Case No. 80615

In the Supreme Court of Nevada

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION,

Appellant,

vs.

LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN CONSTRUCTION, INC.,

Respondents.

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APPEAL

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

RESPONDENTS' ANSWERING 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 that the judges of this court may evaluate possible disqualification or recusal.

Respondent Laurent Hallier is an individual.

Respondents Panorama Towers I, LLC and Panorama Towers I Mezz, LLC are privately held limited liability companies. No publicly traded company owns more than 10% of their stock.

Respondent M.J. Dean Construction, Inc. is a corporation. No publicly traded company owns more than 10% of its stock.

Respondents have been represented by Peter C. Brown, Jeffrey W. Saab, and Devin R. Gifford of Bremer Whyte Brown & O'Meara LLP and Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP.

Dated this 12th day of March, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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ROUTING STATEMENT

Respondents Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc. (the "Builders") agree with appellant Panorama Towers Condominium Unit Owners' Association (the "Association") that the Supreme Court should retain this appeal. Although this Court's decision in *Byrne v. Sunridge Builders, Inc.*, 136 Nev., Adv. Op. 69, 475 P.3d 38 (2020) is conclusive, the Association asks this Court to retroactively apply a 2019 statutory amendment to the statute of repose for construction-defect claims in a way that would revive the Association's claims that had expired years earlier, as had already been confirmed in a final judgment by the district court. The district court correctly rejected that argument. But the Association's bid to now revoke a defendant's vested right of repose, without due process, should be resolved by this Court to provide guidance to the district courts.

STATEMENT OF THE ISSUES

1. Under *Byrne v. Sunridge Builders, Inc.*, 136 Nev., Adv. Op. 69, 475 P.3d 38, 42 (2020), did the statute of repose in NRS 11.202 expire before the Association commenced an action?

2. In 2015, the Legislature retroactively shortened the statute of repose but provided a one-year grace period within which to bring a claim. After the Association allowed the grace period to expire, the Association filed untimely counterclaims against the Builders. More than four years after the repose period ran, and more than three years after the expiry of the grace period, the Legislature later passed a statute extending the repose period with retroactive effect, but it became effective only after the entry of a final judgment against the Association. Are the Builders protected against being retroactively exposed to liability on extinguished construction-defect claims after the Builders' repose had become secure?

STATEMENT OF FACTS

This case began originally as a dispute regarding construction work performed on two residential towers by respondents ("the Builders") for appellant owners association ("the Association") more than a

decade ago.

January 16, 2008 – The work on the Association's Tower I project is substantially completed. [25 AA4393 (district court ruling not disputed)]

March 16, 2008 – The work on the Association's Tower II project is substantially completed. [*Id.*]

February 24, 2015 – AB 125, the 2015 amendment to the statutes of repose, takes effect. This codification establishes a six-year statute of repose applied retroactively to the completion of construction. Under this new statute, the repose period ran as to both towers as of March 16, 2014. The statute, however, creates a one-year grace period to commence an action that would be otherwise barred by the repose period's retrospective application. 2015 Statutes of Nevada; Nev. Laws, ch. 2, sec. 16.

February 24, 2016 – On the final day of the grace period to file a lawsuit, the Association serves the Builders with an NRS Chapter 40 notice of construction defects for both Tower I and Tower II but does not file a lawsuit. [1 AA1.]

September 26, 2016 – A mediation pursuant to NRS 40.680 is concluded without success. [Opening Br. 26]

September 28, 2016 – The Builders file suit against the Association. The Builders' complaint asserts that the Association's construction defect claims are barred because the February 24, 2016 notice was ineffective. [1 AA67]

March 20, 2017 – More than a year after the expiration of the grace period, the Association files counterclaims based on defects identified in its February 24, 2016 notice. [2 AA263]

August 13, 2019 – The district court enters a final judgment with Rule 54(b) certification that dismisses the Association's counterclaims. [25 AA4393]

September 9, 2019 – The Association files a Rule 59(e) motion.

October 1, 2019 – AB 421, the 2019 amendment to the statute of repose, becomes effective. See NRS 218D.330(1). The bill extends the statute of repose from 6 to 10 years, still with retroactive effect. NRS 11.202. [2019 Nev. Laws, ch. 361, sec. 7]

January 14, 2020 – The district court denies the Rule 59(e) motion. [26 AA4526]

STANDARD OF REVIEW

Whether the Association's counterclaims are time-barred under *Byrne* because the statute of repose had run before the Association filed its counterclaims is a question of law that this court reviews *de novo*. *Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006) ("Because the interpretation of a statute is a question of law, the proper standard of review is de novo."); *cf. Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2014) ("[T]he application of the statute of limitations is a question of law that this court reviews de novo.").

The extent of AB 421's retroactive application, and whether it can constitutionally resurrect construction-defect claims after the statute of repose ran and the grace period expired, are also questions of law for this Court. *Sandpointe Apts. v. Eighth Judicial Dist. Court*, 129 Nev. 813, 820, 313 P.3d 849, 853 (2013).

