IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT M. DYKEMA, individually; and RONALD TURNER, individually, Appellants, vs. DEL WEBB COMMUNITIES, INC., an Arizona Corporation, Respondent.	CASE NO.: 69335 DISTRICT COURT CASE NO.: A-15-714632-D

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

PulteGroup, Inc., a publicly traded company, owns 100% of Respondent Del Webb Communities, Inc.'s stock.

Attorneys for Koeller, Nebeker, Carlson & Haluck, LLP have appeared on behalf of Respondent in the District Court and in this Appeal.

These representations are made in order that the justices of the Supreme Court or judges of the Court of Appeals may evaluate possible disqualification or recusal.

ROUTING STATEMENT

Pursuant to NRAP 28, Respondent Del Webb Communities, Inc. submits that this case should be assigned to the Nevada Supreme Court because the appeal raises, as a principal issue, a statutory interpretation question of statewide public importance falling squarely within NRAP 17(a)(13).

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1. Whether Appellants brought their construction defect claims within the time frame set forth by Nevada's statutes of repose.

STATEMENT OF THE CASE

The construction defect claims of Appellants Ronald Turner and Robert Dykema[1] were dismissed by the district court as time-barred by Nevada's statutes of repose. *See* JA v.2 00225-228. An order to that effect was entered on November 25, 2015. *See* JA v.2 00232-247. Appellants noticed this appeal shortly thereafter, *see* JA v.2 00248-309, and a final judgment as to their claims followed on December 23, 2015. *See* JA v.2 00328-330. The opening brief was filed on April 5, 2016. *See generally* Appellants' Opening Brief ("Opening Br.").

STATEMENT OF FACTS

Turner and Dykema are owners of homes located within Anthem Highlands, a Henderson subdivision developed in the early 2000's by Respondent Del Webb Communities, Inc.[2]. *See* JA v.1 00037. Turner owns the residence at 2844 Blythswood Square and Dykema owns the residence at 2818 Creighton Drive. *See* JA v.1 00038.

[1] Referred to throughout this Answering Brief as "Turner" and "Dykema".
[2] Referred to throughout this Answering Brief as "Del Webb".

Turner's Residence

A certificate of occupancy was issued for Turner's residence on December 6, 2004, *see* JA v.1 00048. A notice completion was issued on December 14, 2004. *See* JA v.1 00137. On December 22, 2014, Turner served a notice of construction defects ("Chapter 40 Notice") on Del Webb.[3] *See* JA v.1 00060-63.

Dykema's Residence

A certificate of occupancy was issued for Dykema's residence on November 2, 2004, *see* JA v.1 00050. A notice of completion was issued on November 30, 2004. *See* JA v.1 00142. On December 2, 2014, Dykema served a Chapter 40 Notice on Del Webb. *See* JA v.1 00065-67.

Both Turner and Dykema were named plaintiffs in a complaint filed against Del Webb in the Eighth Judicial District Court on February 27, 2015. *See* JA v.1 00001-13. The complaint was amended, *see* JA v.1 00014-29, and Del Webb moved to dismiss Turner and Dykema's claims pursuant to NRCP 12(b)(5) because they were untimely under the statutes of repose for construction defect claims. *See* JA v.1 00033-44; NRS 11.203 – 11.205. The district court agreed with Del Webb; dismissing Turner and Dykema's claims as untimely. *See* JA v.2 00225-228. Turner and Dykema contend on appeal that the dismissal of their

[3] *See* NRS 40.645(a) ("[B]efore a claimant commences an action . . . for a constructional defect against a contractor . . . the claimant must give written notice . . . to the contractor").

claims was erroneous. *See generally* Opening Br. Del Webb believes the district court applied the law appropriately and the decision should be upheld.

SUMMARY OF ARGUMENT

Turner and Dykema did not bring their claims against Del Webb within the time limit established by the statutes of repose specifically applicable to claims for construction defects. Appellants' claims are unquestionably late under either the six-year (NRS 11.205) or eight-year (NRS 11.204) statute of repose. No argument was presented that raised a genuine issue of material fact that the longest, ten-year statute of repose (NRS 11.203) applies to their claims. No allegations were made and no evidence was produced that Del Webb knew or should have known about any of the defects alleged to exist at Turner and Dykema's homes. Even if the ten-year statute of repose applies to their claims, which it does not, the district court order should be affirmed because Turner and Dykema have not raised a genuine issue of material fact that their claims were brought within the prescribed ten-year period.

