Case No. 77668

IN THE SUPREME COURT OF NEVADA

JANETTE BYRNE, as TRUSTEE OF THE UOFM TRUST,

Appellant,

vs.

SUNRIDGE BUILDERS, INC.; a Nevada Corporation; LANDS WEST BUILDERS, INC., a Nevada Corporation; BRYANT MASONRY, LLC, a Nevada Limited Liability Company; DMK CONCRETE, INC., a Nevada Corporation; CIRCLE S DEVELOPMENT DBA DECK SYSTEMS OF NEVADA, a Nevada Corporation; GREEN PLANET LANDSCAPING, LLC, a Nevada Limited Liability Company; LIFEGUARD POOL MAINT. dba LIFEGUARD POOLS, a Nevada Corporation; PRESTIGE ROOFING, INC., a Nevada Corporation; PYRAMID PLUMBING, a Nevada Corporation; RIVERA FRAMING INC. DBA RIVERA FRAMERS, a Nevada Corporation; S&L ROOFING, INC., a Colorado Corporation,

Respondents.

APPELLANT'S OPENING BRIEF

Eighth Judicial District Court
The Honorable Richard Scotti, District Judge
District Court Case A-16-742143-D

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record 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.

RELATED ENTITIES:

None

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JURISDICTIONAL STATEMENT

Jurisdiction is proper under NRAP 3A(b)(1) because this appeal was timely filed from a judgment certified as final under NRCP 54(b). On October 18, 2017, the district court granted summary judgment in favor of the two general contractors based on the statute of repose. On December 14, 2017, the district court issued a Nunc Pro Tunc Order granting summary judgment on the same grounds in favor of numerous other contractors in the action. Byrne's claims against numerous defendants were not resolved on summary judgment, but were subsequently resolved either by settlement, default judgment or voluntary dismissal.

The written orders resolving Byrne's claims against all defendants are attached to her Docketing Statement. Byrne's claims against Avanti Products, LLC; BSH Home Appliances Corporation; General Electric Company; Ivie Mechanical, Inc.; Trim Time LLC; 4M Corp. and Mountain West Electric have all been dismissed. Default judgments were granted against J.C.W. Concrete; Karl Henry Lisenbardt; Spray Product Applications, LLC; and Window Installation Specialists, LLC. No claims remain between Byrne and any parties who appeared in the action. Accordingly, the district court properly entered an order certifying the judgment as final pursuant to NRCP 54(b).

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals. NRAP 17(b). This appeal should be retained by the Supreme Court pursuant to NRAP 17(11) (principal issue of first impression) and (12) (principal issue of statewide public importance). That there is an important issue concerning the interpretation of newly enacted AB 125, § 21(6) (2015) is demonstrated by the fact that in *Lopez v. U.S. Home Corp*., 2016 U.S. Dist. LEXIS 163571 (D. Nev. 2017), the federal district court construed the tolling provisions of NRS 40.695 and the grace period provided by AB 125, § 21(6) in a manner that directly conflicts with the interpretation made by the district court below. Additionally, in *Sky Las Vegas Condominiums, Inc. v. Sky Las Vegas Condominium Unit Owners Association*, Case No. A-16-738730-D, Dept No. XXII, Clark County, the district court also reached a different conclusion from Judge Scotti with respect to the application of the tolling provisions of NRS 40.695 and the grace period provided by AB 125, 2015 Nev. Stat., ch. 2,§ 21(6). 3 AA 526.

STATEMENT OF THE ISSUES

1. Whether NRS 40.695, which tolls the statute of repose for construction defect claims from the time a prelitigation notice of the claim is served on the contractor pursuant to NRS 40.645, applies to a notice of claim served within the one-year grace period established by AB 125, 2015 Nev. Stat., ch. 2, § 21(6).

2. Whether the district court abused its discretion in awarding attorney's fees to Lands West Builders, Inc. pursuant to NRCP 68 and NRS 40.652(4).

I. STATEMENT OF THE CASE

This case arises out of a construction defect action filed by Appellant (Byrne) on August 22, 2016 pursuant to NRS Chapter 40. On October 18, 2017, the district court granted summary judgment in favor of two of the contractor defendants based on the statute of repose. On December 14, 2017, the district court issued a Nunc Pro Tunc Order granting summary judgment on the same grounds in favor of numerous other contractor defendants in the action. Thereafter, on March 13, 2018, the district court entered an Order Granting Defendant Lands West Builder's motion for attorney's fees and costs. On November 15, 2018, following the resolution of all additional claims involving Appellant Byrne in the case, the district court entered its Order Granting Certification of Final Judgment Pursuant to NRCP 54(b). Byrne filed her notice of appeal on December 10, 2018.

II. STATEMENT OF THE FACTS

A. Facts Pertaining to the Statute of Repose Issue

A brief overview of the applicable law should help to place the facts in their appropriate legal context. Nevada construction defect law is governed by a comprehensive statutory scheme established by NRS 40.600 to 40.695, commonly referred to as Chapter 40. Chapter 40 contains a series of procedures designed to facilitate the resolution of construction defect claims without the need to resort to the

courts. Those procedures require claimants and contractors to engage in an extensive prelitigation dispute resolution process before a claimant is permitted to file suit. *See* NRS 40.645 through 40.680.

The prelitigation process must be commenced in accordance with NRS 40.645(1), which requires a claimant to give a contractor written notice concerning the nature of the claimed defects. The prelitigation process culminates with mediation, if necessary. NRS 40.695 tolls the statute of repose for construction defect actions from the time the prelitigation notice is served until one year after the notice is given or thirty days after the prelitigation mediation is concluded, whichever is earlier.

In 2015, the Legislature passed AB 125, which shortened the statute of repose for latent construction defects from ten years to six years. Assembly Bill 125, 78th Leg. (Nev. 2015). Although the new statute of repose applies retroactively, the Legislature established a one-year grace period that allowed claimants with existing but unfiled claims to commence construction defect actions by February 24, 2016. *See* AB 125, Nev. Stat., ch.2, § 21(6) (2015). Without the grace period, claims that had accrued prior to February 24, 2009 and that were otherwise viable would have been eliminated by the retroactive application of the new six-year statute. The grace period also granted additional time for the filing of claims that otherwise would have

expired within one year of the effective date of the Act.

