# In the Supreme Court of the State of Nevada

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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; STANTEC CONSULTING SERVICES, INC., an Arizona Corporation,

Respondents.

**Supreme Court No.: 79921**

Appeal from Summary Judgment
Second Judicial District Court
Dist. Court Case No. CV 17-02427
Hon. Elliott A. Sattler

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# JOINT ANSWERING BRIEF of RESPONDENTS

**Stantec Consulting Services, Inc.**

**-and-**

**Somersett Development Company, Ltd.**
**Somersett, LLC**
**Somersett Development Corporation**

**-and-**

**Q&D Construction, Inc.**

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# NRAP 26.1 Disclosures

The undersigned counsel of record certifies that the following persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

**Stantec Consulting Services Inc.**

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock:

Mustang Acquisition Holdings Inc. owns 100% of Stantec Consulting Services, Inc.'s stock. Mustang Acquisition Holdings Inc. is wholly owned by Stantec, Inc.

2. Name of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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None

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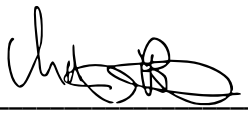

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None

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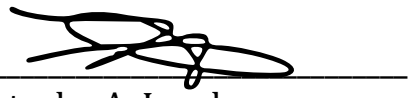

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# Routing Statement

Appellant contends the Supreme Court should retain this case under NRAP 17(11) (principal issue of first impression) & (12) (principal issue a question of statewide public importance). Respondents contend there is no principal issue of first impression, and therefore Respondents provide this Routing Statement.

Issue of First Impression – Substantial Completion

The issue of the appropriate standard for determining "substantial completion" is not a principal issue in this case. The definition Appellant asserts is, in effect, the same as the definition asserted by Respondents and the definition cited by the district court. In its arguments, Appellant cites to a correct definition, and then analyzes a different definition, arguing that warranty language should be grafted onto the substantial completion definition.

Issue of First Impression – Tolling

Although the Supreme Court has not addressed statutory tolling for this type of case, the statute is clear: statutory tolling in NRS Chapter 116 only applies to statutes of limitations, and only in cases under NRS 116.3111 (cases in which a claimant brings an action against an association).

The issue of equitable tolling of a statute of repose is not an issue of first impression. In *FDIC v. Rhodes*, 130 Nev. 893, 336 P.3d 961 (2014), the Court addressed the distinction between statutes of limitations and statutes of repose, notably the fact that statutes of limitations, in contrast with statutes of repose, may be equitably tolled. *Id.* at 899, 965. Further, various Federal courts have also recognized that statutes of repose are not subject to equitable tolling. *See*, *e.g.*, *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014); *NCUA Bd. v. RBS Sec., Inc.*, 833 F.3d 1125, 1132 (9th Cir. 2016) (noting that a preclusion on tolling is "the hallmark of statutes of repose."); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 795 (6th Cir. 2016); and *Prasad v. Holder*, 776 F.3d 222, 228 (4th Cir. 2015).

Because this matter does not raise as a principal issue a question of first impression, and because the matter is not presumptively assigned to the Court of Appeals, the Supreme Court may hear the matter, but it is not required to under NRAP 17(a).

# Statement of Issues Presented for Review

1. Did the district court correctly determine that Appellant failed to meet its production burden to introduce admissible evidence that it initiated its claims prior to the expiration of the statute of repose?

2. Was the district court correct in determining that the common law definition of substantial completion does not address the quality of the work?

3. Was the district court correct when it held that the statute of repose is not subject to equitable tolling or equitable estoppel?

4. Was the district court correct when it held the statute of repose applies to all constructional defect claims, whether characterized as contract, tort, or statutory warranty?

# Statement of the Case

Nature of the Case

This is a constructional defect case initiated by the Somersett Owners Association (the "SOA") against the developer and declarant, Somersett Development Company, Ltd. ("SDC"), contractor Q&D Construction, Inc. ("Q&D"), and contractor Parsons Bros. Rockeries, Inc. ("PBR"). The impetus for the SOA's suit was "the catastrophic failure and collapse of two rockery walls (on the very same day) in 2017 …" This alleged failure occurred years after the statute of repose had run.

In its First Amended Complaint, the SOA alleges claims for relief for (1) Negligence, (2) Breach of Express and Implied Warranties Pursuant to NRS 116.4113 and NRS 116.4114 and Common Law, (3) Negligent Misrepresentation and/or Failure to Disclose, (4) Declaratory Relief, and (5) Breach of NRS 116.1113 and the Implied Covenant of Good Faith. Although couched in terms of various different claims for relief, the SOA's cause of action is for defective construction. AA, Vol. 1, 80-99. SDC cross-claimed against Q&D and PBR (AA, Vol. 1, 124-136), and it filed a third-party complaint against Stantec Consulting Services, Inc. ("Stantec"). AA, Vol. 1,

172-178. SDC's claims against Q&D, PBR, and Stantec are limited to contribution and indemnity.

## Course of Proceedings

After the defense parties filed responses to the various pleadings, all parties agreed to bifurcate discovery. The first phase was limited to the statute of repose issues, and the second phase would have addressed the merits of the case.

During the first phase of discovery, PBR propounded written discovery on the SOA to discover the SOA's contentions about, and evidence of, substantial completion. AA, Vol. 2, 226-230. In response, the SOA failed to point to any evidence tending to prove the rockery walls were substantially completed within six years of serving an NRS Chapter 40 Notice or filing suit. AA, Vol. 2, 232-274.

