In the
Supreme Court of the State of Nevada

Electronically Filed
Aug 13 2020 02:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SOMERSETT OWNERS ASSOCIATION, a Domestic Non-Profit Corporation, Appellant, vs. SOMERSETT DEVELOPMENT COMPANY, LTD, a Nevada Limited Liability Company; SOMERSETT, LLC a dissolved Nevada Limited Liability Company; SOMERSETT DEVELOPMENT CORPORATION, a dissolved Nevada Corporation; PARSONS BROS ROCKERIES, INC. a Washington Corporation; Q & D Construction, Inc., a Nevada Corporation, and DOES 1 through 50, inclusive, Respondent.	**Case No. 79921** District Court Case No.: CV-1702427 Judge: Hon. Elliott A. Sattler

APPELLANT'S OPENING BRIEF

Don Springmeyer, Esq. (# 1021)
Bradley Schrager, Esq. (# 10217)
John Samberg, Esq. (# 10828)
Royi Moas, Esq. (# 10686)
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
5594 B Longley Lane, Reno, Nevada 89511
Attorneys for Appellant

Docket 79921 Document 2020-29955

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 13th day of August, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NSB: 1021)
BRADLEY SCHRAGER, ESQ. (NSB: 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
ROYI MOAS, ESQ. (NSB 10686)
5594 B Longley Lane
Reno, Nevada 89511
(775) 853-6787/Fax (775) 853-6774
Attorneys for Appellant Somersett Owners Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Out of State Cases

State Statutes

Other Authorities

Rules

ROUTING STATEMENT

Retention by Supreme Court is appropriate, per N.R.A.P. 17(11) and (12), as the question of whether the statute of repose may be tolled during the period in which a developer controls the board of a homeowners' association, thereby also controlling the potential for bringing a lawsuit against same developer for issues concerning construction, as well as the question of what is the appropriate standard for determining the date of "substantial completion" of a construction project pursuant to NRS 11.202, are questions of first impression with statewide importance to the coherence of pertinent law in this State.

DATED this 13th day of August, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NSB: 1021)
BRADLEY SCHRAGER, ESQ. (NSB: 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
ROYI MOAS, ESQ. (NSB 10686)
5594 B Longley Lane
Reno, Nevada 89511
(775) 853-6787/Fax (775) 853-6774
Attorneys for Appellant
Somersett Owners Association

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an appeal of an order granting summary judgment in an action stemming from the failure of rockery walls within a homeowners' community. Simply put, the picturesque Somersett community in Reno features miles and miles of rockery walls—seventy thousand lineal feet of such walls; several walls have failed, others have collapsed, dangerously and at great expense, and threaten to continue to do so for many years hence. Somersett Owner's Association ("SOA") brought suit for redress of the damages, deficiencies, and defects these rockery wall failures have occasioned, through Respondents' failures of design, construction, and maintenance, including excessive or inadequate voids with no or inadequate chinking rocks; failure to use filter fabric to enclose the drain rock or otherwise in construction of rockery walls; drain rock and or retained soil spilling through voids; inadequate, improper or otherwise bad placement of rockery wall rocks; over-steepened and or non-uniform face batter of rockery walls; and inadequate stabilization of the rockery walls.

The district court—despite lacking all objective indicia, like a final

building inspection, a notice of completion, or a certificate of occupancy—applied a common law analysis to rule that the building project at issue was "substantially complete," pursuant to NRS 11.202(1)(2015) and 11.2055(2), more than six years prior to SOA's bringing suit, thus barring the suit. The district court did not find—and Respondents did not establish—an actual date upon which the project was, in fact, "substantially complete" under law, only that such a moment must have occurred prior to the elapsing of the six year repose period. Under common law, whether the project was substantially complete turns on a determination of its fitness for intended use, an analysis in which genuine issues of material fact remain in dispute and for which grant of summary judgment by the district court was not appropriate.

Second, and relatedly, the district court ruled that the statute of repose barred Appellant's claims. The developer, however, controlled SOA's board of through the entirety of the statutory repose period. A question under review here, therefore, is whether, under these circumstances, it is equitable to permit a developer to run out the whole of the repose period clock, so that suits like the present one are barred

without a chance for hearing.

Third, the district court failed to address whether Appellant's warranty claims were governed or restricted by the statutes of repose found in NRS 11.202. Applying such repose period to NRS 116 warranty claims would lead to the absurd result of those claims lapsing by virtue of expiration of the statute of repose *before* such claims even commenced or accrued. The question here, therefore, is a straightforward question of law: whether the legislature intended for NRS 11.202 statutes of repose to apply to developer warranty claims relating specifically to the common areas.

