("**MSA**") motion to dismiss on order shortening time (the "**Motion**"), as well as  
34 several joinders ("**Joinders**") submitted by Dekker/Perich/Sabatini Ltd. ("**Dekker**"), Nevada By  
35 Design, LLC ("**NBD**"), Ninyo & Moore, Geotechnical Consultants ("**Ninyo**"), and JW Zunino &  
36 Associates, LLC ("**JW**" and together with MSA, Dekker, NBD, and MSA, "**Movants**").  
37  
38

1 The Motion was filed on February 4, 2020, was fully briefed, and the Court heard oral  
2 arguments on February 20, 2020 at the hour of 10:00 a.m. in Dept. VIII of the Eighth Judicial  
3 District Court, in and for Clark County, Nevada with Judge Trevor Atkin presiding.

4 The City of North Las Vegas ("City" or "Plaintiff") appeared by and through its attorneys,  
5 Richard C. Gordon, Esq. and Aleem A. Dhalla, Esq. of Snell & Wilmer L.L.P. Defendant MSA  
6 appeared by and through its attorney, Jeremy R. Kilber, Esq. of the law firm Weil & Drage, APC.  
7 Defendant JW appeared by and through its attorney, Lee H. Gorlin, Esq. of Foran Glennon  
8 Palandech Ponzi & Rudloff. Defendants NBD appeared by and through its attorney John T.  
9 Wendland, Esq. of Weil & Drage, APC. Defendant Ninyo appeared by and through its attorneys,  
10 Jorge A. Ramirez, Esq. and Harry V. Peetris, Esq. of Wilson Elser Moskowitz Edelman & Dicker  
11 LLP. Defendants Richardson Construction, Inc. and the Guarantee Company of North America  
12 USA appeared by and through its attorney Theodore Parker III, of Parker Nelson & Associates,  
13 Chtd.

14 The Court has reviewed and considered the papers and pleadings on file and the oral  
15 arguments of counsel. The Court makes the following Findings of Fact and Conclusions of Law:

16 **FINDINGS OF FACT**

17 1. This case concerns the alleged deficient construction of Fire Station 53 in North  
18 Las Vegas ("Project"). Compl. ¶¶ 22–23.

19 2. The City retained Dekker to provide Professional Architectural Services for the  
20 design of Fire Station 53 ("Property"). *Id.*

21 3. As part of the Design Agreement, Dekker was responsible for the professional  
22 quality, technical accuracy, timely completion, and coordination of all services furnished by  
23 Dekker and its subconsultants. *Id.* ¶¶ 24–25.

24 4. Dekker contracted and worked with several subconsultants on the Project,  
25 including MSA, NBD, JW, and Ninyo. *Id.* ¶ 27.

26 5. The Property is a non-residential / commercial property.  
27  
28

6. Dekker provided architectural and structural engineering services for the Project.
7. MSA provided mechanical, electrical and plumbing engineering services for the Project.
8. NBD provided civil engineering services for the Project.
9. JW provided landscape architectural services and design for the Project.
10. Ninyo provided a preliminary geotechnical evaluation for the Property and authored a preliminary Geotechnical Evaluation dated August 29, 2007.
11. The Project reached substantial completion on July 13, 2009 when the notice of completion was recorded. *Id.* ¶ 45 & p. 133.
12. Within months after the Project was completed, the City noticed distress to the building including wall cracks and separations, and interior slab cracking. *Id.* ¶ 46.
13. In April 2017, the City retained Edred T. Marsh, P.E. of American Geotechnical, Inc. ("American Geotechnical") to begin performing a geotechnical investigation of the Project. *Id.* ¶ 47.
14. Following completion of the design phase, the City awarded the Project to Richardson Construction. *Id.* ¶¶ 36–38.
15. Richardson Construction's scope of work included site clearing, earthwork, masonry, structural steel roofing, interior finishes, plumbing, fire protection, heating, ventilating and air conditioning systems, electrical systems, lighting, power, telephone, data-communications, landscaping, utilities, asphalt/concrete drives, concrete sidewalk and patios, furnishing equipment, and other work included in the Construction Documents. *Id.* ¶ 39.
16. Richardson Construction subcontracted with several companies to perform portions of its scope of work. *Id.* ¶ 40.
17. After the Project was completed, the City noticed distress to the building including wall cracks and separations, and interior slab cracking. *Id.* ¶ 46.



