IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, NEVADA NON-PROFIT CORPORATION,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,

Respondent.

and

D.R. HORTON, INC.,

Real-Party-In-Interest.

SUPREME COURT CASE NO: 65456

Electronically Filed
Apr 14 2015 08:34 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

D.R. HORTON, INC., A DELAWARE CORPORATION,

Petitioner,

and

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK: AND THE HONORABLE ALLAN R EARL, DISTRICT JUDGE,

Respondents,

and

FIRST LIGHT HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, FOR ITSELF AND FOR ALL OTHERS SIMILARLY SITUATED,

Real-Party in Interest.

SUPREME COURT CASE NO: 65993

D.R. HORTON'S RESPONSE TO FIRST LIGHT HOMEOWNERS ASSOCIATION'S MOTION TO SUPPLEMENT APPENDIX

Real Party In Interest, First Light Homeowner's Association filed a Motion to Supplement Appendix in *D.R. Horton v. Eighth District Judicial District*, Supreme Court Case No. 65993 which was previously consolidated for purposes of oral argument with *High Noon at Arlington Ranch Homeowner's Association v. Eight Judicial District* Case No. 65456. The Association filed its Motion in both actions using the consolidated caption although the request pertained only to D.R. Horton's Petition, Case No 65993. For the sake of consistency, Petitioner, D.R. Horton, Inc. submits the following Response to First Light Homeowners Association's Motion to Supplement Appendix also utilizing the same consolidated caption despite its irrelevance to the High Noon at Arlington Ranch Petition, Supreme Court Case No, 65456:

I. RELEVANT PROCEDURAL HISTORY

On July 3, 2014, Petitioner, D.R. Horton, Inc. ("Horton") filed a Petition for Writ of Mandamus and/or Prohibition with the Supreme Court of Nevada (the "Petition"). Real Party in Interest, First Light Homeowner's Association (the "Association") filed its Answering Brief on August 26, 2014 and Horton filed its Reply to Answering Brief on September 19, 2014 (which was deemed filed by the Supreme Court on October 10, 2014). On December 12, 2014, the Petition was consolidated with Petitioner, High Noon at Arlington Ranch Homeowner's Association's Writ of Mandamus and/or Prohibition, Case No. 65456. Consolidated oral argument on both Petitions was heard on January 7, 2015 and the Petitions were submitted for Decision on the same date. The Association requests this Court enter an Order granting leave to supplement its Appendix with a document dated September 24, 2008, entitled Value Diminution Study (the "Study") and further requests permission to file a Revised Appendix pursuant to NRAP 27(a)(1) approximately seven (7) months after it filed its Appendix and three (3) months after oral argument and the submission of the Petition for a Decision (collectively the "Motion").

II. FIRST LIGHT HOMEOWNERS ASSOCIATION HAS NOT SHOWN GOOD CAUSE FOR RELIEF

NRAP 30(e) mandates an Appendix be served and filed with respondent's answering brief. The Association seeks relief from this requirement pursuant to NRAP 26(b)(1)(A) which provides: "For good cause, the court may extend the time prescribed by these Rules or by its order to perform any act, or may permit an act to be done after that time expires." (Motion, p. 4:7-9). The Association argues the "good cause" is its excusable neglect in not knowing Horton intended to call Mr. Sanders at trial thereby failing to recognize the relevancy of the Study. The Association provides no legal argument as to what constitutes "good cause" or "excusable neglect." The only evidence argued is the Study was completed on September 24, 2008, a date before the substitution of current counsel, Maddox, Isaacson & Cisneros and, because an updated expert report was not deposited to remind the Association of Horton's intention to call Mr. Sanders, it assumed, without any basis, Horton did not intend to call him at trial. (Motion, p. 4:10-14; p.4:15-19). See, NRAP 27(a)(2) requiring "A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. The purported relevancy of the Study and the Association's neglect in failing to recognize Mr. Sanders would be called to testify at trial hardly constitutes good cause. [1]

