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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANSE, INC. d/b/a NEVADA STATE)	CASE NO. :
PLASTERING)	
	District Court Case No.: A470159
Petitioner,)	Dept. No. : XXII
)
vs.)	
	PETITIONER'S REPLY TO REAL
JUDGE ALLAN R. EARL, EIGHTH)	PARTIES IN INTEREST'S ANSWER TO
JUDICIAL DISTRICT COURT OF CLARK)	PETITION FOR WRIT OF MANDAMUS
COUNTY, NEVADA)	AGAINST THE EIGHTH JUDICIAL
	DISTRICT COURT OF CLARK COUNTY,
Respondent,)	NEVADA
)
GLENN HAYWARD; FRED W.)	
SCHAEFER; DONALD T. BARSKY;)	
JAMES F. SEARCY; SHELDON)	
FACTOR; JOHN P. FRIAR; NORMAN)	
YORK; BERNARD BRONSTEIN; D.J.)	
ADDONIZIO, individually, and on behalf of)	
all others similarly situated, and ROES 1-)	
20, 000, inclusive,)	
Real Parties In Interest.	

PETITIONER'S REPLY TO REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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THE HONORABLE SUSAN JOHNSON
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EIGHTH JUDICIAL DISTRICT COURT
OF CLARK COUNTY, NEVADA
Regional Justice Center
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Respondent

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LEGAL ARGUMENT 2

I. PLAINTIFFS FAIL TO PRESENT ANY LEGALLY ACCURATE OR RELEVANT ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS 2

 A. ANSE Has Standing. 2

 B. Plaintiffs' Argument Regarding the Factual Record is Unnecessarily Lengthy, Irrelevant, and an Obvious Attempt to Distract the Court from the Genuine Legal Issue. 3

 C. Plaintiffs' Indiscriminate, Excessive References to Statutory and Case Law Evades the Reasonable Interpretation of "New Residences" and Confuses the Issue before this Court. 4

 1. *Chapter 40 is abundantly clear: "Claimant" refers to the owner of a "new residence."* 4

 2. *Chapter 40 explicitly states its precedence over all conflicting law. ...* 5

 3. *There is no privity of contract requirement. There is a requirement of "new residences."* 6

 4. *To reiterate, Chapter 40 explicitly states its precedence over all conflicting law.* 6

 5. *The Westpark definition of "new residence" does not apply to common area cases within the purview of NRS 116, et seq.*..... 8

CONCLUSION 8

AFFIDAVIT OF KEVIN E. HELM, ESQ 10

1 **PETITIONER'S REPLY TO REAL PARTIES IN INTEREST'S ANSWER TO**
2 **PETITION FOR WRIT OF MANDAMUS**

3 **COMES NOW** Third-Party Defendant ANSE, INC. d/b/a NEVADA STATE
4 PLASTERING (hereinafter "Nevada State Plastering"), by and through its attorneys,
5 HELM & ASSOCIATES, and hereby replies to the Answer of Real Parties In Interest
6 ("Plaintiffs") to Petition for Writ of Mandamus.

7 This Reply is based upon the grounds that Plaintiffs have presented nothing of
8 legal accuracy nor any compelling basis for their argument. Plaintiffs' Answer is merely
9 a thinly veiled attempt to distract this Honorable Court from the relevant issue and to
10 improperly present new arguments for the first time on appeal.

11 Accordingly, Nevada State Plastering hereby requests that this Honorable Court
12 disregard Plaintiffs' misguided Answer and issue a Writ of Mandamus as is necessary to
13 cure Respondent Court's abuse of discretion and misapplication of the law in improperly
14 denying Nevada State Plastering's Motion for Partial Summary Judgment Regarding
15 Chapter 40 Application.

16 DATED this 31st day of March, 2008.

17 **HELM & ASSOCIATES**

18 

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1 **LEGAL ARGUMENT**

2 I. **PLAINTIFFS FAIL TO PRESENT ANY LEGALLY ACCURATE OR**
3 **RELEVANT ARGUMENT IN OPPOSITION TO PETITION FOR WRIT**
4 **OF MANDAMUS.**

5 **(A) Nevada State Plastering Has Standing.**

6 Plaintiffs' understanding of third-party standing is inaccurate¹. In fact, one case
7 cited by Plaintiffs (and heard before this honorable Court) makes Nevada State
8 Plastering's standing in the case at bar abundantly clear:

9 "Standing is the legal right to set judicial machinery in motion." To
10 establish standing in a mandamus proceeding, the petitioner must
11 demonstrate a "beneficial interest" in obtaining writ relief. Although this
12 court has not defined "beneficial interest," the California courts have: "To
13 demonstrate a beneficial interest sufficient to pursue a mandamus action,
14 a party must show a direct and substantial interest that falls within the
15 zone of interests to be protected by the legal duty asserted." "Stated
16 differently, the writ must be denied if the petitioner will gain no direct
17 benefit from its issuance and suffer no direct detriment if it is denied."

18 Heller v. Legislature of State of Nevada, 120 Nev. 456, 460-61, 93 P.3d 746, 749
19 (2004)(citations omitted).

20 ¹ Two cases cited by Plaintiffs lend no support to their argument and are utterly discrete from the case
21 currently before this Court. In Ex parte Handley, plaintiff sued defendant; 16 months later defendant filed
22 a third-party indemnity action against third-party defendant. 775 So.2d 141 (Ala. 2000). Despite an
23 arbitration provision in force between plaintiff and defendant, defendant engaged in discovery for a period
24 of 18 months, to the detriment of plaintiff's interests. When third-party defendant attempted to enforce the
25 arbitration provision as between plaintiff and defendant, and also as between defendant and third-party
26 defendant, the court found "that, whatever arbitration rights [third-party defendant] may have, [third-party
27 defendant] does not have standing to require arbitration as between [plaintiff] and [defendant], **when**
28 **[defendant] has waived its right to arbitrate**" via 18 months of discovery detrimental to plaintiff's
interests. Id at 143 (emphasis added). These facts are clearly distinct from those in the case at bar. The
same holds true in Williams v. Timber, in which third-party defendant filed a motion for summary judgment
against defendant. 524 So.2d 875 (La. App. 1988). The court mistakenly granted the motion as to the
defendant and the plaintiffs. This decision was overturned only as to the plaintiffs, due to the fact that
there were no claims by the plaintiffs against third-party defendant to be dismissed. Not only was the
basis for Williams a simple clerical mistake, and therefore unimportant in the current case, but the facts
are entirely different: Nevada State Plastering does not seek the dismissal of claims by Plaintiffs against
it. Nevada State Plastering is simply requesting that residences that are not "new" under Chapter 40
should not benefit from Chapter 40 entitlements.

1 Clearly, Nevada State Plastering has a "beneficial interest" in this Court's
2 issuance of a writ directing Respondent Court to grant Nevada State Plastering's motion
3 for partial summary judgment regarding Chapter 40 application. As a subcontractor
4 third-party defendant may be bound to indemnify the defendant, Nevada State
5 Plastering will suffer as a direct result of Respondent Court's misapplication of Chapter
6 40, and directly benefit otherwise. If this point needs to be made any more clear, the
7 plain and simple language of NRCP Rule 14 states: "the third-party defendant may
8 assert against the plaintiff any defenses which the third-party plaintiff has to the
9 plaintiff's claim."
10

11
12 Nevada State Plastering would also like to point out that Plaintiffs are just now
13 raising this issue for the first time. Not only are they incorrect in their assertion
14 regarding Nevada State Plastering's standing, they are also improperly raising this issue
15 for the first time on appeal and this Court should dismiss this argument accordingly.
16

17 **(B) Plaintiffs' Argument Regarding the Factual Record is**
18 **Unnecessarily Lengthy, Irrelevant, and an Attempt**
19 **to Distract the Court from the Genuine Legal Issue.**

20 Pages two through six of Plaintiffs' Answer are, in sum, much ado about nothing.
21 Over the course of four pages, Plaintiffs fail to make a single point relevant to the
22 genuine issue on appeal herein. In fact, Plaintiffs' extended emphasis on the large size
23 and purportedly time-consuming nature of Nevada State Plastering's exhibits misses the
24 point entirely and purposely distracts this Court from the same.

25 Despite Plaintiffs' confused understanding to the contrary, the issue on appeal is
26 not *which* homes, specifically, are eligible for potential NRS Chapter 40 entitlements.
27 This determination will be left to the District Court in the course of its consideration. The
28

1 relevant issue on appeal here is **the meaning of "new residence" within the confines**
2 **of Chapter 40.** In other words, the issue on appeal is **whether Chapter 40 applies**
3 when a home has been occupied and resold, NOT which specific homes are entitled to
4 Chapter 40 damages and which specific homes are not. Plaintiffs' response to Nevada
5 State Plastering's argument serves as a red-herring in an effort to distract this court
6 from the relatively simple issue on appeal.

8 **(C) Plaintiffs' Indiscriminate, Excessive References**
9 **to Statutory and Case Law Evades the Reasonable**
10 **Interpretation of "New Residences" and Confuses**
11 **the Issue before this Court.**

12 N.R.S. Chapter 40 applies to defects in the construction of a "new residence."
13 N.R.S. 40.615. Nevada State Plastering presents to this Court that a reasonable
14 interpretation of the term "new" is "new." Plaintiffs' tortuous attempts to give it any other
15 meaning through vague statutory references and questionable assumptions are
16 unnecessary and erroneous.

17 In Westpark Owners' Ass'n v. Eighth Judicial Dist. Ct., this Court clearly
18 determined that "a residence is 'new' only if it is a product of original construction that
19 has been unoccupied as a dwelling from the completion of its construction to the point of
20 sale." 167 P.3d 421, 424 (2007). Despite Plaintiffs' repeated contentions to the
21 contrary, this Court plainly intended that anything beyond the original point of sale
22 between the contractor and the purchaser does not involve a "new" residence for the
23 purposes of Chapter 40.

24
25
26 (1) *Chapter 40 is abundantly clear. "Claimant" refers to*
27 *the owner of a "new residence."*
28

1 Under Chapter 40, a claimant is someone with a claim "to recover damages
2 resulting from a constructional defect." NRS 40.640. A constructional defect,
3 meanwhile, is defined (in pertinent part) as "a defect in the design, construction,
4 manufacture, repair or landscaping of a **new residence...**" NRS 40.615 (emphasis
5 added). Plaintiffs' emphasis on the legislative choice of "claimant" rather than "initial
6 purchaser" within Chapter 40 is misguided. The use of "claimant" rather than "initial
7 purchaser" is irrelevant; NRS 40.615 makes it explicit that a claim under Chapter 40 can
8 only be made for a "new residence."
9

10
11 (2) *Chapter 40 explicitly states its precedence over
12 all conflicting law.*

13 An important element of Chapter 40 missing throughout Plaintiffs' Answer is its
14 clear precedence over conflicting statutes. NRS 40.635 explicitly states "NRS 40.600 to
15 40.695, inclusive:... [p]revail over any conflicting law otherwise applicable to the claim or
16 cause of action."

17 Thus, Plaintiffs' statement that "there is no indication that, in enacting Chapter 40,
18 the Legislature meant to alter the long-standing rule making property damage claims
19 assignable to subsequent purchasers" is entirely inaccurate. (Please see Answer of
20 Real Parties In Interest, 7:12-14). There absolutely is such an indication; in fact, it
21 cannot be any more clear. The Legislature explicitly states that Chapter 40 trumps all
22 conflicting law.
23

24 The Legislature also explicitly states that Chapter 40 claims apply to "new
25 residences." Thus, contrary to Plaintiffs' vague assertions regarding a "well-settled
26 principle," the only reasonable interpretation is that Chapter 40 rights are **not**
27
28

1 assignable. Clearly if the Legislature intended otherwise it would not have limited
2 recovery to those claims involving a "new residence."

3 That said, Plaintiffs' contention here is yet another argument that was not made
4 in the District Court proceeding and is thus improperly presented for the first time on
5 appeal.
6

7 (3) *There is no privity of contract requirement.*
8 *There is a requirement of "new residences."*

9 Plaintiffs once again deviate from the only issue before this Court – the clear and
10 simple focus on the reasonable interpretation of "new residences." Their assertion that
11 Nevada State Plastering's interpretation of "new residences" creates a privity of contract
12 requirement is, quite simply, wrong. The reasonable interpretation of "new residences"
13 urged by Nevada State Plastering does not require privity of contract for recovery under
14 Chapter 40. It has nothing to do with privity. The reasonable interpretation asserted by
15 Nevada State Plastering is that Chapter 40 recovery is available only for claims as to
16 "new residences." This Court has taken this approach in Westpark and Nevada State
17 Plastering is simply requesting a consistent application in the instant matter.
18

19
20 (4) *To reiterate, Chapter 40 explicitly states its precedence*
21 *over all conflicting law.*

22 Plaintiffs' remaining arguments all suffer from the same misconception. Again,
23 NRS 40.635 explicitly states "NRS 40.600 to 40.695, inclusive:... [p]revail over any
24 conflicting law otherwise applicable to the claim or cause of action." Thereby Plaintiffs
25 further arguments as to the conflict between Chapter 40 and NRS Chapter 116; NRS
26 11.202 to 11.205; and NRCP 17 and 25 are all baseless. **Chapter 40 prevails over**
27 **any conflicting law.**
28

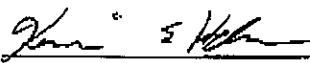
1 In any case, Plaintiffs' arguments disregard certain important distinctions in the
2 law. For one thing, there is no conflict between Chapter 40 and NRS Chapter 116.
3 Chapter 116 deals with warranties; Chapter 40 is expressly limited to Chapter 40 claims
4 and recovery under Chapter 40. Plaintiffs' assertion that Nevada State Plastering's
5 reasonable interpretation of Chapter 40 will "nullify the time periods specified in NRS
6 Chapter 11" is equally overbroad and improperly analyzed. (Please see Answer of Real
7 Parties In Interest, 9:18-19). Limiting Chapter 40 recovery to "new residences," as
8 explicitly set forth in the statute itself and as understood by this Court, does NOT
9 thereby eliminate the purpose and application of the statutes of limitation. Homeowners
10 may still bring suit and recover common law damages within the confines of the statutes
11 of limitation; Nevada State Plastering's interpretation merely precludes homeowners of
12 residences that are not "new" from *Chapter 40* recovery.
13
14

15 Finally, a claim under Chapter 40 is not a transferable right. Chapter 40 explicitly
16 states that a claim may be brought under Chapter 40 for construction defect in a "new
17 residence." Thus, the claim under Chapter 40 may be brought by the owner of a "new
18 residence" and is not transferable to a subsequent purchaser. By contending that
19 NRCP 17 and 25 provide a basis for Chapter 40 claims by subsequent purchasers,
20 Plaintiffs are turning the statutory scheme on its head. As stated previously, NRS
21 40.635 deems Chapter 40 as controlling over conflicting statutes. In this case, the
22 conflict is clear and Chapter 40 controls. Only owners of "new residences" may bring
23 this type of statutory claim.
24
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1 Defendant Nevada State Plastering, Inc.'s Motion for Partial Summary Judgment
2 Regarding Chapter 40 Application.

3 DATED this 3rd day of March, 2008.
4

5
6 **HELM & ASSOCIATES**

7
8 

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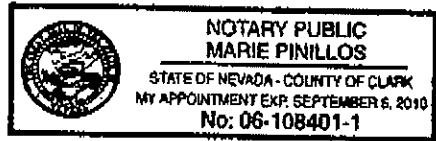
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FURTHER YOUR AFFIANT SAYETH NAUGHT.

Kevin E. Helm
KEVIN E. HELM, ESQ.

SUBSCRIBED and SWORN to before
Me this 31st day of March, 2008.

Marie Pinillos
NOTARY PUBLIC



1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 31st day of March, 2008 I served the foregoing
3 **PETITIONER'S REPLY TO REAL PARTIES IN INTEREST'S ANSWER TO PETITION**
4 **FOR WRIT OF MANDAMUS**, by facsimile transmission, as authorized by this Court in
5 its order of March 13, 2008, as follows:

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