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**Dekker/Perich/ Sabatini LTD. et. al. v. Dist. Court & City of N. Las Vegas, 137 Nev. Adv. Op. 53 (Sep. 23, 2021) .**

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**CONSTRUCTION DEFECT: STATUTORY INTERPRETATION OF THE 2019 NRS 11.202 AMENDMENT EXTENDING REPOSE PERIOD**

**Summary:**

In this case, the City of North Las Vegas’s complaint against the Appellee was not time-barred, did not violate the Appellee’s due process rights, and was not void ab initio. Therefore, the Court denied the Appellee’s petition for writ relief.

The 2019 amendment of NRS 11.202 extending the repose period from six-years to ten years applies retroactively to actions where substantial completion of the construction project occurred before October 1, 2019.<sup>2</sup> The Legislature intended for the amendment to apply retroactively because the six-year repose period prejudiced Nevadans pursuing construction defect claims.

**Facts and Procedural History:**

The City of North Las Vegas (“CNLV”) hired Appellee Dekker/Perich/ Sabatini Ltd. (“Dekker”) to build a fire station. A notice of completion was recorded by CNLV on July 13, 2009. Cracks in the fire station’s foundation and walls were found years later. Then in 2017, it was discovered through an investigation that the building was damaged due to “excessive settlement and expansive soil activity.”

In 2015, NRS 11.202 created a six-year repose for construction defect claim. However, in 2019, Assembly Bill 421 was enacted. This bill extended the repose period to ten years.<sup>3</sup> CNLV filed a complaint against Dekker on July 11, 2019, after the six-year repose period expired, but before Assembly Bill 421 took effect. Dekker moved to dismiss claiming CNLV’s claims were time barred because of NRS 11.202’s six-year repose period. The district court heard the motion the day prior to Assembly Bill 421 taking effect on September 30, 2019. Then on October 14, 2019, the district court dismissed CNLV’s complaint citing the six-year repose period.

Following the district court’s dismissal, CNLV argued that the ten-year repose period was in effect and timely moved to alter the judgment pursuant to NRCP 59(e). Dekker responded arguing that CNLV’s claims were statutorily barred because of the six-year repose period. Therefore, the claims were void ab initio and could not be revived. Additionally, Dekker argued that its due process rights would be violated if CNLV’s motion were granted.

The district court granted CNLV’s motion to alter the judgement finding that NRS 11.202 should apply retroactively and constitutionally. CNLV’s claims were reinstated. Appellee, Dekker, then filed a petition for writ of mandamus.

**Discussion:**

*We exercise our discretion to entertain the writ petition.*

The Court has the sole discretion to decide whether to consider a petition for a writ of mandamus.<sup>4</sup> In this case, the Court decides an issue of first impression that served judicial

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<sup>1</sup> By Jessica Recarey-Valenzuela.

<sup>2</sup> A.B. 421, 2019 Nev. Stat. ch. 361 § 11(4), at 2268.

<sup>3</sup> *Id.* at 2262.

<sup>4</sup> *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

economy because clarifying which version of the statute applies would preclude CNLV from pursuing its claims if Dekker is successful.<sup>5</sup> Therefore, Dekker's petition raised a legal issue of first impression that also had statewide significance and the Court chose to entertain Dekker's petition.

*The district court did not manifestly abuse or arbitrarily or capriciously exercise its discretion by retroactively applying NRS 11.202's ten-year repose period to CNLV's claims.*

The Court reviewed the statutory interpretation of NRS 11.202's 2019 amendment de novo.<sup>6</sup> Further, the Court did not have to look beyond the statute because its plain meaning is clear on its face.<sup>7</sup> Assembly Bill 421 defined the scope of its application by stating that it "appl[ies] retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019."<sup>8</sup> The Court also noted that the Legislature had amended NRS 11.202 once in 2015, decreasing the repose period to six years from ten then in 2019 increasing the repose period back to ten years. The Court stated that the intention of the 2019 amendment was to reduce prejudice to Nevadans who were not aware of property damage that did not reveal itself within the six-year period. Therefore, the Court found that it is within Assembly Bill 421's expressed language and legislative intent to apply the statute retroactively.

In this case, the Court found that the date of the fire station's substantial completion was July 13, 2009. Further, CNLV's complaint was timely filed because it was filed within ten years of the substantial completion pursuant to the amended NRS 11.202. The Court found that CNLV properly filed its motion to alter judgement pursuant to NRCP 59(e) after the district court dismissed CNLV's complaint. Therefore, the action was not time-barred.

*The complaint was not void ab initio.*

The Court found that CNLV's complaint was not void ab initio because NRS 11.202 does not suggest that the period for repose is jurisdictional thus rendering an untimely complaint void ab initio.<sup>9</sup> Additionally, Dekker did not cite to any authority that stated that a complaint would be void ab initio if it was filed after the repose period expired.

*Retroactive application does not violate Dekker's due process rights.*

The Court held that Dekker's due process rights were not violated by retroactively applying Assembly Bill 421's amendment to NRS 11.202 because to meet the requirements of due process there must be a rational legislative purpose to apply NRS 11.202's amendment retroactively.<sup>10</sup> In this case, the Legislature's extension of the repose period was done to be within the timeframe it takes for defects to appear, which allows the fair pursuit of defect claims. Therefore, NRS 11.202's ten-year repose period does not violate due process.

Consequently, the statute of repose did not prevent this action. Further, the district court granted the motion to alter judgment properly.

### **Conclusion:**

The Court denied Dekker's petition for writ relief concluding that the 2019 amendment to NRS 11.202 applies retroactively to the claims filed by CNLV against Dekker. Further, the Legislature expanded the statute of repose intending for it to apply retroactively because the six-

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<sup>5</sup> Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct., 132 Nev. 544, 547, 376 P.3d 167, 170 (2016).

<sup>6</sup> Int'l Game Tech. Inc. v. Second Jud. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

<sup>7</sup> Zohar v. Zbiegien, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014).

<sup>8</sup> A.B. 421, 2019 Nev. Stat. ch. 361 § 11(4), at 2268.

<sup>9</sup> See Sec'y, U.S. Dep't. of Lab. v. Preston, 873 F.3d 877, 880-82 (11<sup>th</sup> Cir. 2017).

<sup>10</sup> See, e.g., Schaeffler Grp. USA, Inc. v. U.S., 786 F.3d 1354, 1362 (Fed. Cir. 2015).

year repose period prejudiced Nevadans. The plain language of NRS 11.202 permits an action to be brought if it is filed within ten years after the substantial completion of the construction project. Further, it does not matter if the action would have been barred under the 2015 six-year repose period when the complaint was filed.