The Nevada Supreme Court recently addressed the issue of counsel's competence in complying with Court appellate rules in *Huckabay Props. v. NC Auto Parts*, 322 P.3d 429, 434, 130 Nev. Adv. Op. 23 (2014), citing the United States Supreme Court in *Link v. Wabash R. Co.* 370 U.S. 626, 633-34, 82 S.Ct. 1386 (rejecting argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because "[p]etitioner voluntarily chose

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[1] As discussed below, Horton disputes the relevance of the Study to the legal arguments raised by Horton in its Writ Petition and disputes Horton did anything to suggest it did not intend to call Mr. Sanders at trial; he has been a designated expert witness through this litigation.

this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."). The *Huckabay* Court, as further authority, cited *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404, 407 (3d Cir.1980), wherein the Third Circuit Court of Appeals dismissed an appeal for appellant's failure to file an appendix that complied with court rules: "The court made it clear to the appellate bar the importance and necessity of complying with court rules concerning the content and filing of briefs and appendices. *Id.* at 434. *Huckabay* noted with approval the reasoning of the *Kushner* Court: "[U]nlike a defendant in a criminal case, an aggrieved party in a civil case involving only private litigants "does not have a constitutional right to the effective assistance of counsel. The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice." *Id.* (internal quotation marks omitted). *Huckabay* concluded the fact counsel did not adhere to the briefing deadlines set forth by court order, nor did they provide any adequate basis for their failure to do so warranted dismissal of the appeal. *Id.* at 436.

The Association contends "Until yesterday, April 2, 2015, this law firm did not know Horton would be calling Mr. Sanders as an expert in this matter as an updated report was not produced upon the deadline for production of the expert reports and the deadline for identifying experts to be called at the time of trial was set for yesterday." (Declaration of Troy Isaacson, 6:17-20). The fact is Horton designated Mr. Sanders on October 2, 2008 as an expert "expected to testify regarding real estate appraisal and loss of value." The Study itself was deposited on October 7, 2008 pursuant to Horton's Eighth (8th) Notice of Compliance. (**Exhibit 1**). Counsel for the Association substituted into this case on June 12, 2009 and was therefore in possession of the Study for approximately five (5) years and able to adequately determine its relevance to the issues raised in the Petition. Counsel seems to suggest they were just made aware Horton intended to call Mr. Sanders to testify at trial although they acknowledge he was

designated on October 2, 2008. Counsel suggests because an updated report was not produced they *assumed* he was not testifying. There is no legal or rational basis for Counsel's mistaken conclusion: he was designated on October 2, 2008 and the Study was produced in compliance with the Court's order on October 7, 2008. Horton has never suggested or indicated it did not intend to call Mr. Sanders. Accordingly there is no "excusable" neglect; there is only inexcusable neglect on the part of Counsel for the Association. See, *City of Las Vegas v. International Ass'n of Firefighters, Local No. 1285*, 1994, 874 P.2d 735, 110 Nev. 449, "To obtain extension of time for transmittal of record for appeal upon showing of good cause, appellant must affirmatively seek such extension and must affirmatively demonstrate good cause. Rules App. Proc., Rule 11(d)." See also, *Moseley v. Eighth Judicial Dist. Court ex rel. County of Clark* 124 Nev. 654, 188 P.3d 1136 (2008), "Under Federal Rule 6(b), a party may obtain an extension of time to act under a particular rule when the time to act has expired and the party seeking an extension demonstrates good faith, a reasonable basis for not complying within the specified period, and an absence of prejudice to the nonmoving party."

The Association has failed to assert any facts or legal argument justifying "good cause" to permit it to supplement its Appendix pursuant to NRAP 26((b)(1)(A).

