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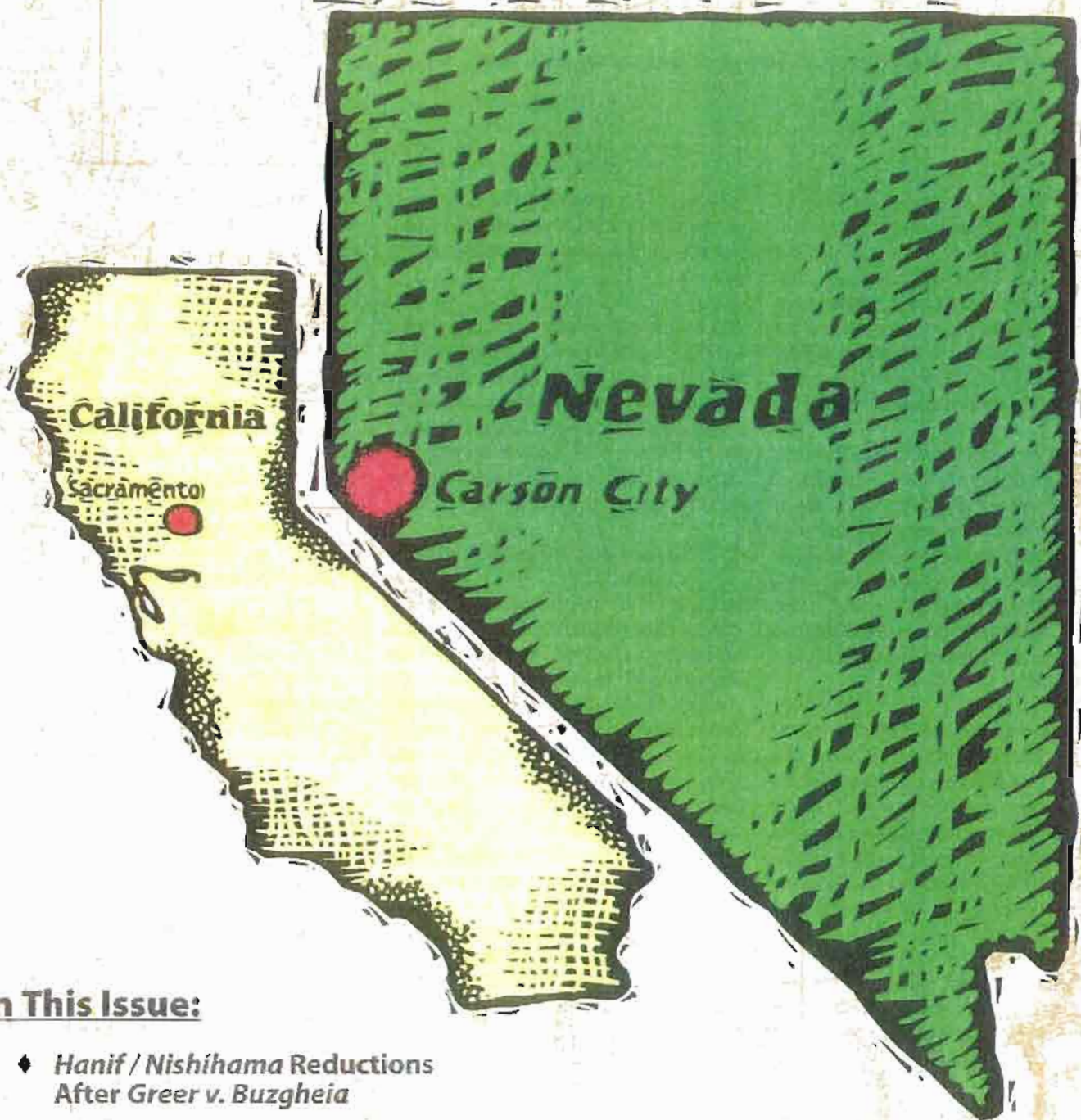


