In the
Supreme Court of the State of Nevada

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SOMERSETT OWNERS ASSOCIATION, a Domestic Non-Profit Corporation,

Appellant,

vs.

SOMERSETT DEVELOPMENT COMPANY, LTD, a Nevada Limited Liability Company; SOMERSETT, LLC a dissolved Nevada Limited Liability Company; SOMERSETT DEVELOPMENT CORPORATION, a dissolved Nevada Corporation; PARSONS BROS ROCKERIES, INC. a Washington Corporation; Q & D Construction, Inc., a Nevada Corporation; and STANTEC CONSULTING SERVICES, INC.,

Respondents.

Case No. 79921

District Court Case No.: CV-1702427

Judge: Hon. Elliott A. Sattler

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The arguments raised in opposition to the opening brief of Appellant Somersett Owners' Association ("SOA") are overly-technical and curiously off-subject. It does not matter, for example, if SOA introduced competent evidence of initiation of its claims during the original statute of repose; the argument is that the statute of repose should be tolled or estopped during the period of developer control of a homeowners' association. Neither does it matter whether SOA offered evidence that there were no final building inspections undertaken, no notices of completion issued, and no certificates of occupancy produced, apparently to prove a negative that is uncontested. *See* Appellant's Appendix ("AA") 6, 1068, n.4. There is no plausible dispute in this action over the fact that "substantial completion" is to be determined by anything other than resort to the common law, pursuant to NRS 11.2055(2). The main points at issue in this appeal thus are fairly simple, but instead Respondents adorn their brief unnecessarily.

The facts of this case surround the spectacular, dangerous, and very expensive collapse of rockery walls, presenting an ongoing threat

to the safety along the many miles these walls run through the Somersett community. Respondents' failures of design, construction, and maintenance, including excessive or inadequate voids with no or inadequate chinking rocks; failure to use filter fabric to enclose the drain rock or otherwise in construction of rockery walls; drain rock and or retained soil spilling through voids; inadequate, improper or otherwise bad placement of rockery wall rocks; over-steepened and or non-uniform face batter of rockery walls; and inadequate stabilization of the rockery walls—all of these deficiencies have caused this unacceptable and treacherous condition.

Either the statute of repose here, under these facts, can be tolled during the time in which the developer controls the board of directors—and thus, the decision whether to sue, essentially, the developer—or it cannot. Either the district court erred by applying an inappropriate standard for determining "substantial completion" of a construction project pursuant to NRS 11.202, or by not finding a genuine dispute of material fact precluding summary judgment on that issue, or it did not. Either Appellant's warranty claims are restricted by the statutes of repose found in NRS 11.202, or they are not. In each instance, the legal

determination are stark and straightforward, and demonstrate that this matter should be remanded to the district court with its summary judgment order reversed.

II. ARGUMENT

A. Equitable Tolling Of The Statute Of Repose During The Period Of Declarant Control Is Essential To Protect Associations And Homeowners

1. Nothing Justifies The Complete Bar To Suit That The Statute Of Repose Threatens In The Circumstances Here

Respondents rely on the assertion that statutes of repose are inviolable, that they create rights in a defendant that may not be tolled or estopped under any circumstances. Those rights, they argue, exist to provide "a fresh start or freedom from liability." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S.Ct. 2175, 2183 (2014), *cited at* Joint Answering Brief, 21. A statute of repose, they aver, is never to be disturbed. In their reading of the law, there is no conduct by Respondents, and no prejudice to Appellants, too disqualifying or great, respectively, that it may have any effect on its running; its sands flow through the hourglass inexorably.

But directing the Court to its discussion in *FDIC v. Rhodes*, 130

Nev. 893, 899, 336 P.3d 961, 965 (2014), the key, prevailing notion of statutes of repose is that they "condition the cause of action on filing a suit within the statutory time period and define the right involved in terms of the time allowed to bring suit." *Id*. But SOA could never bring or file this suit during the period before 2013—not really, not in the manner clearly contemplated by statutory regime for such lawsuits. Like any homeowners' association still operating under the control of its developer, it could not act freely to protect the interests of its membership, given the makeup of its board until the developer relinquishes that control. *See* NRS 116.31032.

In fact, every stated policy argument underpinning the supposed benefits of a statute of repose is belied and offended by Respondents' positions here. Respondents are in no need of "peace of mind" that comes from "barring delayed litigation." *Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.,* 288 F.3d 405, 408–09 (9th Cir. 2002). Peace of mind was here no gift of statute, it was a state never troubled by potential liability at all. Respondents are not being ambushed by some "unfair surprise" of a lawsuit. *Rhodes*, at 899. SOA did not delay filing this suit, nor did it revive dormant claims that

should have been apparent to it at some earlier time. No one is springing untenable issues upon Respondents, or spinning claims out of stale evidence. *Joslyn v. Chang,* 445 Mass. 344, 837 N.E.2d 1107, 1112 (2005).

