IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT M. DYKEMA, individually; and RONALD TURNER, individually, Appellants, v. DEL WEBB COMMUNITIES, INC., an Arizona corporation, Respondent.	CASE NO. 69335 Eighth Judicial District Case No. A-15-714632-D

APPELLANTS' REPLY BRIEF

Duane E. Shinnick, Esq.
Nevada Bar No. 7176
Courtney K. Lee, Esq.
Nevada Bar No. 8154
SHINNICK & RYAN NV P.C.
4001 Meadows Lane
Las Vegas, Nevada 89107
Tel: 702-631-8014
Fax: 702-631-8024

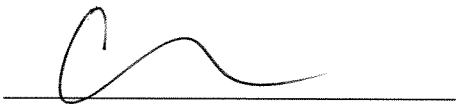
Attorneys for Appellants

NRAP 26.1 DISCLOSURE

The undersigned counsel of record hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The law firm of Shinnick & Ryan NV P.C., and two attorneys thereof (Duane E. Shinnick and Courtney K. Lee), who represent Appellants Robert M. Dykema and Ronald Turner in the district court and in this proceeding.

DATED this 22nd day of June, 2016.



COURTNEY K. LEE, ESQ.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

ARGUMENTS

It should be noted that Respondent Del Webb Communities, Inc.'s ("Del Webb") Answering Brief is untimely as the stipulation and the Court's Order extending the time to file the Answering Brief indicated that the due date would be June 3, 2016. Del Webb's Answering Brief was not filed until June 6, 2016.

Further, a Joint Appendix was already conferred and agreed upon by the homeowner Appellants Robert M. Dykema ("Dykema"), Ronald Turner ("Turner"), and Respondent Del Webb. The Joint Appendix was previously filed on April 5, 2016. Respondent Del Webb appears to be impermissibly enlarging the Joint Appendix with its "Joint Appendix Volume 3" or "supplement". This supplement was never agreed to by homeowner Appellants and Appellants object to same. Furthermore, the supplement contains documents which are not in the record below, therefore should not be considered. In deciding issues on appeal, this Court generally "cannot consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 635 P.2d 276, 277 (Nev. 1981).

Even if the Court were to consider the supplement as an extension of its authority to review or interpret statutes *de novo*, such supplement does not

contradict homeowner Appellants' position that "issued" for a notice of completion means recorded. *See* Del Webb's Joint Appendix Volume 3.[1] Del Webb argues that a signature by the developer and notarization on the notice of completion, without more – without sending it out, or recording it - is sufficient issuance for a notice of completion. *See* Del Webb's Answering Brief at 20. This argument is illogical because a ***notice***[2] of completion would have to ***notify*** affected persons. Del Webb's signature and notarization on the notice of completion alone give no notice. Recordation is the required mechanism to notify affected parties in a notice of completion. *See* NEV. REV. STAT. § 108.228 (2003), NEV. REV. STAT. § 108.22116 (2003).

Del Webb does not effectively counter any arguments, cases cited, statutes cited, by Appellant homeowners that "issued" for a notice of completion in NEV. REV. STAT. § 11.2055 means to send out, record, or to give notice of the completion of the subject homes. *See* BLACK'S LAW DICTIONARY 964 (4th ed.

---

[1] It should be noted that SB 236 did not pass, so any legislative history regarding it is not germane to the current statute as enacted. (Vol. 3, JA00336-349)

[2] "'[N]otice' means information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to ***communicate***." (Emphasis added). BLACK'S LAW DICTIONARY 1210 (4th ed. 1968)

1968); *see also* NEV. REV. STAT. § 108.228 (2003), NEV. REV. STAT. § 108.22116 (2003).

I. DYKEMA AND TURNER'S CLAIMS WERE TIMELY BROUGHT BECAUSE THE RECORDING DATE OF A NOTICE OF COMPLETION IS THE SUBSTANTIAL COMPLETION DATE

Del Webb states both the dates of certificates of occupancy and notices of completion. *See* Del Webb's Answering Brief at 6-7. However, the statute is clear that substantial completion is 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* NEV. REV. STAT. § 11.2055(1) (1999).