Substantial completion of Byrne's residence occurred on May 29, 2009, and her construction defect claim accrued on that date pursuant to NRS 11.202. 3 AA 558. Since Byrne's claim accrued on May 29, 2009, she had until the end of the grace period (February 24, 2016), within which to timely file her construction defect action. In the absence of the grace period, Byrne's claim would have been time-barred on May 29, 2015, just a few months after AB 125 became effective.

Byrne served her prelitigation notice on December 2, 2015, prior to the expiration of the grace period. Thereafter, she proceeded to satisfy all of the other statutory pre-filing requirements, including participating in mediation, before filing this action on August 22, 2016. It is undisputed that Byrne filed the instant action within the time prescribed by NRS 40.695 for the tolling of construction defect actions.

Based on its interpretation of NRS 40.695 and the 2015 amendments to Chapter 40, the district court determined that a prelitigation notice served more than six years after the accrual date does not toll the statute of repose, regardless of whether the notice was served during the grace period. Since Byrne served her prelitigation notice more than six years after her claim accrued, the district court ruled that the notice did not toll the running of the statute of repose, even though the notice

was served within the grace period. The district court therefore concluded that Byrne's complaint was untimely because it was filed after February 24, 2016.

B. Facts Pertaining to the Award of Attorney's Fees

Byrne also appeals the district court's award of attorney's fees to Lands West Builders, Inc. (hereafter "Lands West") in the amount of $94,662.50 pursuant to NRCP 68 and NRS 40.652(4). The facts concerning the award of attorney's fees to Lands West are also straightforward. Byrne purchased her newly constructed residence in February of 2012. The house was an 11,225 square foot custom home. 3 AA 557. Defendant Sunridge was the general contractor. 3 AA 558.

After Byrne became aware of defects in the construction of the house, she requested Sunridge to remedy the problems. In response to Byrne's request, Sunridge agreed to make repairs. However, the attempted repair work was actually performed by a different homebuilding company, Lands West. 2 AA 428. That work continued over a two year period from 2012 to 2014. 5 AA 1054. When the repairs proved to be inadequate, Byrne initiated her Chapter 40 claim by serving her prelitigation notice pursuant to NRS 40.645. Unfortunately, despite a lengthy prelitigation process and mediation, the parties were unable to resolve Byrne's claims.

After the prelitigation process was completed, Byrne initiated this action against Sunridge and Lands West, among other contractor defendants. 1 AA 69.

Byrne sued Sunridge as the general contractor. Byrne also sought recovery of all of her damages against Lands West based on the theories of alter ego and successor liability. 1 AA 76-78. The Second Amended complaint contains detailed allegations supporting the alter ego claim. 1 AA 76-77. Lands West did not file a dispositive motion challenging Byrne's allegations concerning Lands West's relationship to Sunridge. Nor did the district court make any ruling on the merits of that issue.[1]

As the Order granting the fee award indicates, Byrne claimed damages in the amount of $1.8 million dollars. 5 AA 1053, 1054; 5 AA 1076. Lands West made its offer of judgment in the amount of $10,001 on March 14, 2017, just two months after it had entered the lawsuit and before Byrne filed her Second Amended Complaint (March 16, 2017). 3 AA 587. The offer was also made long before any significant discovery had been conducted. In fact, destructive testing of the house was not performed until May 9, 2017 and Byrne's expert reports were not prepared until afterwards. 4 AA 964. Additionally, as of the time of the offer, no discovery had been conducted with respect to the alter ego and successor liability claims. The deadline for completing discovery, February 28, 2018, was almost a year after the

[1] In any event, the record contains ample evidence supporting Byrne's alter ego and successor liability claims. Part of that evidence consisted of the fact that, when Byrne notified Sunridge of the problems, its representatives indicated that they were now operating through a different homebuilding company, Lands West, and that Lands West would be making the repairs. 2 AA 428; 4 AA 963.

offer was made. 4 AA 965.

Notwithstanding the premature timing of the offer, the negligible amount of the offer, the magnitude of Byrne's construction defect claim and the small chance that Byrne's claims would ultimately be dismissed based on the statute of repose, the district court ruled that Lands West was entitled to an award of Attorney's fees in the amount of $94,662.50 based on the offer of judgment. This appeal followed.

III. SUMMARY OF LEGAL ARGUMENT.

NRS 40.695 provides that the service of the prelitigation notice tolls the statute of repose during the pendency of the prelitigation process. Byrne served her prelitigation notice within the grace period. She then proceeded to engage in the prelitigation process over the course of the next seven months. Byrne filed the present action in August, 2016, within thirty days of concluding the prelitigation mediation, after satisfying all of the prelitigation requirements.

The determination of the propriety of the district court's ruling depends on the meaning of NRS 40.695 and several other sections of NRS Chapter 40. In 2015, the Legislature passed AB 125, § 21(5) (effective February 24, 2015), which shortened the statute of repose for construction defect involving latent deficiencies from ten years to six years. Although the new statute of repose applied retroactively, the Legislature established a one-year grace period that allowed claimants to commence

construction defect actions until February 24, 2016. *See* AB 125, § 21(6) (2015). The grace period extended the new six-year statute of repose in order to ensure that all claimants with existing claims affected by the shortening of the repose period would have a reasonable amount of time within which to file their claims after the amendments became effective.

Based on its interpretation of the 2015 amendments to Chapter 40, the district court ruled that Byrne's claims were barred by the statute of repose because she filed her action after February 24, 2016. The district court's ruling was predicated on its determination that, under the amended provisions of Chapter 40, Byrne's service of her prelitigation notice during the grace period did not toll the statute of repose.

The district court's interpretation of the amendments is incorrect for numerous reasons. First, under the plain meaning of the amendments, the grace period is simply an extension of the statute of repose. Therefore, under NRS 40.695, a prelitigation notice filed during the grace period tolls the statute of repose. In addition, the district court's interpretation of the amendments is untenable because such a reading; (1) is inconsistent with numerous sections of Chapter 40 that require a claimant to complete the prelitigation process before a judicial action may be brought; (2) is inimical to a core policy of Chapter 40 to promote the settlement of claims through a statutory prelitigation dispute resolution process; (3) would produce a number of absurd

results, and; (4) would be manifestly unfair to claimants whose claims expired within the grace period.

