Case No. 80615

IN THE SUPREME COURT OF NEVADA

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation,

Appellant,

vs.

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada corporation,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Susan H. Johnson, District Judge
District Court Case No. A-16-744146-D

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Appellant Panorama Towers Condominium Unit Owners' Association is a Nevada non-profit corporation formed as the governing body of condominium homeowners' association. Appellant does not have any parent corporations and does not issue stock, either publicly held or otherwise.

Appellant has been represented throughout this litigation by the three law firms identified on the cover page of this opening brief, Lynch & Associates Law Group, Kemp Jones, LLP, and Williams & Gumbiner, LLP.

DATED: September 21, 2020

KEMP JONES, LLP

/s/ Michael Gayan
MICHAEL J. GAYAN (#11135)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3(b)(1). The district court entered its order pursuant to Rule 54(b), which certified an earlier summary judgment order as a final, appealable judgment, on August 13, 2019. On September 9, 2019, defendant/counter-claimant Panorama Towers Condominium Unit Owners' Association filed a post-judgment motion Rule 59(e). *See* NRAP 4(a)(4).

The district court entered its order denying the post-judgment motion on January 16, 2020. 26 AA4535–4546.[1] Defendant/counter-claimant timely appealed on February 13, 2020. 27 AA4772–4817.

ROUTING STATEMENT

The Supreme Court should retain this appeal to resolve important issues of first impression, including (1) whether the retroactively lengthened statute of repose that went into effect while this case was pending before the district court should be given effect in this action; (2) whether constructional-defect claims are compulsory counterclaims and relate back to the date of the complaint where the recipients of a Chapter 40 notice pre-emptively file suit for damages and declaratory relief against the claimant; and (3) what factors guide NRS 40.695(2)'s good-cause determination

[1] References to "__ AA___" refer to the volume and page number of Appellant's Appendix.

when courts are asked to extend the tolling period in residential constructional-defect actions. NRAP 17(a)(11), (12).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by twice declining to apply the new, retroactively lengthened statute of repose to the Association's constructional-defect claims after AB 421 went into effect even though (a) the Association timely filed a motion for reconsideration of the summary judgment order, and (b) after NRCP 54(b) certification of that order, the Association timely filed an NRCP 59(e) motion to alter or amend the judgment based on this change in controlling law.

2. Whether the district court erred by ruling the Association's constructional-defect counterclaim was not logically related to the Builders' complaint challenging the Association's notice of defects; did not relate back to the date of the Builders' complaint; and, therefore, was not filed before expiration of NRS 40.695(1)'s automatic tolling of the statute of repose.

3. Whether the district court erred in interpreting and applying NRS 40.695(2)'s good-cause requirement to decline the Association's request to extend the NRS 40.695(1) tolling period where the Association acted diligently and the Builders failed to identify any prejudice from such an extension.

STATEMENT OF THE CASE

Panorama Towers Condominium Unit Owners' Association ("Association") appeals from orders granting summary judgment on all of the Association's claims that were later certified as final pursuant to Rule 54(b) in the Eighth Judicial District Court, the Honorable Susan H. Johnson, District Judge, presiding.

The Association includes the owners of 616 condominium units in the Panorama Towers located in Las Vegas, Nevada ("Towers"). In 2009, the Association filed suit against the project developers, architect, and general contractor related to certain alleged constructional defects. In June 2011, the parties to that suit entered into a settlement agreement and the Association provided a release for all claims known to it at that time.

In February 2016, after the Association discovered four new constructional defects in the Towers, the Association provided the Builders with a notice of constructional defects pursuant to NRS 40.645(2) ("Notice"). Thereafter, the Association and the Builders participated in the prelitigation process required by NRS 40.600, *et seq.* On September 28, 2016, just two days after an unsuccessful pre-suit mediation required by NRS 40.680, the Builders filed suit against the Association. The Builders' complaint extensively references the Notice and, through claims for declaratory and substantive relief, seeks money damages and challenges the Association's ability to pursue claims related to the new constructional defects.

In compliance with NRCP 12, the Association timely moved to dismiss the Builders' complaint and, after the district court denied that motion, timely filed its answer and counterclaim.

Thereafter, the Builders filed a series of motions for summary judgment on several of their claims for declaratory relief, each of which challenged the Association's ability to proceed with its constructional-defect claims. The Builders first challenged the sufficiency of the Association's Notice and then, after the district court granted leave for the Association to amend its Notice, challenged the amended Notice. The Builders next challenged the Association's standing to sue under NRS 116.3102(1)(d), which the district court denied.

In February 2019, 30 months after filing their complaint, the Builders filed a motion for summary judgment challenging the timeliness of the Association's counterclaim under the then-existing statute of repose. The Association opposed that motion and counter-moved under NRS 40.695(2) to extend the NRS 40.695(1) tolling period. On May 23, 2019, the district court granted the Builders' motion by finding the Association did not file its counterclaim before the NRS 40.695(1) tolling period expired and denied the Association's countermotion to extend the tolling period.

Days later, the Nevada Legislature passed and the Governor signed into law Assembly Bill 421 to retroactively lengthen the exact statute of repose used to time-

bar the Association's claims. The new, longer repose period rendered the Association's counterclaim timely, regardless of all other considerations. Despite this change in the law, the district court declined to modify its summary judgment order or alter or amend the Rule 54(b)-certified judgment consistent with the new controlling law.

STATEMENT OF FACTS

A. Factual Background

The Panorama Towers development consists of two 30-story towers containing 616 residential condominium units and an additional 33 units in six townhouse buildings. This suit focuses on the design and construction of the two towers, located at 4525 and 4575 Dean Martin Drive, Las Vegas ("Towers").

The Builders and others developed and constructed the Towers between 2004 and 2008. The district court, in the proceedings below, determined the Towers were substantially completed on January 16, 2008, and March 31, 2008. 16 AA2388 at 12:4–6. The units within the Towers were sold, and the unit owners are part of a homeowner's association organized pursuant to NRS 116 and known as Panorama Tower Condominium Unit Owners' Association ("Association").

In September 2009, the Association filed suit against the project developers, architect, and general contractor. 1 AA0052–0073 at ¶¶ 45–46. The developer defendants were defended by Bremer, Whyte, Brown & O'Meara, the same firm representing the Builders in the present suit. That suit was settled in June 2011. 1 AA0060 at ¶ 50. Significantly, the settlement agreement did not contain a general release of all claims, whether known or unknown, but only released the developer defendants from known claims: "This release specifically does not extend to claims arising out of defects not presently known to the HOA[.]" 1 AA0060–61 at ¶ 51.

Later in 2011, following the settlement, the Association became aware of piping deficiencies in the Towers' mechanical rooms. 1 AA0048–51. These deficiencies were not among the *known* claims released in June 2011. 2 AA0283 at ¶ 29(c). Having just settled the suit against the developers and others, however, the Association did not consider pursuing a new claim regarding the deficiencies in the mechanical rooms.

Subsequent to entering into a settlement, the Association sustained a common area, underground sewer malfunction and incurred costs repairing the malfunction. 2 AA0283 at ¶ 29(d).

In 2013, the Association became aware of a window leakage problem in one of the Tower units, 4525 Dean Martin Drive, Unit 300, and retained a construction consulting firm, CMA Consulting, to investigate. 5 AA0637–38 at ¶ 3. CMA's investigation uncovered a serious problem in the Tower's exterior window assemblies, which resulted in substantial leakage within the assemblies and caused rust and deterioration of the Towers' structural steel components. 5 AA0638 at ¶ 5(a). Repairing the problem required vacating the owner and his possessions, fully dismantling the unit's exterior wall assemblies, and installing a new window-wall system at a cost of over $300,000 to the Association. *Id*. at ¶ 4. The repair took approximately 35 months to complete. *Id*.

From November 2015 through January 2016, CMA reviewed the Towers' design and construction documents and inspected 15 other units in the Towers and verified that the window design problem in Unit 300 was constructed consistent with the Towers' design documents and, therefore, existed throughout the Towers, impacting all 616 units and thousands of windows. 5 AA0638–40 at ¶¶ 6–11. This window design defect was also *not* one of the *known* problems released in June 2011. 2 AA0282–83 at ¶ 29(a).

In the course of investigating this serious window design problem, CMA discovered that required fire-blocking was missing throughout the Towers' exterior wall assemblies. 5 AA0638 at ¶ 5(b). The fire-blocking defect was *not* one of the *known* problems released in June 2011. 2 AA0283 at ¶ 29(b).