Because the SOA had the burden of proof to establish that it brought its claims within the NRS 11.202 six-year statute of repose, SDC, Q&D, PBR, and Stantec filed a joint motion for summary judgment. AA, Vol. 2, 207-221. The SOA opposed the motion (AA, Vol. 3, 326-352), and the defense replied. AA,

Vol. 5, 875-890. The district court then held a hearing on the motion.[1] AA, Vol. 6, 896-1063.

On October 2, 2019, the district court granted the joint motion for summary judgment, finding that "the Plaintiff has not identified any admissible evidence proving the [action] was filed within the six-year statute of repose." AA, Vol. 6, 1069 at lines 12-13. Plaintiff appealed.

## Statement of Facts

The Somersett Community is a relatively large development in Northwest Reno consisting of approximately 2,500 acres. Somersett Development Co., Ltd. ("SDC"), the developer and declarant, retained Q&D Construction, Inc. ("Q&D") to perform the majority of the mass grading in Somersett, and it hired Parsons Bros. Rockeries, Inc. ("PBR") to construct the rockery walls, the subject of this current lawsuit. Finally, SDC hired Stantec Consulting Services, Inc. ("Stantec") to observe and test the mass grading and rockery wall construction. Stantec then certified the rockery walls as complete. AA, Vol. 4, 553-587. By the end of 2006 (more than ten years

[1] The district court heard other motions at the same hearing, but they were all rendered moot by the order granting the motion for summary judgment. The SOA does not appeal the order denying its Motion to Strike / Motion for Summary Judgment.

before the SOA initiated this action), the rockery walls were complete and in use. *Id.*

According to the Somersett Owners Association (the "SOA"), two rockery walls failed and collapsed in early January 2017, triggering an investigation, and ultimately this action.[2] Opening Brief at 8-9, AA, Vol. 4, 594. Nearly 11 months later, the SOA engaged engineer Edred T. Marsh "to conduct an evaluation of the rockery retaining walls in the Somersett Development." AA Vol. 3, 363. This evaluation served as the basis for the SOA's December 28, 2017 "NRS Chapter 40 Notice of Claims" (the "Chapter 40 Notice") (AA Vol. 1, 21-26), and this suit filed one day later. AA Vol. 1, 1-18.

The SOA's complaint alleges various claims for relief that all stem from allegations of deficiencies in the design, planning, supervision, observation of construction, and construction of the rockery walls. AA Vol. 1, 1-18 (Original Complaint). At the early case conference, the parties agreed to bifurcate discovery into two phases – the first to focus on statute of repose issues, and the second to focus on the merits of the case.

After the first phase of discovery was completed, Defendants SDC, Q&D and PBR, and Third-Party Defendant Stantec, jointly moved for summary

[2] The SOA claims the walls failed "on the very same day in 2017." Opening Brief, p. 9. The only evidence in the record suggests the failures occurred on different days. *See* AA, Vol. 4, 594 (Declaration of Ryan Dominguez).

judgment based upon the SOA's untimely service and filing of its Chapter 40 Notice and Complaint they effectuated more than six years after final completion of the rockery walls. AA, Vol. 2, 207-221. The district court granted the motion (AA, Vol. 6, 1064-1072), and this appeal followed.

## Standard of Review

This Court reviews a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 731, 1031; NRCP 56(a). While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party must do more than show that there is some metaphysical doubt as to the operative facts to avoid summary judgment being entered in the moving party's favor. *Wood*, at 121 Nev. at 732, 1031.

The moving party bears the initial burden of production to show the absence of a genuine issue of material fact, but the manner in which that party may satisfy its burden of production depends on which party will bear the burden of persuasion at trial. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). When, as here, the nonmoving party

will bear the burden of persuasion at trial, the moving party may satisfy that burden by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) point out that there is an absence of evidence to support the nonmoving party's case. *Id.* at 602-603, 134. When the movant satisfies its burden by pointing out that there is an absence of evidence, "the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* (*citing Wood*, 121 Nev. at 732, 121 P.3d at 1031).

## Summary of the Argument

Because statutes of repose define substantive rights to bring an action, a plaintiff has the burden to prove it brought its claims timely. At the summary judgment stage, if the party opposing summary judgment has the burden of proof, that party must introduce admissible evidence showing there is a genuine issue of material fact.

Here, the SOA failed to introduce any admissible evidence that it brought its claims prior to the expiration of the statute of repose. Instead of introducing admissible evidence that substantial completion occurred within six years of its suit, the SOA sought to introduce evidence that the rockery walls were not "fit for their intended use." But whether the walls are "fit for

their intended use" is not relevant to the common law definition of substantial completion, which is a stage in the construction, and not a measure of the quality of construction. The only competent evidence introduced by the SOA is that the rockery walls were fully complete (as opposed to merely substantially complete) by the end of 2006.

Statutes of repose, unlike statutes of limitations, are not subject to equitable tolling. Statutes of repose provide a fresh start or freedom from liability, so the policy considerations justifying equitable tolling of statutes of limitations do not apply. Similarly, statutes of repose are not subject to equitable estoppel, but if they are, the SOA did not support its estoppel arguments with an analysis of the elements of equitable estoppel.

Finally, the district court correctly held the statute of repose applies to all claims for construction defects, whether pleaded as breach of contract, negligence, warranty, or otherwise. NRS 116.3111 does not take statutory warranty claims out of the category of claims subject to the statute of repose, because the tolling provision in NRS 116.3111 applies only to cases in which a homeowners association is sued by a third party. Additionally, NRS 116.3111 tolling applies only to statutes of limitations, and not to statutes of repose.

# Argument

## I. The district court correctly determined that the SOA failed to meet its burden to introduce admissible evidence that it brought its action prior to the expiration of the statute of repose.

