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 REPLY BRIEF

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES AND RULES **Page**

I. LEGAL ARGUMENT

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

Byrne's Prelitigation Notice Tolled the Statute of Repose

Respondents contend that, under the amendments to Chapter 40 enacted in AB 125, the only period of repose applicable to construction defect claims is the 6-year period specified in NRS 11.202. Respondents therefore maintain that tolling under NRS 40.695 only applies to prelitigation notices served within that time-frame. Respondents' argument, however, amounts to little more than a rehash of the district court's flawed analysis of the meaning of AB 125 § 21(6). Like the district court, Respondents ignore the fact that AB 125 § 21(6) establishes the period of repose applicable to claims governed by that section. When § 21(6) is interpreted in accordance with a common sense reading and applicable principles of statutory construction, there can be no question that the grace period constitutes a period of repose that is subject to the tolling provisions of NRS 40.695.

Respondents' primary argument is that tolling under NRS 40.695 does not apply to AB 125 § 21(6) because that section states that an "action" must be "commenced" within one year of the date of the act. According to Respondents, the fact that § 21(6) refers to the commencement of an "action" rather than the service of

notice implies that actions subject to the grace period deadline are excluded from the ambit of NRS 40.695. But Respondents' argument is self-defeating. For all of the reasons discussed herein, the fact that § 21(6) establishes a bar date for the commencement of an action is the very reason why that section constitutes a statute of repose and thus is amenable to tolling.

To begin with, by any jurisprudential measure, AB 125 § 21(6) fits the definition of a statute of repose. "A statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred." *FDIC v. Rhodes*, 130 Nev Adv. Rep. 88, 336 P.3d 961, 965 (2014). A statute of repose "conditions the cause of action on filing the suit within the statutory time period." *Id*. As Byrne pointed out, the Legislature established the grace period in order to avoid the constitutional infirmity that otherwise would have resulted from the retroactive shortening of the periods of repose. The Legislature addressed that problem by providing a separate period of time within which claims affected by the new shortened period could be brought. Since § 21(6) establishes a bar date for claims accruing prior to February 24, 2010, that section operates, by definition, as a statute of repose. Indeed, § 21(6) has no

other purpose.[1]

Respondents attempt to confuse this Court by mischaracterizing the nature of Byrne's argument. Respondents assert that it is Byrne's contention that the term "action" in § 21(6) refers to the service of the prelitigation notice rather than to the filing of the lawsuit. RAB 11. However, Byrne argued nothing of the sort. Quite to the contrary, Byrne explained that§ 21(6) constitutes a statute of repose because it provides that a construction defect suit must be filed by the expiration date of the grace period. Since that section establishes a statute of repose, there is no reason why that section should have referred to the service of the prelitigation notice (a tolling event) rather than to the commencement of the action.

NRS 11.202, as amended by AB 125 § 21(5), constitutes a separate statute of repose which is applicable to claims that did not need to be filed within the grace period. That section, like § 21(6) (and like all other statutes of repose), prescribes the time-frame within which an "action" must be "commenced." If, as Respondents assert, NRS 11.202 were the only statute of repose, no claimant could ever bring a claim more than six years after the accrual date. But the Legislature enacted § 21(6)

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[1] There is no legal significance to the fact that the Legislature did not designate § 21(6) to be published as a statute, and Respondents have not suggested otherwise. The section contains the only law establishing the grace period, which is a constitutionally essential component of the amendments. Accordingly, it indisputably has the same force of law as if it were enacted in the form of a statute.

for the very purpose of ensuring that some claimants could file actions beyond the 6-year period specified in NRS 11.202. Since there are two separate periods of repose, Byrne was no more required to "commence" an action within the period specified in § 21(6) than a claimant would have been required to "commence" an action within the period specified in NRS 11.202. It follows, by parity of reasoning, that the tolling provisions of NRS 40.695 apply equally to both.

The language of subsections 5 and 6 that cross-references each of those sections to the other also shows that § 21(6) constitutes its own period of repose. 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 period provided in NRS 11.202 is separate from the period provided in subsection 6, the Legislature made clear that subsection 6 contained its own period of repose – one that was applicable to claims accruing prior to February 24, 2010.

