Case No. 81459

In the

Supreme Court

of the

State of Nevada

DEKKER/PERICH/SABATINI LTD.;
NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN;
MELROY ENGINEERING, INC. d/b/a MSA ENGINEERING CONSULTANTS;
JW ZUNINO & ASSOCIATES, LLC;
NINYO & MOORE, GEOTECHNICAL CONSULTANTS;
RICHARDSON CONSTRUCTION, INC.;
THE GUARANTEE COMPANY OF NORTH AMERICA USA; and
JACKSON FAMILY PARTNERSHIP LLC d/b/a STARGATE PLUMBING,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT,
STATE OF NEVADA, CLARK COUNTY, and
THE HONORABLE TREVOR ATKIN,

Respondents,

CITY OF NORTH LAS VEGAS,

Real Party in Interest.

FROM DECISIONS OF
THE EIGHTH JUDICIAL DISTRICT COURT,
CLARK COUNTY, NEVADA
CASE NO. A-19-798346-C
HONORABLE TREVOR ATKIN
DEPARTMENT 8 · PHONE: (702) 671-4338

PETITIONERS' REPLY IN SUPPORT OF JOINT PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

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I. LEGAL ARGUMENT

A. CITY OF NORTH LAS VEGAS' ("CNLV") STATEMENT OF CASE INSERTS A MISLEADING REPOSE REINSTATEMENT ARGUMENT AND THEN CONCEDES THE EFFECTIVE DATE OF AB 421 IS OCTOBER 1, 2019

In its Answering Brief ("Ans."), CNLV first discusses the history of Nevada's statute of repose as cited in *Dykema v. Del. Webb Communities*, Inc., 132 Nev. 823, 825 n.1, 385 P.3d 977, 978 n. 1 (2016). CNLV claims that in 2009, when substantial completion occurred, Nevada's statute of repose had three categories and time periods (10 years-known; 8 years-latent and 6 years-patent). Ans. 4; *Dykema*, 132 Nev. at 828. CNLV then asserts that "it is undisputed that a 10 year period would have applied to this action at that time." *Id*. CNLV's assertion is irrelevant as its claims were never subject to the prior 6, 8 and 10 year repose periods, and is also misleading inasmuch as there has never been a determination that CNLV's claimed defects fall into any particular repose category (known, patent or latent). *Id*. at 4-5.

CNLV next argues that in 2019, when AB 421 was enacted amending NRS 11.202/AB 125 ("AB 125"), said amendment "reinstat[ed] the 10 year repose period." *Id*. at 5. Nothing in AB 421 indicates the 10 year repose is a "reinstatement" of the prior 6, 8, 10 year repose periods. V10 PA1506 (Sec. 7). In fact, this Court recently held the prior 6-10 year repose period was amended to a single period of 6 years "for all defects" in February 2015. *Byrne v. Sunridge*

Builders, Inc., 136 Nev., Adv. Op. 69, 475 P.3d 38, 41 (Oct. 29, 2020). Further eroding CNLV's argument, the prior repose statute required the defect to fall into a defined category to determine the period, but neither the applicable statute (AB 125) nor the current statute (AB 421) re-imposed this distinction. *Dykema, supra*.; *see also*, AB 421. Thus, AB 421 did not reinstate anything, instead creating a single 10 year repose period.

Crucially, CNLV concedes AB 421 "…took effect on October 1, 2019."[1] Ans. 6. This concession establishes that its complaint was not filed under AB 421.[2]

B. CNLV CONCEDES ITS CLAIMS WERE BARRED BY THE SIX YEAR REPOSE

CNLV's factual and procedural summary interestingly includes multiple concessions supporting Petitioners' arguments on repose. Specifically, CNLV concedes the date of substantial completion is July 13, 2009. *Id*. CNLV next

[1] In a footnote, CNLV admits AB 421 does not identify an effective date but still inserted the argument that the 10 year repose applied in July 2019. *Ans.* 6, fn. 2. When a statute is silent about its effective date, it automatically is deemed as becoming effective on October 1st following its passage. *See*, NRS 218D.330(1). Importantly, the prior law "remains effective until the last moment of the day on which it expires by limitation..." *Id*. at (2); *see also*, Legislative Manual, Chapter III, *Legislative Procedure and Action*, 155 (2019 Ed.).

[2] The Ans. also did not oppose any of the extraordinary relief and de novo review arguments raised by Petitioners. Pet. 5-10.

concedes that when its damages began to manifest, the 6 year repose period was in effect and precluded its claims. *Id*. at 7.

CNLV also admits that its complaint was filed on July 11, 2019 and that the District Court, on September 30, 2019, **"…the day before the amended version of NRS 11.202 took effect…"** ruled that retroactive application did not apply to the complaint, thus dismissing the matter.[3] *Id*. 7-9 (emphasis added). There is no dispute CNLV's complaint was untimely as AB 421 was not yet in effect.

