IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No.: 65656
District Case Court No. 07A542616

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the COUNTY OF CLARK; and the HONORABLE SUSAN JOHNSON, District Judge,

Respondent,

D.R. HORTON, INC.

Real Party in Interest.

PETITIONER, HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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I. INTRODUCTION

The resolution and disposition of this appeal requires this Court to answer a single question, to wit: does any part of NRS 116.3102(1)(d)'s plain and unambiguous language or any statute in the Uniform Common Interest Ownership Act (hereafter "UCIOA") prescribe that an association's representative standing is abrogated when a unit is sold? The simple answer is a categorical no – not a single Nevada law, statute or code prescribes or suggests that NRS 116.3102(1)(d) is abrogated with regard to a unit if that unit is sold. Any suggestion to the contrary is as absurd as the discredited claim that only the "original" purchasers of residences may avail themselves to Chapter 40's statutory framework. The District Court clearly abused its discretion when it created an exception to NRS 116.3102(1)(d) that does not exist in the statute's plain and unambiguous language. It is an unauthorized and erroneous act of "judicial legislation" that cannot be allowed to stand.

Real Party In Interest D.R. HORTON, INC.'s (hereinafter referred to as "DRH") Answer to Petitioner's Writ of Prohibition or Mandamus is remarkable in that it urges this Court to adopt a position, based upon California precedent, that the California courts themselves have never adopted. In its Answer, DRH repeatedly asserts that California jurisprudence—a state that has consistently refused to adopt the UCIOA—provides the "black letter law" of Nevada. DRH then goes on to ask this Court to go where no court, even California courts, have gone before—to assert that a unit in an HOA that has sold since the filing of an HOA construction defect complaint, is outside the purview of HOA standing. DRH's reliance on California jurisprudence is especially puzzling when the express language of NRCP 17 states that the determination of a party's capacity to sue shall be determined by the law of Nevada.

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The interpretation, application and scope of the UCIOA are the critical considerations in this case and California jurisprudence has no weight or value where Nevada jurisprudence has adequately addressed the legal issue on appeal. Simply stated, the District Court abused its discretion when it engaged in impermissible "judicial legislation" by amending the UCIOA's statutory grant of standing to associations. DRH's heavy reliance on California jurisprudence is indicative of the untenable grounds upon which the District Court granted DRH's Motion for Partial Summary Judgment.

Like Nevada, several other jurisdictions such as Connecticut, West Virginia and Colorado have adopted the UCIOA. These three states, among others, have adopted provisions nearly identical to NRS 116.3102(1)(d). Critically, published appellate decisions from these states have uniformly rejected arguments that a common interest association's representative standing, as the real party in interest, is abrogated by artificial limitations not appearing in the express and explicit language of the UCIOA. Indeed, Colorado has observed that the UCIOA simplifies association led construction defect cases by "avoiding the necessity of assignment of claims ...." *Yacht Club II Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. Ct. App. 2003). This observation is fatal to DRH's position since its Answering Brief presumes that assignments are necessary in jurisdictions that have adopted the UCIOA.

II. LEGAL ARGUMENT

A. Reference To California Jurisprudence Is Unwarranted Where Nevada Law Clearly Holds That A Homeowners' Association Serving A Common-Interest Community Is Statutorily Authorized To Sue In Its Own Name On Matters Affecting The Common-Interest Community

As a preliminary matter, this Court has held that, "Nevada law controls, and that we only look 'at federal jurisprudence for guidance—when needed.'" *Bahena*

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v. Goodyear Tire & Rubber Co., 245 P.3d 1182, 1185 (Nev. 2010). It follows that California jurisprudence has no weight or value where Nevada law fully occupies a particular area of law such as association standing under the UCIOA. Although DRH's Answering Brief attempts to create ambiguity in Nevada law where none exists by citation to California jurisprudence, this Court has spoken on this issue:

> [W]e conclude that where NRS 116.3102(1)(d) confers standing on a homeowners' association to assert claims "on matters affecting the common-interest community," ***a homeowners' association has standing to assert claims that affect individual units.*** Our conclusion is further supported by section 6.11 of the Restatement (Third) of Property and its commentary. The Restatement provides that "***[e]xcept as limited by statute*** or the governing documents, the association has the power to institute . . . litigation . . . in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.

