IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA DEPARTMENT OF TRANSPORTATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STRUMAN, DISTRICT JUDGE,

Respondents.

And

FRED NASSIRI, INDIVIDUALLYAND AS TRUSTEE OF THE NASSIRI LIVING TRUST, A TRUST FORMED UNDER NEVADA LAW,

Real Party in Interest.

District Court Case No.: A672841

No.: 70098

PETITION FOR REHEARING

COMES NOW, Real Party in Interest, Fred Nassiri, Individually and as Trustee of the Nassiri Living Trust, A Trust Formed Under Nevada Law, (collectively "Nassiri"), by and through his counsel of record Eric R. Olsen, Esq. and Dylan T. Ciciliano of the law firm of Garman Turner Gordon LLP, and petitions the Court for rehearing in the above-named case regarding his unilateral mistake claim only. This petition is based on the following memorandum of points and authorities, all papers and pleadings, oral arguments, and the record and

appendices on file herein.

Dated this 16th day of October, 2017.

Respectfully Submitted,
GARMAN TURNER GORDON LLP

By_____

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POINTS AND AUTHORITIES

On September 27, 2017, this Court filed its opinion granting extraordinary writ relief and ordered the district court to enter summary judgment in favor of the State. *Nevada Dept. of Transportation v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 70 (2017) (*Opinion*). Contrary to the district court's finding of facts and conclusions of law that the statute of limitation for Nassiri's unilateral mistake claim (hereinafter Rescission Claim) did not start to run (and/or tolled) until 2010, this Court determined that judgment was appropriate, as a matter of law, because

there was public information available prior to that time indicating a flyover would be built. However, the case cited in support, *Bemis v. Estate of Bemis*, 114 Nev. 1021, 967 P.2d 437 (1998), requires the district court be affirmed, because there was a sufficient factual dispute as to when Nassiri should have discovered his claim. Such a dispute must be resolved by the factfinder according to *Bemis*, which held that "[w]hether plaintiffs exercised reasonable diligence in discovering their causes of action 'is a question of fact to be determined by the jury or trial court after a full hearing'" 114 Nev. at 1025, 967 P.2d at 440, (quoting *Millspaugh v. Millspaugh*, 96 Nev. 446, 448, 611 P.2d 201, 203 (1980)).

The district court held a six-day trial to determine whether Nassiri reasonably investigated the interchange's configuration and whether he should have discovered the State's intent to build the flyover; it found that he reasonably investigated the interchange and that the statute of limitations did not start running until he received actual notice of the flyover in 2010. This Court will affirm the district court if its findings are supported by substantial evidence, *Certified Fire Protection, Inc. v. Precision Construction*, 128 Nev., Adv. Op. 35, 283 P.3d 250, 254 (2102), and under Nevada law Nassiri reasonably investigated the interchange and relied upon the State's misrepresentations, thus negating his duty to further investigate. The Opinion omits a critical and dispositive block of facts and law

that, when applied, requires the affirmation of the district court's determination that the statute of limitations started to run in 2010.

NRAP 40 permits Nassiri to petition the Court for rehearing. Any point raised in this rehearing petition must be argued in his brief, NRAP 40(c)(a), and the Court must have (1) overlooked or misapprehended a material fact in the record, (2) overlooked or misapprehended a material question of law in the case, or (3) overlooked, misapplied or failed to consider a statute, procedural rule, regulation or dispositive case law, NRAP 40(c)(2), to consider a rehearing.

During settlement negotiations, the State affirmatively represented to Nassiri that no flyover would be built by providing documents in settlement negotiations that purported to show the final design of the interchange—a design that did not include the flyover. PA01583, Real Party in Interest's Brief (RB) 8-10, 12-19. In district court, the State argued that Nassiri had failed to reasonably investigate the interchange because it had prepared an Environmental Assessment Disclosure (EAD) that was available at the public library and showed the flyover. PA01593, Petitioner's Opening Brief (POB) at 44. Recognizing that Nevada law treats the question of whether the statute of limitations has started to run under the discovery rule as a factual dispute according to *Bemis*, the district court held a six-day trial to determine whether the statute of limitations had been tolled. PA01577. After hearing a great deal of evidence, it found Nassiri reasonably investigated the

interchange and the contract. Because the State's affirmative misrepresentation negated Nassiri's duty to investigate absent additional facts that come to his attention, *Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998), and those facts did not come to his attention until the interchange's construction has started, the statute of limitations did not start running until 2010. PA01589-97, RB 40.