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). In other words, the period of repose specified in NRS 11.202 does not apply to an action governed by subsection 6. If NRS 11.202 does not apply to such actions, one can only conclude that another period of limitations does apply, and that is the

period specified in subsection 6. In view of the fact that AB 125 created two separate periods of repose, there can be no question that the tolling provisions of NRS 40.695, which toll all "statutes of limitation or repose applicable to" construction defect claims, are fully applicable to claims covered by §21(6).

As Respondents note, the Legislative Counsel's 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 function as an extension of "the existing statutes of repose." The existing statutes of repose were all subject to tolling under NRS 40.695. As such, the comments in the Digest are fully in accord with the conclusion that there are two periods of repose – one that is applicable to claims that may be commenced after February 24, 2016, and a separate one that is applicable to claims that had to be commenced by that date. There is nothing in the Digest or the language of § 21 indicating a Legislative intent to exclude the latter class of claimants from the coverage of the tolling provisions of NRS 40.695.

Respondent Green Planet attempts to garner support from *Dykema v. Del Webb Communities*, 132 Nev. Adv. Rep. 82, 385 P.3d 977 (2016), the same case that the district court principally relied on. However, Respondent Green Planet has misread

the holding of that case. As Byrne pointed out in her Opening Brief, *Dykema* did not involve an issue concerning the effect of a prelitigation notice served within the grace period because the ten-year statute of repose applicable to the claims expired before the effective date of AB 125 (February 24, 2015).

Respondent Green Planet asserts that *Dykema* is significant because the decision "confirmed that tolling of the statute of repose only occurs if a Chapter 40 notice is served within the applicable repose period." Green Planet RAB 12. But that statement only begs the question as to whether § 21(6) constitutes a statute of repose. Since Byrne was entitled to commence an action within one year from February 24, 2015, § 21(6) ***did*** establish the period of repose that applied to her claim and her notice served within that time-frame tolled the running of the statute.

In this connection, Respondents allude to the fact that Adam Springel, an attorney who was involved in the purchase of the subject residence, is experienced in the field of construction defect law and was aware of certain possible defects at the time of the purchase. RAB 3. However, the date of discovery has no conceivable bearing on the application or interpretation of the statutes in question. And even if there were any question as to the meaning of the governing statutes, the fact that neither Mr. Springel nor the independent law firm that represented Byrne during the prelitigation process were able to anticipate the interpretation ultimately given by the

district court only highlights the fact such an interpretation was far from readily apparent from the language of the new bill. Indeed, attorneys who were familiar with the well-established rule allowing the tolling of all claims by the service of the prelitigation notice would have had no reason to expect that the Legislature might take action to vitiate one of the most essential features of Chapter 40 – the requirement that the builder and owner engage in a mandatory prelitigation process to try to resolve any claims before the homeowner may file a lawsuit.

The District Court's Interpretation Conflicts with the Statutory Scheme

Even if there were any room for debate with respect to the textual meaning of section § 21(6), reversal is mandated by controlling rules of statutory construction. When interpreting a statute, courts must not confine themselves "to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson*, 529 U.S. 120,132 (2000). That is because "the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id*. A court must therefore interpret a statute as part of "a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole." *Id*. at 133. This approach requires courts to analyze the core objectives of a statutory scheme in order to ascertain the meaning of any particular provision. *Id*.

The Nevada Supreme Court endorses the same key principles. "It is a

fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Dezzanni v. Kern & Associates*, 134 Nev. Adv. Rep. 9, 412 P.3d 56, 60 (2018), quoting *David v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Thus, fundamental rules of statutory construction "begin with analyzing a statute's plain language and its context in the statutory framework." *Id.; see also C. Nicholas Pereos v. Bank of Am.*, 131 Nev. Adv. Rep. 44, 352 P.3d 1133, 1136 (2015) ("When interpreting a statue, this court considers the statute's multiple legislative provisions as a whole.").

As Byrne explained in her opening brief, one of the paramount objectives of Chapter 40 is to provide the parties with a framework for resolving their dispute without having to resort to litigation. To facilitate this goal, many sections of Chapter 40 explicitly require claimants to complete the prelitigation process before they are permitted to commence suit. *See, e.g.,* NRS 40.645, NRS 40.647(1)(a), NRS 40.647(2) and NRS 40.680. Respondents even acknowledge that NRS 40.645 requires that the prelitigation requirements be fulfilled ***"before*** commencing an action." (Emphasis in original) RAB 13 and 14.

