MINUTES OF THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
March 4, 2009

The Subcommittee of the Senate Committee on Judiciary was called to order by Chair Terry Care at 9:57 a.m. on Wednesday, March 4, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator David R. Parks
Senator Maurice E. Washington

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Janet Sherwood, Committee Secretary

OTHERS PRESENT:

James L. Wadhams, Coalition for Fairness in Construction
Darren Wilson, President, Sierra Air Conditioning, Incorporated; Treasurer, Nevada Subcontractors Association
Craig A. Marquiz, General Counsel, Nevada Subcontractors Association
Bruce King, Vice-President, Nevada Subcontractors Association
Scott Canepa, Nevada Justice Association

CHAIR CARE:
This is the Subcommittee on construction defects. You will recall we had an informational hearing on February 3 before the full Committee. Based upon that testimony, the Subcommittee was created and asked the full Committee to request a bill draft dealing with construction defects. We have a bill draft request reserved. We just do not have any language.

A subcontractor gets named as a party in construction defect litigation, and it becomes apparent the subcontractor never should have been named. This seems to be the biggest complaint I hear about construction defect litigation. We want to hear testimony today addressing this issue. For several sessions, we have amended Nevada Revised Statute (NRS) 40, Actions and Proceedings in Particular Cases Concerning Property. Perhaps the time has come to find a way to keep parties out of litigation who do not belong. If a party has been brought into litigation unnecessarily, there should be some vehicle for getting them out of litigation as quickly as possible. We do not have anything in writing; we do not have any specific ideas.

I received an e-mail last night from Michael Hoy who testified on February 3. He asked for his e-mail to be made public (Exhibit C). I also have a box of documents from Darren Wilson from Sierra Air Conditioning, Inc. I am going to go through those documents but not this morning. Those documents may be made part of the record.

JAMES L. WADHAMS (Coalition for Fairness in Construction):
I have appeared in front of this Committee before, and I want to repeat the mea culpa put on record the first time. This area of law we call NRS 40 was requested to expedite the repair of homes. Empirically, it has not worked. We have recommended the simplest solution. Give homeowners the direct right to sue. I present a briefing book (Exhibit D, original is on file in the Research Library) describing the issues and problems of the NRS 40 process. Appendix A, pages 11 and 12 of Exhibit D, is a theoretical timeline. Appendix B, pages 13 and 14 of Exhibit D, is a flowchart of the process. Flow Chart C on page 15 of Exhibit D deals with the experts. This gives you a visual frame of reference of the complexity of this process. The Coalition brought you this process in good faith, hoping it would expedite home repair. Unfortunately, documentation from the court system, which we will provide later, clearly demonstrates the NRS 40 process has delayed and frustrated home repair.

DARREN WILSON (President, Sierra Air Conditioning, Incorporated; Treasurer, Nevada Subcontractors Association):
I have compiled a list of all the NRS 40 notices that have blessed my company. I made a copy of the notice of the filing and my offer of repair to every home we have inspected. Because of the many filings our company receives, we must hire three full-time employees to answer the complaints and make repairs if allowed. Sierra Air Conditioning always offers to repair any true defect.

In a review of our cases, 95 percent involve the copper installation on the exterior of the Freon line set. For the last 11 years, the copper installation used by Sierra Air Conditioning is ultraviolet (UV) rated to keep from being destroyed by our desert sun. The UV rating is labeled on the inside of the insulation. We are asked to paint with UV-rated white paint, which we do every time given the chance. Since the materials we use are UV-rated, this seems to save us from being named in the bigger issues.

