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.

Electronically Filed
May 12 2021 06:23 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 REPLY BRIEF

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Docket 80615 Document 2021-13697

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The Association filed its claims before expiration of the current statute of repose, which went into retroactive effect months before the district court entered its orders resolving the Association's motions for reconsideration and NRCP 59(e) relief. The district court abused its discretion by refusing to apply AB 421's retroactively lengthened statute of repose—the law in effect at the time of those decisions—to the Association's claims. This error alone requires reversal of the district court's order.

Neither the district court's NRCP 54(b)-certified judgment nor the expiration of the old statute of repose gave the Builders a vested right to repose that could not be retroactively revived by the Legislature. First, a judgment does not become immune to changes in the law until completion of the appellate process. Thus, the law requires this Court (and required the district court) to apply AB 421's retroactive repose period to the Association's claims.

Second, modern precedent from the Supreme Court of the United States on constitutional due process requires courts to uphold retroactive economic legislation that satisfies rational basis review. AB 421 easily passes the rational-basis test because (1) numerous rational grounds exist for extending the repose period back to its pre-2015 length of 10 years, and (2) the Builders did not even attempt to meet

their heavy burden of showing that giving effect to the Legislature's express directives in AB 421 would constitute a due process violation.

The district court also abused its discretion by erring as a matter of law when it held that AB 421's retroactivity provision did not go into effect until four months after the bill's passage into law. The rules of statutory construction and common-sense preclude delaying the effect of a law the Legislature expressly made retroactive.

In addition to the reversible errors related to AB 421, the district court erred in its interpretation and application of NRCP 13(a), NRS 40.695, and NRS 11.2055. The first two of these errors may be mooted by this Court's recent decision in *Byrne v. Sunridge Builders, Inc*., 136 Nev. Adv. Op. 69, 475 P.3d 38 (October 29, 2020). This Court decided *Byrne* after the Association submitted its opening brief. Thus, the Association did not have an opportunity to brief or argue the issues. The Association respectfully requests that the Court reconsider and reverse the *Byrne* decision for the reasons explained below and, accordingly, address the grounds for reversal related to NRCP 13(a) and NRS 40.695.

Finally, the district court's abuse of discretion related to NRS 11.2055 is an independent basis for reversal because this statute, when properly applied, precludes the determination of *any* statute of repose at this stage of the case due to the incomplete factual record.

ARGUMENT

I. Nevada Law Requires Application of the Current Statute of Repose to the Association's Claims.

One of the "basic grounds" for relief under NRCP 59(e) is an intervening change in the controlling law. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010)); AOB at 20–21 (collecting cases).[1] In *AA Primo*, the moving party sought to amend the judgment after a subsequent factual development required application of a different statute (*i.e.*, the controlling law changed). The *AA Primo* decision, after turning to federal cases interpreting FRCP 59(e), held that (1) the district court abused its discretion by not applying the facts to the controlling law in place ***when it ruled on the NRCP 59(e) motion*** (not the prior motion for summary judgment), and (2) the applicable law expressly required its retroactive application to save the claims. *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197.

Here, the controlling law—the applicable statute of repose—retroactively changed in June 2019, just days after entry of the Repose Order. The district court did not certify the Repose Order as a judgment until August 2019. 25 AA4390–405. Even then, that judgment was not a "final judgment" immune from changes in the

[1] *See also Bryant v. New Jersey Dept. of Transp.*, 998 F.Supp. 438 (D.N.J. 1998) (granting FRCP 59(e) relief due to subsequent change in controlling law and collecting cases); *Quinones-Ruiz v. U.S.*, 873 F.Supp. 359 (S.D. Cal. 1995) (same).

law and NRCP 59(e) relief. *See infra*, Section II.A. If that were the case, one of the "basic grounds" for NRCP 59(e) relief would be meaningless. The procedural timing is significant:

May 28, 2019	Notice of Entry of the Repose Order applying the 6-year statute of repose in place at that time
June 1, 2019	Legislature passed AB 421 retroactively extending statue of repose to 10 years
June 3, 2019	Governor Sisolak signed AB 421 into law, and the Association timely sought reconsideration of the Repose Order
August 13, 2019	Notice of Entry of the Rule 54(b) Order
October 1, 2019	When district court ruled AB 421, § 11(4) went into effect
January 16, 2020	Notice of Entry of the Rule 59(e) Order