Whether, regardless of the application of *Byrne* and the retroactivity of AB 421, the district court concluded correctly that the Association failed to show good cause for an extension of the grace period, is a question of fact for which a substantial evidence standard applies. *Keystone*

Realty v. Osterhus, 107 Nev. 173, 176, 807 P.2d 1385, 1387 (1991).

SUMMARY OF THE ARGUMENT

The Association's construction defect claims were subject to a six-year statute of repose that expired on March 18, 2014, with a grace period that, as applied here, ended on February 24, 2016. There is no dispute here that the Association failed to commence an action on those claims by that date. Consequently, the claims are time-barred. *Byrne*, 136 Nev., Adv. Op. 69, 475 P.3d at 42. For purposes of this appeal, that should end the inquiry.

The Association submitted its opening brief without the benefit of *Byrne*. Nevertheless, even before *Byrne* conclusively resolved the issue in this appeal, the Association's arguments were wrong on their own terms:

(i) The brief maintains (at 19) that, by enacting AB 421, the legislature amended the applicable statute of repose in a way that was retroactive, allowing the Association's extinguished counterclaims to be resurrected. That contention ignores that the Builders' repose had already become secure before the Association filed its counterclaims and that the

district court entered a final judgment *before* that legislation became effective; thus, when the district court entered final judgment, the court applied the law that existed at the time and did so correctly. That contention also ignores that when, as here, retroactive application would divest the Builders of a protectable right, AB 421 may not be applied that way without violating due process principles.

(ii) The brief maintains (at 28) that its untimely claims were compulsory counterclaims that related back to the filing of the Builders' complaint. *Byrne* makes that contention irrelevant because the Builders' complaint was filed more than seven months after the expiration of the grace period for filing a construction-defect action. Regardless, the Association's contention disregards that compulsory counterclaims do not relate back, but even if they do, the contract on which the Association bases its counterclaims is not the subject of any claim asserted in the Builders' complaint, which means that the counterclaims are, at best, permissive and not compulsory. And permissive counterclaims do not relate

back.

(iii) The brief maintains (at 36) that the district court should have recognized a good cause extension of the tolling period. That contention ignores two points: first, the fact that tolling under NRS 40.695(1) is permitted only where the statute of repose has not already expired, which, confirmed by this court's decision in *Byrne,* it has here; and second, that the "primary focus" of a good-cause inquiry is the claimant's explanation for "not complying with the time limit in the first place." *MCI Telecomm. Corp., v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995) (cited with approval in *Nunnery v. State*, 127 Nev. 749, 765-66, 263 P.3d 235, 247 (2011)). Neither the opening brief, nor anything submitted to the district court for that matter, amounts to a reasonable excuse for the Association's failure to commence an action on its claims before they became time-barred.

ARGUMENT

I.

THE COUNTERCLAIMS ARE TIME-BARRED

The Association may resurrect its expired counterclaims only if this court overrules *Byrne*, treats the district court's final judgment as something other than final, *and* ignores that the running of a statute of repose creates a protected vested right. This Court should not do that. It should apply *Byrne* and ordinary due process principles that protect defendants who have a vested right of repose.

A. *Byrne* is Dispositive

When the Legislature enacted AB 125 in 2015, the statute of repose applicable to the Association's construction defect claims was reduced to six years, and the Legislature expressly directed to have the time period apply retroactively. Without the grace period, the Association's claims would have been time-barred on the day the statute became effective, because more than six years had passed since the Builders' work was substantially completed in 2008.

To protect claimants like the Association from that result, the Legislature created a one-year grace period, which allowed an action on

otherwise time-barred claims to be commenced not later than one year after the statute's effective date, or February 24, 2016. As this Court explained, the grace period was just a mechanism "by which a claimant could have saved his or her claim from being suddenly time-barred due to the shortened, retroactive statute of repose." 136 Nev., Adv. Op. 69, 475 P.3d at 42. But

> the grace period itself did not constitute a new statute of repose subject to tolling. Rather, the grace period was a distinct mechanism established by the Legislature, by which a claimant could have saved his or her claim from being suddenly time-barred due to the shortened, retroactive statute of repose. In order to salvage a claim under the grace period, a claimant had to commence an action.

Id.

That deadline passed, however, without the Association's filing a lawsuit. Instead, like the plaintiffs in *Byrne*, on the last day of the grace period, the Association merely served the Builders with a notice of defects as provided by NRS 40.695(1). As *Byrne* recognizes, service of that notice does not toll the statute of repose. Given the plain language of AB 125, a claimant, like the Association here, is required to "file[] a lawsuit within the grace period, not merely serve[] an NRS Chapter 40 Notice[,] to preserve [the claimant's] action." 475 P.3d at 42.

