Case 77668

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANETTE BYRNE, as Trustee of the UOFM TRUST,

Appellant,

vs.

SUNRIDGE BUILDERS, INC., A NEVADA CORPORATION; LANDS WEST BUILDERS,INC., A NEVADA COPRORATION; BRYANT MASONRY, LLC, A NEVADA LIMITED LIABILITY COMPANY; CIRCLE S DEVELOPMENT, D/B/A DECK SYSTEMS OF NEVADA, A NEVADA CORPORATION; DMK CONCRETE, INC., A NEVADA CORPORATION; GREEN PLANET LANDSCAPING, LLC NEVADA LIMITED LIABILITY COMPANY; LIFEGUARD POOL MAINT., D/B/A LIFEGUARD POOLS, A NEVADA CORPORATION; PRESTIGE ROOFING, INC., A NEVADA CORPORATION; RIVERA FRAMING, INC., D/B/A RIVERA FRAMERS, A NEVADA CORPORATION; AND S&L ROOFING, INC., A COLORADO CORPORATION,

Respondents.

RESPONDENTS' ANSWERING BRIEF

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

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following 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:

Sunridge Builders, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

LAW FIRMS APPEARING FOR RESPONDENT IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

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NRAP 26.1 DISCLOSURE STATEMENT

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

RELATED ENTITIES:

Lands West Builders, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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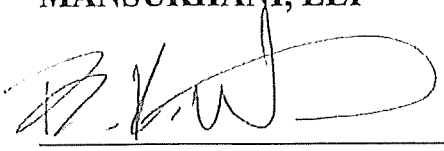

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NRAP 26.1 DISCLOSURE STATEMENT

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

RELATED ENTITIES:

Prestige Roofing, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

LAW FIRMS APPEARING FOR RESPONDENT IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

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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:

DMK Concrete, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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NRAP 26.1 DISCLOSURE STATEMENT

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

RELATED ENTITIES:

Rivera Framing, Inc. dba Rivera Framers does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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NRAP 26.1 DISCLOSURE STATEMENT

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

RELATED ENTITIES:

Lifeguard Pool Maintenance doing business as Lifeguard Pool does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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NRAP 26.1 DISCLOSURE STATEMENT

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

RELATED ENTITIES:

Pyramid Plumbing, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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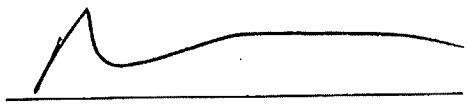

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NRAP 26.1 DISCLOSURE STATEMENT

BY BRYANT MASONRY, LLC

The undersigned counsel of record makes the following disclosure statement as required by Nevada Rules of Appellate Procedure Rule 26.1(a).

RELATED ENTITIES:

Respondent Bryant Masonry, LLC does not have a parent corporation and no publicly held company owns 10% or more of its stock.

LAW FIRMS APPEARING FOR RESPONDENT IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

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NRAP 26.1 DISCLOSURE STATEMENT

BY S&L ROOFING, INC.

The undersigned counsel of record makes the following disclosure statement as required by Nevada Rules of Appellate Procedure Rule 26.1(a).

RELATED ENTITIES:

Respondent S & L Roofing, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

LAW FIRMS APPEARING FOR RESPONDENT IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Whether NRS 40.695 operates to toll the six year statute of repose established by AB 125 (2015) when a claimant serves a Notice pursuant to NRS 40.645 after the repose period has already expired?

ISSUE NO. 2: Whether the District Court abused its discretion in granting Lands West's Motion for Attorney's Fees pursuant to NRCP 68?

I. STATEMENT OF FACTS

Respondent, Sunridge Builders, Inc., ("Sunridge") and Respondent Lands West Builders, Inc., ("Lands West") hereby file this Answering Brief pursuant to NRAP 28 on behalf of themselves and other Respondents.[1] References to the record are in the form: ("AA") for the Appellant's Appendix, Volumes 1-5, filed on May 21, 2019, and ("RA") for the Appendix filed concurrently with this Answering Brief.

A. Relevant Facts Relating to the Statute of Repose Issue

This single family home construction defect action involves a six bedroom, 11,255 square foot, custom home located within McDonald Highlands, a guard-

[1] This includes Respondents Bryant Masonry, LLC, DMK Concrete, Inc., Lifeguard Pool Maint. dba Lifeguard Pools, Prestige Roofing, Inc. Pyramid Plumbing, Inc., Rivera Framing, Inc. dba Rivera Framers, and S & L Roofing, Inc.

gated golf course community ("Subject Residence"). Charles and Erin Catledge were the original owners of the property. (1 AA 221). After originally hiring another construction company to serve as the general contractor, in approximately July, 2007, the Catledges replaced that company and hired Respondent Sunridge to serve as the general contractor for the Subject Residence. (1 AA 221).[2] Construction took approximately two more years to complete. The Certificate of Occupancy was issued by the City of Henderson Department of Building & Safety on April 24, 2009. (1 AA 221; 1 AA 224). On May 26, 2009, Sunridge recorded the Notice of Completion for the Subject Residence.[3] (1 AA 221; 1 AA 226-227).

On February 28, 2012, the UOFM Trust purchased the Subject Residence, which was on the brink of foreclosure, for $2,500,000. (2 AA 327; 2 AA 329). Attorney Adam Springel, along with Janette Byrne, is the trustee and/or investment trustee of the UOFM Trust (collectively "Byrne"). The Subject Residence is his personal residence. (1 AA 2; 2 AA 327). Attorney Springel is one of the founders

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[2] Although Lands West's principal Van Nelson was an owner of Sunridge at the time of construction of the Subject Residence (2 AA 344), Lands West was not involved. Lands West was in revoked status with the Nevada Secretary of State between July 31, 2007 and February 1, 2010. (RA 067-078).

[3] The recording of the Notice of Completion triggered the running of the limitation periods in the applicable statutes of repose under NRS 11.202, as amended. *Dykema v. Del Webb Communities, Inc.*, 385 P.3d 977, (Nev. 2016) (notice of completion is issued on the date it is recorded, regardless of when the notice was signed).

of the law firm of Springel & Fink, and has defended homebuilders and subcontractors from construction defect claims since 1992. (2 AA 327).

During the escrow process in early 2012 (almost three years after substantial completion of the Subject Residence), Attorney Springel commissioned a "Review of Property Inspection Report," addressing electrical and mechanical defects as part of his due diligence investigation. (1 AA 229-236). On February 19, 2012, he received reports detailing various electrical and mechanical defects at the Subject Residence. (1 AA 229-236). Attorney Springel also hired Madsen Kneppers & Associates, Inc. ("MKA"), a construction forensics consulting firm whose architects and construction professionals are frequently hired as expert witnesses in NRS Chapter 40 construction defect cases in Nevada, to perform a complete inspection of the Subject Residence and identify additional defects. (1 AA 238; 2 AA 328). On February 22, 2012, Nevada licensed architect Michelle Robbins, provided Attorney Springel with a "photo log summary" describing what MKA characterized as numerous construction and/or design defects. (1 AA 238-240).

Attorney Springel was comfortable relying on these consultants for his personal residence just as he had relied on them over the years in defending builders. (2 AA 328). He felt they could effectively investigate a home of this price and size. (2 AA 328). However, despite the specific knowledge of electrical and mechanical issues identified in the February 19, 2012 report, and construction

issues identified by MKA in the February 22, 2012 report, (some of which were characterized as "Urgent"), Attorney Springel proceeded with the sale on February 28, 2012, and the UOFM Trust acquired title to the Subject Residence.[4] (2 AA 329).

Various construction defects at the Subject Residence appeared almost immediately after UOFM Trust acquired title to the Subject Residence in February 2012. (2 AA 329-330). Attorney Springel contacted Sunridge and Lands West to address the issues as early as March 2012. (2 AA 329-330). Attorney Springel continued to communicate with Sunridge and Lands West until April, 2014, regarding the claimed defects. (2 AA 329-335).

