**Case No. 81459**

*In the*

# Supreme Court

*of the*

# State of Nevada



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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*.

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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' PETITION FOR EN BANC RECONSIDERATION

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## I.
## PRELIMINARY STATEMENT IN SUPPORT OF EN BANC RECONSIDERATION

Petitioners request en banc reconsideration of the Panel's September 23, 2021 Opinion (the "Opinion") because it meets all the requirements for granting such reconsideration. The Opinion does not maintain the uniformity of Nevada's appellate decisions and it "involves a substantial precedential, constitutional or public policy issue." NRAP 40(A); *see Bass-Davis v. Davis*, 122 Nev. 442, 444-45, 134 P.3d 103 (2006). The Opinion left unresolved, Petitioners' arguments regarding the Constitutionality of the action and the substantive rights of the defendant parties from stale claims once a statute of repose runs. Petitioners' arguments as to the application of NRS 11.258 also went unanswered and were given only cursory review in a footnote.

En banc reconsideration is further warranted because the Opinion failed to secure or maintain uniformity of decisions of the Supreme Court by denying Petitioners' NRS 11.258 argument, via a footnote, without explaining that the Court intended to overturn well-established law as stated in *Otak Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. 593, 260 P.3d 408 (2011) abrogated on other grounds related to service by *Reif by & through Reif v. Aries Consultants, Inc.*, 135 Nev. 389, 449 P.3d 1253 (2019), or that the instant action is somehow distinguishable from *Otak* in a legally significant way. The Opinion, thus, leaves a

lack of clarity in Nevada State Law on the application of NRS 11.258 in lawsuits involving multiple multi-discipline design professional defendants. Consequently, while *Otak* required each claimant to justify their particular claims based on their relationship with the defendant, the Opinion eliminates this requirement by allowing the sole claimant, the City of North Las Vegas ("CNLV"), to bring claims against multiple design professional defendants without obtaining the requisite expert opinion regarding each specific design professional being sued before executing a blanket certification without the underlying support.

En banc reconsideration is also warranted because the Opinion creates substantial precedential and public policy issues by nullifying claimant's duty to first consult with knowledgeable experts to obtain the necessary opinions and reports supporting a reasonable basis to sue each design professional named in the action. The Opinion also nullifies the requirement for the plaintiff to execute an Affidavit of Merit ("AOM"), in good faith, that *based on the expert, the consultation, and the expert report*, the plaintiff believes that it is reasonable to sue each of the named design professionals. Instead, the Opinion allows a plaintiff to identify one design issue, retain an expert in a single discipline, and then use that expert to execute an AOM applicable to all named defendants, despite the expert's complete lack of qualification to opine on any of those other defendants.

En banc reconsideration is further warranted because the Opinion violates the substantive due process rights of the Petitioners to a vested repose defense under both the Nevada and the United States Constitutions. The Opinion ignores a vested constitutional right held by Petitioners and then impermissibly reduces any such Constitutional right to those determinable by the rational basis test. Public policy weighs against the Opinion's rejection of the vested right argument because it has a significant impact on Petitioners' constitutionally protected rights, as well as other defendant parties outside of this action. This issue is ripe for en banc reconsideration given its impact on the Constitutional rights of the Petitioners and similarly situated parties in Nevada, as a whole.

En banc reconsideration is also warranted based on the Opinion allowing an open-ended application of AB 421 that could involve projects years, even decades old. Consequently, the Opinion create significant precedential and public policy issues for defendants now exposed to actions long forgotten, which lost evidence and witnesses. The Opinion effectively eviscerates statute of repose defenses in Nevada by allowing open-ended retroactive application.

Finally, en banc reconsideration is necessary, as the Opinion conflicts with the uniformity of key Nevada cases barring claims after the repose period expires. The Opinion negates these Nevada cases by holding that a statute of repose is no longer barred upon expiration of the repose. Instead, irrespective of the timeliness

of a complaint, the complainant retains the right to file suit at any time and is entitled to toll the repose period for the life of the action, which can last years. Astonishingly, this is allowed even if the complaint is legally defective at the time of filing. If during the life of the action, the repose period is changed by the Legislature, then the claimant profits from the new law by breaking the old.

## II.
## STANDARD OF REVIEW

En banc reconsideration by this Court is governed by NRAP 40A, in pertinent part stating:

> (a) En banc reconsideration… will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. … En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). ….
>
> (b) Any party may petition for en banc reconsideration of a Supreme Court panel's decision within 14 days after written entry of the panel's decision to deny rehearing. …
>
> (c) A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases. If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved. … Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time.

> (d) Form of Petition and Answer; Number of Copies; Length; Certificate of Compliance. … Except by permission of the court, a petition for en banc reconsideration, or an answer to such a petition, shall not exceed 10 pages. Alternatively, the petition or answer is acceptable if it contains no more than 4,667 words, or if it uses a monospaced typeface, and contains no more than 433 lines of text. The petition or answer shall include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms.

Maintaining uniformity of decisions means reconsidering Opinions that disregard the controlling law. *See e.g.*, *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 113 F.3d 1089, 1090 (9th Cir. 1997). En banc reconsideration is granted where either the Opinion or the prior law need to be clarified or revisited to support uniformity. *Bass-Davis v. Davis*, 122 Nev. 442, 445, 134 P.3d 103, 105 (2006).

Here, Petitioners requested Rehearing of the underlying Opinion. (Attached as **Exhibit A**). On October 28, 2021, Rehearing was denied. (Attached hereto as **Exhibit B**). The instant petition has been filed in compliance with the Court's order following the denial of Rehearing and is timely.

As for the content of this Petition, several grounds for reconsideration en banc exist. See, *infra*. First, the Opinion failed to secure or maintain uniformity of decisions of the Supreme Court by denying Petitioners' NRS 11.258 argument without explanation on whether the Court intended to overrule the well-settled law in *Otak*, 127 Nev. 593, 260 P.3d 408, or whether the instant action is distinguishable from *Otak* in a legally significant way, leaving a lack of clarity in the state of Nevada

law. Second, the Opinion creates substantial precedential and public policy issues nullifying the requirement that a claimant must first consult with and obtain expert opinions related to each design discipline at issue in the action, thereby providing complainant a reasonable basis for naming each design professional defendant in an action. The Opinion seemingly forgoes this requirement by allowing the complainant to retain a single expert for its AOM, while suing a host of design professionals practicing in multiple design fields, most of which are outside of the consulted expert's knowledge and expertise. Third, the Opinion violates Petitioners' substantive due process right to a vested repose defense as provided by both the Nevada and United States Constitution. Equating such a property right to mere economic legislation subject to the rational basis test is a violation of Petitioners' rights under the Nevada and United States Constitutions, thus requiring reconsideration en banc. Fourth, the Opinion creates substantial precedential and public policy issues by allowing an open-ended application of the 10-year statue of repose against all defendant parties, exposing them to cases that are years, potentially decades old, after evidence and witnesses are gone. Finally, the Opinion contradicts uniform decisions in Nevada that expressly bars the assertion of claims after the expiration of the repose period. Instead, the Opinion allows claimants to deliberately ignore statute of repose barriers and file invalid complaints only to secure a right to bring these claims as well as a tolling period during the life of the case.

Consequently, filing a legally invalid complaint benefits the law breaker per the Opinion.

## III.
## ARGUMENT

### A. The Opinion Created a Discrepancy in the Law When the Holding Determined that CNLV's Single-Discipline Expert Report and AOM Based Thereon Were Allowed to Sue all Petitioners, Most of Whom Were Not Mentioned in the Single Report or in any of the Findings in Contravention of *Otak Nevada v. Eighth Judicial District Court*

This Court has held NRS 11.258 requires each plaintiff in a non-residential construction malpractice action to file separate expert reports and attorney affidavits "that are **particularized** to that party's claim**s**" because the claimant "must justify its claims of nonresidential construction malpractice based on that party's relationship with the defendant." *Otak*, 127 Nev. at 600, 260 P.3d at 412 (emphasis added). Notably, *Otak* involved multiple plaintiffs and a single defendant and required separate reports and affidavits despite the shared defendant. *Id.* The ruling and the rationale could not be clearer; the purpose of the statute is to ensure that each nonresidential construction malpractice claim has a base level of justification before a design professional can be forced to defend itself against a lawsuit. *Id.*

Here, CNLV is the sole plaintiff. CNLV sued several design professionals, each practicing in a distinct field of design requiring specific licensure, thereby triggering CNLV's obligation to separately comply with NRS 11.258 for each design

professional named in the action. However, CNLV secured one expert report, in one design discipline. This report failed to mention most Petitioners whatsoever, let alone in any critical manner. As such, CNLV's single report cannot possibly "justify its claims of nonresidential construction malpractice based on that party's relationship with" these defendants. *Otak, supra*. The report cannot be said to be particularized to any designer practicing in a discipline outside the scope of the expert's expertise, let alone to any designer not even mentioned in the report. Accordingly, the report and AOM cannot possibly fulfill CNLV's statutory obligations and clear purpose as to these petitioners. *See*, NRS 11.258.