Because the Association filed no lawsuit before the grace period expired on February 24, 2016, the Association's later-filed construction defect claims, like the claim in *Byrne*, were untimely. The Builders' repose from liability on construction-defect claims guaranteed under the new statute became secure. Since the Association's claims were already time-barred at the time it served its notice, no tolling was permitted, and therefore any analysis of "good cause" to extend the tolling period is superfluous:

> [B]y the time [the Association] served an NRS Chapter 40 Notice in [February 2016], the statute of repose had already expired. In other words, in [February 2016], there was no statute of repose left to toll. Furthermore, the grace period itself did not constitute a new statute of repose subject to tolling.

136 Nev., Adv. Op. 69, 475 P.3d at 42.

It is also irrelevant whether the Association could relate their counterclaims back to the Builders' complaint: The Builders filed their complaint on September 28, 2016, within thirty days of the mandatory prelitigation mediation but more than seven months after the grace period expired, so that would not have the effect of timely "commenc[ing]" a lawsuit as *Byrne* requires.

B. AB 421—Enacted After the Builders Had Already Been Given Repose, and Not Effective until after the Final Judgment—Does Not Save the Counterclaims

Leaving *Byrne* aside, the Association's opening brief is flawed principally because of its disregard for the finality of the district court's August 13, 2019, judgment and the effect of finality. Indeed, treating that judgment for what it is, a final judgment, moots most of what is said in the opening brief.

When the Association filed a post-judgment motion under NRCP 59(e), that did not somehow transform the judgment into something that was not final. Indeed, if the contrary were true, the Association's Rule 59(e) motion was out of order because such motions are premature in the absence of a final judgment. NRCP 59(e) (stating that rule applies only to judgments); NRCP 54(a) (defining "judgment" to include orders and decrees that are appealable); *see also e.g., Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008) (stating that "a Rule 59(e) motion . . . may only be filed after the [district] court enters the final judgment"); *Hollis v. Reisenhoover*, No. 17-00326 BLF (PR), 2019 WL 5423454, at *1 (N.D. Cal. Oct. 22, 2019) (denying Rule 59(e) motion

as premature because "[j]udgment has yet to be entered in this matter").

To overcome that, the Association would have this court read an effective date into AB 421 that is not there or, otherwise, conclude that the statute's retroactivity provision applies to, and thus saves, the Association's counterclaims. As explained below, both of those contentions defy well-settled law.

1. AB 421 Became Effective Only After Entry of Judgment

Because no effective date appears in AB 421, by operation of law, that statute became effective on October 1, 2019, or nearly seven weeks after the district court entered its final judgment. NRS 218D.330(1) ("Each law . . . passed by the Legislature becomes effective on October 1 following its passage, unless the law . . . *specifically* prescribes a different effective date." (emphasis added)). There is no indication that the Legislature intended AB 421 to resurrect claims that had *already expired* years before its enactment, and certainly not to force the judiciary to reopen a case that had proceeded to a judgment.

Contrary to the opening brief's suggestion (at 24) that AB 421 "makes no practical sense" unless this court reads what is an unstated

effective date into the statute, whether the Legislature's decision not to include an effective date makes "practical sense" should not concern this court. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 20 (1997) ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."). Stated otherwise, it is not for this court to insert an effective date in a statute where none appears, particularly when a statute already prescribes a default effective date. *E.g., Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) ("It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts." (citation and internal quotation marks omitted)); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (rejecting statutory interpretation that "would have [the Court] read an absent word into the statute" because such an interpretation "would result not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court" (second and third alterations in original, citation and internal quotation marks omitted)); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012) ("[A] matter

not covered [in a statute] is to be treated as not covered."); *see also Burrage v. United States*, 571 U.S. 204, 218 (2014) ("The role of th[e] court is to apply the statute as it is written – even if we think some other approach might accor[d] with good policy." (citation and internal quotation marks omitted, second alteration in original)).

Fairly considered, moreover, it is the Association's interpretation of AB 421 that makes no practical sense. Consider the following hypothetical:

- Construction work on claimant's property is substantially completed on January 1, 2008. At the time, a 10-year statute of repose is in effect.

- AB 125 reduces the statute of repose to six years, effective February 24, 2015, retroactively beginning the repose period as of January 1, 2014. The Legislature, however, allows the one-year grace period, through February 24, 2016, for claims that otherwise would be barred.

- Claimant allows the grace period to expire and files suit alleging various construction defects on January 1,

2017, more than six years but fewer than 10 years after substantial completion.

- Applying AB 125, the district court dismisses the claims as time-barred with a final judgment entered on July 1, 2019.