NRS 40.695 enables the parties to defer litigation until after the dispute resolution process has failed and allows that process to proceed beyond the expiration

of the statute of repose. Thus, AB 125 § 21(5), AB 125 § 21(6), NRS 11.202 and NRS 40.695 are all integral parts of a "symmetrical and coherent regulatory scheme" aimed at providing the parties with an opportunity to resolve construction defect disputes extrajudicially before resorting to lawsuits. Respondents seek to have this Court read § 21(6) in isolation, without giving any consideration to the purpose of the grace period, the function of that section as an extended period of repose, or the purpose of NRS 40.695 to facilitate the objectives of the prelitigation process. In so doing, Respondents have overlooked the policy behind the tolling provisions of NRS 40.695, as well as the vital importance of tolling in the context of the prelitigation scheme of Chapter 40.

Respondents contend that their interpretation is supported by NRS 40.647(2)(b), which permits the district court to stay an action pending compliance with the prelitigation requirements if dismissal would bar the action under the statute of repose. RAB, 18. Respondents assert that "NRS 40.647(2)(b) ***specifically contemplates*** a scenario such as that faced by Byrne in this case." (Emphasis in original). However, not only does that section not contemplate the scenario at bar, it has no arguable relevance to this appeal.

NRS 40.647(2)(b) was part of Chapter 40 before the passage of AB 125. The manifest purpose of that section was to avoid prejudice to a claimant who improperly

files an action before completing the prelitigation requirements. If not for that section, the dismissal of a claim that was filed before the completion of the mandatory prelitigation process could give rise to a defense under the statute of repose. That section also allows claimants to avoid the time bar when they have insufficient time to meet the requirements for serving the prelitigation notice before the end of the repose period. Thus, no aspect of NRS 40.647(2)(b) indicates that it was intended to affect the requirements of the prelitigation process or the application of the tolling provisions in any manner. As such, NRS 40.647(2)(b) was plainly intended to advance policies under the pre-AB 125 scheme that were entirely separate from the policies served by the tolling provisions of NRS 40.695.

It follows that the fact that Byrne could have filed an action and obtained a stay before the end of the grace period in no way implies that the Legislature intended to eliminate tolling as to grace period claimants. As noted, NRS 40.647(2)(b) and NRS 40.695 serve completely independent purposes. For these reasons, 40.647(2)(b) is patently irrelevant to the interpretation of the AB 125 amendments. But the spirit of NRS 40.647(2)(b) is instructive here in one regard: it demonstrates just how important it was to the lawmakers to ensure that the prelitigation requirements not become procedural traps for the unwary.

Respondents' argument that the district court's ruling is consistent with the

plain meaning of § 21(6) also flies in the face of the interpretation given to that section by other courts. *See, e.g.*, *Lopez v. U.S. Home Corp*., 2016 U.S. Dist. LEXIS 163571 (D. Nev. 2017) and *Sky Las Vegas Condominiums, Inc. v. Sky Las Vegas Condominium Unit Owners Association*, Case No. A-16-738730-D, Dept No. XXII, Clark County (both of which construed NRS 40.695 and § 21(6) as providing that notices served during the grace period tolled the statute of repose). 3 AA 526. Indeed, it does not appear that any other court has agreed with Judge Scotti's interpretation.

The Implications of the District Court's Ruling are Absurd

The Legislature could not have rationally intended to create a scheme whereby: (1) some claimants would be required to file an action by a certain deadline while other claimants would not; (2) some claimants would have to file a mere placeholder suit before completing the prelitigation process, while other claimants would not; (3) some prelitigation notices served by different claimants on the very same day would toll claims, while others would not; (4) there would be a direct conflict between the requirement that some claimants file suit before completing the prelitigation process and the objectives of the prelitigation scheme; (5) parties forced to retain attorneys and file pleadings before the completion of the prelitigation process would be saddled with expenses that never would become necessary if that

process were successful; (6) some claimants, like Byrne, would be required to file suit in the middle of the prelitigation process and then proceed to complete the process while the action is stayed, and; (7) district courts would be forced to entertain additional motions as to whether to dismiss or stay actions based on the timing of the filing in relation to the bar date of the statute of repose.