Respondents here do not need a fresh start; the period of declarant control over the SOA Board meant, essentially, that their clock never started running, that the period of repose expired before anyone but Respondents themselves could decide to bring suit against, well, Respondents. Simply put, where a developer declarant controls the board of a community association, and therefore can prevent suits, frustrate the vindication of homeowner or association rights, and otherwise perpetrate faulty or incorrect disclosures until after the transfer of control to homeowners, such a declarant should not be afforded the exceptionally broad liability protections provided by a statute of repose.

The privileges offered by a statute of repose are meaningless, both in law and in pubic policy, if the subject party—here, Somersett Development Corp.—is never exposed to any risk of litigation in the first place. Under these circumstances, repose prevents entirely the

filing of a suit like the present one, and makes meaningless the right of associations to vindicate their rights vis-à-vis developers. In essence, it is a free shot for developers to shift huge financial repercussions of events for which they should, in all other ways, be held liable—or, at the very least, made to answer for potential liability. It is the individual homeowners within SOA, not Respondents, who will have to shoulder the burden of the enormous costs of repairing and fixing rockery walls that were clearly not constructed properly, resulting in failures that will continue to occur across ensuing decades. And all Respondents had to do to free themselves from such liability, it appears, is wait out the statute of repose. They do not have much to say about the inequitable advantage this scenario offers them, or why their peace of mind is of such greater value than the homeowners upon whom they have shifted the burden for repair.

The district court was wrong to determine that statutes of repose are not subject to equitable or statutory tolling…" AA 6, 1070. But this sort of categorical pronouncement has never been tested under the circumstances present here, and this Court should establish a clear and forthright finding, that periods of repose have added to them the time

an association spends under developer control.

2. Equitable considerations tolling or estopping the repose period are perfectly appropriate in the present context

It is clear in Nevada law that, while necessary from certain perspectives, extended declarant control periods also serve to negate the abilities of associations to represent their homeowner constituencies effectively. This is not a novel concept, and Respondents do not deal with this aspect of their positions, except to say that while estoppel or tolling may be appropriate for statutes of limitation, but not for statutes of repose.

NRS 116.3111(3) and NRS 116.4116(4), for example, make explicit the concerns that an association's board is hamstrung by developer control, and seek to ameliorate that condition. NRS 116.3111(3) does so in the context of warranty claims, while NRS 116.4116(4) provides a manner for declarants to evaluate warranty claims during the control period by way of a specially-appointed, independent committee—which, of course, did not occur here at any stage.

In both statutes, developer control is situated and addressed as an impediment to timely discovery, evaluation, and pursuit of claims. Is it

not an important public policy of this state that homeowners quickly and justly be afforded an opportunity to seek redress of claims of this nature? NRS Chapters 116 both demonstrate a recognition of the legal and economic damage extended declarant control periods can occasion, and the unfair advantages such control can create to the detriment of owners' associations.

Statutes of repose are not, and should not be, immune to considerations of equity. Respondents take issue with Appellants' citation to *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 860 (Colo. Ct. App. 1996), but that case was not some isolated matter; it justified the tolling of a statute of repose by collecting cases demonstrating conclusively that repose periods are not absolute bars, that they are subject to many of the same considerations of equity that can toll or estop statutes of limitation. *E.g. Alfred v. Esser*, 91 Colo. 466, 15 P.2d 714 (1932) (party can be equitably estopped from asserting a statute of repose); *Cange v. Stotler & Co.*, 826 F.2d 581 (7th Cir. 1987) (equitable estoppel applies to actions under Commodity Exchange Act); *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978) (equitable estoppel applies to statute of repose in Interstate Land

Sales Disclosure Act); *Craven v. Lowndes County Hospital Authority*, 263 Ga. 657, 437 S.E.2d 308 (Ga. 1993) [*861] (fraud will toll a statute of repose); *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (N.C. [**14] App. 1994) (equitable estoppel may defeat statute of repose). *See First Interstate Bank,* at 860-61.

In Nevada, equitable tolling may be appropriate when the danger of prejudice to the defendant is absent and the interests of justice so require. *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). As discussed, none of the policy prescriptions supporting repose periods applies to Respondents here. It cannot be considered just, or normal, for a period of liability to run—and expire—before SOA can even properly evaluate or bring its claims.

Principles of equity and fairness mandate that equitable tolling apply here as well, to prevent conduct by declarants that defeats SOA's rights in this matter. The statute of repose should either be tolled under the circumstances of this case, or Respondents should be equitably estopped from asserting time limitation bars (or, as Respondents would put it, from demanding SOA present conclusive evidence that it brought its claims within the repose period now tolled.).

B. It Is Not Sufficient For Respondents To Simply Intuit That The Rockery Walls Here Were "Substantially Complete" At Some Indeterminate Moment Years Ago

What is the date of the contested projects substantial completion here? The district court could not establish a date in its findings and order, and Respondents provide little guidance, either. AA 6, 1068.