### A. Introduction and Burden of Proof

Statutes of repose, unlike statutes of limitations, define substantive rights to bring an action. *Colony Hill Condo. I Ass'n v. Colony Co.*, 70 N.C. App. 390, 394 (1984). "Failure to file within that period gives the defendant a vested right not to be sued." *Id.* Therefore, in addition to proving the elements of its claims, the SOA has the burden to prove that it brought its claims within the time frame set forth by the statute of repose. *G & H Assocs. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997) (citing *Colony Hill Condo I Ass'n*, 70 N.C. App. at 394).

Because the SOA bears the burden of persuasion on every element of its claims, Respondents, to satisfy their summary judgment burden, needed only to point out that following the completion of the first phase of discovery (which was limited to the statute of repose issue), there was an absence of evidence to support the SOA's case. *Cuzze*, 123 Nev. at 603, 172 P.3d at 134. Respondents did just that. *See generally*, Defendants' Motion for Summary Judgment (the "MSJ"), AA Vol. 2, 207-221, and specifically, AA Vol. 2, 214.

Then, the burden shifted to the SOA to "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze*, 123 Nev. at 603, 172 P.3d at 134. In other words, the SOA was required to introduce admissible evidence that it brought its claims timely.

The SOA does not dispute that it bears the burden on this issue. Instead, the SOA argues that a genuine issue of material fact exists as to the date of substantial completion, but the SOA never offered admissible evidence showing that substantial completion of the rockery walls, under the very common law definition proposed by the SOA, was achieved within six years of the SOA filing suit.

### B. The Statute of Repose requires a claimant to bring an action within six years of substantial completion.

At the time Respondents filed their MSJ in the district court, NRS 11.202 provided, in relevant part:

> 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 6 years of the substantial completion of such an improvement, for the recover of any damages for:
>
> (a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; …

NRS 11.202(1)(a).[3]

NRS 11.2055 provides the framework to determine the date of substantial completion:

> 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.

NRS 11.2055(1)-(2).

In the district court, the SOA did not attempt to introduce evidence of final building inspections, notices of completion, or certificates of occupancy.[4]

[3] As a result of the 2019 Legislative Session, NRS 11.202(1)(a) was amended, changing the statute of repose to ten years. This change does not affect the analysis for this appeal. All citations to NRS 11.202 are to the pre-2019 version.

Instead, the SOA argued that substantial completion should be determined by the common law.

### C. Substantial Completion under common law is a stage in the construction when the improvement can be put to use; substantial completion is not determined by the quality of the construction.

Under common law, an improvement is substantially complete when the improvement is at such a stage that it can be used for its intended purpose. *Counts Co. v. Praters, Inc.*, 392 S.W.3d 80, 86 (Ct. App. Tenn. 2012) (recognizing that an improvement may be substantially complete even if it has some defects); *Markham v. Kauffman*, 284 So.2d 416, 419 (Fla.App. 1973); and *State ex rel. Stites v. Goodman*, 351 S.W.2d 763, 766 (Mo. 1961). *See* MSJ, AA, Vol. 2, 214, f.n. 4.

In the district court, the SOA asserted a similar definition by referring to the widely used A201 General Conditions Contract promulgated by the American Institute of Architects (the "AIA"):

> § 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently

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[4] In its Opening Brief, the SOA contends that it is mutually uncontested that there are no final building inspections, notices of completion, or certificates of occupancy. Opening Brief at p. 13. But, as Respondents noted in the district court, the SOA simply did not provide any evidence of these things. Respondents reserved their right to conduct that discovery if needed. AA, Vol. 5, 897, f.n. 4.

> complete in accordance with the Contract Documents so that the Owner can occupy or utilize the work for its intended use.

AA, Vol. 3, 333. For purposes of the MSJ, Respondents accepted this AIA definition, because it is, in effect, the same definition asserted by Respondents. AA, Vol. 5, 879. The definition of substantial completion does not require perfect work, and it does not address quality of work.

The district court used a definition for substantial completion that is, again, the same in effect as the other two:

> '[S]ubstantial completion' implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied.

AA, Vol. 6, 1068 at lines 17-20 (*quoting* 22 Am. Jur. 2d Damages § 83). Like the two other definitions, quality is not a component of substantial completion; rather, substantial completion requires that the improvement can be put to its intended use.

These three definitions all make it clear that substantial completion is a point in time in the construction process. Nothing in these definitions requires the improvement to be free from defects to reach that milestone. For example, in the AIA form document relied upon by the SOA, the next section in the contract specifically addresses incomplete or defective work:

> § 9.8.2 When the Contractor considers that the Work [ ] is substantially complete, the Contractor shall prepare and submit to

> the Architect a comprehensive list of items to be completed or corrected prior to final payment.

AA, Vol. 4, 632. In other words, the very document relied upon by the SOA contemplates substantial completion occurring even if some of the work is incomplete or defective (not strictly according to the plans and specifications). This is completely contrary to the SOA's overall position on this key issue.

### D. The SOA's expert opinions do not address whether the walls were substantially complete under the common law definition; rather, the opinions address the quality of the work.

As stated above, the SOA has the burden to prove that it brought its claims timely. *G & H Assocs.*, 113 Nev. at 271, 934 P.2d at 233. This required the SOA to present admissible evidence that substantial completion was not achieved prior to December 28, 2011. The SOA asserts that affidavits from two engineers satisfy this burden, but these engineers' opinions do not address the common law definition of substantial completion[5]. Instead the engineers spoke to the quality of the work.