On February 24, 2015, the Nevada Legislature passed Assembly Bill 125. ("AB 125") (See RA 001-026). Among other changes to NRS Chapter 40 and NRS Chapter 116, AB 125 shortened the statute of repose set forth in NRS 11.202 - 11.205 for all actions for damages caused by construction defects to six years after substantial completion of the improvement. *See* AB 125 § 17. Pursuant to AB 125 the newly shortened statute of repose applied retroactively to actions in which the substantial completion of the improvement to the real property occurred

[4] However, Attorney Springel insistence on the inclusion of specific exclusionary language in the "AS IS" provision in the February 2012 Residential Purchase Agreement clearly indicates that Attorney Springel was contemplating an action against "...the general contractors and subcontractors that built the home" prior to the 2012 purchase of the Subject Residence. (2 AA 254).

before February 24, 2015, the effective date of the act. AB 125 § 21(5). AB 125 also included a "grace period" in which claimants were permitted to commence an action by February 24, 2016, one year after AB 125 took effect. AB 125 § 21(6)(a)

On December 2, 2015, approximately six years and seven months after substantial completion of the Subject Residence, and twenty months after the last written communication with Sunridge and Lands West, Byrne served Notices of Constructional Defects pursuant to NRS 40.645 ("Chapter 40 Notice") on Lands West, Sunridge and various other parties involved in the development and construction of the Subject Residence. (2 AA 256-262). On August 22, 2016, approximately seven years and three months after Sunridge recorded the Notice of Completion, Byrne commenced her action against Sunridge and Lands West by filing her Complaint. (1 AA 1-17).[5]

Following is a summary of relevant dates:

DATE	EVENT
May 26, 2009	Notice of Completion Recorded for Subject Residence ("Substantial Completion" pursuant to NRS 11.2055 and "accrual date" for the claims)
February 22, 2012	Byrne obtained copy of MKA report detailing purported construction defects

[5] Since Lands West was not involved in the construction of the Subject Residence, Byrne's claims against Lands West were predicated on her theory that Lands West was the alter ego of or successor to Sunridge. (1 AA 12-13).

February 28, 2012	Byrne acquired title to Subject Residence
February 24, 2015	Effective date of AB 125
May 26, 2015	**Six years from date of recording of Notice of Completion for Subject Residence**
December 2, 2015	Byrne's NRS Chapter 40 Notice Served
February 24, 2016	Expiration of the one year "Grace Period" to commence an action pursuant to AB 125
August 22, 2016	Byrne's Complaint filed

B. Facts Related to the District Court's Award of Attorney's Fees to Lands West

On December 14, 2016, Lands West appeared in this matter. (1 AA 119-121). On January 6, 2017, Lands West filed its Answer to Byrne's Amended Complaint. (1 AA 48-59). On March 14, 2017, Lands West served Byrne with an Offer of Judgement (hereinafter "Offer") in the amount of $10,001.00 pursuant to NRCP 68. (1 AA 60-62). Byrne did not respond to the Offer and it was therefore rejected by its terms. (*See* 1 AA 61). Byrne did not make a counter-offer.

II. SUMMARY OF AGRUMENT

The District Court properly dismissed this case as untimely under the six-year statute of repose for constructional defects as established by AB 125. All parties agree that the statute began to run on May 26, 2009. Therefore, the statute of repose expired on May 26, 2015. Since Byrne failed to commence her action by filing her Complaint on or before February 24, 2016, she is not saved by the one-year grace period set forth in AB 125. As the District Court correctly observed, Byrne's December 2, 2015 Chapter 40 Notice did not toll the statute of repose

because "By this date the deadline for [Byrne] to file her Complaint had already expired – so there was nothing left to toll!" (3 AA 560). Additionally, the District Court's award of attorney's fees to Lands West based on Byrne's rejection of an Offer of Judgment pursuant to NRCP 68 was not clearly erroneous.

Finally, the Legislature's recent enactment of AB 421, which extends the statute of repose for construction defects to ten years, does not take effect until October 1, 2019. Even if this Court determined that AB 421 took immediate effect upon passage, retroactive application in this case would impermissibly deprive Respondents of their vested, fundamental rights to not be sued after expiration of the six year statute of repose established by AB 125.

III. LEGAL ARGUMENT

A. The District Court Correctly Determined that Byrne's Claims Were Barred by the Six-Year Statute of Repose Established by AB 125.

NRS 11.202, as amended by AB 125 on February 24, 2015, barred the filing of a "construction defect action" more than six years after the date of substantial completion of a residence, the date the cause of action accrued.[6] Here, the expiration date was May 26, 2015, six years after the accrual date of May 26, 2009.

[6] The date of recording the notice of completion is also called the "accrual date," which triggers the running of the period of repose against the claim. (*See* NRS 11.2055)

However, Byrne failed to commence her action for constructional defects until August 22, 2016, *more than a year after the expiration of the statute of repose.*[7]

The provision in NRS 40.695 for tolling the limitations period did not save Byrne's claim because that period had already expired before the trigger date for starting the tolling period. Tolling begins when the Chapter 40 Notice is served and end at the **earlier of** one year after the date of the Chapter 40 Notice **or** end of the Chapter 40 mediation—in this case, the trigger date was December 2, 2015, when Byrne served the Chapter 40 Notice.[8] However, by then, the period for filing the action set by NRS 11.202 had long expired—on May 26, 2015. Because Byrne's NRS Chapter 40 Notice was served *after* the expiration of the six year repose period, tolling never occurred. Consequently, the District Court correctly determined that Byrne's action was time-barred under NRS 11.202.

In addition, NRS 40.695 then in effect had a second provision for tolling of the period of repose set by NRS 11.202 so long as the claimant could demonstrate "...to the satisfaction of the court that good cause exists to toll the statutes of

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[7] AB 125 contained an exception to retroactivity that defined a narrow excepted class of claims that (1) accrued before February 24, 2015 [the effective date of AB 125] and (2) were "commenced", meaning filed in court within one year after that date, *i.e.*, by February 24, 2016. Though Byrne's claims accrued before February 24, 2015, they were commenced (filed in court) on August 22, 2016, months after the deadline. Therefore, Byrne's claims were not excepted from retroactivity and the six-year limitations period enacted into law by AB 125 rendered all of them time-barred.

[8] *See* AB 125 §16 (RA 020-021)

limitation and repose under this section for a longer period." NRS 40.695(2). Byrne, however, made no effort to make any use of this provision because there was no "good cause."

It is undisputed that Byrne's claim accrued on May 26, 2009, the date of substantial completion. (Opening Brief, 14). Pursuant to NRS 11.202(a)(1) as amended by AB 125, Byrne therefore had until May 26, 2015, six years from substantial completion, to commence an action for construction defects. However, Byrne did not serve her Chapter 40 Notice until December 2, 2015, more than six-months after the statute of repose had already expired. (2 AA 262). As the District Court correctly determined, "By this date the deadline for [Byrne] to file her Complaint had already expired – so there was nothing left to toll!" (3 AA 560). In short, Byrne failed to commence her action prior to the expiration of the statute of repose, which was never tolled.[9] *See Dykema v. Del Webb Cmtys., Inc.*, 385 P.3d 977, 980-981 (Nev. 2016) (A statute of repose is tolled when a Chapter 40 notice is served within the repose period).

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[9] Under the version of NRS 11.202 in effect before AB 125, tolling could also not take effect for "patent" defect claims because [as applied to Byrne's facts] the limitations period for such defect claims would have expired on May 26, 2015 [6 years], but the trigger date to begin tolling would not have occurred until August 22, 2016, when Byrne gave the pre-litigation notice. Thus, a "mis-match" between the end of the limitations period and the trigger for tolling was not an anomaly unique to AB 125; but rather, was an established aspect of Nevada law depending on the facts of a particular case.

Nevertheless, Byrne contends that her December 2, 2015 Chapter 40 Notice tolled the statute of repose after it had already expired. In order to justify this argument, Byrne insists "...that the Legislature intended [the grace] 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." (Opening Brief, 18). Byrne's theory, however, is not reflected in the actual statutory language of NRS 11.202 as enacted in AB 125 or any of the provisions of NRS Chapter 40.

The plain language of AB 125 indicates that the grace period was included to allow claimants additional time to *commence an action by filing a complaint* — not additional time *to start the process* of commencing an action through the tolling provision of NRS 40.695. Contrary to Byrne's suggestion to the contrary, the provisions of NRS 40.600 *et seq.* allow claimants like Byrne to commence an action before completing the pre-litigation process without compromising any of their rights when faced with an expiring statute of repose.

1. The grace period is not an extension of the six-year statute of repose or its own separate statute of repose subject to tolling.

This Court must reject Byrne's argument that the one year grace period is merely an extension of the six-year statute of repose or its own separate statute of repose in which tolling under 40.695 can apply. (*See* Opening Brief, 17). Such an

interpretation is wholly inconsistent with the plain language of NRS 11.202, AB 125 and NRS 40.600 *et seq.*[10]

The term "grace period" is described in the Legislative Counsel's Digest to AB 125:

> Section 21 of this bill: (1) provides that the revised statutes of repose set forth in sections 17-19 apply retroactively under certain circumstances; ***and (2) establishes a 1-year grace period during which a person may commence an action under the existing statutes of repose, if the action accrued before the effective date of this bill.***
>
> (Emphasis added)

Although the term "grace period" is not used, the language constituting the grace period is contained in AB 125 § 21(6). That section provides:

> 6. 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...
>
> (Emphasis added).