While this Court affirms a bench trial's findings of fact if they are supported by substantial evidence, the Court omitted any discussion about the bench trial or the dispute of facts in its Opinion; instead it based its rationale that reversal was required because the State had included the flyover plans in its EAD. This is problematic. The Court cannot reach its result without ignoring both (1) the mountain of evidence of the State's affirmative misrepresentation, and (2) Nevada law holding that when a party makes a misrepresentation and the other party reasonably relies on that misrepresentation, the duty to investigate is satisfied until the party is put on inquiry notice. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440. Given the Opinion's omission of these critical facts and Nevada law, the Court appears to have either misapprehended material facts in the record or ignored well-established Nevada law.

Specifically, the Court held Nassiri's Rescission Claim was time-barred because he should have discovered the interchange's plans as the State had

"publicly disclosed its proposed plans for the Blue Diamond Project, including the potential flyover, in its 2004 Environmental Assessment." Opinion at 12. The Court cited *State v. Eighth Judicial Dist. Court* (*Ad America*), 131 Nev., Adv. Op. 41, 351 P.3d 736, 740 (2015) in support, but while *Ad America* held an environmental assessment of a planned future development constituted public knowledge, that outcome was in the context of whether there was an ad hoc taking. The property owner had actual notice of the project and there was no misrepresentation by the State. *Id.* at 743-44. Conversely, the Opinion reasons the EAD was available for Nassiri to discover and thus he had notice as a matter of law. The critical distinction, however, is that *Ad America* did not involve a misrepresentation by the State that a party relied upon and thus it is inapplicable here. The Court also omits any discussion or analysis of whether Nassiri was put on inquiry notice or that the district court's findings of fact were not supported by substantial evidence.

Under Nevada law, once a party misrepresents a material fact to the other party, the other party's duty to investigate is satisfied unless additional facts come to its attention that would put it on inquiry or actual notice. *See Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987) (holding that when a business affirmatively represented its income to a prospective buyer and the buyer reasonably relied on that knowledge, the buyer's duty to investigate was not

imposed "absent any facts to alert the defrauded party his reliance [was] unreasonable"); *Blanchard v. Blanchard*, 108 Nev. 908, 913, 839 P.2d 1320, 1323 (1992) ("A party is not under a duty to make a reasonable investigation unless the recipient has information which would serve as a danger signal and a red light to any normal person of his intelligence and experience") (internal quotation marks omitted); *Woods v. Label Inv. Corp.*, 107 Nev. 419, 426, 812 P.2d 1293, 1298 (1991) (disapproved of on other grounds by *Hanneman v. Downer*, 110 Nev. 167, 871 P.2d 279 (1994)) ("If the purchaser is aware of facts from which a reasonable person would be alerted to make further inquiry, then he or she has a duty to investigate further and is not justified in relying on the seller's" representation.); *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1040 (9th Cir. 2003) (the statute of limitation is tolled when a party relies upon another party's false representations); *see also* Real Parties in Interests Brief (RB) 38-41. While these cases usually arise in a fraudulent or negligent misrepresentation context, the law is equally applicable here because there was an affirmative misrepresentation made by the State. PA00871, 876, 981-85, 989, 1092, 1581-83, 1585; *see also* RB 12-19. If a party is not required to investigate further, then the statute of limitations is tolled until "the claimant discovers, or reasonably should have discovered, the material facts for the action." *Brady Vorwerck v. New Albertson's*, 130 Nev., Adv. Op. 68, 333 P.3d 229, 232 (2017); *Bemis*, 114 Nev. at 1024, 967 P.2d at 439-40, RB 39-40.

Inquiry notice occurs when a party learns certain facts that "'would lead an ordinary prudent person to investigate the matter further.'" *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev., Adv. Op. 23, 277 P.3d 458, 462 (2012) ((quoting *Black's Law Dictionary* 1165 (9th ed. 2009)); *Merck & Co. v. Reynolds*, 559 U.S. 633, 651 (2010) (inquiry notice refers to the point where the facts would lead a reasonably diligent person to investigate further); RB 39. Those facts must come to the party's attention and they must be sufficient to put a reasonable person on notice that further investigation is needed. *See Bemis*, 114 Nev. at 1026, 967 P.2d at 440-41 (because the knowledge that would have put the parties on inquiry notice did not come to their attention, the statute of limitations did not start to run until those facts were discovered). If those facts do not satisfy both prongs, then inquiry notice does not exist. *Id.* at 1026, 967 P.2d at 441. And whether there was inquiry notice is a question of fact for the factfinder, not the judge, to determine. *Id.* at 1025, 967 P.2d at 440 ("Whether plaintiffs exercised reasonable diligence in discovering their causes of action is a question of fact to be determined by the jury or the trial court after a full hearing."); RB 39-40.