The Report is similarly deficient as to the geotechnical petitioner, despite the expert being a geotechnical engineer. The Report failed to include any criticisms of the geotechnical petitioner, and as such could not have provided CNLV with a good faith basis to sue this petitioner either.

The AOM is no different. CNLV's attorney attested to his belief that his client has a reasonable basis to sue <u>each</u> design professional named in the suit, based only on the single-discipline report. Permitting CNLV's claims to proceed based on this deficient AOM based solely on the single-discipline report, defeats the very purpose of NRS 11.258, which is to protect design-professional defendants from unsustainable lawsuits. Moreover, the fact that CNLV's attorney, an officer of the Court, attested the single-discipline report gave him and CNLV the reasonable belief

to sue **all defendants** is very troubling and is a gross misrepresentation of both the report and the attorney's duty of candor to the tribunal.

Thus, en banc reconsideration is needed to square the Court's ruling in this case with its ruling in *Otak*. Ideally, the en banc court will reaffirm its ruling in *Otak* and apply the same here. However, at a minimum, en banc reconsideration is needed to clarify and/or distinguish *Otak* to harmonize its ruling in the instant matter. *See Ronning v. State*, 116 Nev. 32, 33, 992 P.2d 260, 261 (2000) (clarifying a prior decision despite not overturning the instant Opinion). One way or another, en banc reconsideration is required as the Opinion, which disposed of this critical issue via a footnote, has created a massive discrepancy with Nevada law as provided in *Otak*.

### B. The Opinion Created Significant Precedential and Public Policy Issues by Nullifying a Plaintiff's Obligation to Obtain Expert Opinions as to Each Design Professional the Plaintiff Chooses to Sue

CNLV sued the entire design team; yet, only consulted with and obtained a limited geotechnical (soils) investigation report from a geotechnical engineer. *See*, Petition for Writ of Mandamus ("Pet.") 21-29 & Reply in Support of Pet. ("Reply") 20-28. Nowhere in the investigation report, the sole basis supporting the AOM, did CNLV's geotechnical expert offer any opinions in the fields of architecture, mechanical/electrical/plumbing ("MEP"), landscape architecture, or even civil engineering. *Id*. at 23-24. In fact, CNLV admitted the report supporting its AOM, authored years before the complaint, never provided it with notice of any claim

against the design team. *Id*. at 24 (V20 PA3447). CNLV further conceded on the record that it needed additional experts for the other design defendants, which it intended to secure during discovery. Pet. at 23 (V21 PA3563). However, NRS 11.258 does not allow a Plaintiff to secure discovery without first completing the necessary threshold legwork to justify its particular claims. Because the subject expert report did not provide CNLV with notice of any claim, there is no logical explanation for how said report can later form a valid basis for a lawsuit against those very same design professionals.

The Opinion failed to address the fundamental issues of whether: 1) a report by one expert in a single design discipline, which only discusses that sole design discipline, can be used to sue design professionals whose discipline and scope of work are not addressed within that report; and 2) whether said expert report must provide actual criticisms or opinions of the design professional's work to form a valid basis for an AOM. *See*, Opinion 6, fn. 3. The Opinion created significant precedential and public policy issues because now, the protections of NRS 11.258 are no longer available to all design professionals, so long as a plaintiff procures one expert who names one design professional, even if not critical of that professional. Pet. 21-29.

NRS 11.258 was enacted to "advance judicial economy and prevent frivolous suits against design professionals…" by requiring "an expert…to show the standard

of care and the design professional fell below that standard of care." Pet. 27-29; *see also*, (V18, PA3118 & 3121). In enacting this procedural requirement, the Legislature required that an expert must review the case early on "to show merit to a claim and a reasonable basis to proceed with a suit." *Id*. Petitioners also identified minutes wherein the Legislature noted the purpose of an expert report was to illustrate what was done wrong. *Id.* These statements establish NRS 11.258 was enacted to explain how a particular design discipline was involved with the claims using competent and relevant expert support. The Opinion eviscerates that purpose and provides no notice to the design team.

How could a geotechnical engineer possibly opine on any architectural design/services, MEP design/services, civil design/services, or landscape architecture design/services? It cannot.

Without expert consultation and support as to these design practices, how can CNLV issue a NRS 11.258 compliant AOM in good faith and within his duty of candor to the tribunal? It cannot.

How can an AOM be compliant when the expert is not even critical of the one professional within the discipline of the expert's expertise? It cannot.

Given the purpose of NRS 11.258 and to avoid confusion and the needless inclusion of design professionals in actions irrelevant to their services, it is crucial in multi-design cases that plaintiffs properly identify and consult with as many

experts necessary to address the plaintiff's particular claims against each design defendant it names. The plaintiff's consultant(s) must also be critical of the design professionals, and those critical opinions must be in the report before it can be relied upon for a valid AOM under NRS 11.258.

There is no value to requiring an AOM, if plaintiffs can fulfill their statutory obligations by consulting with a single expert on a single design issue, and based thereon, bootstrap all other design professionals it desires into the action. Pet. 21-29. It undermines NRS 11.258 even further, when those expert opinions are not critical of any of the design professionals in the first place. Instead, the Opinion invites frivolous actions and en banc review is necessary.

### C. The Opinion Deprived Petitioners of Their Constitutional, Substantive Due Process Right to Repose Following the Expiration of the Then Effective Statute of Repose

A critical issue raised in the Opinion pertains to whether the Petitioners (and other defendants in Nevada) have a protected, substantive property right to a repose defense once the period proscribed in the statute of repose expires. It is important to note that defendants' right to a vested repose defense is and should be treated the same as the protected vested rights of claimants to bring their claims. This Court has previously adopted a holding from the Eastern District of Louisiana finding that "there are constitutional restrictions on the impairment of vested rights which limit retroactive application of statute of limitations…" *Alsenz v. Twin Lakes Village, Inc*.,

108 Nev. 1117, 1122, 843 P.2d 834, 837 (1992) (citing *Currie v. Shon*, 704 F. Supp. 698, 701 (E.D. La. 1989)). The *Alsenz* Court concluded that so long as a grace period was applied, the impairment of a claimant's vested right to pursue a claim was sufficiently protected. *Id*.

The majority of jurisdictions, even those cited in the Opinion, hold that the expiration of a statute of repose, creates a substantive right protected by due process. *See,* Pet. 12-21, Reply 10-17 & (V16 PA 2520-2523 & 2541-2545) including: *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633, 637 (1925); *Chenault v. U.S. Postal Services*, 37 F.3d 535, 539 (9th Cir. 1994); *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc*., 721 F.3d 95, 106 (2d Cir. 2013); *Sch. Bd. of Norfolk v. US Gypsum, Co*., 360 S.E.2d 325, 328 (Va. 1987); *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244-45 (Ill. 1994); *Swartz v. Swartz*, 894 P.2d 209, 212-13 (Kan. 1995) (citing *Harding v. K.C. Wall Products, Inc*., 831 P.2d 958 (1992);[5] *Wood v. Eli Lilly & Co*., 701 So. 2d 344, 346 (Fl. 1997)).

