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# High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Judicial Dist. Court, 133 Nev. Adv. Op. 66 (Sept. 27, 2017) (en banc)

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## PROPERTY LAW: REPRESENTATIONAL STANDING

### **Summary**

Under NRS Chapters 40 and 116, homeowners associations (HOAs) have the representational standing to represent all homeowners who purchase their homes after litigation is commenced by or against the HOAs. However, the Court clarified that there is no such representational standing to bring or continue to pursue a case on behalf of homeowners who sell their units after litigation has begun.<sup>2</sup>

### **Background**<sup>3</sup>

High Noon at Arlington Ranch HOA (High Noon) commenced this litigation against D.R. Horton in June 2007 alleging four claims: (1) breach of implied warranties of workmanlike quality and habitability; (2) breach of contract; (3) breach of express warranties; and (4) breach of fiduciary duty. D.R. Horton moved for partial summary judgment in January 2014 arguing that when High Noon filed its complaint, only 112 of its 342 members owned units, meaning that High Noon's standing should be decreased to those 112 units. Also, D.R. Horton argued that, for the same reason, a subclass of 192 High Noon units for interior claims' purposes should be decreased to 62 units.

The Eighth Judicial District Court of Nevada granted partial summary judgment in favor of D.R. Horton, determining that High Noon could not bring claims on behalf of 230 former unit owners because they were not real parties in interest in the litigation.<sup>4</sup> However, former owners could still recover damages suffered in connection with loss of property market value and repair expenses and attorneys' fees incurred by former owners.<sup>5</sup> The district court also concluded that High Noon representational standing was allowed for subsequent owners of units with existing or continuing construction defects.

### **Discussion**

*Writ relief is appropriate*

Generally, the Court does not consider partial summary judgment orders because they are interlocutory lower court orders. However, here, the Court used its discretion and considered the district court's partial summary judgment order because it raised an important issue. By granting

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<sup>1</sup> By Homero Gonzalez.

<sup>2</sup> NEV. REV. STAT. § 116.3102(1)(d) (2007). The Court applied the 2007 version of the Nevada Revised Statutes because High Noon filed its complaint against D.R. Horton in June of 2007.

<sup>3</sup> The Nevada Supreme Court pointed-out that this opinion contains only the relevant facts because the case was pending for eight years, and the parties filed multiple motions and writ petitions.

<sup>4</sup> See NEV. R. CIV. P. 17 (2017) (requiring that "[e]very action shall be prosecuted in the name of the real party in interest.").

<sup>5</sup> See NEV. REV. STAT § 40.655 (2007) (listing the remedies a claimant can recover for damages "proximately caused by a constructional defect").

its discretion, the Court addressed both the legal question at hand and resolved an issue that affected other similar litigation.

*High Noon's claims for relief*

The Court first addressed High Noon's complaint. The Court pointed out that the district court ruled on standing without considering each claim alleged in High Noon's complaint. To determine standing, the correct analysis requires that each claim High Noon alleged in its complaint relate to the construction defect claims under NRS Chapter 40, which were transferred from former unit owners to new unit owners once the unit sale became final. The four claims High Noon alleged in its complaint were: (1) breach of implied warranties of workmanlike quality and habitability<sup>6</sup>; (2) breach of contract; (3) breach of express warranties; and (4) breach of fiduciary duty.

The Court defined "constructional defect" as

a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance:

1. Which is done in violation of law, including, without limitation in violation of local codes or ordinances.<sup>7</sup>

The Court declined to address the claims of breach of contract, breach of fiduciary duties, and breach of implied warranty of habitability because these claims were not related to construction defect claims under NRS Chapter 40. However, the Court found that the claims of breach of implied warranty of workmanlike quality and breach of express warranty were construction defect claims under NRS Chapter 40, even though High Noon's complaint stated these claims arose out of NRS Chapter 116. The Court reasoned that NRS 40.600 to 40.695 take precedence over any other conflicting law related to construction defects<sup>8</sup> and that these provisions applied to "any" construction defect claims.<sup>9</sup>

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<sup>6</sup> The actual claim was breach of warranty of workmanlike quality and habitability. However, in its discussion, the Court analyzed *habitability* and *workmanlike quality* separately because they were separate concepts, and were thus treated differently for purposes of determining whether or not each was a construction defect claim under chapter 40 of the Nevada Revised Statutes. In short, *habitability* was not, but *workmanlike quality* was.