Byrne's proposed application of NRS 40.695(1) tolling to the one-year grace period is problematic in that it relies on the faulty premise that "commencement" of an action in the context of an NRS 40.600 *et seq.* lawsuit is satisfied by merely serving notice pursuant to NRS 40.645. However, when read together, AB 125,

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[10] NRS 40.695 expressly applies to "...statutes of limitation or repose applicable to a claim based on a constructional defect." The "grace period" language set forth in AB 125 § 21(6) was not incorporated into NRS 11.202. In this respect, the "grace period" is not a separate statute of repose subject to tolling as contemplated by NRS 40.695

NRS 11.202 and NRS 40.645 make clear that "commencement" of an action during the grace period requires the filing of a complaint in court. *See e.g.,* NRCP 3 ("A civil action is commenced by filing a complaint with the court.").

The Court must begin its inquiry with the statute's plain language. *Arguello v. Sunset Station, Inc.*, 252 P.3d 206, 209 (2011). The Court may not look beyond the statute's language if it is clear and unambiguous on its face. *See Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-793 (2006). In circumstances where the statute's language is plain, "...there is no room for constructive gymnastics, and the court is not permitted to search for meaning beyond the statute itself." *See Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074 1078 (2001). "When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction." *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012).

Further, "...it is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *Boulder City v. Gen. Sales Drivers, Local Union No. 14*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985). NRS 11.202(1)(a), as amended by AB 125 establishes a six year repose period for construction defect claims. As such, 11.202(1)(a) unquestionably relates to NRS 40.600 *et seq.* Therefore, this Court should presume that the Legislature's

use of the term "commenced" has the same meaning as utilized in numerous provisions throughout NRS 40.600 *et seq*. That is, commencement of an action means the filing of a complaint.

The plain language of NRS 11.202(1)(a) provides that "no action may be ***commenced***" more than 6 years after substantial completion. (Emphasis added). In the context of an NRS Chapter 40 lawsuit, commencement of an action means filing a complaint. For example, NRS 40.645(1)(a) clearly delineates between *giving written notice* of construction defects and *commencing an action* for construction defects. Specifically, the statute requires that the notice be given *before* a claimant "commences an action" (filing a complaint):

> ***[B]efore*** a claimant ***commences an action or amends a complaint*** to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant:
>
> (a) ***Must give written notice***

(Emphasis added).

Additionally, NRS 40.645(4) provides, in pertinent part, that "***Notice*** is not required pursuant to this section ***before commencing an action***..." (Emphasis added). NRS 40.645 clearly delineates two separate and distinct steps: "notice" must come before "commencing an action." This interpretation is consistent with NRCP 3. "A civil action is commenced by filing a complaint with the court."

Volpert v. Papagna, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969) (citing NRCP 3).[11]

Finally, the Legislative Counsel's Digest to AB 125 reiterated the difference between a Chapter 40 Notice and commencement of an action:

> Under existing law, before an owner of a residence or appurtenance or certain other persons ***may commence a civil action*** against a contractor, subcontractor, supplier or design professional for certain defects in the residence or appurtenance, the claimant must provide ***notice of the defect*** to the contractor.
>
> (Emphasis added).

Here, the plain language of AB 125 § 21(6) indicates that an action must be "commenced" within the one-year grace period. Commencement of an action under Chapter 40 means to file a complaint. Therefore, Byrne's argument that the grace period is just an "extension" of the repose period that can be tolled by NRS 40.695 with a Chapter 40 Notice is not supported by the plain language of AB 125 § 21(6). Service of a Chapter 40 Notice during the grace period does not constitute commencement of an action and does not toll the statute of repose.

Since it must be presumed that in enacting a statute the Legislature acts with full knowledge of existing statutes relating to the same subject, *Boulder City*, 101

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[11] *See James Hunter & Co. v. Truckee Lodge, I. O. O. F.*, 14 Nev. 24, 27 (1879) (Commencing proceedings means commencing suits and issuing summons); *Howard v. Waale-Camplan & Tiberti, Inc.*, 67 Nev. 304, 309, 217 P.2d 872, 874 (1950) ("The 'proceedings' there referred to mean, without doubt, ***the commencement of an action by the filing of a complaint*** to foreclose the lien...") (Emphasis added).

Nev. at 118-19, 694 P.2d at 500, and because NRS 11.202 clearly relates to NRS 40.600 *et seq.*, this Court must presume that "commencement" of an action carries the same meaning throughout AB 125, NRS 11.202 and NRS 40.600 *et seq.* Specifically, the Court must presume that when the Legislature utilized the term "commenced" it meant the filing of a complaint, as that is the meaning ascribed to the term throughout NRS Chapter 40. *See id.* Since Byrne did not commence an action by filing her complaint before the expiration of the one year grace period on February 24, 2016, the District Court correctly determined that her action was time-barred.

Byrne cited to this Court's decision in *Alsenz,* for the proposition that "...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***." (Opening Brief, 16 *citing Alsenz*, 108 Nev. 1117; 843 P.2d 834) (Emphasis added). That is exactly what the Legislature did in enacting AB 125 and including the one-year grace period to commence an action *by filing a complaint.*

Byrne also argued that 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." (Opening Brief, 20). However, this same rationale applies to Byrne's arguments.

Had the Legislature intended to allow an a Chapter 40 Notice to toll the grace period pursuant to NRS 40.695, it would not have required an action to be "...***commenced*** within one year after the effective date." AB 125 § 21(6) (Emphasis added).

In fact, the Legislature could have easily specified that an action can be initiated within the grace period by serving a Chapter 40 Notice rather than requiring that an "action" be "commenced." For example, the Legislature could have drafted AB 125 § 21(6) as follows: "The provisions of subsection 5 do not limit an action: (a) That accrued before the effective date of this act, ***and for which notice pursuant to NRS 40.645 was served within 1 year after the effective date of this act***..."

Since the language of AB 125 § 21(6) is clear and unambiguous, the plain and ordinary meaning of the word "commence" should be applied. *Consipio Holding, BV*, 128 Nev. at 460, 282 P.3d at 756. In the NRS Chapter 40 context, to commence an action means to file a complaint. There is no other reasonable interpretation of the term.

When read together, the plain language of AB 125, NRS 40.645 and NRS 11.202(1)(a) does not permit a Chapter 40 Notice to toll the grace period under NRS 40.695. The language of AB 125 § 21(6) is clear. The six year statute of repose does not limit an action that was "...***commenced*** within 1 year after the

effective date of this act..." AB 125 § 21(6) (Emphasis added). In this context, to "commence" an action means to file a complaint. Therefore, this Court must reject Byrne's argument that her Chapter 40 Notice served *after* expiration of the six year statute of repose somehow saved her untimely complaint.

2. Byrne's proposed application of the grace period ignores NRS 40.647, which permits commencement of an action before completion of the pre-litigation process when necessary to avoid the consequences of a statute of repose.

In an effort to paint the District Court's decision as "repugnant" to Chapter 40, Byrne disingenuously argued that her complaint would have been "dismissed" had she commenced her action within the grace period prior to completing the NRS Chapter 40 process. (Opening Brief, 23). Specifically, Byrne represented to this Court:

> NRS 40.647 further pronounces that, if a claimant commences an action without complying with the notice, inspection and repair requirements, ***the court must dismiss the action***.
>
> (Opening Brief, 23) (Emphasis added).

This is a misleading and incorrect characterization of the statute. NRS 40.647(2) actually provides:

> 2. If a claimant commences an action without complying with subsection 1 or NRS 40.645, the court shall:
>
> (a) Dismiss the action ***without prejudice*** a***nd compel the claimant to comply with those provisions before filing another action***; or

> ***(b) If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with those provisions by the claimant.***
>
> (Emphasis added).

Failure to comply with NRS Chapter 40 pre-litigation requirements does not result in dismissal with prejudice, as Byrne seems to suggest. Pursuant to NRS 40.647(2)(a), if a Chapter 40 action is commenced before satisfaction of the pre-litigation requirements, the result is dismissal ***without prejudice*** to permit completion of the Chapter 40 process and commencement of a new action. *See* NRS 40.647(2)(a). However, if that process will result in the action being ***"procedurally barred by the statute of limitations or statute of repose",*** the District Court is required to stay the proceedings to allow the Chapter 40 claimant to complete all pre-litigation requirements. *See* NRS 40.647(2)(b). Attorney Springel is undoubtedly aware of this procedure through his experience defending homebuilders and subcontractors from construction defect claims since 1992. (2 AA 327).