In *Danzer*, the United States Supreme Court held that a law that construes a retroactivity provision to create liability against a defendant who was free from liability is "to deprive defendant of its property without due process of law in contravention of the Fifth Amendment." 268 U.S. at 637. As such, whether Petitioners obtained a constitutionally protected right, at least under the U.S. Constitution, once the existing repose expired, is beyond dispute. While this Court

is the ultimate arbiter of the interpretation of the Nevada Constitution, it cannot ignore the United States Supreme Court's interpretation of the U.S. Constitution. Petitioner's vested right to a repose is guaranteed by the Fifth Amendment to the U.S. Constitution and any prohibition on depriving Petitioners of said right is incorporated to the Nevada Legislature and this Court by the 14th Amendment.

Even this Court recently held that "[S]ubstantive due process guarantees that **no person shall be deprived** of life, liberty **or property for arbitrary reasons**." *Eggleston v. Stuart*, 137 Nev., Adv. Op. 51, 2021 WL 4344945 *4 (Sept. 23, 2021) (citing *In re Guardianship of LS & HS*, 120 Nev. 157, 166, 87 P.3d 521, 527 (2004)) (emphasis added). As such, en banc reconsideration is needed to determine under *Eggleston* and *Danzer* whether the Legislature can impose a retroactivity provision that deprives Petitioners of their vested property rights.[1]

Here, the Opinion failed to protect, let alone acknowledge, the substantive rights held by Petitioners and other defending parties with respect to their right to

[1] Petitioners acknowledge that the Court en banc has recently upheld AB 421's retroactivity even in a case that was commenced and adjudicated prior to AB 421's effective date. *Panorama Towers Condominium Unit Owners' Ass'n v. Hallier*, 137 Nev., Adv. Op. 67 (Nov. 10, 2021). However, the Court did not address the constitutionality of AB 421 in the *Panorama* Opinion. Instead, the Court determined that AB 421's retroactivity was intended by the Legislature to apply to all actions pending as of October 1, 2019, regardless of whether any such action was valid at the time it was commenced. As such, en banc reconsideration remains warranted and necessary to determine whether AB 421's retroactivity provision is constitutional under the Nevada and U.S. Constitution.

assert a statute of repose defense once the existing period expired (NRS 11.202/AB 125). Instead, while noting several of the cases cited in papers as affording such due process rights, the Opinion ignored the majority rule and did not find a substantive due process right existed in Nevada because there is no direct Nevada case on point (ignoring the other cases cited, including Nevada cases discussing the role of statute of repose). *See*, Opinion vs. Pet. 12-21, Reply 10-17, Rehearing Petition and (V16 PA 2520-2523 & 2541-2545). Again, Petitioners presented sufficient binding federal authority establishing the right under the U.S. Constitution.

Unfortunately, the Opinion has far reaching implications to Nevada's defendants who have the constitutional rights to be free from stale claims, especially claims concerning projects that existed years, even decades earlier.[2] The Opinion impacts defending parties' rights by exposing them to liability that had been extinguished, and new actions for which evidence is likely gone. For example, in

[2] The Court did not take into consideration that the purpose of statute of repose is to protect these defending parties and provide them with "peace of mind" and finality by barring delayed litigation which creates unfair surprise from revived dormant claims for which evidence is banished and memories fade. *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (citing *Underwood Cotton Co. v. Hyundai Merch. Marin (Am.), Inc*., 288 F.3d 405, 408-09 (9th Cir. 2002)); *Byrne v. Sunridge Builders, Inc*., 136 Nev., Adv. Op. 69, 475 P.3d 38, 41 (2020); *Nev. Lakeshore Co. v. Diamond Elec., Inc*., 89 Nev. 293, 295-96, 511 P.2d. 113, 114 (1973). A statute of repose bars causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. *See Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391, 46 P.3d 62, 64. This is stronger than a statute of limitations which does not accrue until an injury is discovered. *Id.*

this case, the subject fire station commenced repairs even before CNLV commenced its action and a key witness has already died, impacting the rights of the defendants to defend against these unconstitutionally untimely claims. (V20 PA3434-3435).

Accordingly, a vested, constitutionally protected property right held by Nevada defendant parties (including Petitioners) to be free from previously foreclosed claims and actions, under both the Nevada and the U.S. Constitutions, has been negatively impacted by the Opinion and Petitioners respectfully request en banc reconsideration of this issue.

### D. Reconsideration of the Opinion en banc is necessary to address substantial precedential and public policy issues on the reach of the 10-year repose

In the Writ, Petitioners raised significant concerns on the scope and reach of AB 421's retroactive application of the 10-year Statute of Repose, arguing that the new repose period should only apply to projects within a 10-year period prior to the Effective Date of AB 421 (October 1, 2009-October 1, 2019). Pet. 12-14. Allowing claims prior to October 1, 2009, would create repose rights exceeding 10 years and allows claimants to raise or resurrect projects even those existing decades ago, due to an open-ended retroactive application. *Id*. at 14. In essence, any project in Nevada, for which the statute of repose was ever below 10 years, is now legally resurrected by the Opinion to the unfair prejudice of defendants. These defendants lose their valid repose defenses and are exposed to long-expired cases that lost

evidence and witnesses. These are the very concerns this Court raised as justifications for statutes of repose. *FDIC,* 130 Nev. at 899 (citing *Underwood*, *supra*).

Consequently, the Opinion did not clarify or address this slippery slope and instead, created an open-ended application of AB 421. This means, any construction defect action filed within 10 years (irrespective of the applicable statute of repose), **at any time**, can be re-opened to the unfair detriment of defendants. Thus, en banc reconsideration is necessary to reconsider the application of the Opinion to projects before October 1, 2009, which have substantial completion dates ten years prior to the enactment of AB 421.

### E. Reconsideration of the Opinion en banc is necessary to maintain uniformity on key Nevada cases governing Statute of Repose

Claims brought after the expiration of the statute of repose are "barred." *Byrne*, 136 Nev. Adv. Op. 69, 475 P.3d at 41; *FDIC*, 130 Nev. at 899, 336 P.3d at 965; Pet. 10-12 and Reply 1-9. The term, "bar" or "barred" mean "[s]ubject to hinderance or obstruction by a bar or barrier which, if interposed, will prevent legal redress or recovery…" BLACK'S LAW DICTIONARY 150 (5th Ed. 1990); 54 C.J.S. Limitations of Actions § 28 (2021).

The Opinion and the recently issued *Panorama* decision, created rulings that undermine the overall uniformity of established Nevada law that bar claims after the repose period expires. *Byrne, supra, FDIC*, *supra, see also*, cases cited in Pet. 10-

12. Instead of ruling in conformity with these decisions that "bar" is a barrier, a prevention, the Opinion finds that "bar" or "barred" is not a barrier at all. Instead, a complainant, like CNLV, merely needs to file a complaint, even one that is legally defective at the time of filing (*e.g.* filed 4 years after the operative and binding statute of repose had already run), to acquire a legal right and even a tolling period for the life of an improper action, irrespective of the actual applicable repose period. Conceivably, without any appreciation of the term "bar," the Opinion allows a future Legislature to retroactively modify the repose even during this action. Moreover, if the new repose is less than 10 years, Petitioners can terminate this matter even during trial. Such a result would be absurd, just like the result of the Opinion granting CNLV the inverse.

Inasmuch as the Opinion and *Panorama* state a repose is no longer a "bar," thereby undermining the uniformity of the holdings indicating as such, reconsideration en banc is necessary to avoid non-uniformity in Nevada statute of repose cases. *See,* Pet. 10-14 and Reply 1-9.

## IV.
## CONCLUSION

Based upon the foregoing, Petitioners respectfully contend that the Opinion filed by this Court on September 23, 2021, needs to be reevaluated by the entire Court to comport with Nevada law and to remedy significant precedential, constitutional, and public policy issues created by the Opinion. Wherefore,

Petitioners respectfully ask this Honorable Court to Grant this Petition for Reconsideration En Banc.

DATED: November 29, 2021.

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DATED: November 29, 2021.

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## CERTIFICATE OF COMPLIANCE

We hereby certify that this 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 Petition complies with the page limits of NRCAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), pursuant to the word count provided by Microsoft WORD, the document type volume limitation does not exceed 4,667 words.