C. CNLV FAILS TO JUSTIFY THE DISTRICT COURT'S RULING AMENDING ITS DISMISSAL ORDER

(i) CNLV'S COMPLAINT WAS UNTIMELY, BARRED AND THE UNDERLYING ACTION NEVER COMMENCED

CNLV seeks to narrow Petitioners' arguments on repose by completely ignoring any discussion on the clear and plain language of AB 125. Ans. 10. This silence is because CNLV was clearly prohibited from filing its complaint on July

[3] CNLV's argument concerning EDCR 2.26 is a "red herring." First, this argument pertains to a separate order on scheduling which is not part of the orders at issue in the Pet. *See*, Pet., *see also*, V15 PA-2399-2406 & V18 PA-3064-73. Second, the District Court has broad discretion on controlling its calendar. *Maheu v. Eighth Jud. Distr. Ct.*, 89 Nev. 214, 510 P.2d 627 (1973). Third, EDCR 1.10 states that the EDCR rules are to be "liberally construed to secure the proper and efficient administration of the business and affairs of the Court and to promote and facilitate the administration of justice."

11, 2019 pursuant to AB 125.[4] *Id*. Given this conundrum, CNLV instead attempts to distinguish Petitioners' cases regarding "void ab initio." *Id*. In other words, CNLV's arguments focus solely on the effect of its failure, as opposed to the legal basis for the failure. Per AB 125, "no action may be commenced," means any action, including this matter, which clearly violated AB 125, therefore, **never commenced**.

The following chart illustrates the key defects with CNLV's complaint:

Date	Event	Source	Existing Deadline to Commence Suit
July 13, 2009	Undisputed Substantial Completion date	V 1, PA6 at Para. 45; Ans. 6	July 13, 2015, 2017, or 2019 (depending on type of defect)
February 24, 2015	AB 125 Effective Date	*See*, 2015 Nev. Stat., Ch.2, 21(5)); *see also*, leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1439/Overview	July 13, 2015 (following expiration of 1 year grace period)
July 13, 2015	Expiration of CNLV's claims for the project	AB 125 Section 21(6)	July 13, 2015 (following expiration of 1 year grace period)

[4] "***No action may be commenced*** against … any person performing or furnishing the design … or the construction of an improvement to real property ***more than 6 years after the substantial completion of such improvement***, for the recovery of damages for: (a)…any deficiency in the design, planning… [or] construction of such an improvement…" AB 125 (emphasis added).

February 24, 2016	Expiration of the 1 year grace period to bring an action under prior repose period	*Id*.	July 13, 2015
July 11, 2019	CNLV filed its void Complaint	V1 PA1	**July 13, 2015**
September 30, 2019	Order Dismissing CNLV's Complaint is pronounced by the District Court	V15 PA2399-2406	July 13, 2015
October 1, 2019	AB 421 went into legal effect (Effective Date)	*Id*.; *see also*, NRS 218D.330, V14 PA2235 & 2257; AB 421 Sect. 11(4); V15 PA2471	July 13, 2019

This Court recently held a claimant in a construction defect action "must file a lawsuit within the [then-existing] statute of repose." *Byrne*, 136 Nev., Adv. Op. 69, 475 P.3d at 41. "[A] statute of repose **bars** a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (emphasis added).

Pursuant to the plain language in AB 125 and *Byrne*, CNLV's complaint ***was barred,*** and the underlying action ***never commenced***. This is undisputed under any reasonable analysis of the differing statutes of repose. Unable to counter this

established fact, CNLV offers unsupported arguments that: (1) its complaint was actually timely under the 10 year statute in effect when the claims accrued in July 2009 and (2) the Legislature retroactively restored the 10 year period in October 2019. Ans. 11. Both statements are misleading as shown herein. CNLV's claim of timeliness under the prior 6-10 year repose is baseless as those repose periods were terminated by AB 125. *Bryne*, *supra*. CNLV forfeited the 6-10 year repose argument when it failed to file its complaint prior to AB 125 or during the 1 year grace period thereafter. Furthermore, AB 421 is a new statute of repose, not a reinstatement of the prior 10 year repose, as AB 421 does not define any "categories" of defects and has a single period of repose (not three different periods). *See*, AB 421.

CNLV next argues that Petitioners' position that CNLV's complaint, filed before AB 421, is untimely somehow "defies logic" because legislatures, in general, can retroactively apply "newly extended statute of limitations to revive time-barred claims." Ans. at 11. CNLV certainly missed the point of Petitioners' arguments in the Petition. Even if legislatures can pass laws retroactively reviving claims, a point Petitioners' strongly disputed in the Petition (legislatures cannot revive stale claims but can only extend claims), AB 421 still fails to save CNLV's complaint because any retroactive effect did not occur until October 1, 2019, ***well after*** CNLV filed its complaint.