The law requires this Court, and required the district court, to apply AB 421—the current controlling law. *AA Primo*, 126 Nev. 578, 245 P.3d 1190; *see Thorpe v. Durham Hous. Auth.*, 393 U.S. 268, 281 (1969); *Lambert v. Blodgett*, 393 F.3d 943, 973 (9th Cir. 2004). Here, this rule of law means the Court must apply the law as it stands today—a 10-year statute of repose applicable to all structures completed before October 1, 2019. The district court violated this rule of law when it decided the Association's NRCP 59(e) motion in January 2020 and refused to apply, without explanation, a law it held was already in effect. 26 AA4526–34 at ¶ 8. The district court's legal error constitutes an abuse of discretion and is not entitled to any

deference. *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197 (holding "deference is not owed to legal error"); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) (holding district court abuses discretion when it makes error of law).

II. AB 421's Retroactive 10-year Repose Period Applies to the Association's Claims.

The Builders advance three arguments to avoid retroactive application of AB 421 to the Association's claims, each of which lacks merit: (i) the district court's "final judgment" is immune from subsequent changes in the controlling law, including retroactive legislation, RAB at 17–18; (ii) the Builders' alleged vested right of repose since the expiration of AB 125's shortened repose period shields them from the retroactively lengthened repose period, RAB at 18–23; and (iii) AB 421's retroactivity provision did not go into effect until October 1, 2019, due to NRS 218D.330(1). The Builders are incorrect on all points. RAB at 12–16.

A. The Builders Have No Right to the Judgment Until it Becomes Final After the Appellate Process Concludes.

No party may claim a vested right in a judgment until that judgment is final, meaning after the "case has completed its journey through the appellate process" and "the availability of appeal is exhausted, and the time for a petition for certiorari has elapsed or the petition has been denied." *Johnston v. Cigna Corporation*, 14 F.3d 486, 489–90, n.4 (10th Cir. 1993); *see also Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (judgment "final" only after "the availability of appeal [is] exhausted, and

the time for a petition for certiorari [has] elapsed or a petition for certiorari [has been] finally denied"); *Axel Johnson Inc. v. Arthur Andersen & Co*., 6 F.3d 78, 84 (2d Cir. 1993) ("[A] case remains [pending] and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse."). Thus, "***if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed[.]***" *Axel Johnson*, 6 F.3d at 84 (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801)) (emphasis added).

The Builders ignore this wealth of authority and rely on *McCullough v. Commonwealth of Virginia*, 172 U.S. 102 (1898), for its unique holding that a trial court judgment may not be affected by a subsequent change in the law, even while on appeal. *See* RAB 17. That reliance is misplaced. The Supreme Court has never applied that *McCullough* holding to decide another case.

Instead, the Supreme Court has decided cases on the same issue according to a different and more widely accepted rule both before and after *McCullough*. *See, e.g.*, *Thorpe*, 393 U.S. at 281 (holding appellate court "must apply the law in effect at the time it renders its decision"); *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943) ("A change in the law between a nisi prius and an appellate decision ***requires the appellate court to apply the changed law***." (emphasis added)); *Schooner Peggy*, 5 U.S. (1 Cranch 103), 2 L.Ed. 49 (1801). Courts have recognized that this particular

McCullough holding is not the rule. *See Hosp. Ass'n of New York State v. Toia*, 435 F. Supp. 819, 828 (S.D.N.Y. 1977) (stating "the ***determination that a trial court judgment cannot be legislatively divested***, as expressed in *McCullough*, ***has been rejected by virtually every federal court*** which has since considered the issue" (emphasis added)).

This Court has previously stated that a district court judgment "remain[s] modifiable" for purposes of NRCP 59(e) relief and appeal. *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197 (citing *Duncan v. Sunset Agricultural Minerals*, 273 Cal.App.2d 489, 78 Cal.Rptr. 339, 342 (1969) (holding abuse of discretion to not modify judgment)).

Here, the district court's judgment must be modified to give effect to the retroactively lengthened statute of repose that remains in effect and applies to the Association's claims.

B. AB 125's Repose Period Did Not Give the Builders a Vested Right Immune from Legislative Alteration.

The Builders next argue that they (a) obtained a vested right not to be sued as soon as AB 125's shortened repose period ran, and (b) that permitting AB 421 to revive the Association's claims allegedly violates their due process rights. *See* RAB 18–23. The Builders' arguments conflict with modern authority permitting retroactive economic legislation to revive time-barred claims without offending due process as long as it satisfies rational basis review.