18. The City retained Edred T. Marsh, P.E. of American Geotechnical, Inc. (“American Geotechnical”) to perform a geotechnical investigation of the site. *Id.* ¶ 47.

19. Mr. Marsh concluded that the distress to Fire Station 53 and surrounding appurtenant structures was due to a combination of excessive differential settlement and expansive soil activity. *Id.* ¶ 49. In short, settlement of the building occurred as a result of stresses from the weight of the structure and self-weight of the earth materials and was aggravated by introduction of water to the subsoil. *Id.* ¶ 52.

20. The City filed its complaint on July 11, 2019, which included its attorney's affidavit pursuant to NRS 11.258, along with its expert's report, a separate statement from its expert, the documents reviewed by its expert, and several other exhibits. *See generally* Compl.

21. On February 4, 2020, MSA filed a motion to dismiss, arguing the City's complaint violated NRS 11.258's expert requirement. *See* MSA's Motion, filed on February 4, 2020.

## **CONCLUSIONS OF LAW**

22. In considering a motion to dismiss, the Court “must construe the pleadings liberally and accept all factual allegations in the complaint as true.” *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). “Furthermore, this court must draw every fair inference in favor of the non-moving party.” *Id.*

23. “Nevada has not adopted the federal ‘plausibility’ pleading standard.” *McGowen, Tr. of McGowen & Fowler, PLLC v. Second Judicial Dist. Court*, 134 Nev. Adv. Op. 89, 432 P.3d 220, 225 (2018). Nevada’s notice-pleading standard only “requires plaintiffs to set forth the facts which support a legal theory.” *Liston v. Las Vegas Metro. Police Dep’t*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). “Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party.” *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

24. Under NRCP 12(b)(5), dismissal is only appropriate “if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief.”

1 *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Tr.*, 401 P.3d 1068, 1070  
2 (Nev. 2017) (internal quotations omitted).

3 25. NRS11.258(1) requires that, before commencing an action against a design  
4 professional, claimant's attorney must consult with a relevant expert, attach an attorney affidavit  
5 with the complaint stating that he has consulted with the expert, that he reasonably believes the  
6 expert is knowledgeable in the relevant discipline involved in the action, and that the attorney  
7 believes—based on his review of the facts and consultation with the expert—that the action has a  
8 reasonable basis in law and fact.

9 26. Specifically, NRS 11.258(1) states:

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

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

15 (b) Has consulted with an expert;

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

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

20 27. In reviewing the City's attorney affidavit submitted with its complaint, the Court  
21 finds that the City complied with all requirements of NRS 11.258(1).

22 28. Movants argue that NRS 11.258(1) requires the City's attorney to consult with an  
23 expert that is knowledgeable in the precise discipline or sub-specialty of each design defendant,  
24 and that the City's geotechnical and professional engineer is deficient under NRS 11.258 because  
25  
26  
27  
28

1 he is not qualified in the specialization of each design defendant. The Court finds these arguments  
2 unpersuasive.<sup>1</sup>

3  
4 29. Notably, NRS 11.258(1) uses strictly singular language. It states that that  
5 claimant's attorney must consult with "*an* expert" that the attorney reasonably believes is  
6 knowledgeable in "*the* relevant discipline"—not discipline(s). Moreover, this section of the  
7 statute states that the attorney must consult with an expert who is "knowledgeable in the relevant  
8 discipline *involved in the action*" not the specific sub-discipline of each individual defendant.  
9 (emphasis added).

10 30. NRS 11.258(1) states that claimant's attorney need only have a reasonable belief  
11 that the expert is knowledgeable in the relevant discipline involved in the action. The Court finds  
12 that the City's attorney's belief that the expert he consulted with was knowledgeable in the  
13 relevant discipline involved in the action was reasonable under these circumstances. The Court  
14 further finds that the City's expert, Edred T. Marsh, P.E. of American Geotechnical, Inc., is both a  
15 licensed professional engineer and an expert in geotechnical engineering.

16 31. Additionally, the statute defines the term "expert." NRS 11.258 (6) states that: "As  
17 used in this section, 'expert' means a person who is licensed in a state to engage in the practice of  
18 *professional engineering*, land surveying, architecture or landscape architecture." (emphasis  
19 added). Because the City's expert is a licensed professional engineer in the relevant discipline  
20 involved in the action, the Court finds him to be a qualified expert under NRS 11.258.

