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.

APPEAL

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

PETITION FOR REHEARING

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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 28th day of January, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
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PETITION FOR REHEARING

Respondents Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc. ("builders") seek rehearing for two reasons:

1. The Court applied AB 421's retroactivity provision more broadly than the Legislature expressly directed.

2. As a consequence, the Court's reading imposed two constitutional violations:

Separation of Powers. First, the Court misapprehended a material point of law—that once certified under Rule 54(b), the judgment here was enforceable, preclusive, and not subject to legislative revision. Likewise, a later Rule 59(e) motion does not reopen the judgment to apply a new law not in effect when the judgment was entered.

Due Process. Second, the Court adopted an erroneous holding that the Legislature could retroactively eliminate a defendant's accrued repose. In the unusual circumstances of this appeal, after briefing concluded, a three-Justice panel in a *different* case issued an opinion purporting to decide the question presented in this *en banc* appeal. That

panel did not have the benefit of the briefing in this case. *See* IOP 1(f), 7(e)(1).

The *en banc* Court should confront the merits of the builders' arguments regarding the text of the relevant statute of repose, NRS 11.202, as well as the constitutionality of resurrecting a reposed claim after final judgment based on intervening legislation.

ISSUES

1. Does the retroactivity provision of AB 421 apply only as broadly as the Legislature expressly directed, and not when

(a) the defects fall outside the statute's ten-year retroactivity provision,

(b) repose had already become permanent, and

(c) the claimant did not comply with the requirements of the then-effective grace period for accrued claims?

2. Does the retroactive application of a statute of repose violate the separation of powers or due process when it disturbs an effective, enforceable judgment and eviscerates a defendant's previously secure repose?

BACKGROUND

The buildings here were completed on January 16, 2008, and March 31, 2008. (25 App. 4393.) At the time, the repose period for construction-defect claims varied between six and ten years. In 2015, AB 125 created a single repose period of six years. The Legislature also provided a grace period for claims, like the association's, otherwise barred under the new repose period.

In 2017, more than a year after the grace period expired—and more than three years after the repose period had run—the association filed a counterclaim alleging construction defects. (2 App. 263.) The association sought to relate those claims back to a Chapter 40 notice, filed on the last day of the grace period. But as the *en banc* Court in *Byrne v. Sunridge Builders, Inc.*, 136 Nev. 604, 475 P.3d 38 (2020) confirmed, the claims cannot relate back to the Chapter 40 notice; the repose had become permanent.

On May 23, 2019, the district court dismissed the counterclaims. (15 App. 2377.) After twice denying reconsideration and Rule 59(e) relief (16 App. 2444, 2475; 25 App. 4313, 4369), on August 13, 2019, the district court certified its judgment as final under Rule 54(b). (25 App.

4393.) No changes in the law took place during the 28-day period to file a motion under Rule 59(e).

Nevertheless, the association filed yet another Rule 59(e) motion on the basis of a not-yet-effective statute, AB 421, purporting to apply a 10-year statute of repose retroactively. (25 App. 4406.) The statute took effect while the motion was pending. The district court denied relief (26 App. 4526), and the association appealed (27 App. 4772).

Pending the appeal, the *en banc* Court decided *Byrne*. This appeal was fully briefed and assigned to the *en banc* Court.

Before this appeal could be heard, and without the benefit of the builders' briefing here, a three-Justice panel issued an opinion in a different case, *Dekker/Perich/Sabatini Ltd. v. Eighth Judicial District Court*, 137 Nev., Adv. Op. 53, 495 P.3d 519 (2021). Under different facts, the panel decided that the Legislature could constitutionally revoke a defendant's repose because the longer repose period had a conceivable "rational basis."

Shortly thereafter, the *en banc* Court in this case issued an opinion that did not address any of the substantive arguments in the build-

ers' briefs against retroactive application. Instead, this Court took *Dekker* as a given and did not revisit the panel's conclusions that the statute withstood rational-basis review. Further, this Court held that the district court abused its discretion by not treating AB 421 as a "retroactive change in the controlling law" that justified reinstating the complaint. (Opinion 7-8.)

ARGUMENT

I.