Respondents have not disputed the fact that the district court's interpretation would result in these absurd consequences. In fact, they concede that "two claimants who serve Chapter 40 notices on the same date can have different outcomes." RAB 20. Nevertheless, they contend that the district court's ruling "promoted consistency and uniformity" because all claimants whose claims are subject to the grace period are treated the same. RAB 21. But that assertion broadly misses the point: regardless of the fact that grace period claimants are treated the same as each other, there is no logical or practical reason for the creation of two sets of rules, one for grace period claimants and one for others. Such an arbitrary dichotomy cannot possibly be reconciled with the design and purpose of the prelitigation scheme.

Respondents next suggest that Byrne could have taken advantage of the tolling provision by serving her prelitigation notice before May 26, 2015. But this truism is also beside the point. AB 125 did not change the rights of claimants to toll the filing of actions by serving prelitigation notices before the last date on which they could file

an action. Accordingly, regardless of whether Byrne could have taken some different course of action that may have mooted the issue at bar, her claim was tolled because she served her notice within the period of repose applicable to her claim.

In a similarly inapposite vein, Respondents note that Byrne could have filed suit before February 25, 2016 and obtained a stay of the litigation pursuant to NRS 40.647(2). But once again, Respondents' references to hypothetical courses of action Byrne could have taken shed no light on the meaning of § 21. The fact that Byrne could have served notice or filed an action sooner by no means implies that § 21(6) does not constitute a statute of repose. Byrne did not take any earlier action for the obvious reason that nothing in the 2015 amendments indicated that her claim would not be tolled by service of the prelitigation notice during the grace period. In light of the foregoing, it is evident that Respondents have advanced no tenable ground upon which to affirm the district court's interpretation.[2]

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

Even assuming that AB 125 and NRS 40.695 are somehow susceptible to the interpretation urged by Respondents, such an interpretation would not have been

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[2] In this connection, Respondents submit that Byrne's cost of filing such an action and obtaining a stay would have been "relatively insignificant." RAB 23. However, the costs of completing the prelitigation process alone can be enormous. Thus, the added cost of filing suit would certainly not be "insignificant" to the homeowner who is already incurring ongoing expenses in connection with that elaborate process.

apparent to claimants because: (1) NRS 40.695 had historically operated to toll the claims of all claimants under all circumstances; (2) the sole purpose of § 21(6) was to extend the period of repose for claims that would have been barred by retroactivity; (3) the completion of the prelitigation process prior to the filing of an action had always been a basic requirement of Chapter 40; (4) NRS 40.695, as amended, continued to apply to all statutes of repose associated with Chapter 40, and; (5) there was no practical reason why the Legislature might have intended to eliminate tolling for certain claimants. Thus, in view of the language of § 21(6) and NRS 40.695, the mandatory prelitigation requirements of Chapter 40, and the narrow purpose of the grace period, 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.

On the contrary, Chapter 40, as amended by AB 125, contains a cohesive framework of interrelated and interdependent provisions that uniformly point to the conclusion that tolling applies to all claims. Litigants and their attorneys therefore would not have been fairly apprised of the possibility that tolling would not apply to claims subject to the bar date specified in the grace period. Indeed, if the Legislature had intended to make such a fundamental change in the law with regard to tolling, one would certainly expect that the lawmakers would have expressed such intent in

a conspicuous manner as a specific exception to the tolling statute. For these reasons, even if section 21, when read in conjunction with NRS 40.695, were somehow susceptible to an interpretation that a notice served during the grace period would not toll the period of repose, the statutes, read as a harmonious whole, were far more amenable to the alternative interpretation – that NRS 40.695 would apply to notices served before the grace period bar date in the same manner that it applied to notices served before the bar date prescribed by NRS 11.202.