If the Association's interpretation of AB 421 were applied to these hypothetical facts, the statute of repose would not expire until later this year, and therefore, the claimant would be permitted to have the final judgment vacated so that the claims could be pursued. As such, if there is an interpretation of AB 421 that looks past the principle that statutes should be construed in a way that avoids absurd results, surely it is the construction of AB 421 that the Association has advanced. *See e.g., Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 604 (2015) (applying principle that statutes should not be interpreted when the result is "unreasonable and absurd"). At the very least, in words that remain appropriate today, Chief Justice John Marshall said that, before a court will recognize that application of a statute as written promotes an absurd result, "the absurdity and injustice of applying the provision to the

case[] would be so monstrous[] that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowninshield,* 17 U.S. (4 Wheat.) 122, 202–03 (1819). The absurdity posited by the Association's opening brief falls well short of one that "all mankind, without hesitation" would recognize.[1]

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[1] The opening brief's contention (at 21 n.6) that federal courts correct judgments "when there has been an intervening change in the law" overlooks that in none of the cases cited in the brief did a court allow what the Association urges here, *viz.*, the undoing of a final judgment based on law that did not exist at the time the judgment was entered. Not only that, but the opening brief's contention (at 21 n.6) that "[f]ederal courts use FRCP 59(e) . . . to correct judgments when there has been an intervening change in controlling law" is not supported by any of the cases that the brief cites because an intervening change of law was not an issue in any of those cases. *See, e.g.*, *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (Rule 59(e) motion did not "allege[] an intervening change in the controlling law"); *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1254 (1992) (cross-appellant did not urge an intervening change in the law). Likewise, none of the Nevada appellate decisions on which the opening brief (some of it noncitable under NRAP 36(c)(3)) relies (at 21) considered an intervening change in the law, much less a change that occurred after entry of a final judgment. *See*, *e.g.*, *Williams as Trustee for L.D.W. III R.E. Assets Living Trust v. Clear Recon Corp.*, No. 77112-COA, 2020 WL 3568636, 466 P.3d 541, at *5 (Nev. Ct. App. June 30, 2020) (unpublished and noncitable) ("[appellant's] motion for a rehearing did not address any of the grounds" for a Rule 59(e) motion).

2. The Final Judgment Defeats Retroactive Application of AB 421

The Association's interpretation of the retroactivity provision in AB 421 would, in effect, allow an act of the legislature to vacate a final judgment. Courts faced with that issue have repeatedly rejected that outcome. For example, in *Adams v. Fidelity & Cas. Co.*, the court recognized that, although legislation may affect "pending" actions, "when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." 147 F.R.D. 265, 268 (S.D. Fla. 1993). In doing so, the court relied on a principle that has been applied since at least the late 19th century: in *McCullough v. Commonwealth of Virginia*, the Supreme Court concluded that, even though a statute had been repealed after the entry of judgment by the trial court, "the court of appeals, in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained" because "we have no doubt that the rights acquired by the judgment under [then-existing law] were not disturbed by a subsequent repeal of the statute." 172 U.S. 102, 123-24 (1898) (cited in *Adams*, 147 F.R.D. at 268). Modern day courts are in accord. *E.g., United States v. McGlory*, 968 F.2d 309, 350 (3d Cir. 1992)

("Generally, . . . when a legislature repeals a statute, the repeal is not applied retroactively to final judgments"); *Treiber v. Katz*, 796 F.Supp. 1054, 1061 (E.D. Mich. 1992) ("Once a lawsuit is finally adjudicated, the rights become vested and Congress cannot constitutionally divest them"); *Safechuck v. MJJ Prods., Inc.*, 43 Cal. App. 5th 1094, 1100 (2020) ("Retroactive application of statutory revisions cannot, however, reopen cases that have been litigated to final judgments"); *see also Bachman v. McLinn*, 65 So. 3d 71, 73 (Fla. App. 2011) (declining to apply amended statute retroactively that became effective after final judgment was entered); *Int'l Fid. Ins. Co., Inc. v. State*, 567 N.E.2d 1161, 1164 (Ind. App. 1991) ("When a final judgment has been rendered in a case, a subsequent statutory amendment will not apply" to that judgment).

3. The Expiration of the Association's Claims—which Vested the Builder's Right to Repose—Defeats Retroactive Application of AB 421

Even if the judgment had not become final, the Association's construction-defect counterclaims could still not be resurrected retroactively: the statute of repose had run in 2014, and the grace period had expired more than a year before the counterclaims were filed—during

which time the Builders had become secure in the knowledge that their repose from liability was permanent. The unconstitutionality of resurrecting extinguished claims—and retroactively forfeiting a defendant's vested right of repose—is strong evidence that the Legislature did not intend such an application here.

The policy underlying the decisions discussed above should hardly be the subject of reasoned debate when dealing with statutes of repose because retroactive application of that statute would expose a defendant to liability that had been extinguished. "Such a revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process." *Colony Hill Condo. I Ass'n v. Colony Co.*, 70 N.C.App. 390, 394, 320 S.E.2d 273, 276 (1984) (citations and internal quotations marks omitted).

To put it differently, a statute of repose that is applied retroactively has failed to provide defendants with notice, consistent with due process, that extinguished claims are not really extinguished (*Ripley v. Tolbert*, 260 Kan. 491, 511, 921 P.2d 1210, 1224 (1996)), which means

that retroactive application fails to alert a defendant that it would be a mistake to conduct one's affairs based on the assumption that, "[l]ike a discharge in bankruptcy, a statute of repose . . . provide[s] a fresh start or freedom from liability" (*CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014)). "As such, the defendants' rights in the time bar defense vested when the plaintiff's substantive statute of repose expired; the defendants' vested rights would have been taken if the plaintiff's extinguished claims had been revived [by a statute that was] not effective when the statute of repose expired. If the defendants' vested rights would have been taken, due process would have been violated." *Ripley*, 260 Kan. at 511, 921 P.2d at 1224.