NRS 40.647(2)(b) *specifically* contemplates a scenario such as that faced by Byrne in this case. Under NRS 40.647(2)(b), Byrne could have simply commenced her action at any time before the expiration of the one-year grace period on February 24, 2016 regardless of the progress made in the pre-litigation process. Doing so would have obligated the District Court to "...***stay the***

proceeding pending compliance with..." NRS 40.647(2)(b) (Emphasis added). As recognized by this Court:

> [t]he statute specifically states that if a plaintiff who files a constructional defect suit before completing the pre-litigation process would be prevented from filing another suit based on the expiration of the statute of limitations or repose, ***then the court must stay the case rather than dismiss it in order to allow for compliance with the NRS Chapter 40 requirements***.

D.R. Horton, Inc. v. Eighth Judicial Dist. Court of Nev., 358 P.3d 925, 928 (Nev. 2015) citing NRS 40.647(2)(b). (Emphasis added).

In fact, Byrne's complaint reveals that she was aware that she could simply file her lawsuit to "stop the running of any and all applicable statutes of repose and limitations":

> 25. In the event that Plaintiff failed to file suit within the statutorily prescribed time period for any allegations contained herein, Plaintiff alleges that she detrimentally relied upon the conduct and representations of the Defendants, and each of them in making repairs and/or representations to Plaintiff concerning the Subject Property and therefore the statute of limitations and repose are thus tolled. ***Notwithstanding these actions, this lawsuit is being filed to stop the running of any and all applicable statutes of repose and limitations.***

(1 AA 6) (Emphasis added).

This Court must presume that the legislature had NRS 40.672(2)(b) in mind when drafting the one-year grace period. *See Boulder City*, 101 Nev. at 118-19, 694 P.2d at 500. ("[It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject."). That is, the

Legislature was fully aware that a Chapter 40 claimant whose claims were approaching expiration of the repose period had the ability to commence her action before completing the pre-litigation process without compromising her rights. *See id.* This Court must presume that the Legislature was aware of the fact that an action commenced under such circumstances would result in a stay of the case to complete the pre-litigation process, not dismissal with prejudice as suggested by Byrne. *See id.*

However, for reasons not explained or justified in her brief, Byrne opted to proceed under the erroneous assumption that her Chapter 40 Notice, which was served *after* the statute of repose had already expired, somehow preserved her claim. Simply stated, she failed to take advantage of the procedural safeguards put in place by the Legislature to avoid this precise situation. The District Court's Order dismissing Byrne's Complaint must therefore be affirmed.

B. The District Court's Ruling Promotes Consistency and Uniformity.

The District Court's ruling provides a clear outline of the statute of repose set forth by AB 125 and the narrow "grace period," and sets out a framework for the applicability of the tolling provision. This ruling promotes consistency and uniformity amongst different claimants.

Byrne argues that the District Court's evaluation of the grace period set forth in AB 125 §21(6) leads to irrational consequences, including arbitrary

discrimination between similarly situated claimants. (Opening Brief, 24). This argument fails as the application of the grace period is straightforward. Moreover, no two claimants are similarly situated, unless they have the exact same date of substantial completion and they serve their Chapter 40 Notice or commence their action by the filing of a complaint on the exact same dates. If those circumstances are in place, then the application of the grace period is exactly the same and the results are exactly the same. In this instance, Byrne is not similarly situated with any other claimant and the relevant dates, including substantial completion, service of the Chapter 40 Notice and the filing of the Complaint are unique to Byrne.

The analysis of the statute of repose issue on any particular claim rests on a detailed factual evaluation of the key dates, and the applicability of those dates to the operative statute. Obviously, two claimants who serve Chapter 40 Notices on the same date can have different outcomes, depending on the substantial completion dates, or the accrual dates for their claims. This is nothing new. The potential impact on the viability of the claim depends on the relevant dates. For example, in this matter, since Byrne's claim accrued on May 26, 2009, before the enactment of AB 125, Byrne could have taken advantage of the grace period afforded by AB 125 §21(6). If a claim accrues after the enactment of AB 125, the grace period is not available. It is a simple analysis. Byrne's hypothetical dates and incomplete fact patterns skew this analysis unnecessarily.

Further, the District Court's ruling does not unevenly apply the tolling provisions of NRS 40.695, nor does it eliminate the tolling provision for any particular claimants. Simply stated, the tolling provision is available to a claimant if it is invoked by the service of the Chapter 40 Notice within the statute of repose period. *See Dykema v. Del Webb Cmtys., Inc.*, 385 P.3d 977, 980-981 (Nev. 2016) (A statute of repose is tolled when a Chapter 40 notice is served within the repose period).

Under the facts of this case, to take advantage of the tolling provision set forth in NRS 40.695, Byrne could have served her Chapter 40 Notice at any time before May 26, 2015, the expiration of the statute of repose. That was not done and interestingly, Byrne has not provided any reason as to why that was not done. Surely, Attorney Springel knew of the claimed defects during this timeframe, as he had been communicating with Sunridge and Lands West since 2012! (2 AA 329). In fact, in communications as far back as December, 2012, he essentially threatened construction defect litigation. (2 AA 366). However, instead of commencing the action within the six-year statute of repose, Byrne opted to wait another six months until December 2, 2015 to serve Chapter 40 Notice.

Byrne also ignores the fact that there was another procedural avenue available other than tolling the statute. As discussed above, Byrne could have simply commenced her action by filing the Complaint during the grace period. *See*

NRS 40.647(2). Had she done so, all her rights under NRS 40.600 *et seq.* would have been preserved. *See id.*

Finally, there is no conflict in the provisions adopted by the Legislature in AB 125 as it relates to the procedural options open to Byrne. There is a clear path outlined that describes how to proceed in an action against a contractor.[12] *See Boulder City*, 101 Nev. at 118-19, 694 P.2d at 500. ("[It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.").

Practically speaking, utilization of this provision is common practice in the construction defect litigation arena by the Plaintiffs' bar, as lawsuits are filed, then stayed, presumably to preserve all rights related to statute of repose issues, but also to allow the general contractor and the subcontractors the right to inspect and/or repair. In this case, Byrne could have easily commenced the action by the filing of the Complaint by February 26, 2016 and then stayed the litigation until the Chapter 40 proceedings were concluded, just a few months later. *See* NRS 40.647(2). Any argument that such a strategy would have been detrimental to the parties because of the added expenses lacks merit. The only added expense would be the relatively insignificant cost of filing the lawsuit to stop to running of the statute of repose.

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[12] Moreover, the "placeholder suit," as described by Byrne, (Opening Brief, 26), is exactly what was contemplated by the Legislature, as there is a specific provision that allows for it in NRS 40.647(2)(b).

C. The District Court's Ruling is in Line With Public Policy Considerations.

Prior to AB 125, Nevada had a complex statute of repose scheme for construction defect claims which required an analysis of whether the defect was latent, patent, known to the contractor or was caused by "willful misconduct" of the contractor had to be taken into account. AB 125 simplified the previous scheme to one universal statute of repose of six years "...for all actions for damages caused by a deficiency in construction of improvement to real property is 6 years after substantial completion of the improvement." Legislative Counsel Digest to AB 125. The District Court's ruling is consistent with the Legislature's simplification of the scheme by promoting a clear deadline for commencing actions within the identified statute of repose.

Byrne argues that the District Court's interpretation creates a "trap for the unwary" as the statues "expressly prohibited" Byrne from filing this action prior to the fulfillment of the statutory requirements for commencing the action. (Opening Brief, 27). Once again, Byrne disingenuously suggests that commencement of her action before satisfying the statutory prerequisites would result in dismissal with prejudice. (*See* Opening Brief, 27).

As discussed above, because she was facing the expiration of a statute of repose, Byrne could have commenced her action within the six year statute of repose or even the one year grace period without compromising any of her rights.

See NRS 40.647(2)(b)("If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, ***the court shall stay the proceeding pending compliance with those provisions by the claimant.***"). (Emphasis added). Byrne failed to take advantage of a procedure put in place by the Legislature for this exact type of situation.