Byrne is clear that CNLV's complaint needed to be filed within the then-existing 6 year repose period. *Byrne, supra.* Once that repose period expired, CNLV's complaint became immediately barred. *Id.* Per AB 125, no action could thereafter commence, which this Court upheld in *Byrne*. *Id*. CNLV even admits knowing of the 6 year repose period and understanding that its claims were precluded during the time of filing. Ans. 7. Yet, CNLV, without legal justification, still filed its complaint on July 11, 2019 in violation of AB 125.

CNLV next argues its complaint is not void ab initio. Ans. 12-13. However, other than seeking to distinguish Petitioners' cases and narrowing the void ab initio argument to certificate of merit issues, CNLV offered no justification that its complaint on July 11, 2019 was legally filed per AB 125. The only argument concerned a general statement that AB 421 was signed, but not yet effective. Thus, CNLV offered nothing to establish that its complaint was legally valid when filed to counter Petitioners' void ab initio argument based on AB 125.

Void ab initio is a legal concept which treats a document, such as an untimely complaint, as invalid from the outset or as something that does not "legally exist and thus it cannot be amended." *Washoe Med. Ctr. v. Second Judicial Dist. Ct*., 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (citing, *Black's Law Dictionary* 5 (8th Ed. 2004 (defining "ab initio" as "from the beginning.")); see also, *Oak Nevada, LLC v. Eighth Jud. Distr. Ct*., 127 Nev. 593, 260 P.3d 408

(2011), *abrogated on other grounds by, Reif v. Aries Consultants, Inc*., 135 Nev. Adv. Op. 51 (Oct. 10, 2019). Void ab initio is not limited to certificate of merit issues and has been applied to legal instruments, policies, judgments, statutes, and contracts. *See e.g*., *Faison v. Lewis*, 25 N.Y.3d 220, 224 (N.Y. Ct. App. 2015) (a forged deed is void ab initio); *Patton v. Diemer*, 518 N.E.2d 941, 944 (Ohio 1988) (judgment by Court with no subject matter jurisdiction is void ab initio).

Thus, by applying these facts and legal language from *Byrne* (bars) and AB 125 (no action may be commenced), CNLV's complaint was clearly void ab initio. It lacked legal sufficiency, was void from the moment of filing, and never legally existed. In *Wheble*, this Court held that where a complaint never legally existed, the action never commenced as defined by NRCP 3. 128 Nev. 119, 272 P.3d 134 (2012). The *Wheble* holding, while focusing on the certificate of merit, is consistent with the *Byrne* holding and AB 125.

AB 421 does not resurrect CNLV's complaint as said law did not take effect until October 1, 2019. However, even if CNLV's complaint was filed on October 1, 2019 per AB 421, its claims are still three months past the new 10 year repose. CNLV's deliberate filing of a legally defective complaint (which it knew and understood it had no legal right to file) under AB 125 on July 11, 2019, does not allow it to circumvent existing law to gain a tactical advantage of new statute which was not effective on said date. To find otherwise would condone CNLV's

clear abuse of the legal system and provide special benefits to CNLV that other claimants who followed the law (specifically waiting until AB 421 actually went into effect) would not receive.

Even if AB 421 could possibly resurrect actions for projects that were substantially complete ***on or after*** October 1, 2009, this does not apply to this matter as the subject project was substantially completed on July 13, 2009. Thus, even if CNLV filed on October 1, 2019 under AB 421, its claims would be barred under the new 10 year statute of repose. To get around this issue, CNLV devised a strategy to secure the benefit of the 10 year repose by improperly and prematurely filing its complaint in violation of AB 125. CNLV then planned to stall out the pending matter to get past the October 1, 2019 effective date to argue that AB 421 saved its claims. This strategy failed when CNLV's claims were properly dismissed. V15 PA-2399-2406.

Ultimately, CNLV's complaint never legally existed and is hence, void ab initio.[5] For these reasons, the District Court also exceeded its jurisdiction when it amended the Order for Dismissal to provide a legal right to CNLV that neither existed on the date of filing nor on October 1, 2019 when AB 421 went into effect.

[5] It is also important to note this matter was dismissed with prejudice before AB 421 took effect, where at the September 30, 2019 hearing, the District Court pronounced that CNLV failed to timely file its complaint and that its claims violated then-effective AB 125. V15 PA-2399-2406.

(ii) THE AUTHORITIES CITED BY CNLV ARE INAPPLICABLE TO THE RETROACTIVE DEPRIVATION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT

As set forth in the Petition, Petitioners' substantive due process rights were violated by the District Court's decision allowing the revival of a time-barred claim which had been dismissed with prejudice. Pet. 25-35. The authorities cited in the Ans. which purport to demonstrate a constitutional basis for said violation, are inapplicable to the specific factual and procedural context encompassed by the District Court's order.