B. Procedural Background

In 2015, the Nevada Legislature enacted Assembly Bill 125 ("AB 125"), effective February 24, 2015, which substantially revised Nevada's constructional defect laws in several respects. Among other things, AB 125 required claimants to provide much more specificity when identifying constructional defects in the initial notice to the builder (NRS 40.645(2)), precluded an association from asserting claims for constructional defects not within the development's common areas (NRS 116.3102(1)(d)), and shortened the statute of repose for constructional defects from up to 10 years to six years (NRS 11.202(1)). Due to the shortened statute of repose,

as required by this Court's precedent, AB 125 contained a one-year grace period for potential claimants to bring claims. 8 AA1227 at Sec. 21(6).

On February 24, 2016, the Association served the Builders with its notice of constructional defects pursuant to NRS 40.645 ("Notice"). 1 AA0001–51. The Notice identified the window and fire-blocking deficiencies discovered in 2013 and 2014, and included the previously discovered mechanical room piping and sewer deficiencies. The district court subsequently ruled that the notice was timely filed within AB 125's grace period. 16 AA2388 at 12:8–12.

Thereafter, the Association and Builders engaged in pre-litigation proceedings pursuant to NRS 40.680, including the Builders' inspection of the defective conditions identified in the Notice and the mandatory pre-litigation mediation. On September 26, 2016, the parties participated in an unsuccessful mediation. *Id*. at 12:18–19.

Two days later, on September 28, 2016, the Builders filed their strategic, preemptive complaint against the Association, asserting several causes of action, including claims for declaratory relief and breach of the prior settlement agreement. 1 AA0052–73.

In October 2016, the Builders provided the Association with an extension to respond to the complaint. 24 AA4109 at 6:22. On December 7, 2016, the Association timely filed a motion to dismiss the Builders' complaint. 1 AA0074–85. By order

filed on February 9, 2017, the district court denied the motion without explanation. 2 AA0261–62.

On March 1, 2017, the Association timely filed its answer and counterclaim asserting its claims related to the constructional defects identified in the Notice. The Association asserted tort-based claims for negligence and products liability, contract-based claims for breach of contract, breach of warranty, and breach of the duty of good faith and fair dealing, and a statutory claim based on the non-disclosure of defects. 2 AA0263–296.

On March 20, 2017, the Builders filed the first of their four carefully sequenced case-dispositive motions,[2] this one for summary judgment challenging, among other things, the sufficiency of the Association's Notice. 2–4 AA0297–400. On September 15, 2017, the district court filed an order resolving this motion and dismissed the Association's claims related to the mechanical room piping defect on the ground that it was barred by the statute of limitation, gave the Association leave to amend the Notice to provide additional specificity regarding the window, fire-blocking, and sewer defects, and stayed the entire action for six months to allow the Association to provide the Builders with an amended Chapter 40 notice. 4 AA0497–516.

[2] 22 AA3672 at 9:19–20 and 27 AA4764 at 11:3–4 (admitting Builders filed all motions for summary judgment with intentional, strategic timing and sequencing).

On October 10, 2017, the Association filed a motion for clarification of the September 15, 2017 order regarding the sewer and fire-blocking defects. 4 AA0517–46. The Association sought more details regarding the basis under the law the sewer defect claim failed to satisfy Chapter 40 and why the fire blocking claim required inspection at every location where claimed to exist in order to meet satisfy the notice requirements under Chapter 40. 4 AA0521 at 5:8–15. The district court denied the motion without explanation by order filed on February 1, 2018. 5 AA0584–0585.

On March 15, 2018, the district court extended the stay for an additional 30 days. 5 AA0589–90 at 4:25–5:22.

On April 5, 2018, in accordance with the district court's September 15, 2017 order, the Association served the Builders with an amended notice of defects pursuant to NRS 40.645(2) containing additional specificity regarding the window, fire-blocking, and sewer defects ("Amended Notice"). 5 AA0594–641.

On August 3, 2018, the Builders filed a motion for summary judgment challenging the sufficiency of the Amended Notice, 5–6 AA0651–839, on which the district court ruled by order filed on November 30, 2018 ("Notice Order"). 10 AA1508–25. As to the window design defect, the Association argued and the district court agreed that the Amended Notice met the Association's notice obligations under NRS 40.645(2) because the window deficiency, as alleged by the Association, involved a design error that affected 100% of the windows. 10 AA1520–21 at 13:7–

14:7, 14:12–24. As to the fire-blocking defect, the district court ruled the Amended Notice was insufficient because the deficiency involved an installation error that was not alleged to exist in all locations and the Amended Notice failed to identify the "specific locations" where the defect existed. 10 AA1522 at 15:5–7. The district court also ruled that the Amended Notice was deficient as to the sewer defect because, the sewer having been repaired, it failed to identify the installation error. *Id*. at 15:18–27. Accordingly, the district court found the Amended Notice insufficient as to the fire-blocking and sewer defects and allowed the case to proceed on the Association's claims related to the window design defect. 10 AA1523 at 16:3–7.

On October 22, 2018, the Builders filed their third dispositive motion, this one for summary judgment on their claim for declaratory relief challenging the Association's standing to assert claims for the window design defect. 7–9 AA 1180 –1450. The district court entered an order denying that motion on March 11, 2019. 15 AA2231–33.

On December 17, 2018, the Builders filed a motion for reconsideration of the Notice Order, 10–11 AA1526–1638, which was denied by order filed on March 11, 2019. 14 AA2228–30.

On February 11, 2019, having failed to defeat the Association's claims through their previous motions, the Builders filed their fourth dispositive motion,

this time a motion for summary judgment grounded in NRS 11.202(1), which had been shortened in 2015 by AB 125 from 10 years to six years. 14 AA2052–2141. On March 1, 2019, the Association filed its opposition, which included a countermotion for relief pursuant to NRS 40.695(2) and urged the district court to follow the good-cause framework adopted in *Scrimer v. District Court*, 116 Nev. 507, 998 P.2d 1190 (2000). 14 AA2199–2227. On May 23, 2019, the district court ruled (1) the Association timely served the Notice before expiration of the statute of repose and the one-year grace period provided by AB 125, (2) the Associated did not timely file its defect counterclaims after the Chapter 40 pre-litigation process, (3) the Association did not demonstrate good cause to extend the tolling of the statute of repose pursuant to NRS 40.695(2), and, therefore, (4) the Association's claims related to the window defect were untimely pursuant to NRS 11.202(1) ("Repose Order"). 15–16 AA2377–95.

On June 1, 2019, nine days after the district court entered the Repose Order, the Nevada Legislature passed Assembly Bill 421 ("AB 421"), which Governor Sisolak signed into law on June 3, 2019. 16 AA02429–43. AB 421 reversed several of the AB 125 changes for constructional defect claimants. Among other things, AB 421 extended the statute of repose from six years to 10 years and expressly made this extension retroactive:

> **Sec. 7.** NRS 11.202 is hereby amended to read as follows:
> 11.202 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property ***more than 10 years after the substantial completion*** of such an improvement, for the recovery of damages for:
>
> (a) Except as otherwise provided in subsection 2, any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement;
>
> (b) Injury to real or personal property caused by any such deficiency; or
>
> (c) Injury to or the wrongful death of a person caused by any such deficiency.
>
> . . .
>
> **Sec. 11.** . . .
> 4. ***The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively*** to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019.

16 AA2436, 16 AA2443. (emphasis added).[3]

Earlier in the day on June 3, 2019, the Association timely sought reconsideration of the Repose Order, noting that AB 421 was awaiting the Governor's signature. 16 AA2455 at 12:4–5. On June 13, 2019, after the Governor signed AB 421 into law, the Association filed another motion for reconsideration of

[3] In 2008, the year in which the district court determined the Towers were substantially completed (at the Builders' request), 10 years was the longest statute of repose for constructional defect claimants. Although AB 125 created a brief, intervening period with a shorter statute of repose, AB 421's enactment in 2019 changed the statute of repose back to the 10-year period that existed in 2008 and eliminated the more complicated tiered repose system that existed before 2015.

the Repose Order based on AB 421's enactment. 16 AA2475–2505. On July 16, 2019, the district court heard both motions for reconsideration, denied the first motion, and took the second motion under submission. 16–22 AA2506–3663. On August 9, 2019, the district court entered its order denying the Association's second motion for reconsideration ("Reconsideration Order"). 25 AA4369–76. In the Reconsideration Order, the district court ruled that, pursuant to NRS 218D.330(1), the retroactive extension of the statute of repose to 10 years, as enacted via AB 421 on June 3, 2019, would not become effective until October 1, 2019. 25 AA4374–75 at 6:22–7:7.