II. JURISDICTION OF THE COURT

This is a direct appeal from the grant of a motion for summary judgment, and Court has jurisdiction pursuant to N.R.A.P. 3(b)(1). The order appealed from here was a final order or judgment in the action below, entered on October 2, 2019. Appellant's Appendix Vol. 6 ("AA 6"), 1064-1072. The notice of appeal in this action was filed on October 29, 2019. AA 6, 1085-1087. The appeal is therefore timely. N.R.A.P. 4(a).

III. STATEMENT OF THE ISSUES PRESENTED ON REVIEW

1. Did the district court err by applying an inappropriate

standard for determining "substantial completion" of a construction project pursuant to NRS 11.202, or by not finding a genuine dispute of material fact precluding summary judgment on that issue?

2. Did the district court err when it ruled that the statute of repose may not be tolled or subject to equitable estoppel while a developer controls the board of a homeowners' association, thereby also controlling the potential for bringing a lawsuit against that same developer for issues concerning construction?

3. Did the district court err when it implicitly ruled that the statute of repose applied to common-area warranty claims under NRS 116.4114 by the homeowners' association against the developer?

IV. STANDARD OF REVIEW

The Nevada Supreme Court reviews 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 (2005). Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." Id. This

court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party. Id. The moving party has the burden of establishing that a summary judgment is proper. *Intermountain Veterinary Medical Ass'n v. Kiesling-Hess Finishing Co.*, 101 Nev. 107, 706 P.2d 137 (1985).

V. STATEMENT OF THE CASE

This action was filed in the Second Judicial District Court on December 29, 2017. AA 1, 1. An amended complaint was filed on May 3, 2018. AA, 80. The amended, operative complaint stated claims for Negligence and Negligence Per Se; Breach of Express and Implied Warranties Pursuant to NRS 116.4113 and NRS 116.4114 and Common Law; Negligent Misrepresentation and/or Failure to Disclose; Declaratory Relief; and Breach of NRS 116.1113 and the Implied Covenant of Good Faith. Id.

On August 13, 2018, Respondent Q&D Construction, Inc. answered the amended complaint. AA 1, 103. On August 17, 2018, Respondent SDC answered and asserted cross-claims against Respondents Q&D Construction, Inc. and Parsons Brothers Rockeries

for Implied Indemnity; Contribution; Equitable Indemnity; Apportionment; and Express Indemnity. AA 1, 124. On August 21, 2018, Respondent Parsons Brothers Rockeries, Inc. answered the amended complaint. AA 1, 137. On August 23, 2018, Respondent Parsons Brothers Rockeries, Inc. answered Respondent SDC's cross-claims. AA 1, 160. On September 28, 2018, Respondent Q&D Construction, Inc. answered Respondent SDC's cross-claims. AA 1, 185.

On August 29, 2018, Respondent SDC asserted third-party claims against Stantec Consulting, Inc. for Implied Indemnity; Contribution; Equitable Indemnity; Apportionment; and Express Indemnity. AA 1, 172. Stantec answered the third-party complaint on August 30, 2018. AA 1, 179.

After initial discovery was limited to the potentially-dispositive issues of limitations and repose, Defendants, collectively, filed an omnibus motion for summary judgment on March 26, 2019. AA 2, 207. Appellant responded to the motion on April 26, 2019, and reply by Defendants was had on June 7, 2019. AA 3, 326 and AA 5, 875. The district court held hearing on the matter on July 15, 2019. AA 6, 896.

The district court issued its order granting Respondents' omnibus summary judgment motion on October 3, 2019, and it was entered that same day. AA 6, 1064 and AA 6, 1073. The notice of appeal was filed on October 29, 2019. AA 6, 1085.

VI. STATEMENT OF RELEVANT FACTS

SOA is a homeowners association of a common-interest community comprised of over 3,000 units (the "Somersett Community") owned by Appellant's members and governed by its owner-controlled Board of Directors. AA 1, 80-81. The developer Respondents Somersett Development Company, Ltd, Somersett, LLC, and Somersett Development Corporation ("SDC"), are entitled to build up to approximately 5,000 units.

The Somersett Community is located in the western portion of the City of Reno on the north side of Interstate 80. The project was mass graded by the developer (and or on its behalf) into terraced residential lots and streets, with dry stacked rock retaining walls (rockery walls) placed to retain earth, facilitate grade separations between lots, and create desired level areas for lots and common areas.

The Somersett Community consists of both privately owned units, and common areas. The existing rockery walls, which are the subject of this litigation, are all in common areas owned by SOA according to the conditions, covenants and restrictions ("CC&Rs") that govern the Association and deeds transferring ownership of the common areas to the Association. AA 1, 80, 85. According to SOA's CC&Rs, it is responsible for maintaining the common areas, including the Rockery Walls. AA 1, 81.