CNLV broadly contends "[t]he U.S. Supreme Court has long held that legislatures may apply a statute of limitations retroactively without offending due process." Ans. 15. In reality, however, not only are the authorities cited in support of this expansive assertion inapposite to the circumstance in which legislation retroactively results in the reinstitution of a dismissed claim, but the US Supreme Court has directly addressed that specific question and pronounced such an outcome unconstitutional in *Plait v. Spendthrift Farm*, 514 U.S. 211 (1995).

CNLV primarily focuses its arguments on *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945). In *Chase*, plaintiffs sued to recover the purchase price of securities sold, which had not been registered, in violation of Minnesota's then-existing Blue Sky Law. *Id.* at 305-06. While proceedings were pending in the trial Court, the Minnesota legislature enacted a statute amending the Blue Sky Law

which expressly allowed an action to be brought within 1 year after the enactment of the amendment, thereby depriving the defendant of any statute of limitation defense. *Id.* at 306-308. Upon appeal to the Minnesota Supreme Court, one of the arguments raised was that the amended limitations provision violated the due process clause of the Fourteenth Amendment. The Minnesota Supreme Court rejected the appeal. *Id.* at 309. However, the US Supreme Court disagreed and distinguished its prior holding in *William Danzer Co. v. Gulf R.R.*, 268 U.S. 633 (1925), as follows:

> In the Danzer case it was held that ***where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law***.

Chase, supra, 325 U.S. at 312, fn. 8 (emphasis added).

The Tenth Circuit, among others, found this distinction to be determinative. In *Johnston v. Cigna Corp.*, 14 F.3d 486 (10th Cir. 1994), the Federal District Court granted the defendants' motion for summary judgment as to the plaintiffs' action asserting violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Act"). Approximately two months after judgment was entered against the plaintiffs, Congress amended the Act, extending the limitation period for an action brought under the Act and providing for dismissed causes of action under the old limitations period to be reinstated on a motion by a plaintiff if made within a

specified time frame. *Id.* at 487-88.

The District Court denied plaintiffs' motion to reinstate their action on the grounds that the amendment violated the principle of separation of powers and impermissibly upset a final judgment. *Id.* at 488. On appeal, the Tenth Circuit found *Chase* and *Campbell* distinguishable on the ground that "[n]either case . . . involved a final judgment." *Id.* at 492. Rather, the Court found the decision was governed by the vested rights doctrine as enunciated by the US Supreme Court in *McCullough v. Virginia*, 172 U.S. 102 (1898), which held:

> ***It is not within the power of a legislature to take away rights which have been once vested by a judgment***. Legislation may act on subsequent proceedings, may abate actions pending, but ***when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases***.

Id. at 123-124 (emphasis added). Petitioners enjoy those same rights here following dismissal of CNLV's Complaint with prejudice.

Similarly, in *Perez v. Roe*, 146 Cal. App. 4th 171, 52 Cal. Rptr. 3d 762 (2006), the California Court of Appeal upheld a judgment of dismissal entered pursuant to a demurrer sustained without leave to amend. Subsequent to the judgment becoming final, the California legislature expanded the limitations period, including a revival provision applicable to actions otherwise barred because the previous limitations period had expired. The revival provision stated that it does not apply to actions "litigated to finality on the merits before January 1, 2003"

but also foresaw the constitutional challenges in reciting that "[t]ermination of a prior action on the basis of the statute of limitations does not constitute a claim that has been litigated to finality on the merits." *Id.* at 174-75.

The California Court of Appeal noted that "[n]one of the decisions cited by appellants and amicus [which included *Chase*] involves retroactive application of a limitations period to revive actions that had been dismissed under an earlier, shorter statute of limitations, however, and therefore none applies here." *Id.* at 770, fn. 6. The Court of Appeal also found the amendment violated the separation of powers doctrine since a final judgment entered by the judiciary "could not be legislatively revived." *Id.* at 775.

A comparable conclusion was reached by the Sixth Circuit in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993). Like *Johnston, supra, Plaut* involved Congress' amendment to Section 10(b) of the Securities Exchange Act of 1934 which provided a mechanism for reinstating causes of action dismissed under the old limitations period. Following the amendment, plaintiff investors moved to have their security fraud claims reinstated. *Id.* at 1490.

The Sixth Circuit affirmed the District Court's denial of plaintiffs' motions, citing the US Supreme Court's holding in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) affirming that when a court's adjudication upon the private rights of parties has "passed into judgment, the right

becomes absolute, and it is the duty of the Court to enforce it." *Plaut*, 1 F.3d at 1495. Further, the Court observed that "we fail to identify a single case (besides the ones holding [this amendment] to be constitutional) which has held that the decision of a … Court adjudging a claim to be time-barred is not a final judgment." *Id.* at 1496.