D.R. Horton, Inc. v. Eighth Judicial Dist. Court of Nev., 125 Nev. 449, 457 (Nev. 2009), emphasis added, citations omitted.

The critical consideration is whether any Nevada statute limits HIGH NOON's standing to only those homes in the community that retain the same ownership they had at the onset of the litigation. Neither the District Court nor DRH has identified any Nevada statute limiting NRS 116.3102(1)(d) standing where an association meets the express elements of the statute—that the claims pertain to "matters affecting the common interest community." Nothing more is required. As noted below, published appellate decisions in jurisdictions that have adopted the UCIOA are in accord.

This Court reiterated this point in *Beazer Homes Holding Corp.* where it observed that an association's compliance with NRCP 23 does not determine *whether* the representative action may proceed but rather, *how* it shall proceed.

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Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev., 291 P.3d 128, 135 (Nev. 2012). In *ANSE, Inc.*, this Court warned against "judicial legislation" by barring the practice of reading limitations into statutes that do not exist in its plain language:

> NRS 40.610 defines a constructional defect claimant as "[a]n owner of a residence" – *without qualification. NRS 40.610 plainly does not require that a constructional defect claimant be a residence's first owner, as petitioners' interpretation of 'new residence' suggests, or expressly impose any other limitation.*

ANSE, Inc. v. Eighth Judicial Dist. Court of Nev., 124 Nev. 862, 873 (Nev. 2008). Similarly, NRS 116.3102(1)(d) plainly does not mandate that an association's standing be abrogated whenever a unit owner sells his or her unit.

This Court has emphasized that "[i]f the text of a statute is unambiguous, we need not look beyond it." *Bielar v. Washoe Health Sys.*, 306 P.3d 360, 365 (Nev. 2013). Finding no support for its position in Nevada law, DRH attempts to create ambiguity by referring to California jurisprudence for a proposition that even California courts have not adopted. Moreover, California has consistently refused to adopt the UCIOA. *Ruoff v. Harbor Creek Community Assn.*, 10 Cal.App.4th 1624, 1629 (1992); *see also* California Law Revision Commission, UCIOA – Study H-852, Meeting Minutes dated November 21, 2003, p. 8[1]. DRH cannot credibly claim that a creative extrapolation of California's "black letter law" has any bearing on NRS 116.3102(1)(d), especially when California has rejected the adoption of the UCIOA in its entirety.

DRH's Answering Brief is without merit because it has failed to identify, let alone analyze, a single Nevada statute that limits the application of NRS 116.3102(1)(d). DRH's primary source of legal authority is a state that has

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[1] http://www.clrc.ca.gov/pub/Minutes/Minutes2003-11.pdf

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refused adoption of the UCIOA. This Court's recent decisions analyzing NRS 116.3102(1)(d) have clearly held that absent any statute specifically limiting an association's standing, the only salient question is *how* a representative action shall proceed to trial. The critical point that the District Court disregarded is that where the UCIOA is applicable, subsequent changes in ownership of units is irrelevant because nothing in the plain language of NRS 116.3102(1)(d) abrogates standing when that occurs. Without any support in a Nevada statute, the District Court abused its discretion by practicing "judicial legislation" in violation of this Court's warnings in *ANSE, Inc.*

B. A Review Of Decisions In States That Have Adopted The UCIOA Reveal That NRS 116.3102(1)(d)'s Parallel Statutes Are Broadly Interpreted And Do Not Allow Judicially-Created Limitations to The Statutory Grant of Standing

In addition to Nevada, states that have adopted the UCIOA include Alaska, Colorado, Connecticut, Delaware, Minnesota, West Virginia and Vermont. Yet DRH conspicuously directs this Court to California jurisprudence instead – a state that has refused to adopt the UCIOA. It is a classic "fitting a square peg into a round hole" logical fallacy. Although Nevada law is clear on the issue of association representative standing, a review of sister states' jurisprudence interpreting NRS 116.3102(1)(d)'s parallel statutes exposes the tortured nature of DRH's legal contentions.