21 32. The Court finds that NRS 11.258 is unambiguous on its face. "When a statute is  
22 clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v.*  
23 *Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). As such, it is unnecessary for the Court to  
24 look outside the statutory language in interpreting NRS 11.258. Contrasting NRS 11.258(1) with  
25 the affidavit of merit requirements from NRS 41A.071 in medical malpractice cases further  
26

27 <sup>1</sup> The Court does not intend for this to be an exhaustive list or summary of Movants' arguments. However, the Court  
28 finds it helpful to briefly explain some of Movants' arguments pertinent to its decision. As is true for this entire  
Order, the Court has considered all of Movants' arguments—regardless of whether they are mentioned herein.

1 solidifies the Court's analysis. It is apparent to the Court that the legislature could have required  
2 claimant's expert to practice in an area that is substantially similar to the type of practice engaged  
3 in by each defendant, as required in medical malpractice cases under NRS 41A.071. However,  
4 the Court finds that these requirements are conspicuously absent from NRS 11.258(1).  
5

6 33. In addition to the attorney affidavit, NRS 11.258(3) requires the claimant to attach  
7 the expert's resume, a report that includes his conclusions, each document that he reviewed in  
8 reaching his conclusions, a statement that he is experienced in each discipline that is the subject of  
9 his report, and a statement that he has concluded that there is a reasonable basis for filing the  
10 action.

11 34. Specifically, NRS 11.258(3) states:

12 3. In addition to the statement included in the affidavit pursuant to  
13 subsection 1, a report must be attached to the affidavit. Except as  
14 otherwise provided in subsection 4, the report must be prepared by  
the expert consulted by the attorney and must include, without  
limitation:

15 (a) The resume of the expert;

16 (b) A statement that the expert is experienced in each discipline  
which is the subject of the report;

17 (c) A copy of each nonprivileged document reviewed by the  
18 expert in preparing the report, including, without limitation, each  
19 record, report and related document that the expert has  
20 determined is relevant to the allegations of negligent conduct that  
are the basis for the action;

21 (d) The conclusions of the expert and the basis for the  
conclusions; and

22 (e) A statement that the expert has concluded that there is a  
reasonable basis for filing the action.

23 35. The Court finds that the City complied with all requirements of NRS 11.258(3).  
24

25 36. Movants argue that the City's expert failed to specifically opine on each design  
26 defendants' scope of work and that he did not state that each design defendant specifically  
27 breached the standard of care. The Court finds that these are not requirements of NRS 11.258.  
28

1           37.     The Court also finds that Mr. Marsh's report was sufficiently detailed and included  
2 his conclusions as to the geotechnical and soil issues on the Property. The Court finds that the  
3 City also included a separate statement from Mr. Marsh wherein he stated that he was  
4 experienced in each discipline which is the subject of his report and that he concluded that there is  
5 a reasonable basis for filing the action. The Court also finds that the City attached all necessary  
6 documents required by NRS 11.258(3).

7           38.     "The starting point for determining legislative intent is the statute's plain meaning;  
8 when a statute is clear on its face, a court cannot go beyond the statute in determining legislative  
9 intent." *McNeill v. State*, 132 Nev. 551, 555, 375 P.3d 1022, 1025 (2016) (internal quotations  
10 omitted).

11           39.     No party has identified a specific ambiguity in the statute and the Court finds that  
12 NRS 11.258 is clear on its face. Thus, the Court need not look beyond the statutory language or to  
13 legislative history to interpret NRS 11.258.


14           40.     Accordingly, the Court finds that the City's complaint complies with NRS 11.258  
15 as to all Movants.

16  
17                                 **ORDER**

18           **IT IS HEREBY ORDERED** that the Motion and all Joinders are DENIED.

19           **IT IS FURTHER ORDERED** that Movants must file their respective answers within  
20 fourteen (14) days of entry of this Order pursuant to NRCP 12(a)(3)(A).

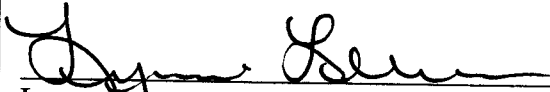
21  
22     Dated: March 30, 2020.

23  
24  
25                                 

26                                 Trevor L. Atkin  
27                                 District Court Judge  
28

1 **Certificate of Service**

2 I hereby certify that on the date filed, a copy of this  
3 Order was electronically served on all parties registered  
4 through the Eighth Judicial District Court EFP system or mailed  
5 to any party or attorney not registered with the EFT system.