III. THE STUDY IS IRRELEVANT TO THE ISSUES RAISED BY HORTON

The Association asserts the Study should be part of the Court's record characterizing it as "evidence that is highly relevant to the veracity of statements made by Horton in both the written pleadings and at oral argument." (Motion, 2:21-23). The Association does not seek to merely supplement the Appendix; it seeks to supplement its *legal argument* by arguing the Study is relevant to the Supreme Court's determination of representational standing, an argument it

failed to raise in its Answering Brief or at oral argument. "No litigant has an unqualified right to inundate a court with motions, supplements, errata, responses, exhibits and replies belatedly asserting arguments that it previously failed to raise. Nor do litigants have unfettered license to utilize such methods to manipulate judicial proceedings and unreasonably delay a final resolution of litigation. *Whitacre Inv. Co. v. State Dept. of Transp.* 113 Nev. 1101, 1103-1104, 946 P.2d 191, 193 (1997) (holding pleadings filed in the appellate court constituted belated and procedurally improper attempts to assert arguments that movants previously failed to raise; to abuse the appellate processes of the court; to obfuscate the issues; and to delay the final resolution of these matters).

The Association argues the Study demonstrates an "argument" Horton made to the Supreme Court regarding reduction in property values as a result of the alleged construction defects is without foundation because Horton's own expert, Mr. Mike Sanders, concluded the existence of the alleged constructional defects has no effect on the values of the properties. (Motion, 3:8-9). On this basis, the Association seeks to *supplement* the Appendix with the Study for the purpose of discrediting the "veracity of Horton's arguments made in its Writ." (Motion, p. 3:22-25). The reduction in property values as a result of the alleged construction defects was not the basis of the legal argument to the Supreme Court nor did Horton seek a determination as to whether the property values were affected. Horton presented one issue on appeal: Whether the District Court erred in determining the Association, in its representative capacity, may represent current unit owners for claims in the Complaint who purchased their property after the Complaint was filed without a valid assignment. (Writ Petition, 6:2-7). Thus, the only issue presented to the Supreme Court was whether NRS 116.3102(1)(d) confers representational standing to the Association on matters its individual members lacked standing to sue in their own right, in violation of the United State Constitution Article III and existing common law as to who owns a cause of action. The statements made in its

Petition regarding property values and cited by the Association are not relevant "arguments" as represented by the Association but rather illustrations or examples of the potential impact on the rights of Horton and the Subsequent Purchasers and the potential legal consequences that could result if the Supreme Court affirmed the District Court's ruling. The argument Horton made to the Supreme Court was NRS 116.3102(1)(d) did not confer standing on the Association as to matters the individual members lacked standing in their own right. Horton did not seek a legal determination of whether there was a reduction in the purchase price or the value of the unit at the time of the sale to the Subsequent Purchaser nor did not it seek a determination as to the knowledge of the Subsequent Purchasers or damages suffered by the Prior Owner or the Subsequent Purchaser. It sought only the determination as to whether the District Court erred when it ruled the Association could represent the Subsequent Purchaser.

The Association states the following: "Specifically, one of the grounds of Horton's arguments before this Court is that 'all Subsequent Purchasers bought with notice of the claimed defects'". (Motion, p. 2:23-24). This statement is untrue. In the Introduction section of the Petition, Horton described the procedural history of the underlying Motion for Partial Summary Judgment and in doing so indicated the four grounds raised in that motion: "all Subsequent Purchasers bought with notice of the claimed defects; they have not provided a new Chapter 40 Notice or evidence of a valid assignment; the prior owners are the party allegedly harmed by the alleged defects as claimed in the Chapter 40 notice and Complaint; and the prior Owners own the rights to sue for damages. (Petition, 2:6-19). The District Court determined the Association could represent the Subsequent Purchasers without an assignment of rights and, on appeal, Horton raised the last two grounds of the underlying motion as the issue for the Supreme Court's consideration; namely who owns the causes of action alleged in the Complaint and whether NRS 116.3102(1)(d) confers unconditional

representational standing without regard to changes in ownership during the pendency of the Action. In doing so, Horton illustrated how, absent an assignment of the causes of action, the Subsequent Purchasers presumed knowledge of the alleged defects defeated one or more elements of the causes of action pled by the Association, breach of the implied warranties and negligence. However, the basis for relief was not the Subsequent Purchasers knowledge but the Court's interpretation of the representational standing conferred by NRS 116.310291)(d). Accordingly, the Association's statement "one of the grounds of Horton's argument is all Subsequent Purchasers brought with notice of the claimed defects" is incorrect. The only grounds for the Petition was whether NRS 116.3102(1)(d) conferred representational standing.