Calculation of the statutes of repose found in NRS 11.203, 204 and 205 is triggered by the substantial completion date of the residence. NRS 11.2055. Here, we have notices of completion and certificates of occupancy for both the Turner and Dykema residences. JA v.1 00048, JA v.1 00137 (Turner); JA v.1 00050, JA v.1 00142 (Dykema). Both documents conclusively establish that neither Turner

nor Dykema served Del Webb with their Chapter 40 Notices before the expiration of the statutes of repose. Del Webb is aware of Appellants' argument that the statutory period was not triggered until the notices of completion were recorded, but such argument is substantially without merit in light of the plain, unambiguous language of NRS 11.2055 and the corresponding legislative intent.

The district court was correct in its application of the statutes of repose to the facts of the case. Turner and Dykema did not bring their construction defect claims against Del Webb within the applicable statutes of repose. Del Webb respectfully requests that this Court affirm the district court's order.

ARGUMENT

I. STANDARD OF REVIEW

Del Webb's Motion to Dismiss was treated and disposed of as a motion for summary judgment by the district court. JA v.2 00223-224 at ¶ 1; NRCP 12(b). The district court's order dismissing Appellants' claims should therefore be reviewed as an entry of summary judgment on appeal. *MacDonald v. Kassel*, 97 Nev. 305, 307, 629 P.2d 1200, 1200 (1981). Entries of summary judgment are reviewed by this Court *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("*Wood*").

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1031. A genuine issue of material fact exists where the evidence, viewed in a light most favorable to the non-moving party, is such that a rational trier of fact could return a verdict for that party. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031.

In this case, a rational trier of fact could not return a verdict for Turner and Dykema because their construction defect claims were not brought within the time frame set forth by the statutes of repose. Since Turner and Dykema brought their claims too late, the district court correctly dismissed their claims.

II. TURNER AND DYKEMA'S CLAIMS WERE NOT BROUGHT WITHIN THE TIME FRAME SET FORTH BY THE STATUTES OF REPOSE.

In order for Turner and Dykema to prevail on their construction defect claims, they must prove the essential elements of their causes of action and also "that [their] cause[s] of action w[ere] brought within the time frame set forth by the statutes of repose." *G & H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997). "Nevada's statutes of repose, NRS 11.203–11.205, bar actions for deficient construction after a certain number of years from the date construction was substantially completed." *Alsenz v. Twin Lakes Vill., Inc.*, 108

Nev. 1117, 1120, 843 P.2d 834, 836 (1992). As previously explained by this Court:

> NRS 11.203(1) provides that an action based on a known deficiency may not be brought "more than 10 years after the substantial completion of such an improvement...." NRS 11.204(1) provides that an action based on a latent deficiency may not be commenced "more than 8 years after the substantial completion of such an improvement...." NRS 11.205(1) provides that an action based on a patent deficiency may not be [sic] commenced "more than 6 years after the substantial completion of such an improvement...

Id. A latent deficiency is defined as "a deficiency which is not apparent by reasonable inspection," NRS 11.204(4), and a patent deficiency is "a deficiency which is apparent by reasonable inspection." NRS 11.205(4). An improvement is deemed substantially complete on the date a final inspection of the residence is conducted, a notice of completion is issued for the residence, or a certificate of occupancy is issued for the residence, whichever is the latest to occur. *See* NRS 11.2055(1).

Here, the certificate of occupancy for the Turner residence was issued on December 6, 2004 (JA v.1 00048). The notice of completion was issued on December 14, 2004 (JA v.1 000137). Turner did not serve Del Webb with his Chapter 40 Notice until December 22, 2014 (JA v.1 00060-00063). Using the latest date, as required by NRS 11.2055 for the trigger, Turner's Chapter 40 Notice was served on Del Webb 10 years and 8 days after the substantial completion of

his residence, which is well beyond the statutes of repose for construction defect claims. NRS 11.203 – 11.205.

Next, the Dykema residence. In this case, the certificate of occupancy was issued on November 2, 2004 (JA v.1 00050). The notice of completion was issued on November 30, 2004 (JA v.1 000142). Dykema did not serve Del Webb with his Chapter 40 Notice until December 2, 2014 (JA v.1 00065-00067). Using the latest date, as required by NRS 11.2055 for the trigger, Dykema's Chapter 40 Notice was served on Del Webb 10 years and 2 days after the substantial completion of his residence, which is well beyond the statutes of repose for construction defect claims. NRS 11.203 – 11.205. Both claims, then, were properly dismissed as untimely.

A. Appellants have not raised a genuine issue of material fact that the ten-year statute of repose applies to their claims, and Appellants' claims are untimely under both the six and eight-year statutes of repose.

In its motion to dismiss, Del Webb argued that Turner and Dykema's claims are time-barred under the statutes of repose, because "there is an absence of allegations in the operative complaint to apply the 10-year period of repose, and that therefore the 8-year period applies." JA v.1 00041. Del Webb further argued that Turner and Dykema's claims were precluded by either the eight or ten-year statute of repose because neither "served Del Webb with a Chapter 40 Notice until more than 10 years after the date of substantial completion of their respective

properties." JA v.1 00040; *see also* NRS 40.668(2) & 40.695(1) (tolling any statutes of repose or limitation once a Chapter 40 Notice is served pursuant to NRS 40.645).