For example, engineer Edred T. Marsh testified in his affidavit:

> In my opinion, in order to be fit to be utilized for the use for which they are intended, as to purpose and useful life expectancy, the rockery walls would need to have been built in accordance with

[5] Stantec objected to the admission of the engineers' testimony as irrelevant, because both engineers rely upon the incorrect definition of substantial completion. AA, Vol. 5, 892-893.

> the approved plans and specifications of the design professionals, particularly as to the critical design elements of height and surcharge. Throughout the common areas, most of the walls materially deviate from the approved plans and specifications, which render them unfit to be used for the purpose for which they are intended.

AA, Vol. 3, 366. Another engineer, Joseph Shields, testified similarly, concluding that the rockery walls that are greater than ten feet, as well as the tiered walls, materially deviate from the plans and specifications. He continues:

> As such, it renders these wall structures unstable, and thereby not fit for the purpose for which they were intended, nor for the maximum duration for which they are to perform; specifically, being less likely to prove support for the stated infrastructure, homes and other structures for not less than 50 years. As such, it is my opinion that the identified walls are not substantially complete.

AA, Vol. 3, 400.[6]

The SOA's expert testimony does not create a genuine issue of material fact as to whether the walls were ever substantially complete. Both engineers focus on the ***quality*** of the work, i.e. whether the walls are constructed

[6] Despite the SOA's contentions, if its position regarding quality of construction is that it is an element of determining substantial completion, the presence of any defective condition can and will be utilized to argue that an improvement was never substantially completed, rendering the statute of repose inapplicable to any construction defect case. Allegedly defective structures would never be "complete" and statutes of repose would never begin to run, negating the purpose and intent of the law.

perfectly, rather than ***when*** the walls were put into use. It is undisputed, and indisputable, that the rockery walls were actually put into use by the end of 2006. AA, Vol. 5, 876. *See also*, *generally*, AA, Vol. 3, 326-352 (the SOA's opposition to the MSJ does not dispute the fact the walls were put into use in 2006).

Now, the SOA argues, "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." Opening Brief at 17. Four pages later, the SOA urges this Court to consider whether the "walls are not **fit for intended use** *as rockery walls*, and therefore are not substantially complete." *Id.* at 21 (italics in original, bold emphasis added). As it did in the district court, the SOA urges one definition, but then applies a completely different definition in its analysis. *See* AA, Vol. 3, 343 (AIA definition) and AA, Vol. 3, 327, 332 at f.n. 6, 333, 334, 336, 341, 344 (different definition).

Whether the Court uses the common law definition cited by Respondents in the MSJ, the AIA definition urged by the SOA, or the AM JUR definition utilized by the district court, the result is the same. Substantial completion is a stage in the process, and not a measure of perfection. Fitness

for use is not a consideration, and the SOA's expert witnesses' testimony does not create an issue of material fact.

### E. Logically, Substantial Completion is less than or equal to final completion.

The Nevada Legislature has clearly defined when a work of improvement is considered complete (as opposed to only substantially complete). NRS 108.22116 provides as follows:

> "Completion of the work of improvement" means:
>
> 1. The occupation or use by the owner, an agent of the owner or a representative of the owner of the work of improvement, accompanied by the cessation of all work on the work of improvement;
>
> 2. The acceptance by the owner, an agent of the owner or a representative of the owner of the work of improvement, accompanied by the cessation of all work on the work of improvement; or
>
> 3. The cessation of all work on a work of improvement for 30 consecutive days, provided a notice of completion is recorded and served and the work is not resumed under the same contract.

Notably, actual completion is not conditioned on contract compliance or a determination as to whether the construction is "fit for its intended use"; actual completion is based on the owner's use or acceptance of the work accompanied by a cessation of further work.

The SOA does not dispute that the Declarant and the SOA accepted and started using the walls in 2006, and that all construction work on the walls ceased, making the walls finally complete under NRS 108.22116. Stantec certified these walls as complete in 2006. AA, Vol. 4, 553-587. It does not make logical or legal sense that an improvement that meets the statutory definition of "Completion of the Work of Improvement" can, at the same time, not be "substantially complete" under the common law.

### F. Adopting the SOA's modified standard of "fit for its intended use" is contrary to the purpose of the statute of repose.

Statutes of repose "effect a legislative judgment that a defendant should "be free from liability after the legislatively determined period of time."" *CTS Corp.*, 573 U.S. at 9 (quoting 54 C.J.S., Limitations of Actions § 7, p. 24 (2010)). *See also*, *FDIC*, 130 Nev. at 899, 336 P.3d at 965 ("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.")

Under the SOA's proffered definition of "fit for its intended use" (that is not found in the common law), the statute of repose would never bar suits against defendant contractors in the absence of a record of a final building inspection, notice of completion, or certificate of occupancy, when the

improvement varied slightly from the plans or specifications, or when there was a minor defect in the improvement that requires remediation. That is contrary to the purpose of the statute of repose, and reflects a policy decision properly left to the legislature.[7]

### G. The only competent evidence on substantial completion shows the rockery walls were substantially complete at the end of 2006.