1. The Fourth Circuit's articulation of the rational basis test for retrospective economic legislation.

Much more recently than the Builders' cited authority, the Fourth Circuit considered the constitutionality of reviving a time-barred claim against a device manufacturer. *Shadburne-Vinton v. Dalkon Shield Claimants Tr.*, 60 F.3d 1071, 1077 (4th Cir. 1995), *cert denied,* 516 U.S. 1184 (1996). Initially, the district court dismissed plaintiff's claim under the statute of repose. *Id.* at 1073–74. While on appeal, the legislature amended the statute to retroactively exclude IUD manufacturers as a protected class of defendants, thereby opening the manufacturer to liability under the newly enacted law. *Id.* at 1072–73. The district court reasoned that because rights of repose are "substantive," they cannot be deprived without offending due process. *Id.* at 1075. The Fourth Circuit rejected that notion, holding that the amended legislation revived liability against the manufacturer without offending due process. *Id.* at 1075–1078. In so holding, the *Shadburne* court relied on three Supreme Court decisions.

First, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Supreme Court recognized that:

> It is ***by now well established*** that legislative Acts adjusting the burdens and benefits of economic life come to the Court with ***a presumption of constitutionality***, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

> ... [O]ur cases are ***clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.*** This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Id. at 1075 (emphasis added).

Second, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co*., 467 U.S. 717 (1984) (relying on *Usery*, 428 U.S. 1), the Supreme Court held that "legislation imposing liabilities ***retroactively must only be supported by a rational legislative purpose.***" *Id.* (emphasis added).

Third, in *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (citing *Pension Benefit*, 467 U.S. at 730), the Supreme Court held that in order for retroactive economic legislation to comport with the Fifth Amendment's due process requirements, it must serve a legitimate legislative purpose that is furthered by rational means. *Id.* at 1075–76.

Based on these decades of Supreme Court precedent, the *Shadburne* court held "that the analysis used by the Court in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation." *Id.* at 1076. Thus, the Fourth Circuit determined that:

> [R]ecent developments in the law ***require us to apply the rational basis test*** in determining whether retroactive legislation violates the Due Process Clause of the Fifth Amendment. For purposes of constitutional analysis, ***the same test applies regardless of whether the statute at issue is one of repose or one of limitation.***

Id. at 1077 (emphasis added).

2. Many other courts apply the rational basis test to retroactive economic legislation, including the statute of repose.

Many other courts have also recognized the Supreme Court's requirement of rational basis review and upheld retroactive amendments to the statute of repose. *See, e.g.*, *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co*., 876 F.2d 119, 121 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (applying rational basis review and holding ***revival of time-barred claims via retroactive amendment of statute of repose did not violate due process***); *In re Fort Totten Metrorail Cases Arising Out of the Events of June 22, 2009*, 793 F. Supp. 2d 133, 144 (D.D.C. 2011) (same); *Doe v. Hartford Roman Cath. Diocesan Corp*., 317 Conn. 357, 405, 119 A.3d 462, 496 (2015) (same); *Liebig v. Superior Court*, 209 Cal.App.3d 828, 834–35, 257 Cal.Rptr. 574 (1989), *review denied*, California Supreme Court, Docket No. S006295 (June 22, 1989) ("Even if we were to assume arguendo that a vested right exists in repose of a cause of action, the law is clear that vested rights are not immune from retroactive laws"); *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 833 (Minn. 2011) (recognizing property right in statute of repose, but applying rational basis review to uphold revival statute because

"protectable property right" is "not absolute and must be balanced against the [s]tate's legitimate interest").[2]

The Ninth Circuit has taken note of this trend. In *Underwood Cotton*, a case cited by the Builders, RAB at 22, the Ninth Circuit noted that "[i]t is also true that the legislature can remove a statute of limitations impediment retroactively. However, that may even be true of a statute of repose in proper circumstances." *Underwood Cotton Co., Inc. v. Hyundai Merchant Marine, Inc*., 288 F.3d 405, 408, n.7 (2002) (citing *Shadburne*, 60 F.3d at 1074–77; *Wesley*, 876 F.2d at 121–23 (D.C. Cir. 1989)); *see Campanelli v. Allstate Life Ins. Co*., 322 F.3d 1086, 1100 (9th Cir. 2003) (stating "retrospective economic legislation must only pass rational basis review"); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001) (holding "barring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit" and that "in analyzing the constitutionality of retroactive legislation, statutes of repose are now treated the same as statutes of limitation").