Meanwhile, on July 22, 2019, the Builders filed a motion to have the Repose Order certified as a final judgment pursuant to NRCP 54(b). 25 AA4277–4312. On August 12, 2019, the district court granted that motion over the Association's objection ("Rule 54(b) Order"). 25 AA4377–89. The Builders filed a notice of entry of the Rule 54(b) Order the next day. 25 AA4390–4405.

On September 9, 2019, the Association timely filed a motion to alter or amend the Repose Order pursuant to NRCP 59(e) ("Rule 59(e) Motion"). 25–26 AA4406–76. On October 17, 2019, the district court heard the Association's Rule 59(e) Motion. 26 AA4509–25. On January 14, 2020, the district court entered its order denying the Rule 59(e) Motion, declining to apply AB 421 because, among other things, it believed the court applied the correct law at the time it entered the Repose

Order (the "Rule 59(e) Order"). 26 AA4532 at 7:11–12. On January 16, 2020, the Builders filed a notice of entry of the Rule 59(e) Order. 26 AA4535–46.

On February 13, 2020, the Association timely filed its notice of appeal of the district court's various orders, including but not limited to the Repose Order, the Reconsideration Order, the Rule 54(b) Order, and the Rule 59(e) Order. 27 AA4772–4817.

SUMMARY OF THE ARGUMENT

1. The district court erred by twice declining to apply the new, retroactively lengthened repose period.

Nevada retroactively lengthened the applicable statute of repose *days* after the district court relied on the old statute of repose to time-bar the Association's claims. The Nevada Legislature expressly made this change retroactive. Because Nevada's new statute of repose became longer (and not shorter), the retroactive statute of repose went into immediate effect. The district court erred by agreeing to reconsider its summary judgment order but declining to give effect to the new, controlling repose period because it ruled the retroactive statute did not go into immediate effect.

Then, after certifying its summary judgment order as a final judgment pursuant to Rule 54(b), the district court erred by denying the Association's timely Rule 59(e) motion to alter or amend the judgment based on this change in controlling law. The district court declined to alter or amend the judgment despite recognizing that (a) AB 421 retroactively lengthened the repose period applicable to the Association's claims to 10 years from the date of substantial completion, (b) the Association filed its counterclaim less than 10 years after the Towers' court-determined dates of substantial completion, (c) AB 421's retroactively lengthened statute of repose went into effect no later than October 1, 2019, (d) the Association timely sought to alter or amend the judgment that applied the old statute of repose—that was no longer in effect—to time-bar the Association's claims, and (e) the district

court considered and ruled on the Association's Rule 59(e) motion after October 1, 2019.

Whether via reconsideration or Rule 59(e), Nevada law required the district court to apply the new, effective statute of repose and grant relief from its order and/or judgment to permit the Association's claims to proceed on the merits.

2. The Association's counterclaim is compulsory and relates back to the date of the Builders' complaint.

The district court erred by finding no logical relationship between the Builders' complaint, filed in response to the Association's Notice, and the Association's counterclaim related to the Notice. The Association complied with its Rule 13 obligation to file, as counterclaims in this action, its logically related counterclaim against the Builders.

The district court also erred by determining that the Association's counterclaim, even if compulsory, would not relate back to the date of the Builders' complaint. The great weight of the authority provides that compulsory counterclaims relate back to the date of the complaint, and this Court has never held otherwise for a case such as this one.

3. The district court erred by misinterpreting NRS 40.695(2) and abused its discretion by declining to find good cause to extend the NRS 40.695(1) tolling period.

The district court's order impermissibly rewrote NRS 40.695(2)'s good-cause requirement. Specifically, the district court required the Association to show good

cause why it did not file the counterclaim sooner even though the statute expressly contemplates a late filing. The Association met this court-created standard, but the district court held otherwise, expressly deemed the lack of prejudice to the Builders as *irrelevant*, refused to extend the tolling period, and time-barred the Association's claims.

Because NRS 40.695(2)'s good-cause language and purpose mirror the language and purpose of Rule 4(e)(3), the district court should have applied the good-cause framework in *Scrimer v. Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190 (2000). The *Scrimer* factors require courts to consider facts such as pre-suit notice of the claim and the lack of prejudice, yet the district court refused to consider those important uncontested facts. Further, the district court was obligated, but failed, to exercise its discretion under NRS 40.695(2) consistent with Nevada's strong public policy in favor of adjudicating claims on their merits whenever possible.

ARGUMENT

I. The Retroactive, Now-Controlling Statute of Repose Renders the Association's Counterclaim Timely.

Nevada lengthened the statute of repose to 10 years—through AB 421—after the district court entered the Repose Order, but before the district court considered or ruled on both the Association's Reconsideration Motion and the Rule 59(e) Motion to alter or amend the judgment based on this change in the controlling law. The retroactive lengthening of the applicable statute of repose rendered the Association's counterclaim timely regardless of all other considerations.

A. The New, 10-Year Statute of Repose is Clear, Retroactive, and Applicable to the Association's Claims.[4]

Barring ambiguity in the statutory language, the primary rule of statutory construction is that the court should give effect to the statute's plain language. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). In general, "Courts will not apply statutes retrospectively unless the statute clearly expresses a legislative intent that they do so." *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988). Nevada law requires certain protections for laws that retroactively *shorten* a statute of repose, *see Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1992), but, due to the lack of similar due

[4] **Standard of Review:** This Court reviews questions of statutory interpretation *de novo*. *D.R. Horton, Inc. v. Eighth Judicial District Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009).

process concerns, provides no special requirements for laws that retroactively *lengthen* a statute of repose.

Here, AB 421 unambiguously and retroactively lengthened the statute of repose from six years to 10 years for all actions involving structures with substantial completion dates before October 1, 2019. The Nevada Legislature could not have expressed its intent any clearer: ***all constructional defect claimants*** were to have 10 years in which to bring an action for ***any structures*** substantially completed before October 1, 2019. The district court ruled that the Towers' substantial completion dates were January 16, 2008, and March 31, 2008—both well before October 1, 2019. 16 AA2388 at 12:4–6. The Association filed its counterclaim on March 1, 2017, within 10 years of the Towers' court-determined dates of substantial completion. 2 AA0263–0296.

B. NRCP 59(e) Required the District Court to Alter or Amend the Judgment Based on the New, Retroactive Statute of Repose.[5]

NRCP 59(e) authorizes parties to seek an order altering or amending a judgment within 28 days of the notice of entry of the final judgment. *See* NEV. R. CIV. P. 59(e). "Among the ***'basic grounds'*** for a Rule 59(e) motion are 'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable

[5] **Standard of Review:** This Court reviews the denial of a Rule 59(e) motion for abuse of discretion. However, deference is not owed to legal error. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

evidence,' the need 'to prevent manifest injustice,' or ***a 'change in controlling law."***" *AA Primo Builders, LLC*, 126 Nev. at 582, 245 P.3d at 1193 (quoting *Coury v. Robison*, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999)) (emphasis added); *see also Williams as Tr. for L.D.W. III R.E. Assets Living Tr. v. Clear Recon Corp.*, 466 P.3d 541, 2020 WL 3568636, at *5 (Nev. App. 2020) (noting "basic grounds" for Rule 59(e) relief is "change in the controlling law.").[6]

Here, Rule 59(e) required the district court to alter or amend the judgment because the controlling law changed before the district court *considered* or *ruled on* the Association's timely Rule 59(e) Motion. The district court based its Repose Order, which it later certified as a final, appealable judgment pursuant to Rule 54(b), on the statute of repose in effect at that time. Within days of the Repose Order, the Nevada Legislature repealed much of AB 125 and *retroactively* lengthened the statute of repose to 10 years for the Towers and all other structures substantially completed before October 1, 2019. Although the Association disputes the district court's ruling that AB 421's retroactive provision did not go into effect until October 1, 2019, *see infra*, Argument I.C, that particular ruling could have had no impact

[6] Federal courts use FRCP 59(e) in like fashion to correct judgments when there has been an intervening change in the controlling law. *See, e.g., Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (citing *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999)); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999); *School Dist. No. 1J v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993); *Virgin Atl. Airways v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992).

when the district court heard the Association's Rule 59(e) Motion on October 17, 2019 (26 AA4509–4525), or entered its Rule 59(e) Order on January 14, 2020 (26 AA4526–4534), because both of those events occurred after October 1, 2019.