Further, Byrne's suggestion that she was "unwary" or that a "claimant in Byrne's position" would not have had fair warning is absurd. (Opening Brief, 27-28). Attorney Springel knew exactly what the claimed defects on the Subject Residence were well before the enactment of AB 125, well before the expiration of the six year statute of repose on May 26, 2015 and well before the expiration of the one year grace period on February 24, 2016. (2 AA 328; 2 AA 256-262). Moreover, Attorney Springel, who has practiced in the construction defect arena since 1992, (2 AA 327), was presumably aware that AB 125 brought about a significant statutory change. Despite this knowledge, Byrne failed to take necessary action. To further suggest that Byrne failed to take the necessary action because of the "rigors of the pre litigation process" is a weak excuse, not grounded in any factual basis.

Finally, while Respondents do not dispute that there is a basic underlying policy consideration to have cases decided on the merits, there are some obvious

inherent limits on that policy consideration. *See Lentz v. Boles,* 438 P.2d 254, 256-257, 84 Nev. 197 (Nev., 1968) (Holding that litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity). In cases where statutes of limitations and statutes of repose have long since expired, this public policy consideration cannot revive these claims.

The case cited by Byrne, *Fink v. Markowitz,* 132 Nev. Adv. Rep.7, 367 P. 3d 416 (2016), as well as other Nevada cases, certainly promote the ideal that in instances where excusable neglect explains a default or missed deadline, the Court could entertain the public policy consideration of hearing a case on the merits. However, there is no Nevada case law that stands for the proposition that failing to commence an action within the statute of repose can be cured by putting forth an excusable neglect argument. And Byrne's disingenuous argument that she was somehow prohibited from commencing her action within the grace period because she had not completed the pre-litigation requirements cannot be considered an excuse, since Chapter 40 permits a claimant in Byrne's situation to commence an action to stop a statute of repose from expiring without compromising her rights. *See* NRS 40.647(2)(b).

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D. Enactment Of AB 421 Set To Take Effect On October 1, 2019, Cannot Constitutionally Revive The Time-Barred Claims Of Byrne Without Impairing Respondents' Vested Rights Of Repose.

After Byrne filed her opening brief, the Legislature enacted AB 421. (RA 027-039). AB 421 amended NRS Section 11.202 to extend the statute of repose for construction defect claims from six years to ten years.[13] AB 421 also provides that the extended, ten-year statute of repose shall "apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019." AB 421 § 11(4) However, AB 421 is silent, and thus inapplicable, to stale constructional defect claims previously time-barred by the expiration of the period for filing a claim set by NRS 11.202. As Byrne may argue that AB 421 impacts the applicable statute of repose in this action, the effectiveness, and constitutionality, of AB 421 are addressed in this brief.

AB 421 does not go into effect until October 1, 2019, and therefore does not change the law applicable to this appeal. AB 421 does not expressly specify an

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[13] AB 421 returned a large part of the law of the statute of repose for constructional defect claims to its state in effect before February 2, 2015, when AB 125 took effect. Under prior law before AB 125, the limitations periods for constructional defect claims were defined by type of defect: 10 years post-accrual date for any "known" defect, 8 years for any "latent" defect, and 6 years for any "patent" defect with a tolling provision that suspended the running of the period between the date of the pre-litigation notice and completion of the mediation. In 2015, AB 125, however, amended the limitations periods in NRS 11.202 to one six year period for any constructional defect claim, whether known, latent, or patent. Thus, AB 125 made no change to Appellant's rights to file constructional defect claims for "patent" defects [of which a number of such claims were alleged]. For a visual comparison of the law changes, see RA 079

effective date, and it therefore is presumed effective on October 1, 2019, pursuant to Nevada's Legislative Guidelines.

Even if AB 421 were deemed effective now, applying it retroactively in this case would violate the due process provisions of the United States and Nevada constitutions by stripping away the vested, fundamental rights of builders to be free from liability following the expiration of the six-year statute of repose, rights which Respondents held under the prior version of NRS 11.202.

Nevada law, like the majority of states, recognizes that statutes of repose, such as the six-year limit in NRS 11.202, exist to "protect persons engaged in the planning, design and construction of improvements to real property who otherwise would endure unending liability, even after they had lost control over the use and maintenance of the improvement." *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775, fn2 (1988). In other words, unlike a procedural statute of *limitations*, a statute of *repose* vests a substantive, fundamental right, in a potential defendant, to not be sued.

Nevada law recognizes that the fundamental rights of plaintiffs holding accrued claims cannot be constitutionally impaired by retroactively imposing a statute of repose. *Alsenz*, 108 Nev. at 1123. Similarly, the fundamental rights of potential defendants to be free from claims under an expired statute of repose cannot be constitutionally stripped by retroactively lengthening a statute of repose,

and reviving expired claims. Long-established precedent establishes that a statute of repose confers a vested, fundamental right in the potential defendant once it has elapsed which cannot be impaired without due process. *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925).

Respondents enjoyed this vested, fundamental right to not be sued for construction defect claims related to the Subject Residence under NRS 11.202, starting on May 26, 2015, (six years after the notice of completion) or at the latest starting on February 24, 2016, (accounting for the grace period of one year following the enactment of AB 125). The District Court properly enforced Respondents' vested rights when it granted summary judgment in favor of Respondents under NRS 11.202. Respondents' vested, fundamental rights to be free from construction defect claims after February 24, 2016, cannot now be abridged by a retroactive legislative enactment. The retroactivity provision of AB 421, if applied in this case, would strip away Respondent's vested rights to not be sued, and therefore constitutes a Due Process violation under the United States and Nevada constitutions.

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1. AB 421 does not change the law as it applies to this Appeal.

While AB 421 was approved by the Governor on June 3, 2019, and although it *will* apply retroactively, the statute does not take immediate effect. Nothing in AB 421 states it will take effect immediately. Section 11 specifically provides that various amendments with respect to NRS Chapter 40 will apply to certain actions that take place "on or after October 1, 2019." *See*, AB 421 § 11(1)-(3). Section 11, subsection 4 provides for retroactive application to improvements to real property which were completed before October 1, 2019. *Id.* at § 11(4). However, the section is silent as to the effective date — that is, when the 10-year period of repose goes into effect and begins to affect claims retroactively.

The Nevada Legislative Manual offers the following guidance:

> **Effective Date of the Bill**
>
> If no specific date is included in a bill to indicate when it will become effective (e.g., "This act shall become effective upon passage and approval" or "This act shall become effective May 1, 2019"), **it automatically becomes effective on October 1 of the year in which the bill is passed**.

(RA 061, 2019 Nevada Legislative Manual, Chapter III, Legislative Procedure and Action at p. 155, emphasis added.)

Other than Section 11, which uses October 1, 2019, as the effective date in a variety of contexts, AB 421 has no other language specifying its effective date. It also does not say anywhere that it becomes effective upon passage and approval.

However, the Nevada Legislature's web page for AB 421 notes on the "Overview" tab that it is "effective October 1, 2019.[14] This is consistent with the conclusion under the provisions of the Nevada Legislative Manual that the effective date is October 1, 2019.

Therefore, the applicable statute of repose under NRS 11.202 is currently still 6 years, and will continue to be so until October 1, 2019. As such, this Court's evaluation of this appeal should be based upon existing and current law — not the law that will take effect months from now. Alternatively, in the event this Court deems AB 421 to be effective and applicable to this case, the Court should find AB 421 to be unconstitutional if applied retroactively to Respondents in this case.

2. The vast majority of jurisdictions hold the right to not be sued under an expired statute of repose is a fundamental property right deserving of due process protection.

For decades courts have recognized the distinction between a statute of limitation, which simply erects a procedural bar to a plaintiff bringing suit after a specified period, and a statute of repose, which extinguishes any existing liability and thus confers an outright immunity from suit upon potential defendants after the specified period has elapsed. The United States Supreme Court first drew this distinction *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925)

[14] *See*:https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6799/Overview

In *Danzer*, the plaintiff filed suit under the Interstate Commerce Act, but failed to file within the two-year time limit. Congress then enacted the Transportation Act, which, if applied retroactively, would revive the plaintiff's claim. *Id.* at 634. The *Danzer* court ruled that retroactive application of the Transportation Act would be unconstitutional because reviving the plaintiff's expired cause of action amounted to a taking of the railroad's property without due process. *Id.* at 635. The *Danzer* court explained that some statutes of limitations relate to the remedy only, and thus do not invest a defendant with any right to be free from suit; whereas other statutory periods, by contrast, "operate as a limitation on liability." *Id.* at 637. A construction defect statute of repose is just such a statute - its purpose being to completely extinguish builders' liability at a specific, predictable time. Retroactively reviving a liability that has already been extinguished under such a limitation period "would . . . deprive [the] defendant of its property without due process of law." *Id.* at 637.