It is certainly true that the provisions and requirements of subsection 1 of NRS 11.2055 cannot provide the date of substantial completion. There was no final inspection of the project conducted. There was no notice of completion issued. There was no certificate of occupancy produced. Respondents claim this is somehow an evidentiary failing of SOA, but one can readily assume that if any of the Respondents could establish that any of the indicia of substantial completion listed in NRS 11.2055(1)(a)-(c), they would have done so in their own motions for summary judgment, or proffered such evidence in their papers at some juncture of the proceedings below. They did not, because they cannot, and the district court found no reason to reject the premise that the question of fact of the date of the project's substantial completion, in this action, should be determined by recourse to common law principles.

Respondents maintained below, and maintain now, that the rockery walls were completed in 2006, and that therefore the statute of repose would have expired in 2012. This was never the stated view of the district court in its order, however. AA 6, 1068. Appellant disputed with competent and highly particularized evidence that the rockery walls were not substantially completed in 2006, and in fact may not be substantially complete even now. AA 3, 365; AA 3, 400.

The appropriate secondary sources for district courts to seek a usable standard for "substantial completion," in the absence heretofore of a clear announcement by this Court, are derived from within the construction and building industry. As discussed in the Opening Brief, the American Institute of Architects standard form contract at Section A.9.3.1 defines substantial completion as:

> The stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

See AA 4, 632.

This is a good and plausible standard. It was good enough, in fact, for these same Respondents in *Ryder Homes of Northern Nevada, Inc.*.

v. Somersett Dev. Co. Ltd., et al, Second Judicial District Court Case No. CV17-01896, where—when it was to their advantage—they argued to the same court that the appropriate common law standard ought to be that "an improvement is substantially complete when the improvement is at such a stage that is can be used for its intended purpose." AA 4, 618. Now, they seem less enthused with this accepted industry standard.

But whereas the district court below applied a standard wherein "substantial completion implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied," that standard is, in fact, no standard at all, and Respondents breathe little life into its terms. AA 6, 1068. It is surely more equitable and proper to accept an industry-wide notion of substantial completion that determines whether a particular project is "sufficiently complete in accordance with the Contract Documents," and able to be utilized for their "intended use."

The main rhetorical strategy of Respondents is to emphasize—here, as it did repeatedly below—that, as the district court put it, it is a rank absurdity that perhaps "the statute of repose would potentially

last decades for appurtenances and other common interest elements and developments, such as roads, sidewalks, walls, parks, trails and developed open spaces constructed for the benefit of all members of a community." AA 6, 1070.

Again, SOA is making no claim for endless rights to sue developers, and does not argue that defective building means a project is never complete, or even never substantially complete. As in most instances, then slope is never as slippery as an appeal respondent would have one believe. Simply stated, in instances where a developer or contractor builds a defective structure, and then cannot or will not procure the appropriate certificates that would establish indicate substantial completion under NRS 11.2055(1), the full privilege of liability protection that the statute of respose provides may not be activated or enjoyed. The privilege of the peace of mind that "substantial completion" and the subsequent running of the repose clock offers is a public policy trade off: Provide a work product that functions for its intended use, or leave yourself exposed to claims that flow from a failure to substantially complete the project.

The intended use of the rockery walls in question here is (1) to

hold up and/or hold back earth in the context of the area in which it is situated; and (2) to do so for a suitable useful life of at least 50 years. AA 3, 397-398l AA 3, 369. If it is unavailable *as a wall*, as these walls clearly were not one-fifth into their expected lifespan, there is a question of fact regarding as to the fitness of the product for its intended use. Respondents want to read all defective building elements from the analysis, and focus this Court's attention on whether the walls were ever used *as walls* at any time since being erected. But "intended use" is only one portion of the story; the walls must demonstrate *fitness* for that use, a test the walls have now conclusively failed. It does not seem particularly promising for Respondents to argue that quality or defectiveness is no matter of concern here, when *fitness* is among the signal elements of the standard.

In the opinions of Appellant's technical engineers, as presented to the district court, deviation from plans and specifications in this case, approximately 250 of the 374 walls are not *fit* for their intended use and are therefore not substantially complete. AA 3, 415; AA 3, 369; AA 3, 400. The walls were not fit when built, and they remain unfit at the very moment of this writing.

Appellant put into evidence supportable, reasonable, and unrebutted, allegations that place the date of substantial completion of the rockery walls in dispute. Under the standard urged by SOA, there is a genuine controversy of material fact over whether or when "substantial completion" occurred. The district court's summary judgment order should be reversed on these grounds, and the case remanded forthwith.

III. CONCLUSION

Based upon the foregoing, Appellant SOA asks this Court to reverse the district court and remand with instructions to proceed in keeping with its opinion.

DATED this 14th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5), and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 2,901 words.

3. Finally, I hereby certify that I have read this 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 N.R.A.P. 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 volume number, if any, 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 14th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2020, a true and correct copy of the foregoing **Appellant's Reply Brief** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

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