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Summary of Otak Nev., LLC v. Eighth Jud. Dist. Ct., 127 Nev. Adv. Op. No. 53

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Summary

Petition for writ of mandamus challenging the Eighth Judicial District Court’s orders that pleadings alleging nonresidential construction malpractice, initially filed without attorney affidavits and expert reports, were valid under NRS 11.258.

Disposition/Outcome

The Court granted Otak’s petition for writ relief on the claims of nonresidential construction malpractice and held that pleadings filed under NRS 11.258 without the required affidavit and expert report are void and legally non-existent, and cannot be cured by amendment.

Factual and Procedural History

The issue before the Court arose from a claim by Christopher Watkins (“Watkins”) for damages related to a car accident. The accident was allegedly due to a defect in a road construction project with which the other real parties in interest were involved.

Watkins filed suit against the parties involved with the project. Then, in September 2009, the project’s general contractor and real party in interest, Pacificap Construction Services, LLC (“PCS”), filed a third-party complaint alleging nonresidential construction malpractice against the project’s architect, petitioner Otak Nevada, LLC (“Otak”) for its role in the project. PCS served Otak with the third-party complaint on September 21, 2009, but no attorney affidavit or expert report accompanied the complaint as required under NRS 11.258.²

In January 2010, PCS filed an amended third-party complaint, which included an attorney affidavit and an expert report. Otak filed a motion to dismiss PCS’s amended third-party complaint, arguing that the original third-party complaint was void ab initio and legally non-existent, thus could not be amended under the Supreme Court of Nevada’s holding in *Fierle v. Perez*.³ The district court denied Otak’s motion to dismiss and declined to apply *Fierle*, stating that it applied only to cases involving medical malpractice.⁴

Subsequently, the other real parties in interest, Pacificap Properties Group, LLC; Pacificap Holdings, XXIX; Chad I. Rennaker; and Jason Q. Rennaker (collectively, P&R) filed motions for leave to amend their answer and assert cross-claims against Otak. In opposition of P&R’s motion, Otak again argued that the cross-claims were void ab initio under *Fierle*. The district court granted P&R’s motion for leave to amend and allowed P&R, as well as Watkins, to use PCS’s expert report in their amended complaints against Otak.

Otak then petitioned the Supreme Court of Nevada for a writ of mandamus to set aside the district court’s orders.

¹ By Jason Wallace.

² NEV. REV. STAT. § 11.258 (2007).

³ *Fierle v. Perez*, 125 Nev. ___, ___, 219 P.3d 906, 914 (2009).

⁴ *Otak Nev., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. Adv. Op. No. 53 at 4 (September 8, 2011).

Discussion

Suitability of Writ Relief

Justice Hardesty wrote for the unanimous three-judge panel. The Court determined that Otak's petition warranted consideration because it was not fact bound, it presented an issue of first impression, and at this early stage of litigation, a determination on the matter would promote judicial economy.

The Court reviewed the district court's statutory construction determinations de novo. The Court analyzed the language in NRS 11.259, which governs dismissal of pleadings that fail to comply with NRS 11.258, and concluded that the phrase "shall dismiss" indicated the Legislature's intent to mandate dismissal and preclude judicial discretion to allow parties to amend defective complaints. The Court held that "because a pleading filed under NRS 11.258 without the required attorney affidavit and expert report is void ab initio and of no legal effect, the party's failure to comply with NRS 11.258 cannot be cured by amendment."⁸ This analysis and holding comported with earlier decisions where the Court analyzed a similar statute governing medical malpractice complaints.⁹

Based on this analysis, the Court held that the original pleadings filed by PSC and P&R violated NRS 11.258, rendering them void and legally non-existent. Also, the Court noted that pleadings void for failure to comply with 11.258 cannot be amended under NRCP 15(a). Accordingly, the Court held that the district court abused its discretion when it denied Otak's motion to dismiss PCS's amended third-party complaint and granted P&R's motion for time to amend.

The Court added that the district court erred when it allowed P&R and Watkins to use PSC's expert report as their own, because NRS 11.258(1) requires the attorney for the complainant to file the expert report. Thus, each complaint must include its own attorney affidavit and expert report reflective of the complainant's relationship with the defendant.

Conclusion

Any pleading filed under NRS 11.258 without the required affidavit and expert report shall be dismissed as void ab initio and cannot be cured by amendment. Additionally, each complaint must include its own attorney affidavit and expert report reflective of the complainant's relationship with the defendant.

⁸ Otak, 127 Nev. Adv. Op. No. 53 at 8-9.

⁹ See Fierle, 219 P.3d at 914; Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1303, 148 P.3d 790, 793-74 (2006).