Byrne also appeals from the district court's award of attorney's fees based on Lands West's offer of judgment. The standards governing such an award are set forth in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983). The *Beattie* factors require a determination of whether Byrne's claim was brought in bad faith, whether Land's West's offer was reasonable in timing and amount, and whether Byrne's decision to reject the offer was grossly unreasonable. Lands West's motion for summary judgment was solely based on its statute of repose defense. There was no determination in this case regarding the amount of Byrne's damages or Land's West's liability for those damages. As such, the district court was required to evaluate the *Beattie* factors solely in light of the amount and timing of the offer, the amount of Byrne's claim, and the risk posed by Lands West's statute of repose defense.

A proper analysis of the *Beattie* factors cannot support an award of attorney's fees in this case. In order to find against Byrne under the *Beattie* factors, the district court would have been required to find that Byrne had such a small chance of prevailing on the tolling issue that she should have accepted a $10,001 offer to relinquish her $1.8 million claim – and that she should have done so shortly after she filed her complaint. However, for all of the reasons discussed below, Byrne had

sound legal grounds upon which to base her argument that the statute of repose was tolled. Accordingly, at the very least, Byrne had a reasonable chance of prevailing against Lands West with respect the tolling issue.

Furthermore, the timing of Lands West's offer was manifestly unreasonable. The offer was made on March 14, 2017, before Byrne had even filed her Second Amended Complaint. In view of the amount of Lands West's offer, the timing of the offer, and the strength of the arguments in support of Byrne's position on the tolling issue, the only reasonable conclusion that a court could reach is that all of the *Beattie* factors weigh heavily against an award of attorney's fees.

IV. LEGAL ARGUMENT.

A. The District Court Erred by Ruling that Byrne's Claims Were Barred by the Statute of Repose.

Rules of Statutory Construction

Questions involving statutory interpretation are reviewed de novo. *Dykema v. Del Webb Cmtys.*, 132 Nev. Adv. Rep. 82, 385 P.3d 977, 979 (2016). The goal of statutory interpretation is to give effect to the Legislature's intent. *Hobbs v. State,* 127 Nev. 234, 237, 251 P.3d 177 (2011). The Legislature's intent is determined from the plain language of the statute. *Id*. When the language is clear, the apparent intent must be given effect and there is no room for construction. *Edgington v. Edgington*,

119 Nev. 577, 582, 80 P.3d 1282 (2003). "Whenever possible, this Court interprets a statute in harmony with other rules or statutes, so that the act as a whole is given effect." *N.J. v. State,* 134 Nev. Adv. Rep. 48, 420 P.3d 1029, 1032 (2018); *Nevada Power v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870 (1999).

If the statute is ambiguous, meaning it is capable of two or more reasonable interpretations, the court looks to the provision's legislative history and the "context and the spirit of the law or the causes which induced the Legislature to enact it." *Dykema*, 385 P.3d at 979. In determining the context and spirit of the law, this Court has repeatedly sought to discern the underlying purposes of individual statutes and the statutory schemes in which they are found. *See, e.g., Kulic v. Hunter's Ridge Homeowner's Ass'n*, 126 Nev. 731, 367 P.3d 791 (2010) (interpretation should not "undermine the statutory scheme and the purpose of the statute"); *Wells Fargo Bank v. Radecki*, 134 Nev. Adv. Rep. 74, 426 P.3d 593 (2018) (interpreting the statute in a manner consistent with the "primary purpose" of the Uniform Fraudulent Transfers Act); *Gunderson v. D.R. Horton*, 130 Nev. Adv. Rep. 9, 319 P.3d 606 2014) (noting that one of the "primary purposes of our construction defect statutory scheme is to protect the rights of home buyers"); *Holdawa-Foster v. Brunell*, 130 Nev. Adv. Rep. 51, 330 P.3d 471, 473 (2014).

Where alternative interpretations of a statute are possible, the one producing

the most reasonable result should always be favored. *See G & H Associates v. Ernest W. Hahn,* 113 Nev. 265, 272, 934 P.2d 229 (1997). Interpretations leading to absurd results must be avoided. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519 (1998). And an interpretation that renders language meaningless or superfluous should be rejected. *Hobbs*, 127 Nev. at 237. When two statutes are potentially in conflict, the more specific statute will take precedence over the more general one and is construed as an exception to the latter. *N.J.*, 420 P.3d at 1032.

Governing Sections of NRS Chapter 40

Nevada construction defect law is governed by a comprehensive statutory scheme established by NRS 40.600 through 40.695. One of the primary purposes of Chapter 40 was to establish a process that would facilitate the resolution of construction defect claims without the need for litigation. As the Nevada Supreme Court has noted, Chapter 40's prelitigation process is intended to promote the settlement of claims before litigation by providing contractors with the opportunity to voluntarily make repairs and by requiring the parties to engage in prelitigation mediation. *See D.R.Horton v. District Court*, 131 Nev. Adv. No. 86, 358 P.3d 925, 931 (2015).

The prelitigation process commences when the claimant serves the contractor with a "notice of the claim" pursuant to NRS 40.645(1). That section provides that

a claimant "must give written notice" of the defects to the contractor "before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor." The claimant is then required to allow the contractor to inspect the residence in order to determine whether repairs are necessary. NRS 40.6462. If the contractor elects to make repairs, the claimant must allow the contractor to attempt to do so. NRS 40.647(1)(c). Before filing an action, a claimant is also required to submit the matter to mediation. NRS 40.680.

In 2015, the Legislature made extensive changes to Chapter 40 through Assembly Bill 125, signed into law on February 24, 2015. A.B. 125, 78th Leg. (Nev. 2015) (hereafter "AB 125"). The changes that give rise to this appeal involve the shortening and retroactive application of the statutes of repose provided in former NRS 11.202. The former statutes of repose required a claimant to file an action within periods ranging from six to twelve years from the date of substantial completion of construction, depending on the type of defect. AB 125 amended NRS 11.202 by establishing a single six-year period that applies to all claims, regardless of the type of defect. 2015 Nev. Stat., ch. 2, § 17(1).