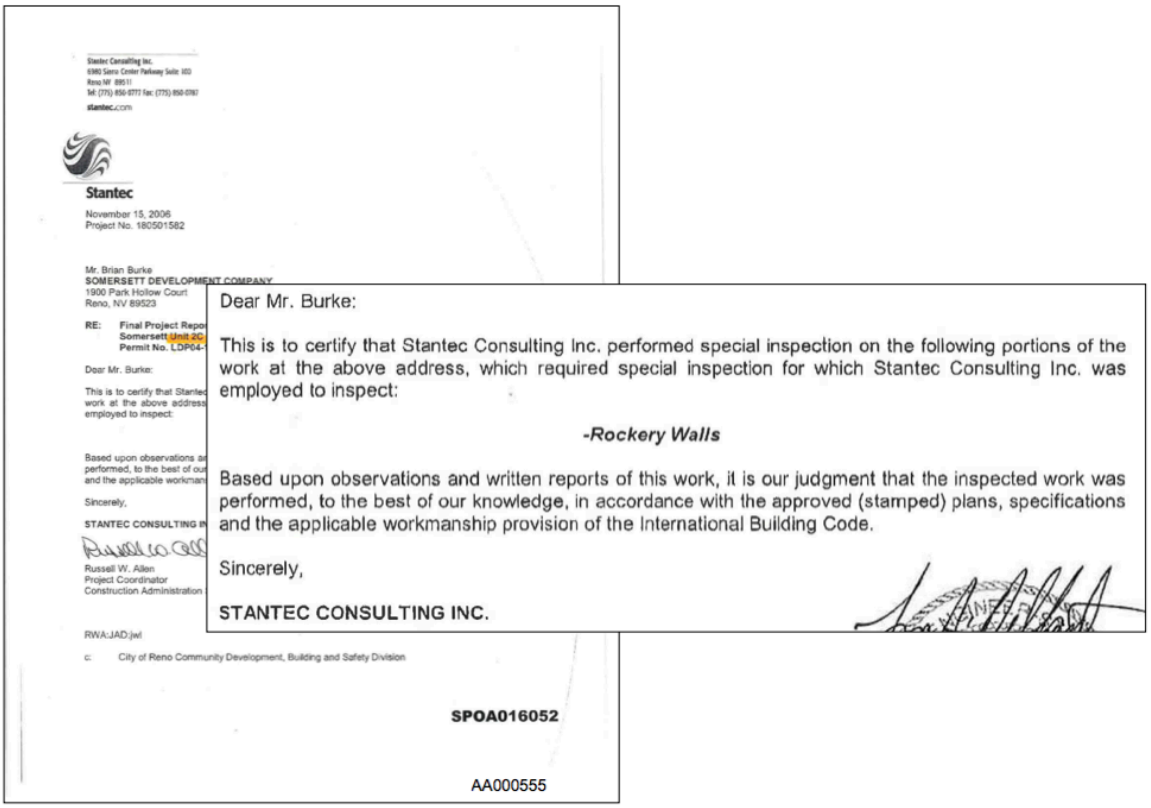
The SOA complains, "neither the district court nor Respondents established – or really even attempted to establish – a date of substantial completion, as required under NRS 11.2055(2), to determine that it fell outside the period of repose." Opening Brief at 13-14. Of course, because the SOA bears the burden of proof, the SOA, and not Respondents, had the burden to establish the date of substantial completion.

Notwithstanding the SOA's mischaracterization of the burden, the only competent evidence establishing a date of substantial completion was put forth by the SOA, and it is contained in the record on appeal.

As part of its opposition to the MSJ, the SOA introduced into evidence, without objection, 35 rock wall certifications for 35 different areas in

[7] Responding to a question from the district court during the hearing on the MSJ, the SOA acknowledged that under its characterization of the common law definition of substantial completion, an improvement could be in use for 45 years and still not be substantially complete. AA, Vol. 6, 939-940.

Somersett. AA, Vol. 4, 553-587. These rockery wall certifications, authored by Stantec, reflect the fact that the rockery walls were complete (both substantially and finally) by the end of the year 2006:



Stantec

November 15, 2006
Project No. 180501582

Mr. Brian Burke
SOMERSETT DEVELOPMENT COMPANY
1900 Park Hollow Court
Reno, NV 89523

RE: Final Project Repo
Somersett Unit 2C
Permit No. LDP04-

Dear Mr. Burke:

This is to certify that Stantec Consulting Inc. performed special inspection on the following portions of the work at the above address, which required special inspection for which Stantec Consulting Inc. was employed to inspect:

*-Rockery Walls*

Based upon observations and written reports of this work, it is our judgment that the inspected work was performed, to the best of our knowledge, in accordance with the approved (stamped) plans, specifications and the applicable workmanship provision of the International Building Code.

Sincerely,

STANTEC CONSULTING INC.

Russell W. Allen
Project Coordinator
Construction Administration

RWA:JAD:jwl

c: City of Reno Community Development, Building and Safety Division

SPOA016052

AA000555

AA, Vol. 4, 555. It is at that point the rockery walls were put into use in the subdivision.

The SOA did not introduce any other evidence that the walls were not substantially complete, under common law, at that time. The SOA did not introduce any evidence that the walls were not put to use at the end of 2006. The SOA did not introduce any evidence that work on the walls continued past

December 2006. Finally, the SOA did not introduce any evidence that the owner, SDC, rejected the work performed by Q&D, PBR, and Stantec.

## II. The district court correctly held that the statute of repose cannot be tolled without statutory authorization, or be subject to equitable estoppel.

The SOA advances several arguments as to why the statute of repose should be tolled, or why Respondents should be equitably estopped from raising the defense.[8] These arguments fail to consider the nature of a statute of repose and the reasons behind years of jurisprudence instructing otherwise.

### A. Statutes of repose, unlike statutes of limitations, are not subject to equitable tolling.

There are numerous cases throughout the United States discussing the differences between statutes of limitations and statutes of repose. While the two time bars share many policy objectives, each has a distinct purpose and each is targeted at a different actor. *CTS Corp.*, 573 U.S. at 8. ***Statutes of limitations*** require plaintiffs to pursue diligent prosecution of claims, and they promote justice by preventing surprises through plaintiffs' revival of claims that have been allowed to slumber until evidence has been lost,

[8] Again, the Statute of Repose is not an affirmative defense. Filing the action within the period of repose is an essential element of the SOA's claims.

memories have faded, and witnesses have disappeared. *Id.* (*citing Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)).