The expert witness canvasses homes in neighborhoods, working to drum up lawsuits for the firm from which the expert will eventually get paid. The expert witness finds defects and puts the general contractor and subcontractors on notice. As a member of the Nevada Subcontractors Association, I feel it is important to bring these issues to the attention of the Senate Committee on Judiciary. Currently making the news is the corruption and fraud being brought to light with the ongoing FBI investigation. The amount of money involved in the NRS 40 process brings the worst out in people. Nevada Revised Statute 40 is not about defects but rather a few making money off the backs of Nevadans. Defects rarely get repaired as they truly are not defects. I am not saying every building in Nevada is built correctly. If the construction defect case is legitimate, why is it necessary to name every subcontractor who stepped foot on the site? This process of NRS 40 has not worked since being instituted in 1995. Since 1999, I have been attending the Legislature every session in an attempt to fix the process. Much hard work has gone into NRS 40 by the legislative body. It is a shame that a homeowner with a real issue only has to call the State Contractors' Board and issue a complaint against the general contractor or subcontractor. The State Contractors' Board warrants a free investigation of the issue at hand and makes a ruling as to whether there is an acceptable construction standard. If there is no acceptable standard, the contractor is made to repair in the 30-day time frame. Should the contractor fail to repair, he or she must go before the Contractors' Board and pay all administrative fees and costs plus run the chance of losing one's license. The system worked prior to the 1995 Session. It still works today when utilized.

I have enclosed the forms and instructions from the State Contractors' Board Website along with its mission and function statement. I would like you to review the e-briefs illustrating what the Contractors' Board does to both licensed and unlicensed contractors in Nevada. The Board has the ability to get the job done. If additional funding is required, the cost can easily be passed onto the licensed contractors in the State. This would be more appealing than

involvement in a lawsuit or NRS 40 notice with no way to get out except by using insurance dollars and losing a lifelong customer. Business is built on happy customers.

I have two DVDs from Channel 3 News in Las Vegas I would like you to watch. Two homeowners were brought into a construction defect suit by a so-called expert who knocked on their door and coerced the homeowners into the NRS 40 process by telling them homes in their neighborhood had many defective problems as a result of bad workmanship. One of the ladies in the video said when she got out of the NRS 40 process, the builder immediately repaired the real problems in her home. That is what this is about.

I have also brought you a copy of the Nevada Real Estate Sales Agreement and Disclosure. On pages 2 and 4, homeowners must disclose a NRS 40 issue on their home. The Construction Defect Disclosure and Waiver is bringing down the values in an already depressed home market. I brought you a packet of information from the State Contractors' Board: their mission and function statements, e-briefs showing disciplinary action, its Ten Most Wanted list in northern and southern Nevada, steps on filing a complaint with the Board, the consumer process, the investigation process, steps on how to get issues resolved and the Residential Recovery Fund. Let me read the mission statement:

> The Nevada State Contractors Board is committed to promote integrity and professionalism in the construction industry in Nevada. The Nevada State Contractors Board has the responsibility to promote quality construction by Nevada licensed contractors through a regulatory licensing system designed to protect the health, welfare and safety of the public.

If this is what our State government already does, why do we need trial attorneys and expert witnesses knocking on homeowners' doors when we have the ability and a vehicle in place? I brought you additional media releases in light of the corruption cases going on right now. I was given a packet by one of my subcontractor members, Avanti Door Group, Inc. This is a new lawsuit they received in December. Like Sierra Air Conditioning, Avanti Door Group goes to every destructive testing or mediation hearing. At one particular site, 4 of the 12 homes were bank-owned properties. As many foreclosures as there are on the market, the banks do not know what is going on. You can see by the photos given to me, they are claiming door locks do not work; yet, the upper door lock is a brass dead bolt and the bottom is bronze. You can see the outline

where the original door assembly was taken off and replaced with this brass and bronze lockset. I have another letter from a law firm in Las Vegas where an electrical contractor was involved in a case called Mountainside Manor. The total cost of repair he was blamed for by the plaintiff's attorney was $48.05. His insurance company paid $43,428.58 for legal fees and costs.

CHAIR CARE:
How many times has Sierra Air been named as a party in construction defect litigation?

MR. WILSON:
Since 1997-1998, I have been named a party in a case 250 times.

CHAIR CARE:
How many of those cases have actually proceeded all the way through trial?

MR. WILSON:
I have had no cases go to trial.

CHAIR CARE:
Was Sierra Air able to resolve or find a way to get out of litigation prior to being involved in any sort of discovery?