ON ITS TERMS, THE 10-YEAR STATUTE OF REPOSE DOES NOT APPLY

A. The Retroactivity Provision Is Only as Broad as the Text Clearly Expresses

"When the Legislature intends retroactive application, it is capable of stating so clearly." *Salloum v. Boyd Gaming Corp.*, 137 Nev., Adv. Op. 56, 495 P.3d 513, 517 (2021) (citation omitted). In turn, even if a statute is clearly retroactive to *some* degree, this Court should not interpret the retroactive effect more broadly than the Legislature has clearly expressed.

Here, the Legislature has not clearly directed that the statute applies beyond the ten-year repose period preceding its enactment or to

claims previously resolved in an enforceable judgment. Nor did the Legislature revive claims that had expired through noncompliance with the prior legislative grace period.

B. The Statute of Repose Applies Retroactively to Defects in the Ten Years Before its Enactment

1. The Specific Reference to October 1, 2019 Indicates the Legislature's Intent to Cabin the Retroactivity Period

Setting aside its constitutional infirmities, AB 421 does not extend backward into infinity. Rather, the statute is retroactive specifically for property constructed in the ten years before the statute's enactment:

> The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply [*sic*] retroactively to actions in which the ***substantial completion*** of the improvement to the real property occurred ***before October 1, 2019***.

2019 Nev. Stat 2268, AB 421, § 11(4) (emphasis added).

This is the most natural reading. By specifically referencing October 1, 2019, the Legislature clarified that rather than applying solely to construction completed on or *after* the enactment date, the statute allowed claimants to sue for defects up to ten years *before* that date, *i.e.*, to October 1, 2009. To make the statute reach back indefinitely rather

than ten years, the Legislature would have omitted the specific date, instead decreeing just that "[t]he period of limitations appl[ies]retroactively," period.

2. A Ten-Year Look-Back Revives Reposed Claims

This reading has teeth. It would revive claims arising from defects between October 1, 2009 and October 1, 2013, that had expired under the six-year repose period of AB 125 or former NRS 11.205—a result the *Dekker* panel seemed to think was constitutional—without reaching back beyond the ten years that the statute itself created.

3. Limitless Retroactivity Would Have Absurd Consequences the Legislature Did Not Intend

A contrary reading of limitless retroactivity is untenable. The Court here apparently concluded, absent any textual basis, that retroactivity extends indefinitely and "change[s] the applicable law . . . at the time the judgment was entered." (Opinion 6-7.) But were that so, claimants whose claims were thrown out years or decades earlier could move under Rule 60(b) to revive a complaint that was ruled untimely under a shorter statute of repose. Indeed, NRS 11.202's roots reach to

1965, when the Legislature enacted a six-year repose period for all construction-defect claims. 1965 Nev. Stat. 948, SB 113, § 1. So if, say, a court in 1969 barred a complaint for defects in real property constructed seven years earlier, the plaintiff could rejoice a half-century later: suddenly, "the applicable law" at the time of the 1969 judgment would be a ten-year repose period.[1]

There is no legal or logical distinction between that absurd hypothetical (a structure completed in 1962) and the facts of this case (buildings completed in January and March 2008). That the Legislature did not intend to revive 50-year-old claims merely underscores the need to respect the limit it drew, reviving liability only for the previous decade of construction.

[1] A partial extension in 1983 was not retroactive. 1983 Nev. Stat. 1237-39, SB 236.

C. The Ten-Year Statute of Repose Does Not Disturb Judgments Entered Before its Effective Date

Alternatively, the logical limit to retroactivity is one that the Legislature intended and that the constitutional separation of powers demands: the statute does not disturb judgments entered before its effective date.

1. The Legislature Enacted AB 421 Against the Backdrop of the Existing Law

AB 421 was not drafted in a vacuum. The Legislature understood the principles concerning the effectiveness of district-court judgments: they are enforceable and preclusive, and are the legal terminus of the "pending action" in the district court—even while the district court considers a Rule 59(e) motion.

a. JUDGMENTS ARE PRECLUSIVE PENDING POST-JUDGMENT MOTIONS AND APPEAL

A judgment is immediately effective for purposes of preclusion, regardless of any post-judgment motions, appeal, or stay of enforcement. *Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008).