In particular, the Sixth Circuit distinguished the holdings in *Chase* and *Campbell*, with respect to claims which have been dismissed:

> While the *Chase Securities* decision's description of the legislature's power to change statutes of limitations retroactively is indeed sweeping, this language conclusively shows both that the Court believed dismissals of time-barred claims to be "final judgments" and that the Court did not view this legislative power as extending to require that Courts substitute a new limitation period in cases finally decided under a previously applicable one. *See also Campbell*, 115 U.S. at 628, 6 S. Ct. at 213 ("[S]tatutes, shortening the [limitation] period or making it longer, which is necessary to its operation, have always been held to be within the legislative power ***until the bar is complete***.")

Id. (emphasis in original).

The Sixth Circuit concluded, "[w]here Congress disagrees with the manner in which the judiciary has interpreted a statute, it may amend that statute so as to effect the proper congressional intent, and thus render the faulty judicial interpretation moot. But Congress may not require the Federal Courts to nullify or vacate their properly rendered judgments, regardless of what injustice Congress

believes those judgments have visited upon private parties." *Id.* at 1499.

The US Supreme Court further noted "that in § 27A(b) Congress has exceeded its authority by requiring the Federal Courts to exercise '[t]he judicial Power of the United States,' U.S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm,* 514 U.S. 211, 217-18 (1995). The Court further held:

> When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.' … Our decisions stemming from *Hayburn's Case*—although their precise holdings are not strictly applicable here, see *supra,* at 1452–1453—have uniformly provided fair warning that such an act exceeds the powers of Congress."

Id. at 225. The Court added:

> [h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable ***to that very case*** was something other than what the Courts said it was."

Id. at 227 (emphasis in the original).

The US Supreme Court specifically stressed this principle applies to cases dismissed due to the operation of a statute of limitations. "The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove

substantive liability, or for failure to prosecute as a judgment on the merits." *Id.* at 228. In emphasizing this point, the Court stressed the holding in *Chase* "does not set statutes of limitations apart." *Id.* at 229. The Court concludes:

> We know of ***no previous instance*** in which Congress has enacted retroactive legislation requiring an Article III Court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires Federal Courts to reopen final judgments entered before its enactment.

Id. at 240 (emphasis added).

Accordingly, CNLV's exhortation that this Court should follow the precedent of the US Supreme Court [Ans. 12] may have validity, but not in the manner CNLV is intending in its Ans. The US Supreme Court has clearly and unequivocally held the retroactive application of a statute of limitation, resulting in the reversal of a dismissal on statute of limitations grounds, is unconstitutional. Nevada's constitution "mirrors" the US Constitution, such that this Court should follow this precedent. Ans. 20.

With respect to Nevada's sister-state jurisdictions, CNLV's contention that only "a minority of states" have held such retroactive actions unconstitutional is also erroneous. Ans. 12. As the Arkansas Supreme Court noted in *Johnson v. Lilly*, 823 S.W.2d 883 (Ark. 1992) it had "long taken the view***, along with a majority of the other states***, that the legislature cannot expand a statute of

limitation so as to revive a cause of action already barred." *Id.* at 885 (emphasis added).

CNLV also erroneously contends that rational basis review applies to the constitutionality of AB 421's retroactivity. Ans. 19-22 (citing *Pension Benefit Guaranty Corp v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir. 1997). Neither of these authorities actually involved the application of a statute of limitations.

Pension Benefit dealt with an amendment to ERISA, which retroactively imposed withdrawal liability provisions on employers making withdrawals from a multiemployer pension plan. 467 U.S. at 720-724. *Jeffries* dealt with the ***potential*** retroactive application of the Antiterrorism and Effective Death Penalty Act to a murder conviction. Further, the *Jeffries* Court held the law had no such retroactive application and did not reach the question of whether retroactive application would have been constitutional. 114 F.3d at 1494-1499.

CNLV also mischaracterizes decisions of this Court, which are not on point. Citing to *Lotter v. Clark County Bd. of Comm'rs*, 106 Nev. 366, 793 P.2d 1320 (1990), CNLV states "[t]his Court has applied rational basis review to [NRS 11.202]'s prior iterations." Ans. 20. In actuality, this Court held the statutes of limitation and repose in that matter were not retroactive at all and accordingly did not undertake any analysis of constitutionality. *Id.* at 370. The Court referenced

its prior decision in *Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988). However, *Wise* involved neither the retroactive application of a statute of limitation nor a due process challenge, but rather involved an assertion that NRS 11.204 violated the equal protection clause by excluding material suppliers from its ambit. *Id.* at 753-54. Accordingly, this Court's application of rational basis analysis to completely unrelated issues, has no bearing on the present Pet.