Finally, we hereby certify that we have read this Petition for Rehearing En Banc, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the 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

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that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: November 29, 2021.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 29th day of November, 2021, the foregoing **PETITIONERS' PETITION FOR EN BANC RECONSIDERATION** 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:

**VIA E-MAIL AND THE COURT'S ELECTRONIC FILING SYSTEM:**

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*Trial Court Judge*

/s/ *Joanna Medina*

_____
Joanna Medina, an Employee of
W&D LAW, LLP

# Exhibit A

# Exhibit A

**Case No. 81459**

*In the*

# Supreme Court

*of the*

# State of Nevada



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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' PETITION FOR REHEARING

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## I.

## BRIEF SUMMARY OF ARGUMENT FOR REHEARING

### A. The Court Misapprehended The Facts Regarding NRS 11.258

City of North Las Vegas ("NLV") failed to provide an affidavit of merit ("AOM") addressing the merits of NLV's claims against MSA Engineering, Consultants ("MSA"), the mechanical/electrical/plumbing ("MEP") engineer, Dekker/Perich/Sabatini, Ltd. ("DPS") the architect, Nevada By Design Engineering Consultants ("NBD") the civil engineer, or JW Zunino & Associates, Inc. ("JWZ") the landscape architect. The AOM also failed to raise any opinions critical against the professional services of Ninyo & Moore Geotechnical Consultants ("N&M"), the geotechnical engineer.

NLV's counsel did not consult with a MEP engineer, architect, or landscape architect when preparing his NRS 11.258 AOM. *See*, Petition for Writ of Mandamus ("Pet.") 22-27, Reply in Support of Pet. ("Reply") 20-28. Instead, NLV's counsel only consulted with a geotechnical engineer. *Id*. Neither NLV's AOM, nor its expert's report, addressed the merits of NLV's claims against non-geotechnical engineering design professionals because NLV's expert is not a MEP engineer, architect, or landscape architect. Pet. 21-22. Accordingly, he is not qualified to address the merit of, or reach conclusions about, NLV's claims in relation to these design disciplines. *Id*. Furthermore, in the areas NLV's expert

may be qualified, he offered no opinions critical of the civil engineering work by NBD and failed to identify any defects in the work of N&M, the geotechnical engineer. Pet. 28-30; Reply 21-23. Therefore, NLV failed to comply with NRS 11.258 in relation to all design disciplines.[1] To allow NLV to pursue claims against MSA, Decker, or JWZ, when NLV's counsel did not consult with experts in these design disciplines, wholly negates the purpose of NRS 11.258, which is to ensure the merit of claims asserted against each design professional before they are dragged into protracted litigation.[2] Furthermore, to allow NLV to pursue claims against NBD and N&M when no opinions critical of their work were presented in the AOM and report, further undermines the purpose of NRS 11.258. *Id*.

[1] NLV's expert also had no criticism of the project's geotechnical engineer's services, finding instead said engineer's recommendations were not followed.

[2] Pursuant to NLV's Complaint, a portion of NLV's building sank due to subsiding soils. There are no allegations in NLV's Complaint related to the building's mechanical, electrical, plumbing, or architecture (landscape or otherwise). MEP engineers and architects do not provide soils design, yet, if upheld, this Court would establish the precedent that MEP engineers and/or architects can be dragged through years of litigation wholly unrelated to their design discipline, based only counsel's consultation with a geotechnical engineer.

## B. The Court Misapprehended Petitioners'[3] Argument, That Petitioners Possess A Substantive Due Process Right To Be Protected From Expired Claims, Not that Still-Existing Repose Periods Cannot be Extended, Generally

As established in the Petition, the majority view in Federal and State Courts, hold that once a repose period expires, defendants, such as Petitioners, have a vested, substantive property right to be free from stale claims and retroactive application of new statutes purporting to revive such claims. Allowing such time-barred claims violates the due process protections prohibiting the unlawful taking of property. Pet. 12-21. Rather than addressing Petitioners' argument that an *expired* repose period cannot be *revived* without violating vested, substantive due process rights, the Court appeared to focus on the Legislature's right to *extend* repose periods, in general. Respectfully, the Court provided an answer to a question that was not asked.

Despite Petitioners citing dozens of cases from the majority view, including holdings from the United States Supreme Court and the Ninth Circuit, the Opinion ignores the majority view because no citation was made to a specific Nevada case asserting this position. The Court also found even if there was a substantive right, AB 421's retroactivity survives due process scrutiny using the rational basis test.

[3] "Petitioners" are DPS, MSA, NBD, JWZ and N&M. For arguments concerning statute of repose, not NRS 11.258 issues, contractor Jackson Family Partnership, LLC ("Jackson") is also included in this definition.

*See*, Opinion dated September 23, 2021 (the "Opinion"), 10-11, attached hereto as **Exhibit A**. While admittedly, there is no specific Nevada case concerning this argument, the Petition and submitted papers highlighted several Nevada cases that touched upon this issue through analysis and citations to other cases. The majority view is that a vested repose defense is a substantive property right and is protected by the U.S. and by extension Nevada's, Constitutions. On this finding, none of the cases used a rational basis test, and each prohibited the retroactive revival of a stale claim, finding such an absurd result to be a due process violation.

The Opinion's reliance on a case from the Federal Circuit and a legal treatise misapprehended the issue and equated Petitioners' substantive rights to mere economic rights, despite no authority discussing rational basis in terms of a vested, substantive repose defense. To ignore the repose defense as a substantive right and then equate such right, even if found in Nevada, to economic legislation, undermines the intent and purposes of the statute of repose and a fundamental, substantive property right held by Petitioners when NLV's claims became time-barred in 2015.

### C. The Court Misapprehended The Legal Authority Demonstrating That Nevada Bars The Filing Of A Complaint When The Plaintiff Has No Existing Legal Right To Do So

Countless Nevada law and precedence have held that claims brought after the expiration of the statute of repose are barred. Pet. 10-15. The term, "bar" or

"barred" means a barrier, prohibiting the bringing of claims after the repose. The Court misapprehended Nevada authority barring NLV's conduct, holding "bar" or "barred" is neither a barrier nor a prohibition. Instead, the Opinion held that NLV, was allowed to file and commence an action, even in clear violation of the operative statute of repose, and profit by retaining a quasi-legal right for these expired claims to remain open until a new law took effect months later.

Petitioners contend, supported by Nevada law, that the term "bar" or "barred" means bar – a prohibition to the filing of a complaint. Pet. 10-15. Filing before the effective date of AB 421 violated the existing law, as the complaint and claims were already time-barred. Because NLV's complaint was, and is, time-barred, it did not survive to enjoy any retroactivity that went later into effect. *Id*. Reply 2-9.

## II.

## STANDARD OF REVIEW

Establishing the necessity of rehearing by this Honorable Court is governed by NRAP 40, which provides in pertinent part:

> (a) Procedure and limitations.
>
> > (1) Time. Unless the time is shortened or enlarged by order, a petition for rehearing may be filed within 18 days after the filing of the appellate court's decision under Rule 36. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule.

> (2) Contents. The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue....

(c) Scope of application; when rehearing considered.

> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
> (2) The court may consider rehearings in the following circumstances:
>
> > (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> >
> > (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case....

Here, the instant Motion has been filed within 18 days of the Opinion and is therefore timely. The scope of the petition concerns the misapprehension of (1) facts regarding NLV's "expert report" and AOM to satisfy NRS 11.258; (2) the substantive due process rights of Petitioners, as well as the scope of their argument; and (3) the impact of Nevada law barring NLV's filing on July 11, 2019

before AB 421's Effective Date of October 1, 2019. A rehearing to address these issues is necessary.

## III.

## ARGUMENT

### A. The Court Misapprehended The Fact That The Sole Expert Report On Which NLV Relied To Fabricate Its AOM Related Only To Geotechnical Engineering, Therefore It Cannot Possibly Satisfy The Requirements Of NRS 11.258 In Order To Sue Multiple Design Professionals Whose Practice Is Not The Subject Of The Sole Report

The Court used a single footnote to address the complex NRS 11.258 issues argued in the Petition. However, the Court's footnote failed to address the primary issue raised concerning NRS 11.258, namely, whether NLV can pursue claims against MSA, DPS, and JWZ without consulting with an expert (or experts) qualified to opine on the scope of work provided by these design professionals, nor providing an AOM in relation to the design services provided by these designers, as well as NBD and N&M. MSA/Dekker/JWZ recognize NLV provided an AOM in relation to the single design discipline of geotechnical engineering. However, NLV offers no AOM or expert reports addressing MEP engineering, architecture, or landscape architecture, which are different disciplines from geotechnical engineering. Furthermore, NLV's expert offered no opinions critical of NBD's and N&M's work. Therefore, it is not the position of the Petitioners that NLV failed to provide an AOM, but rather, the AOM provided, failed to apply to NLV's

claims against the Petitioners because it did not address their respective design disciplines (as the expert was not qualified) nor did the AOM provide any opinions as to the areas he was qualified. This was argued in the papers and the Pet. submitted to this Court. *See*, Pet. 22-27, Reply 20-28.