The Association further concluded the following statements made by Horton are without foundation making the Study relevant to the Court's consideration:

> [T]here may be unit owners who purchased their home at a reduced purchase price due to the existence of the defect." (Motion, p. 2:25-27)
>
> and,
>
> A seller is required by law to disclose the Complaint and the existence of the constructional defects to prospective purchasers. Accordingly, upon sale of a home during the pendency of the Chapter 40 process or during the pendency of an action for construction defects, the parties have two options: the parties can chose not to reduce the purchase price of the home due to the existence of the defects and the seller can assign his claims and/or causes of actions to the prospective purchaser who will be made whole for the defects through the out of the litigation; or the seller can reduce the purchaser price of the home and maintain the right to recover his damages including the value of the reduction in the purchaser price from the contractor." (*Id.* at p. 3:1-9).

Not only are the statements not determinative of the issue presented to the Supreme Court, they are misquoted and taken out of context. Both statements appear under the section of the Petition illustrating how allowing the Association to represent the Subsequent Purchasers could impact the rights of

Horton and the rights of the Subsequent Purchasers. The Association intentionally omits the pertinent fact that the above quoted statement begins with "***For example, as discussed herein***, a seller…." (Petition, p. 38:6-8 Emphasis added). Horton was providing the Supreme Court with an *example* of the result a decision affirming the District Court's opinion could have on the rights of the Subsequent Purchasers: it was not seeking the Court's ruling on whether in fact these rights were impacted. In discussing the potential impact of the District Court's ruling, Horton concluded: "The District Court completely ignored these *complications* when it concluded a transfer of real property automatically transfers the cause of action for damages resulting from the construction defect to the Subsequent Purchaser." (Petition, 39:18-22, Emphasis added).

Accordingly, the Study has no relevance to the Petition and the Association has not demonstrated good cause to permit it to avoid the requirements of NRAP 30(e). Should the Association desire to discredit the opinions of Mr. Sanders at trial, it is free to do so, but his Study has no relevance to the issue presented to the Supreme Court and the Association should not be permitted to supplement its Appendix.

Respectfully Submitted this 13 day of April, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 13 day of April, 2015, I submitted for electronic filing and electronic service the foregoing, RESPONSE TO FIRST LIGHT HOMEOWNERS ASSOCIATION'S MOTION TO SUPPLEMENT APPENDIX to the following:

Troy L. Isaacson, Esq. - **Docket No. 65993**
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Honorable Judge Jerry A. Wiese II **-Docket 65993 – HAND DELIVRED**
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Honorable Judge Susan H. Johnson-**Docket No. 65456 – HAND DELIVERED**
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Employee of WOLFENZON ROLLE