To satisfy its initial burden of production, Del Webb established the tardiness of Turner and Dykema's claims by presenting the district court with the substantial completion dates of the homes, as reflected in the certificates of occupancy issued for each of their residences. *See generally* JA v.1 00037-44 (relying on exhibits B, C, F & G thereto). Del Webb also presented the district court with the Chapter 40 Notices, which established the date when both Turner and Dykema served Del Webb with the notice required to institute a construction defect claim. *Id.* All of these critical dates were presented to the district court in a table format in Del Webb's motion. The data set forth in the table revealed that Turner and Dykema brought their claims outside of the statutorily-permissible period. *See* JA v.1 00042.[4]

Turner and Dykema opposed Del Webb's motion, asking the district court to apply the ten-year statute of repose – in effect, asserting an exception to the eight-year statute of repose. *See* JA v.1 00112-115; *Acosta v. Glenfed Dev. Corp.*, 128 Cal. App. 4th 1278, 1292-93, 28 Cal. Rptr. 3d 92, 102 (2005) ("*Acosta*"). By

[4] *See, e.g., Acosta v. Glenfed Dev. Corp.*, 128 Cal. App. 4th 1278, 1292-93, 28 Cal. Rptr. 3d 92, 102 (2005) (finding a defendant to have satisfied its initial burden of production in an analogous situation).

making that argument, Turner and Dykema now carried the burden to show that a genuine issue of material fact existed that the construction defects they were alleging against Del Webb were known, or should have been known, to Del Webb. *Elley v. Stephens*, 104 Nev. 413, 418-19, 760 P.2d 768, 772 (1988) ("*Elley*"); *Acosta*, 128 Cal. App. 4th at 1292-93; NRS 11.203(1).

Like the plaintiffs in *Elley*, both Turner and Dykema failed to satisfy their burden. *Elley*, 104 Nev. at 418-19, 760 P.2d at 772. The plaintiffs in *Elley* asserted that NRS 11.202[5] applied to their otherwise untimely claims, and this Court stated that their burden was therefore "to show that a material issue of fact existed about willful misconduct." *See id.* Because the record revealed "no evidence supporting [the Elleys'] allegations that the [defendants] engaged in willful misconduct," this Court found that the Elleys did not fulfill their burden and affirmed the district court's dismissal of their claims as untimely per NRS 11.203. *See id.*

Here, the record likewise reveals that neither Turner nor Dykema produced any evidence that Del Webb knew or should have known of any one of the various construction defects alleged. *See generally* JA v.1 00106-121 (including

[5] NRS 11.202(1) states: "An action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for . . .[a]ny deficiency . . . which is the result of his or her willful misconduct or which he or she fraudulently concealed."

corresponding exhibits). In fact, in the course of this action, Turner and Dykema have yet to even allege that Del Webb knew or should have known of a particular defect, let alone present evidence of such knowledge. *See generally* JA v.1 00014-29; JA v.1 00106-118; Opening Br. at 3-18; *see also* JA v.1 00210 (Appellants' counsel contemplating amending the operative complaint to include these allegations at the hearing on Del Webb's motion). Just like in *Elley*, there is no genuine issue of material fact regarding the applicability of the ten-year statute of repose. NRS 11.204. Moreover, as demonstrated by the following table, both Turner and Dykema's claims are untimely under both the six and eight-year statutes of repose:[6]

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[6] In dismissing Appellants' claims, the district court did not expressly reach the issue of which statute of repose applied. *See* JA v.2 00232-247. But resolution of that question is immaterial as the claims are untimely under all statutes of repose. In any event, this Court may affirm a district court order "if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

Appellant	Address	Date of Substantial Completion[7]	Last Day to Commence Suit under NRS 11.204 (eight-year)	Last Day to Commence Suit under NRS 11.205 (six-year)	Date Chapter 40 Notice Served	Elapsed Time
Turner	2844 Blythswood Sq.	12/14/04	12/14/12	12/14/10	**12/22/14**	10 years 8 days
Dykema	2818 Creighton Dr.	11/30/04	11/30/12	11/30/10	**12/02/14**	10 years 2 days

Both Turner's and Dykema's construction defect claims were brought against Del Webb over four years too late under NRS 11.205 and over two years too late under NRS 11.204.

B. <u>Even if the ten-year statute of repose applied to Appellants' claims, they have not raised a genuine issue of material fact that their claims were brought within the prescribed ten-year period.</u>

The ten-year statute of repose set forth by NRS 11.203 states that: "[N]o action may be commenced against . . . any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 10 years after the substantial completion of such an improvement." NRS 11.203(1).