1. Connecticut Jurisprudence – Courts May Not Practice "Judicial Legislation" By Reading Exceptions Or Limitations Into Association Representative Standing That Is Not Already Present In The Plain And Unambiguous Language Of The UCIOA

Candlewood Landing Condominium Ass'n is relevant to the case at bar because it involved a scenario where a trial court imposed a judicially-created limit to an association's representative standing under Connecticut's identical

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version of NRS 116.3102(1)(d). *Candlewood Landing Condo. Ass'n v. Town of New Milford*, 44 Conn. App. 107, 109-110 (Conn. App. Ct. 1997). In overruling the trial court, the Connecticut Appellate Court's following observation is highly instructive to the issue before this Court:

> ***The [Uniform Common Interest Ownership] act, however, confers on a condominium association the power to "institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community."*** [Citation.] Thus, the question immediately before us is whether § 47-244(a)(4) includes the right to take tax appeals on behalf of unit owners.
>
> The objective of statutory construction is to give effect to the intended purpose of the legislation. [Citation.] If the language of a statute is plain and unambiguous, courts need look no further than the words used because courts assume that the language expresses legislative intent. [Citation.] Common sense must be used and courts will assume that the legislature intended to accomplish a reasonable and rational result. [Citation.] We must presume that each sentence, clause and phrase in a public act has a purpose and that the legislature did not intend to enact a meaningless law. [Citation.] ***Section 47-244(a)(4) would be meaningless if we agreed with the trial court that, despite the statute's clear terminology, an association lacked standing to appeal a tax assessment on a condominium's common elements.***
>
> ***Furthermore, § 47-244(a)(4) contains no exceptions or limitations on a condominium association's authority to act on behalf of the unit owners as long as at least two unit owners agree. If we affirmed the trial court we would be effectively amending § 47-244(a)(4) by adding a clause to the effect that, except for litigation pertaining to tax appeals, a condominium association may act in litigation and administrative proceedings. We decline to participate in such judicial legislation.***

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> ***The plaintiff also urges us to reverse the trial court because of public policy considerations. Although the condominium in this case is small – only thirteen units – we cannot ignore the realities of condominium development in this state. Many condominiums consist of hundreds of units. If we construe the tax appeal statute to require that each unit owner bring an individual tax appeal for his fractional ownership of the common elements, we will have burdened the court system and the municipalities with hundreds of cases where a single action by the association could have accomplished the same result more speedily and efficiently. Furthermore, such a construction might well have the practical effect of making tax appeals in large condominiums virtually impossible.***

Candlewood Landing Condo. Ass'n, supra, 44 Conn. App. at 110-111; *see also Caswell Cove Condo. Ass'n v. Milford Partners, Inc.*, 58 Conn. App. 217 (Conn. App. Ct. 2000), emphasis added, citations omitted.

The salient points to be gleaned from the opinion are: (1) the language of NRS 116.3102(1)(d) is crystal clear and it contains no exceptions or limitations beyond its express language; (2) the imposition of additional requirements by trial courts beyond the express language of the statute violates principles of statutory construction and is tantamount to unauthorized judicial legislation; (3) imposing limits on NRS 116.3102(1)(d) would burden the Nevada court system with hundreds of cases where a single cause would be more efficient, and effectively makes construction defect lawsuits in large developments virtually impossible; and (4) representative standing under the UCIOA was intended to provide a streamlined, efficient alternative to forcing hundreds of unit owners to sue individually.