Consistent with law and practice, at its inception, control of the board was held by the developer/declarant, SDC. Pursuant to NRS Chapter 116, control of the board was transferred by SDC to the homeowners on or about January 8, 2013. AA 4, 597.

The remaining Respondent parties were engaged by SDC to design and construct the rockery walls. Third-Party Defendant Stantec was hired by Somersett to inspect the Rockery Walls, Defendant Q&D performed the mass grading and soil foundations, Defendant Parsons construct the Rockery Walls and upon belief Defendant Somersett coordinated the entire construction.

Following the catastrophic failure and collapse of two rockery

walls on the very same day in 2017, Appellant engaged the services of American Geotechnical ("American Geotech") to undertake a comprehensive evaluation of the common area rockery walls. The principal engineer and supervisor for that project was Edred T. Marsh. AA 3, 365-366.

In early December 2017 American Geotech conducted a comprehensive evaluation, and the report that followed was issued on December 22, 2017 ("the Initial Report"). The Initial Report served as the investigation required by statute in order for Appellant to have filed the Chapter 40 litigation below. The Initial Report in its entirety was filed with the Court at the same time this action was filed on December 27, 2017. American Geotech conducted a follow up evaluation in January 2018, and issued a Supplemental Report on November 8, 2018 ("the Supplemental Report"). Both the initial evaluation and the follow up evaluation were performed in order to determine whether any of the common area rockery walls were defective. AA 3, 362-370.

The Initial Report contains 28 maps of sections within the common area, and identifies with exacting particularity (per map, per

wall) material defects in nearly all of the 70,000 feet (over 13 miles) of rockery retaining walls in the Somersett common area. A copy of the overview map depicting the location of the 28 maps is attached as Exhibit 1 to the Appendix of Exhibit filed concurrently herewith. Id.

Since the preparation of the Initial Report, both American Geotech and Appellant's other retained expert witness, Joseph Shields ("Shields") of Shields Engineering, have been provided with the thousands of pages of documents, rockery wall plans, specifications and drawings, and all other documents exchanged among and between the parties in this action pursuant to their respective Rule 16.1 disclosure obligation. AA 4, 608. Both Marsh and Shields have reviewed the rockery wall plans and specifications which pertain to the subject rockery walls. AA 3, 365; AA 3, 398.

As part of the preparation of this Opposition and the other pleadings filed concurrently herewith, Appellant's counsel had Marsh review both the Initial Report and the Supplemental Report to determine whether any of the as-built common area rockery walls substantially deviated in a material manner from the plans and specifications applicable to the rockery walls. Since destructive testing

has yet to be conducted by the parties in this action (destructive testing will cost well over $500,000.00), Marsh looked at two (2) immutable, readily visible, and structurally significant wall design features (a) wall height, and (b) wall surcharge—i.e., wall load based on grading above walls, and bench depth on multi-tiered walls. AA 3, 365. Those two features are integral to the walls structure and function, and are not subject to the ravages of time or the hand of man (natural events such as earthquake, rain, snow, etc.; or regular association activity such as maintenance, landscaping, and the like). Those two features are the same today as they were in 2006. AA 3, 367.

As set forth in the Marsh Declaration, it was determined that nearly two-thirds (2/3) of the 374 common area rockery walls materially deviate from the plans and specifications as to wall height and wall surcharge, and that those material deviations are readily visible. Id. Marsh and his colleagues at American Geotech prepared a spreadsheet that provides with exacting particularity (per map, per wall) those walls that materially deviate from plans and specifications as to (a) wall height, and (b) wall surcharge. AA 3, 405-415; *see also* AA 3, 416-473. Both Marsh and Shields opined that those walls are

therefore not complete, as they are "not fit for the purpose for which they are intended." AA 3, 361-370; AA 3, 395-400.

Prior to the filing of the complaint below, on or about December 29, 2017, SOA, in accordance with provisions of NRS 40.645 and each subsection thereof, provided Respondents a written NRS Chapter 40 Notice of Claims (herein "Chapter 40 Notice"), including a statement that the notice is being given to satisfy the requirements of NRS 40.645, and identifying in specific detail each defect, damage and injury to the common area that is the subject of the claim, including, without limitation, the exact location by Map and Picture of each such defect, damage and injury. AA 1, 84-85; AA 6, 1065, n. 2. Additionally, to the extent known, the cause of the defects and the nature and extent of the damage or injury resulting from the defects is identified in reasonable detail. Id.

Appellant alleged defects and deficiencies including but not limited to excessive or inadequate voids with no or inadequate chinking rocks; failure to use filter fabric to enclose the drain rock or otherwise in construction of rockery walls; drain rock and or retained soil spilling through voids; inadequate, improper, or otherwise bad placement of

rockery wall rocks; over-steepened and or non-uniform face batter of rockery walls; and inadequate stabilization of the rockery walls. AA 1, 86.