Respondents suggest that Byrne's attorneys' experience in the field of construction defect law should somehow have helped them to avoid such a trap by recognizing the possibility that § 21 and NRS 40.695 could be interpreted in a manner that would render tolling inapplicable to Byrne's notice. RAB 25. But as previously discussed, it is far more likely that the opposite is true; the more one knows about the history and policy behind Chapter 40, the harder it would have been to come to the conclusion reached by the district court. Attorneys who were familiar with the prelitigation scheme of Chapter 40, the purpose of the amendments, and the crucial constitutional function of the grace period established by §21(6), would have been the least likely group to have suspected that the Legislature might have subtly carved out an exception to tolling that would apply only to notices served during the grace period. Indeed, in view of the statutory scheme, such an exception would have been

utterly pointless and counterproductive.

In any event, Byrne's attorneys' knowledge of construction defect law has nothing to do with the issue of whether NRS 40.695 applies to prelitigation notices served during the grace period. And as discussed at length in the Opening Brief (AOB, 27-28), since any uncertainty concerning the scope of NRS 40.695 must be interpreted in favor of the plaintiff, the district court's decision must be reversed based upon settled rules of statutory construction.

The Enactment of AB 421 is Irrelevant to this Appeal

Curiously, Respondents devote a large portion of their brief to the argument that AB 421 (2019), which establishes a new set of amendments to Chapter 40, cannot revive Byrne's claim. RAB 27-40. However, even aside from the constitutional problems detailed by Respondents, the law is clear that, unless the Legislature has expressly provided for the revival of a claim barred under a previous statute of repose, a new statute will not be held to do so even if it contains certain general features of retroactivity. Although AB 421 provides that the new 10-year period of repose will have retroactive effect, it does not specifically provide for the revival of previously expired claims. It follows that, if the district court had correctly ruled that Byrne's claim was time-barred, AB 421 would not operate to change the result. Accordingly, Respondents discussion of AB 421 is nothing but an attempt to

distract this Court from the real issues raised by this appeal.

Respondent Green Planet Asserted no Independent Ground For Summary Judgment in the District Court

Respondent Green Planet additionally argues on appeal that summary judgment was properly granted in its favor because it was not individually served with the prelitigation notice and therefore that Byrne's claim against it was not tolled under NRS 40.695. However, the district court did not rule on this issue for the simple reason that Green Planet did not raise it in its motion for summary judgment. Green Planet merely filed a "joinder" to the motion for summary judgment filed by Respondents Lands West and Sunridge. 2 AA 292. Green Planet's joinder stated that "this Joinder incorporates the same arguments and grounds for relief found in" Lands West's and Sunridge's motion for summary judgment. 2 AA 294. Lands West's and Sunridge's motion for summary judgment was solely based on the issue of whether Byrne's service of notice tolled the period of repose. 1 AA 195 – 2 AA 262.

Green Planet's joinder also contained the terse remark that "at no time was [Green Planet] ever given Notice under Chapter 40 from the Plaintiff, a separate fact ***which may*** by itself be grounds for dismissal." (Emphasis added). 2 AA 295. However, Green Planet provided no further argument with respect to that issue and did not request the district court to rule on it. Accordingly, the issue was not properly

raised in the district court and is not properly raised on appeal. *See Ferreira v. P. C.H., Inc*., 105 Nev. 305, 307, 774 P.2d 1041 (1989) (a point not raised in support of a motion for summary judgment may not be considered for the first time on appeal).

In any event, *Desert Fireplaces Plus v. District Court*, 120 Nev. 632, 97 P.3d 607 (2004), the only authority relied upon by Green Planet, actually holds that, "under NRS 40.695, limitation periods are tolled once the plaintiff gives notice to the general contractor of the construction defect claim." *Id*. at 637. As the Court recognized in *Desert Fireplaces Plus*, the prelitigation notice provisions of Chapter 40 only require notice to the general contractor and are designed to relieve the claimant of the burden of providing additional notices to the individual subcontractors, many of whose identities might be difficult for the claimant to ascertain. Furthermore, Chapter 40 addresses the notice issue by requiring the general contractor to forward a copy of the notice to the subcontractors. NRS 40.646. For all of these reasons, Green Planet's argument is meritless.

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

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. There was also no determination of the merits of Byrne's alter ego claim.

Lands West does not dispute these facts. They concede that: (1) the district court did not determine any issue with respect to the merits of Byrne's claims; (2) Byrne's complaint alleged that Lands West was liable for all of her construction defect damages because it was the alter ego of Sunridge, and; (3) Lands West's motion for summary judgment was solely based on its statute of repose defense.