***Statutes of repose***, on the other hand, "effect a legislative judgment that a defendant should "be free from liability after the legislatively determined period of time."" *CTS Corp.*, 573 U.S. at 9 (*quoting* 54 C.J.S., Limitations of Actions § 7, p. 24 (2010)). "Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." *Id.*

Because statutes of limitations focus on encouraging the plaintiff to pursue her rights diligently, they may be subject to equitable tolling. *Id.* at 10. When the plaintiff is prevented by extraordinary circumstance from bringing a timely action, barring the claim does not further the statute of limitations' purpose. *Id.*

Statutes of repose, however, focus on the defendant's right to not be sued after a certain period of time. *Id.* Therefore, the policy justifications advanced by equitable tolling do not apply to statutes of repose. *Id.*

The Nevada Supreme Court recognizes this distinction:

> The distinction between these two terms is often overlooked. A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action. **Moreover, a statute of limitations can be equitably tolled. In contrast, 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.** It 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.

*FDIC*, 130 Nev. at 899, 336 P.3d at 965 (internal citations and quotations omitted, emphasis added).

Allowing equitable tolling, whether based on estoppel or otherwise, would eviscerate the policy behind having statutes of repose. In this case, it would allow SOA to file suit well after the defendants obtained a vested right to not be sued for the work performed and completed more than ten years ago.

In this appeal, the SOA focuses on the period of declarant control to justify its request that this Court create a category of cases for which the statute of repose may be tolled. But the SOA's argument focuses on the wrong party – the plaintiff. As explained by numerous courts, a statute of repose provides vested rights to defendants, no matter the circumstances behind the plaintiff's failure to timely sue.

Additionally, the SOA fails to acknowledge the trigger for its filing suit: "[T]he catastrophic failure and collapse of two rockery walls (on the very same day) in 2017 …" AA, Vol. 3, 335 at lines 3-4. Whether the SOA was declarant-controlled until 2013 would not have made any difference – under the SOA's own theory, there was no triggering event to file suit until 2017,

more than four years after the statute of repose had run, and more than ten years after the walls were substantially complete.

The Nevada Legislature, if it desires, may provide for tolling of the statute of repose in this type of situation. The legislature already provides for tolling of the statute of repose in the context of an NRS Chapter 40 Notice of Constructional Defect. The statute of repose is tolled from the time a claimant gives notice of the claim until one year after the notice of claim, or thirty days after mediation is concluded or waived, whichever occurs earlier. NRS 40.695(1).[9] Clearly, the Legislature is aware of its ability to toll the statute of repose, but it has not done it for the situation presented in this case.

The SOA relies on *First Interstate Bank of Denver, N.A. v. Central Bank and Trust of Denver*, 937 P.2d 855, 860 (Colo. Ct. App. 1996) for the proposition that a statute of repose may be equitably tolled. But the language cited by the SOA is dicta, as the decision rests on the parties' express tolling agreement, which includes "any statute of limitations, doctrine of laches, **or other similar time limit applicable to any claim** …" *Id.* (emphasis added).

[9] Statutory tolling under NRS 40.695(1) makes logical sense. The statute of repose is tolled after the defendants receive notice of the claims, so defendants can start to investigate the claim. Further, because claimants are required to give notice under Chapter 40, it would be unfair to not toll the statute of repose while the parties proceed through that process.

Therefore, this out-of-state authority does not assist the SOA in its equitable tolling arguments.

### B. Applying equitable tolling based on the period of declarant control ignores the fact that the declarant-controlled board pursued claims against the declarant and the contractors.

The SOA argues that the Court should apply equitable tolling to the legislatively imposed statute of repose during the period of time the declarant controlled the board of the SOA. The SOA claims that "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[.]" Opening Brief at 27.

This argument is misplaced. First, the SOA admits that the 2017 failure of two walls led to this claim. It is an occurrence that cannot be concealed, nor was it concealed because it occurred well after the declarant relinquished control in 2013.

Second, the declarant reaps no benefit from the alleged "possible" conduct. During the period of declarant control, the declarant, for whom the contractors and engineers worked, had the opportunity and the motivation to bring claims against those contractors and engineers if the quality of construction was poor. There is simply no motivation, and none suggested by the SOA, for the declarant to ignore problems with the construction of

common areas. The SOA board, while under declarant control, could pursue those claims against both the declarant and the contractors and engineers who performed the work.

Here, not only ***could*** the SOA-controlled board pursue claims against the contractors, it ***did*** pursue claims against the contractors, and against SDC, the declarant. AA, Vol. 6, 985-986, 1012.[10] So, the SOA's claim that it was prevented from pursuing warranty claims against the developer/declarant is simply untrue.[11] Therefore, there is no factual basis here to equitably toll the statute of repose.

### C. Because the contractors and engineers will always be targets of indemnity and contribution claims by the developer, allowing the claim to proceed against the declarant will render the statute of repose meaningless to the non-declarant contractors and engineers.

The SOA's equitable estoppel argument based on the time of declarant control applies only to the declarant, and not to the other respondents sued

[10] During the hearing on the MSJ, counsel for SDC noted that the SOA, while under SDC's control, initiated multiple claims, as seen in the cited portion of the transcript. Counsel for the SOA, later in the hearing, acknowledged that evidence of those claims were disclosed as part of the parties' initial disclosures. *See* AA, Vol. 6, 1012.