MR. WILSON:
Yes, we always attend the inspection. At that time, if allowed, we make the repair. We do not get a release. When these individual homes get brought to the final, I am brought in with my insurance company and asked for a settlement anywhere between $500 and $2,500 per home, after I have made what they think is a repair.

CHAIR CARE:
When Sierra Air is named as a party in a lawsuit, what are the allegations against your company?

MR. WILSON:
It is the Armaflex, the insulation on the refrigerant lines outside, that the sun deteriorates. Many companies do not use UV-rated Armaflex. If the inspector would know his/her business, he/she would flip the Armaflex back and see the UV label on the inside. The inspector wants me to paint it with a UV-rated

paint, which I do. I typically do not hear anything for a number of years until the settlement stage, the time to pay for attorney fees and expert cost. I am out of this situation for two years and then brought back in to pay my prorated share. This is the problem.

CHAIR CARE:
The rules of pleading are liberally construed in Nevada. It does not take a lot to file a lawsuit. I wonder if there is some way to come up with a requirement of specificity. If you have been defrauded, you have to plead fraud with specificity. If somebody owns a house, the owner should go through the house and identify specifically what is wrong as opposed to a blanket complaint.

MR. WILSON:
We have a group of attorneys canvassing Sun City Anthem, a subdivision by Pulte Homes for which I installed all the air-conditioning. Experts knock on the door and get the homeowners stirred up. Once they are in, it is hard for them to get out. The builder's hands are tied. Because of the change in S.B. No. 241 of the 72nd Session, the home builder was forced to put everyone on notice. If they were not, they were on the hook. The biggest issue right now is they can bring a NRS 40 notice, but when you get to the mediation table, they disclose all the rest of the defects they have identified in the meantime. Even if I made those repairs, I have the potential to be brought back in at the end of the day with something else found wrong. Despite all the hard work which has gone into NRS 40, I have not seen it work.

Once in awhile I get a case to the Contractors' Board, where you have a licensed expert from Nevada who has a standard he applies and decides whether a problem is a defect. If I did something wrong, let me fix it. Most of the time, either the contractor or subcontractor makes the repair. This is not taking away a person's right to sue. If the homeowner is not happy with the Contractors' Board today, they can still sue. Just give us subcontractors the opportunity to work through somebody who is not part of the money. The biggest problem is the money that can be made in construction defect litigation.

CHAIR CARE:
This idea has been kicked around in previous sessions. What I have been told is the Contractors' Board says it is not staffed and does not have the budget.

MR. WILSON:
You can go back to sworn testimony in the 2003 and 2005 Sessions; their industry was willing to pay. If the fees were $9 million, it would impact every licensed contractor in the State in the amount of $564. It seems a small price to pay as a contractor. You have the right to contract in Nevada, you are governed by a Board, and the homeowner has the right to get what they paid for and have their problems fixed. Being dragged into a lawsuit for three or four years and not getting the problems fixed is not helping our State. NRS 40 does not work. We have to go back to a simpler way.

During the 2001 Session, there was a problem with the swimming pool industry. Guys were coming into town, barely licensed, building pools and acting as a general pool contractor. They created an ombudsman through the Contractors' Board, and today, we have no issue with swimming pools. It worked.

CHAIR CARE:
I remember the bill well.

MR. WILSON:
I do not know who sponsored that bill, but it worked. We have that same mechanism that an industry is willing to fund to solve the homeowners' issues. The homeowners still have the right to sue if they feel the Contractors' Board did not do their job. It would take a load off the court system, which at some point in time, we all pay for as taxpayers.

SENATOR WASHINGTON:
In your earlier testimony you said you have three employees who are dedicated to dealing with only construction defects. Can you give me a figure of how much it costs annually for those three employees?

MR. WILSON:
The approximate cost would be $200,000 a year.

SENATOR WASHINGTON:
How many class action lawsuits have been filed against you?

MR. WILSON:
I do not get as many class action lawsuits as I had in the past because S.B. No. 241 of the 72nd Session and the court system changed some of their views. The issue is we still do not get a repair, and then we get dragged back into the case. If my company does something wrong, the homeowner deserves to have the problem fixed. Many subcontractors weigh their point. If one's insurance only covers the physical damage one's work product does to the occupancy, the contractor or subcontractor may have to make a business decision as to whether to repair. I choose to repair.

SENATOR WASHINGTON:
What does it cost you to deal with construction defect problems?

MR. WILSON:
I do not know for certain. It could possibly cost hundreds of thousands of dollars.

SENATOR WASHINGTON:
Would you say it is a third of your bottom line?

MR. WILSON:
It is at least a third of my bottom line today.

SENATOR PARKS:
You have a stack of 250 complaints. What portion of those complaints represents all the air-conditioning units you have installed since 2004?

MR. WILSON:
These complaints represent about 5 percent. The complaints come in waves. Wherever the canvassing works, we immediately show up and talk to the homeowner—if allowed—about the problems they are having with their heating, ventilating and air-conditioning (HVAC) system. Nine times out of ten, they do not even know they have a problem. For every house we install in Nevada, a State-licensed mechanical engineer drew and stamped that plan. We do not draw our own plans. We work to the plan, and 99 percent of the time, they work. I now have to put the cost of construction litigation into my bottom line for what it costs me to air-condition a home. Since everyone has to do this, what are we adding to the cost of a home?

CHAIR CARE:
Are you aware of any cases where you installed the HVAC and the homeowner later filed a suit for construction defect where you have not been named as a party?

MR. WILSON:
No. I am always named. The builder has no choice but to name me.

CHAIR CARE:
I do not mean the notice letter. Have you been brought into litigation as a party?

MR. WILSON:
All subcontractors are brought in as a party.

MR. WADHAMS:
The question you asked on specificity is important. I have one copy of a NRS 40 notice. Item J on the notice says the heating and air-conditioning units do not heat and cool properly or evenly. Item K states the repair attempt in the attic near the air handler has missing insulation on the refrigerant line. In the lawsuit subsequently filed, the reference of specificity was the HVAC systems do not adequately heat and cool. When the general contractor receives either of these notices, he has no idea of the specific problem; therefore, he must ask the HVAC subcontractor to evaluate and figure out the problem. I will have copies of this notice delivered to the Committee.

CRAIG A. MARQUIZ (General Counsel, Nevada Subcontractors Association):
I represent numerous subcontractors in southern Nevada, serving as general counsel and litigation manager. When looking at the magnitude of the problem you are forced to assess, understanding the process and various problems along the way will help you appreciate the daily livelihoods Mr. Wilson and other subcontractors are forced to incur. This process of construction defect litigation begins with a NRS 40 notice, a presuit process. Before claimants can bring a claim before the district courts, they are obligated to submit a NRS 40 notice. That particular notice and the specificity required is detailed by NRS 40.645. If you are dealing with an individual homeowner notice, a claimant is obligated to identify what is wrong, where it is wrong, the nature and extent and causes to the extent there known. This Committee has heard an example of a shotgun notice. Not every notice submitted qualifies as a shotgun notice, but the majority of them are shotgun notices. The flowcharts in the Legislative Briefing

Book presented by Mr. Wadhams, Exhibit D, walk you through this process. It is important to understand that once a claimant sends this letter of notice to the developer, the developer is statutorily obligated to pass that notice on under NRS 40.646. The statute requires a NRS 40 compliant notice be submitted to the subcontractors.

Several builders have challenged the NRS 40 notices. A case that went to the Nevada Supreme Court, *D.R. Horton v. Dist. Ct*., 123 Nev. Adv. Op. No. 45, 168 P.3d 731 (2007), ultimately decided the NRS 40 notices are presumptively valid. This means—despite what was required under NRS. 40.645—even though they are shotgun notices, they are valid. It is incumbent upon the builder, developer and subcontractors to go through the process and physically challenge the adequacy of that notice. There were several proceedings in southern Nevada doing exactly that. As a result, the case went to the Supreme Court with respect to a determination of a reasonable threshold test. The Court ultimately said there should be a testing when extrapolation is used for experts which is another form of notice that can occur—other than the individual homeowner notice that is permissible to use on behalf of the group of homes similarly situated—to use an expert who will write a detailed report identifying the specifics, the causes, the nature and extent known. When you are looking at those issues across a broad spectrum of homes, it is important this be done in some readily identifiable manner: testing by plan, by phase, by contractor or subcontractor modes.

After many years of cases in a holding pattern, the sufficiency of the notice is challenged, placing the burden on the district courts to proceed. Once that process begins, the developer sends a valid notice to the subcontractor. It is now the subcontractor's burden to perform an inspection and detail in writing their findings with respect to these shotgun notices. You heard Mr. Wilson testify he has three customer service representatives in his company devoted to the NRS 40 process. I respectfully submit to you that virtually every subcontractor and builder have their own departments and individuals staffed to do nothing else but work through this process.

Because the construction process has evolved over a period of years, subcontracting is generally done in phases where a builder or developer will issue a release whether for 20 homes, 40 homes or 50 homes. The subcontractors change, at times, on those various releases. When a builder sends notice, he or she is forced to send notice to every subcontractor who

worked on the project. Every generic problem identified triggers a corresponding obligation on the part of the developer to bring in all subcontractors. The subcontractors, many of whom may not have done work on the particular home, are obligated to participate in the inspection and present their records to confirm they did work on the house in question. In my practice, I have sent response letters to the builder and developers requesting the subcontractor client be removed and the tender of defense and indemnity that comes from the builder pursuant to the contract be removed. In most cases, the builder/developer cannot do that.

Addressing one of Senator Care's comments with respect to the release of getting a party out of litigation, when the claimant submits their list during the course of this mandatory mediation process of NRS 40, these so-called experts will present preliminary defect lists. Those lists are exactly that, a snapshot in a moment of time, identifying every imaginable defect. Many times, the list is neither detailed nor specified with photographs or documentary evidence. Sometimes, code references are used. Many times, the codes used are not the codes in effect at the time the particular unit was constructed. This forces the subcontractor to educate the experts on what codes and standards were used when the building was constructed. The costs associated with this process are enormous and not passed on through insurance. In most cases, these costs are absorbed by the individual subcontractor's business.

Looking at the magnitude of this problem, it is important to understand most subcontractors have commercial general liability policies of insurance. When a commercial general liability policy is in existence, which virtually every project requires, the subcontractor has a duty to cooperate with the insurance carrier. Many carriers hire insurance defense counsel to represent the subcontractor throughout this process. The insurance carrier controls the decision, and it becomes a risk assessment for the insurance carrier. As this process evolves, these large lists of defects are whittled down. The experts meet, refine and define what is actually wrong versus a cosmetic issue, versus a homeowner failure to maintain issue, or because this was constructed during the appropriate code in place when installed. It is not a deviation as defined under NRS 40. During the course of the mediation process, costs have incurred along the way.

MR. MARQUIZ:
There are some points where a homeowner claimant, through their counsel, will identify no problems with an air-conditioning HVAC subcontractor or a

landscaper. Sometimes, we are willing to allow an issue release in those cases. Unless it is settled on a global basis, where every subcontractor is at the table resolving every issue on their final defect list, everyone is still fair game. A subcontractor who exercises his or her right to repair or paint a cosmetic issue which is truly not a defect is still subject to being brought into litigation if it does not settle. The mediation privilege associated with NRS 40 essentially absolves everything that has occurred. The claimants are then free to file their lawsuit and proceed with their list of defects. Everything that happens in the NRS 40 process is mediation-protected. This means if any concessions or understandings were mutually agreed upon by experts who had meet-and-confer sessions, nothing is binding going forward because of the mediation privilege.