<sup>7</sup> NEV. REV. STAT. § 40.615 (2007).

<sup>8</sup> NEV. REV. STAT. § 40.635(2) (2007).

<sup>9</sup> *Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 562, 245 P.3d 1164, 1172 (2010).

*Under the then-existing statute, homeowners' associations have standing to represent unit owners who purchase units after litigation begins*

NRS 116.3102(1)(d) grants HOAs representational standing rights. The only caveat is that the HOA seeking representational standing can only do so if it acts on behalf of two or more of its members, and that the actions sought concern the community.<sup>10</sup> What makes this a *prima facie* case is that NRS 116.3102(1)(d) does not expressly state whether or not representational standing applies to a person who buys a residential unit from a seller who was involved in the HOA's ongoing litigation. The Court found that because NRS 116.095 defined a unit owner as a person currently owning a unit, and because there was no restriction placed on subsequent unit owners, it then followed that an HOA has representational standing of subsequent unit owners who become current owners, but not of former owners who are no longer members of the HOA that brought the claim to court.<sup>11</sup>

Furthermore, the Court rejected D.R. Horton's argument that High Noon's representational standing was limited to the people who owned the units at the time High noon filed suit. By considering the Legislature's intent behind passing NRS 116.3012(1)(d), the Court found that, as a matter of policy, not allowing High Noon representational standing for subsequent unit owners would have yielded unreasonable results.<sup>12</sup> The Court also provided specific examples supporting this conclusion by comparing it to what NRS Chapter 40<sup>13</sup> states and what other cases within Nevada and other jurisdictions have also concluded.

*Homeowners' associations do not have standing to continue to represent unit owners who sell units after litigation begins*

The Court addressed D.R. Horton's argument that High Noon should not retain its representational standing over former unit owners because they were no longer members of High Noon.<sup>14</sup> The Court agreed with D.R. Horton's argument. First, HOA representational standing only applies to current residential unit owners, and former unit owners are no longer members of the HOA that commenced litigation. Also, High Noon's "Covenants, Conditions & Restrictions" made it clear that the HOA's benefits, including any litigation it may bring on behalf of owners, applied only to current High Noon members and not prior members.

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<sup>10</sup> *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 731, 291 P.3d 128, 134 (2012).

<sup>11</sup> *See* NEV. REV. STAT. § 116.095 (2007) (defining "unit's owner" as "a declarant or other person who owns a unit.").

<sup>12</sup> *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 826, 192 P.3d 730, 734 (2008).

<sup>13</sup> Again, chapter 40 of the Nevada Revised Statutes overrides what any other chapter states regarding claims of constructional defects.

<sup>14</sup> D.R. Horton actually requested the Nevada Supreme Court issue a writ of mandamus vacating the district court's finding that an HOA could continue to represent its former members, but D.R. Horton made this request in its answer rather than in an actual petition. Typically, the Nevada Supreme Court declines to consider these issues, but when the error is already apparent in the record, the Court may exercise its discretion *sua sponte* and address, or even rule on that error. *Mainor v. Nault*, 120 Nev. 750, 774, 101 P.3d 308, 324 (2004) (as corrected on denial of rehearing (Apr. 13, 2005)) (quoting *Crow-Spieker #23 v. Robert L. Helms Constr. & Dew Co.*, 103 Nev. 1, 3, 731 P.2d 348, 350 (1987)).

## **Conclusion**

High Noon's representational standing of current unit owners is valid. This includes representational standing on behalf of new residential unit purchasers who became current High Noon members, even though litigation had already begun. However, High Noon may not begin or continue litigation on behalf of its former members. The Court issued the writ of mandamus vacating the grant of partial summary judgment and ordered the district court to reconsider the partial summary judgment motion consistent with this opinion.