Appellant alleged that the above-referenced defects are pervasive throughout the Somersett Community and its 70,000 linear feet of rockery walls. Id.

VII. ARGUMENT

A. Material Facts Remain At Issue Regarding Whether The Project Was "Substantially Complete"

In this case there are none of the objective statutory criteria, pursuant to NRS 11.2055(1)(a)-(c), that would establish substantial completion of an improvement to real property. It is mutually uncontested here that there were no final building inspections undertaken, no notices of completion issued, and no certificates of occupancy produced. AA 6, 1068, n.4. The question of fact of the date of the project's substantial completion, therefore, is to be determined by

/ / /

/ / /

/ / /

recourse to common law, pursuant to NRS 11.2055(2).[1] As of this writing, this Court has not announced a definitive standard for determining a date of "substantial completion."

Neither did the district court announce and apply its own standard for such a determination in this action, though it did appear to adopt an oblique, contract-based approach to the question when it stated in its order that "substantial completion implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied." AA 6, 1068, quoting 22 Am.Jur.2d Damages § 83. But neither the district court nor Respondents established—or really even attempted to establish—a date of

---

[1] **NRS 11.2055 Actions for damages for injury or wrongful death caused by deficiency in construction of improvements to real property: Determination of date of substantial completion of improvement to real property.**

1. Except as otherwise provided in subsection 2, for the purposes of this section and NRS 11.202, the date of substantial completion of an improvement to real property shall be deemed to be the date on which:

(a) The final building inspection of the improvement is conducted;

(b) A notice of completion is issued for the improvement; or

(c) A certificate of occupancy is issued for the improvement,

whichever occurs later.

2. If none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law.

substantial completion, as required under NRS 11.2055(2), to determine that it fell outside the period of repose. Respondents *suggested* below that the rockery walls were completed in 2006, and that therefore the statute of repose would have expired in 2012. The district court, however, never found such to be true, and Appellant disputed with competent and highly particularized evidence that the rockery walls were not substantially completed in 2006, and in fact may not be substantially complete even now. AA 3, 365; AA 3, 400.

This Court should apply reason and persuasive authority to arrive at a clear standard regarding a determination of "substantial completion" under common law, to serve in those circumstances where a builder or developer has not met the requirements of NRS 11.2055(1), that lower courts can apply and parties can know and rely upon, so that this and future cases can be resolved consistently and efficiently.

1. The appropriate standard for "substantial completion," according to industry standard and reason, is when the owner can occupy or utilize the work for its intended use

In the absence, thus far, of an announced standard for such inquiries in Nevada, district courts have considered appropriate secondary sources within the construction and building industry to

define "substantial completion" pursuant to NRS 11.2055(2).

Specifically, the American Institute of Architects standard form contract at Section A.9.3.1 defines substantial completion as:

> The stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

See AA 4, 632; (*see also Balle v. Howard Hughes Corp.*, 2016 WL 4263826, 2016 Nev. Dist. LEXIS 3502 (Nev. Dist. Ct.) at 3, to which Appellants refer merely to demonstrate the practice by certain lower courts facing this issue, and not for persuasive authority regarding its substantive content).

In fact, in a case decided just one year prior to the summary judgment order in the present case, these very same Respondent parties faced claims from Ryder Homes of Northern Nevada, turning as here upon the application of the statute of repose in NRS 11.202 to a finding of "substantial completion" per NRS 11.2055(2) with, again, none of the documents or acts indicating substantial completion under 11.2055(1). These exact parties argued to this very same district court on a motion for summary judgment that the appropriate common law standard

ought to be that "an improvement is substantially complete when the improvement is at such a stage that is can be used for its intended purpose." AA 4, 618, *Ryder Homes of Northern Nevada, Inc.. v. Somersett Dev. Co. Ltd., et al*, Second Judicial District Court Case No. CV17-01896. These same Respondents argued below, here in this case, that "fit for its intended purpose" has no bearing on a common law standard of "substantial completion."

As in similar cases to this one, the trier of fact here should look to whether the rockery walls were or are "sufficiently complete in accordance with the Contract Documents," and whether they are sufficiently complete to be utilized for their "intended use." This is a more reasonable and equitable standard for building projects than what the district court below appears to have employed, that "substantial completion implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied." AA 6, 1068.