[7] The statutes of repose begin to run from the date of substantial completion of an improvement to real property. NRS 11.203(1); NRS 11.204(1); NRS 11.205(1). In this table, Del Webb has included the date of substantial completion as found by the district court, *see* JA v.2 00243-44, NRS 11.2055.

> 1. [T]he date of substantial completion of an improvement to real property shall be deemed to be the date on which:
>
> (a) The final building inspection of the improvement is conducted;
> (b) A notice of completion is **issued** for the improvement; or
> (c) A certificate of occupancy is issued for the improvement,
>
> whichever occurs later.
>
> 2. If none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law.

NRS 11.2055 (emphasis added).

Here, the parties do not dispute that the latest event to occur under NRS 11.2055(1)(a) – (c) was the issuance of notices of completion. *See* JA v.1 00191. A notice of completion was issued for the Turner residence on December 14, 2004, and for the Dykema residence on November 30, 2004. *See* JA v.1 00137 &00142; JA v.2 00243-44. The latest possible date on which Turner could have commenced suit under the ten-year statute of repose was December 14, 2014, and for Dykema, November 30, 2014. *See* NRS 11.203(1); JA v.2 00243-44.

Neither Turner nor Dykema met those deadlines as illustrated by the following table:

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Appellant	Address	Date of Substantial Completion[8]	Last Day to Commence Suit under NRS 11.203 (ten-year)	Date Chapter 40 Notice Served[9]	Elapsed Time
Turner	2844 Blythswood Sq.	12/14/04	12/14/14	**12/22/14**	10 years 8 days
Dykema	2818 Creighton Dr.	11/30/04	11/30/14	**12/02/14**	10 years 2 days

Accordingly, the district court appropriately dismissed Turner and Dykema's claims as time-barred. *See* JA v.2 0243-44.

Turner and Dykema advance only two arguments in support of the timeliness of their claims on appeal. Opening Br. at 6. First, Turner and Dykema contend that their claims were timely because the triggering event for the ten-year statute of repose is not the date the notices of completion for their homes were issued (as stated in the statute), but the date the notices of completion were recorded. *Id.* Second, Turner and Dykema argue that dismissal of their claims was inequitable. *Id.* Del Webb submits that both arguments are substantially without merit.

1. The statutes of repose began to run on the dates the notices of completion were issued, not when they were recorded.

In light of the plain, unambiguous language of NRS 11.2055 and the corresponding legislative intent, Turner and Dykema's claim that the substantial

[8] JA v.1 00137 & 00142.
[9] JA v.1 0060 & 0065; JA v.2 00243-44.

completion dates for their residences are not the dates on which the notices of completion were *issued* but the dates on which the notices of completion were *recorded*, is meritless.

a. Statutory Interpretation Rules

Questions of statutory interpretation are reviewed *de novo*. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357-58, 167 P.3d 421, 426-27 (2007). "It is well established that when 'the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" *Nelson v. Heer*, 123 Nev. 217, 223-25, 163 P.3d 420, 425-26 (2007) (internal citations omitted). "If the statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, this [C]ourt ... look[s] to the provision's legislative history and ... the context and the spirit of the law or the causes which induced the [L]egislature to enact it." *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1206-07 (2015) (internal quotations omitted).

"An ambiguous statutory provision should also be interpreted in accordance 'with what reason and public policy would indicate the [L]egislature intended.'" *Harris Associates v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003) (internal citations omitted). "The Legislature's intent is the primary consideration when interpreting an ambiguous statute," and thus, "[t]his [C]ourt

has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." *Orion Portfolio Servs. 2 LLC v. Cty. of Clark*, 126 Nev. 397, 402-03, 245 P.3d 527, 531 (2010). "[N]o part of a statute should be rendered meaningless and its language 'should not be read to produce absurd or unreasonable results.'" *Harris Associates*, 119 Nev. at 641-42, 81 P.3d at 534 (internal citations omitted).

b. NRS 11.2055 is not ambiguous.

NRS 11.2055 states,

> 1. [T]he date of substantial completion of an improvement to real property shall be deemed to be the date on which:
>
> (a) The final building inspection of the improvement is conducted;
> (b) A notice of completion is **issued** for the improvement; or
> (c) A certificate of occupancy is issued for the improvement,
>
> whichever occurs later.
>
> 2. If none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law.

NRS 11.2055 (emphasis added).