Significantly, the *Pension Benefit* Court repeatedly stated its holding pertained to ***economic legislation***. 467 U.S., at 732-33. The Court initiated its analysis by stating, "[t]he starting point for analysis is our decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, … (1976)."[6] *Id.* at 728. In summarizing its holding in *Usery*, the Court stated:

> We further explained that the strong deference accorded ***legislation in the field of national economic policy*** is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Id. at 729 (emphasis added). The Court stressed it was not inclined to depart from such an application of deference "when conducting ***the limited judicial review***

[6] *Usery* also had nothing to do with a statute of limitations, but rather involved "a constitutional challenge to the retroactive effects of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972." *Id.*

accorded economic legislation." *Id.* at 731 (emphasis added). In its summary, the Court again underlined the fact that it was applying "***the less searching standards imposed on economic legislation***."[7] *Id.* at 733 (emphasis added).

A similar emphasis was made by the Federal Circuit in *Schaeffler Group USA, Inc. v. United States*, 786 F.3d 1354 (Fed. Cir. 2015), another authority cited by CNLV in purported support of its rational basis argument. Ans. 23. The *Schaeffler* Court stressed that "***Economic legislation*** 'come[s] to the Court with a presumption of constitutionality'"; *id.* at 1358 (emphasis added; citations omitted); that "the Supreme Court has established a test for analyzing retroactive ***economic legislation*** under the Due Process Clause"; *id.* at 1362 (emphasis added; citations omitted); and that "[r]ational basis review ***of economic legislation*** under the Due Process Clause is highly deferential to Congress"; *id.* at 1363 (emphasis added; citations omitted).

In stark contrast, as discussed *supra*, legislation which creates a retroactive application of a statute of limitation, particularly in a manner which results in the reversal of a dismissal of an action, is clearly not economic legislation. Rather, it

[7] Economic legislation means a legislative effort to structure and accommodate the burdens and benefits of economic life. *Usery*, 428 U.S. at 15. The *Usery* Court further stated, "[i]t does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively..." and "…retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id*. at 16.

deprives parties of a substantive constitutional right. Such a violation of Petitioners' constitutional rights is clear error and cannot stand.

D. CNLV FAILS TO ESTABLISH THAT THE DISTRICT COURT CORRECTLY APPLIED NRS 11.258

CNLV claims it has fully satisfied NRS 11.258 as against the entire design team (comprised of different parties, scopes of design professional services, contractual obligations and design disciplines) based on attaching a single affidavit to its complaint attesting that the action has a reasonable basis in law and fact following consultation with a single geotechnical engineer, who offered no conclusions critical of any of the work of the design professional Petitioners.[8] Ans. 29-32. CNLV's position of simply filing a token affidavit and single purpose expert report, a mere checking of the box, does not equate to compliance with NRS 11.258.

NRS 11.258 sets forth specific requirements that must be met for proper compliance with the statute. Primary among these is consulting with an "expert"

[8] CNLV appears to be hedging its position by requesting relief to cure a defect in its NRS 11.258 if the Court finds multiple experts are required by remanding the matter back to the District Court to determine which design professional would fall within the "ambit" of the expert report by a geotechnical engineer. Ans. 30 at n. 11. This relief is unavailable, as it is tantamount to allowing a cure or an amendment of a void pleading which is prohibited. *Otak*, 127 Nev. at 599-600, 260 P.3d at 412; NRS 11.259.

"in **the** relevant discipline"[9] (emphasis added). NRS 11.258(6) not only requires consultation with a licensed design professional, the licensed design professional must be licensed in the "relevant discipline." Thus, to comply with NRS 11.258, counsel must consult with an expert licensed in the discipline logically connected to the discipline of design professional(s) against whom the expert is offering their opinions.

Here, there are multiple design professionals with different services, time of involvement, contracts and scopes design professional services. Each design professional was sued by CNLV[10] based solely on the findings from a single geotechnical engineer, which contained no identification or criticisms of those very design professionals, and which CNLV admitted provided no notice at the time of the report of any possible claim. V20 PA-3447. CNLV failed to explain how that same report suddenly provided a good-faith basis to sue these professionals in 2019 especially after conceding on the record that more experts were needed. V21 PA-3563.

CNLV argues Petitioners failed to identify what experts they believe CNLV should have consulted with before filing the action. Ans. 29. This is a false

[9] Not **a** relevant discipline.

[10] It is well established that a claimant is a master of his or her complaint. *Aryeh v. Cannon Business Solutions, Inc.*, 55 Cal.4th 1185, 1202 (CA 2013).

statement as the Petition identifies all of design professional disciplines outside of Mr. Marsh's experience, knowledge and understanding. Pet. 1. Petitioners also identified the absence of any opinions regarding the services of the Petitioners, including the civil and geotechnical engineers. Pet. 28.