AB 421's retroactive change of the controlling law—the statute of repose applicable to the Association's claims—rendered the Repose Order incorrect, unjust, and inconsistent with Nevada law. This Court has held that Rule 59(e) exists for this precise situation to ensure the applicable Nevada law is given effect. The district court erred as a matter of law and, therefore, its failure to correctly apply Rule 59(e) and the controlling, retroactive statute of repose is entitled to no deference. This Court's *de novo* review should correct this serious, case-dispositive error and remand this action for further proceedings on the merits of the Association's claims.

C. AB 421's Retroactively Lengthened Statute of Repose Went into Effect Upon Enactment.[7]

"In interpreting statutes, the primary consideration is the Legislature's intent." *Cromer v. Wilson*, 126 Nev. at 109, 225 P.3d at 790 (citing *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993)). "When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction." *Id.* "If, however, a statute is susceptible of

[7] **Standard of Review:** This Court reviews orders denying reconsideration for abuse of discretion. However, deference is not owed to legal error. *AA Primo Builders, LLC*, 126 Nev. at 589, 245 P.3d at 1197.

another reasonable interpretation, we *must not give the statute a meaning that will nullify its operation*, and we look to policy and reason for guidance." *Id.* (citing *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 714 (2007)) (emphasis added). "The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results." *Welfare Div. of State Dept. of Health, Welfare and Rehabilitation v. Washoe Cty. Welfare Dept.*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972).

The Nevada Legislature may, with limitations that do not apply here, expressly provide for the retroactive application of statutes. *Alsenz v. Twin Lakes Village, Inc.*, 108 Nev. 1117, 843 P.2d 834 (1992). When a case involves a subsequently enacted statute, the court must first "discern whether [the legislature] has spoken to whether the statute should have retroactive effect." *Faiz–Mohammad v. Ashcroft*, 395 F.3d 799, 801–02 (7th Cir. 2005) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994)). If the legislature "has clearly specified a statute's retroactive reach, then '***there is no need to resort to judicial default rules.***'" *Labojewski v. Gonzales*, 407 F.3d 814, 818 (7th Cir. 2005) (quoting *Landgraf*, 511 U.S. at 280) (emphasis added). "An expressly retroactive statute is given its intended retroactive effect unless there is a constitutional impediment to doing so." *Id.* (citing *Landgraf*, 511 U.S. at 267–68).

Further, a legislative body manifests an intent to *avoid* the retroactive effect of a statute by expressly postponing the effective date after enactment. *See U.S. v. Rumney*, 979 F.2d 265, 267 (1st Cir. 1992) (citing *U.S. v. Brebner*, 951 F.2d 1017, 1023 (9th Cir. 1991); *Davis v. U.S.*, 972 F.2d 227, 229–30 (8th Cir. 1992)).[8] In general, courts should look to the logical impact when determining a statute's effective date. *See City of Richmond v. Grand Lodge of Virginia, A.F. & A.M.*, 174 S.E. 846, 848 (Va. 1934) (determining effective date of new statutory amendment, court reasoned because "the language would be meaningless, and entirely superfluous" a particular effective date could not apply).

The district court erred in holding that the newly lengthened, retroactive statute of repose did not take effect until some future date by resorting to default rules of construction. The Legislature expressed its unambiguous intent that the new 10-year statute of repose have retroactive effect. Although AB 421 does not include an express effective date for its retroactive provision, setting some future effective date for a retroactive statute makes no practical sense. If a statute is to be retroactive, why would the Legislature delay its effect? The end result will be the same: the statute of repose will be 10 years for all structures substantially completed prior to October 1, 2019. The district court's decision violated the rules of statutory

[8] *See also U.S. v. Duprey*, 895 F.2d 303 (7th Cir. 1989) (declining to retroactively apply statute with future effective date); *People v. Ramsey*, 192 Ill.2d 154, 183–84, 735 N.E.2d 533, 548 (2000) (collecting cases).

construction by rendering AB 421's retroactive provision meaningless from June 3, 2019, to October 1, 2019.

In addition, the clear policy and spirit of the retroactively lengthened statute of repose is to undo the impact of AB 125 and *permit* claimants to bring claims. In addition, because the Legislature expressed a clear intent to retroactively lengthen the statute of repose, the district court had no need to turn to default rules of statutory construction. Further, many courts have held that by establishing a future effective date, a legislature expresses an intent *against* the retroactive application of the statute. Thus, the district court's application of a future effective date to AB 421's retroactive mandate is internally inconsistent and creates the absurd result of time-barring the Association's claims even after enactment of a retroactively lengthened statute of repose. The district court's decision to delay giving effect to the retroactive provision violates the cannons of statutory construction and the clear legislative intent.

II. The Association Timely Filed its Counterclaim Before AB 421 Lengthened the Applicable Statute of Repose.[9]

Even if AB 421 had not lengthened the statute of repose, the Association asserted its counterclaim before the NRS 40.695(1) tolling period expired. NRCP 13 required the Association to assert its constructional-defect claims as counterclaims

[9] **Standard of Review:** This Court reviews an order granting summary judgment *de novo*. *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

against the Builders because they arise out of the same transaction or occurrence as the Builders' claims. Because compulsory counterclaims relate back to the date of the complaint, the Association brought its constructional-defect claims within 30 days of the parties' mandatory prelitigation mediation as required by NRS 40.695(1)(b).

A. NRS 40.695(1) Tolled the Prior Statute of Repose Until at Least 30 Days After the Parties' Prelitigation Mediation.

Nevada law tolls the statute of repose from the time a claimant provides a notice of constructional defects until the earlier of one year from the date of the notice or 30 days after the mandatory prelitigation mediation. *See* NEV. REV. STAT. § 40.695(1). Here, the district court first determined the Association served its Notice before the statute of repose expired because it was served within the one-year grace period provided by AB 125. 16 AA2388 at 12:8–12. Therefore, under NRS 40.695(1), the Association's Notice tolled the statute of repose until at least October 26, 2016, 30 days after the parties' mandatory prelitigation mediation. *Id*. at 12:18–19.

B. The Builders Filed Their Complaint—in Response to and Regarding the Association's Notice—During the NRS 40.695(1) Tolling Period.

On September 28, 2016, just two days after the mediation and well within the NRS 40.695(1) tolling period, the Builders filed their complaint against the

Association. The Builders' complaint relates to and involves nothing but the Association's Notice and the alleged defects. Specifically, the Builders' complaint:

(1) Repeatedly references and discussed the Association's Notice and the alleged defects, *see, e.g.*, 1 AA0052–0073 at ¶¶ 9–21, 28, 30–32, 34, 36–38, 44, 59–60;

(2) Describes the Builders' prelitigation inspection of the defects, written response denying all liability, and the parties' prelitigation mediation, *id.* at ¶¶ 15–21;

(3) Discusses the Builders' views on the then-current statute of repose and grace period applicable to the Association's noticed claims, *id.* at ¶¶ 22–34;

(4) Describes the Builders' views on the statutory pre-suit notice requirements and whether the Notice met those requirements, *id.* at ¶¶ 35–38;

(5) Describes the Builders' views on whether the Association has standing to assert the defects identified in the Notice, *id.* at ¶¶ 39–44;

(6) Describes the Builders' views on the prior litigation and release that allegedly bars the Association from asserting the defects contained in the Notice, *id.* at ¶¶ 45–60;

(7) Asserts claims for declaratory relief challenging the Association's ability to pursue the defects identified in the Notice, *id.* at ¶¶ 61–90; and

(8) Asserts contract-based claims related to the prior settlement agreement and seeks declaratory relief related to certain provisions of that agreement. *Id.* at ¶¶ 94–114.

Based on these allegations and claims, the strong, direct connection between the Association's Notice and the Builders' allegations and claims is clear. In reality, many of the Builders' claims are simply reframed versions of affirmative defenses

that contractors typically assert in constructional defect cases. 24 AA004107 at 4:11–16.

C. The Association Timely Filed its Constructional Defect Counterclaim in Response to the Builders' Complaint.

On March 1, 2017, consistent with Rules 12 and 13, the Association timely filed its answer and asserted a counterclaim against the Builders related to the constructional defects identified in the Notice. The Association's counterclaim raises the same issues identified in the Builders' complaint, including:

(1) The Association's prior lawsuit and release that does *not* extend to unknown defects, *compare* 1 AA0057 at ¶ 28 *with* 1 AA0060–0062 at ¶¶ 45–60;

(2) The Association's Notice and detailed descriptions of the defects, *compare* 1 AA0282–0284, at ¶¶ 29, 32 *with* 1 AA0054–0062 at ¶¶ 9–21, 28, 30–32, 34, 36–38, 44, 59–60;

(3) The parties' prelitigation mediation, *compare* 1 AA0284 at ¶ 33 *with* 1 AA0059–0060 at ¶¶ 39–44; and

(4) The Association's standing to assert claims for the defects, *compare* 1 AA0278 at ¶¶ 5–7 *with* 1 AA0057 at ¶ 21.