NRS 11.258 will serve no purpose if counsel can sue a host of design professionals based solely on consultation with a single design expert practicing in only one design discipline wholly unrelated to the disciplines of all other design professionals named in the complainant's lawsuit. If an expert does not practice in the defendant designer's relevant field of practice, how can the expert conclude there is merit to the complainant's claims against that design professional? Further, how can an attorney swear, in good faith, and with all required candor to the court, that he or she reasonably believes that the consulted expert is knowledgeable in design disciplines they are not licensed in, and does not practice in? Unfortunately, the Court's Opinion does not address these issues.

NRS 11.258(1) states, "the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney… (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action[.]" By virtue of NLV suing each design professional providing project design services, NLV has put into issue the design discipline of <u>each</u> design professional being sued

in the action, not just the geotechnical engineering discipline. Therefore, NRS 11.258(1)(c) can only be given proper effect if NLV's counsel consults with an expert qualified to opine in each design discipline it has placed into issue by virtue of suing each design professional. Unfortunately, the Court's Opinion does not address NLV's failure to address each discipline NLV involved in the action when it chose to sue each project design professional.

In *Otak Nevada, LLC v. Eighth Judicial District Court*, this Court determined design defect claims are unique as between each party and designer. The *Otak* Court found each plaintiff party must supply its own AOM certifying the merits of that party's claims against the subject design professional. 127 Nev. 593, 599-600, 260 P.3d 408, 411 (2011). A single expert report cannot be relied on by multiple plaintiffs – even if they were damaged by the exact same design defect at issue in the litigation. This holding in *Otak* establishes the purpose of NRS 11.258 is to ensure the merit of claims as between a specific complainant and a specific design professional. *Id*. ("…each party must justify its claims of nonresidential construction based on that party's relationship with the defendant"). Accordingly, the Court misapprehended this decision which logically holds that a plaintiff needs to establish the merits of its particularized claims against each individual design professional against whom they are asserting claims, particularly because each

such claim is necessarily unique. Unfortunately, the Opinion did not address this issue. Opinion, fn.3.

The logic of Petitioners' position that a complainant must provide an AOM for each design professional being sued, is best illustrated through a hypothetical: Imagine a complainant alleges a single construction defect related to subsiding soils. Complainant then sues every project design professional – including an MEP engineer. To represent compliance with NRS 11.258, complainant's counsel consults only with a geotechnical expert who is not qualified and provides no opinions or conclusions related to MEP engineering. Nevertheless, complainant proceeds with their action against the MEP engineer, having never identified the basis or merit of their claim against the MEP engineer. Imagine further that the complainant subsequently settles their lawsuit with the project geotechnical engineer providing the soils design, extinguishing the only issue for which the complainant provided an AOM. The complainant then continues to maintain its action against the MEP engineer.

In the foregoing hypothetical, if the merit of complainant's action was based solely on its counsel's consultation with a geotechnical engineer concerning soils subsidence, is the intended purpose of NRS 11.258 met in relation to the complainant's claims against MEP engineer if the soils subsidence issue is resolved? Does the complainant have to provide another AOM at the time the soils

issue is resolved, if it wishes to continue litigating against the MEP engineer? Unfortunately, the Opinion is silent with respect to these specific issues.

This logic would also extend to DPS and JWZ and even as to areas within the expert's expertise, where the expert fails to offer any opinions relevant to NBD and N&M. The Court's footnote further ignored Petitioners' arguments regarding the substance of NLV's AOM and its lack of any criticism of the actual work done by the geotechnical consultant. *See,* Pet. 21–25. The Court appears to misapprehend these critical facts in its Opinion. In doing so, the Court also misapprehended the clear intent of 11.258, which is to have an expert certify through a report that the design professional's work fell below the standard of care so that an action against each design professional has some reasonable basis for being commenced. When there was no statement critiquing N&M's or even NBD's work, how could NLV's counsel attest in good faith and with candor to the court to have a reasonable basis to commence a claim against these parties as argued above?

The Nevada Legislature's enactment of 11.258 clearly stated that an expert must review the case early on "to show merit to a claim and a reasonable basis to proceed with a suit." (V18, PA 3121). Petitioners identified minutes showing the Legislature wanted the report to illustrate what was done wrong. The Senate Committee on Judiciary met on March 23, 2007, to discuss the language of S.B.

243, which became NRS 11.258. (V18, PA3118). These statements establish the intent of the Legislation was for the expert report to explain how a design professional failed to meet the standard of care applicable to their profession. The Opinion did not address any of these arguments. Instead, the footnote provided a conclusory opinion that the AOM and report were sufficient under the circumstances, with no explanation given. Given NLV's failure to provide an expert report critical of the work of the Petitioners, including N&M and NBD, the Court respectfully should rehear the viability of the NLV's AOM based on misapprehension of the facts and law as discussed herein to ensure parties in Nevada can understand how courts are expected to interpret NRS 11.258 in the context of claims against multiple design professionals with different scopes, contract and services. *See*, e.g. (V20 PA3320-3325).

**B**. **The Court Opinion Misapprehended The Petitioners' Argument That Retroactive Application Of AB 421 To NLV's Expired Claims Violates Petitioners' Vested Substantive Rights**

The plethora of Federal and State cases cited in the Petition establishes the majority of jurisdictions hold that once a statute of repose has expired, potential defendants secure a vested, substantive right to be free from any such claim that become time-barred. *See*, Pet. 12-21, Reply 10-17 & (V16 PA 2520-2523 & 2541-

2545).[4] The purpose of a statute of repose is to provide "peace of mind" to defendants by barring delayed litigation which prevents unfair surprises from revived claims dormant for a period during which evidence is banished and memories fade. *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (citing *Underwood Cotton Co. v. Hyundai Merch. Marin (Am.), Inc*., 288 F.3d 405, 408-09 (9th Cir. 2002) and *Joslyn v. Chang*, 837 N.E. 2d 1107, 1112 (Mass. 2005) ("noting that statute of repose prevent[s] stale claims from springing up and surprising parties when the evidence has been lost")).

Rather than address Petitioners' argument that *expired* repose periods cannot be legislatively *resurrected*, the Court instead focused on NLV's strawman that a Legislature can generally *extend unexpired* repose periods. Respectfully, the Court ended up answering a question that Petitioners never asked.

Petitioners' argument that they held vested, substantive rights is supported by numerous decisions from both Federal and State courts that hold retroactive application expanding the period of a statute of repose/limitation cannot survive due process challenges if it extinguishes a right or bars a remedy by *reviving* time-

[4] Based on this Court's ruling prohibiting Petitioners from exceeding word and page limitations on the Petition, not all cases were directly cited therein, but they remain part of the appellate record, within the appendices and were cited extensively in the underlying motion practice. *See, e.g.* (V16 PA 2520-2523 & 2541-2545).

barred stale claims. *See,* Pet. 12-21, Reply 10-17 & (V16 PA 2520-2523 & 2541-2545) including: *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633, 637 (1925); *Chenault v. U.S. Postal Services*, 37 F.3d 535, 539 (9th Cir. 1994); *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc*., 721 F.3d 95, 106 (2d Cir. 2013); *School Bd. of Norfolk v. US Gypsum, Co*., 360 S.E.2d 325, 328 (Va. 1987);[5] *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244-45 (Ill. 1994); *Swartz v. Swartz*, 894 P.2d 209, 212-13 (Kan. 1995) (citing *Harding v. K.C. Wall Products, Inc*., 831 P.2d 958 (1992);[6] *Wood v. Eli Lilly & Co*., 701 So. 2d 344, 346 (Fla. 1997)).

The Opinion misapprehended these arguments, and Petitioners' cited legal authority, by finding there was no substantive, vested right for Petitioners to be free from claims after the repose period expired (based on the absence of a specific Nevada law discussing this issue). The Court then misconstrued the law by finding that such right is subject to the rational basis test to justify AB 421's retroactive application to revive NLV's pre-expired claims. Not once in the multitude of cited

[5] Virginia's Constitutional protections for due process are co-extensive to the US Constitution and the same analysis applies. *Morrisette v. Commonwealth*, 569 S.E. 2d 47, 53 (2002).

[6] Kansas' Constitution Bill of Rights is given the same effect as the clauses of the 14th Amendment pertaining to due process and equal protection of the law. *State v. Limon*, 122 P.3d 22, 28 (Kan. 2005).

cases in the Petition did any of the courts apply a rational basis examination after finding a vested, substantive repose defense to analyze due process violations. *Id.* In fact, this Court recently held "[S]ubstantive due process guarantees that no person shall be deprived of life, liberty or property for arbitrary reasons." *Eggleston v. Stuart*, 137 Nev., Adv. Op. 51, 2021 WL 4344945 *4 (Sept. 23, 2021) (*citing In re Guardianship of LS & HS*, 120 Nev. 157, 166, 87 P.3d 521, 527 (2004)). While admittedly there is no Nevada case directly examining this specific issue, this Court's ruling in *Alsenz v. Twin Lakes Village, Inc.*, cited to a Federal District Court case holding, "[there are constitutional restrictions on the impairment of vested rights which can limit retroactive application of statute of limitations…" 108 Nev. 1117, 1122, 843 P.2d 834 (1992) (citing *Currie v. Schon*, 704 F. Supp. 698, 701 (E.D. La. 1989)). Therefore, cases discussing repose (and/or limitations) defenses in Nevada, and throughout other Federal and State jurisdictions, can and do place restrictions on retroactive application of repose (and/or limitations) when impinging upon vested substantive rights for defendants once the period expires. This Court has discussed this possibility through indirect citations to relevant cases and even comments in recent cases. *Id*. Yet, the Opinion did not address this question as applicable to defendant parties in Nevada.

Instead, the Opinion presented a hypothetical that even if a substantive right existed, said right is akin to economic legislation and thus bound to the rational

basis test. None of the authority cited by Petitioners equated vested repose defenses, which were found to be substantive property rights to economic legislation. *See*, Pet. 12-21, Reply 10-17 & (V16 PA 2520-2523 & 2541-2545). The case cited in the Opinion to support the application of the rational basis test focused solely on "economic legislation," adjusting burdens and benefits of economic life, not violations of any substantive vested right. *See*, *Schaeffler Grp., U.S., Inc. v. U.S.*, 786 F.3d 1354, 1361-62 (2015) (case concerned anti-dumping duties from "The Continued Dumping and Subsidy Offset Act of 2000", not substantive statute of repose defenses). The Opinion also relied on language from 16B Am. Jur. 2d *Constitutional Law* §964, which came from a tax legislation case, wherein the U.S. Supreme Court held that in the context of tax legislation, taxpayers hold no vested right in the IRS. *See*, 16B Am. Jur. 2d, supra (citing *U.S. v. Carlton* 512 U.S. 26, 33 (1994)). Accordingly, the Court not only misapprehended Petitioners' repose defense argument as specific to expired repose periods, but also the swarth of authority providing that a repose defense is a substantive right, ignoring the Nevada cases touching upon the issue and the majority of Federal and State cases specifically finding such a right. The Court further misapprehended the law by comparing the substantive right of an expired repose period to mere economic legislation subject to the rational basis test, when

the supporting authority did not discuss the issue and none of the cited cases applied the rational basis test to a vested, substantive right.

Petitioners respectfully request the Court rehear this matter to address its misapprehension of the legal arguments and legal authority therein holding that Petitioners' repose defense to be free from stale claims, is a recognized substantive right protected by due process and cannot be extinguished by applying the rational basis test.

### C. The Court Overlooked The Undisputed Fact That The Complaint Was Filed Without Any Existing Legal Right To Do So

Petitioners argued that the complaint was invalid when it was filed, as all causes of action were barred under the then-existing law. Pet. 10-12; Reply 1-9; (*See, e.g.* V5 PA654-656; V16 PA2520-2523). Nevada, the federal judiciary, and a majority of other jurisdictions have held that statutes of repose, establish the outer limits of claims, and once expired, those claims are barred, regardless of fortuitous future changes in the law. *Id*., *see also,* NRS 11.202/AB 125, *G&H Assoc. v. Earnest W. Hahn Inc., Inc*. 113 Nev. 265, 271, 934 P.2d 229, 233 (1997); *Byrne v. Sunridge Builders, Inc*., 136 Nev., Adv. Op. 69, 475 P.3d 38, 41 (2020); *FDIC, supra*. The terms, "bar" or "barred" mean "[s]ubject to hinderance or obstruction by a bar or barrier which, if interposed, will prevent legal redress or recovery. This is the same as when it is said that a claim or causes of action is "barred by the statute of limitations." *Black's Law Dictionary* 150 (5th Ed. 1990).

When a repose period expires, the cause of action is extinguished before it comes into existence and is prevented from accruing. *Lewis v. Russell*, 838 F. Supp. 2d 1063, 1068 (E.D. Cal. 2012) (citing In re Individual 35W Bridge Litig., 806 N.W.2 820, 831 (Minn. 2011)); *see als*o, 54 C.J.S. Limitations of Actions § 28 (2021).

As argued, NRS 11.202/AB 125 governed the complaint (and NLV's claims) when filed on July 11, 2019, because NRS 11.202/AB 421 had not yet taken effect. Pet. 10-12. As such Nevada's operative law unequivocally established that NLV's claims and its entire action were barred from commencement. Reply, 2, fn. 1 *citing*, NRS218D.330(1)&(2); *see also, Byrne, supra*; *FDIC, supra*.

If the complaint had been filed on or after October 1, 2021, AB 421 would govern over the claims, and the analysis might have been different, that is if NLV's claims would not have been also barred by the now-effective 10-year repose period. Instead, and with knowledge that a Complaint would similarly be barred once the new law went into effect, NLV wholly ignored the then-existing law seeking to take advantage of the future law that would not come into effect in time for NLV to have benefited. Pet. 13, Reply 9. The Court misapprehended this argument and the cited authority, by accepting that the expired claims were somehow not barred and instead, survived in a quasi-legal state to artificially become timely under the future law, months later. Opinion, 8. Thus, the Opinion

managed to create a likely unintended legal loophole in established precedent that "bar" or "barred" no longer means a barrier or preclusion to bringing of any claims or actions.

Contrary to the Opinion, "bar" or "barred" as commonly used, means a barrier, a prohibition precluding the assertion of time-barred claims as supported by countless cases, even recent cases from this Court obviating any legal justification for NLV to file its complaint on July 11, 2019, as those claims were time-barred. *FDIC, supra*. By allowing NLV's barred claims to survive, claimants are encouraged to ignore the law and use time-barred complaints as place holders in hopes of securing future legislative redress via repose modifications. The Opinion misapprehended the language of the then-existing statute and good law explaining this prohibition, as well as the effective date of AB 421 and its impact on NLV's complaint. Petitioners raised these concerns in the Petition and Reply and respectfully request that the Court rehear this issue, or alternatively, clarify this portion of the Opinion. Pet. 10-14, Reply 1-9.

## IV.

## CONCLUSION

Based upon the foregoing, Petitioners respectfully contend that the Opinion filed by this Court on September 23, 2021, needs to be reheard to address these misapprehended facts and arguments and misapplied laws to comport with Nevada

law. Accordingly, a rehearing on this matter is warranted. Wherefore, Petitioners respectfully ask this Honorable Court to Grant this Motion for Rehearing.

DATED: October 11, 2021.
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## CERTIFICATE OF COMPLIANCE

We hereby certify that this 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 Petition complies with the page limits of NRCAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), 4,542 words pursuant to the word count provided by Microsoft WORD, the document type volume limitation does not exceed 4,667 words.