The only beneficiary of the scenario warned against in *Candlewood Landing Condo. Ass'n* would be DRH and similarly situated defendants, who benefit from rules that make access to the courts oppressive, burdensome and costly. The losers in such a scheme would be Nevada citizens and the Nevada

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court system. Public policy would clearly not be served by such a result. Indeed, nowhere in DRH's 42-page Answering Brief is there any plausible explanation of how its interpretation of NRS 116.3102(1)(d) fulfills the spirit, intent and goals of Chapter 40 or the UCIOA. In sum, the holding of *Candlewood Landing Condo. Ass'n* affirms this Court's warning in *ANSE, Inc., supra*, 124 Nev. at 873, against judicial legislation. Unlike California, Connecticut has adopted the UCIOA as codified in Conn. Gen. Stat. § 47-200, et seq., and therefore this holding is on all fours with the relevant issues in the case at bar. *Winthrop House Ass'n v. Brookside Elm Limited Partners*, 451 F.Supp.2d 336, 340 (D. Conn. 2005).

2. West Virginia Jurisprudence – The Only Limitation To Representative Standing Pursuant To The UCIOA Is That The Action Affect The Common Interest Community And The Statutory Standing Exists Separately, Distinctly And Independently Of Ownership Of Units, Thus Changes In Ownership Cannot Abrogate Representative Standing Of Associations

In *Univ. Commons Riverside Home Owners Ass'n*, the West Virginia Supreme Court interpreted West Virginia's version of NRS 116.3102(1)(d), West Virginia Code section 36B-3-102(a)(4). *Univ. Commons Riverside Home Owners Ass'n v. Univ. Commons Morgantown, LLC*, 230 W. Va. 589, 590 (W. Va. 2013). West Virginia Code section 36B-3-102(a)(4) states that an association may, "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." W. Va. Code § 36B-3-102(a)(4). NRS 116.3102(1)(d) states that an association, "[m]ay institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community." Nev. Rev. Stat. Ann. § 116.3102(1)(d). The two statutes are nearly identical.

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The underlying action involved a construction defect matter brought by the homeowners' association and involved the certification of representative standing questions to the West Virginia Supreme Court when it was argued by defendants that all individual homeowners should be joined as indispensable parties under Rule 19. *Id.* at 591-592. The West Virginia Supreme Court responded with the following cogent observation:

> The plain language of West Virginia Code § 36B-3-102(a)(4) permits a unit owner's association to bring an action not only on its own behalf but on behalf of "two or more unit owners." ***The only limitation on that action is that it must be one that "affect[s] the common interest community."*** . . .
> [¶] Our conclusion that the HOA may pursue claims on behalf of two or more unit owners for matters affecting their individual units is supported by the commentary to the UCIOA which served as the model for our Act. The commentary to § 3-102 of the UCIOA which mirrors West Virginia Code § 36B-3-102 states: ***"This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest."***

Univ. Commons Riverside Home Owners Ass'n, supra, 230 W. Va. at 594, emphasis added, citations omitted.

The critical point of the quoted passage is that *association representative standing pursuant to the UCIOA is separate and independent from ownership rights in a unit.* It follows that if association representative standing exists independently from ownership of units; changes in ownership of units have no bearing on the viability of the association's standing. Indeed, as noted by the West Virginia Supreme Court, the *only limitation* to an association's standing under the UCIOA is that the matter affect the common interest community – a point that is beyond dispute in the case at bar. The West Virginia Supreme Court even cited with approval this Court's decision in *D.R. Horton, Inc. v. Eighth Judicial District Court*, 125 Nev. 449, 215 P.3d 697 (Nev. 2009). *Id.* at 595.