Relying on these important principles, the majority of courts that have considered the issue have recognized that legislatures may not retroactively abrogate rights held under expired statutes of repose. In *Hall v. Summit Contractors, Inc.*, 158 S.W.3d 185, 188 (Arkansas 2004), the Arkansas Supreme Court stated that "we have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a

cause of action already barred." Florida law is in accord.[15] *Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361, 1363 (Florida. 1992). Illinois law is in accord. *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244 (Illinois, 1994). New Jersey law is in accord. *Markey v. Robert Hall Clothes of Paterson, Inc.*, 27 N.J. Super. 417, 420–21, 99 A.2d 552, 554 (1953). Pennsylvania law is in accord. *Overmiller v. D.E. Horn and Co.*, 191 Pa.Super. 562, at 572, 159 A.2d 245 (1960).

In the North Carolina case of *Colony Hill Condo. I Ass'n v. Colony Co.*, 70 N.C. App. 390, 393, 320 S.E.2d 273, 275 (1984), much like in the present case, a builder was granted summary judgment after the statute of repose on the plaintiff's claims had expired. *Colony Hill*, 70 N.C. App. at 392, 320 S.E.2d at 275 Plaintiff's claims, filed in 1981, were barred as of 1979. *Colony Hill*, 70 N.C. App. at 393, 320 S.E.2d at 276. In 1981, the statute of repose was amended to remove the statute of repose for claims of willful and wanton negligence - which the plaintiff had alleged. *Colony Hill*, 70 N.C. App. at 393, 320 S.E.2d at 275. However, the North Carolina court held that once the prior statute of repose expired, a subsequent statute could not revive it. "A statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action....

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[15]The Ninth Circuit has also affirmed this principle. (*See Davis v. Valley Distributing Company* 522 F.2d 827, 830 (1975) (*citing* James v. Continental Insurance Co., 424 F.2d 1064, 1065-66 (3d Cir. 1970) when holding that subsequent extensions of a statutory limitation period will not ***revive*** a ***claim previously barred***.).

Failure to file within that period gives the defendant a vested right not to be sued. Such a vested right cannot be impaired by the retroactive effect of a later statute." *Colony Hill*, 70 N.C. App. at 394, 320 S.E.2d at 276. (Internal citations omitted).

The Supreme Court of South Dakota, in surveying numerous other states' laws (Arkansas, Delaware, Florida, Illinois, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, Nebraska, North Carolina, Pennsylvania, Texas, Utah, Virginia, and Wisconsin) summarized that "[m]ost state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and thus violates due process. These courts have taken the position that the passing of the limitations period creates a vested right of defense in the defendant, which cannot be removed by subsequent legislative action expanding the limitations period." *State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 369 (S.D. 1993).

More recently, the Supreme Court of Wisconsin similarly concluded that "Nearly all jurisdictions treat the expiring of modern statutes of repose as substantive." *Wenke v. Gehl Co.*, 274 Wis. 2d 220, 261, 682 N.W.2d 405, 425 (Wis. 2004). Specifically, the *Wenke* court stated:

> Because of the substantive nature of statutes of repose, courts have treated the effect of the period expiring to be jurisdictional. Consistent with this view, other courts have

expressly held that the running of a statute of repose creates a vested right not to be sued.
Id.

The Supreme Court of Virginia also certified for review essentially the same question presented in the appeal at hand. In *Sch. Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987), the Norfolk School Board filed a civil complaint for asbestos removal damages against various manufacturers in 1986. *Id.* The claim was time barred under Virginia's construction defect statute of repose. 234 Va. at 34, 360 S.E.2d at 326. In 1986, however, the Virginia legislature, passed a provision retroactively reviving time-barred asbestos claims until July 1, 1990. 234 Va. at 35, 360 S.E.2d at 326.

Virginia's Supreme Court found the retroactive expansion of the statute of repose to be unconstitutional. 234 Va. at 39, 360 S.E.2d at 329 The Virginia Supreme Court discussed how a statute of repose is different from a statute of limitation, in that its expiration extinguishes not only the legal remedy but also all causes of action. *Id.* Virginia's statutory period for construction defect, like Nevada's, was a statute of repose, in that it was "meant to extinguish all the rights of a plaintiff, including those which might arise from an injury sustained later." 234 Va. at 37, 360 S.E.2d at 328. Virginia courts, like Nevada[16], had previously

[16] In *Alsenz, discussed infra*, this Court struck down SB105's retroactive application of the construction defect statute of repose as an unconstitutional impairment of vested rights.

held that "the retroactive application of a statute impairing a 'substantive' right violates due process and is therefore unconstitutional." 234 Va. at 38, 360 S.E.2d at 328 The Virginia Supreme Court therefore held that the rights bestowed on the defendants by the construction defect statute of repose are substantive, if not vested and, as such, may not constitutionally be impaired by retroactive expansion of the time period. *Id.* This was true notwithstanding the expressed legislative intent for the statute to operate retroactively. 234 Va. at 39, 360 S.E.2d at 328. This Court is now in a position similar to Virginia's Supreme Court at the time this constitutional question was certified in *Sch. Bd. of City of Norfolk*, and should arrive at the same conclusion.

3. Nevada Law is in harmony with the majority of states in holding statutes of repose, distinct from statutes of limitation vest substantive rights, and that such vested rights cannot be constitutionally abridged by retroactive statutory periods.

In Nevada, the construction defect statutes of repose have been repeatedly amended, and repeatedly struck down as unconstitutional. The Nevada construction defect statute of repose was initially struck down as an equal protection violation because the statute excluded owners without a rational basis. *State Farm v. All Electric, Inc.*, 99 Nev. 222, 229 (1983) ("*All Electric*"). In so ruling the Supreme Court of Nevada recognized that the construction defect statutory period, then enacted in NRS 11.205, served to entirely abolish claims for

relief. Rather than just extinguishing a remedy procedurally, like a statute of limitations, the statute of repose entails a substantive definition of rights. *Id.* at 224. Similarly, *Nevada Lakeshore Co. v. Diamond Elec., Inc.*, 89 Nev. 293, 295–96, 511 P.2d 113, 114 (1973), this Court held that the purpose of Nevada's construction defect statute of repose was "... to afford ultimate repose and protection from liability for persons engaged in the designing, planning and construction of improvements to realty. Without protection such persons would be subject to liability for many years after they had lost control over the improvement or its use or maintenance."

In 1983, in response to the Supreme Court's ruling in *All Electric* the Nevada legislature enacted new construction defect statutes of repose, including protection of owners, to resolve the equal protection issue in NRS 11.204. *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772 (1988) ("*Furgerson*"), this Court held that the new 1983 statute of repose could not be applied retroactively on constitutional grounds. *Furgerson* began by restating the key difference between statutes of limitation and statutes of repose, and recognizing that statutes of repose exist to "protect persons engaged in the planning, design and construction of improvements to real property who otherwise would endure unending liability, even after they had lost control over the use and maintenance of the improvement." (*Id.* at 775, fn2.) The *Furgerson* Court observed that prior to the enactment of the 1983 statute

of repose, there was in effect no statute of repose applicable to the homeowner's claim, as the prior statute of repose had been struck down as unconstitutional in *All Electric*. *Id.* at 774-775. Thus applying the 1983 statute of repose retroactively "would violate due process of law." *Id.* at 776. The *Furgerson* Court also noted, however, that the legislature did not expressly direct the law to be applied retroactively. *Id.*

In 1991, the Nevada Legislature enacted a Senate Bill 105, which included a retroactivity amendment to the 1983 construction defect statutes of repose providing that the 1983 statute applied retroactively to actions based on construction with completion dates *before* 1983. The constitutionality of SB 105 was challenged in *Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev.1117, 843 P. 2d 834 (1992). In *Alsenz*, this Court struck down SB 105's retroactive application provision as an unconstitutional impairment of vested rights, because there was no grace period. Parties were unforeseeably deprived of vested claims without any fair opportunity to file suit before the law changed. *Alsenz, 108 Nev. at* 1123, 843 P. 2d at 838 Notably, the *Alsenz* Court found that due process prohibits retroactive legislation impairing vested rights even when the legislature expressly directed that the statute of repose be applied retroactively. *Id.* The *Alsenz* Court further observed "that there are constitutional restrictions on the impairment of vested rights which can limit retroactive application of statutes of limitation." *Alsenz,* 108

Nev. at 1122; 843 P. 2d at 837 citing *Currie v. Schon*, 704 F.Supp. 698, 701 (E.D.La. 1989).