AB 125 also provided that the new six-year statute of repose would apply retroactively to all actions involving improvements that were substantially completed before the effective date of the act (February 24, 2015). 2015 Nev. Stat., ch. 2, §

21(5). However, the Legislature, recognizing that the retroactive shortening of the statute of repose would extinguish some claims and adversely impact others, created an exception in order to protect claimants who would be adversely affected by the change. 2015 Nev. Stat., ch. 2, § 21(6). Section 21(6) provides, in pertinent part, that "The provisions of subsection 5 do not limit an action: (a) That accrued before the effective date of this act, and was commenced within 1 year after the effective date of this act." 2015 Nev. Stat., ch. 2, § 21(6). Subsection 6 is referred to in the Act as the "1-year grace period." *See* AB 125, Legislative Counsel's Digest, at 3, (summarizing the purpose of § 21).

The statute at the heart of this appeal is NRS 40.695. The amended version of that statute, like the previous version, provides that the service of a notice of claim pursuant to NRS 40.645 tolls the running of the statute of repose. NRS 40.695 provides, in pertinent part, that: "(1) Except as otherwise provided in subsections 2 and 3, statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim is given, until" one year after the notice is given or thirty days after mediation is concluded or waived, whichever is earlier. The amendment of NRS 40.695 merely placed a time limit on the duration of the tolling period, which had previously remained open until the date when the mediation was concluded. 2015

Nev. Stat., ch. 2, § 16.

NRS 40.695 has only one purpose: to facilitate the policy underlying the prelitigation process. Tolling accomplishes this purpose by enabling the dispute resolution process to proceed beyond the expiration of the statute of repose. Indeed, if not for the tolling effect of NRS 40.695, there would be an unavoidable conflict between the statute of repose and the provisions of Chapter 40 that implement the prelitigation process. The Legislature harmonized those competing interests by ensuring that, once the prelitigation process has been triggered, the process can be completed and its statutory purpose will be fulfilled.

Byrne's Notice of Claim Tolled the Statute of Repose

It is undisputed that substantial completion of Byrne's residence occurred on May 29, 2009, and therefore that her claim accrued on that date pursuant to NRS 11.202. Accordingly, her claim was subject to the one-year grace period provided by § 21(6) of AB 125. It is also undisputed that, since Byrne served her notice of claim on December 2, 2015, her notice was served prior to the expiration of the grace period. Further, it is undisputed that Byrne filed the instant action within the time prescribed by NRS 40.695. However, the district court concluded that Byrne's notice of claim did not toll the statute of repose because it was served more than six years after her claim accrued.

The district court's ruling was based on a misinterpretation of several provisions of Chapter 40. In reaching its decision, the district court explained that:

> In this case, the tolling provision does not apply because the new six-year statute of repose would have expired before the tolling could start. Any tolling could not start until the claimant presented her notice of construction defect. Claimant presented her notice of construction defects on December 2, 2015. By this date the deadline for claimant to file her Complaint had already expired – so there was nothing to toll! 3 AA 559.

Thus, the district court found, in effect, that the tolling provision of NRS 40.695 did not apply to any prelitigation notice served more than six years after the claim accrued, even if such notice were served during the grace period. Accordingly, under the district court's interpretation of the amendments, the Legislature intended to allow tolling as to claims that were subject to the six-year period of repose under NRS 11.202, but to preclude tolling as to claims that were subject to the bar date established by the grace period. The district court's interpretation of NRS 40.695 is not supported by the language of the amendments and contravenes both the letter and spirit of Chapter 40.

To begin with, the Legislature created the grace period for the sole purpose of ensuring that claimants whose rights would be affected by the new shortened period of repose would not be prejudiced by that change. Prior to the enactment of AB 125, the Nevada Supreme Court had held that a change in the law that purports to shorten

an existing statue of repose and apply the new period retroactively is unconstitutional unless a reasonable grace period is provided to claimants whose claims are affected by the change. Therefore, in order to satisfy the demands of due process, a new statute of repose must contain a grace period that ensures that all claimants who are affected by the change will be afforded a reasonable period of time in which to file an action. *See Alsenz v. Twin Lakes Village*, 108 Nev. 117, 1122, 843 P.2d 834 (1992).

It is readily apparent from the language of the new provisions of AB 125 that the Legislature was keenly aware of the constitutional requirements bearing upon retroactivity when it made the new six-year statute of repose retroactive to all claims that accrued prior to February 24, 2015. As the Legislature recognized, the blanket retroactive application of the new six-year statute would have barred claims that accrued more than six years prior to the effective date of AB 125 (February 24, 2015). Retroactive application also would have placed an unreasonable burden on claimants whose claims would have been extinguished by the new repose period shortly after the effective date of the amendments. Thus, the Legislature plainly recognized that it was required to establish a reasonable grace period in order to ensure that no claimants would be prejudiced by the shortening of the limitations period. The Legislature accomplished this objective by extending the new period of repose to

February 24, 2016, for all claimants adversely affected by the change.

The practical effect of the amendments to the statue of repose was to establish two new periods of repose: one that was applicable to claims accruing after February 24, 2010 (the six-year period under § 21 (5)), and one that was applicable to claims accruing prior to February 24, 2010 (the period extending to February 24, 2016 under § 21(6)). Since the amendments did nothing other than to create these two new periods of repose, they had no effect on the application of the tolling provisions of NRS 40.695. The tolling provisions of NRS 40.695 apply to a prelitigation notice served within the grace period in exactly the same manner that tolling applies to a notice served within the six-year period.

The verbiage in subsections 5 and 6 that cross-references those provisions to each other further evinces a legislative intent to ensure that the new bill would have no disparate effect on the rights of a claimant who was required to bring an action within the grace period. Subsection 5 begins by stating "except as otherwise provided in subsection 6, the period of limitations on actions set forth in NRS 11.202, as amended by section 17 of this act, applies retroactively. . . ." By stating that the new six-year statute is subject to the exception provided in subsection 6, the Legislature made clear that the only purpose of the grace period provided in subsection 6 was to establish an alternative limitations period applicable to claims accruing prior to

February 24, 2010. Indeed, because subsection 21(6) is described as an exception to subsection 21(5), it is clear that the six-year limitation period was not intended to apply at all with respect to claims accruing prior to February 24, 2010.