The language of NRS 11.2055 is plain and unambiguous; its meaning clear and unmistakable. The date of substantial completion of an improvement to real property is the date on which "a notice of completion is *issued* for the improvement." *Id.* (emphasis added). A notice of completion is issued for the improvement when it is signed and notarized, attesting that the work of

improvement has been completed. *See, e.g.,* JA v.1 00137 & 00142. A certificate of occupancy is likewise "issued" for purposes of NRS 11.203(1)(c) on the date it is signed, indicating that a residence is fit for occupancy and therefore at least substantially complete. *See* NRS 11.2055(1)(c).

Although Del Webb understands why Turner and Dykema would want to replace the word "issued" with "recorded" in NRS 11.2055, they are without authority to do so. And, Turner and Dykema's interpretation that the statute really means "recorded" when it says "issued" is not only contrary to the plain terms of NRS 11.2055, it is quite unreasonable, as it would allow a homeowner to avoid the statutes of repose entirely by waiting to record the notice until immediately before filing suit. *See* NRS 108.228(1) (reflecting that a homeowner[10] may record a notice of completion at any time "after the completion of the work of improvement."). If such an interpretation of NRS 11.2055 was adopted by this Court, the statutes of repose would be rendered essentially meaningless, which is an absurd result that should be avoided. *Harris Associates*, 119 Nev. at 641-42, 81 P.3d at 534.

The meaning of NRS 11.2055 is clear and unmistakable. The date of substantial completion of an improvement to real property is the date on which a notice of completion is issued – the date on which it is signed by the property

[10]This is a strange case in that the homeowner was also the contractor participating in the improvement, but the statutes of repose apply to non-contractor homeowners as well. *See* JA v.3 00354 (illustrating the Legislature's understanding that the statutes of repose apply to all improvements to real property both large and small).

owner attesting that the work of improvement has been completed. The statute is not rendered ambiguous, and there is no room or reason for statutory construction here. *See Nelson v. Heer*, 123 Nev. at 223-25, 163 P.3d at 425-26; *Torres v. Nev. Direct Ins. Co.*, 353 P.3d at 1206-07. Nevertheless, legislative history and reason inform that the Legislature intended for the statutes of repose to run from the date a notice of completion is issued as well.

c. The Legislature intended for statutes of repose to begin to run on the date a notice of completion is issued.

Legislative history and reason insist that the Legislature intended for the statutes of repose to begin from the date a notice of completion is issued – not, as Appellants contend, from the date a notice is recorded. The statutes of repose set forth by NRS 11.203 – 11.205 were enacted in 1983 by Senate Bill 236 ("SB 236"). *See* S.B. 236, 62nd Legislature (1983). As explained by this Court: "The [L]egislature enacted the statutes of repose to protect persons engaged in the planning, design and construction of improvements to real property who otherwise would endure unending liability, even after they had lost control over the use and maintenance of the improvement." *Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. at 1120, 843 P.2d at 836 (relying on *Nevada Lakeshore Co. v. Diamond Elec., Inc.*, 89 Nev. 293, 295–96, 511 P.2d 113, 114 (1973)).

In the course of deciding upon appropriate lengths for the statues of repose, the Legislature studied similar statutes enacted in other states, primarily California.

See JA v.3 00339. The Nevada Legislature ultimately decided on a six, eight and ten-year statute of repose, with no statute of repose to protect a builder for defects that result from willful misconduct or fraudulent concealment. *See* JA v.3 00349; NRS 11.202 – 11.205. The statutes of repose "would run from 'substantial completion'," which was described as "when a building is very nearly finished." JA v.3 00346. Although the Legislature anticipated problems with the "substantial completion" language, it decided to leave the term undefined. *See* JA v.3 00347; S.B. 236, 62nd Legislature (1983).

As predicted, problems with the "substantial completion" language did surface. As a result, the Legislature revisited the use of "substantial completion" in 1999. *See* S.B. 32, 70th Legislature § 15 (1999). The term was defined by Senate Bill 32 ("SB 32") as it is defined today. *See id.* at § 15; NRS 11.2055; A.B. 125, 78th Legislature §§ 17-19 & 22 (2015) (maintaining SB 32's definition of "substantial completion" even amidst the repeal of the ten and eight-year statutes of repose and other sweeping changes to Nevada's construction defect laws). As the legislative history of SB 32 reveals, a definition of substantial completion was desired by homeowners and builders alike to avoid costly litigation over when an improvement was substantially complete. *See* JA v.3 00355. That is the singular intent discernible in the legislative history relating to the enactment of NRS 11.2055. *See* JA v.3 00354-56.

Absent from the legislative history of SB 32 is any indication that the Legislature desired to change its original intent for the statutes of repose to run from the date on which an improvement was very nearly finished. *See generally id.* Indeed, the language of NRS 11.2055 was not legislative at all but developed by representatives of Nevada homeowners and builders. *See* JA v.3 00354. Even if the argument can be made that the Legislature adopted those parties' intent when the bill was enacted, nothing in the legislative history evinces an intent for the date a notice of completion is recorded (vs. issued) to be the date from which the statutes of repose would run. *See* JA v.3 00354-56.