The trial court recognized this factual dispute and held a six-day bench trial, in which it determined that Nassiri (1) exercised reasonable diligence; (2) the State misrepresented the interchange configuration to Nassiri, (3) Nassiri was not under a duty to review every public document available when the State misrepresented

the flyover to Nassiri, and (4) Nassiri was not subsequently put on notice until 2010. PA01577, 1587-97. These conclusions were based upon significant and substantial evidence introduced at trial. PA01578-86. Because Nassiri was not put on notice until 2010, the statute of limitations had not yet run when he filed his complaint in 2012. PA01597.

This Court will affirm the district court's findings of fact in a bench trial if it is supported by substantial evidence, *Certified Fire Protection*, 283 P.3d at 254, and reviews legal conclusions de novo, *County of Clark v. Sun State Properties, Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). That Nassiri was not put on inquiry notice is a factual determination that falls under the substantial evidence standard of review. So too is the determination that he received actual notice in 2010. Conversely, that the statute of limitations had started to run in 2010 and that Nassiri was not under a duty to investigate every public document due to the State's misrepresentations are legal conclusions.

The Opinion simply reaches the conclusion that Nassiri's claim was time-barred because the EAD was publicly available. Opinion at 12. This holding effectively means Nassiri had a duty to read every publicly-available document, despite his face to face dealings with the State. The Opinion omits any discussion of whether the district court's findings of fact are supported by substantial evidence, nor could it as the trial transcript is missing from the record and thus

cannot be reviewed. *See Cuzze v. Univ. and Cmty. College Sys. of Nev.*, 123 Nev. 598, 604, 172 P.3d 131, 135 (2007) (if the appellants have failed to include the relevant portion of the record, then the record is presumed to support the district court's decision).

Determining that Nassiri had a duty to read every public record despite the State's misrepresentations either abrogates established Nevada law holding that reasonable reliance tolls the statute of limitations or creates a dangerous exception for the State. It allows the State to make any representation that it desires in negotiations if a publicly-available document contains the State's ultimate plans. That, of course, amounts to bad public policy - the State should be held to a higher standard of conduct than the public and not a lower standard. The State, and the State alone, is the only entity that knows what is contained in all its public documents. It will effectively destroy any trust in negotiations; lawyers and their clients will always be fearful that some public document exists, somewhere, that provides the State an escape hatch to release it from its representations. This is a far cry and substantial departure from the "reasonable diligence" standard adopted by this Court. *Siragusa*, 114 Nev. at 1391, 971 P.2d at 806, RB 39. Nor is it justified by the policy concerns raised by the distinguishable case of *State v. Eighth Judicial Dist. Court (Ad America)*, 131 Nev., Adv. Op. 41, 351 P.3d 736, 740 (2015).

CONCLUSION

In sum, the State affirmatively represented to Nassiri that there would be no flyover, which eliminated Nassiri's duty to investigate as a matter of law. Nassiri could have been put on inquiry or actual notice if additional facts came to his attention, but they did not until 2010. Thus, the statute of limitations was tolled and had not yet run when Nassiri filed his complaint. This district court determined this after six days of trial. This Court's Opinion neglects this analysis; the facts of the case and Nevada law demands a different outcome.

This Court is invested with the power to amend, abrogate, or overturn Nevada laws. *See Lacy v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 63 (2017), *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011). With respect, however, Nassiri has good cause for concern when it appears that this Court has abrogated Nevada law without mentioning, analyzing, or discussing its

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rationale for abrogation. Therefore, the Real Parties in Interest respectfully request that its petition for rehearing be granted for its unilateral mistake claim.

Dated this 16th day of October, 2017.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Microsoft 365 for Business in 14 point font of the Times New Roman style.

2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is proportionally spaced, has a type face of 14 points, and contains 2834 words.

Dated this 16th day of October, 2017.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 16th day of October, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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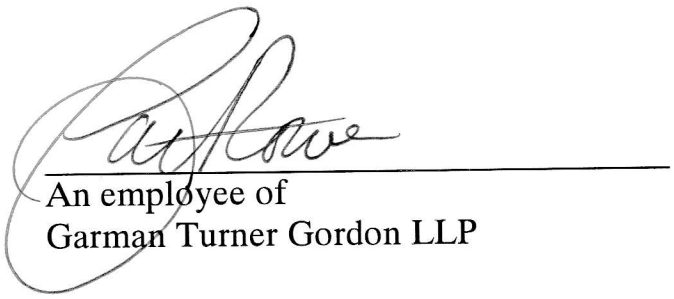

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