[11] In 2015, the Legislature passed AB125, which reduced the statute of repose to six years. AB 125 provided a 1-year saving period for claims initiated within one year of AB 125's effective date. Therefore, the SOA had years to initiate a claim after the declarant relinquished control of the board.

directly by the SOA and/or by SDC under theories of indemnity and contribution. Therefore, if the Court applies equitable estoppel, it can apply it only to the declarant, and summary judgment on the claims against the non-declarant defendants will stand.

However, under NRS 11.202, claims for indemnity and contribution are not subject to the statute of repose. NRS 11.202(2)(a). If the suit is allowed to proceed against the declarant, the contractors and engineers would nonetheless lose the protections of the statute of repose, as they may be liable under theories of indemnity and contribution. So, the practical effect of applying equitable tolling to the statute of repose will be to revive long-expired claims against the non-declarant contractors and engineers.

### D. The SOA does not articulate an argument on equitable estoppel.

In its Opening Brief, the SOA states, without analysis, "… Respondents should be equitably estopped from asserting time limitation bars as affirmative defenses in this action."[12] Opening Brief at 31. Even if a party may be estopped from raising the statute of repose issue, the SOA does not provide

[12] Again, the statute of repose is not an affirmative defense.

any argument utilizing the appropriate factors.[13]

"Equitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct." *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990). "The defense of estoppel requires a clear showing that the party relying upon it was induced by the adverse party to make a detrimental change in position, and the burden of proof is on the party asserting estoppel." *Id. See also*, *Lantzy v. Centex Homes*, 31 Cal.4th 363, 384 (2003) (holding that a party may be estopped from asserting the statute of limitations defense when that party represents, during the limitations period, that all actionable damage has been or will be repaired, thus making it unnecessary to sue).

Here, the SOA did not submit any evidence that any of the Respondents induced the SOA to make a detrimental change in position. The SOA did not argue below, and does not argue here, that any of the Respondents represented to the SOA any facts that would induce the SOA to sit on its rights. Again, the triggering events for this action, according to the SOA, were two wall failures occurring in 2017, well after the statute of repose had run. AA,

[13] Like here, the SOA did not analyze the equitable estoppel factors in the district court.

Vol. 3, 335 at lines 3-4. Even if the declarant turned over control of the SOA in 2008, the triggering event, which occurred well after the statute of repose had run, would have been the same. There is simply no legal justification or basis for equitable estoppel.

The SOA's argument is, in essence, simply a repeat of its equitable tolling argument. Because equitable tolling is distinctly different that equitable estoppel, the SOA's failure to articulate a cogent argument on estoppel is fatal.

## III. The district court correctly held that NRS 11.202 applies to all claims for construction defects, and the tolling provisions in NRS Chapter 116 do not take warranty claims out of the universe of claims subject to the statute of repose.

The SOA claims that certain statutory provisions provide, either explicitly or implicitly, statute of repose tolling for statutory warranty claims during the period of declarant control. This, the SOA claims, means that the statute of repose simply does not apply to NRS 116 warranty claims. This novel argument is contrary to the plain language of NRS 11.202, and contrary to the tolling language in NRS 116.3111.

### A. The statute of repose applies to all construction defect claims.

The language of NRS 11.202 is clear and unambiguous, and it applies to all actions against persons "furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property …" NRS 11.202(1). The statute contains only three exceptions: (1) claims for indemnity or contribution; (2) claims against the owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house on account of his or her liability as an innkeeper; and (3) claims against any person on account of a defect in a product. NRS 11.202(3)(a) & (b).

The plain language of the statute makes it clear that it applies to all claims, whether characterized as constructional defect, breach of contract, tort, warranty, or otherwise. When a statute is clear on its face, the Court "will not look beyond the statute's plain language." *Washoe Med. Ctr. v. Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).

### B. NRS 116.3111 is an indemnity statute, and it does not apply to construction defect claims by homeowners associations against developers and their contractors.

The SOA's argument that NRS 11.202 does not apply to NRS 116 warranty claims appears to be based on a tolling provision in NRS 116.3111. But this tolling provision only applies to actions under that section, which is an indemnity statute.

NRS 116.3111 provides in full:

1. A unit's owner is not liable, solely by reason of being a unit's owner, for an injury or damage arising out of the condition or use of the common elements. Neither the association nor any unit's owner except the declarant is liable for that declarant's torts in connection with any part of the common-interest community which that declarant has the responsibility to maintain.

2. An action alleging a wrong done by the association, including, without limitation, an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit's owner. If the wrong occurred during any period of declarant's control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit's owner for all tort losses not covered by insurance suffered by the association or that unit's owner, and all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.

3. 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. A unit's owner is not precluded from maintaining an action contemplated by this section because he or she is a unit's owner or a member or officer of the association. Liens resulting from judgments against the association are governed by NRS 116.3117.

NRS 116.3111 (emphasis added).[14]

The underlined portions of subsection 2 make clear that the section applies only to cases in which the association is sued for wrongdoing, even if that wrongdoing simply arises out of the condition or use of the common elements. If the declarant had control of the common element at the time of the wrongdoing, and if the association gives the declarant notice and an opportunity to defend, the declarant is liable to the association for all tort losses not covered by insurance, and all costs the association would not have incurred but for a breach of contract or other wrongful act or omission.

Subsection 3 tolls any statute of limitation "affecting the association's right of action against a declarant **under this section** …" NRS 116.3111(3) (emphasis added). In other words, statute of limitations tolling applies only to cases in which the association has been sued, and where the association has a right of indemnity against the declarant. By its own terms, the limitations tolling does not apply when an association affirmatively sues a declarant for breach of warranty when the association is not subject to a claim by a third party.