b. UNLESS STAYED, JUDGMENTS ARE ENFORCEABLE PENDING POST-JUDGMENT MOTIONS AND APPEAL

Similarly, a judgment is effective when entered, and may be executed upon unless stayed. NRCP 62. Specifically, merely *filing* a post-judgment motion to alter or amend the judgment does not stay enforcement pending the motion's resolution; the court must actually grant a stay. NRCP 62(b); 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2903 (3d ed. updated Apr. 2021) (noting that "[a] posttrial motion . . . does not stay the judgment" and that the prevailing party is free "to bring proceedings to enforce it"); *see also Heikkila v. Barber*, 164 F. Supp. 587, 591 (N.D. Cal. 1958) (distinguishing tolling from effectiveness).

c. AFTER JUDGMENT, THE "ACTION" RESOLVED IS NO LONGER PENDING

Likewise, the "principle that intervention may not follow a final judgment" rests on the idea that once the case has reached judgment—even if that judgment is still subject to challenge—there is no longer a "pending action to which the intervention might attach." *Eckerson v. C.E. Rudy, Inc.*, 72 Nev. 97, 99, 295 P.2d 399, 400 (1956); *accord Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 201, 207, 462 P.3d 677, 680, 682 (2020).

d. RULE 54(b) JUDGMENTS ARE LIKE ANY OTHER

These principles apply equally to judgments certified under NRCP 54(b). *See* 10 WRIGHT & MILLER § 2661. Such a judgment is effective, enforceable, and preclusive, and terminates the pending action as to the claims or parties resolved—notwithstanding any post-judgment motions.

Here, for instance, Rule 54(b) certification terminated the construction-defect claims in a final judgment, such that when AB 421 took effect, no action remained pending as to those claims.

2. The Legislature Did Not Intend to Reopen Judgments

The directive to apply the ten-year statute of repose "retroactively to *actions*," 2019 Nev. Stat 2268, AB 421, § 11(4) (emphasis added), necessarily incorporates these principles about the effect of a judgment.

There is no evidence that the Legislature intended to disturb an action on claims that had already reached judgment, under Rule 54(b) or otherwise. Indeed, the Legislature knows how to draft an alternative definition: In eminent-domain actions, for instance, a "final judgment" means "a judgment which cannot be directly attacked by appeal, motion for new trial or motion to vacate the judgment." NRS 37.009(2). But

this is unusual. *Compare, e.g.*, NRS 40.435 (defining a "final judgment" as one that can still be appealed). And even in eminent domain, the Legislature has not tried to change the parties' substantive rights *after* a district-court judgment.

AB 421 does no such thing, either. The Legislature gave no instruction to apply the retroactivity provision to claims that had already been resolved in an effective, enforceable judgment. Absent a specific directive to so invade the judiciary's judgments, this Court should not imply one.

D. The Legislature Did Not Revive Claims that Expired because of Noncompliance with the Grace Period

Alternatively, *Dekker*, which does not address the *scope* of retroactivity, can be harmonized with *Byrne*. The two cases differ in one crucial respect: in *Dekker*, the six-year repose period of AB 125 had passed *before* the claim accrued, while in *Byrne*, the claim had already accrued in 2015, but the claimant failed to meet the terms of the legislative grace period.

Assuming AB 421 applies to claims that were barred *solely* due to the retroactive application of the shortened statute of repose (i.e., they

accrued after the grace period expired), nothing in AB 421 indicates that it applies to claims barred *in addition* by the claimant's noncompliance with the grace period.

1. Dekker*: Accrual after the Grace Period*

The grace period through February 2016 provided no protection to the claimant in *Dekker*. That claim did not accrue until 2017, when damage first became apparent in an investigation. 495 P.3d at 521. Two years later, the Legislature through AB 421 might have wanted to protect such claimants, whose claim through no fault of their own was barred by the retroactively accelerated repose in AB 125.

2. Byrne*: Noncompliance with the Grace Period*

In contrast, the grace period in AB 125 would have protected Byrne, had she complied with it. Byrne conceded that AB 421 could not apply to her:

> [E]ven aside from the constitutional problems detailed by Respondents, the law is clear that, unless the Legislature has expressly provided for the revival of a claim barred under a previous statute of repose, a new statute will not be held to do so even if it contains certain general features of retroactivity. Although AB 421 provides that the new 10-year period of repose will have retroactive effect, it does not specifically provide for the revival of previously expired claims. It follows

> that, if the district court had correctly ruled that Byrne's claim was time-barred, AB 421 would not operate to change the result.

No. 77668, Doc. No. 2019-39004, at 16 (Sept. 18, 2019).

This Court's opinion in *Byrne* likewise emphasizes the availability of—and Byrne's noncompliance with—the grace period by filing just the Chapter 40 notice, but not the complaint, before its expiration:

> [T]he grace period mandated that the new statute of repose did not limit "an action . . . [t]hat accrued before the effective date of [A.B. 125], and was *commenced* within 1 year after the effective date of [A.B. 125].").

Byrne, 136 Nev. at 607, 475 P.3d at 41 (quoting AB 125). So, this Court held, "nothing prevented Byrne from filing her lawsuit within the grace period." *Id.* at 608-09, 475 P.3d at 42-43.

3. The Association, Like Byrne, Neglected to Comply with the Grace Period

Here, the association is not among the fault-free claimants the Legislature may have wanted to protect. Rather, like Byrne, the association's claims had accrued "prior to February 24, 2015." (2 App. 282.) Yet it waited until the last day of the grace period even to serve the Chapter 40 notice, and did not file its construction-defect counterclaims until March 2017.

This Court should harmonize *Dekker* with *Byrne* by leaving *Byrne* intact for claims that did not comply with the grace period when it was in effect: AB 421 does not expressly revive claims that had expired due to a claimant's failure to timely file *accrued* claims. The association's claims expired because of the association's own neglect—not merely the retroactive application of a statute of repose. There is no basis to revive those claims.

II.

APPLYING THE 10-YEAR STATUTE OF REPOSE HERE IS UNCONSTITUTIONAL

Further supporting the limited-retroactivity reading is the principle that "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Doe Dancer I v. La Fuente, Inc.*, 137 Nev., Adv. Op. 3, 481 P.3d 860, 872 (2021) (citation omitted).

Here, even if the reading that the Legislature intended to overturn judgments were permissible, this Court should not adopt it. That

interpretation is not just constitutionally dubious; it is a clear invasion of the separation of powers and a violation of due process.

A. The Opinion Violates the Separation of Powers

Under the constitutional separation of powers, a subsequent change in law cannot upset a final judgment dismissing an action under the then-applicable statute of repose. This is significant here because the tiers-of-scrutiny analysis applied in *Dekker* is irrelevant to separation-of-powers violations. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 299-300, 212 P.3d 1098, 1108-09 (2009) (forbidding the Legislature from "waiv[ing]" separation of powers).

1. The Separation of Powers Forbids Legislative Alteration of a Judgment's Preclusive Effect

The separation of powers "prevent[s] one branch of government from encroaching on the powers of another branch." *Lyft, Inc., v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 86, ___ P.3d ___, ___ (2021) (citation omitted). The Legislature cannot disturb a judgment's enforceability or preclusive effect.

In *Berkson v. LePome*, this Court addressed the Legislature's attempt to do so at the appellate level, giving a plaintiff whose judgment

was reversed the chance to refile without preclusive effect. 126 Nev. 492, 501, 245 P.3d 560, 566 (2010). Such a statute "unconstitutionally interferes with the judiciary's authority to manage the litigation process and this court's ability to provide finality through the resolution of a matter on appeal." *Id.* That legislative incursion is no more excusable when it dismantles a district-court judgment before appeal.

Other states recognize the same principle. *See, e.g.*, *State v. Bodyke*, 933 N.E.2d 753, 766 (Ohio 2010) ("A judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted." (citation omitted)); *Ex parte Jenkins*, 723 So. 2d 649, 656 (Ala. 1998) ("[T]he core judicial power is the power to declare finally the rights of the parties, in a particular case or controversy, based on the law at the time the judgment becomes final."); *Commonwealth v. Sutley*, 378 A.2d 780, 782 (Pa. 1977) ("The vesting in the legislature of the power to alter final judgments would be repugnant to our concept of the separation of the three branches of government.").[2]

[2] Some constitutions, including the U.S. Constitution, draw the line elsewhere. Because the U.S. Constitution lets *Congress* control