Like the courts cited here, this court has recognized and applied the same principle when treating with retroactive application of a statute. In *Town of Eureka v. Office of State Engineer*, this court held that a statute cannot be applied retroactively if doing so would disgorge a vested right because "the protection afforded by the due process clause of the Fourteenth Amendment to the United States Constitution extends to prevent retrospective laws from divesting vested rights." 108 Nev. 163, 167, 826 P.2d 948, 951-52 (1992). And, that the expiration of

a statute of repose creates a protectable right is not fairly debatable. In language equally relevant here, the court in *Givens v. Anchor Packing, Inc.* explained that the "immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. Just as a judgment is a vested right which cannot be impaired by a subsequent legislative act, so, too, is immunity granted by a completed statutory bar." 466 N.W. 2d 771, 774 (Neb. 1991). *See also Fed. Hous. Fin. Agency for FNMA v. Nomura Holding Am., Inc.*, 873 F.3d 85, 110 n.25 (2d Cir. 2017) ("A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time, regardless of the plaintiff's actions and equitable considerations" (citation and internal quotation marks omitted)); *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 831 (Minn. 2011) (concluding that, "when the repose period expires, a statute of repose defense ripens into a protectable property right"); *M.E.H. v. L.H.*, 685 N.E.2d 335, 341 (Ill. 1997) (concluding that expiration of statute of repose creates a "vested right" that is "as valuable and entitled to as much protection as the plaintiffs' right to bring the suit itself"); *Harding v. K.C. Wall*

Prods., Inc., 250 Kan. 655, 669, 831 P.2d 958, 968 (1992) (stating that although "[t]he legislature has the power to revive actions barred by a statute of limitations . . . [t]he legislature can*not* revive a cause of action barred by a statute of repose, as such action would constitute the taking of property without due process" (emphasis in text)); *School Bd. v. U.S. Gypsum*, 234 Va. 32, 37-38, 360 S.E.2d 325, 328 (1987) (concluding that expiration of statute of repose creates substantive right that is entitled to due process protection).

Once the repose period begins, it becomes a permanent, vested right in reliance on which a builder is entitled to conduct its affairs—to stop insuring against the risk of construction-defect claims, to dispose of evidence that would aid in the defense against such a claim, to let investors and other stakeholders know that the threat of liability has passed. "Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (citing *Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 408–09 (9th

Cir. 2002) and *Joslyn v. Chang,* 445 Mass. 344, 837 N.E.2d 1107, 1112 (2005)). Here, the Association let the grace period expire, entitling the Builders' to the repose the Legislature had promised. To now hold that a builder must assume, even after all potential claims have been extinguished, the possibility of perpetual liability would make that "peace of mind" an empty promise. Such a result is not just unjust; it is unconstitutional.

II.

THE JUDGMENT WAS CORRECT ON ALTERNATIVE GROUNDS, EVEN IF *BYRNE* IS OVERRULED

The above discussion of *Byrne* and the permanence of a right of repose, both when it vests and when it becomes the basis for a final judgment, disposes of the Association's claims. Only if this Court overrules that precedent does it become necessary to examine alternative bases for upholding the judgment: (A) that the Association construction-defect counterclaims cannot relate back to the Builders' September 2016 complaint; and (B) that the district court correctly rejected a "good cause" exception to excuse the Association's untimeliness.

A. The Counterclaims are Permissive and Not Compulsory

The Association would have this Court order the reinstatement of time-barred construction defect claims based on a misreading of NRCP 13 and a disregard for this Court's decision in *Nevada State Bank v. Jamison Family Partnership*, while ignoring that, by no reasonable measure, is there a "logical relationship" between the Association's construction defect claims and the claims asserted in the Builder's complaint.

The relevant facts, which are not disputed, are:

(i) The Association served a construction defect notice on the Builders on February 24, 2016.[2]

(ii) A mediation as contemplated by NRS 40.680 concluded unsuccessfully on September 26, 2016.

(iii) Assuming NRS 40.695(1) applied in these circumstances and the claim had not already been extinguished, the Association was allowed 30 days, or until October 26,

[2] The Builders' complaint seeks a declaratory judgment that the notice was insufficient. That issue is not part of this limited Rule 54(b) appeal. What should matter, however, is that given *Byrne*, that notice accomplished nothing.

2016, to assert a construction defect claim in a court proceeding. The Association let that filing deadline expire.

(iv) Finally, on March 1, 2017, the Association filed claims against the Builders pertaining to construction work that was substantially completed in early-2008.[3] The Association did so by denominating those claims as counterclaims in the action that the Builders had commenced shortly after the mediation concluded five months earlier.