Finally, we hereby certify that we have read this **Petition for Rehearing**, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the 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 Petition is

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not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 11, 2021.
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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 12th day of October, 2021, the foregoing **PETITION FOR REHEARING** 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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# EXHIBIT “A”

# EXHIBIT “A”

137 Nev., Advance Opinion 56

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE SALLOUM,
Appellant,
vs.
BOYD GAMING CORPORATION, D/B/A MAIN STREET STATION, A DELAWARE CORPORATION,
Respondent.

No. 80769



Appeal from a district court order granting a motion to dismiss in an employment discrimination matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

*Affirmed.*

Watkins & Letofsky, LLP, and Theresa M. Santos and Daniel R. Watkins, Henderson,
for Appellant.

Snell & Wilmer, LLP, and Hayley J. Cummings, Kelly H. Dove, and Paul S. Prior, Las Vegas,
for Respondent.

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BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

*OPINION*

By the Court, CADISH, J.:

In this appeal, we consider whether the Legislature's enlargement of a limitation period revives previously expired claims and

conclude that, absent explicit provision by the Legislature, it does not. After respondent terminated appellant's employment, appellant sent a letter of inquiry to the Equal Employment Opportunity Commission and ultimately filed a charge of discrimination. The limitation period for appellant's potential claims against respondent expired on either the day he filed his letter of inquiry or shortly after he requested a right-to-sue letter from the Commission. The Legislature subsequently amended NRS 613.430, providing aggrieved employees an additional 90 days to file a claim after receiving a right-to-sue letter. After the amended statute became effective, appellant filed the underlying district court complaint, alleging discrimination based on age and sex. Respondent moved for dismissal, arguing that appellant's claims expired under the former version of NRS 613.430 before that statute was amended and the Legislature's amendments to the statute did not revive them. The district court agreed and granted the motion, also rejecting appellant's arguments that the equitable tolling doctrine applied.

Given that the 2019 amendment to NRS 613.430 does not state it applies to claims that expired before the amendment's effective date, we hold that the district court correctly determined the amendment does not apply to revive appellant's already-expired claims. Furthermore, we conclude that appellant failed to establish the requirements for equitable tolling, particularly that his noncompliance with the statute of limitations resulted from external factors beyond his control. Accordingly, the district court properly dismissed appellant's complaint with prejudice.

*FACTS AND PROCEDURAL HISTORY*

On August 15, 2018, respondent Boyd Gaming Corporation discharged appellant Antoine Salloum from employment for alleged

violations of company policies. Salloum sent an inquiry letter to the EEOC on or around February 11, 2019, alleging that Boyd discharged him based on his sex, national origin, and age, and requesting that the EEOC investigate his termination. On June 10, Salloum filed a formal charge of discrimination against Boyd with the EEOC and the Nevada Equal Rights Commission (NERC), alleging that Boyd terminated him due to his sex, national origin, and age in violation of the Civil Rights Acts of 1964 and the Age Discrimination in Employment Act of 1967. On August 12, Salloum requested a right-to-sue letter from the EEOC, which it issued the next day.

On November 1, 2019, Salloum filed the underlying district court complaint, alleging that Boyd committed unlawful employment practices by subjecting him to a hostile work environment and terminating him due to his age and sex. Boyd moved for dismissal, arguing that Salloum's claims expired under the 1983 version of NRS 613.430 (giving a claimant 180 days from the act complained of to file an unlawful employment practice complaint), which controlled through September 30, 2019. Salloum opposed, arguing that the 2019 amendment to NRS 613.430 (giving a claimant 180 days from the act complained of or 90 days from NERC issuing a right-to-sue letter, whichever is later, to file an unlawful employment practice complaint) retroactively applied such that his complaint was timely. At the hearings on the motion, Salloum also argued that the district court should deny Boyd's motion under a theory of equitable tolling.

The district court granted Boyd's motion to dismiss with prejudice, concluding that Salloum's claims expired on February 11, 2019, under the 1983 version of NRS 613.430 when no formal administrative charge was filed by that date and that the 2019 amendment to NRS 613.430

did not resurrect Salloum's claims.[1] The district court concluded that equitable tolling did not apply because the statute has clear time limitations with which Salloum did not strictly comply.

*DISCUSSION*

When, as here, a district court considers matters outside of the pleadings, we review an order resolving a motion to dismiss under NRCP 12(b)(5) as one for summary judgment under NRCP 56. *Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994); NRCP 12(d). We review "a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

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[1]Salloum argues that his filing of a letter of inquiry with the EEOC constituted the filing of a complaint with NERC such that tolling is appropriate under the 1983 version of NRS 613.430 (providing that the 180-day limitation period to file an unlawful employment practice complaint "is tolled . . . during the pendency of the complaint before [NERC]"). Thus, he contends that the district court erred in concluding that his claims expired on February 11, 2019. Even if Salloum's argument is correct, which we take no position on, his claims still expired the day after he received the right-to-sue letter from the EEOC. Thus, under either the district court's conclusion or Salloum's argument on appeal, Salloum's claims expired under the 1983 version of NRS 613.430 before the 2019 amendment took effect.

*The 2019 amendment to NRS 613.430 did not revive Salloum's expired claims*

Salloum argues that the 2019 amendment to NRS 613.430 retroactively applies, thereby reviving his expired claims against Boyd, because it relates to procedures. Salloum contends that his claims against Boyd were timely under the 2019 amendment because he filed them within 90 days of receiving a right-to-sue letter. Thus, the first question before us is whether the 2019 amendment to NRS 613.430 retroactively applied and revived Salloum's claims.

"[W]e generally presume that [newly enacted statutes] apply prospectively unless the Legislature clearly indicates that they should apply retroactively or the Legislature's intent cannot otherwise be met." *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 179, 162 P.3d 148, 154 (2007). However, "statutes that *do not change substantive rights* and instead relate solely to remedies and procedure . . . appl[y] to any cases pending when . . . enacted." *Id.* at 179-80, 162 P.3d at 154 (emphasis added).

Determining whether a statute alters substantive rights and thereby has a retroactive effect "is not always a simple or mechanical task." *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994)). When making such a determination, we "take a 'commonsense, functional' approach," focusing on "fundamental notions of 'fair notice, reasonable reliance, and settled expectations.'" *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 155, 179 P.3d 542, 553-54 (2008) (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001)).

Salloum relies upon *Valdez v. Employers Insurance Company of Nevada* to argue that the 2019 amendment to NRS 613.430 is procedural in nature and thus retroactively applies. There, a work-related accident left a worker quadriplegic, "requiring continuous care by a urologist." *Valdez*, 123 Nev. at 172-73, 162 P.3d at 150. The Nevada State Industrial Insurance System (SIIS) covered the worker's claim, and the worker began treatment with a urologist "located approximately one mile from [his] home." *Id.* at 173, 162 P.3d at 150. After the Legislature privatized SIIS, the resulting entity, Employers Insurance Company of Nevada, assumed responsibility for the claim and notified the worker that he must choose a new urologist within its network. *Id.* The worker objected, but the Nevada Department of Administration ultimately concluded "that the issue of physician choice was procedural and therefore the provisions" privatizing SIIS retroactively applied to the worker's claim. *Id.* On appeal, we held "that managed care and physician choice [were] acceptable procedural and remedial mechanisms for administering a vested entitlement. Legislative provisions to that effect are retroactive in the absence of a clear statement of contrary legislative intent." *Id.* at 179, 162 P.3d at 154.

The analysis in *Valdez* does not apply here, as the injured worker in *Valdez* had acquired a substantive right to medical treatment before the Legislature's overhaul of the SIIS. Whether the injured worker retained his urologist or selected a new one did not alter the worker's right to treatment. Here, application of the new limitation period *would* alter Boyd's substantive rights, as Salloum's claims against it had expired under the 1983 version of NRS 613.430, thus eliminating potential liability thereunder. Therefore, Salloum's reliance upon *Valdez* is misplaced, and we decline to apply *Valdez* here.

We similarly reject Salloum's reliance upon *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985). There, the personal representative of the decedent brought claims against the manufacturer of an aircraft relating to an apparent crash over the Pacific Ocean. *Id.* at 1038. At the time of the crash, a two-year limitation period controlled. *Id.* Not long after the crash, Congress repealed the statute and enacted in its place a three-year limitation period. *Id.* The personal representative sued more than two years after the crash but within the three-year limitation period. *Id.* The court held that the three-year limitation period controlled, as "[t]he two-year time bar was not yet complete and the action was viable when [Congress lengthened] the limitation period . . . to three years" and "defendants had acquired no vested right to immunity from suit for their alleged wrong under [the then-controlling statute]." *Id.* at 1040. Here, Salloum's claims against Boyd expired before the Legislature lengthened the limitation period.[2] *Friel* therefore does not support application of the 2019 amendment's limitation period here.