Like legislative history, reason insists the Legislature intended for the statutes of repose to run from the date a notice of completion is issued. The parties who drafted NRS 11.2055 chose to utilize the term "issued" not the term "recorded" despite being aware a notice of completion might be recorded under NRS Chapter 108,[11] *see* JA v.3 00356, and despite being presumably aware that California's statutes of repose began to run from the date a notice of completion is recorded. *See* Cal. Civ. Proc. Code § 337.15(g)(2); *see also* JA v.3 00339 (reflecting the 62nd Legislature's familiarity with California's statutes of repose).

[11] Appellants interpret Chapter 108 to support their argument that the Legislature must have meant "recorded" when it used the term "issued" because "if a notice of completion is provided, then it must be recorded." Opening Br. at 10. Appellants are incorrect. Subsection 1 of the statute, conveniently omitted from their Brief, reads: "a homeowner *may* record a notice of completion after the completion of the work of improvement." NRS 108.228(1) (emphasis added).

Additionally, by enacting NRS 11.2055, the parties were attempting to clarify the date of substantial completion – the date an improvement to real property was very nearly finished. *See* JA v.3 00354-56; JA v.3 00346. The date an improvement to real property is very nearly finished is closer in time and thus better indicated by the date on the face of a notice of completion confirming that the work of improvement has been completed than the (presumably) later date on which the notice is recorded. *See* JA v.1 00137 & 00142.

Reason likewise defeats Appellants' reliance on NRS 108.22116 as well. *See* Opening Br. at 9-10. NRS 108.22116(3) states that an improvement to real property may be considered *complete* when a notice of completion is recorded. It logically follows therefore that *substantial completion* would be indicated by something less than recordation – like issuance. *See* NRS 11.2055.

In sum, both legislative history and reason insist that the Legislature intended for the statutes of repose to run from the date a notice of completion is issued for an improvement, as indicated by the property owner's notarized signature attesting that the improvement has been completed. The legislative intent mirrors the plain and unambiguous language of NRS 11.2055. The arguments advanced by Turner and Dykema are not supported by the plain and unambiguous language of the statute or by the legislative history.

2. It is not inequitable to bar Appellants' untimely claims.

In concluding their Brief, Turner and Dykema contend it would be unfair to them if their construction defect claims against Del Webb were barred. *See* Opening Br. at 15-17. Turner and Dykema argue that Del Webb would not suffer an injustice if their claims were allowed, and moreover, that the ten-year statute of repose should be extended pursuant to NRS 11.203(2) for Dykema.[12] *Id.* But such broad-sweeping assertions ignore the plain reasoning behind the statutes of repose and ignoring these statutes, as Turner and Dykema insist, would instead work an injustice on Del Webb.

a. Del Webb would suffer an injustice if Appellants' untimely claims were allowed to proceed.

Turner and Dykema first advance the equitable argument that statutes of repose, like statutes of limitation, are designed to "promote justice by 'preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost.'" Opening Br. at 15-16 (internal citation omitted). Turner and Dykema then reason that because Del Webb was given timely notice of other homeowners' claims within the Anthem Highlands development, Del Webb was on notice to preserve evidence relating to *all homes* in the Anthem Highlands development. Thus, Turner and Dykema conclude, Del Webb would not suffer an

[12] Turner makes no such claim and even Dykema's claim is not supported by any evidence.

injustice if their claims were allowed to proceed because Del Webb knew about other claims. *See* Opening Br. at 16.

As an initial matter, this is not a class action suit, and the evidence required to defend against construction defect allegations differs from one house to the next. *Shuette v. Beazer Homes Holdings, Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). Statutes of repose and statutes of limitation moreover work differently. As this Court has previously explained: "The legislature enacted the statutes of repose to protect persons engaged in the planning, design and construction of improvements to real property who otherwise would endure unending liability, even after they had lost control over the use and maintenance of the improvement." *Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. at 1120, 843 P.2d at 836; *see also* JA v.3 00339, 00341, 00348 (reflecting that intent).

There are no allegations that Del Webb still has control over any aspect of the Turner and Dykema residences. Each residence has likely had numerous previous owners since they were first sold by Del Webb in the early 2000's, and any express warranty on these properties has presumably long expired. Thus, no equitable basis exists to deprive Del Webb of the protection the Legislature sought to provide when enacting the statutes of repose. Allowing Turner and Dykema's untimely claims to proceed would cause Del Webb to suffer the precise injustice the statutes of repose were enacted to prevent.

b. Dykema has not raised a genuine issue of material fact concerning the applicability of NRS 11.203(2) to his claims.