EXHIBIT 1

OCT 7 2008

NOTC
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DISTRICT COURT

CLARK COUNTY, NEVADA

FIRST LIGHT HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiff, vs. D.R. HORTON, INC., a Delaware Corporation, Third-Party Plaintiff, vs. ALL PURPOSE OF LAS VEGAS, INC. DBA ALL PURPOSE WINDOWS AND DOORS; ANSE INC., DBA NEVADA STATE PLASTERING; AMPAM RCR COMPANIES; INC.; BEE LURE PAINTING, INC.; BILL YOUNG'S MASONRY, INC.; BRANDON, LLC DBA FIRST PREMIER DRYWALL & PAINT; CAMPBELL CONCRETE OF NEVADA DBA CAMPBELL CONCRETE.; CHARMAC INC., CLASSIC DOOR & TRIM, INC.; CONCRETE, INC.; DAVE'S DRYWALL, INC.; ENVIRONMENTAL CONTROL OF NEVADA DBA ECON; EFFICIENT ENTERPRISES, INC. DBA EFFICIENT ELECTRIC; FIRESTOP, INC.; HOMEREADY INC. DBA DUPONT FLOORING SYSTEMS, INC.; L&S AIR CONDITIONING HEATING AND	CASE NO: A499743 DEPT NO: XIX **(ELECTRONIC FILING CASE)** **DEFENDANT/THIRD PARTY PLAINTIFF D.R. HORTON'S EIGHTH NOTICE OF COMPLIANCE**

FIREPLACES LLC; LUKESTAR CORPORATION DBA CHAMPION MASONRY; M&M CONSTRUCTION, INC.; MS CONCRETE CO., INC. DBA MS CONCRETE, LLC; MCKIMMEY ELECTRIC, INC.; MESTAS ROOFING, INC.; OPM, INC. DBA CONSOLIDATED ROOFING; VITA ELECTRIC DBA PREMIER ELECTRIC LLC; QUALITY WOOD PRODUCTS LTD.; REYBURN LAWN & LANDSCAPE DESIGNERS, INC.; RP WEDDELL & SONS, CO.; SOUND & SECURE DBA EAGLE SENTRY; SOUTHWEST IRON WORKS DBA SOUTHWEST IRON WORKS LLC; VEGAS GENERAL CONSTRUCTION COMPANY; WESTERN SHOWER DOOR, INC. and DOES 1-100,

Third-Party Defendants

TO: ALL INTERESTED PARTIES; and

TO: THEIR COUNSEL OF RECORD.

COMES NOW Defendant D.R. HORTON, by and through its attorneys of record, Wolfenzon Schulman & Ryan, and hereby provide notice that the following documents were delivered to the depository at Litigation Services, 1640 West Alta Drive, Suite 4, Las Vegas, NV 89106, on the 6 day of October, 2008.

DOCUMENT	BATE RANGE
JOB FILES	
EMP Consultants Job File Electrical	DRH053933 – DRH054344
EMP Consultants SI Photos Electrical	DRH054345 – DRH057226
EMP Consultants Job File Mechanical/Plumbing	DRH057227 – DRH057957
EMP Consultants SI Photos Mechanical/Plumbing	DRH057958 – DRH062521
EMP Consultants Preliminary Electrical Report	DRH62522 – DRH062561
EMP Consultants Preliminary Mechanical/Plumbing Report	DRH62562 – DRH062572

Not used at this time	DRHO62573 – DRH062770
Curry Price Court Job File	DRH062771 – DRH066363
Curry Price Court Preliminary Response to Structural Defect List	DRH066364 – DRH066368
Not used at this time	DRH066369 – DRH066612
KPAA Photos (1 of 2)	DRH066613 – DRH080400
KPAA Photos (2 of 2)	DRH080401 – DRH088314
KPAA BC Additional Images	DRH088315 – DRH088436
Not used at this time	DRH088437 – DRH088563
CE Prime Job File	DRH088564 – DRH089759
CE Prime Preliminary Defect Issue Report	DRH089760 – DRH089764
Not used at this time	DRH089765 – DRH089955
Bell, Anderson & Sanders Report	DRH089956 – DRH090008
Bell, Anderson & Sanders Job File #1	DRH090009 – DRH091261
Bell, Anderson & Sanders Job File #2	DRH091262 – DRH094701
Bell, Anderson & Sanders Job File #3	DRH094702 – DRH095114
Mc Consultants Job File	DRH095115 – DRH100895
KPAA 001 Job File	DRH100896 – DRH104219
John R. Weeks, Ph.D. Report	DRH104220 – DRH104235

Dated this 6 day of October, 2008.

WOLFENZON SCHULMAN & RY AN

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