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3. Colorado Jurisprudence – The UCIOA Embodies The National Trend Towards Enabling Associations To Effectively Represent Their Owner Members In Construction Defect Actions Without Resort To Assignments. Thus DRH's Contention That Assignments Are Necessary To Maintain HIGH NOON's Representative Standing Is Without Merit

In *Yacht Club II Homeowners Ass'n*, the Colorado Court of Appeals made several observations that expressly contradict DRH's *ipse dixit* misinterpretation of the effect changes in ownership of units have, if any, on HIGH NOON's NRS 116.3102(1)(d) standing:

> Section 38-33.3-302(1)(d) was patterned after the UCIOA (UCIOA) [citation] whose purpose was to make ***"clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest."*** [Citation.] The Colorado Common Interest Ownership Act [citation] ***"follows the national trend acknowledging the representative capacity of the association and ends substantial difficulty on the standing issue in Colorado . . . enabling the association to represent more effectively its owners in such matters as construction defects, . . . avoiding the necessity of assignment of claims,*** powers of attorney or class actions in many circumstances, [and] thereby simplifying and making more practical the prompt action in the association's and owners' common interests".

Yacht Club II Homeowners Ass'n v. A.C. Excavating, 94 P.3d 1177, 1180 (Colo. Ct. App. 2003), emphasis added, citations omitted. Like NRS 116.3102(1)(d) Colorado Revised Statutes section 38-33.3-302(1)(d) states that an association may, "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." C.R.S. 38-33.3-302(1)(d).

The critical point of the quoted passage is that like in West Virginia, an association's standing under the UCIOA exists independently of any ownership

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interest in units. An equally critical point is that this representative standing enables associations to "more effectively" represent its owners in construction defect actions *without resort to assignments.* Therefore, DRH's tortured argument HIGH NOON's standing is invalid without assignments from unit owners is without merit. Unlike DRH's resort to California jurisprudence, Colorado has adopted a parallel version of NRS 116.3102(1)(d) and has definitively held that assignments are ***not*** required for representative standing by associations. Indeed, the West Virginia Supreme Court cited with approval Colorado's observation that assignments are not required for standing under the UCIOA. *Univ. Commons Riverside Home Owners, supra*, 230 W. Va. at 595 *citing Yacht Club II Homeowners Ass'n, supra,* 94 P.3d at 1180.

C. DRH's Reliance On California Jurisprudence Is Without Merit Because California Courts Have Held That *Vaughn*, *Keru*, And *Krusi* Cannot Be Relied Upon To Frustrate The Legislative Intent Of A Statutory Grant Of Association Representative Standing For Construction Defect Matters Under California's Analogue To NRS 116.3102(1)(d) – California Code of Civil Procedure Section 1368.3

In light of the clear and unambiguous guidance of this Court's prior decisions on NRS 116.3102(1)(d)'s representative standing, and affirming published appellate decisions in jurisdictions that have adopted the UCIOA, HIGH NOON contends that further argument regarding California jurisprudence is categorically moot and irrelevant. However, HIGH NOON briefly highlights the previously cited *Standard Fire Ins. Co. v. Spectrum Community Assn.*, 141 Cal.App.4th 1117 (2006) to demonstrate the remarkable contortions that DRH has utilized to support its tortured legal position.

A significant fact of *Standard Fire Ins. Co.* is that the California court rejected the same exact argument that DRH is now asserting in Nevada:

> Standard Fire contends that the Association does not even have a cause of action against the developers . . . that no one can sue for

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> property damage other than the party that owns the property at the time the damage occurs . . . [¶] Based on *Vaughn* [citation], Standard Fire argues that the Association can have no cause of action against the developers because no cause of action for property damage was ever assigned to the Association. We disagree, for several reasons.

Standard Fire Ins. Co., supra, 141 Cal.App.4th at 1139, citations omitted. Critically, the court noted that *Vaughn, Keru and Krusi* are all distinguishable because they did not involve homeowner associations asserting representative standing. *Id.* at 1146.