The introductory language to subsection 6 also shows that the Legislature intended that, for all actions accruing before February 24, 2010, the period of repose would continue until February 24, 2016. Subsection 6 begins by stating that "**the provisions of subsection 5 do not limit an action**: (a) that accrued before the effective date of this act. . . ." (Emphasis added). This exclusionary language, like the exclusionary language of subsection 5, makes clear that the limitation period specified in subsection 5 does not apply to claims falling within the grace period. Rather, the grace period constituted its own period of repose applicable to all claims that accrued before February 24, 2010.

In view of the purpose, context and structure of the provisions relating to the establishment of the grace period, it is clear that the Legislature intended that period to constitute either its own statute of repose or an extension of the former statutes of repose for claims that had to be initiated within the grace period. But in either case, nothing in the amendments suggests that the Legislature had any intention to alter the tolling effect of NRS 40.695 with respect to any claimant.

The Legislative Counsel's Digest of the Act provides further clarification of

the Legislature's intent. The Digest states that section 21 "establishes a 1-year grace period during which a person may commence an action **under existing statutes of repose**, if the action accrued before the effective date of this bill." (Emphasis added). Thus, the Legislative Counsel considered the 1-year grace period to be a statute of repose, and indicated that an action commenced within the grace period is an action commenced within the statute of repose. The Legislative Counsel also indicated that the grace period constituted an extension of "the existing statutes of repose." Thus, when the Legislature shortened the statute of repose retroactively, it undoubtedly did so with the understanding that the amendments would not alter the rights of claimants under any other section of Chapter 40.

In view of the above, it is evident that the provisions of section 21(6) were intended to extend the statute of repose in order to ensure that all claimants would be provided with a reasonable amount of time within which to bring their claims. There is nothing in the language of section 21indicating a Legislative intent to abrogate the tolling provisions of NRS 40.695 as to claimants who were required to file their actions by February 24, 2016. And there is certainly nothing in the language of NRS 40.695, as amended, that implies that notices served during the grace period should be treated differently than notices served before the effective date of the Act or after February 24, 2016 (for claims accruing after February 24, 2010).

If the Legislature had intended to eliminate tolling with respect to all actions that were required to be filed by the end of the grace period, it could have easily employed language suitable for such a purpose. For example, the Act could have stated that "notwithstanding the one-year grace period for commencing an action set forth in subsection 6, the tolling provisions of NRS 40.695 do not apply to a notice of claim served more than six years after the claim has accrued." But of course the Legislature would never have created such an exception because, for all of the reasons discussed above, there would have been no reasonable purpose for eliminating the prelitigation process as to a certain class of claimants and such a distinction would have been antithetical to the policy underlying the alternative dispute resolution provisions of Chapter 40. Indeed, since the sole purpose of adopting subsection 21(6) was to extend the time for filing an action for claimants whose claims would otherwise have been adversely impacted by the new six-year statute of repose, there is no logical reason why the lawmakers might also have seen fit to use that section as a vehicle for denying those same claimants the benefits of tolling.

The only legal authority relied on by the district court is *Dykema v. Del Webb Communities*, 132 Nev. Adv. Rep. 82, 385 P.3d 977 (2016). In *Dykema*, a case that was decided prior to the enactment of AB 125, the Nevada Supreme Court simply

observed that the claimant's prelitigation notice tolled the statute of repose because it was served before the expiration of the ten-year statute of repose under former NRS 11.203(1) (2013). Since *Dykema* did not address the amendments in AB 125, it did not involve an issue concerning the effect of a prelitigation notice served within the grace period. Nevertheless, the district court apparently believed that, because *Dykema* indicated that tolling was triggered by service of a prelitigation notice within the ten-year period formerly set forth in Chapter 11, NRS 11.202 continues to delineate the outer limit of the period within which a prelitigation notice can have a tolling effect.

Contrary to the district court's conclusion, however, *Dykema* merely stands for the general proposition that NRS 40.695 applies to a prelitigation notice served before the end of the repose period. As such, *Dykema* in no manner supports a determination that Byrne's claim was not tolled. On the contrary, since the grace period created in AB 125 functioned either as an alternative statute of repose or as an extension of the existing statutes of repose for claimants who were required to file claims within that period, Byrne's prelitigation notice had precisely the same tolling effect as the notice at issue in *Dykema*.

Since Byrne's claim accrued on May 29, 2009, the six-year period of repose under AB 125, § 21(5) expired on May 29, 2015, just three months after AB 125 became effective. However, under the period of repose established by AB 125, §

21(6), Byrne had until February 24, 2016 within which to file her action. Since she served her prelitigation notice within the period of repose that applied to her claim, the statute of repose was tolled by the filing of her notice.

Chapter 40 Makes the Prelitigation Process a Prerequisite to an Action

Even if there were any room for debate with respect to the textual interpretation of section 21(6), there can be no doubt that the district court's interpretation is repugnant to Chapter 40's fundamental policy of promoting alternative dispute resolution. As noted above, one of the paramount purposes of Chapter 40 is to provide the parties with a framework for resolving their dispute without having to resort to litigation. *See* NRS 40.645 through 40.695. Chapter 40 requires that process to be initiated with the service of the prelitigation notice. If tolling were not available to claimants who were required to bring an action within the grace period, they and their contractors would be required to retain attorneys and file their actions before they could even begin to avail themselves of the benefits of the Chapter 40 settlement process.

Moreover, the district court's interpretation is not only contrary to the spirit of Chapter 40, but also would require claimants to violate the letter of the Act. Numerous sections of Chapter 40 explicitly require claimants to complete the prelitigation process before they are permitted to commence suit. For example, NRS 40.645 states that a claimant "must give written notice" before commencing an action.

NRS 40.647(1)(a) provides that the claimant "must allow an inspection of the alleged constructional defect" before she may commence an action. NRS 40.647(2) further pronounces that, if a claimant commences an action without complying with the notice, inspection and repair requirements, the court must dismiss the action.

And if a dispute continues to exist even after all of the requisite steps have been taken to identify defects and to effectuate voluntary repairs, the claimant is still required to mediate her claims before filing suit. NRS 40.680 requires construction defect claims to be submitted to mediation "before a claimant commences an action or amends a complaint to add a cause of action for constructional defect." Defendants could potentially seek sanctions against a claimant who files suit in violation of such clear mandates.