The district court—urged by Respondents—appeared to consider an approach of this nature to be categorically inappropriate, because "if the Court were to accept Plaintiffs' analysis, the statute of repose would

potentially last decades for appurtenances and other common interest elements and developments, such as roads, sidewalks, walls, parks, trails and developed open spaces constructed for the benefit of all members of a community." AA 6, 1070. This is not accurate, and Appellants here neither make no claim for a limitless ability to sue or a meaningless statute of repose. SOA certainly does not argue that a defective structure *ipso facto* can never be substantially complete. A structure can be built to plans and specifications and still be defective, if the plans and specifications are inadequate. A defective structure can still be considered "substantially complete" under law if, for example, a final building inspection is conducted, a notice of completion is issued, or a certificate of occupancy is issued. NRS 11.2055(1). However, if you build a defective structure, and cannot procure or issue the documents and certificates that indicate substantial completion, you ought not be able to enjoy the mighty protections of the statute of repose—especially in the manner Respondent SDC has here, by dominating the board of the homeowners association during the entire time a lawsuit could be authorized and pursued—if you have not provided a work product that

has reached the stage at which its owner can occupy or utilize it for its intended use.

2. A genuine dispute of material facts exists regarding the date of substantial completion of the rockery walls

Plaintiff's claims against the Defendants have not expired, and should not have been subject to summary judgment, since there is a genuine dispute of material fact as to the substantial completion date of the rockery walls.

Rockery walls are retaining walls, and are intended to perform for over 50 years. A rockery wall above four (4) feet in height is a retaining wall, and is therefore an engineered structure. AA 3, 397; AA 3, 364. The intended use of a retaining wall is (1) to hold up and/or hold back earth in the context of the area in which it is situated; and (2) to do so for a suitable useful life of at least 50 years. AA 3, 397-398l AA 3, 369. If its use is so immediately and materially demonstrated to be unavailable *as a wall*, as these walls were, there is clearly some question as to the fitness of the product for its intended use from the very outset.

The rockery retaining walls

> were intended to be utilized to provide support for all of the above, i.e. residential structures, roadways and other types of infrastructure including utilities, walkways and public transport. Retaining walls are intended to provide support for the homes and other structures for their useful life, which is considered to be greater than 50 years.

AA 3, 364.

In the opinions of Appellant's technical engineers, as presented to the district court, by materially deviating from the plans and specifications of wall height and surcharge in this case, nearly 2/3 of the 374 total walls are not fit for their intended use and are therefore not substantially complete.[2] AA 3, 415; AA 3, 369; AA 3, 400. The walls were not fit in 2006 and, with but two or three exceptions, are not fit now. The only walls that are substantially complete currently are the two or three walls that in fact previously failed and have been repaired to be fit for purpose. Prior to their failure, those walls materially

[2] It was the opinion of Appellant's technical engineers that walls over 10 feet in height *by definition* materially deviate from the approved plans and specifications, as do both single and tiered walls with benches less than 15 feet, or other indicia of surcharge. AA 3, 366. All such walls, therefore, are presently not substantially complete, according to the common law standard stated above.

deviated from approved plans and specifications, as described to the district court, and as such were both defective and not substantially complete. AA 3, 370.

As established with particularity and supported by competent evidence below, certain indisputable and immutable features of nearly two-thirds (2/3) of the rockery walls (maximum height, and minimum bench depth), are materially inconsistent with the plans and specifications. *See* AA 3, 362-370, in general and in particular 370, which provided:

> In my opinion, the walls which are greater than 10 feet and the tiered walls with inadequate bench width imposing a surcharge materially deviate from the plans and specifications. As such, it renders the structures unstable and thereby not fit for the purpose for which they were intended. Specifically, being less likely to provide support for the stated infrastructure, homes and other structures for not less than 50 years. As such, the identified walls are not substantially complete.

As such, according to Plaintiff's evidence, the identified walls are not fit for intended use *as rockery walls*, and therefore are not substantially complete. Respondents' insistence that the walls are substantially complete only serves to underscore the existence of a genuine dispute of

fact regarding the issue.

Further, a developer declarant and any dealer impliedly warrant that a unit and the common elements in the common-interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by a declarant or dealer, or made by any person before the creation of the common-interest community, will be a) free from defective materials; and b) constructed in accordance with applicable law, according to sound standards of engineering and construction, and in a workmanlike manner. *See* NRS 116.4114(2). SDC made that representation when it handed off control of the Board to the homeowners on January 8, 2013, both expressly by statute, and impliedly by inference. AA 4, 597.