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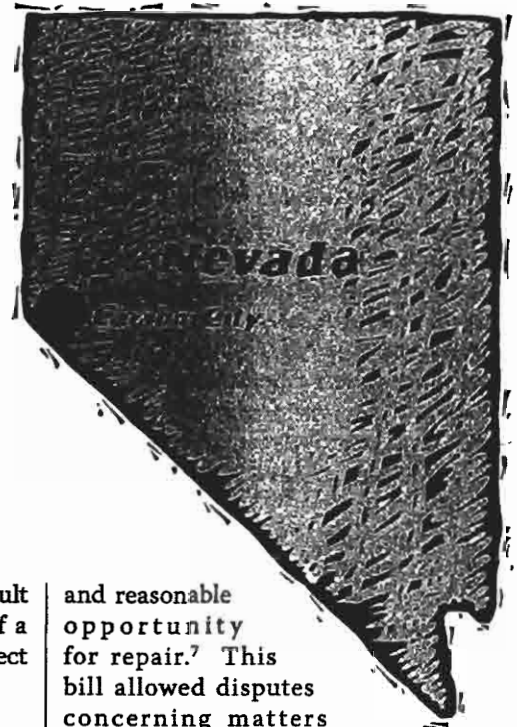
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NRS Chapter 40 & the Evolving Area of Construction Defect Litigation In Nevada



By Andrea K. Pressler, Erickson, Thorpe & Swainston, Ltd., Reno, NV

Within recent years in Nevada, construction defect litigation has become a breed of its own and at the end of the day, the people that appear to benefit the most are the lawyers involved. For the most part, once the matter proceeds to involve attorneys, any chance of an amicable resolution between the homeowner and the contractor is lost.

Construction defect litigation has become a rather specialized body of law, consisting of countless hours of site inspections, expert witness consultations, invasive destructive testing, depositions, special master hearings and mediation upon mediation, with most, if not all parties, dissatisfied with the end product. Not to mention the voluminous documentation that is produced and must be analyzed.

While Nevada Revised Statutes (NRS) Chapter 40 attempts to prevent the onslaught of litigation, it has become common knowledge to those that defend this type of litigation, that once a contractor, subcontractor or design professional receives NRS Chapter 40 notification from a homeowner, or their counsel, that litigation is near.

Sure, NRS Chapter 40, at least in Northern Nevada, has potentially assisted in preventing matters from proceeding to trial ... but at what cost?

Construction defect litigation has an effect on everyone involved, to include increased insurance premiums to building costs to insurance carriers declining to write homeowner's insurance in Nevada to

problems with housing resale as a result of the defect stigma and the duty of a homeowner to disclose construction defect matters.¹

This article will provide a broad overview of NRS Chapter 40 and its requirements,² as well as an analysis of recent Nevada Supreme Court cases involving construction defect litigation. As can be seen through this summary, NRS Chapter 40 provides numerous time lines and obligations that must be met by those parties involved.

A. NRS Chapter 40 requirements.

In light of the tremendous surge of construction defect litigation in the State of Nevada, in 1995, the Nevada Legislature implemented legislation, NRS 40.600 through 40.695, governing of construction defect litigation.³ The bill was proposed as compromise legislation of the Nevada Trial Lawyers Association (NTLA) and the Southern Nevada Homebuilders.⁴ The Legislative intent of the NRS Chapter 40 provisions was that "[p]rior to the filing of an action, the claimant must provide the contractor with notice of the action and an opportunity to inspect and repair the damages at his expense."⁵ The purpose of the legislation was to "prevent people from running to court before the contractor even has a chance to address the problem."⁶

In 2003, Senate Bill 241 proposed supplemental terms to NRS Chapter 40 to establish procedures and time lines for homeowners to provide notice of constructional defects to a contractor of alleged defects and allow an inspection

and reasonable opportunity for repair.⁷ This bill allowed disputes concerning matters affecting or relating to a constructional defect to be submitted to the State Contractor's Board, a determination which was neither non-binding nor admissible in a judicial or administrative proceeding.⁸ Further, the bill permitted a district judge to order an insurance claim representative to attend a settlement conference and to penalize any party unprepared or who failed to act in good faith at the conference.⁹