In *Alsenz,* this Court found a due process violation where a statute of repose was applied retroactively to impair vested rights of potential plaintiffs to sue. *Alsenz*, 108 Nev. at 1123; 843 P. 2d at 838. Since the vested rights of potential defendants to not be sued under an already-expired statute of repose is also a property right deserving of due process protection, the analysis in *Alsenz* should also apply to prohibit the retroactive revival of an expired statute of repose. Nevada has long recognized that statutes of repose are not merely procedural, but confer substantive rights. *All Electric,* 99 Nev. at 229. Their purpose is to "afford ultimate repose and protection from liability..." *Nevada Lakeshore Co. v. Diamond Elec., Inc.*, 89 Nev. 293, 295–96 (1973).

The court in *Jackson v. Am. Best Freight Sys., Inc.*, 709 P.2d 983, 985 (Kansas 1985) correctly noted that "[t]here is no distinction between a vested right of action and a vested right of defense. Accordingly, the general rule is that a vested right to an existing defense is protected in like manner as a right of action, with the exception only of those defenses which are based on informalities not affecting substantial rights." As the majority of states' courts surveyed above have long held, the right to not be sued under a previously existing expired statute of repose is a vested property right affording due process protections.

The retroactive expansion of the statute of repose contemplated by AB 421, if applied in this case, would impair the Respondents' vested rights to be free from liability after six years. This right vested in Respondents on May 26, 2015 (6 years after notice of completion) or at the latest on Feb. 24, 2016 (accounting for the grace period). The District Court correctly concluded that Byrne's failure to commence (file) her action by filing a complaint until August 22, 2016, extinguished her claim under the then-existing six year statute of repose. It would therefore be unconstitutional to resurrect extinguished claims by applying AB 421 retroactively in this case. Applying the retroactivity provision of AB 421 would strip Respondents' vested right to be free from claims after six years, and in doing so, would unconstitutionally deprive Respondents of their property rights without due process.

The Fourteenth Amendment of the United States Constitution states that "No State shall deprive any person of life, liberty, or property, without due process of law." Section 8 of the Nevada Constitution similarly provides that "No person shall be deprived of life, liberty, or property, without due process of law." If applied in this case, the retroactivity provision of AB 421 would operate to deprive Respondents of their vested rights to be free from claims arising out of the Subject Residence.

E. The District Court did not Abuse its Discretion in Awarding Attorney's Fees to Lands West.

This Court has traditionally afforded significant deference to District Courts in evaluating orders awarding or declining to award attorney's fees. *See County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). (An award of attorney's fees resides within the sound discretion of the District Court.). In the absence of ***a manifest abuse of discretion***, the District Court's decision on the issue will not be overturned. *Id.* (Emphasis added).

In exercising its discretion regarding the allowance of fees under NRCP 68, the trial court must carefully evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' 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. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

When a District Court properly evaluates the *Beattie* factors, its decision to grant or deny a motion for attorney's fees will not be disturbed absent a ***clear abuse of discretion***. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000) (Emphasis added); *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 672 (1998) ("Unless the trial court's

exercise of discretion in evaluating the *Beattie* factors is ***arbitrary or capricious***, this court will not disturb the lower court's ruling on appeal.") (Emphasis added).

1. Byrne's focus on procedural dismissal before adjudication on the merits is misplaced.

Byrne appears to argue that attorney's fees cannot be awarded to a prevailing party after a rejected offer of judgment when the judgment is based on procedural grounds and when there has been no adjudication on the merits. (Opening Brief, 30). She does so in an effort to frame the District Court's decision as reliant on the statute of repose issue. (*See* Opening Brief, 31). Byrne cites to no authority for this proposition and the argument is inconsistent with the public policy considerations underlying NRCP 68. Also, the District Court's order clearly took into consideration evidence other than the statue of repose issue.

Pursuant to NRCP 68(a), an Offer of Judgment can be made "[a]t any time more than 21 days before trial." "Within 14 days after service of the offer, the offeree may accept the offer by serving written notice that the offer is accepted." NRCP 68(d)(1). As such, an offeror can hypothetically issue an offer of judgment immediately after filing a complaint or serving an answer and the offeree has 14 days to respond. The express terms of Rule 68 are therefore designed to allow a party to make an offer to try to resolve a case *before* an adjudication on the merits occurs.

This Court has recognized that one of the policy rationales underlying NRCP

68 is "...to save time and money for the court system, the parties, and the taxpayer by rewarding the party who makes a reasonable offer and punishing the party who refuses to accept such an offer." *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 419, 132 P.3d 1022, 1029 (2006). This Court has also recognized that the potentially costly consequences of rejecting an offer of judgment make a party carefully consider the offer as compared to the claim. *Nava v. Second Judicial Dist. Court*, 118 Nev. 396, 398 n.3, 46 P.3d 60, 61 (2002) *citing Richardson v. National Railroad Passenger Corp.*, 311 U.S. App. D.C. 26, 49 F.3d 760, 765 (D.C. Cir. 1995). Therefore, an award of fees based on an offer of judgment served before an adjudication on the merits is entirely consistent with the policy goals underlying NRCP 68.

2. The District Court's Order was based on an extensive analysis of the *Beattie* factors.

A District Court's award of attorney's fees based on a *Beattie* analysis will be upheld absent a "clear abuse of discretion." *LaForge v. State ex rel. Univ. & Cmty. Coll. Sys.*, 116 Nev. 415, 424, 997 P.2d 130, 136 (2000) ("Because the district court applied all of the *Beattie* factors without clear abuse of discretion, we uphold the award of attorney's fees.")

Here, the District Court's order granting Lands West's Motion for Fees was based on a thorough analysis of *Beattie* as contained in: (1) Lands West's Motion for Attorney's Fees and Costs (3 AA 578-594); Byrne's Opposition (3-4 AA 632-

870); Lands West's Reply (4 AA 882-893) and extensive oral argument at the hearing on the Motion (5 AA 1160-1225). After the District Court considered oral argument on the *Beattie* factors, it actually directed additional briefing. (5 AA 1222-1223). Lands West (4-5 AA 990-1021) and Byrne (4 AA 960-989) both provided the District Court with supplemental briefing on specific facts of the case and application of the *Beattie* factors. There can be no dispute that the District Court's order was based on a careful and reasoned analysis of the *Beattie* factors.

a. The evidence presented by Lands West supported a finding that Byrne's claims were not brought in good faith.

In its Motion for Fees, Lands West submitted evidence to the District Court to support its contention that Byrne's claims against it were not brought in good faith. Lands West provided evidence showing that Sunridge, not Lands West, developed and constructed the Subject Residence. (3 AA 585). Lands West was om revoked status at the time the Subject Property was developed and constructed. (3 AA 585; RA 067-068). Since Lands West was not involved with the construction of the Subject Property, Byrne's claims against Lands West were entirely dependent on Byrne's alter ego/ successor liability theory. In its Motion for Fees, Lands West argued that Byrne's addition of the alter ego/successor liability claims against it represented a needless and totally unnecessary expansion of her lawsuit. (*See* 3 AA 586-587).

In support of its Motion for Fees, Lands West also submitted evidence to the District Court in support of its position that Byrne's alter ego/successor liability claim was meritless. (3 AA 585-586). As discussed in Lands West's Motion for Fees, to prove alter ego, the plaintiff must establish: (1) The corporation is influenced and governed by the person asserted to be its alter ego; (2) There must be such unity of interest and ownership that one is inseparable from the other; and (3) ***The facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.*** (3 AA 585 *citing Frank McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957)) (Emphasis added). Critically, Byrne did not address the shortcomings of its alter ego/successor liability theory in its opposition to Lands West's Motion for Fees. (3 AA 632-639).

In its Motion for Fees, Lands West also argued that, even if the first and second alter ego elements were met, Byrne could never establish a "fraud" or "injustice" causing her harm as it related to the construction of the Subject Residence. (3 AA 585). Lands West provided the Court with evidence demonstrating that Sunridge and its subcontractors had at least $9,000,000.00 in insurance coverage. (3 AA 585). As such, Byrne could never demonstrate how the relationship between Sunridge and Lands West caused her harm. In other words, if Byrne had accepted the Offer and ultimately prevailed on its construction

defect claims against the other defendants, sufficient insurance was in place to satisfy the judgment. While the District Court did not make specific findings as to Byrne's alter ego claims, it certainly had sufficient evidence to evaluate the merits of the claim. *See Luciano v. Diercks*, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981) (This Court will imply factual findings so long as the record is clear and will support the judgment.).