In short, Appellant put into evidence supportable, reasonable, and unrebutted, allegations that place the date of substantial completion of the rockery walls in dispute; for their part, Respondents did next to nothing to establish any such date of substantial completion, and merely asserted that SOA had not proven its claims fell within the statute of repose. Clearly there is a dispute between the parties over "substantial completion," clearly it is factual, and it is certainly genuine

and material.[3]

B. Under The Facts Of This Case, The Statute Of Repose Should Be Tolled During The Period Of Developer Control Of A Homeowners' Association, Or Respondents Should Be Equitably Estopped From Asserting Repose In This Action

Two types of equitable modifications of limitations periods have been recognized by courts: (1) equitable tolling, which focuses upon the plaintiff's excusable inability to act within a limitations period and lack

---

[3] In the *Ryder Homes* litigation—again, these same Defendants/ Respondents, and the same district court—the court denied Defendants' summary judgment motion on the following grounds:

> (The) parties agree that a notice of completion was never issued, the parties dispute the date of substantial completion. The Defendant insists substantial completion occurred in 2006, when the Third-Party Defendants finished the rockery walls and mass grading, and Defendants certified the lots as buildable. The Plaintiff insists substantial completion occurred in 2017 or 2018, at the time of the final government inspection. **Whether the certification of the pads as buildable or the final building inspection by the City of Reno constituted substantial completion is a genuine issue of material fact, because it would determine whether Plaintiff's claims are barred by the statute of repose. Therefore, there is a genuine issue of material fact which precludes the entry of summary judgment**.

Ryder Homes, Second Judicial District Court Case No. CV17-01896, Order Denying Motion for Summary Judgment, September 24, 2018 (emphasis supplied).

of prejudice to the defendant; and (2) equitable estoppel, focusing upon the actions of the defendant in preventing the plaintiff from filing suit. *Naton v. Bank of Cal.*, 649 F.2d 691, 696 (9th Cir. 1981) (*citing to Abbott v. Moore Bus. Forms, Inc.*, 439 F. Supp. 643, 646 (D.N.H. 1977) (recognizing long history of Supreme Court recognition of general applicability of equitable tolling factors to statutes of limitations).

Respondent Somersett controlled the association until January 8, 2013, and prevented the filing of any claims against it for the entirety of the period of repose. As a result, it should be estopped from asserting any limitations period defense, or at the very least see the period of repose tolled through the time of its transfer of board control to the homeowners of SOA.

SOA has been diligent in bringing claims immediately upon discovery. On January 8, 2013 the Developer Control Period ended, and in February 2017 SOA observed a complete failure of rockery walls located on Trail Ridge Court. In less than a year's time, SOA had thirteen miles of rockery walls investigated in order to identify defective conditions, prepared a Chapter 40 Notice exceeding 2,000 pages, and detailed each and every location of the defects and failures in the

rockery walls system, and commenced this action. SOA deserves to have its claims heard and decided.

1. The entire justification for statutes of repose is absurdly defeated by declarants whom have not transferred board control to association homeowners

The district court below ruled that statutes of repose are not subject to equitable or statutory tolling…" AA 6, 1070. But this sort of categorical pronouncement has never been tested under the circumstances present here, and under inquiry it becomes clear that the reasons why this and other courts have often been less willing to toll or estop statutes of repose do not obtain here. Simply put, where a developer declarant controls the board of a community association, and therefore can prevent suits, frustrate the vindication of homeowner or association rights, and otherwise perpetrate faulty or incorrect disclosures until after the transfer of control to homeowners, such a declarant should not be afforded the exceptionally broad liability protections provided by a statute of repose.

This Court, in *FDIC v. Rhodes*, 130 Nev. 893, 336 P.3d 961 (2014), discussed the distinction between statutes of limitation and statutes of repose. "In contrast [to a statute of limitations]," the Court wrote, "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." Id, at 899. A statute of repose "conditions the cause of action on filing a suit within the statutory time period and defines the right involved in terms of the time allowed to bring suit." Id (internal quotations omitted).

But the Court then offered a discussion of the purposes underlying statutes of repose, and it is here that the apparent iron nature of such provisions breaks down:

> Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded. *See Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.,* 288 F.3d 405, 408–09 (9th Cir. 2002) (providing that statutes of repose are concerned with a defendant's peace of mind); *Joslyn v. Chang,* 445 Mass. 344, 837 N.E.2d 1107, 1112 (2005) (noting that statutes of repose prevent stale claims from springing up and surprising parties when the evidence has been lost).

Id. Not a single word of that cogent description of the policy supporting statutes of repose applies in the present circumstances. What peace of mind does a declarant need when it controls the board of a community association? What "unfair surprise" lurks to spring upon a developer

who will not permit suit to be brought against itself through the entire period of repose? What stale claims threaten a declarant when it is virtually impossible for a homeowners' board to discover and pursue claims against the developer for breach of warranty, negligence, or other allegations of defective construction?