D. The Association's Counterclaim Overlaps with and Logically Relates to the Builders' Complaint.[10]

Under Rule 13(a), a party must assert a counterclaim "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."

[10] **Standard of Review:** This Court reviews the interpretation and application of the Nevada Rules of Civil Procedure, like other statutes, *de novo*. *Webb, ex rel. Webb v. Clark County Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009).

NEV. R. CIV. P. 13(a). When considering whether a claim arises out of the same "transaction or occurrence" that is the subject matter of a suit, "the Nevada Supreme Court has indicated that the phrase 'transaction or occurrence' in ***Rule 13 should be interpreted broadly.***" *Cutts v. Richland Holdings, Inc.*, 953 F.3d 554, 558 (9th Cir. 2019) (citing *MacDonald v. Krause*, 77 Nev. 312, 362 P.2d 724, 729 (1961)) (emphasis added). "The purpose of NRCP 13(a) is to make an 'actor' of the defendant so that circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action." *Great W. Land & Cattle Corp. v. Sixth Judicial Dist. Ct.*, 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970). "[T]he words [of the rule] are general to the last degree" so as to require parties to litigate their differences in one lawsuit, thus avoiding a multiplicity of actions. *MacDonald*, 77 Nev. at 320–321, 362 P.2d at 729.

This Court has provided further guidance and held that claims "arise[ ] out of the same transaction or occurrence" if "the pertinent facts of the different claims are so logically related that issues of judicial economy and fairness mandate that all issues be tried in one suit." *Mendenhall v. Tassinari*, 133 Nev. 614, 620–22, 403 P.3d 364, 370–71 (2017) (citing *United States v. Aquavella,* 615 F.2d 12, 22 (2d Cir. 1979)). Federal courts follow the logical relationship test when applying Rule 13 and

their decisions provide additional guidance.[11] In construing the meaning of "transaction or occurrence" under Rule 13(a), "'***[t]ransaction' is a word of flexible meaning.*** It may comprehend ***a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.***" *Waterfall Homeowners Ass'n v. Viega, Inc.*, 279 F.R.D. 586, 589 (D. Nev. 2012) (citing *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S.Ct. 367, 371, 70 L.Ed. 750 (1926)) (emphasis added). Consequently, "all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." *Id*. (citing 7 C. Wright, Federal Practice and Procedure § 1653 at 270 (1972)).[12]

[11] NRCP 13 and FRCP 13 contain the same "transaction or occurrence" language, and this Court has stated that "[f]ederal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority because the Nevada Rules of Civil Procedure are based on large part upon their federal counterparts." *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872, 876 (2002).

[12] *See also Mattel, Inc v. MGA Ent., Inc.*, 705 F.3d 1108, 1110 (9th Cir. 2013) (holding logical relationship exists "when the counterclaim arises from the same aggregate core of facts as the initial claim, in that the same operative facts serve as the basis of both claims ***or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.***" (emphasis added)); *Critical–Vac Filtration Corp. v. Minuteman Int'l, Inc.,* 233 F.3d 697, 699 (2d Cir. 2000); *Liberty Dialysis-Hawaii LLC v. Kaiser Found. Health Plan, Inc.*, 2018 WL 1801794, at *7 (D. Haw. Apr. 16, 2018) (discussing "the liberal 'logical relationship' test" and citing *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987)); *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 701 F.Supp.2d 568, 588–89 (S.D.N.Y. 2010).

Here, the district court misconstrued and misapplied the logical relationship test by taking a rigid, literal approach and focusing more on the parties' causes of action than the pertinent facts and series of events leading to the Builders' complaint. 16 AA2389 at ¶ 16. In effect, the district court looked for an identity of factual backgrounds and ignored the obvious logical relationship between the Builders' complaint and the Association's counterclaim. A strong logical relationship exists because the Builders' claims and the Association's counterclaim involve the following identical factual and/or legal determinations:

(1) Whether the Association has standing under NRS 116.3102(1)(d) and its CC&Rs to pursue claims for the defects identified in the Notice;

(2) Whether the Association complied with the notice requirements of NRS 40.645(2) and all other prelitigation requirements under NRS 40.600, *et seq.*;

(3) Whether the Association initially served the Notice before the expiration of the applicable statute of repose and grace period; and

(4) Whether the prior release bars the Association's claims for any of the four defects identified in the Notice, which requires a factual investigation of these four defects.

See supra, Argument II.B–C. Based upon these facts, the district court erred in determining that no logical relationship exists between the Builders' claims and the Association's counterclaim.

The district court's finding of no logical relationship also violates Rule 13(a)'s purpose of settling all controversies between the parties in a single action to ensure

judicial economy and fairness. Under Rule 13(a), the Association and the Builders should resolve, in a single action, all of their disputes related to the Notice, the new constructional defects, and the scope of the prior release. Any other result would waste scarce judicial resources and risk inconsistent rulings. For example, if the Association had filed a separate action, the two different courts could have reached contradictory results on any of the issues raised by both actions, including (1) whether the Association's Notice met the NRS 40.645(2) requirements, (2) whether the Association timely filed its claims, including the application of AB 125's grace period (initially) and AB 421 (now), (3) the Association's standing to sue for the new constructional defects, and (4) whether the prior release precludes the Association from asserting the new constructional defects. Readily apparent considerations of judicial economy and fairness mandate that a single court preside over the Builders' complaint and the Association's counterclaim to ensure consistent results on these important issues.

Further, the Builders removed all doubt on this issue by admitting in their complaint that the parties' respective claims arose out of the same transaction or occurrence. Specifically, the Builders allege in their first claim for relief that, ***because the Association "intends to file a Complaint against the [Builders]*** for the construction defects identified in [the Association's] Chapter 40 Notice," a justiciable controversy exists between the parties "as to their respective rights and

liabilities relating to [the Association's] Chapter 40 Notice and the defects alleged therein[.]" 1 AA0063 at ¶¶ 62, 64 (emphasis added). The Builders then admit the logical relationship between their claims and the Association's constructional-defect claims: "***All the rights and obligations of the parties*** hereto ***arose out of what is actually one transaction or one series of transactions, happenings or events***, all of which can be settled and determined in a judgment ***in this one action.***" *Id*. at (¶ 68) (emphasis added). The Builders incorporated all of these allegations into every other cause of action. 1 AA0064–0069 at ¶¶ 71, 81, 91, 94, 99, 107. The law precludes the Builders from contradicting this clear, deliberate judicial admission that all rights of the parties arose out of the same transaction or series of transactions,[13] yet the Builders argued against their admission and the district court inexplicably permitted and accepted the Builders' contradictory position. 15 AA2259–2264 (Builders' brief), 16 AA2389 (Order, ¶ 17).

[13] *See Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 631–32, 572 P.2d 921, 924 (1977) (noting Rule 36 admission comparable to "admission in pleadings . . . and therefore is not rebuttable by contradictory testimony of the admitting party."); *United States v. Davis,* 332 F.3d 1163, 1168 (9th Cir. 2003) (stating judicial admissions "are binding on both the parties and the court"). Courts apply this concept in the context of motions for summary judgment. *See, e.g., Rodarte v. Alameda Cty.*, 2015 WL 5655403, *5 (N.D. Cal. Sept. 24, 2015); *S.E.C. v. Schooler*, 2015 WL 3491903, *2 (S.D. Cal. June 3, 2015).

E. The Association's Compulsory Counterclaim Relates Back to the Date of the Builders' Complaint.

While this Court has not squarely addressed the question, under the identical federal rule, compulsory counterclaims relate back to the filing of the original complaint. In other words, a plaintiff's institution of a suit tolls or suspends the running of the limitations period(s) for any compulsory counterclaims. *See Religious Technology Center v. Scott*, 82 F.3d 423 (9th Cir. 1996)) (holding "a compulsory counterclaim relates back to the filing of the original complaint"); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380 (4th Cir. 2000) (holding "the filing of an action tolls the limitations period for a compulsory counterclaim"); 6 Wright, Miller & Kane, Federal Practice and Procedure (3d Ed. 1995) §1419.[14]

Rather than follow the overwhelming authority in support of the relation back of compulsory counterclaims, the district court ruled that the Association's counterclaim would not relate back even if they were compulsory. 16 AA2390 at ¶ 18. To support this result, the district court relied on *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801 P.2d 1377 (1990), a distinguishable case

[14] *See also Banco Para El Comercio,* 744 F.2d 237, 243 (2d Cir. 1984); *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 2019 WL 177467, at *3 (D. Nev. Jan. 10, 2019); *Rubin v. Valicenti Advisory Services, Inc.*, 471 F.Supp.2d 329, 338 (W.D.N.Y. 2007); *Yates v. Washoe County School Dist.*, 2007 WL 3256576, at *2 (D. Nev. Oct. 13, 2007); *Perfect Plastics Industries, Inc. v. Cars & Concepts, Inc.*, 758 F.Supp. 1080, 1082 (W.D. Pa. 1991).

involving Rule 13(a) and relation back in the context of a 90-day statute of limitation for deficiency judgments. *Id*.