Prior to initiating full-blown litigation or amending a complaint to allege a construction defect cause of action, a homeowner must provide the contractor with written notification of the alleged defective conditions.¹⁰ This notice must contain "reasonable" detail of the defects, alleged damages and/or injuries of the residence or appurtenance, to include the cause and location of the defects, and the known nature and extent of the damages and/or injuries caused by such defects.¹¹ Such notice is not required where the contractor originally commenced an action against the homeowner.¹² Following receipt of this initial notice, a contractor is required to respond to the allegations within 60 days.¹³

Once a homeowner has begun this NRS Chapter 40 process, all parties involved are obligated to take prompt action.

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Upon receipt of notice of construction defect allegations, the contractor is required to provide notification to any potentially applicable subcontractors, suppliers and design professionals who the contractor believes may additionally be responsible for the homeowner's alleged defects.¹⁴ This subsequent notice must be sent within 30 days of receipt of the homeowner's allegations and include a copy of the homeowner's notice.¹⁵

A homeowner is precluded from filing a complaint or adding a cause of action for construction defects unless he/she provides the contractor(s) a reasonable opportunity to inspect and potentially conduct repairs.¹⁶ The homeowner's failure to follow through with this obligation permits the court in which the action is filed to dismiss the matter without prejudice and order compliance with the NRS Chapter 40 requirements.¹⁷

Within 90 days of notification of alleged constructional defects, the contractor must notify the homeowner in writing as to whether he requests an inspection and

will conduct repairs.¹⁸ Upon reasonable notice from the contractor, the homeowner is required to provide access to the residence for inspection of the alleged conditions.¹⁹ Within 30 days of receipt of the contractor's notice, the subcontractor, supplier and/or design professional must conduct an inspection of the subject residence and provide the contractor with notification of any intent to repair the alleged deficiencies and an estimated length of time for such repairs.²⁰

If repairs are contemplated, they must be completed within 105 days if the original notice was received from four or fewer homeowners or within 150 days if the notice is received from five or more homeowners.²¹ However, for residences that are *less than one year old* at the time of receipt of the notice, the time period is reduced to 45 days.²²

Another preventative measure before litigation may be commenced requires the parties to submit the matter to mediation, unless waived in writing.²³ Failure to resolve the matter at mediation permits

the homeowner to commence the action in court.²⁴

This notification, right-to-inspect and right-to-repair process tolls the applicable statute of limitations to protect the litigation rights of the homeowner until 30 days after conclusion of the mediation.²⁵

Once litigation has commenced, additional obligations pertain with regard to claims against design professionals, to include those involved with professional engineering, land surveying, architecture or landscape architecture.²⁶ A professional affidavit by the attorney is required before such claims of professional negligence can be commenced against these professionals.²⁷ The affidavit must state that the attorney has reviewed the facts of the case and consulted with a reputable expert and as a result of such review and consultation the action has a reasonable basis in law and fact.²⁸ Failure to file such an affidavit shall result in dismissal.²⁹

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Under NRS 40.655, the recoverable damages in a construction defect case are reasonable attorney's fees, reasonable costs of repair, reasonable housing costs for relocation during time of repairs, reduction of the home's market value, loss of use and interest as provided by statute. Additionally, damages incurred in assessing the alleged defects, estimated costs, loss of use, reduction in market value and relocation costs are recoverable.³⁰ NRS Chapter 40 also provides for the interesting settlement measure of repurchasing the homeowner's residence.³¹

As is evidenced by this overview, initiation and defense of these types of proceedings are tedious and very time sensitive, and the parties' obligations should not be taken lightly.