We previously addressed whether the Legislature's subsequent lengthening of a limitation period governing the collection of child support arrearages revived a claim that expired under the prior limitation period in *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296 (1994). There, the mother filed an action in 1991 to collect child support arrearages dating back to 1977, relying on a 1987 legislative amendment that removed the statute of limitations for such collection actions. *Id.* at 201-03, 871 P.2d at 297-98.

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[2]The Legislature passed the 2019 amendment to NRS 613.430 on May 21, 2019. 2019 Nev. Stat., ch. 100, § 8, at 550. But the amendment did not provide an effective date, and thus, pursuant to NRS 218D.330 (providing effective date for legislative measures where Legislature does not specifically designate one), it took effect on October 1, 2019.

The district court concluded that the amendment retroactively applied and affirmed the referee's award of arrearages dating back to 1977. *Id.* at 202-04, 871 P.2d at 297-98. On appeal, we held that the Legislature's removal of the limitation period did not retroactively apply to allow the mother to collect arrearages that were time-barred under the prior limitation period. *Id.* at 203-04, 871 P.2d at 298. Because the Legislature specifically removed a section of the bill providing for retroactive application, we could not conclude that the Legislature intended the enlarged limitation period to revive time-barred claims. *Id.* at 203, 871 P.2d at 298. We also could not "conclude that retroactive application [was] necessary to satisfy the [L]egislature's intent." *Id.* Accordingly, we held that the mother could only recover arrearages that were not time-barred under the pre-amendment six-year limitation period. *Id.* at 203-04, 871 P.2d at 298.

*McKellar* is in accord with the majority of jurisdictions that have addressed the question of whether a limitation period extended by statutory amendment should apply to revive expired claims. *See, e.g., Quarry v. Doe I*, 272 P.3d 977, 983 (Cal. 2012) ("Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a retroactive application of the law under an enlarged statute of limitations. Lapsed claims will not be considered revived without express language of revival."); *State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-70 (S.D. 1993) (collecting cases regarding the same); *see also* 51 Am. Jur. 2d *Limitation of Actions* § 52 (2021 update) ("An act enlarging or lengthening a limitation period governs those actions not previously barred by the original limitation period, but ordinarily does not apply to those claims in which the original limitation period has already run." (internal citations omitted)). We now explicitly hold that this general principle—that

statutory enlargements of limitation periods do not operate to revive a previously barred action absent a clear expression of such application by the Legislature—applies in Nevada. Thus, whether the 2019 amendment to NRS 613.430 retroactively applies and revives Salloum's previously time-barred claims turns on whether the Legislature expressly provided for retroactive application or whether retroactive application is necessary to meet the act's purpose. *Valdez*, 123 Nev. at 179, 162 P.3d at 154.

The 2019 amendment to NRS 613.430 provided,

> No action authorized by NRS 613.420 may be brought more than 180 days after the date of the act complained of ~~.~~ ***or more than 90 days after the date of the receipt of the right-to-sue notice pursuant to [NRS 613.412], whichever is later.*** When a complaint is filed with the Nevada Equal Rights Commission, the limitation provided by this section is tolled as to any action authorized by NRS 613.420 during the pendency of the complaint before the Commission.

2019 Nev. Stat., ch. 100, § 8 at 550. Nothing in the amendment expresses any intent for retroactive application. *See Pub. Emps.' Benefits Program*, 124 Nev. at 155, 179 P.3d at 553 ("[W]hen the Legislature intends retroactive application, it is capable of stating so clearly."). Furthermore, we cannot conclude that we must retroactively apply the 2019 amendment to NRS 613.430 to meet the Legislature's intent. *See McKellar*, 110 Nev. at 203, 871 P.2d at 298 ("Prospective application [of an enlarged limitation period] advances the [L]egislature's intent, despite the resulting preclusion of recovery for time-barred claims."). We therefore hold that the Legislature did not provide for retroactive application of the 2019 amendment to NRS 613.430, nor is retroactive application necessary to advance the amendment's purpose. Accordingly, the 2019 amendment to NRS 613.430 does not retroactively apply to Salloum's expired claims.

*Equitable tolling does not apply to Salloum's claim*

Although the district court erred by flatly concluding that equitable tolling could not apply to Salloum's claim, *see Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (holding that equitable tolling may apply to claims of discriminatory employment practices), we conclude that the district court's error was harmless on this record because Salloum failed to demonstrate the factors that would make equitable tolling appropriate here. *See Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010) ("When the material facts of a case are undisputed, the effects of the application of a legal doctrine to those facts are a question of law that this court reviews de novo."); NRCP 61 (providing that courts "must disregard all errors and defects that do not affect any party's substantial rights").

Salloum argues that equitable tolling is appropriate because he "acted in good faith upon his understanding of the [2019 amendment to NRS 613.430]" and because tolling would not prejudice Boyd. We disagree.

When weighing whether to apply equitable tolling, courts must consider

> the diligence of the claimant; the claimant's knowledge of the relevant facts; the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; any deception or false assurances on the part of the employer against whom the claim is made; the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case.

*Copeland*, 99 Nev. at 826, 673 P.2d at 492. Addressing the diligence aspect of these considerations, we recently stated that plaintiffs seeking equitable

tolling must "demonstrate that, despite their exercise of diligence, extraordinary circumstances beyond their control prevented them from timely filing their claims." *Fausto v. Sanchez-Flores*, 137 Nev., Adv. Op. 11, 482 P.3d 677, 681 (2021).

Here, Salloum made no argument, and the record contains no evidence, that an administrative agency or Boyd misled him to his detriment. He also made no argument that his lack of knowledge regarding the facts of his claims precluded him from timely filing his complaint. Even if he had, the record demonstrates that Salloum had all the requisite knowledge to pursue his claim when he sent his letter of inquiry to the EEOC. Finally, the record before us does not demonstrate that extraordinary circumstances prevented Salloum from timely filing his complaint. Rather, Salloum argues that we should apply equitable tolling to save his otherwise-expired claims because of his "miscalculation of an amended statute" while represented by counsel. Simply stated, a miscalculation by Salloum or his counsel under these facts does not constitute extraordinary circumstances warranting the application of equitable tolling.

*CONCLUSION*

After review of our caselaw and the weight of authority from our sister jurisdictions, we now definitively hold that we will not retroactively apply a lengthened limitation period enacted after a claim expired, effectively resurrecting the claim, absent an express statement from the Legislature to that effect. As the 2019 amendment to NRS 613.430 contains no such statement, we hold that the 2019 amendment does not retroactively apply to revive Salloum's time-barred claims. Furthermore,

Salloum failed to demonstrate that equitable tolling applies in this instance. We therefore affirm the district court's dismissal of Salloum's complaint.

_____, J.
Cadish

We concur:

_____, J.
Pickering

_____, J.
Herndon

# Exhibit B

# Exhibit B

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; AND NINYO AND 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 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TREVOR L. ATKIN, DISTRICT JUDGE,
Respondents,
and
CITY OF NORTH LAS VEGAS,
Real Party in Interest.

No. 81459

FILED

OCT 28 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER DENYING REHEARING*

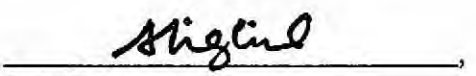


21-31152

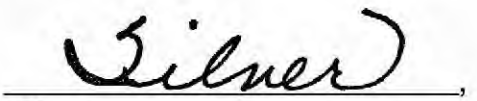
Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

_____, J.
Parraguirre



_____, J.
Stiglich



_____, J.
Silver

cc: Hon. Trevor L. Atkin, District Judge
W&D Law, LLP
Clyde & Co US LLP/Las Vegas
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Lincoln, Gustafson & Cercos
Parker, Nelson & Associates
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk

[1] The motion for leave to file an amicus brief in support of the petitioners' petition for rehearing is denied.