Further, a certificate of occupancy or final building inspection are completed by a third party, the Department of Building and Safety, and are not documents that are required to be recorded by statute. In contrast, the notice of completion is drafted by the owner or developer itself, and requires notification to affected parties, that is recordation, to be an effective notice. *See* NEV. REV. STAT. § 108.228 (2003), NEV. REV. STAT. § 108.22116 (2003). Even Del Webb's supplement supports this finding as David Pursiano, Nevada Trial Lawyers' Association, stated that "typically a builder would file a notice of completion

because that triggers the lien rights. He explained that if the notice of completion is not filed or filed late, it extends the lien-right period." (JA00356) Filing in this context means recording the notice of completion in the county recorder's office where the property is located. *See* NEV. REV. STAT. § 108.228 (2003), NEV. REV. STAT. § 108.22116 (2003). Del Webb misconstrues the first provision of NEV. REV. STAT. § 108.228(1) to mean that a notice of completion may or may not be recorded to be effective. *See* Del Webb's Answering Brief at 19, fn 11. However, when NEV. REV. STAT. § 108.228 is read together with NEV. REV. STAT. § 108.22116(3), the statute is clear that if a notice of completion is selected by a developer or owner to be issued[3], then it must be recorded to be effective. The previously string cited case law by homeowner Appellants supports this position which has not been contradicted by Del Webb. *See* Appellants' Opening Brief at 13-14. Accordingly, the plain and unambiguous language of the statutes indicates that the recorded date is the date of substantial completion for an issued notice of completion. *See* NEV. REV. STAT. § 108.228 (2003), NEV. REV. STAT. § 108.22116(3) (2003).

[3] The "may" language signifies that completion may be evidenced by the owner's acceptance or occupation, but that if a notice of completion is selected to be issued, then it must be recorded to be effective. *See* NEV. REV. STAT. § 108.22116 (2003), NEV. REV. STAT. § 108.228 (2003).

Del Webb erroneously asserts that the homeowners are the parties who may record the notices of completion and would allow a "homeowner to avoid the statutes of repose entirely by waiting to record the notice until immediately before filing suit." Del Webb's Answering Brief at 16. First, homeowners Dykema and Turner were not "owners" of the homes or properties at the time the notices of completion were required to be recorded. Second, even if Dykema and Turner were the "owners" at the time the notices of completion could be issued, this waiting until filing suit would never result because the occupation or acceptance of the work of improvement by the owners would also indicate completion. *See* NEV. REV. STAT. § 108.22116(1) and (2) (2003).

The portion of Chapter 108 of the Nevada Revised Statutes was formulated in the context of a lien claimant's right to payment for work performed. An owner would hire a contractor to make improvements/repairs or to originally build his home, and allowed the owner to record a notice of completion if he so chose to trigger lien rights for any contractors, including subcontractors. *See* NEV. REV. STAT. §§ 108.221 -108.246. However, as previously indicated, the homeowners Dykema and Turner were not the developers or contractors of their own homes and were not "owners" of the homes/properties until after the time the notices of

completion were issued. (Vol. 1, JA00141-144, JA00136-139) Del Webb was the developer or "owner" required to record the notice of completion, if the notice of completion was selected as the method to signal completion, to give all notice, mainly subcontractors, of the completion of the home. NEV. REV. STAT. § 108.228(1) (2003) states "1. The owner may record a notice of completion after the completion of the work of improvement." The statute is clear that the owner does not have to record a notice of completion as there are other ways to signal completion – acceptance or occupancy by the owner. However, if the notice of completion is the method chosen to signify completion, then it must be recorded. *See* discussion *infra*.

Del Webb argues that there is "nothing in the legislative history [that] 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." Del Webb's Answering Brief at 19. Del Webb further asserts that "*substantial completion* would be indicated by something less than recordation – like issuance." Del Webb's Answering Brief at 20, *citing* NEV. REV. STAT. § 11.2055. However, the statutes themselves are unambiguous that a notice of completion must be recorded. *See* NEV. REV. STAT. § 108.228 (2003), NEV. REV. STAT. § 108.22116 (2003). In

addition, the statutes provide that completion could be evidenced by occupation or acceptance of the work of improvement by the owner, other than by recordation of a notice of completion, or by the certificate of occupancy or final building inspection. *See* NEV. REV. STAT. § 108.22116(1) and (2) (2003), NEV. REV. STAT. § 11.2055(1) (1999). In the present matter, Del Webb chose to issue a notice of completion, requiring Del Webb to record such notice in order for the notice, which constructively notifies all interested parties, to be effective. (Vol. 1, JA00136-139, JA00141-144) If a notice of completion is not effective until it is recorded or "filed", then the recordation date is necessarily the "issued" date for a notice of completion to indicate substantial completion.

Moreover, the notice of completion is oftentimes recorded by the developer at the same time as when the first homeowner records or takes title. As such, the notice of completion is closer in time to when an actual first homeowner would take possession or ownership of the home and would notice construction defects. It would seem unfair to start running the statute of repose before a first homeowner takes possession of the home from the developer or builder.