6   
7 Lynne Lerner  
8 Judicial Executive Assistant  
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**EXHIBIT 63**  
**PETITIONERS' APPENDIX**

**EXHIBIT 63**  
**PETITIONERS' APPENDIX**



1 RTRAN

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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 NORTH LAS VEGAS CITY OF ,

9 Plaintiff,

10 vs.

11 DEKKER/PERICH/SABATINI LTD.,

12 Defendant,

CASE#: A-19-798346-C

DEPT. VIII

13  
14 BEFORE THE HONORABLE TREVOR ATKIN, DISTRICT COURT JUDGE  
15 TUESDAY, MARCH 17, 2020

16 **RECORDER'S TRANSCRIPT OF HEARING:**  
17 **ALL PENDING MOTIONS**

18 APPEARANCES ON PAGE 2:

19  
20  
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23  
24 RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER  
25



1 APPEARANCES ALL MADE VIA VIDEOCONFERENCE:

2  
3 For the Plaintiff:

4 City of North Las Vegas

RICHARD C. GORDON, ESQ.  
ALEEM A. DHALLA, ESQ.

5  
6 For the Defendants:

7 Stargate Plumbing

SHANNON G. SPLAINE, ESQ.

8  
9 Ninyo & Moore Geotechnical Construction

HARRY V. PEETRIS II, ESQ.  
JONATHAN P. PATILLO, ESQ.

10  
11 MSA Engineering Inc.

JEREMY R. KILBER, ESQ.

12 Nevada by Design LLC

JOHN T. WENDLAND, ESQ.

13 Richardson Construction Inc.

THEODORE PARKER, ESQ.

14 JW Zunino & Associates LLC

DYLAN P. TODD, ESQ.

1 Las Vegas, Nevada, Tuesday, March 17, 2020

2 [Case called at 10:54 a.m.]

3 THE COURT: Okay, this is on for McElroy [sic] Engineering's  
4 motion for clarification regarding court's minute order denying MSA's  
5 motion to dismiss pursuant to NRS 11.258 on order shortening time.  
6 There being a concern as to preserving appealable issues. Am I  
7 correct?  
8

9 MR. KILBER: Yes, Your Honor, Jeremy Kilber on behalf of  
10 MSA.

11 THE COURT: Okay. Thank you. Since that time, I have  
12 been provided by the City of North Las Vegas, proposed order denying  
13 that motion. I need it in Word format just so if I want to tinker with it I  
14 can. But the basis for my ruling, to be clear and so we have a record,  
15 and I very much appreciate what you guys are trying to do. So, I just  
16 want to make a record for you so that I can make your jobs a little bit  
17 easier and your client's interest protected. But also, the Appellate Court  
18 reviewing my decision. I don't want to make it any worse.

19 So it is my position -- my position, my ruling that the City of  
20 North Las Vegas complied with NRS 11.258 as it -- subsection 1 and  
21 subsection 3 and the reason that is for that is I'm looking at subsection 1  
22 and it states as: except as otherwise provided in subsection 2 in an  
23 action involving non-residential construction. And I'm going to stop right  
24 there.

25 So, the legislature surely was intending that this was for  
commercial construction, it's non-residential construction. So, the

1 Legislature knows and there's a history that if something goes wrong on  
2 a construction -- commercial construction project any lawsuit is likely to  
3 involve, as history teaches us, multiple, multiple, multiple defendants  
4 multiple disciplines, sciences, engineers, that type of thing.

5 So there's an understanding that if the building I'm watching  
6 going up downtown, if something is wrong the Legislature knows that  
7 there may be multiple fields of engineering or whatever you want to call  
8 it involved, contractors, architects, you name it, They know there may  
9 be multiple sources. So that's my starting point.

10 So, continuing on with subsection 1: the attorney for the  
11 complainant shall file an affidavit. So that's singular. It says an affidavit.  
12 Had it contemplated you need an expert for every single field it would  
13 have, I would think, say file affidavits, plural. It did not. With the court  
14 concurrently with the service in the first pleading in the action stating that  
15 the attorney A) has reviewed the facts of the case, B) has consulted with  
16 an expert. It didn't say experts in the field of each science or field it is  
17 suing, just an expert.

18 Sub part C reads, reasonably believes the expert, not experts  
19 who was, not were consulted is knowledgeable in the -- not the relevant,  
20 not in all relevant disciplines involved in the action. It just says in the  
21 relevant discipline.