Leaving *Byrne* aside, if one were to assume that the statute of repose ran after the Builders filed their complaint but before the Association filed its answer, the issue is whether the Association could save otherwise time-barred claims by recasting them as counterclaims.

The Association's contention [Open Br. at 34]—that a counterclaim asserted under NRCP 13 "relates back" to the date when the Builders filed its complaint—misapprehends that Rule 13 does not contemplate a relation-back inquiry. Thus, in *Nevada State Bank v. Jamison Family Partnership*, this court recognized that "a plaintiff, by

[3] The dates of substantial completion were January 16, 2008, and March 26, 2008. At no point does the Association's opening brief dispute that either of those dates is appropriate.

instituting an action before the expiration of a statute of limitation, does not toll the running of that statute against compulsory counterclaims filed by the defendant after the statute has expired." 106 Nev. 792, 798, 801 P.2d 1377, 1381-82 (1990); *see also North Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 206-07 (5th Cir. 2015) (holding that "compulsory counterclaims seeking affirmative relief are not tolled"); *Basham v. Finance Am. Corp.*, 583 F.2d 918, 927 (7th Cir. 1978) ("Where a counterclaim seeks to assert a separate cause of action for an independent wrong, it generally may not be instituted after the applicable statute of limitations has expired"); *Smith-Johnson S.S. Corp. v. U.S.*, 231 F. Supp. 184, 186 (D. Del. 1964) ("It is settled law that affirmative counterclaims may not be instituted after the applicable period of the statute of limitations has expired for the reason that such claims are regarded as independent causes of action").[4]

[4] *Jamison* did allow the defendant to assert his claim as an affirmative defense of recoupment [*id.* at 799, 801 P.2d at 1382], but that does not assist the Association here. "Recoupment" is "a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under *the same contract*." *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 222, 275 P.3d 933, 941 (2012) (citation and internal quotation marks omitted, emphasis added). The Builders' complaint asserts no claim for damages under a contract for

Apart from that, a relation-back inquiry is beside the point when a counterclaim is permissive and not compulsory because a permissive counterclaim *never* relates back. *E.g.*, *Bryant v. Mattel, Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 11463865, at *9 (C.D. Cal. Oct. 5, 2010); *see also U.S. v. Southern Cal. Edison Co.,* 229 F. Supp. 268, 270-71 (S.D. Cal. 1964) (concluding that counterclaim was time-barred because it was not a compulsory counterclaim); 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1425 (3d ed. Westlaw Oct. 2020 update) (stating that "in the absence of statutory language specifically providing for relation back, permissive counterclaims will be barred unless asserted within the time prescribed by th[e] limitations period"). Here, the Association's counterclaims fail to qualify as compulsory because the Association did not and could not show that a "logical relationship" exists between those claims and the claims asserted in the Builders' complaint. *See, e.g.*, *Mendenhall v. Tassinari*, 133 Nev. 614, 620-21, 403 P.3d 364, 370-71 (2017) (recognizing that "the relevant consideration"

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which the Association has a right of reduction. Although that complaint does assert a claim for damages attributable to the Association's breach of the parties' settlement agreement, that contract is not "the same contract" on which the Association bases its construction-defect counterclaims. [Compare 1 AA53 with 2 AA277]

when deciding whether a counterclaim is compulsory "is whether 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" (emphasis added)).

The Association's counterclaims seek to recover monetary damages attributable to allegedly defective workmanship in two condominium towers. [2 AA277] The quality of workmanship, however, is not implicated by any claim that is asserted in the Builders' complaint. Instead, that complaint seeks (i) a declaratory judgment that any workmanship-related claims are barred, either because the Association's February, 2016, notice of defects was procedurally ineffective or because the Association released those claims under the terms of an earlier settlement agreement between the parties, and (ii) an award of damages attributable only to the breach of the settlement agreement and no other contract. [1 AA53]

No evidence regarding the work that the Builders performed, much less the quality of that work, is relevant to the Builders' request for declaratory relief regarding either the sufficiency of the Association's

notice of defects or the release terms of the parties' settlement agreement. Moreover, in actions that assert requests for declaratory relief, counterclaims are treated as permissive. In *Boca Park Marketplace Synd. Grp., LLC v. Higco,* this court held that a claim seeking a declaratory judgement and a claim seeking an award of monetary damages were distinct to the point that "claim preclusion does not apply when the original action [seeks] only declaratory relief." 133 Nev. 923, 926, 407 P.3d 761, 724 (2017). As such, if an action for a declaratory judgment does not bar a later action for damages, then a counterclaim asserted in the former matter is necessarily permissive because there is no impediment to asserting that claim, either as an independent action or as a counterclaim, in a later filed action for damages.