The *Jamison* court declined to allow compulsory counterclaims to relate back to the complaint because "it is questionable whether stale claims and lost evidence represent the paramount concern addressed by a three month statute of limitation. Since the statute also addresses viable concerns other than stale evidence, it should be enforced." *Jamison*, 106 Nev. at 798, 801 P.2d at 1381–82. In other words, the *Jamison* court acknowledged that preventing stale claims and lost evidence are two of the primary concerns in enacting most statutes of limitation and repose. The *Jamison* court also noted that ***a party who files an affirmative action cannot claim surprise or prejudice*** when the opposing party files a compulsory counterclaim arising from the same transaction or occurrence. *Id.* (quoting *Allie v. Ionata*, 503 So.2d 1237, 1240 (Fla. 1987)).

The district court erred by applying the factually distinct and qualified *Jamison* decision (which was based on a 90-day statute of limitation) to this action (which involves a six-year statute of repose and an additional one-year grace period). While *Jamison*'s 90-day limitation clearly signals legislative considerations beyond stale claims and lost evidence, the *Jamison* court acknowledged those issues are the primary reasons behind the repose period at issue here. The district court's extension of *Jamison* as a blanket rule against the relation back and tolling of compulsory

counterclaims for lengthier statutes of limitation or repose such as NRS 11.202 frustrates Rule 13(a)'s purpose of promoting judicial efficiency and fairness by having related disputes litigated together.[15] Therefore, the Association respectfully urges this Court to follow the great weight of authority and hold that the Builders' complaint tolled the time for the Association to file its compulsory counterclaim related to the constructional defects identified in the Notice.

III. The Association Demonstrated Good Cause to Extend Tolling of the Statute of Repose Under NRS 40.695(2).[16]

Even if AB 421 did not extend the applicable statute of repose and the Association's counterclaim did not relate back to the date of the Builders' complaint, the Builders' Repose Motion should nonetheless have been denied and the Association's countermotion granted because the Association demonstrated good cause to extend the NRS 40.695(1) tolling period. When considering good cause, the district court's misinterpretation and misapplication of NRS 40.695(2) resulted in it

[15] Litigants could abuse such a blanket rule. For example, a party could file an action on the last day of the limitations period and thereby time-bar its opponent from filing compulsory counterclaims that the opponent would have otherwise foregone had suit not been filed against it. A general rule against the relation back of compulsory counterclaims would violate basic fairness considerations and the mandates of NRCP 1 to construe the rules in such a way to promote and accomplish justice.

[16] **Standard of Review:** This Court reviews a good-cause determination for abuse of discretion. *See*, *e.g.*, *Scrimer v. Dist. Ct.*, 116 Nev. 507, 513, 998 P.2d 1190 (2000). However, the determination of what to consider under NRS 40.695(2) presents a question of statutory interpretation and is reviewed *de novo*. *D.R. Horton, Inc. v. Eighth Judicial District Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009).

using an incorrect analytical framework and expressly ignoring the lack of prejudice to the Builders from extending the tolling period. Further, the district court abused its discretion under NRS 40.695(2) by failing—in violation of Nevada's public policy—to exercise its discretion to permit, whenever possible, claims to proceed on the merits. Finally, the district court should have followed—and this Court should adopt—the good-cause factors from *Scrimer v. Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190 (2000), for courts considering whether to extend the tolling period pursuant to NRS 40.695(2).

A. Courts May Extend the NRS 40.695(1) Tolling Period When Good Cause Exists.

Under NRS 40.695(1), a claimant's service of a notice of defects pursuant to NRS 40.645(2) tolls all statutes of limitation and repose for all claims related to the notice. This tolling continues for either one year or until 30 days after the parties' prelitigation mediation. NEV. REV. STAT. § 40.695(1). Nevada law allows courts, upon a showing of good cause, to extend the tolling period. Specifically, NRS 40.695(2) provides:

> *Statutes of limitation and repose may be tolled under this section* for a period longer than 1 year after notice of the claim is given only if, in an action for a constructional defect *brought by a claimant after* the applicable statute of limitation or repose *has expired*, *the claimant demonstrates to the satisfaction of the court that good cause exists to toll the statutes of limitation and repose under this section for a longer period*.

NEV. REV. STAT. § 40.695(2) (emphasis added). The statute expressly contemplates an already-expired statute of repose (allowing extension "only if, in an action . . . brought by a claimant after the [statute] has expired"). Neither the statute nor its enacting legislation—AB 125—identify what facts or circumstances courts should consider when determining whether good cause exists to extend the automatic tolling period.

B. The Association Demonstrated Good Cause to Extend the NRS 40.695(1) Tolling Period.

All of the relevant facts and circumstances presented below, had the district court considered them, constitute good cause to briefly extend the NRS 40.695(1) tolling period in order to allow the Association's timely noticed claims to be resolved on the merits. The Association provided its Notice to the Builders before the one-year grace period expired, diligently complied with all other prelitigation obligations under NRS 40.600, *et seq.* (*e.g.*, accommodated the Builders' request to inspect the constructional defects pursuant to NRS 40.647 and participated in prelitigation mediation pursuant to NRS 40.680), and timely responded to the Builders' complaint. In other words, the Association initially behaved as any other diligent NRS Chapter 40 claimant and then, after the Builders' filed suit, behaved as any other diligent defendant in any other action.

The Association made substantial efforts after sending the Notice, yet the district court effectively ignored the following facts when conducting its NRS 40.695(2) good-cause analysis.

Date	Event
Feb. 24, 2016	Association served Builders with Notice
Mar. 23, 2016	Association received letter from Builders
Mar. 23, 2016	Parties coordinated prelitigation inspections
Mar. 24, 2016	Association sent Builders certain window pictures
Mar. 24, 2016	Builders inspected Towers
Mar. 29, 2016	Parties corresponded about window testing
Apr. 29, 2016	Association received letter from Builders
May 24, 2016	Builders responded to Association's Notice
June 9–16, 2016	Parties corresponded to coordinate prelitigation mediation
June 30, 2016	Parties corresponded about contractors that received Notice
June 30, 2016	Association submitted its confidential mediation brief
Aug. 5–11, 2016	Parties corresponded to schedule prelitigation mediation
Sept. 26, 2016	Parties held mandatory mediation, ending without resolution
Sept. 28, 2016	Builders served tender of defense and indemnity on Association
Sept. 28, 2016	Builders filed suit against Association
Oct. 2016	Builders granted Association extension to respond to complaint
Nov. 28, 2016	Association responded to Builders' tender of defense and indemnity
Dec. 7, 2016	Association timely moved to dismiss Builders' complaint
Dec. 20, 2016	Hearing on Association's motion to dismiss continued from January 10, 2017, to January 24, 2017
Jan. 4, 2017	Builders opposed Association's motion to dismiss
Jan. 10, 2017	Parties stipulated to appoint special master
Jan. 17, 2017	Association filed reply in support of motion to dismiss
Jan. 24, 2017	Court heard Association's motion to dismiss

Date	Event
Feb. 9, 2017	Court entered order denying Association's motion to dismiss
Mar. 1, 2017	Association timely filed answer and compulsory counterclaim

24 AA4109–10 at 6:8–7:4. The district court disregarded all this information because it limited NRS 40.695(2)'s good-cause test to require the Association to demonstrate it *could not* have filed the counterclaim by October 26, 2016—a limitation not found in the statute. 16 AA2410–11 at ¶ 15; *see infra*, Argument III.C.