Lands West has also acknowledged that: (1) there was also no determination in the case concerning the amount of Byrne's damages; (2) Lands West's own experts acknowledged that the cost of repairs might be as much as a million dollars, and; (3) the district court concluded 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.

Notwithstanding the foregoing facts, Lands West contends that the district court based its fee award on an analysis of the merits of the alter ego claim. RAB 43. Lands West's argument, however, is not supported by the record. No issue pertaining to the merits of the alter ego claim was ever presented to, addressed by, or decided by the district court. Moreover, as Byrne pointed out in her Opening Brief, the district court's Order awarding fees ***did not even mention the alter ego claim***, let alone actually evaluate any aspect of that claim.

The first time when Lands West even alluded to the merits of the alter ego

claim in the district court action was in its motion for an award of fees. There, Lands West merely proclaimed 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." RAB 45. However, since the district court had made no prior determination regarding the merits of the alter ego claim, Lands West could not properly argue that the fee award should somehow be based on a consideration of the merits of that claim.

In any event, issues concerning "fraud" and "injustice" are inherently factual in nature and thus would not have been amenable to a determination on summary judgment, let alone to a determination in connection with a motion for fees. *See Epperson v. Roloff*, 102 Nev. 206, 719 P.2d 799, 802 (1986). Lands West did not establish at any stage of the proceedings that there was no factual issue as to whether its relationship with Sunridge amounted to fraud or injustice. Nor does Lands West refute the fact, discussed in the Opening Brief, that the record contains ample evidence supporting Byrne's alter ego and successor liability claims. Under these circumstances, even if the district court had purported to assess the merits of Byrne's alter ego claim, such a factor could not have provided any valid support for the award of fees.

In an attempt to prop up its argument, Lands West baldly states that it provided

the district court with evidence demonstrating that Sunridge had at least $9 million in insurance coverage. However, it made that assertion in its fee motion under the heading "***Even if Lands West was the 'alter ego' or 'successor' to Sunridge***, it did not harm Plaintiff because Sunridge and the other defendants were sufficiently insured." (Emphasis added). 3 AA 585. Thus, Lands West did not even try to rely on its insurance argument to show that Byrne could not establish alter ego liability, but simply attempted to show that Byrne could recover her damages from other sources.

Moreover, Lands West's fleeting argument concerning the existence of insurance is deeply flawed. First, Lands West produced no competent evidence concerning policy limits or coverage. Second, Lands West submitted no evidence establishing that there were no exceptions or exclusions applicable to the alleged policies. Third, the existence of an insurance policy on paper is not a guaranty that the insurer will be able to satisfy a judgment at some time in the future. Fourth, and most significantly, there is no indication in the record that the district court considered Lands West's insurance argument for any purpose.

The district court also did not purport to make the fee award based on an evaluation of the strength of the alter ego claim. Aside from the statute of repose issue, the only matter mentioned by the district court had to do with Lands West's

potential liability for work that it actually performed in connection with repairs made to the residence. As the district court noted, there was a factual issue with respect to the amount of damages caused by work actually performed by Lands West in connection with defective repairs. 5 AA 1053. The Order states, "it is undisputed that Lands West did perform some repairs over a two year period of time."[3] 5 AA 1054. The district court then faulted Byrne for not having quantified the amount of actual damages attributable to Lands West's work. But there is no reason why, in responding to the fee motion, it might have been incumbent on Byrne to establish the extent to which Lands West was liable for damages resulting from its repairs. Nor had the amount of damages resulting from work performed by Lands West been the subject of any prior motion in the case.

In any case, the issue concerning the amount of repair damages for which Lands West might have been liable has nothing to do with the issue of whether Lands West might have been liable, based on the alter ego doctrine, for the damages stemming from the original construction. Therefore, even if Lands West's repair work were ultimately determined not to have been defective, it still could have been

[3] In this regard, the district court further noted that Plaintiff's experts opined that damages resulting from the repair work totaled over $223,000 and that "Plaintiff's expert opined that the amount of Lands West's liability was certainly greater than $10,001." 5 AA 1054.

found liable for more than a million dollars of damages resulting from defects inherent in the original construction of Byrne's residence.