That leaves only the Builders' claim for damages as appropriate for a logical-relationship inquiry. But, merely because the Builders and the Association have both asserted claims for contract damages is, of itself, inconsequential. The terms of the settlement agreement on which the Builders has sued and the terms of the construction contract on which the Association has based its counterclaims represent two different transactions that were negotiated at two different times. Because

the settlement agreement is not the subject of the Association's construction defect counterclaims, and because the construction contract is not the subject of the Builder's claim for damages, the Association's counterclaims are permissive. *E.g.*, *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1441 (7th Cir. 1993) (recognizing that "a permissive counterclaim by definition arises from a different contract"); *Plymouth Yongle Tape (Shanghai) Co. v. Plymouth Rubber Co.*, 683 F.Supp.2d 102, 110 (D. Mass 2009) (concluding that, because "[defendant's] claims do not involve the same contracts, or the same allegedly wrongful conduct as [plaintiff's] claims," defendant's claims, "therefore, are permissive").

B. No Good-Cause Exception Exists, Nor Did the Association Demonstrate Good Cause to Avoid the Statutory Deadline

In urging this Court to adopt a "good cause" exception that supposedly justifies disregarding the statutory deadlines, the Association's opening brief (at 41) imagines that the requested extension was for "just five (5) days." To the contrary, even if one were to ignore *Byrne* and give the Association the benefit of the doubt, the tolling period would have been tied to the conclusion of mediation on September 26, 2016.

NRS 40.695(1)(b). In those circumstances, as a matter of law, the tolling period ended 30 days later, on October 26, 2016—more than five *months* before the Association finally filed its counterclaims. *Id.*

1. "Good Cause" Is a Judicial Standard for Service Deadlines, Not Statutory Filing Deadlines

The Association's contention [Open Br. at 42] that authorities interpreting NRCP 4(e)(3) are instructive here, because the purpose of that rule supposedly "mirrors" the purpose of NRS 40.695(2), is supported by no authority, nor seemingly could it be: a civil procedure rule reflects judicial policy, while a statute is a matter of legislative policy. Thus, whether, as the Association's brief insists (at 43), the Legislature was aware of Rule 4 when enacting NRS 40.695.2 is of no consequence, at least not without something amounting to legislative history showing the judicial rule directly influenced the legislation. The record establishes, however, that the Association never made any such showing in the proceeding below, nor has it done so in its opening brief. Thus, the support for the Association's assertion that the policies underlying Rule 4(e)(3) and NRS 40.695(2) are mirror images is nothing other than the Association's own say-so.

Beyond that, the Association's attempt [Open Br. at 48] to force a

good-cause standard from an appellate decision applying Rule 4(e)(3) into a statute of repose inquiry disregards that the rule and statute accomplish different and not similar ends. Rule 4(e)(3) was designed "to encourage diligent prosecution of complaints *once they are filed*." *Scrimer v. Eighth Judicial Dist. Ct.*, 116 Nev. 507, 513, 998 P.2d 1190, 1194 (2000) (emphasis added). In contrast, a statute of repose "implements a legislative decision that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *California Pub. Emp. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 51 (2017) (citation, internal quotation marks, and alteration omitted). Thus, unlike the concerns that underlie Rule 4(e)(3), "[s]tatutes of repose are not primarily concerned with encouraging prompt presentation of claims and thus may bar claims pursued by even the most diligent claimants. They are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 (Ind. 2012) (citations and

internal quotation marks omitted)); *accord Rhodes*, 130 Nev. at 899, 336 P.3d at 965. A judicial policy that accords flexibility to a plaintiff who has already *timely* filed a claim is consistent with a legislative policy cuts off liability and prohibits thereafter the filing of an *untimely* claim.

Moreover, unlike a Rule 4(e)(3) deadline for service of process, as explained above, the expiration of a statute of repose creates a protectable property right that a court is not free to disregard without violating the defendant's due process. *E.g., Ripley*, 260 Kan. At 511, 921 P.2d at 1224; *Colony Hill*, 70 N.C.App. at 394; 320 S.E.2d at 276; *see also Federal Housing Fin. Agency*, 873 F.3d at 110 n.25; *M.E.H.*, 685 N.E.2d at 341; *Harding*, 831 P.2d at 968; *Givens*, 466 N.W.2d 773-74.

The Association's attempt to co-opt the good-cause standard from *Scrimer*, a service of process case, warrants no consideration because the underlying policy considerations in *Scrimer* and this case are not the same.

2. The Association Demonstrated No Good Cause

Yet, even if a Rule 4 inquiry were appropriate here, the Association's brief overlooks what this court has recognized, at least implicitly, as the principal criterion. When treating with the untimely filing of a

notice, albeit in a different but not irrelevant context, this court cited *MCI Telecomm.* with approval. See *Nunnery*. 127 Nev. at 765-66, 263 P.3d at 247. *MCI Telecomm.* recognizes that, when a court evaluates good cause, "the primary focus is on the plaintiff's reasons for not complying with the time limit in the first place." 71 F.3d at 1097.