Instead, the statute of repose in these circumstances permits a pure power play by developers like SDC here. In combination with the maintenance of declarant control—here, until January of 2013, or, coincidently seven years beyond when Respondents suggest the period of repose began to run in this action—NRS 11.2055 here does not "condition the cause of action on filing a suit within the statutory time period and defines the right involved in terms of the time allowed to bring suit," as the Court explained in *Rhodes*. Quite the opposite, repose prevents entirely the filing of a suit whether discovered or not, and destroys the right of associations to vindicate their rights vis-à-vis developers. This is absolutely a situation in which equitable tolling is necessary, to prevent the sort of shell game Respondent SDC played here. Such a surfeit of peace of mind is no longer meaningful or positive public policy.

2. Analogous and pertinent statutes in Chapter 116, as well as abundant persuasive case law, demonstrate that tolling or estoppel is appropriate in this context

Avoiding the trap of extended declarant control periods that frustrate the rights of associations to bring suit is the clear function of particular statutes found in NRS Chapter 116. NRS 116.3111(3) states in part that

> Except as otherwise provided in subsection 4 of NRS 116.4116 with respect to warranty claims, **any statute of limitation affecting the association's right of action against a declarant under this section is tolled until the period of declarant's control terminates.**

NRS 116.3111(3) (emphasis supplied). Here, SOA has made out breach of warranty claims. AA 1, 90-93. It would be an exceptionally perverse result for those claims to be expressly tolled because the declarant control period here did not end until early 2013, but then barred by a statute of repose, the reasons for which this Court explored in *Rhodes*—defendant peace of mind, avoidance of unfair surprise, etc.—are not and cannot be present. NRS 116.4116(4) states

> **During the period of declarant control, the association may authorize an independent committee of the executive board to evaluate and enforce any warranty claims involving the common elements, and**

> **to address those claims.** Only members of the executive board elected by units' owners other than the declarant and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the declarant or any member of the executive board or officer appointed by the declarant. All costs reasonably incurred by the committee, including attorney's fees, are common expenses, and must be added to the budget annually adopted by the association in accordance with the requirements of NRS 116.31151**. If the committee is so created, the period of limitation for a warranty claim considered by the committee begins to run from the date of the first meeting of the committee.**

NRS 116.4116(4) (emphasis supplied). Again, declarant control is presented as a force preventing the timely discovery, evaluation, and pursuit of claims, and 116.4116(4) provides an attempt to remedy that problem: declarant-controlled associations can get the benefit of a re-started limitations clock if they institute an independent committee of homeowner representatives to evaluate and enforce warranty claims.[4] Read together and in harmony with both practical, equitable issues and the Legislature's clear concerns regarding prejudice to association rights, the provisions of Chapter 116 and Chapter 11 evince willingness to redress the legal and economic damage extended declarant control

[4] It is undisputed that here Respondent SDC did not form any such committee under 116.4116.

periods can wreak, as happened here.

Statutes of repose are not sacrosanct and inviolable regarding tolling. Though they are often intended as absolute bars, they are nonetheless subject to exception and/or inapplicability. *See First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 860 (Colo. Ct. App. 1996) (collecting cases):

> Indeed, various statutes of repose have been legislatively or **equitably tolled and/or the assertion of the statute equitably estopped and expressly waived, as indicated by decisions in a variety of contexts and jurisdictions.** *See Rosenthal v. Dean Witter Reynolds, Inc., supra* (class action suit tolls § 11-51-125(8) for putative class members while class certification evaluated); *Southard v. Miles*, 714 P.2d 891 (Colo. 1986) (legislative exception tolls statute of repose as well as statute of limitations in malpractice actions); *Alfred v. Esser*, 91 Colo. 466, 15 P.2d 714 (1932) (party can be equitably estopped from asserting a statute of repose); *see also McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992) (statute of repose not implicated because parties agreed to toll any applicable statute of limitations); *Cange v. Stotler & Co.*, 826 F.2d 581 (7th Cir. 1987) (equitable estoppel applies to actions under Commodity Exchange Act); *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978) (equitable estoppel applies to statute of repose in Interstate Land Sales Disclosure Act); *Craven v. Lowndes County Hospital Authority*, 263 Ga. 657, 437 S.E.2d 308 (Ga. 1993) [*861] (fraud will toll a statute of repose); *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (N.C. [**14] App. 1994) (equitable estoppel may defeat statute of repose); *One North McDowell Ass'n of Unit Owners, Inc. v. McDowell Development Co.*, 98 N.C. App.

125, 389 S.E.2d 834 (N.C. App. 1990) (statute of repose on equipment warranty claims tolled by express agreement).

First Interstate Bank, at 860-61. Principles of equity and fairness mandate that equitable tolling apply here as well, to prevent conduct by declarants that makes a mockery of associations like SOA's rights in this matter. The statute of repose should either be tolled under the circumstances of this case, or Respondents should be equitably estopped from asserting time limitation bars as affirmative defenses in this action.