CNLV's expert report reveals that the "investigation" was done to "evaluate the site's geotechnical conditions and to determine the probable cause(s) of the existing distress…and to provide remedial recommendations for improvement of adverse site conditions." V2 PA-136. Moreover, there is no mention that AGI was to determine whether there is a basis to make a claim against any parties. *Id.* at PA-137 §1. Instead, this report's scope was to summarize [AGI's] field investigations, findings, conclusions, and remedial recommendations. *Id*. This report does not provide a reasonable basis for filing a lawsuit against any design professional pursuant to NRS 11.258(3)(e).

The intent and purpose of NRS 11.258 is to prevent frivolous lawsuits against design professionals by requiring a claimant to secure a reasonable basis to bring the suit, **prior** to filing. *In re CityCenter Constr. v. Lien Master Litig.*, 129 Nev. 669, 678, 310 P.3d 574, 581 (2013). This Court has already held that each plaintiff is obligated to file its own affidavit to justify its "nonresidential malpractice based on that party's relationship with the defendant." *Otak*, 127 Nev. at 599-600, 260 P.3d at 412. This is not *dictum* as claimed by CNLV, but an

integral element tied to the affidavit which establishes the specific basis for the malpractice claim as against ***each design defendant, based on the specific relationship to the claimant***.

The Nevada Legislature was very clear that an expert must review the case early on "to show merit to a claim and a reasonable basis to proceed with a suit."[11] The Legislature also envisioned the attorney would then take the expert's report and craft the complaint against the design professional based on the errors alleged in the report instead of just submitting a boilerplate complaint with generic allegations.[12] Without a doubt, the attached report lacks any analysis or statements reflecting why any of the Petitioners' scope of services on the project fell below the standard of care. As such, Mr. Marsh's July 3, 2019 declaration, referencing and solely relying upon that deficient report, cannot substantiate the reasonableness for filing this action against any of the design professionals because he never rendered such opinions in the report.[13]

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[11] *See* Senate Committee on Judiciary, pg.7, March 23, 2007; *see also*, V6 PA-794-801.

[12] *See* Assembly Committee on Judiciary, pg. 14, May 14, 2007.

[13] CNLV's hyperbolic contention that petitioners seek to expand NRS 11.258 is meritless. Petitioners only ask that NRS 11.258 is enforced as intended.

CNLV next argues that based on the usage of singular wording such as "the expert" or "an expert," only obligates a single expert regardless of number of different fields at issue. Ans. 30. CNLV is wrong. When interpreting a statute, the Court first examines the plain language in the statute, and absent ambiguity, generally applies, the statute as written. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.2d 712, 715 (2007); *Gallagher v. City of Las Vegas*, 114 Nev. 595, 600-601, 959 P.2d 519, 521 (1998). If there is ambiguity in the language, the plain meaning rule does not apply and legislative intent along with reason and public policy become the controlling factors. *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007). In its interpretation, the Court is not to render any part of the statute meaningless, surplus and should not produce absurd or unreasonable results. *Id*., *see also, Leven*, 123 Nev. at 403, 168 P.2d at 715.

This Court recently analyzed NRS 21.090(1)(u) and found the statute therein was ambiguous. *Kaplan v. Chapter 7 Trustee*, 132 Nev. 809, 811-12, 384 P.3d 491, 493-94 (2016). This Court found the words "payments" (plural) and "personal injury" (singular) were susceptible to multiple interpretations. *Id.* The Court examined the legislative history, applied reason and public policy considerations to clarify the statute, ultimately holding the statute should be read to provide for multiple personal injury exemptions on a per-claim basis. *Id*. This Court should respectfully do the same here, as NRS 11.258's usage of plural and

singular language create ambiguity per the language ***and*** ambiguity ***in application against multiple defendants***.

While most of NRS 11.258 is clear, §(1)(c) is ambiguous in its application in cases involving multiple design professionals with different scopes of services. The specific language in §(1)(c) states the plaintiff's counsel is required to consult with an expert in "the relevant discipline involved in the action." This action involves ***multiple relevant design disciplines as asserted by CNLV***. V1 PA-1-17. Reading the statute to only require a single issue expert in a multi-design discipline action, would render meaningless the language "relevant discipline" and produce the absurd result of a single discipline expert being used to sue design professionals that the expert did not, and could not, have rendered opinions against given his lack of qualifications and understanding. V2, PA-270-73. Certainly, the services of design professionals are specialized and not with the common knowledge of the public or even other specialists. *See*, NRS 11.2565; *Otak, supra*. CNLV's interpretation renders the Affidavit meaningless to many (if not all) of the design professionals and absolutely encourages frivolous actions.[14]

[14] Other District Courts that have seen this exact issue, have dismissed the actions under NRS 11.258 and issued rulings that comport with Petitioners' stated position. V20 PA-3374-78, *Nash v. KGA Architecture*, Eighth Judicial District Court Case No. A-19-804979.