In support of its argument regarding alter ego liability, Lands West also cites the district court's statement that, at the time of the offer, Byrne "either knew or should have known that Lands West was not the general contractor on the job." 5 AA 1053. This matter, however, is another red herring. The questions of what Byrne might have known and whether Lands West was the general contractor have nothing to do with the issue of alter ego liability. While Byrne may have known that Sunridge purported to be the general contractor for the construction of the residence, her alter ego claim is based on a relationship between Sunridge and Lands West that, if established, would result in Lands West being held liable for Sunridge's negligence.

It is equally clear that the district court's findings on the second and third *Beattie* factors have nothing to do with the alter ego claim. As noted in the Opening Brief, the district court's analysis of these factors was solely based on the question of whether Byrne should have settled as a result of the risk posed by the statute of repose defense. The district court stated that "plaintiff decided to take the risk that the Court would, in the future, resolve the statute of limitations (sic) issue in its favor." 5 AA 1055:2; 5 AA 1053.

Despite the foregoing, Lands West represents that "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***." (Emphasis added). RAB 46. However, that statement is supported by nothing in the record and is directly contradicted by the language of the Order. Indeed, the district court observed that Lands West actually performed repair work and that Byrne had submitted evidence showing that the damages resulting from such work were far in excess of Lands West's offer of judgment. 5 AA 1053, 1054. Additionally, since Lands West made no motion and submitted no evidence to defeat the alter ego claim, it is beyond question that Lands West was properly "included" in the lawsuit based on this claim as well.

In view of the above, the only pertinent issue is whether Byrne should have accepted Lands West's offer in light of the likely outcome of the statute of repose issue. But Lands West has not attempted to argue that Byrne should have accepted the offer based upon the risk posed by the tolling issue. Indeed, the district court made clear that there was no reason why Byrne should have done so. As the district court stated, "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" and that "it probably wasn't apparent how any judge would interpret that

statute of repose." 5 AA 1174:11-19; 5 AA 1188:23.

Despite the district court's acknowledgment of the difficulty of the issue, it ultimately based the fee award on its conclusion 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." RAB 49. The district court's reliance on the risk posed by the statute of repose issue simply makes no sense in light of the court's own conclusions that the issue was a "difficult" and "close" one and that Byrne reasonably sought more than $1 million in damages from the defendants. 5 AA 1053, 1054; 5 AA 1076. 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, there can be no question that the amount of the $10,001 offer was unreasonably small.

Additionally, as discussed above, the district court recognized that Lands West might also have been liable for substantial damages resulting from defective repairs. The amount of the potential damages that might have been recoverable for repair work performed by Lands West demonstrates, in itself, that the offer was unreasonably small, particularly in view of the fact that there had been no adjudication of the amount of such damages.

Byrne also pointed out that the district court's abuse of discretion is highlighted by the inconsistent conclusions the court reached in its Order denying the general contractor's (Sunridge's) motion for attorney's fees. Lands West continues to misrepresent the record and obfuscate the issues in addressing this argument. In this regard, Lands West first asserts that "Byrne's claims against Lands West were entirely dependent on proving that it was the alter ego/successor to Sunridge." RAB 51. However, as Lands West acknowledged in other sections of its brief, its liability did not depend solely on the alter ago claim because it actually performed some of the faulty repair work.

Lands West also attempts to distinguish the district court's decisions in the two Orders based on the fact that the claim against Lands West for defects in the original construction were based on alter ego, whereas the claims against Sunridge were based on the work it actually performed as the general contractor. In this connection, Lands West represents that "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." RAB 52. However, for all of the reasons previously discussed, Lands West's representation is demonstrably untrue. As noted, there is nothing in either of the district court's Orders indicating that the court gave any consideration to the merits of Byrne's alter ego

claim. Since the alter ego claim formed no part of the district court's award of fees to Lands West, it is evident that, even under the district court's analysis, Byrne could have potentially recovered the same amount of damages against Lands West that she sought from Sunridge. It is therefore impossible to reconcile the district court's findings in the two conflicting Orders.

II. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the district court's Order granting summary judgment, as well as all other awards based on that Order, should be reversed. In the alternative, the district court's award of attorney's fees to Lands West should be reversed because it constituted 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 6745 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 18th day of September, 2019.

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CERTIFICATE OF SERVICE

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

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