As Dykema served his Chapter 40 notice for the home located at 2818 Craigton Drive on December 2, 2014 (Vol. 1, JA00065-67), and the notice of

completion was recorded on December 8, 2004 (Vol. 1, JA00141-144), Dykema's claims were well within the ten- year statute of repose.

Turner served his Chapter 40 notice for the home located at 2844 Blythswood Square on December 22, 2014 (Vol. 1, JA0060-63), and the notice of completion was recorded on December 23, 2004. (Vol. 1, JA00136-139) Turner's claims were also within the ten- year statute of repose.

II. DEL WEBB ATTEMPTS TO IMPERMISSIBLY SHIFT BURDEN OF PROOF IN SUMMARY JUDGMENT BEFORE IT HAS MET ITS BURDEN REGARDING SIX-, EIGHT- AND/OR TEN- YEAR STATUTE OF REPOSE, WHICH THE DISTRICT COURT ALREADY RECOGNIZED AND PROPERLY DISREGARDED

Summary judgment is rendered if a moving party "shows[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . An order granting summary judgment shall set forth the undisputed material facts and legal determinations on which the court granted summary judgment." NEV. R. CIV. P 56(c); *see Borgerson v. Scanlon*, 117 Nev. 216, 19 P.3d 236 (2001); *see also Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 14 P.3d 511 (2000). The burden of establishing the non-existence of any genuine issues of fact is on the movant. *Pacific Pools Construction Co. v. McClain's Concrete, Inc.*,101 Nev. 557, 559, 706 P.2d 849, 851 (1985). Del Webb

states that it established the "tardiness of Turner and Dykema's claims by presenting the district court with the substantial completion dates of homes, as reflected in the certificates of occupancy." Del Webb's Answering Brief at 8. However, the substantial completion date is the later of the final inspection, notice of completion or certificate of occupancy. *See* NEV. REV. STAT. § 11.2055(1) (1999). It has already been determined that the certificates of occupancy were not the statutorily mandated later dates of substantial completion - the notices of completion were found to be later. Del Webb acknowledged same. (Vol. 1, JA00048, JA00050, JA00136-139, JA00141-144, JA00191)

Nevertheless, even if the certificates of occupancy were the later dates of substantial completion, production of the certificates of occupancy alone would be insufficient to bar Dykema's and Turner's claims for six-, eight- or ten- year statutes of repose. (Vol. 1, JA00048, JA00050) The district court appeared to recognize that at the time Del Webb filed its Motion to Dismiss, or summary judgment against Dykema and Turner, that discovery had not yet begun, and construction defect claims' categorization as latent, patent or known were premature as no experts' reports were deposited. *See* NEV. R. CIV. P. 56. (Vol. 1, JA00001-29, JA00033-105) Construction experts would be needed to designate

any such defects as latent, patent, or known deficiencies. Del Webb presented no expert testimony or sworn affidavits to establish any of Dykema's or Turner's defects as latent or patent sufficient to support summary adjudication as barred by the six- or eight- year statute of repose. (Vol. 1, JA00033-105, JA00186-218) Further, Del Webb did not specify which, if any, of Dykema's or Turner's claims of defects as latent or patent were particularly barred. (Vol. 1, JA00033-105, JA00186-218) Del Webb, as movant, attempted to improperly shift the burden onto homeowners Dykema and Turner before it met its burden of establishing the non-existence of any genuine issues of fact.

Del Webb wrongly stated that "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." Del Webb's Answering Brief at 7, *citing* JA00041. No support for this statement is set forth. Nevertheless, Dykema and Turner properly asserted construction defect claims within the applicable ten year- statute in their complaint. (Vol. 1, JA00020-22, JA00026) Therefore, the district court appropriately considered whether the claims of Dykema and Turner were barred by the longest applicable statute of repose or the ten- year statute for known deficiencies. (Vol. 2, JA00220-234) Unfortunately, the district court erred in

failing to consider that the recorded date of the notice of completion constituted substantial completion for the running of the statute of repose.

Del Webb cites to *Elley v. Stephens*, 104 Nev. 413, 418-19, 760 P.2d 768, 772 (1988) to support its contention that Dykema and Turner failed to satisfy their burden. However, the *Elley* case is inapposite and Del Webb misapplies the case. In *Elley v. Stephens*, the Stephenses owned a vacant at Incline Village upon which a contractor built and assembled a prefabricated house, including the deck and railing. *See Elley*, 104 Nev. at 414. The Stephenses sold the house, without ever living in it, to Robert and Muriel Hall. *Id.* The Elleys purchased the house from the Halls in June 1985. *Id.* Mr. Bradley Elley fell over or through the railing of the house's deck a month after purchase, suffering injury. Elleys sued the Stephenses and Washoe County. *Id.* The house was finished in 1973, and the complaint was filed twelve years later. The Nevada Supreme Court found that the negligence and negligent inspection claims were barred by the ten-year statute of repose and that the Elleys did not have standing to challenge its constitutionality. *Elley*, 104 Nev. at 415. Further, the Court found that the record revealed no evidence supporting appellants' allegations that the Stephenses or the County engaged in willful misconduct, which has no statute of repose/limitation. *Elley*, 204 Nev. at 419.