2. An Unconstitutional Intrusion on Judicial Judgments Is Not a "Change in Controlling Law"

Pointing to the license to alter a judgment based on a "change in controlling law" (Opinion 5) presupposes *when* a change in law controls. Most cases cited for the general rule do not actually involve such a purported change.[3] Of the few cases applying this exception, most involve a *judicial* decision that constitutes "subsequent, contradictory controlling authority." *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); 18B WRIGHT & MILLER § 4478; 11 WRIGHT & MILLER § 2810.1 n.20. Of the

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which, if any "inferior Courts" to "ordain and establish," Congress—unlike the Nevada Legislature—can determine the "[f]inality of a legal judgment" and change the rule of decision at any stage of appeal. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221, 227 (1995). In contrast, the Nevada Constitution itself creates the district courts. NEV. CONST. art. 6, § 1. The Legislature's narrow powers over the district courts do not include the power to abridge the effect of a district court's judgment. *See id.* § 6.

This Court in fact has cautioned against reliance on the federal separation of powers articulated in *Plaut* because "the Nevada Constitution embraces separation of powers to an even greater extent than the United States Constitution." *Berkson*, 126 Nev. at 501 n.5, 245 P.3d at 566 n.5. In Nevada, statutes altering the doctrines of claim or issue preclusion are categorically unconstitutional.

[3] None of the cases cited in the opening brief (at 21) or the opinion do.

even smaller subset involving legislative change, those traditionally apply *prospective* remedies, such as an injunction for trademark dilution. *E.g.*, *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 390 (6th Cir. 2010). Undersigned counsel found none reviving a dismissed complaint based on a lengthened statute of repose that had not become effective when judgment was entered.

Indeed, the perverse effect of the opinion here is that it will encourage claimants not just to prolong the litigation pre-judgment, but also to try to create delay with post-judgment motions. Here, for example, after losing two motions for reconsideration, the association's third motion was filed not on the basis of any then-controlling law, but in the expectation, merely by filing the motion, that they could impose sufficient delay so that a new law would come into operation by the time the motion was decided.

Because Nevada's constitution expressly vests judicial power in the district courts, it does not give the Legislature license to alter the district court's judgment regarding past conduct.

3. As Applied Here, the Retroactivity Statute Violates the Separation of Powers

Here, this Court held that the district court abused its discretion by failing to apply a "change in controlling law" that the Legislature had enacted "since the entry of the judgment." (Opinion 6.) But that judgment—on claims from which the builders had been guaranteed repose—was not subject to legislative revision.

Indeed, this Court's own analysis confirms this. Without textual basis, the Court concluded that the Legislature "intended [AB 421] to apply to construction defect actions pending as of October 1, 2019." (Opinion 7.) Yet the Court overlooked that "when a final judgment is reached, there necessarily is no 'pending' issue left" in the resolved action. *Nalder*, 136 Nev. at 207, 462 P.3d at 684. The Rule 54(b) judgment certified as final the dismissal of the only "construction defect action[]" in the case—the association's counterclaims. As of October 1, 2019, that judgment was effective, enforceable, and preclusive as any other.[4] There was no "construction defect action[] pending" on the statute's effective date. Once the district court entered final judgment, the

[4] Notice of entry of the Rule 54(b) certification was served on August 13, 2019. (25 App. 4390.)

Legislature's power to prescribe the controlling law in this proceeding ceased.

B. Denying a Defendant Repose After It Had Become Permanent Violates Due Process

1. The Prevailing Approach: Repose Creates an Especially Secure Property Interest

As the builders emphasized in their answering brief, substantial persuasive authority holds that a final judgment constitutes a vested right on which a party is entitled to rely. *See, e.g.*, *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *United States v. McGlory*, 968 F.2d 309, 350 (3d Cir. 1992).

Similarly, expiration of a repose period "create[s] vested rights to a timebar defense in the defendant." *Ripley v. Tolbert*, 921 P.2d 1210, 1225 (Kan. 1996); *see, e.g.*, *City & County of San Francisco v. Workmen's Comp. Appeals Bd.*, 74 Cal. Rptr. 810, 816 (Ct. App. 1969).