Here, the District Court's interpretation created an absurd result allowing the deficient, single issue report, to be used to commence this legal matter against all of the design professionals whose scope of work was never identified, much less evaluated, in Mr. Marsh's report. This Court can avoid this absurd result by holding that NRS 11.258 requires the plaintiff to consult an expert to establish the good faith basis to sue ***each*** design professional it chooses to sue in an action subject to NRS 11.258. *Otak, supra*. Without these reports, CNLV's counsel could not possibly have any good faith basis in law and fact to sue the various design professionals named in the complaint.

Pertaining to geotechnical engineers (and arguably civil engineers), CNLV's Affidavit of Merit is still defective as the report could not have provided counsel with a reasonable basis to sue Ninyo & Moore ("Ninyo") and/or Nevada By Design, LLC dba Nevada By Design ("NBD"). Counsel's affidavit references general opinions in the report, but none of those opinions pertained to how Ninyo's or the services of any other design professional allegedly caused or contributed to the alleged defects and/or fell below a standard of care. The report fails to state what act or omission by Ninyo or any other design professional, led to any of the conditions found by AGI as alleged in the Complaint. There are no conclusions about how Ninyo's work or the work of any other design professional caused the claimed defects in the complaint. V2 PA-135-147. The report also includes a

number of assumptions and conditions to the findings rendering it useless as a report in support an affidavit of merit. *Id*.

Mr. Marsh's declaration, like his report, fails to state how Ninyo's recommendations or the work of any design professional is relevant or fell below the standard of care to give rise to any claim against Ninyo, or any of the other named design professionals. V2 PA274-275.

CNLV's argument that *Otak* and legislative history fail to support the Petition is based on self-serving speculation. *Otak* mandated that ***each*** plaintiff justify its malpractice claim against ***each*** defendant.[15] *Otak*, *supra*. Here, while CNLV is a single party, it sued multiple defendants, each with different scopes of design professional services, contracts and legal relationships. To comply with *Otak*, CNLV must justify its malpractice claim as to each defendant. Otherwise, the purpose of NRS 11.258 is defeated.

Petitioners cited multiple sections from the legislative history of NRS 11.258 that absolutely contradict CNLV's one issue/one expert position. Pet. 26-29; V19 PA-3121. Given the ambiguity in portions of NRS 11.258 in a multi-discipline matter, the Court should consult the legislative history to ascertain the intent and

[15] CNLV's argument about the difference between NRS 41A.071 and NRS 11.258 is misleading, as *Otak* is clear as to what is required. Further CNLV's argument lacks support and should be rejected. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

purpose of NRS 11.258. Because there are different professionals and services placed into issue by CNLV, it was obligated to treat these differing services on an individual basis by consulting with as many appropriate experts as necessary to justify suing each defendant.

Allowing CNLV to proceed with a single-issue expert and report will create a slippery slope of frivolous actions in multi-design professional cases, as claimants will be able to deprive design professionals of the very protections that NRS 11.258 was created to provide, by picking and choosing their spots and complying as to one professional while suing many. Under this framework, a design professional would not know from one lawsuit to the next, when it would be afforded the protections delineated in NRS 11.258. This would undermine the intent and purposes of NRS 11.258 by driving up litigation fees and costs; harassing design professionals that should not be named in actions, while increasing time, effort and complexity in actions. Thus, the District Court committed legal error by allowing this absurd result.

II. CONCLUSION

For the reasons herein, and those in the Pet., the referenced documents and records in the appendices, Petitioners respectfully request this Court grant their Pet. and provide the relief requested.

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NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

We hereby certify that this Reply in Support of Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman typeface.

We further state that this Reply in Support of Petition complies with the type-volume limitation under Amended NRAP Rule 21(d) as it contains words, by following NRAP 32(a)(7)(C) Computing Page- and Type-Volume Limitation, **no more than 7,000 words**, not counting "The disclosure statement, table of contents, table of authorities, [and] required certificate of service and compliance with these Rules, and any addendum containing statutes, rules, or regulations do not count toward a brief's page- or type-volume limitation."

Finally, we hereby certify that we have read this **Reply in Support of Petition for Writ of Mandamus or, Alternatively, Prohibition**, and to the best of our knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. We further certify that this Reply in Support of Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Reply in Support of Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the accompanying Reply in Support of Petition is not in conformity with

the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 17th day of December, 2020, the foregoing **REPLY IN SUPPORT OF JOINT PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION** was e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

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