Citing to *Orange Grove Terrace Owners Ass'n v. Bryant Properties*, 176 Cal.App.3d 1217 (1986), the court identified California's analogue of association representative standing, Civil Code section 1368.3 [now renumbered Civ. Code ¶ 5980] which states in pertinent part:

> An association has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the members, in matters pertaining to . . . (b) Damage to the common area; (c) Damage to a separate interest that the association is obligated to maintain or repair; (d) Damage to a separate interest that arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair.

Standard Fire Ins. Co., supra, 141 Cal.App.4th at 1147. Although California has not adopted the UCIOA, California's analogue representative standing statute bears similarities with NRS 116.3102(1)(d). Relying on Civil Code section 1368.3 and legal authorities interpreting the statute, the court concluded that, "the intent of the Legislature [in adopting section 1368.3] is to enable homeowners associations to pursue causes of action against developers with respect to construction defects . . . rely[ing] on distinguishable cases such as *Vaughn*

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[citation], *Keru* [citation], and *Krusi* [citation], to achieve a contrary result would be to frustrate that legislative intent." *Id.* at 1147-1148, citations omitted.

Remarkably, DRH's Answer Brief attempts to distinguish *Standard Fire Ins. Co.* by claiming that it was an insurance coverage case and further attempts to "spin" the dispositive language of the decision. *DRH Answering Brief* at 15:4-17:23. However, a review of the entire decision reveals the inescapable fact that *Standard Fire Ins. Co.* stands for the unambiguous rule that where associations are statutorily granted representative standing, the holdings of *Vaughn*, *Keru*, and *Krusi* cannot be utilized to defeat that legislative grant of representative standing, and no assignments are necessary to maintain that standing. *Standard Fire Ins. Co., supra,* 141 Cal.App.4th at 1147-1148. Therefore, notwithstanding the fact that California jurisprudence has no weight or value in Nevada, DRH's Answering Brief misinterpreted California jurisprudence pertaining California's analogue to NRS 116.3102(1)(d).

D. The Remaining Sections Of DRH's Answering Brief Lack Appropriate Analysis, Citation Or Argument, Instead Relying Upon *Ipse Dixit* Assertions That Violate NRAP 28's Requirement Of Appropriate Citations For All Factual And Legal Assertions

DRH's Answering Brief is also remarkable for its 42-page length and its multiple unsupported arguments asserted. Beginning with Section IV(C), on page 28, DRH's analysis devolves into an *ipse dixit* soliloquy that violates NRAP 28's requirement that all assertions be followed by a citation to the record. HIGH NOON will concisely respond to each argument raised by DRH's inappropriately lengthy brief.

1. DRH Answering Brief Section C – DRH Fails To Provide Evidence, Citation Or Argument For The Asserted Legislative Intent Of Chapter 40

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The weakness of this section of DRH's Answering Brief is that it makes generalized arguments and utilizes hypotheticals that HIGH NOON's interpretation contradicts Chapter 40 but without any citation to what DRH purports the legislative intent of Chapter 40 to be. Moreover, DRH contends that a subsequent unit owner may have a nebulously referenced "separate and independent cause of action against a developer" but cannot litigate until her/she serves the developer with a new NRS 40.645 notice. *DRH Answering Brief* at 29:18-29:23. However, no citation is made to any legal authorities or the record for this *ipse dixit* assertion. DRH's reliance on the District Court ruling in *Smith, et al. v. Central Park, LLC, et al.* is in error because that matter involved single family homes, and did not implicate the UCIOA or an action by an association pursuant to NRS 116.3102(1)(d). *HIGH NOON's Appendix*, Vol. IV, Tab 15, pp. 0921-0930.

2. DRH Answering Brief Section D – DRH Expends Nearly Three Pages Arguing The Nebulous Rights Of DRH And Unit Owners Without Citation To The Record Or Any Legal Authorities

In this section of the brief, DRH expends three pages of text making statements and arguments without citation to any supporting legal authorities. For instance, DRH claims that "[t]hose represented at the time of the Complaint cannot automatically change on any given day . . . such unchecked fluidity of represented parties would violate D.R. Horton's rights." *DRH Answering Brief* at 30:5-30:7. However, DRH failed to identify any legal authority in support of these nebulous rights it claims are violated.