Under these circumstances, the Builders did not—and could not—claim *any* prejudice from the Association filing its counterclaim on March 1, 2017. 22 AA3756 at 23:26–27. The Builders were on notice of the Association's forthcoming claims long before the NRS 40.695(1) tolling period expired, inspected the Towers, denied all liability for the new defects, mediated with the Association, and then sued the Association to challenge the Notice and other aspects of the Association's ability to bring a lawsuit. Further, the Builders admitted that they ***intentionally waited nearly 30 months*** to raise their statute-of-repose defense with the district court. 22 AA3672 at 9:19–25. The Builders' strategic decision forced the Association to spend significant time and expense to litigate this action for three years when the Builders could have raised the repose issue at the outset. Under these circumstances, good cause existed to briefly extend the NRS 40.695(1) tolling period from October 26, 2016, to March 1, 2017, in order to allow the Association's timely noticed constructional-defect claims to proceed on the merits.

C. The District Court Impermissibly Limited NRS 40.695(2) to a Good-Cause Requirement Not Found in the Statute.

When a claimant files an action after expiration of the statute of repose, NRS 40.695(2) authorizes courts to extend the tolling period if "good cause exists" to do so. Based on this clear directive, the Association pointed out myriad reasons to extend the tolling period to *just five (5) days* more than one year, including the Association's diligence and the lack of any prejudice to the Builders. *See supra*, Argument III.B. The Builders urged the district court to limit the good-cause analysis to whether the Association showed good cause for not filing its counterclaim sooner. 15 AA2265 at 27:24–26) (arguing "the focus of the good cause analysis is *solely* on the Association and the basis for which it filed its claim late. The prejudice to the Builders is irrelevant for demonstrating good cause to extend tolling pursuant to NRS 40.695(2)[.]").

Even though the statute contemplates an action filed after the repose period expires, the district court adopted the Builders' argument and disregarded all facts and circumstances other than whether the Association could have filed its counterclaim sooner. The district court held as follows:

> The Association does not show this Court good cause exists ***for its failure to institute litigation before October 26, 2016***. *Whether the Builders' ability to defend the Association's claim is not adversely affected is, therefore,* ***not relevant*** *to the issue of good cause.* Accordingly, this Court declines tolling the statute of repose for a period longer than one (1) year after the NRS 40.645 notice was made.

16 AA2391 at 15:12–17) (emphasis added). The district court's ruling misinterpreted the statute, which this Court reviews *de novo*, by considering only the Association's filing date and expressly deeming the most critical fact—a lack of any prejudice to the Builders—to be irrelevant.

As the Association argued below, the language and purpose of NRS 40.695(2) mirrors the language and purpose of Rule 4(e)(3) (formerly Rule 4(i)). 16 AA2453–54 at 10:18–11:9. Specifically, both the statute and the rule permit courts to extend initial filing and service deadlines when a party shows that "good cause exists" to do so. *Compare* NEV. REV. STAT. § 40.695(2) *with* NEV. R. CIV. P. 4(e)(3). Further, the statute and the rule share the same general purpose of requiring the timely prosecution of claims.[17] The Supreme Court of the United States has held that "statutes containing similar language and having a similar underlying purpose should be interpreted consistently." *U.S. v. Hynes*, 467 F.3d 951, 967 (6th Cir. 2006) (citing *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428, 93 S.Ct.

[17] Rule 4(e)(1)'s 120-day service deadline and Rule 4(e)(3)'s authority to extend that deadline have the effect of extending the time when a defendant receives notice of a claim beyond the applicable statutes of limitation or repose. Despite the legitimate concerns against stale claims and lost evidence, the law permits this delay. Here, the Builders received notice of the Association's claims more than 360 days *before* the Association filed its counterclaim and more than 240 days *before* the NRS 40.695(1) automatic tolling period ended. Based on the Builders' receipt of pre-suit notice, the concerns about stale claims and lost evidence should not factor into the NRS 40.695(2) good-cause analysis.

2201, 37 L.Ed.2d 48 (1973) (per curiam)).[18] Similarly, this Court "presumes that the Legislature, when enacting statutes, is aware of other similar statutes." *Cable v. State*, 122 Nev. 120, 125, 127 P.3d 528, 531 (2006); *see City of Boulder City v. General Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985); *see also Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004) (holding reasonable to infer legislature aware of existing case law). Because the Nevada Legislature enacted NRS 40.695(2) in 2015, this Court may presume it was aware of what was at that time Rule 4(i) and existing case law interpreting that rule's good-cause requirement.

Despite the similarities between NRS 40.695(2) and Rule 4(e)(3) and the relevant rules of statutory construction, the district court interpreted and applied NRS 40.695(2) more like Rule 4(e)(4) by requiring the Association to first show good cause for the *timing* of its filing before considering whether good cause exists to extend the tolling period. The district court erred. Rule 4(e)(4) provides in pertinent part:

> If a plaintiff files a motion for an extension of time after the 120-day service period—or any extension thereof—expires, *the court must first determine whether good cause exists for the plaintiff's failure to timely file the motion for an extension before the court considers whether good cause exists for granting an extension of the service period.*

[18] *See also Slep-Tone Entertainment Corp. v. Karaoke Kandy Story, Inc.*, 782 F.3d 313 (6th Cir. 2015) (citing *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2, 109 S.Ct. 2732, (1989)); *U.S. v. Ajoku*, 718 F.3d 882, 889–90 (9th Cir. 2013) ("Where two statutes use similar language and were enacted for the same purpose, it is appropriate to interpret the language of the statutes pari passu.") (citing *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. at 428)).

NEV. R. CIV. P. 4(e)(4) (emphasis added). In other words, such a plaintiff must make two good-cause showings—one for the timing of its filing and, if successful, another for the extension. The district court's order that "[t]he Association does not show this Court good cause exists *for its failure to institute litigation before October 26, 2016*" impermissibly adds a second good-cause requirement—similar to Rule 4(e)(4)—that does not exist in NRS 40.695(2). The district court erred as a matter of law by failing to interpret NRS 40.695(2) consistent with the single good-cause requirement of Rule 4(e)(3) where the statute and the rule share identical good-cause language and a similar practical purpose.

While the district court had discretion to conduct the good-cause analysis, its discretion did not permit it to limit or rewrite NRS 40.695(2) and ignore plainly relevant information, including but not limited to the lack of *any* prejudice to the Builders.[19] The language of NRS 40.695(2), whether "good cause exists", did not allow the district court to (a) add a second good-cause showing to the statute or (b) based on that impermissible rewriting of the statute, disregard all other facts and circumstances bearing on whether good cause exists to extend the NRS 40.695(1)

[19] *We People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170–71 (2008) ("Unless ambiguous, a statute's language is *applied in accordance with its plain meaning*. When the Legislature's intent is clear from the plain language, this court will give effect to such intention and *construe the statute's language to effectuate rather than nullify its manifest purpose.*") (emphasis added).

tolling period, including the Association's diligence and the lack of any prejudice to the Builders. *See supra*, Argument III.B.

D. The District Court Abused its Discretion in Finding a Lack of Good Cause to Extend the NRS 40.695(1) Tolling Period.

The district court's misinterpretation and misapplication of NRS 40.695(2)'s good-cause requirement caused it to abuse its discretion in finding a lack of good cause. In addition to these errors of statutory interpretation and application, the district court abused its discretion in declining to find good cause where the Association (a) provided a timely Notice to Builders,[20] (b) actively participated and cooperated in all aspects of the prelitigation process, (c) timely moved to dismiss the Builders' complaint, and (d) timely asserted its counterclaim based on the constructional defects described in the Notice consistent with Rules 12 and 13. *See supra*, Argument III.B. Even under the district court's modified NRS 40.695(2) good-cause analysis, these circumstances constitute good cause for the Association's "failure to institute litigation before October 26, 2016." 16 AA2391 at ¶19.

The district court further abused its discretion by failing to find good cause where ***the Builders did not claim or suffer any prejudice*** from the timing of the

[20] This Court has held the purpose of the NRS 40.645(2) pre-suit notice requirement is to put the contractors on notice of the potential claims against them so they can make the "business decision to inspect or repair" during the prelitigation process or contest and litigate the claims. *D.R. Horton, Inc. v. Dist. Ct.*, 123 Nev. 468, 481, 168 P.3d 731, 741 (2007). The Builders made their "business decision" and the Association should be allowed to proceed with its claims.

Association's counterclaim because they (a) received the Notice with extensive details of the potentially forthcoming claims before expiration of the statute of repose, (b) inspected the Towers' alleged defects, (c) participated in prelitigation settlement discussions with the Association, and (d) filed a detailed complaint against the Association to, among other things, challenge the Notice, the timeliness of the Notice, and the Association's standing to sue for the new defects identified in the Notice. *See supra*, Argument III.B.