22 And then sub part D reads has concluded on the basis of the  
23 review and the consultation with the expert, singular, as to -- as opposed  
24 to plural.

25 Then continuing on with subsection 3, similar argument. It

1 reads, second sentence: except as otherwise provided in subsection 4,  
2 the report must be prepared by the expert consulted by the attorney.

3 So, the way the statute was written I believe it contemplated,  
4 A) commercial projects. The Legislature knows a project litigation often  
5 involves multiple fields, disciplines, and despite that, it never the less  
6 made -- drafted 11.258 in using the singular as opposed to plural. So,  
7 for those reasons that why I denied the McElroy Engineer's motion to  
8 dismiss. And I have a proposed order in that regard that --

9 [Unidentified noise]

10 THE COURT: -- reflects that and I'm going to go through it  
11 and redline it as I deem necessary. I haven't done that yet, but that's  
12 going to be the basis of my decision.

13 Now with that stated counsel for I'll call it McElroy Engineer --  
14 Melroy, excuse me. Melroy Engineering, is there anything you want to  
15 add or address with the Court?

16 MR. KILBER: I mean, I don't believe it would be proper to  
17 reargue our motion. My only clarification would be is it the Court's  
18 opinion that [indiscernible] this was presented in a plural by the  
19 Legislature that a party could not then sue an individual design  
20 professional?

21 THE COURT: No, and I appreciate you indicate, --

22 THE RECORDER: Was that Mr. Kilber?

23 THE COURT: Yes.

24 I appreciate you not rearguing. I just believe that the statute --  
25 and I'm just going to leave it at that. The statue indicates that only one

1 expert is required to get past the initial hurdle of filing a complaint. And I  
2 think that's been done.

3 MS. SPLAINE: Your Honor, this is Shannon Splaine. I  
4 understand the City of North Las Vegas attached their proposed order in  
5 the opposition that we, you know, just got. And they did circulate it late  
6 on Friday. And I understand Your Honor's going to go through it and  
7 redline it. We have not had the opportunity to address some of the  
8 concerns with the City's counsel.

9 Specifically, and I'm not going to talk about the underlying  
10 motion itself but in the findings of fact there are some statements in  
11 there that cause some concern as it relates to the overall case, because  
12 it implies that Your Honor, is finding as fact certain statements by  
13 plaintiff's expert as to the underlying allegations in the case.

14 THE COURT: I saw that.

15 MS. SPLAINE: Specifically, [indiscernible] and so I just want  
16 to make sure that we have an opportunity to either address it or submit a  
17 concern to the Court, because some of that goes outside of this  
18 particular motion and what [indiscernible] what are being found as part  
19 of this motion.

20 THE COURT: Okay. City of North Las Vegas, what's your  
21 position in this regard? I kind of have a thought of what I might want to  
22 do. You go ahead.

23 MR. GORDON: Sure, thank you, Your Honor. And you know,  
24 again our position here, Your Honor, is that you know, the Court  
25 indicated a process to be followed here. And it's being followed. And

1 Ms. Splaine's position that they would like to make comments and  
2 proposed changes is really the normal course that we actually  
3 anticipated would take place here until we saw a motion filed on  
4 Monday.

5 So, we are certainly open to receive comments from the  
6 opposing side. That's normally how it's done. And if the parties can  
7 come to an agreement, we would present you a joint order and if not  
8 then, you know, competing orders are permissible.

9 Unfortunately, I think, Your Honor, we're forcing you into the  
10 middle of the editing process when that really shouldn't have been the  
11 case. But we're welcome --we welcome any comments from the other  
12 side and if we agree we will give you one order, if not we will probably  
13 give you competing.

14 THE COURT: Okay. Okay, does anyone else want to be  
15 heard on this before I outline what I propose?

16 MR. WENDLAND: Yes, Your Honor, John Wendland for  
17 Dekker and North Las Vegas. I know it's been kind of implied in all the  
18 comments made, but there was a series of joinders. Are you also ruling  
19 this same fashion with respect to the joinders? In particular, I have an  
20 architectural client who Your Honor's ruling would subject them to a  
21 geotechnical report and I want that clearly defined that this will also  
22 apply to -- do your rulings also apply to the joinders even if they are  
23 separate parties from the scope of the geotechnical report?