In view of the foregoing, it is evident that Chapter 40 prohibits litigation until every aspect of the alternative dispute resolution process has been exhausted. NRS 40.695 enables claimants to comply with the prelitigation requirements without risk of prejudice to their claims. The tolling statute also allows claimants to avoid the expense of preparing and filing pleadings in court while pursuing an out-of-court settlement. Accordingly, it is inconceivable that the Legislature might have contemplated creating a scheme in which some claimants would be bound to file prelitigation notices before filing suit, while other claimants would be compelled to do the reverse.

In *Lopez v. U.S. Home Corp*., 2016 U.S. Dist. LEXIS 163571 (D. Nev. 2017), the Federal district court ruled that the tolling mechanism in NRS 40.695 operates in favor of all claimants, including those who filed notices during the grace period. The district court reasoned that, even if there were a conflict between NRS 40.695 and NRS 11.202, the tolling provision would control because, under NRS 40.635, the provisions of Chapter 40 "prevail over any conflicting law otherwise applicable to the claim." *Id*. at 13.

AB 125 did not change NRS 40.695 in any manner material to this appeal (it only altered the length of the tolling period). Nor did AB 125 change NRS 40.645 (mandatory identification of defects), NRS 40.647(1) and (2) (mandatory allowance of inspection by contractors), or NRS 40.680 (mandatory prelitigation mediation) in any relevant way. Accordingly, there can be no doubt that in enacting AB 125, the Legislature had no intention of depriving grace period claimants of the benefit of the tolling mechanism of NRS 40.695.

The Implications of the District Court's Ruling are Absurd

The district court's interpretation of AB 125, § 21(6) is also untenable because it would lead to a number of irrational consequences. First, the uneven application of NRS 40.695 would arbitrarily discriminate between similarly situated claimants. Under the district court's interpretation, the tolling effect of NRS 40.695 applies to a party who was not required to file a claim by February 24, 2016, but does not apply

to a party, such as Byrne, whose claim was subject to the one-year grace period. Thus, the tolling provision would have been unavailable to a claimant simply because the six-year period from the date of accrual happened to expire prior to or during the grace period. Such a reading of AB 125 results in an unequal and arbitrary application of the law.

Second, under the district court's ruling, prelitigation notices served on the very same day could have had different consequences for different claimants, depending on the accrual dates for their claims. For example, according to the district court's formulation, a claimant who was required to file an action by February 25, 2016 could not have tolled the statute by serving notice of her claim on February 24, 2016 (the last day to file suit), while a claimant whose six-year period terminated on or after February 25, 2016 would have been able to toll the statute by serving her notice on February 24, 2016. Such a distinction is patently absurd and illogical.

Third, under the district court's interpretation of AB 125, the tolling effect of some prelitigation notices served before AB 125 would have been vitiated by the Act. Under the district court's construction of AB 125, no notice of claim served more than six years after the accrual of the claim could operate to toll the running of the statute. So if a claimant's claim accrued prior to February 24, 2009 and she served her notice of claim more than six years later, the tolling effect of such notice would have terminated on February 24, 2015, when the new period of repose went into

effect. Thus, the logical implication of the district court's ruling is that some claimants who served prelitigation notices before the passage of AB 125 would have been retroactively stripped of the benefit of tolling on the effective date of the Act.

Fourth, the Legislature could not reasonably have intended to adopt a provision that would directly conflict with numerous other sections of Chapter 40. As noted above, NRS 40.645, NRS 40.647(1) and (2), and NRS 40.680 all expressly prohibited a claimant from pursuing an action until she had fully satisfied the statutory prerequisites for filing an action. Since both the pre and post AB 125 statutory schemes required claimants to satisfy the same prelitigation requirements, a requirement that a certain class of claimants file suit before the completion of the process would have done nothing but subvert many of the key provisions of Chapter 40.

Finally, the Legislature could not have had any rational basis for eliminating tolling for those particular claimants who happened to have initiated the prelitigation process prior to or during the grace period. An action filed by such a claimant would merely have served as a placeholder suit because, under the comprehensive framework of Chapter 40 discussed above, the parties still would have been required to complete the prelitigation process before litigation could proceed. As such, a requirement that certain claimants file their actions before the conclusion of mediation would have accomplished nothing. *See Jensen v. Intermountain*

Healthcare, Inc., 424 P.3d 885, 891 (Utah 2018) (holding that the legislature could not reasonably have intended that the statute of repose would not be tolled during the pendency of the prelitigation review process in a medical malpractice case). Quite to the contrary, such a requirement would have been detrimental to the interests of all parties because it would have forced them to retain attorneys and file pleadings, thus incurring expenses that never would have become necessary if the prelitigation process had proved to be successful.

The District Court's Interpretation Would Create a Trap for the Unwary

Statutes should not be interpreted in a manner that turns them into procedural traps for the unwary. *See Bing Constr, v. Nevada Sep't of Taxation*, 107 Nev. 630, 817 P.2d 710, 711 (1991) (rejecting a literal and narrow interpretation that would have created a trap for the unwary). Under the district court's interpretation of AB 125, the amendments would have created just such a trap. NRS 40.645, NRS 40.647 and NRS 40.680 expressly prohibited Byrne from filing this action until she had fully satisfied each of the statutory prerequisites for commencing an action. And, as noted, NRS 40.647(2)(a) directs the court to dismiss any action filed before the completion of the prelitigation process.

In view of the language of NRS 40.695, the mandatory prelitigation requirements of Chapter 40, and the narrow purpose of the amendments contained in section 21, a claimant in Byrne's position would not have had fair warning that a

prelitigation notice served during the grace period would not toll the new statute of repose. This is especially true for a claimant, such as Byrne, who was immersed in the rigors of the prelitigation process at the time when the grace period expired. Accordingly, even if section 21 were somehow susceptible to an interpretation that notices served during the grace period are not tolled, such an interpretation would traverse the due process requirement that claimants be afforded reasonable notice of changes in the law that could terminate their claims.