By ignoring all of this information in its NRS 40.695(2) good-cause analysis, the district court failed to follow this Court's "proper guide to the exercise of discretion," which is Nevada's strong public policy in favor of resolving claims on their merits. *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 154, 380 P.2d 293, 295 (1963) (providing "as a proper guide to the exercise of discretion, the basic underlying policy to have each case decided upon its merits. In the normal course of events, justice is best served by such a policy."); *see also Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (holding "the policy favoring adjudication on the merits" is a factor in determining whether dismissal with prejudice is warranted). This Court has repeatedly conveyed Nevada's strong and "sound public policy of resolving cases on the merits ***whenever possible.***" *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 309 (1993) (emphasis added), *holding modified on other grounds by Willard v. Berry-*

Hinckley Industries, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020). Here, Nevada's strong public policy required the district court to exercise its discretion in such a way to permit the Association's claims to be heard and resolved on the merits because, under NRS 40.695(2), that important result was entirely possible.

Further, the district court's ruling implies a view that the Association should have filed its constructional-defect claims in a separate action on or before October 26, 2016, despite the existence of the Builders' complaint. The district court's decision on this issue involves two flaws. First, had the Association filed a separate suit, the Builders could, and almost certainly would, have sought to dismiss the Association's defect claims because Rule 13 required those claims to be plead in response to the Builders' complaint. *See supra*, Argument II.D. At the time, this was a serious risk and the Association could not have anticipated the district court would take the positions it did regarding Rule 13 and the parties' competing claims. The Association should not be barred from the courthouse for attempting to comply with Rule 13 and the public policy against the proliferation of related litigation.

Second, filing a separate action would waste scarce judicial resources by requiring a second court to preside over the Association's claims at least until the Association filed its answer to the Builders' complaint.[21] Thus, two different courts

[21] Pursuant to the applicable local rules, a motion to consolidate two related actions "would be prematurely brought if done in advance of filing an answer." EDCR 2.50(a)(1).

would have needed to consider and resolve motions to dismiss. Thereafter, one or both parties would have likely sought to consolidate the two related actions to avoid prejudice from inconsistent rulings. *See supra*, Argument II.D. This would have served no necessary purpose, wasted judicial time and resources, and violated the mandate of Rule 1 to construe, administer, and employ the Nevada Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action and proceeding." NEV. R. CIV. P. 1.

E. The District Court Should Have Utilized the Scrimer *Court's Analogous Good-Cause Framework in Conducting its NRS 40.695(2) Good-Cause Analysis.*

As the Association argued below, NRS 40.695(2)'s good-cause language and purpose mirror the language and purpose of Rule 4(e)(3). *See supra*, Argument III.C. Although this Court has not previously considered what factors courts should use when conducting the NRS 40.695(2) good-cause analysis, it has strongly endorsed a flexible and forgiving good-cause analysis under the analogous provision of Rule 4(e)(3) for extending the time to effectuate service of process. *Scrimer v. Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190 (2000). When considering whether good cause exists to grant additional time to complete service of process, "the district court should recognize that '***good public policy dictates that cases be adjudicated on their merits***.'" *Id.* at 516–17 (quoting *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)) (emphasis added). The *Scrimer* court expressly "disavow[ed] and

overrule[d]" its prior decisions endorsing "an inflexible approach" to the Rule 4 good-cause analysis. *Id.* at 517.

In mandating a more flexible approach to good-cause determinations, the *Scrimer* court listed the relevant factors, none of which individually controls the outcome:

> (1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120–day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, (4) difficulties encountered by counsel, (5) ***the running of the applicable statute of limitations***, (6) ***the parties' good faith attempts to settle the litigation during the 120–day period***, (7) the ***lapse of time*** between the end of the 120–day period and the actual service of process on the defendant, (8) ***the prejudice to the defendant caused by the plaintiff's delay*** in serving process, (9) ***the defendant's knowledge of the existence of the lawsuit***, and (10) any extensions of time for service granted by the district court.

Id. at 516 (emphasis added). ***The prejudice to a defendant has always been a significant factor in the good-cause analysis.*** *See id.* at 513 (discussing lack of prejudice in *Domino v. Gaughan*, 103 Nev. 582, 747 P.2d 236 (1987)), 514 (discussing existence of prejudice in *Dallman v. Merrell*, 106 Nev. 929, 803 P.2d 232 (1990)).

Here, despite their identical language and similar purposes, the district court declined to accept the Association's request to apply the *Scrimer* good-cause framework to its good-cause analysis under NRS 40.695(2). 14 AA2212–13 at 14:3 –15:3, 16 AA2391 at ¶19, 16 AA2453–54 at 10:18–11:12. The district court

provided no reason for its rejection of the *Scrimer* factors. Because the policy considerations under NRS 40.695(2) are generally the same as those under Rule 4(e)(3)—timely notice of claims—the Association respectfully asks this Court to (1) formally adopt the relevant portions of the *Scrimer* good-cause framework for purposes of making a good-cause determination under NRS 40.695(2) (*i.e.*, factors five through nine), and (2) determine, based on the uncontroverted facts established below, that the Association has demonstrated good cause under all of the applicable *Scrimer* factors.[22]

Based on the uncontested facts, every relevant *Scrimer* factor weighs in favor of finding good cause to extend the NRS 40.695(1) tolling period and allowing the Association's claims to proceed on the merits:

- **Factor 5:** Absent tolling, the applicable statute of repose would run and time-bar the Association's claims that were timely conveyed to the Builders pursuant to NRS 40.645(2);

- **Factor 6:** The Association fully participated in the statutorily mandated pre-litigation process, including settlement discussions through a private mediator;

- **Factor 7:** After being sued by the Builders, the Association timely moved to dismiss the complaint and then timely filed is answer and counterclaim after its motion was denied; the lapse of time was non-existent;

[22] Alternatively, if this Court feels additional facts should be developed, the Association asks the Court to remand this case with instructions for the district court to apply the relevant *Scrimer* factors and give significant weight to the uncontested lack of prejudice to the Builders.

- **Factor 8:** The Builders made no showing of prejudice resulting from the Association filing its counterclaim on March 1, 2017, as there obviously was none; and

- **Factor 9:** The Builders, having initiated the lawsuit, were well aware of the Association's claims more than a year before the Association filed its counterclaim, investigated the Association's claims during the prelitigation proceeding, denied all liability, and then identified the Association's claims in their complaint.

14 AA2212–13 at 14:3–15:3, 16 AA2453–54 at 10:18–11:12, 24 AA4108–11 at 5:28–8:1.

The *Scrimer* court's inclusion of prejudice as a significant factor in the good-cause analysis is consistent with and likely required by Rule 61, which mandates that a party's technical errors be ignored absent prejudice to the opposing party. Specifically, "[a]t *every stage* of the proceeding, the court *must disregard* all errors and defects *that do not affect any party's substantial rights.*" NEV. R. CIV. P. 61 (emphasis added). While this Court often invokes Rule 61's mandate when considering whether to order a new trial,[23] the mandate applies equally to "every stage" of a proceeding. The district court's refusal to even *consider* the obvious lack of prejudice to the Builders violated Rule 61's mandate and Nevada's strong public policy in favor of adjudicating claims on their merits.

[23] *See, e.g., Phenix v. State*, 114 Nev. 116, 119, 954 P .2d 739, 740 (1998); *Tungsten Corp. v. Corporation Serv., Inc*., 76 Nev. 329, 331–332, 353 P.2d 452, 454 (1960).

Because the Association diligently and consistently pursued its claims from February 24, 2016, when it served the Notice, to the present time, and considering the lack of prejudice to the Builders, this Court should extend the NRS 40.695(1) tolling period to allow the Association's claims to be resolved on the merits rather than summarily rejected based on a harmless procedural hyper-technicality.

CONCLUSION

The district court's judgment summarily dismissing the Association's counterclaim must be reversed for each of the three independent reasons addressed: (i) Nevada's adoption of a retroactively lengthened statute of repose, via AB 421, days after entry of the Repose Order rendered the Association's counterclaim timely; (ii) the Association timely filed its counterclaim before AB 421's enactment because it arose from the same transaction or occurrence as the Builders' complaint and, therefore, related back to the date of the complaint; and (iii) even if the Association did not timely file its counterclaim before AB 421's enactment, it demonstrated good cause pursuant to NRS 40.695(2) to briefly extend the NRS 40.695(1) tolling period to the date of the counterclaim.

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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 of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Time New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(B)(i) and NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,812 words.

3. Finally, 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 an 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 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.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of September, 2020, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

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