So once a claim is properly reposed—that is, once the "effective laws at the time . . . inform[] [a] defendant[] that [a] plaintiff's claims were completely and totally extinguished"—that repose becomes a weighty reliance interest. *Ripley*, 921 P.2d at 1224. This interest af-

fects a host of considerations, including decisions about liability insurance, evidence-preservation duties, accounting protocols, and public-reporting obligations. Accordingly, as this Court has recognized, a statute of repose "give[s] 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) (citations omitted).

Unlike a statute of limitations, a statute of repose is subject to neither a plaintiff's reasonable discovery nor equitable tolling, so a defendant can easily calculate the repose period and be sure it has run. *Somersett Owners Ass'n v. Somersett Dev. Co., Ltd.*, 137 Nev., Adv. Op. 35, 492 P.3d 534, 539 (2021) (collecting authorities).

2. Repose Rights, Unlike an Expired Statute of Limitations, Cannot Be Retroactively Stripped Away

For that reason, the property right created after the repose period runs is constitutionally distinct from that created in a statute of limitations:

> The legislature has the power to revive actions barred by a statute of limitations if it specifically expresses its

> intent to do so through retroactive application of a new law. The legislature *cannot* revive a cause of action barred by a statute of repose, as such action would constitute the taking of property without due process.

Ripley, 921 P.2d at 1220 (citation omitted); *accord Colony Hill Condo. I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) ("Once the 1963 statute of repose barred the plaintiffs' suit, however, a subsequent statute could not revive it. . . . Such a vested right cannot be impaired by the retroactive effect of a later statute.").[5]

3. Dekker *Strays from the Majority Approach to Repose Rights Without Addressing those Precedents*

Neither opinion, here or in *Dekker*, addresses any of this authority. In *Dekker*, the panel simply concluded that "Dekker [did] not point to any Nevada law characterizing statutes of repose as awarding an entitlement to be free from a stale claim." 495 P.3d at 524. Here, the Court relied on *Dekker* without analysis. Indeed, it appears that the

[5] *Colony Hill* is cited with approval in *G & H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997) and is indirectly referenced in *Somersett*, through a citation to *Bryant v. Adams*, 448 S.E.2d 832 (N.C. Ct. App. 1994), which in turn (at 835-36) cites *Colony Hill*.

builders' authorities were not even considered before *Dekker*'s announcement that a retroactive statute dismantling previously secure repose passed constitutional muster.

This omission alone justifies rehearing so the Court can clarify the effect of repose under Nevada law, with full consideration of persuasive authority that this issue deserves.

4. Reopening Reposed Claims Lacks Rational Basis

Regardless, the *Dekker* panel never addressed the correct constitutional question. It defended only the ten-year repose period itself as rationally "reflect[ing] the timeframe in which these types of defects most often materialize." 495 P.3d at 525. *Dekker* provides no rational basis for applying that extended repose period *retroactively* to claims that had already reached repose *and* a judgment.

This oversight is determinative, for "a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266-67 (1994) (citation omitted). The Court must consider not just the merits of the legislation itself, but

"the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.*

The *Dekker* panel did not. There is no evidence that the Legislature considered the effects on defendants who stop insuring against reposed defects claims, or how due process requirements of notice would be satisfied for defendants suddenly exposed to such claims. Indeed, as cases such as *Ripley v. Tolbert* illustrate, there is no rational basis.

Retroactivity is particularly irrational in light of the constitutional requirement that a grace period accompany any retroactive truncation of a statute of limitation on a claim that has accrued. *Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. 1117, 1123, 843 P.2d 834, 838 (1992). The Legislature was aware of this authority and that a defendant's repose rights are *more* secure than a plaintiff's contingent right to sue. Perforce, retroactive application of a lengthened repose period after the prior repose had accrued lacks a rational basis.

C. The Combined Constitutional Doubts Eliminate the Broad Retroactive Reading

The two constitutional violations converge here: the builders' repose became permanent before the association filed its counterclaim,

and the final judgment of dismissal was entered before AB 421 took effect. The repose period had run in 2014, six years after construction, and more than *five* years before AB 421.

But this Court need not address the constitutional questions. Instead, those doubts require the narrower reading of the Legislature's retroactive intent discussed in part I.

CONCLUSION

For these reasons, this Court should grant rehearing.

Dated this 28th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

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Dated this 28th day of January, 2022.

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