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Nevada Dep't of Trans. v. Eighth Judicial Dist. Ct., 132 Nev. Adv. Op. 10 (Feb. 25, 2016)

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Nevada Law Journal

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Recommended Citation

Jackson, F. Shane, "Nevada Dep't of Trans. v. Eighth Judicial Dist. Ct., 132 Nev. Adv. Op. 10 (Feb. 25, 2016)" (2016). *Nevada Supreme Court Summaries*. 943.

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TORTS: PROFESSIONAL NEGLIGENCE

Summary

The Court considered a petition for a writ of mandamus challenging a district court order denying a motion to dismiss. Petitioner Nevada Department of Transportation (“NDOT”) sought dismissal of a professional negligence claim filed against it on grounds that the complaint was not accompanied by an attorney affidavit and expert report as required by NRS 11.258, and when the court denied NDOT’s motion, it filed the instant petition. The Court denied the petition, holding that NDOT is not a design professional under NRS 11.2565(1)(a), and therefore the requirements of NRS 11.258 are inapplicable to NDOT since the action would not statutorily qualify as “an action involving nonresidential construction.”

Background

The owner of an urgent care facility filed a negligence claim against NDOT alleging that the department failed to properly design, construct, maintain, and/or repair a state highway located adjacent to the urgent care facility, thereby allowing water to enter and flood the premises. NDOT filed a motion to dismiss the claims for failure to comply with NRS 11.256–.259. The district court denied the motion after finding that NDOT is not “primarily engaged in the practice of professional engineering” and, as such, all claims brought against NDOT are not subject to the mandatory filing requirements of NRS 11.256–.259. NDOT then filed a petition for writ relief.

Discussion

NRS 11.258(1) provides that, 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.² The attorney must include an expert report with the affidavit.³

NRS 11.2565(1) defines an action involving nonresidential construction as one that (a) is brought against a design professional and (b) involves the design, construction, manufacture, repair or landscaping of a nonresidential building or structure, of an alteration of or addition to an existing nonresidential building or structure, or of an appurtenance, including, without limitation, the design, construction, manufacture, repair or landscaping of a new nonresidential building or structure, of an alteration of or addition to an existing nonresidential building or structure, or of an appurtenance.⁴

¹ By F. Shane Jackson.

² NEV. REV. STAT. § 11.258 (2015).

³ *Id.*

⁴ NEV. REV. STAT. § 11.2565.

NRS 11.2565(2)(b)⁵ defines “design professional” as “a person who holds a professional license or certificate issued pursuant to chapter 623 [Architecture, Interior Design and Residential Design], 623A [Landscape Architects] or 625 [Professional Engineers and Land Surveyors] of NRS *or* a person primarily engaged in the practice of professional engineering, land surveying, architecture or landscape architecture” (emphasis added).⁶

NRS 625.050(1) defines “professional engineering” as (a) any professional service which involves the application of engineering principles and data, such as surveying, consultation, investigation, evaluation, planning and design, or responsible supervision of construction or operation in connection with any public or private utility, structure, building, machine, equipment, process, work or project, wherein the public welfare or the safeguarding of life, health or property is concerned or involved; and (b) such other services as are necessary to the planning, progress and completion of any engineering project or to the performance of any engineering service.⁷

Here, NDOT argued that it is a design professional because its employees are professionally licensed engineers and it primarily engages in professional engineering. The Court disagreed, however, noting that not all of NDOT’s employees are statutorily required to be licensed professional engineers,⁸ and that NDOT—though it engages in several professional engineering activities⁹—is not primarily engaged in the practice of “professional engineering” as defined in NRS 625.050(1). Rather, NDOT’s board of directors is the “custodian of the state highways and roads,”¹⁰ and its director’s duties include “construction, reconstruction, improvement, maintenance and repair of all highways” in Nevada, so while some of NDOT’s employees may be engaged in areas of professional engineering, NDOT is not itself primarily engaged in the practice of professional engineering.

The Court further held that NDOT, as a government entity, does not fall within the definition of “person” in NRS 0.039,¹¹ and therefore cannot satisfy the definition of “design professional” in NRS 11.2565(2)(b). Since NDOT is not a design professional as envisioned by the Legislature in NRS 11.2565(1)(a), the requirements of NRS 11.258 are inapplicable to NDOT because the action filed against it does not statutorily qualify as “an action involving nonresidential construction.” Accordingly, the district court did not err in denying NDOT’s motion to dismiss, and the Court denied NDOT’s petition for writ relief.

Conclusion

The mandatory filing requirements of NRS 11.258 are only applicable to actions involving nonresidential construction, which can only be brought against design professionals pursuant to NRS 11.2565(1). In this case, the filing requirements did not apply to an action against NDOT because NDOT is not a design professional.

⁵ *Id.*

⁶ *Id.*

⁷ NEV. REV. STAT. § 625.050.

⁸ *See, e.g.*, NEV. REV. STAT. §§ 408.106, .163, .178.

⁹ *See, e.g.*, NEV. REV. STAT. §§ 408.200, .233, .234 (2015).

¹⁰ NEV. REV. STAT. § 408.100 (2015).

¹¹ NEV. REV. STAT. § 0.039.