II. Part Two. Nevada case law addressing NRS Chapter 40.

As a result of the relatively "new" construction defect legislation in Nevada and the never-ending emergence of these types of cases, the Nevada Supreme Court has had the ongoing opportunity to address the statutes' applicability and the Legislature's intent and vision.

The following section will provide brief insight into recent case law addressing construction defect litigation in Nevada.

In *Calloway v. City of Reno*, the Nevada Supreme Court determined that the economic loss doctrine applied to constructional defect cases.³² The Court concluded that the damages sought in tort for economic losses from defective construction are just as offensive to tort law as damages sought for economic losses that result from a defective product.³³ Accordingly, the Court held that damages resulting from allegedly defective framing constituted damage to the structure and because there was no further property damage, the plaintiff suffered purely economic losses barring any tort claims.³⁴ However, as the negligence claims for relief pre dated the inception of NRS Chapter 40, the Court did not address whether construction defect causes of action allowed for negligence claims under different circumstances.³⁵

Several years later, in *Olson v. Richard*, the Nevada Supreme Court readdressed negligence claims as presented in construction defect cases.³⁶ As a matter of first impression, while attempting not to shatter the economic loss doctrine, the Court determined that a negligence claim could be maintained in a construction defect initiated pursuant to NRS Chapter 40 as the legislative intent did not appear to limit "a homeowner's recovery to construction defects covered by a contract or warranty."³⁷ Specifically, the Court stated that the liability of a contractor, as set forth in NRS 40.640, did not limit a homeowner's recovery to purely contractual remedies.³⁸

In *Desert Fireplaces Plus., Inc. v. Eighth Judicial Dist. Court*, the Nevada Supreme Court held that a third party's claims against a dissolved corporation in a construction defect cases arises for purposes of NRS 78.585³⁹ when the litigant discovers or should have discovered the defects.⁴⁰ The Court held that notice of construction defect claims to a general contractor tolls the statute of limitations period for any

claims against third parties, even if they are not present in the litigation.⁴¹ The Court held that the matter was not barred against the third-party subcontractor because the statute of limitations was tolled until 30 days after the pre-litigation mediation between the homeowners' association and the general contractor.⁴²

A case of utmost importance to complex construction defect litigation is that of *Shuette v. Beazer Homes*.⁴³ In *Shuette*, numerous single-family homeowners initiated class action litigation against their homebuilder, Beazer Homes.⁴⁴ The Nevada Supreme Court directly addressed whether class action certification was appropriate in construction defect matters.⁴⁵ With regard to single-family home construction defect litigation, the Court held that, generally, the class action certification requirements of typicality, numerosity, commonality and adequacy, cannot be met due to the range of alleged defects.⁴⁶ The Court stated that construction defect cases involving a number of homes "are

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often very complex, involving allegations between numerous primary parties and third parties concerning different levels or types of property damage.⁴⁷ Such matters include varying levels of causation, liability defense and are not based upon generalized proof and require substantiation of claims.⁴⁸ Accordingly, the Court found that the district court erred in granting the homeowners' class action certification and reversed the lower court's judgment in favor of the homeowners.⁴⁹ However, the Court further noted that class certification may be applicable to construction defect causes of action, but in such instance the court awarding such certification must provide a thorough and documented NRCP 23⁵⁰ analysis.⁵¹

This case is of value to complex single-family home construction defect litigation because previously, homeowners' attorneys presented evidence of alleged defects on essentially a percentage basis, only requiring inspections and testing of a portion, and not all, of the subject residences. Now, *Shuette* requires inspection and testing of all residences involved where the defects are inconsistent from home to home and allegations cannot be made on mere percentage basis for the subject residences. However, in turn, this decision will lead to more time and money spent on these types of cases.