The opening brief makes no showing that explains the Association's failure to file its counterclaims not later than 30 days after the parties concluded their mediation:

- no citation to a declaration explaining that, during the 30 days following the conclusion of the mediation, the Association was somehow prevented from filing the counterclaims before time ran;
- no reference to any record evidence establishing, or even suggesting, that the Builders took any action during those 30 days that impeded the Association's ability to timely file the counterclaims; and
- no identification of anyone or anything on which the Association detrimentally relied that caused it to miss the deadline for filing the counterclaims.

In short, given the record here, if the Association has a good excuse for

sitting on its claimed rights, it remains undisclosed.

To be sure, the Association [Open Br. at 39] has identified a litany of activities in which the Association engaged over time. But correctly read, that list refutes what the Association would have it say. Again, disregarding *Byrne*, the question to be answered is why the Association failed to file its counterclaim before October 26, 2016. The opening brief's list reveals that, during the 30 day grace period leading up to that deadline, the Association did nothing that was relevant to this case. And as explained above, the opening brief offers no excuse for that failure.

Reduced to its essence, therefore, the Association's opening brief urges that good cause exists in this case *only* because the Builders allegedly cannot claim any adverse prejudice. But "the absence of prejudice alone is never sufficient to constitute good cause" for an untimely filing. *Nunnery*, 127 Nev. at 765-66, 263 P.3d at 247. Were it otherwise, statutes of limitations and repose would lose all meaning, for a plaintiff could always throw the burden to a defendant to show why an untimely

claim could not proceed.[5]

Finally, the contention [Open Br. at 46] that recognition of a good cause extension here furthers the policy of deciding claims their merits amounts to asking this court to disregard a policy that is solely the province of the legislature, and not this court. A statute of repose reflects a "legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *CTS Corp.*, 573 U.S. at 7 (citation and internal quotation marks omitted); *Cal. Pub. Emp. Ret. Sys.*, 137 S. Ct. at 2051 (same); *Sch. Bd. v. U.S. Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) ("[S]tatutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability" (citation and internal quotation marks omitted)). Consequently, if a statute of repose causes a problem, "it is a problem that only [a legislative body] can address: judges may not deploy equity to avert the

[5] Here, indeed, the Builders do not agree that the Association's untimely claims caused "no prejudice," especially since, as discussed, the Builders' own suit was based on procedural and contractual breaches and did not require the preparation or preservation of substantive evidence regarding the workmanship of the construction. That factual question of prejudice, were it relevant, would have to be addressed by the district court in the first instance on remand.

negative effects of statutes of repose." *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 110 (2d Cir. 2013). And, as discussed, the Legislature's right to amend a statute repose applies only to those claims that still exist, not those that have not already extinguished, as determined in a final judgment.

3. After the Statute of Repose Expired, there Was Nothing Left to Toll, Regardless of "Good Faith"

The Association's "good faith" argument functions as a poor substitute for the doctrine of equitable tolling, a narrow doctrine whose requirements the Association did not even try to meet below and which is waived by its absence from the opening brief.[6]

[6] Indeed, the Association's proposed "good cause" exception to the statute of repose would excuse far more untimely claims than the doctrine of equitable tolling for statutes of limitations: Equitable tolling applies only when a "extraordinary circumstances beyond [the plaintiff's] control caused his or her claim to be filed outside the limitations period," *Fausto v. Sanchez-Flores*, 137 Nev., Adv. Op. 11, at 8–9, ___ P.3d ___, ___ (Mar. 11, 2021), traditionally when the defendant itself has "lulled [the plaintiff] into a false sense of security" that the claim need not have been filed earlier, *see State Dept. of Taxation v. Masco Builder Cabinet Group*, 127 Nev. 730, 738–39, 265 P.3d 666, 671–72 (2011). Here, no circumstances beyond the Association's control prevented it from timely filing a Chapter 40 lawsuit on or before February 24, 2016.

But this Court has made clear that no equitable exception—for "good cause" or otherwise—applies to a statute of repose. Indeed, that is the hallmark of a statute of repose. *See Rhodes*, 130 Nev. at 899, 336 P.3d at 965 (citing *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n,2, 766 P.2d 904, 907 n.2 (1988) and *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 365 n.1, 325 P.3d 1276, 1280 n.1 (2014)).

Byrne underscored this point when it explained that "the grace period itself did not constitute a new statute of repose subject to tolling." 136 Nev., Adv. Op. 69, 475 P.3d at 42. Here, the statute of repose had already run, and in letting the grace period expire, the Association forfeited the Legislature's "distinct mechanism" for salvaging a claim. "In other words, in [February 2016], there was no statute of repose left to toll." *Id.*

CONCLUSION

As *Byrne* conclusively holds, the Builders' right to repose became secure, and once the Association allowed its grace period to expire without filing suit, any construction-defect claim was forever extinguished. Neither they nor the Legislature can exhume those expired claims now and destroy, without due process, the Builders' promised "peace of

mind."

The judgment of the district court dismissing the Association's counterclaims should be affirmed.

Dated this 12th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 7,587 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 12th day of March, 2021.

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