The District Court clearly considered the evidence offered in support of Lands West's Motion for Fees. In its Order, the District Court determined that Byrne "...knew or should have known that Lands West was not the general contractor and not involved in the initial construction." (5 AA 1066). The District Court also specifically found that "[Byrne]'s initial Chapter 40 Notice did not identify any defects in repair work performed by Lands West." (5 AA 1067). The District Court further found that Byrne "...never identified the extent to which Lands West might be liable for any of the $1.8 million in damages claimed by [Byrne]." (5 AA 1067). Finally, the District Court found that Byrne "...never distinguished the damages attributable to [Sunridge] arising from original construction from the damages allegedly attributable to Lands West for its allegedly defective post-construction repairs." (AA 1067).

The District Court's consideration of these facts reveals that it agreed with Lands West's position that there was no good reason to include it in the lawsuit.

The District Court's finding that Byrne's complaint against Lands West was not brought in good faith was neither arbitrary nor capricious. *See Yamaha Motor Co., U.S.A.*, 114 Nev. at 252, 955 P.2d at 672.

b. The evidence presented by Lands West supported a finding that its Offer was reasonable in both timing and amount.

The District Court's finding that Lands West's Offer was reasonable in both timing and amount was neither arbitrary nor capricious. Byrne contended that the timing of the Offer was unreasonable because at the time of the offer, no discovery had been conducted with respect to the alter ego and successor liability claims. (Opening Brief, 35). However, the record reflects that Attorney Springel was well-versed in the relationship between Sunridge and Lands West long before the lawsuit was even initiated. (*See* 2 AA 326-336). In fact, Attorney Springel was engaged in extensive dealings with Sunridge and Lands West as far back as 2012, more than four years before the complaint was filed. (*See* 2 AA 326-336). In its Order, the District Court recognized that at the time of Lands West's Offer, Byrne "...either knew, or should have known, that Lands West was not the general contractor on the job." (5 AA 1067).

Byrne also argues that the Offer was unreasonable because it was made long before she was presented with the tolling issue. (Opening Brief, 35). Once again, this argument is not supported by the record. In a December 23, 2012 e-mail to

Lands West's principal Van Nelson (a copy of which was submitted to the District Court in support of Lands West's supplemental briefing on its Motion for Fees), Attorney Springel stated: "...now that I know the home has defects, I am forced to sue sooner because I am on notice of the defects." (4 AA 992; 1020). Further, Byrne's Amended Complaint reflects her knowledge that the statute of repose was going to be a potential problem. (1 AA 5-6 at ¶ 25; 4 AA 992).[17] The District Court found that "[f]rom the time of [Byrne]'s Chapter 40 Notice until the time of Lands West's Offer of Judgment, [Byrne] knew that [she] might have a statute of repose problem." (5 AA 1067). Byrne's attempt to frame the timing of the Offer as depriving her of a reasonable opportunity to evaluate her claims against Lands West is not compelling.

Byrne also argued that the amount of Lands West's Offer was "...unreasonably small in relation to Byrne's $1.8 million claim." (Opening Brief, 34). However, Byrne's claim was just that — a "claim." As acknowledged by Byrne, "...there was no adjudication in the case concerning the amount of Byrne's damages." (Opening Brief, 31). Since Lands West was taking the position that it was not the alter ego or successor of Sunridge and therefore not responsible for *any* portion of Byrne's alleged damages, its Offer was based on its projected cost of defense. (3 AA 587).

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[17] "Notwithstanding these actions, this lawsuit is being filed to stop the running of any and all applicable statutes of repose and limitations."

As discussed above, Lands West provided the District Court with evidence demonstrating that Sunridge and its subcontractors had at least $9,000,000.00 in insurance coverage. (3 AA 585). As such, the District Court correctly observed that Byrne "...could have accepted Lands West's offer of judgment and recovered an amount to pay for a significant portion of its costs; instead, [Byrne] decided to take the risk that the Court would, in the future, resolve the statute of limitations issue in its favor." (5 AA 1067). Byrne's Offer was in keeping with the policy rationale of NRCP 68 "...to save time and money for the court system, the parties, and the taxpayer by rewarding the party who makes a reasonable offer and punishing the party who refuses to accept such an offer." *Albios*, 122 Nev. at 419, 132 P.3d 1029. Importantly, acceptance of the Offer would have completely eliminated the need for Byrne to incur the time and expense in trying to establish her unnecessary alter ego claims, since all the parties that built the Subject Residence were already in the lawsuit.

There is no bright-line rule that qualifies an offer of judgment as *per se* reasonable in amount; instead, the District Court is vested with discretion to consider the adequacy of the offer and the propriety of granting attorney fees. *State Drywall v. Rhodes Design & Dev.*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006). Here, the District Court's finding that Lands West's $10,001.00 Offer to Byrne was reasonable in timing and amount was not clearly erroneous.

c. The evidence presented by Lands West supported a finding that Byrne's rejection of the Offer was grossly unreasonable.

The District Court's finding that Byrne's rejection of Lands West's Offer was grossly unreasonable was neither arbitrary nor capricious. In its Order, the District Court stated that Byrne had to consider the following n its decision whether or not to accept Lands West's Offer: "(1) the amount potentially owed by Lands West; (2) the attorney's fees and time and effort to recover the amount owed; (3) the risk in seeking to convince the trier of fact of the amount owed; (4) and the risk of some legal impediment to recovery." (5 AA 1068). The District Court clearly examined Byrne's decision related to Lands West's Offer as a risk/reward analysis.

The District Court then observed that "Plaintiff 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 1068). The District Court ultimately found that "Plaintiff had enough information to decide not to continue to pursue its claims against Lands West, and should have accepted the offer" and that this factor therefore weighed "slightly in favor of Lands West." (5 AA 1069).

The District Court determined that the circumstances, when considered together, rendered Byrne's decision to reject the Offer to be grossly unreasonable.

Since this Court can imply factual findings so long as the record is clear and will support the judgment, *Luciano*, 97 Nev. at 639, 637 P.2d at 1220, the District Court's finding in this regard was neither grossly unreasonable nor arbitrary or capricious.

3. The District Court treated Sunridge's Motion for Fees differently because Sunridge was the actual general contractor.

Byrne attempts to paint the District Court's analysis of *Beattie* as inconsistent by comparing its rulings on Sunridge's Motion for Fees as compared to Lands West's Motion for Fees. (*See* Opening Brief, 33) Byrne argued that "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. (Opening Brief, 37).

However, this is an overly simplistic comparison that does not account for the evidence submitted in support of each parties' Motions and certainly does not suggest that the District Court's Order was clearly erroneous.

Byrne's claims against Lands West were entirely dependent on proving that it was the alter ego/successor to Sunridge. (*See* 1 AA 18-34). As such, Byrne had an extra burden requiring additional evidence in its claim against Lands West as compared to Sunridge. As discussed above, Lands West submitted evidence in

support of its Motion for Fees to indicate that Byrne's alter ego claim was meritless and that Lands West's inclusion in the action was unnecessary. (3 AA 585-586). Significantly, Byrne did not address the shortcomings of its alter ego/successor liability theory in its opposition to Lands West's Motion for Fees. (3 AA 632-639).

Lands West also submitted evidence demonstrating that Sunridge and its subcontractors – the entities that actually performed the construction of the Subject Residence – were more than sufficiently insured to satisfy a hypothetical judgment. (3 AA 585). The District Court considered the relative strengths and weaknesses of Byrne's alter ego/successor liability theory in addition to the statute of repose issue in its analysis of Lands West's Motion for Fees. The District Court's treatment of the Motions for Fees submitted by Lands West and Sunridge are not contradictory and merely reflect the fact that the two defendants were not similarly situated

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V. CONCLUSION

For the reasons set forth herein, Respondents respectfully submit that the District Court's ruling granting summary judgment pursuant to NRS 11.202 in favor of Respondents be affirmed. Lands West also requests that this Court affirm the District Court's Order granting its Motion for Attorney's Fees.

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 typestyle requirements of NRAP 32(a)(6) because this Brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

2. The Brief consists of 13,347 words. This is less than 14,000 words, in compliance with NRAP 32(7)(A)(ii).

3. I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I hereby further certify that this Answering 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 and 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 Nevada Rules of Appellate Procedure.

Dated this 22nd day of July, 2019.

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I certify that on this date, I electronically filed the foregoing *Respondent's Answering Brief* thereby serving notice of the filing to:

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