In *Skender v. Brunsonbilt Construction*, the homeowner contracted with Brunsonbilt to construct a single-family residence, with the homeowner providing the plans and specifications.⁵² Pursuant to the contract, the homeowner agreed to accept liability for damages resulting from defective plans or specifications and would indemnify Brunsonbilt for any actions as a result of the homeowner's negligence or the plans.⁵³ Brunsonbilt ultimately filed suit against the homeowner on claims of breach of contract, to which the homeowner counterclaimed alleging construction defects.⁵⁴ The Nevada Supreme Court held that when the homeowner plays a role in planning and construction, the extent of the comparative negligence defense may be expanded to include the owner's participation in either the planning or construction and whether such participation caused any damage

under the statutes governing constructional defects.⁵⁵

While this article only provides an overview of applicable statutory and case law of NRS Chapter 40, it is evident this area of law is continually evolving and requires ongoing legislative and judicial intervention to work out all the quirks and truly realize the benefits. With the continued growth and influx in population in the State of Nevada, only time will tell when such benefits will be realized for all parties involved. ■

(end notes)

- 1 See NRS 40.689.
- 2 As a disclosure, this article does not address all the provisions of NRS Chapter 40 and the author recommends thorough review of the chapter in full if participating in this type of litigation.
- 3 See *Maddox, Robert, In Defense of Chapter 40: Homeowner's Rights* at 12 (10-APR Nev. Law. 12 2002).
- 4 *Id.*
- 5 See *Legislative History of S.B. 395* at 1 (1995) (accessed at <http://www.leg.state.nv.us/lcb/research/library/1995/SB395,1995.pdf>).
- 6 *Id.* at 72.
- 7 See *Legislative History of S.B. 241* at 3 (2003) (accessed at <http://www.leg.state.nv.us/lcb/research/library/2003/SB241,2003.pdf>).
- 8 *Id.*
- 9 *Id.*
- 10 NRS 40.645(1)(a).
- 11 NRS 40.645(2)(b) - (c).
- 12 NRS 40.645(6)(a).
- 13 NRS 60.6452(1).
- 14 NRS 40.646(1).
- 15 NRS 40.646.
- 16 NRS 40.647(1).
- 17 NRS 40.647(2).
- 18 NRS 40.6472.
- 19 NRS 40.6472.
- 20 NRS 40.646(3).
- 21 NRS 40.648(2)(d)(1) - (2).
- 22 NRS 40.672.
- 23 NRS 40.680.
- 24 NRS 40.680(5).
- 25 NRS 40.695.
- 26 NRS 40.6884.
- 27 *Id.*
- 28 *Id.*
- 29 NRS 40.6884(4)(c).
- 30 NRS 40.655.

- 31 NRS 40.665.
- 32 116 Nev. 250, 993 P.2d 1259 (2000); see also NRS 40.600, *et seq.*
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 *Id.*
- 37 120 Nev. 240, 243, 89 P.3d 31, 33 (2004).
- 38 *Id.*
- 39 NRS 78.585 sets forth the statutory limitations for commencing a cause of action against a dissolved corporation for claims arising prior to its dissolution. It provides that litigation against dissolved corporation for claims that were discovered or should have been discovered before the dissolution must be commenced within two (2) years of the date of dissolution.
- 40 120 Nev. 632, 634, 97 P.3d 607, 608 (2004).
- 41 *Id.*; see NRS 40.695.
- 42 *Id.*
- 43 121 Nev. 837, 124 P.3d 530 (2005).
- 44 *Id.* at ___, 124 P.3d at 535.
- 45 *Id.* at ___, 124 P.3d at 536.
- 46 *Id.* at ___, 124 P.3d at 542-43.
- 47 *Id.* at 543.
- 48 *Id.*
- 49 *Id.* at 546-47.
- 50 NRCP 23(c)(1) permits a district court to grant class action certification on a conditional basis, upon determining the factors that 1) common questions predominate the matter pursuant to NRCP 23(b)(3); and 2) that class action is a superior method for adjudicating the matter.
- 51 121 Nev. at ___, 124 P.3d at 544.
- 52 122 Nev. ___, ___, P.3d ___, 2006 WL 3804835 at 1 (Dec. 28, 2006).
- 53 *Id.*
- 54 *Id.* at 2.
- 55 *Id.* at 4.