Also unconvincing is Dykema's argument that the ten-year statute of repose should be extended two years pursuant to NRS 11.203(2).[13] *See* Opening Br. at 17.

NRS 11.203(2) reads:

> [I]f an injury **occurs** in the 10th year after the substantial completion of such an improvement, an action for damages for injury to property or person, damages for wrongful death resulting from such injury or damages for breach of contract may be commenced within 2 years after the date of such injury, irrespective of the date of death, but in no event may an action be commenced more than 12 years after the substantial completion of the improvement.

NRS 11.203(2) (emphasis added).

NRS 11.203(2) is an exception to the ten-year statute of repose, and for it to apply, Dykema has the burden of raising a genuine issue of material fact that an injury occurred in the tenth year after the substantial completion of his home. *See Elley*, 104 Nev. at 418-19, 760 P.2d at 772; *Acosta*, 128 Cal. App. 4th at 1292-93. Dykema has failed to satisfy his burden because the only evidence he has submitted in support of the alleged injury are three repair invoices. *See* Opening Br. at 17 (citing to JA v.1 00127-129). The invoices are incapable of creating a genuine issue of material fact as a matter of law because they are inadmissible as evidence. Even if admissible, the invoices fail to raise a genuine issue of material

[13] Turner does not advance this argument, and neither Appellant has argued that NRS 11.204(2) or NRS 11.205(2) applies to their claims. *See generally* Opening Br. 1-17.

fact because Dykema has not alleged that Del Webb knew or should have known of the "defects" necessitating the repairs, and moreover, the invoices do not demonstrate that an injury occurred in the tenth year after the substantial completion of Dykema's residence.

i. The repair invoices relied on by Dykema are inadmissible as evidence and cannot create a genuine issue of material fact as a matter of law.

The first invoice relied on by Dykema is for the replacement of electrical outlets, the second invoice is for the installation of a pressure reducing valve, and the third invoice – to the extent it can be properly termed an invoice – is for an estimate to repair and resurface fiberglass in his master bathroom. *See* JA v.1 00127-129. Dykema does not explain, and Del Webb cannot readily infer, the relevancy of these invoices to any of the construction defect allegations advanced in the operative Complaint or his Chapter 40 Notice. *See* JA v.1 00021-22 at ¶¶ 9-10 & JA v.1 00065-67. The invoices are therefore irrelevant and inadmissible pursuant to NRS 48.025(2).

To the extent the invoices possess any relevance whatsoever, the invoices are nevertheless inadmissible because none of the invoices are authenticated in any manner. *See* JA v.1 00127-129; NRS 52.015 (revealing that authentication is a condition precedent to admissibility); NRS 52.025 (indicating that testimony of a person with knowledge that a matter is what it is claimed to be is sufficient for

authentication); JA v.1 00112-115 (reflecting that no testimony was submitted to the district court with the invoices).

Because the invoices are neither relevant nor authenticated, they are inadmissible as evidence. *See* NRS 48.025(2) & 52.015. As a result, the invoices are incapable of creating a genuine issue of material fact as a matter of law, and Dykema has failed to satisfy his burden concerning the applicability of NRS 11.203(2) to his claims. *See In re Cay Clubs*, 130 Nev. Adv. Op. 92, 340 P.3d 563, 573-74 (2014) (stating that a non-moving party may not demonstrate a genuine issue of material fact with inadmissible evidence unless the moving party does not object to the evidence's inadmissibility); JA v.1 00195 (illustrating Del Webb's objection to the inadmissibility of the invoices below).

ii. Even if admissible, the invoices cannot create a genuine issue of material fact because Dykema has not alleged that Del Webb knew or should have known about any of the "defects" necessitating the repairs.

The determination of which statute of repose applies in a construction defect case depends on the nature of each defect alleged. *See* NRS 11.203 – 11.205; JA v.3 00349. The ten-year statute of repose applies only to claims for damages resulting from defects allegedly known to Del Webb. *See* NRS 11.203(1). The exception to the ten-year statute of repose set forth by NRS 11.203(2) can therefore only apply to claims for damages resulting from defects allegedly known to Del Webb. Here, there is no allegation that that Del Webb knew of any defects,

including those necessitating the repairs allegedly made by Dykema.[14] Accordingly, the invoices are insufficient to create a genuine issue of material fact concerning NRS 11.203(2)'s applicability, and Dykema has failed to satisfy his burden.[15]

iii. The invoices fail to create a genuine issue of material fact because they do not demonstrate that an injury occurred in the tenth year after the substantial completion.