24 THE COURT: It applies as to the architects and all the  
25 joinders.

1 MR. WENDLAND: Thank you, Your Honor.

2 THE COURT: Thank you. All right anyone else want to be  
3 heard?

4 MR. PEETRIS: Your Honor, Harry Peetris here on behalf of  
5 Ninyo and Moore.

6 THE COURT: Okay.

7 MR. PEETRIS: Our argument was a little bit different with the  
8 Court. We were arguing -- obviously we're a geotechnical engineer.  
9 And if Your Honor recalls we just did work preconstruction. Our  
10 argument was more towards the reasonableness arguments for  
11 11.258(1) and we were also challenging the fact that the report that was  
12 submitted was not adequate since it had no criticisms or the basis of  
13 criticisms with regard to any work preformed by Ninyo and Moore so as  
14 to put us on notice of what it is we allegedly did wrong. And we're still  
15 maintaining that position today.

16 But I just wanted to bring that up for the record since it was a  
17 little bit different than the arguments of the main motion plus the joinders  
18 being as it was a different discipline. Ours go towards the  
19 reasonableness and the fact that there is no basis for the opinion or  
20 documents that support the opinion. That's under 11.258(1) and (3).

21 THE COURT: Okay. I appreciate that argument but it --to go  
22 through each and every defendant then we'd be parsing out and then  
23 we're back to the same situation. So, it applies to your client as well.

24 MR. PEETRIS: Thanks, Your Honor.

25 THE COURT: All right, anyone else like to be heard.

1 MR. KILBER: Yes, Your Honor, Jeremy Kilber on behalf of  
2 MSA. I do want to clarify that the Court has found that the contents of  
3 the report meet the requirement, all the requirements of NRS 11.258.

4 THE COURT: Yes, that's the answer. That's my ruling.

5 MR. KILBER: Including providing a basis of the merit for the  
6 claims?

7 THE COURT: Yes. It required an expert in the relevant field.  
8 That was met. Whether it goes to each defendant --

9 MR. KILBER: But they also -- the statement from the expert  
10 that there's no merit for the claims asserted against those parties, the  
11 Court finds that's contained in the report?

12 THE COURT: What are you asking me?

13 MR. KILBER: I'm asking that -- to clarify to make sure that we  
14 understand the Court's ruling that the Court has found that the expert's  
15 report contains the statement that there is merit for the claims asserted  
16 against the parties.

17 THE COURT: Okay, here is what I'm saying. The plaintiff's  
18 complaint has fully satisfied all the requirements of NRS 11.258, period.

19 MR. KILBER: Okay.

20 THE COURT: That's what I found. That's why the motion to  
21 dismiss was denied.

22 MR. WENDLAND: That's nice and easy.

23 THE COURT: Right. But I -- believe me, ladies and  
24 gentlemen, I respect each of your positions and what you're trying to do  
25 for you clients as well as what the City of North Las Vegas is trying to



1 do. As well as respect what our Legislature has done. So, I'm doing the  
2 best I can as well. And I want to make sure that whatever I end up  
3 signing is done in a timely fashion so that all of your clients are protected  
4 relative to an appeal, while also providing the Appellate Court with what  
5 it needs to be able to make a ruling one way or the other.

6 So with all that said, I would just like -- this is just -- let's say  
7 it's a run of the mill little case, relatively small. We always say, hey run  
8 this by counsel for approval to the extent you can. And I get one order  
9 that everyone can live with or die with on appeal. So that's what I would  
10 ask.

11 I loathe competing orders because it just complicates. But  
12 sometimes they -- we just can't do that. So, I would like -- I'm going to  
13 afford all of the defendants the opportunity to get with plaintiff's counsel.  
14 So, it's kind of like herding cats on the City of North Las Vegas to figure  
15 out what the order submitted will look like. I would like that order  
16 submitted by the 24<sup>th</sup> of this month. And if it can't be, then by the 24<sup>th</sup>,  
17 the competing orders.

18 And I don't want two -- I don't want more than two. If we have  
19 competing orders, I don't want more than two. All right.

20 MR. GORDON: Very good, Your Honor. Thank you.

21 MR. WENDLAND: Thank you, Your Honor.

22 MS. SPLAINE: Thank you, Your Honor.

23 THE COURT: Thank you for all doing the best you can in this  
24 system. So particularly this case, so thank you all.

25 MR. PARKER: Thank you, Your Honor.

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MR. PEETRIS: Thanks, Your Honor.

MR. PARKER: All right. Bye-bye.

[Hearing concluded at 11:10 a.m.]

\* \* \* \* \*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Jessica Kirkpatrick  
Court Recorder/Transcriber