This Court will be on solid and current constitutional ground by adopting and applying the rational basis test to AB 421's retroactively lengthened statute of repose. In fact, this Court expressly adopted *Usery*'s rational-basis framework when

[2] The Builders claim this case as support for their position but fail to disclose that the Minnesota Supreme Court upheld the revival statute under the rational basis standard, which undermines the Builders' position. *See* RAB at 21.

it held that retroactive economic legislation did not violate due process. *K-Mart Corp. v. State Indus. Ins. Sys*., 101 Nev. 12, 22, 693 P.2d 562, 568 (1985); *see id*. at 23, 693 P.2d at 569 (recognizing the Supreme Court upheld retroactive legislation "even though 'it upsets otherwise settled expectations' because it was a *rational* method to spread the costs of the mine workers' disabilities to those who have benefitted from their labor.").

3. The Builders rely on outdated, invalid due process jurisprudence.

Notwithstanding the wealth of authority outlined above, including this Court's adoption of rational basis review for retrospective economic legislation, the Builders rely on *Colony Hill Condominium I Ass'n v. Colony Co*., 70 N.C.App. 390, 320 S.E.2d 273 (1984). There, a state intermediate appellate court held a statute of repose provided the defendant with a vested right not to be sued. *See* RAB at 19, 33. The non-binding *Colony Hill* decision predates *Shadburne* by a decade and has little persuasive value "because it does not recognize the recent changes in this area of the law triggered by the Supreme Court's decisions in *Turner Elkhorn* and *Pension Benefit*." *Shadburne*, 60 F.3d at 1077. Indeed, *Colony Hill* relies on the *Danzer* and *Campbell* decisions as support, both of which are "outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation." *Id.* at 1076.

The Builders also rely on *Town of Eureka v. Office of State Engineer*, where this Court held that "the protection afforded by the due process clause . . . extends

to prevent retrospective laws from divesting vested rights." 108 Nev. 163, 167, 826 P.2d 948, 951–52 (1992). The *Eureka* court quoted *Ettor v. Tacoma*, 228 U.S. 148, 155–56 (1913) for the proposition. *Ettor* has since come under attack for the same reasons as *Danzer*, *Chase*, *Campbell*, and *Colony Hill*.[3] The *Eureka* court rendered its decision years before the *Shadburne*, *Honeywell*, *Underwood Cotton*, and other courts recognized the Supreme Court's application of rational basis review for retroactive economic legislation. Further, the *Eureka* court, after discussing prior Nevada decisions upholding retroactive statutes over due process objections, upheld the constitutionality of the retroactive statute at issue. *Eureka*, 108 Nev. at 167–68, 826 P.2d at 951.

4. AB 421's retroactively lengthened repose period passes the rational basis test.

For the reasons discussed above, retroactive economic legislation, such as AB 421, must only pass rational basis review: the statute must be based on "a legitimate legislative purpose furthered by rational means." *Romein*, 503 U.S. at 191. Under

[3] *See Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554–55 (8th Cir. 1997) (holding "even though . . . *Ettor* [has] never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's Lochner era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis. . . . We rely instead on the more recent Supreme Court pronouncements of substantive due process analysis for economic legislation, which articulate a rational basis test.").

this test, *any rational basis* will uphold the Legislature's decision to revive the Association's claims (to the extent any revival was necessary) via retroactive amendment of the statute of repose. AB 421's retroactivity provision easily passes the rational basis test, particularly because the current 10-year repose period mirrors the repose period in place when the Builders designed and constructed the towers. 6 AA1016 (AB 125, Leg. Dig. at 3) (reciting "existing law" providing statute of repose up to "10 years after substantial completion").

Here, the State of Nevada has legitimate interests in determining the amount of time its property owners may seek redress against state-licensed contractors for allegedly faulty construction. And it is the Builders' burden to show that the Legislature's decision was arbitrary or irrational.[4] The Builders cannot meet this heavy burden, nor have they made any attempt to do so. *Peck v. Zipf*, 133 Nev. 890, 896, 407 P.3d 775, 780 (2017) (holding "if any rational basis exists, or can be hypothesized, then the statute is constitutional").

In sum, the Builders' belief that they have a vested right not to be sued is a theory premised on a "completely defunct" rationale. *Shadburne*, 60 F.3d at 1076 (quoting *Wesley*, 876 F.2d at 122)). For the reasons discussed above, applying the

[4] *See Usery*, 428 U.S. at 15 (holding "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way").

rational basis test is consistent with the Supreme Court's current precedent on constitutional due process. Under that test, the retroactive application of AB 421's repose period passes constitutional muster and must be given effect.

C. AB 421's 10-year Repose Period Went into Retroactive Effect Months Before the District Court Entered a Judgment.

The Builders contend that AB 421's retroactivity provision did not go into effect until October 1, 2019, four months after it was signed into law and two months after the district court certified the Repose Order as a judgment pursuant to NRCP 54(b). Neither Nevada law nor common-sense support the Builders' contention that the Legislature intended to delay the effect of this retroactive law.

AB 421 provides: "*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 AA2443 at § 11(4) (emphasis added). The Legislature provided an express effective date for the three *prospective* aspects of AB 421. 16 AA2443 at § 11(1)–(3). Ignoring the practical meaning and purpose of the retroactivity provision, the Builders take the absurd position (which the district court adopted) that NRS 218D.330(1) required a four-month delay in the new statute of repose's retroactive application.

The question of when a retroactivity provision becomes effective is one of first impression for this Court. NRS 218D.330(1) serves the useful purpose of

resolving questions arising from the Legislature's failure to specify an effective date when enacting *prospective* legislation. *Picetti v. State*, 124 Nev. 782, 793, 192 P.3d 704, 711 (2008) (holding effective date reflects intent for prospective application only). However, this remedial statute serves no purpose when the Legislature states that the new statute applies *retroactively*. *Id.* (tacitly holding retroactive law needs no effective date). Established rules of statutory construction uniformly support this interpretation.

- **Rule No. 1:** The aim of statutory interpretation is to effectuate the Legislature's intent. In general, the language used in the statute reflects the intent. AOB at 22. The Legislature provided an effective date for the three *prospective* aspects of AB 421 (*e.g.*, new notice and inspection requirements) and expressly made the 10-year repose period retroactive for all structures completed before October 1, 2019. The plain meaning of § 11(4) requires giving immediate effect to the retroactivity.
- **Rule No. 2:** If a statute can be interpreted in more than one reasonable way, courts "must not give the statute a meaning that will nullify its operation[.]" AOB at 22–23. Here, the district court interpreted AB 421's retroactivity provision in the one way that nullified its operation.
- **Rule No. 3:** When two laws conflict, the specific statute prevails over the general statute. *Matter of N.J.*, 134 Nev. 358, 360, 420 P.3d 1029, 1032

(2018). AB 421's retroactivity provision—specific to NRS 11.202—prevails over NRS 218D.330(1)'s general application to *prospective* laws.

- **Rule No. 4:** The words of a statute must be construed as having been intended by the Legislature and not treated as surplusage. *Valenti v. State*, 131 Nev. 875, 883, 362 P.3d 83, 87–88 (2015). Here, the district court's reliance on NRS 218D.330(1) treated the word "retroactively" as surplusage with no effect.
- **Rule No. 5:** Courts should construe statutes to avoid absurd results. AOB at 23. By what logical rationale would the Legislature enact AB 421 in June 2019, expressly make the new repose period retroactive, but intend the retroactive application be deferred?[5] The Builders cite no law from *any* jurisdiction where a legislature or court has ever followed or adopted such an absurd rule.

[5] If builders in separate actions pending before the same court sought summary judgment against property owners who filed actions less than 10 years, but more than six years, after substantial completion. The court then entered its order on one motion on September 30, 2019, and the other on October 1, 2019. According to the district court and the Builders, the first order would time-bar the property owner's claims and the second order would allow the property owner's claims to proceed simply because the court entered its orders one day apart. Both property owners filed suit within the repose period. This Court should not interpret AB 421 to require such an absurd result.

III. The Court Should Reconsider its *Byrne* Decision.

By ignoring the Legislature's directive that the then-existing statutes of repose (*i.e.*, NRS 11.203–.205) applied during the grace period, the *Byrne* decision violates the rules of statutory construction, creates absurd results, and transforms Chapter 40's protections for homeowners into a fatal procedural trap that robs them of fair access to the courts.[6] Nevada law precludes such an unfair result, particularly when Chapter 40 statutes prevail over all laws to the contrary and must be interpreted to protect property owners. NEV. REV. STAT. § 40.635(2).

A. Byrne*'s Finding that § 21(6) is Unambiguous Conflicts with Nevada Law.*

Contrary to *Byrne*, § 21(6) is ambiguous because it is capable of more than one reasonable interpretation and because it "does not speak" to issues raised: how § 21(6) impacts the repose period, the Chapter 40 process, or tolling under NRS 40.695. *Clark County Office of Coroner v. Las Vegas Review-Journal*, 136 Nev. 44, 48, 458 P.3d 1048, 1052 (2020). Numerous courts, including the Eighth Judicial District Court's construction defect specialty courts, *have differed* regarding §

[6] The *AA Primo* court held that tolling rules should be interpreted to "avoid confusion, and to prevent harsh results for unwary parties" and that simple rules for tolling motions were necessary to avoid "a technical trap for the unwary draftsman." 126 Nev. at 584–85, 245 P.3d at 1194–95. Here, the Association asks for a similar simple, clear rule for tolling under NRS 40.695 rather than the confusing and harsh rule (*i.e.*, trap) created by the *Byrne* decision. *See infra*, Section IV.C.

21(6)'s interpretation.[7] Further, § 21(6) is silent on whether it requires Chapter 40 claimants to violate the mandatory prelitigation process to avoid being time-barred or whether NRS 40.695 operates during the grace period. Moreover, *Byrne* failed to account for the statutory requirement that Chapter 40's provisions "prevail[] over any conflicting law," including NRS 11.202 and § 21(6). *See* NEV. REV. STAT. § 40.635(2). Thus, § 21(6) cannot, as a matter of law, require something expressly prohibited by Chapter 40 (*i.e.*, filing suit before completing the mandatory prelitigation process). For these reasons, § 21(6) is ambiguous.

B. Byrne *Ignored the Legislature's Directive that the Existing Statutes of Repose—Which Could be Tolled by NRS 40.695—Applied During the Grace Period.*

Because § 21(6) is ambiguous, the plain meaning rule of construction "is inapplicable" and the legislative intent "becomes the controlling factor[.]" *Harris Assoc. v. Clark County School Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). To give effect to the legislative intent, the Court must (i) interpret § 21(6) consistent with reason and public policy, (ii) give meaning to all words in the context of § 21(6)'s purpose, (iii) harmonize § 21(6) with existing statutes, and (iv) avoid absurd

[7] 16 AA2396–2417 at ¶¶10–12; 14 AA2222–27 (*Sky Las Vegas Condominiums, Inc. v. Sky Las Vegas Condominium Unit Owners Ass'n*, Case No. A-16-738730-D (June 9, 2017) (Johnson, J.)); *Lopez v. U.S. Home Corp.*, 2016 WL 6988486 (D. Nev. Nov. 27, 2016) (Navarro, J.).

results. AOB at 22–23. Respectfully, the *Byrne* decision fails to achieve these purposes.

1. A grace period is only required for claimants whose rights are being "cut off," not all claimants.

To pass constitutional muster, the retroactive shortening of a statute of repose must provide a grace period for parties whose claims had accrued prior to the law's passage to bring an action. *G and H Assoc. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 270, 934 P.2d 229, 232 (1997) (citing *Alsenz v. Twin Lakes Village, Inc.*, 108 Nev. 1117, 843 P.2d 834 (1992)). The grace period is required when the new, shorter repose period will "***cut off a claimant's right*** to file suit for an 'accrued' cause of action without affording that claimant" a reasonable amount of time after passage of the law to bring an action. *Id.* (emphasis added). In other words, a grace period need not *extend* the time to bring a claim under the existing statute of repose.

2. The existing statutes of repose applied during AB 125's grace period.

Because the goal of statutory interpretation is to achieve the Legislature's intent, what legislators said about a statute is important. *See Harris*, 119 Nev. at 642, 81 P.3d at 534. The Legislature expressly stated that § 21(6) "establishes a 1-year grace period during which a person may commence an action ***under existing statutes of repose***, if the action accrued before the effective date of this bill." 6 AA1016 (AB 125, Leg. Dig. at 3) (emphasis added). In other words, during the grace period, the

new six-year repose period did not apply to pre-existing claims; the then-existing applicable repose periods applied. Thus, the grace period did not create a quasi-statute of repose that extended the time for property owners who, under the then-existing statutes of repose, had less than one year left to bring a claim.[8]

3. *Byrne* ignores the Legislature's express directive that the existing statutes of repose applied during the grace period.

Contrary to the 2015 Legislature's express directive that the existing statutes of repose applied during the grace period, *Byrne* held—without analysis—that the (i) retroactively shortened six-year repose period applied during the grace period; (ii) the grace period served as a separate quasi-repose period that could not be tolled by NRS 40.695; and (iii) after the new six-year repose period had expired, even if the expiration occurred *before* passage of AB 125, the Legislature unambiguously intended that § 21(6) override NRS 40.635(2) and nullify the requirements of NRS 40.645 and the protections of NRS 40.695. No part of AB 125 or Chapter 40 supports these interpretations.

The only reasonable interpretation of § 21(6), which reconciles *Alsenz* and its progeny, all of AB 125 (including § 21(6)), NRS 40.600, *et seq.*, and Nevada law

[8] For example, if upon passage of AB 125 a property owner had three months left under the existing statute of repose, she had three months to serve a Chapter 40 notice. For property owners with more than one year left on the existing eight-year and ten-year repose periods, AB 125—via the grace period—shortened their repose period to one year. Nothing suggests the Legislature intended AB 125 or the grace period to *extend* the time to make a claim. The exact opposite is true.

regarding statutory interpretation, is that (i) the then-existing statutes of repose applied during the grace period; (ii) the grace period did not extend the existing statutes of repose or serve as an independent quasi-repose period; (iii) the grace period reduced the existing repose period to one year for parties whose rights would be "cut off" by the six-year repose period (*i.e.*, parties who, at the time of AB 125's passage, had more than one year remaining under the existing eight- and 10-year statutes of repose); and (iv) service of a Chapter 40 notice during the grace period, if done before expiration of the applicable repose period, tolled the time to file an action pursuant to NRS 40.695. The Court should take this opportunity to correct the *Byrne* decision's substantial oversights and errors.

C. Byrne *is Inconsistent with Decades of Nevada Precedent.*

NRS 40.645 bars claimants from "commencing" lawsuits before completing the mandatory prelitigation process. Actions commenced in violation of this requirement may not proceed. NEV. REV. STAT. § 40.647(2). The *Byrne* decision inexplicably held that the Legislature, by no more than using the word "commenced" in § 21(6), unambiguously intended to force claimants to forego the prelitigation process even though the Legislature reiterated the importance of the mandatory prelitigation process. Opinion, p. 7. That aspect of the decision violates the rules of statutory construction that requires courts to reconcile new statutes with existing statutes and to avoid rendering any part of a statute meaningless. It also violates the

statutory directive that Chapter 40 provisions prevail over any conflicting laws. NEV. REV. STAT. § 40.635(2).

Byrne also creates absurd results by (i) robbing certain claimants of NRS 40.695's protections by construing the grace period as a quasi-repose period not provided for by § 21(6); (ii) interpreting § 21(6) in a way that extended the repose period when the Legislature clearly intended to shorten the repose period; and (iii) forcing claimants to skip the mandatory prelitigation process and file lawsuits when the entire Chapter 40 statutory scheme exists to avoid the filing of lawsuits.

IV. If the Court Revisits *Byrne*, then the Association's Claims are Timely on Additional Grounds.

Because AB 125 required the prior statutes of repose to apply during the grace period, the Association's Chapter 40 Notice—which it timely served—tolled the statute of repose pursuant to NRS 40.695. The district court correctly decided this issue. 16 AA2388. However, the district court misinterpreted and misapplied Nevada law when it held that (1) the Association's counterclaim had no logical relationship to the Builders' claim, despite the Builders' judicial admission to the contrary; (2) the counterclaim did not relate back to the date of the complaint; and (3) even if the counterclaim related back, good cause did not exist to further toll the repose period under NRS 40.695(2). AOB at 31–33. The district court's legal errors are not entitled to deference. *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197.

A. The Association's Defect Claims Logically Relate to the Builders' Claims.

The Builders filed their Complaint in direct response (and with repeated reference) to the Association's Chapter 40 Notice and admitted that the parties' respective claims arose out of the same transaction or occurrence that should be resolved in a single action. AOB at 32–33; 1 AA0063 at ¶¶ 62, 64. The Builders' Complaint repeats this admission six times. 1 AA0064–0069 at ¶¶ 71, 81, 91, 94, 99, 107.

These factual allegations are judicial admissions by the Builders because they are "deliberate, clear, unequivocal statements by [the Builders] about a concrete fact within [the Builders'] knowledge." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.,* 127 Nev. 331, 343, 255 P.3d 268, 276 (2011); *see Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 954 n.31, 59 P.3d 1237, 1244 (2002) (noting judicial admission is conclusively binding). "Judicial admissions . . . have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." 2 McCormick on Evid. § 254 (7th ed. 2013).

This Court should not allow the Builders to contradict the judicial admission that their claims and the Association's defect claims arise out of the same transaction or occurrence. The district court erred as a matter of law by not giving effect to the Builders' judicial admission, failing to give effect to NRCP 13(a)'s requirements

and purposes, and holding the Association's defect claims were not compulsory counterclaims. AOB at 28–32.

B. The Association's Compulsory Counterclaims Relate Back.

This Court has never decided the general proposition of whether compulsory counterclaims relate back to the date of the complaint. Federal courts applying the analogous federal rule have repeatedly held that compulsory counterclaims relate back. AOB at 34 (collecting cases). The district court abused its discretion by incorrectly applying the law and relying on the readily distinguishable *Jamison* decision to avoid relation back. *Id.* at 34–36. The Association timely filed its defect counterclaims because (1) they are compulsory and relate back to the date of the Complaint; (2) the Chapter 40 Notice tolled the existing statute of repose until at least 30 days after the prelitigation mediation, *see* NEV. REV. STAT. § 40.695(1); and (3) the Builders filed the Complaint two days after the prelitigation mediation. 1 AA0052–53.

C. The District Court Misinterpreted and Misapplied NRS 40.695(2)'s Good Cause Standard.

Even if the Association's compulsory counterclaims do not relate back, which they do, the district court erred as a matter of law when it misconstrued and misapplied NRS 40.695(2)'s good cause test. Specifically, the district court analyzed whether good cause existed for the timing of the Association's filing rather than the statute's express directive for the court to consider whether, under all circumstances,

good cause existed to further toll the statute of repose. 16 AA2391 at ¶ 19. In effect, the district court rewrote the statute. AOB at 41–42. This legal error is not entitled to deference. *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197.

The district court abused its discretion by misconstruing NRS 40.695(2) and refusing to consider all relevant facts when deciding whether good cause existed to extend the tolling period. AOB at 41–43, 48–51. Here, the Builders received notice of the Association's defect claims more than a year before Association filed its counterclaim. AOB at 42, n.17. The district court also ignored the complete lack of prejudice to the Builders, the parties' prelitigation inspections and settlement discussions, and the Association's timely filing of a motion to dismiss, answer, and counterclaim. *Id.* at 37. Further, the district court erred as a matter of law by failing to exercise its discretion under NRS 40.695 consistent with Nevada's strong public policy to have claims adjudicated on their merits. *Id.* at 48.

Under these circumstances, the Court should adopt the relevant parts of the *Scrimer* court's analogous good-cause framework for purposes of NRS 40.695(2) (*i.e.*, factors five through nine) and (2) determine, based on the uncontroverted facts, that good cause exists to extend the NRS 40.695 tolling period sufficient to allow the Association to pursue its claims on the merits.

. . .

. . .

V. The District Court Abused its Discretion by Determining the Dates of Substantial Completion in Violation of the Clear Statutory Definition.

The district court abused its discretion by determining the dates of substantial completion without the required factual information and before any discovery occurred. The statute of repose, no matter its length, does not begin to run until the date of substantial completion. NRS 11.2055 defines substantial completion as the *latest* of three events: (1) the final building inspection; (2) the notice of completion; or (3) the certificate of occupancy. The Builders' motion for summary judgment contained only one of these dates (and inadmissible evidence regarding one other date), yet the district court ruled—before discovery occurred—that the certificates of occupancy established the dates of substantial completion. 16 AA2387–88; 14 AA2205–06. This was plain legal error entitled to no deference due to the statute's misapplication.[9]

CONCLUSION

AB 421 retroactively lengthened the statute of repose to 10 years just days after entry of the Repose Order applying the old statute of repose. The district court

[9] The Association referenced this ruling in its Case Appeal Statement and Opening Brief. 2/13/20 CAS at 5; AOB at 20. If the Court finds the issue was not preserved, the Court may, on its own prerogative, consider issues raised on reply if doing so "is in the interests of justice." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, 252 P.3d 668, 672 (2011). The district court's misapplication of law resulting in dismissal offends the interests of justice.

abused its discretion by refusing to give effect to the new, retroactive statute of repose in place at the time it rendered its decisions on the Association's motion for reconsideration and motion pursuant to NRCP 59(e). This Court must correct those mistakes by clarifying the applicable law and reversing the district court's erroneous judgment.

Additionally, the district court abused its discretion by misconstruing and misapplying NRCP 13(a), NRS 40.695, and NRS 11.2055. This Court should revisit *Byrne* and also correct the district court's errors of law related to NRCP 13(a) and NRS 40.695. Further, the district court's legal error related to NRS 11.2055 constitutes an independent basis for reversal of the judgment because no statute of repose can apply to the Association's claims before knowing the correct date of substantial completion.

DATED: May 12, 2021

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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 6,811 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 12th day of May, 2021, 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 REPLY 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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