For NRS 11.203(2) to apply, an injury must occur in the tenth year after the substantial completion of an improvement. *See* NRS 11.203(2). The invoices do not evince that an injury occurred in the tenth year after the substantial completion of Dykema's residence. *See* JA v.1 00127-129. The invoices merely reflect the date on which Dykema chose to incur (and, in one instance merely obtain an estimate of) damages resulting from an alleged injury by having repairs made.[16] *See id.*

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[14] Indeed, Appellants do not even allege that the repairs were made necessary by a "construction defect." *See* NRS 40.615 (defining constructional defect).

[15] Del Webb submits that even had Dykema alleged the repairs were necessitated by known defects, NRS 11.203(2) could only be applied to claims for relief from damages resulting from those defects. All claims for damages resulting from other, non-known defects would remain untimely.

[16] Although a complete statutory construction analysis is not warranted here, to interpret NRS 11.203(2), NRS 11.204(2) and NRS 11.205(2) to allow a two-year extension in every case where a repair is made in the last year of the statutory period would virtually eliminate the ten, eight and six year statutes of repose in favor of twelve, ten, and eight-year statutes of repose, as homeowners could simply schedule their injuries to ensure the timeliness of their claims. *See Harris Associates*, 119 Nev. at 641-142, 81 P.3d at 534 (stating that statutory language "should not be read to produce absurd or unreasonable results.").

Highlighting the problem with allowing repair invoices and estimates to establish an injury's occurrence is the fact that an injury could require multiple repairs, or – in the event of bodily injury – multiple medical treatments. *See* NRS 11.203(1)(b)-(c) (referring to personal injuries). Because each time an injury is repaired or medically treated does not amount to a "re-accrual" of the statutes of limitation set forth by NRS 11.190, and because NRS 11.203(2) essentially adds a period of limitation to the end of the repose period,[17] a repair should likewise not amount to a reoccurrence of an injury for purposes of extending the statutes of repose.

The invoices submitted by Dykema demonstrate, at best, that an injury may have *existed* in the tenth year. Without more, a rational trier of fact could not find that an injury *occurred* in the tenth year. Dykema has failed to satisfy his burden to raise a genuine issue of material fact concerning the applicability of NRS 11.203(2) to his claims. Not one of Turner and Dykema's equitable arguments warrant the revival of their untimely claims. Del Webb respectfully submits that the district court order should be affirmed.

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[17] *See G & H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997) ("'Statutes of repose' bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. In contrast, 'statutes of limitation' foreclose suits after a fixed period of time following occurrence or discovery of an injury.") (quoting *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988)).

CONCLUSION

Both Turner and Dykema's homes were substantially completed, as that phrase is unambiguously defined by NRS 11.2055, on the dates notices of completion for their residences were issued. The statutes of repose began to run on those dates, and their claims were brought after the expiration of any applicable repose period. No genuine issue of material fact was raised by either Turner or Dykema, and the district court was correct when it dismissed their claims. All of the admissible evidence, statutory interpretation, case law, and Nevada legislative history support Del Webb's position that Turner and Dykema's construction defect claims were brought too late. Accordingly, the underlying district court order dismissing Appellants' claims should be affirmed.

DATED this 3rd day of June, 2016.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document, RESPONDENT'S ANSWERING BRIEF, filed in case number 69335 does not contain the social security number of any person.

DATED this 3rd day of June, 2016.

KOELLER NEBEKER CARLSON
& HALUCK, LLP

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CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, RICHARD D. YOUNG, being first duly sworn on oath, deposes and states under penalty of perjury that the following assertions are true and correct of my own personal knowledge:

1. I am an attorney duly licensed to practice law in the State of Nevada. I am a partner in the law firm Koeller Nebeker Carlson & Haluck, LLP, attorneys for Respondent, DEL WEBB COMMUNITIES, INC.

2. This Answering Brief is filed in accordance with NRAP 31(a)(1)(B) and an extension made to June 3, 2016 to allow for filing.

3. I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding a matter in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

4. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font,

Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,740 words.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

DATED this 3rd day of June, 2016.

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SUBSCRIBED and SWORN to before me
this 3rd day of June, 2016.

KELLI PETERSON
Notary Public - State of Nevada
APPT. NO. 04-87613-1
My App. Expires August 31, 2016

NOTARY PUBLIC in and for said
County and State

PROOF OF SERVICE

I HEREBY CERTIFY that on 3rd day of June, 2016, I electronically filed and served the foregoing RESPONDENT'S ANSWERING BRIEF upon all counsel of record in *Phillips, et al. v. Del Webb Communities, Inc.,* Case No. A-15-714632-D (Eighth Judicial District Court) and Appeal Case No. 69335 through the Court's electronic filing program and by first class U.S. Mail, postage prepaid, upon:

Honorable Susan H. Johnson
District Judge, Eighth Judicial District Court
Regional Justice Center, Department 22
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Las Vegas, Nevada 89155

An Employee of
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