Since statutes of limitation and repose can easily result in traps for the unwary, virtually all courts have held that any ambiguity appearing in such statutes should be construed in favor of the plaintiff. *See Bouchard v. State Emples. Ret. Comm'n*, 178 A.3d 1023, 1035 (Conn. 2018); *Hees v. Phillip Morris USA*, 175 So.3d 687, 693 (Fla. 2015); *Eisenmenger by Eisenmenger v. Ethicon*, 871 P.2d 1313, 1317 (Mont. 1994) (ambiguous statute of limitations should be interpreted, in the interest of justice, to allow the longer period to prosecute the action); *James v. Buck*, 727 P.2d 1136, 1138 (Idaho 1986) (citing cases from Alaska, Hawaii, Arizona, and Utah for the same proposition).

Applying analogous principles of justice, this Court has long recognized "the basic underlying policy to have each case decided upon its merits." *Fink v. Markowitz*, 132 Nev. Adv. Rep. 7, 367 P.3d 416 (2016). Even if the text of AB 125 could be deemed to have left room for debate, the policy favoring adjudications on

the merits strongly militates against the district court's interpretation. Here, the defendants had no cogent reason for demanding to be sued before the completion of the prelitigation process. As a result of the prelitigation notice, the defendants were fully aware that, if the prelitigation process were not successful, Byrne would proceed to litigate her claims against them. Thus, regardless of whether Byrne had actually filed suit before the end of the grace period, the defendants would have been in exactly the same position with regard to the timing of a trial and their ability to defend the action on the merits.

B. The Award of Attorney's Fees was an Abuse of Discretion

Byrne also appeals from the district court's award of attorney's fees pursuant to NRCP 68 and NRS 40.452. Awards of attorney's fees are reviewed for an abuse of discretion. *In re Estate of Miller*, 125 Nev. 550, 552, 216 P.3d 239 (2009). An abuse of discretion occurs "when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. Adv. Rep. 54, 330 P.3d 1, 5 (2014)

In *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), this Court held that district courts should weigh the following factors in determining whether attorney's fees should be awarded based on an offer of judgment: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's

decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. The *Beattie* Court stressed that "while the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims." *Id.* at 588.

Here, the district court found that Byrne's complaint was not brought in good faith, that Lands West's offer was reasonable in its timing and amount, and that Byrne's decision to reject the offer was grossly unreasonable or in bad faith. However, none of those findings are supported by the record. To the contrary, the record discloses that: (1) the district court entered summary judgment in favor of Lands West solely on the procedural ground that Byrne's notice of claim did not toll the statute of repose; (2) the dispositive issue was one of first impression and entirely unsettled; (3) there was no adjudication of the merits of any claim made by Byrne against Lands West, and; (4) the amount and timing of Lands West's offer were anything but reasonable under the circumstances of this case.

To begin with, it is important to recognize that the district court did not determine any issue with respect to the merits of the case. As set forth above in the statement of facts, Byrne alleged that Lands West was liable for all of her construction defect damages because it was the alter ego of Sunridge, the general contractor. Alternatively, Byrne alleged that Lands West was liable as Sunridge's

successor. However, the alter ego and successor liability claims were never adjudicated, as the district court solely ruled that Byrne's claims against Sunridge and Lands West were barred because they were untimely.

There was also no determination in the case concerning the amount of Byrne's damages. As noted above, Byrne had claimed construction defect damages in the amount of $1.8 million. 5 AA 1054. Even Lands West's experts acknowledged that the cost of repairs might be as much as a million dollars. 3 AA 634. The district court even noted that, at the time when Land's West made its $10,001 offer, "plaintiff reasonably believed that its damages on the project were about $1.3 million." 5 AA 1076.

Since there was no determination in this case regarding the amount of Byrne's damages or Land's West's liability for those damages, an award based on the offer of judgment could not have been grounded on any aspect of the case concerning the merits of Byrne's claims. Rather, since summary judgment was solely based on the statute of repose defense, that issue was the only one germane to the district court's evaluation of the *Beattie* factors. Thus, in order to find against Byrne under the *Beattie* factors, the district court would have been required to find that Byrne had such a slim prospect of prevailing on the tolling issue that she should have accepted a $10,001 offer on her $1.8 million claim shortly after she filed her complaint. For the reasons discussed below, such a finding is blatantly unsupportable.

In the first place, even if this Court were somehow able to conclude that NRS 40.695 does not apply to grace period claimants, it is indisputable that Byrne's attorneys had strong reasons to believe that, at a minimum, Byrne had a reasonable chance of prevailing against Lands West with respect to the tolling issue. Those reasons have been detailed in the prior sections of this brief.

The district court even recognized the strength of Byrne's arguments. The district court's own commentary at the hearing reveals that the court was far from convinced that Byrne should have accepted the offer based upon the risk posed by the tolling issue. Rather, the district court expressly recognized that the issue was a close and difficult one. The district court stated that "I really don't think anybody anticipated the statute of repose would be a limitation on liability here until very far into the case." 5 AA 1174:6. The court further remarked that "what we're dealing with here is, you know, a complicated issue, legal interpretation of a statute that had been recently amended and without a lot of authority on how it should be interpreted. It was, I think, a difficult issue to analyze. I don't think the parties had anticipated my ruling on that and I just – I don't think that my interpretation was readily apparent and I think all those factors are going to weigh in favor of the plaintiff here in terms of deciding to reject the offer." 5 AA 1174:11-19. The court also observed that "it probably wasn't apparent how any judge would interpret that statute of repose." 5 AA 1188:23.

In view of such comments, it is apparent that the district court believed that Byrne had at least a reasonable chance of prevailing on the issue. For this reason alone, it is evident that the district court's findings do not support its conclusion that Byrne's rejection of the offer was unreasonable.

The decision is also inconsistent with the findings the district court made in evaluating the *Beattie* factors. With respect Byrne's decision to reject the $10,001 offer, the district court stated that "plaintiff either knew or should have known of the probability that the Court might interpret the statute of repose issue differently than its understanding of the law, which could result in the elimination of its claims." 5 AA 1054:20. The district court then went on to posit that, "at the time of the offer, Plaintiff had enough information to decide not to continue to pursue its claim against Lands West, and should have accepted the offer." 5 AA 1055:2. But these findings do not support its conclusion that Byrne's assessment of her chances of prevailing on the tolling issue was grossly unreasonable or in bad faith. At the very most, such findings merely reflect the district court's belief that Byrne should have been aware that there was a *possibility* that her claim could be defeated based on the statute of repose defense.