DRH further asserts without citation to any authority that "homeowners should not be forced to participate in litigation and should not be forced to put a potential purchaser on notice of pending litigation if the unit owner does not believe its unit suffers from any defect." *DRH Answering Brief* at 30:15-30:19.

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Ironically, the operation of NRS 116.3102(1)(d), vesting representative standing to the unit owner's association to pursue a construction defect claim on his or her behalf, is the solution to DRH's purported concerns for the homeowners' rights to not be forced to litigate. Furthering the irony, the primary contention of DRH's Answering Brief is that individuals who sell their units, and the units' purchasers are each required to litigate claims individually.

DRH concludes its arguments in this section with an extensive presentation of a hypothetical scenario involving sales prices for units, price reductions, and complications from sales of units in litigation. *DRH Answering Brief* at 30:19-32:14. Incredibly, DRH even asserts that "the most important reason why a Subsequent Purchaser should not be forced into litigation, however, is doing so (sic) subjects the Subsequent Purchaser to a degree of liability [from attorney's fees and costs] should the Association fail to recover from a (sic) D.R. Horton." *DRH Answering Brief* at 31:24-32:2. These contentions should be given no consideration since DRH declined to cite to any facts in the record or legal authorities to support its claims, in violation of NRAP 28. Indeed, HIGH NOON is at a loss to discern how DRH could ever justify a claim of attorney's fees and costs against an individual homeowner who is not a party to the action.

3. DRH Answering Brief Section E – DRH's NRS 40.640 Argument Is Without Merit Because The Nevada Supreme Court Has Declined To Resolve Matters Of Fact For The First Time On Appeal

This Court has clearly stated that, "[i]n our appellate capacity, we do not resolve matters of fact for the first time on appeal." *Liu v. Christopher Homes*, LLC, 321 P.3d 875, 881 (Nev. 2014) *citing Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604 (Nev. 1981) [noting that "an appellate court is not an appropriate forum in which to resolve disputed questions of fact"]. Notwithstanding the well-established prescription, DRH appears to argue that it

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has defenses against certain of HIGH NOON's unit owners pursuant to NRS 40.640, and relies on that fact as a basis to contend that "absent an assignment, the contractor remains liable to the seller for damages" and thus assignments are required to maintain HIGH NOON's representative standing. *DRH Answering Brief* at 34:2-34:3. Finally, DRH argues that NRS 40.640 tacitly serves as a limitation upon NRS 116.3102(1)(d). However, absent any citation to legal authority or legislative history supporting that strained assertion, DRH's argument has no merit.

4. DRH Answering Brief Section F – DRH Did Not Raise The Issue Of Subsequent Purchasers' Knowledge Barring Warranty And Fiduciary Duty Claims As Part Of Its Motion For Partial Summary Judgment And The Nevada Supreme Court Has Declined To Address Issues Raised For The First Time On Appeal

This Court has clearly stated that it will not consider issues that were not properly before the district courts, and decline to address issues raised for the first time on appeal. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 252 P.3d 681, 697 (Nev. 2011). Notwithstanding that well-established prescription, DRH now argues for the first time on appeal that HIGH NOON does not have standing to represent subsequent unit owners because said individuals allegedly had knowledge of defects alleged by HIGH NOON. Indeed, such assertions of the purported knowledge of certain unit owners is an issue of fact that is inappropriately raised for the first time on appeal. *Liu, supra*, 321 P.3d at 881. HIGH NOON requests that this Court disregard DRH's arguments in their entirety as new issues and facts that are inappropriately raised for the first time on appeal, and were not presented to the District Court as part of DRH's Motion for Partial Summary Judgment. In addition, such issues and facts did not formulate the basis

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of the District Court's order that is currently being challenged by HIGH NOON's writ petition.