[14] Subsection 1 simply provides immunity to unit owners in the absence of a unit owner's negligence or fault. Therefore, Subsection 1 is inapplicable to this case.

### C. NRS 116.3111 applies to statute of limitations, and not statutes of repose.

Even if NRS 116.3111 applied to first-party claims by an association against a declarant, it only tolls statutes of limitations, and not statutes of repose.

There is no dispute and no argument that NRS 11.202 is a statute of repose, rather than a statute of limitations. NRS 116.3111 provides that "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 added). By its own language, NRS 116.3111(3) applies *only* to a statute of limitations, rather than to any statutes of repose.

Any argument that the Legislature intended to include statutes of repose tolling in NRS 116.3111 is belied by its history. NRS 116.3111 was enacted in 1991, after numerous cases interpreted NRS 11.202's predecessors as statutes of repose. *See*, *e.g.*, *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 766 P.2d 904 (1988); *Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988); *Lotter v. Clark County By and Through Bd. of Com'rs*, 106 Nev. 366, 793 P.2d 1320 (1990); *Nevada Lakeshore Company, Inc. v. Diamond Electric, Inc.*, 89

Nev. 293, 511 P.2d 113 (1973); *Tahoe Village Homeowners Ass'n v. Douglas County*, 106 Nev. 660, 799 P.2d 556 (1990).

[T]he legislature is presumed to be aware of [Nevada's] case law …" *Olson v. Richard*, 120 Nev. 240, 246, 89 P.3d 31, 35 (2004) (Becker, J., dissenting). Therefore, the Legislature, when it enacted NRS 116.3111, was aware of the difference between statutes of repose and statutes of limitations in the construction defect context, yet it made the policy decision to toll only statutes of limitations, and not statutes of repose.

The SOA relies on one case from Wisconsin for the proposition that "courts have held that when legislatures use the term "any applicable statute of limitation," it typically is meant to encompass both statutes of limitation and statutes of repose." Opening Brief at 32. But the legislative scheme in Wisconsin is vastly different than that of Nevada.

In *Landis v. Physicians Ins. Co. of Wis., Inc.*, 245 Wis.2d 1, 628 N.W.2d 893 (2001), the Wisconsin Supreme Court addressed tolling in the context of a medical malpractice claim. *Id.* at 4, 895. The statute at issue required mediation of all medical malpractice claims, and gave the claimant the right to request mediation either prior to or after filing her claim. The request for mediation triggers a 90-day mediation period, and during this period, a

claimant is prohibited from filing an action in circuit court.[15] At that time, Wisconsin had a combination statute of limitations / statute of repose, requiring a claimant to file three years from the date of the injury, or one year from the date the injury was discovered. However, "an action may not be commenced under this paragraph more than 5 years from the date of the act or omission." *Id.* at 12, 899. A tolling provision in another statute provided that "Any applicable statute of limitations" is tolled until 30 days after the last day of the mediation period. *Id.* at 13, 899.

The Wisconsin Court addressed the question of whether the tolling provision applied to both the statute of limitations and the statute of repose. The Court reasoned that applying tolling to the statute of repose furthered the policy behind the mandatory mediation of medical malpractice actions. When addressing the issue of whether the tolling statute was ambiguous, the Court noted that the Wisconsin legislature "does not employ the phrase "statute of repose."" *Id.* at 29, 907. In Nevada, the term "repose" is used more than seven times in Chapter 40 alone, making clear the Nevada Legislature understands

[15] In this respect, the tolling provided in Wisconsin is similar to that in NRS 40.695(1) in that it tolls the statute while the plaintiff is prevented by statute from filing suit. Here in Nevada, the legislature was specific that the tolling in NRS 40.695(1) applies to both statutes of limitations and statutes of repose, while the tolling in NRS 116.3111 applies only to statutes of limitations.

the distinction between statutes of limitations and statutes of repose, and it treats them separately and differently. *See generally*, NRS 40.600 *et seq.*

## Conclusion

Substantial completion, under the common law, is achieved when the improvement is at such a stage that it can be used for its intended purpose. The rockery walls in Somersett were substantially complete by the end of 2006.

The SOA, when opposing the MSJ, did not introduce admissible evidence to establish that substantial completion occurred with six years of its suit. Rather, the evidence submitted by the SOA shows the walls were finally complete, and therefore substantially complete, in December, 2006.

Because statutes of repose provide developers, contractors, and design professionals with vested rights to not be sued after a period of time, statutes of repose are not subject to equitable tolling. Similarly, the effects of statutes of repose cannot be avoided through equitable estoppel, and if they can, the SOA did not provide any evidence that equitable estoppel should be applied here.

Finally, the statute of repose applies to all claims for deficient design and construction. NRS 116 warranty claims are not exempt from the statute, either expressly or by implication.

Respondents Stantec, SDC, and Q&D respectfully request this Court affirm the district court's grant of summary judgment.

Dated this 14th day of October, 2020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# NRAP 28.2 Attorneys' Certificate

1. We hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRSAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 14.7.7 (170905) in Cambria 14 point.

2. We further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP32(a)(7)(C), it is either:

[X] Proportionally spaced, has a typeface of 14 points or more, and contains 8,617 words.

3. Finally, we hereby certify that we have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of October, 2020

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# Certificate of Service

I hereby certify that I am an employee of Hoy Chrissinger Kimmel Vallas, and that on this date the foregoing Answering Brief of Respondents was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the service list as follows:

DON SPRINGMEYER
CHARLES BURCHAM
STEPHEN CASTRONOVA
NATASHA LANDRUM
JOHN SAMBERG
BRADLEY SCHRAGER
ROYI MOAS

Dated this 14th day of October, 2020

Shondel Seth