In any event, nothing in the district court's written order or comments from the bench suggests that Byrne should not have had reasonable expectation of prevailing on the tolling issue. In view of the district court's conclusion that the outcome of the

tolling issue was far from clear, none of the *Beattie* factors could possibly weigh in favor of a fee award to Lands West.

Moreover, in view of Byrne's chances of prevailing on the tolling issue, Lands West's $10,001 offer was unreasonably small in relation to Byrne's $1.8 million claim. The offer made by Lands West could not be deemed to have been reasonable unless it was for an amount that reasonably reflected the risk to the parties posed by the tolling issue. But even assuming that Byrne only had a 50% chance of prevailing on the tolling issue, the amount of the offer was trivial when compared to the amount of the damages sought by Byrne. In view of Byrne's chances of prevailing on the tolling issue and the amount of damages that she might reasonably have expected to recover against Lands West, it is almost inconceivable that any rational plaintiff would have accepted such an offer under the circumstances of this case.

The timing of Lands West's offer was also manifestly unreasonable. The offer was made on March 14 2017, even before the filing of the second amended complaint (March 26, 2017) and just three months after Lands West had appeared in the case. It was not until almost six months later that Lands West even filed its summary judgment motion on the tolling issue (September 11, 2017). And since the offer was made at the outset of the case, it was made long before any significant discovery had been conducted. In fact, destructive testing of the house was not performed until May 9, 2017 and Byrne's expert reports were not prepared until afterwards. 4 AA 964. As

a result of such discovery and testing, it became clear that extensive defects existed throughout the home. 3 AA 634.

It is also noteworthy that, as of the time of the offer, no discovery had been conducted with respect to the alter ego and successor liability claims. The deadline for completing discovery, February 28, 2018, was not until almost a year after the offer was made. 4 AA 965. Given such circumstances, it is readily apparent that the offer was made long before Byrne had a reasonable opportunity to investigate and fully assess the merits of her case, and long before Byrne was presented with the details of Lands West's arguments on the tolling issue. Despite the clear prematurity of the timing of the offer, there is no indication that the district court gave any meaningful consideration to the timing of the offer or the amount of the offer relative to the amount of the claim. Rather, the Order simply states that the offer was reasonable in its timing and amount simply because, at the time of the offer, "Plaintiff knew that it might have a statute of repose problem." 5 AA 1053.

It is also evident that the district court based its decision, in part, on matters that were wholly irrelevant to the standards to be applied under *Beattie*. For instance, the Order states that Byrne "either knew, or should have known, that Lands West was not the general contractor on the job." 5 AA 1053. But Byrne did not allege that Lands West was the general contractor. Rather, as explained above, Byrne's claim against Lands West was based on the alter ego doctrine and successor liability. Thus,

it would appear that the district court's determination may have been influenced by its misapprehension of the nature of Byrne's claim against Lands West. In any case, since the only matter actually adjudicated in the case was the tolling issue, matters pertaining to Lands West's relationship to the general contractor and the extent of its liability for the alleged defects should have played no role in the court's analysis of the *Beattie* factors.

The district court's abuse of discretion is further highlighted by the vastly different conclusions the court reached in its Order denying the general contractor's (Sunridge's) motion for attorney's fees. Lands West and Sunridge's motions for attorney's fees were heard at the same time. The district court issued its minute order denying Sunridge's motion on February 20, 2018, just two days before it issued its minute order granting Lands West's motion. 5 AA 1024. Nevertheless, although the matters were heard at the same time and the Orders were virtually contemporaneous, the findings set forth in the Sunridge Order directly conflict with the findings contained in its Order granting Land's West's motion.

In ruling on Sunridge's motion, the district court did not find that any of the *Beattie* factors weighed in favor of Sunridge. Rather, in denying Sunridge's motion for fees, the district court found that Sunridge's offer was "premature in time and insufficient in amount." 5 AA 1076. In support of that finding, the district court stated that "Plaintiff reasonably believed that its damages on the project were about

$1.3 million. Thus, the court determined that Plaintiff's claims were brought in good faith." 5 AA 1076. However, it is impossible to conclude that Byrne's claims were brought in good faith against Sunridge, but in bad faith against Lands West. If the alter ego claim were established, the underlying substantive claims against the two defendants would be identical.

The district court further stated that it could not conclude that Byrne's rejection of the offer was grossly unreasonable or constituted bad faith. The Order states that "the Court cannot say with any assurance that no reasonable attorney would have acted differently than the manner in which Plaintiff's counsel acted." 5 AA 1076:25. Yet, since the statute of repose issue was the same for both defendants, Byrne had exactly the same chance of prevailing on that issue against either defendant.

The contradictions running through the district court's reasoning were compounded by the fact that Sunridge's offer was, if anything, significantly more reasonable than Lands West's offer, both in terms of timing and amount. Sunridge's offer was five times the amount of Lands West's offer and was not made until almost four months after the Lands West offer. Indeed, in contrast to Lands West's offer, Sunridge's offer was made after substantial discovery had been completed, including the production of Byrne's expert reports on June 28, 2017. 4 AA 964.

In light of the foregoing, there is no logical basis for the district court's inconsistent conclusions with respect to the two defendants. Byrne could have

potentially recovered the same amount of damages against Lands West that she sought from Sunridge. And the statute of repose issue was the same as to both defendants. Thus, there is no reason why the district court should not have reached exactly the same conclusions in ruling on Lands West's motion that it reached in ruling upon the motion filed by Sunridge. Most importantly, for all of the reasons discussed above, there can be no question that the district court's analysis of the *Beattie* factors in the Order resolving Sunridge's motion was correct, and that its analysis of those factors in the Lands West Order was wrong.

V. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the district court's Order granting summary judgment against Byrne should be reversed. In addition, the district court's award of attorney's fees to Lands West was an abuse of discretion.

CERTIFICATE OF COMPLIANCE

1. 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 proportionally spaced typeface using WordPerfect 9 in 14-point Times New Roman.

2. The brief consists of 9,497 words.

3. I hereby certify that I have read this appellate 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, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters 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.

DATED this 21st day of May, 2019.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed the foregoing *Appellant's Opening Brief* and *Appendix*, thereby serving notice of the filing to:

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