5. DRH Answering Brief Section G – The District Court Violated NRCP 56 As Demonstrated By The Record

HIGH NOON posits to this Court that the record speaks for itself in that the District Court relied on a decision it issued in a single-family home construction defect case as the basis for its ruling and Order abrogating HIGH NOON's NRS 116.3102(1)(d) standing rights. It is undisputed that the *Balle v. Carina Corp.* decision was not cited or identified in any of DRH's moving or reply papers. Such was a violation of NRCP 56 because it was indeed independent grounds upon which the District Court's ruling was premised. Indeed, as noted in HIGH NOON's Opening Brief, the District Court's Order granting DRH's Motion for Partial Summary Judgment was nearly a carbon-copy of its ruling in *Balle v. Carina Corp.*

6. DRH Answering Brief Section H – The District Court's Order Abrogating HIGH NOON's Representative Standing Rights Is Indicative Of Unauthorized Judicial Legislation

HIGH NOON posits that the District Court correctly ruled in accordance with Nevada law in its prior rulings related to HIGH NOON's representative standing pursuant to NRS 116.3102(1)(d). HIGH NOON further posits that the District Court's Order granting DRH's Motion for Partial Summary Judgment on the eve of trial is indicative of the practice of "judicial legislation" that has been prohibited by this Court and courts of other jurisdictions that have adopted statutes identical to NRS 116.3102(1)(d). *ANSE, Inc., supra*, 124 Nev. at 873; *Candlewood Landing Condo. Ass'n, supra*, 44 Conn. App. at 110-111. For the first time, on the eve of trial, the District Court concludes that NRS 116.3102(1)(d) is abrogated whenever there has been a transfer of ownership in units at the project. *HIGH*

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NOON's Appendix, Vol. IV, Tab 19, pp. 0985-0995. It is beyond dispute that the plain and unambiguous language of NRS 116.3102(1)(d) contains no such limitation or prohibition. Therefore, it follows that the District Court's reading of such a limitation or prohibition into NRS 116.3102(1)(d) was an unauthorized act of "judicial legislation" that amended the UCIOA by judicial fiat.

III. CONCLUSION

For the forgoing reasons, Petitioner HIGH NOON urges this Court for issuance of a writ of mandamus, commanding Respondents, the Eighth Judicial District Court and the Honorable Susan H. Johnson to rule that the Motion for Partial Summary Judgment is without merit and be accordingly denied with prejudice.

Dated: June 26, 2014

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By: _____

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NRAP 21 VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Under penalties of perjury, the undersigned declares that he is counsel for Petitioner, High Noon at Arlington Ranch Homeowner's Association, named in the foregoing Petition, and know the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matter he believes it to be true. This verification is made pursuant to NRAP 21(a)(5) and NRS 15.010.

DAVID M. BRAY

Subscribed and sworn to before me
This 26th day of June, 2014 by
David M. Bray

Notary Public, in and for
Said County and State

MARCELLA L. MCCOY
Notary Public, State of Nevada
Appointment No. 08-106225-1
My Appt. Expires Jun 4, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of June, 2014, I submitted for electronic filing and electronic service to all parties the foregoing Petitioner, High Noon at Arlington Ranch Homeowners Association's Reply In Support of Petition For Writ of Prohibition or Mandamus.

I HEREBY CERTIFY that on the 27 day of June 2014, a copy of Petitioner, High Noon at Arlington Ranch Homeowners Association's Reply In Support of Petition For Writ of Prohibition or Mandamus was hand delivered to the following:

Honorable Judge Susan H. Johnson
Regional Justice Center, Department XXII
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89101

I HEREBY CERTIFY that on the 27 day of June, 2014, a copy of Petitioner, High Noon at Arlington Ranch Homeowners Association's Reply In Support of Petition For Writ of Prohibition or Mandamus was hand delivered to the following:

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