C. NRS 11.202 Does Not Apply To NRS Chapter 116 Warranty Claims

Respondents did not oppose, and the district court did not address, Appellant's position that its NRS Chapter 116 warranty claims do not begin to run until SDC transferred control of the homeowners association to the homeowners, and therefore the statute of repose in NRS 11.202 does not apply to such claims. Such is the distinction between accrual of the time to commence a claim and expiration of a statute of repose. If a statute of repose can expire prior to the accrual of a claim, it would render the provision (and the tolling provision in NRS 116.3111) meaningless.

NRS 116.3111(3) provides that "Except as otherwise provided in subsection 4 of NRS 116.4116 with respect to warranty claims, **any statute of limitation** affecting the association's right of action against a declarant under this section is tolled until the period of declarant's control terminates" (emphasis supplied). This confirms that in adopting the Common Interest Ownership (Uniform Act) the legislature intended to toll all periods of limitation, (however denominated from state to state) including of necessity statutes which may be referred to as "repose." This is not particularly novel; courts have held that when legislatures use the term "any applicable statute of limitations," it typically is meant to encompass both statutes of limitation and statutes of repose. *See Landis v. Physicians Ins. Co. of Wis., Inc.*, 245 Wis. 2d 1, 628 N.W.2d 893 (2001).

Additionally, the Court should interpret NRS Chapter 116 and NRS Chapter 11 in a manner to avoid a conflicting results. "This court interprets statutes according to their plain meaning unless such an interpretation would run contrary to the spirit of the statutory scheme... [and p]otentially conflicting statutes are harmonized whenever possible." *Mineral Cty. v. State*, 121 Nev. 533, 535, 119 P.3d 706, 707

(2005) (internal citations omitted).

Here, NRS 11.202's repose hinges upon the substantial completion of the work in question, whereas NRS Chapter 116 warranty claims accrue upon the transfer of control from the declarant to the association. Again, setting aside the genuine disputes of material fact relating to the substantial completion of the rockery walls, transfer of control from the declarant to the owners in January of 2013 is undisputed here.

NRS 116.4116(4) provides that:

> 4. During the period of declarant control, the association may authorize an independent committee of the executive board to evaluate and enforce any warranty claims involving the common elements, and to address those claims. Only members of the executive board elected by units' owners other than the declarant and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the declarant or any member of the executive board or officer appointed by the declarant. All costs reasonably incurred by the committee, including attorney's fees, are common expenses, and must be added to the budget annually adopted by the association in accordance with the requirements of NRS 116.31151. **If the committee is so created, the period of limitation for a warranty claim considered by the**

> **committee begins to run from the date of the first meeting of the committee**.

NRS 116.4116(4) (emphasis supplied). It is clear that the Legislature intended for the periods of limitation not to commence until the earlier date of the formation of the independent committee or the transfer of declarant control. It is simply not plausible—and deeply inequitable—to interpret the provisions of NRS 11.202 (which depend on substantial completion) to cut off NRS Chapter 116 warranty liability before accrual of the warranty claim.[5] To do so would fail "to effectuate (the) general purpose" of NRS 116.4114. *See*, NRS 116.1109.

VII. CONCLUSION

Based upon the foregoing, Appellant asks this Court to reverse the judgment of the district court, and hold either that there is a genuine dispute of material fact regarding whether the rockery walls were or are substantially complete within the meaning of NRS 11.2055; that equitable tolling or estoppel acts to delay the application of the period of repose in NRS 11.202 until the time of declarant transfer of control, or

[5] Respondents below did not provide a single instance where the Nevada Supreme Court, or any other court, has provided that NRS 11.202 has been interpreted to bar NRS 116.4113 and NRS 116.4114 warranty claims.

to bar Respondents from asserting the time bar in this instance; that NRS 11.202 does not apply to NRS Chapter 116 warranty claims; or some combination of these holdings permitting SOA to proceed upon its claims.

DATED this 13th day of August, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NSB: 1021)
BRADLEY SCHRAGER, ESQ. (NSB: 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
ROYI MOAS, ESQ. (NSB 10686)
5594 B Longley Lane
Reno, Nevada 89511
(775) 853-6787/Fax (775) 853-6774
Attorneys for Appellant Somersett Owners Association

CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Answer exempted by N.R.A.P. 32(a)(7)(C), it contains 6,933 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Answer 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. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of August, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NSB: 1021)
BRADLEY SCHRAGER, ESQ. (NSB: 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
ROYI MOAS, ESQ. (NSB 10686)
5594 B Longley Lane
Reno, Nevada 89511
(775) 853-6787/Fax (775) 853-6774
Attorneys for Appellant Somersett Owners Association

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2020, a true and correct copy of the foregoing **Appellant's Opening Brief** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: /s/ *Dannielle Fresquez*
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP