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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANSE, INC. d/b/a NEVADA STATE
PLASTERING ASSOCIATION

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF CLARK; AND THE
HONORABLE ALLAN R. EARL, DISTRICT
JUDGE,

Respondents,

and

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,

Real Parties In Interest.

CASE NO. 15-049 PM 4:25

District Court Case No. A470159
Dept. XIX
[currently being heard in Dept. XXII]

ANSWER OF AMICUS CURIAE
SAFE HOMES NEVADA, INC.
TO PETITION FOR WRIT OF MANDAMUS

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1 **I. THIS COURT'S DECISION WILL HAVE AN EXTRAORDINARY IMPACT**
2 **ON THE RIGHTS OF HOMEOWNERS AS WELL AS THE HOME BUILDING**
3 **INDUSTRY**

4 Safe Homes Nevada, Inc. ("Safe Homes"), on behalf of itself and its thousands of
5 homeowner members, urges this Court to deny the petition of ANSE, Inc. ("ANSE"). The
6 Petition asks this Court to employ a caste system of home ownership and leave NRS 40.655
7 remedies only to original home purchasers through the unfounded expansion of the holding in
8 *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 167 P.3d 421 (Nev. 2007).

9 The subsequent purchaser of an automobile or appliance typically enjoys the same
10 protections and remedies as an original buyer. Equality should be maintained amongst Nevada
11 home ownership. This Court has consistently acknowledged that the "purchase of a home is the
12 largest investment most consumers will ever make." *Id.* at 426-9 (citing *Calloway v. City of*
13 *Reno*, 116 Nev. 250, 261, 993 P.2d 1259, 1266 (2000)). And each NRS Chapter 40
14 interpretation undertaken is "a matter of great importance for thousands of homeowners
15 throughout Nevada." *Id.* This Court's interpretation of who may be a claimant under NRS
16 Chapter 40 is of the upmost importance to the vast majority of Nevada homeowners.

17 Without the protections of NRS Chapter 40, homeowners stand virtually helpless in
18 holding their builders accountable for shoddy and non-code compliant workmanship. *See,*
19 *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004)(holding that the economic loss doctrine
20 does not apply to claims brought pursuant to NRS Chapter 40); *but see, Calloway v. City of*
21 *Reno*, 116 Nev. 250, 261, 993 P.2d 1259, 1266 (2000)(applying the economic loss doctrine to
22 construction defect claims thereby precluding homeowner actions in tort); NRS 116.4116(1)
23 (allowing developers to limit the period of limitation for bringing a breach of warranty claim to
24 only two years). If this Court removes subsequent purchasers from NRS Chapter 40, their time
25 to bring suit and theories for recovery become extraordinarily limited.

26 The unfairness to subsequent purchasers heightens when they must actually recover the
27 cost to repair their homes. The vast majority of residential builders have typical Commercial
28 General Liability Insurance or project specific insurance with similar coverages. *See, Lynda A.*
Bennett, Insurance Coverage for Construction Defect Claims, SUSTAINABLE LAND

1 DEVELOPMENT TODAY, October 2, 2007. The common insurance policies cover the builder for
2 construction defect liability resulting from the builder's negligence. *Id.* The policies almost
3 never cover damages resulting from breach of contract or breach of warranty theories. *Id.*
4 ANSE's view thus reserves insurance coverage for the damages of original home purchasers,
5 but to the exclusion of subsequent purchasers.

6 The building industry will face its own turmoil if this Court adopts ANSE's position.
7 After the home's initial sale, only contract theories will remain for the subsequent purchasers,
8 for which the builders have no insurance. *See, id.* (recognizing that "[i]nsurers typically deny
9 coverage because the complaint alleges breach of contract, including breach of warranty, and
10 therefore from the insurer's perspective, the claim cannot fairly be characterized as an
11 occurrence that is covered by insurance"). Formerly well-insured homebuilders will be stripped
12 of insurance each time a home is resold.

13 Homebuilders will also be robbed of their "right to repair" under NRS Chapter 40 if this
14 Court adopts ANSE's argument. The design of the statutory scheme allows homebuilders
15 opportunity to perform repairs or negotiate a settlement before being sued for construction
16 defects. *See*, NRS 40.645-40.648 (setting forth a pre-litigation right-to-repair regime). The
17 homebuilders will lose their right to repair and negotiate a settlement prior to litigation if this
18 Court issues the writ sought by ANSE.

19 Finally, if the Court adopts ANSE's position, tremendous questions arise as to the
20 exclusion of certain homeowners from NRS Chapter 40. That is, must the exclusion apply:

- 21 1. Where a husband and wife purchase a home for their family and then a year later
22 convey legal ownership to a family trust?
- 23 2. Where two people purchase a home as tenants in common, but then one tenant
24 transfers her undivided half interest to a third party?
- 25 3. Where a bank obtains ownership of a two-year-old home because it was forced
26 to foreclose?
- 27 4. Where a homeowner moves from the home and then leases it to a third-party?
- 28 5. Where a home is sold in the midst of the NRS Chapter 40 pre-litigation "right-
to-repair" process.

///

1 The five examples above provide a small myriad of issues that arise when attempting to
2 apply ANSE's position to the realities of home ownership. The writ ANSE seeks should be
3 denied.

4 **II. LEGAL ANALYSIS**

5 **A. *Shuette v. Beazer Homes Holdings Corp. Did Not Alienate Subsequent*** 6 ***Purchasers by Excluding Them from NRS Chapter 40's Purview***

7 This Court closely examined the potential for varying degrees of damages that
8 homeowners may incur within a single subdivision. *Shuette v. Beazer Homes Holdings Corp.*,
9 121 Nev. 837, 124 P.3d 530 (2005). The 206 subject homes in *Shuette* were constructed
10 between 1994 and 1999. *Id.* at 843, 124 P.3d at 535. In analyzing whether commonality,
11 typicality, adequacy, predominance and superiority existed for NRCP 23 class treatment, the
12 Court scrutinized the variability of damages throughout the homes. *Id.* at 848-61, 124 P.3d at
13 538-47. Certainly the application of NRS 40.655 damages to some class members but not
14 others due to subsequent purchaser status would have been the most obvious, convenient and
15 compelling basis for denying class certification. But despite an exhaustive analysis on the
16 disparity of available damages throughout the class, this Court branded no distinction upon
17 subsequent purchasers. *See, id.* This Court should remain consistent and refrain from doing so
18 now.

19 **B. This Court Should Remain Consistent in Employing Specialized Care to** 20 **Distinguish "Apartment Residences" from "New Residences" as a** 21 **Determinative Factor for Applying NRS Chapter 40**

22 *Westpark Owners' Ass'n v. Eighth Judicial Dist. Ct.*, reviewed a constructional defect
23 action brought by a homeowners' association on behalf of its unit owners. 167 P.3d 421 (Nev.
24 2008). There, the condominium developer moved the district court for a judicial determination
25 that NRS 40.600 *et seq.*, did not apply to the action because the dwelling units were rented as
26 apartments prior to their conversion into condominium units. *Id.*

27 In *Westpark*, this Court clarified that apartments are "residences." *Id.* at 428-29 (citing
28 NRS 40.630). *Westpark* then held that condominium units first occupied as apartment
29 dwellings for seven years were, however, not "new residences" pursuant to NRS 40.615. *See,*

1 *id* at 429.

2 This Court did not hold that NRS Chapter 40 only applies to original purchasers. It
3 should likewise deny ANSE's petition and refrain from doing so now.

4 **C. Basic Rules of Statutory Construction Lead to the Conclusion That Homes**
5 **Within the Statutes of Repose Are Subject to NRS Chapter 40**

6 When the words of a statute have a definite and ordinary meaning, this Court will not
7 look beyond the plain language of the statute unless it is clear that this meaning was not
8 intended. *Carson-Tahoe Hosp. v. Building & Const. Trades Council of Northern Nevada*, 122
9 Nev. 218, 128 P.3d 1065 (2006). Also, this Court is reluctant to insert words into a statute or
10 broaden its meaning, where the Legislature could easily have done so itself within the statute.
11 *Southwest Gas Corp. v. Public Serv. Comm'n of Nev.*, 92 Nev. 48, 59, 546 P.2d 219, 226
12 (1976)(refusing to broaden Public Service Commission's statutory authority where Legislature
13 could easily have, but did not, state such intent in the statute); *see also, Crowley v. Duffrin*, 109
14 Nev. 597, 855 P.2d 536 (1993)("In interpreting a statute whose language is unambiguous, a
15 court should not add or alter the language to accomplish a purpose not on the face of the statute
16 or apparent from permissible extrinsic aids such as legislative history or committee reports.").

17 The statutory definition of a person who may bring a claim pursuant to NRS Chapter 40
18 is plain and unambiguous. That is, a "claimant" is "an owner of a residence." NRS 40.610(1).
19 There is no limitation against subsequent purchasers or subsequent occupiers of the residence.
20 *See, id.* The Legislature could easily have stated that a "claimant is the initial purchaser of a
21 residence," but it did not. This Court should refrain from adding such terms.

22 Likewise, words should not be added to NRS 40.640, which sets limits to a contractor's
23 liability for constructional defects.¹ If the Legislature intended to further limit a contractor's
24

25 ¹ **NRS 40.640 Liability of contractor.**

26 In a claim to recover damages resulting from a constructional defect, a
27 contractor is liable for his acts or omissions or the acts or omissions of
28 his agents, employees or subcontractors and is not liable for any
damages caused by:

1 liabilities, it logically would have added a prong providing: “a contractor is not liable to
2 subsequent purchasers of a residence.” Because NRS 40.640 shows no intent to provide such
3 limitation, this Court should not infer additional limitations into the statute. *See, Olson v.*
4 *Richard*, 120 Nev. 240, 243, 89 P.3d 31, 33 (2004)(the Court’s “objective in construing Chapter
5 40 is to give effect to the Legislature’s intent”); *see also, Department of Taxation v. Daimler*
6 *Chrysler Serv. North America, LLC*, 121 Nev. 541, 119 P.3d 135 (2005)(reciting *expressio*
7 *unius est exclusio alterius*, the expression of one thing is the exclusion of another, as a well-
8 established maxim of statutory construction).

9 Only the enumerated limitations of NRS 40.640 should apply to any homeowner. This
10 Court should not insert its own.

11 **D. A Logical and Simple Definition of a “New Residence” Is Available to this**
12 **Court**

13 Whenever possible, this Court interprets a statute in harmony with other statutes. *Albios*
14 *v. Horizon Communities*, 122 Nev. 409, 132 P.3d 1022 (2006). Such an interpretation is
15 available here that logically harmonizes with the statutes of repose.

16 “‘Constructional defect’ means a defect in the design, construction, manufacture, repair
17 or landscaping of a *new* residence” Ordinary understanding of the term “new” varies in
18 meaning relative to the beholder’s prospective. Indeed, a residence that has been occupied for
19 two years from the home’s completion will not be as “new” to the seller as it is “new” to the
20 buyer. And to a home builder, a residence may not be perceived as “new” the second the home
21 is occupied.

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- 22
23
24 1. The acts or omissions of a person other than the contractor or his agent, employee or subcontractor;
25 2. The failure of a person other than the contractor or his agent, employee or subcontractor to take
26 reasonable action to reduce the damages or maintain the residence;
27 3. Normal wear, tear or deterioration;
28 4. Normal shrinkage, swelling, expansion or settlement; or
5. Any constructional defect disclosed to an owner before his purchase of the residence, if the
disclosure was provided in language that is understandable and was written in underlined and
boldfaced type with capital letters.

1 The ability of a homeowner to bring a claim for constructional defects is already
2 restricted for time. The Legislature provides protection to builders against suit for “old”
3 residences by way of the statutes of limitation and repose.²

4 For statutory construction purposes, this Court should adopt an interpretation of “new”
5 that logically fits within the statutory scheme. *See, Lane v. Allstate Ins. Co.*, 114 Nev. 1176,
6 969 P.2d 938 (1998)(stating that the Court’s definition of a term was based upon a logical and
7 consistent statutory interpretation). Fortunately for Nevada homeowners, a logical definition of
8 a “constructional defect” and the consequent meaning of a “new residence” readily exists. That
9 is, “new residences” for constructional defect purposes are those homes existing within the
10 statutes of repose. Those residences in existence outside the statutes of repose are only subject
11 to NRS Chapter 40 where they received an “alteration” such as a complete re-roof onto an
12 “existing residence,” or an “addition” such as the construction of game room or extra bedroom
13 onto an “existing residence.”

14 The interpretation above should be adopted by this Court to give plain and logical
15 meaning to the term “new residence” within NRS 40.615.

16 **E. Fundamental Fairness, Foreseeability, and Statutory Harmony All Warrant**
17 **the Inclusion of Subsequent Purchasers**

18 NRS Chapter 40 provided a trade-off in the availability of damages to homeowners. It
19 allows victims of shoddy construction to “net” sufficient funds to repair their homes, but no
20 more. *See*, NRS 40.655(1). Indeed, the claimant is entitled to the reasonable cost of repairing
21 the home, plus the costs of bringing suit and necessary relocation. *Id.* In return, the
22 homeowner is not entitled to punitive or other damages absent from those enumerated in NRS
23 40.655(1). Furthermore, the contractor wishing to resolve a claim prior to litigation may do so
24 by performing repairs or making a monetary offer. *See*, NRS 40.648; NRS 40.672(2)(b). And
25 where the claimant unreasonably rejects a settlement offer from the contractor, attorneys’ fees
26 and costs may be denied to the claimant and awarded to the contractor. NRS 40.650(1).

27
28 ² *See*, NRS 11.203-205; and, 11.220.

1 Construction standards are the same for a contractor building an apartment,
2 condominium or single family residence. *See, e.g.*, § 101.3 UNIFORM BUILDING CODE 1997
3 (the Uniform Building Code as adopted shall apply to the construction of all buildings and
4 structures within the jurisdiction). Moreover, the protective purpose of the code applies equally
5 regardless of the class of occupancy. *Id.* at § 101.2 (“The purpose of this code is to provide
6 minimum standards to safeguard life or limb, health, property and public welfare by regulating
7 and controlling the [construction of all buildings within this jurisdiction].”).

8 The standards of the building codes ensure the long-term integrity of the homes
9 constructed under them. The codes do not merely ensure the integrity of the homes until the
10 point of resale. It is excruciating to conceive that the Legislature intended to create a caste
11 system amongst homeowners who are victims of code violations.

12 Successors-in-interest of shoddy construction must be empowered to safeguard their
13 family’s life, limb, health, property and welfare equal to that of original purchasers. There is no
14 good or just reason to hold otherwise.

15 **III. CONCLUSION**

16 For the foregoing reasons, Safe Homes prays that this Court will deny ANSE’s Petition
17 and find that subsequent home purchasers have NRS Chapter 40 rights equal to original
18 purchasers.

19 Respectfully submitted this 25th day of March, 2008.

20 **CISNEROS & THOMPSON, CHTD.**

21
22 By 

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