Willful misconduct or fraud allegations requires pleading with specificity, whereas other claims for relief only need be averred generally. *See* NEV. R. CIV. P 8 and 9. The current case is distinguishable and/or misapplied from the *Elley* case as Dykema and Turner did not sue the first homeowner or the County for the construction defect/negligent inspection claims, but sued Del Webb, the developer for construction defect claims. (Vol. 1, JA00014-29) Further, Dykema and Turner did not claim fraud or willful misconduct attributable to Del Webb. Dykema and Turner did not file their claims twelve years later, but within the ten- year statute of repose considering tolling by service of Chapter 40 notices and substantial completion dates. (Vol. 1, JA00014-29, JA0060-63, JA00065-67, JA00136-139, JA00141-144) Therefore, the other construction defect claims for relief in general were sufficiently pled. *See* NEV. R. CIV. P 8. (Vol. 1, JA00020-22, JA00026)

In the event that the Court finds that the issued date of the notices of completion are the dates indicated by Del Webb and not the recording dates, then Dykema's and Turner's claims should not be barred in the interest of justice.

Dykema and Turner generally alleged in their complaint that construction defects discovered in the 10th year extended the statute of limitations an additional two years. *See* NEV. REV. STAT. § 11.203 (1999). (Vol. 1, JA00022)

If the district court order/final judgment is not overruled by this Court, then the meritorious claims of Dykema and Turner would be unfairly barred.

CONCLUSION

In the present matter, the plain reading of the statutes, and case law support the fact that the statute of repose did not begin to run until after substantial completion of Dykema's and Turner's homes. The later dates of Dykema's and Turner's notices of completion were the substantial completion dates. If the notices of completion were selected as the method to signal completion, they were required to be recorded to be effective. As such, the recorded dates of the notices of completion were the beginning dates, or issued dates, for the statute of repose.

///

///

///

As the Chapter 40 notices (NEV. REV. STAT. § 40.600-40.695) served by Dykema and Turner tolled the statute of repose, the claims of Dykema and Turner were timely brought within the ten- year statute of repose. Accordingly, this Court is requested to overrule the Order of Dismissals/Final Judgments of Robert M. Dykema and Ronald Turner, and direct the honorable district court judge to reinstate their construction defect claims.

Respectfully submitted this 22nd day of June, 2016.

SHINNICK & RYAN NV P.C.

By: 

DUANE E. SHINNICK, ESQ.
Bar No. 7176
COURTNEY K. LEE, ESQ.
Bar No. 8154
4001 Meadows Lane
Las Vegas, Nevada 89107
Tel: 702-631-8014
Fax: 702-631-8024

Attorneys for Appellants

AFFIDAVIT OF COURTNEY K. LEE

1. I am over the age of 21 years, am of sound mind, and have personal knowledge of all matters attested to herein.

2. I am counsel of record for Plaintiffs in *Phillips, et al. v. Del Webb Communities, Inc,* Case No. A-15-714632-D, pending in the Eighth Judicial District Court, and for Appellants Robert M. Dykema and Ronald Turner in the current Appeal, Case No. 69335.

3. The matters stated in homeowner Appellants' Reply Brief are accurate to the best of my knowledge, information and belief.

FURTHER AFFIANT SAYETH NAUGHT.

COURTNEY K. LEE

Sworn and subscribed before me this
22nd day of June, 2016.

Notary Public

JESSICA J. WHITE
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 12-11-2018
Certificate No: 10-3071-1

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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 Reply Brief has been prepared in a proportionally spaced typeface (14-point Times New Roman) using MS Word and contains 2,941 words (less than the 14,000 word limit).

2. I further certify that I have read this Reply 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 Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the Reply Brief regarding matters in the record be supported by a reference to those portions of the record, if any, where the matter relied upon is to be found. I understand that I may be subject to sanctions if this Reply Brief does not comply with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of June, 2016.

COURTNEY K. LEE

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellants' Reply Brief were electronically served this 22nd day of June, 2016, 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
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Jessica White
Jessica White
An Employee of SHINNICK & RYAN NV P.C.