Additional topics come into play. One of those topics, dealing with the costs not only associated with the process itself, is the attorney fees and costs passed through. Under NRS 40, there is an entitlement. Although the statute is defined as limitations on actions, it is far from a limitation. Most of the claimant law firms that take on NRS 40 cases do so pursuant to a contingent fee agreement, ranging from 25 percent to 40 percent. In theory, the concept of a contingent fee is associated with no recovery; the individual homeowner is not obligated to pay a fee other than being responsible potentially for the cost associated with the suit. Under the confines of NRS 40, a fee is automatically awarded as part of the NRS 40 mediation process. Although the language is defined as discretionary, the net result is that costs associated with the repair, expert fees and attorney fees associated with claimant's counsel are put into a pool. This is sent over in a demand to the builder/developers. The builder/developers add on their associated costs of defense-related issues. The subcontractors then get specific issue demands related to their respective scopes of work, incorporating the attorney fees and costs.

There is no incentive to get a subcontractor out of litigation at the beginning. A subcontractor may no longer be in business because of poor workmanship, prior lawsuits or claims, and they do not have an extensive amount of insurance coverage remaining on their commercial general liability policies. By definition, this forces a redefining of the ability to pay, and whoever is left standing bears a larger share. It is then incumbent upon the insurance companies that have written these policies to make a determination. Do we want to be the only subcontractors left standing, when everyone else has settled, and we are the only chairs at trial? Every other issue brought up during the NRS 40 process is

no longer an issue, and they are bringing the entirety of this lawsuit based on the only one, two or three issues that remain.

One of the other magnifying problems, of which there are several cases currently before the Nevada Supreme Court, deals with the issue of who has the right to bring these particular claims. One of the other pieces of legislation that the Committee will deal with is NRS 116, the Uniform Common-Interest Ownership Act. It is important to highlight some of the carryovers because NRS 40 expressly incorporates NRS 116, in part, where it defines appurtenance in NRS 40.605. It defines common elements expressly as that of NRS 116.017. When you look at that particular group of statutes under NRS 116, one of the things you see and have seen over the years is a class action lawsuit process where a group of homeowner representatives or homeowners' association brings one suit on behalf of all homeowners similarly situated in their development. The Supreme Court case in *Shuette v. Beazer Homes Holdings Corporation***,** 121 Nev. 837, 124 P.3d 530 (2005) determined that residential construction was not appropriate for class action treatment unless it was truly a single-issue problem related to all homes. The net effect of that decision resulted because of case manageability issues. In NRS 40 notice proceedings where individual homeowner notices are all combined in one proceeding, the mandatory mediation process that takes place is done so with one mediator who has every single home in that development. It is not an individual homeowner-by-homeowner issue. It is the magnified problem of the entire development. This delays the process, magnifies the cost and impairs the ability of the homeowner to have their legitimate issues repaired.

Dealing with NRS 116 is an important prospect because several important definitions trigger the issue of what a claimant can be for purposes of NRS 40. Nevada Revised Statutes 116.093 and 116.095 clearly define an owner in a common-interest ownership community as the person who actually owns the residence itself as opposed to common areas that might be for the benefit of the community as a whole. When you look at that definition and the nature of these claims being advanced, many of those claims address the issue of trying to broadly define common interest. The suits pending before the Nevada Supreme Court deal with the issue of standing. Although the language is clear in the *Nevada Revised Statutes* regarding unit owner and what the scope of a particular unit includes, the boundaries are under NRS 116.2102. You have homeowners' associations exceeding their statutory rights, bringing claims under the pretense of NRS 40 matters for which they do not have a legal right.

Hopefully in the near future, the Supreme Court will resolve several of those cases and provide some guidance. As the law is litigated in practice, these statutes are at issue. No definitive bright-line rule has been espoused despite what the statutes say.

CHAIR CARE:
Have you given any thought to creating a forum where a subcontractor or any party, who believes they should not be involved in a lawsuit, forces the claimant to put on a case to demonstrate that the subcontractor does belong in the lawsuit?

MR. MARQUIZ:
Because the NRS 40 process is a presuit process, your availability of those alternatives of dispositive motions, motions for summary judgment or dismissal are not triggered because the rules of civil procedure have yet to trigger and precede that.

CHAIR CARE:
I understand. This is why I say something early on, aside from those dispositive motions.

MR. MARQUIZ:
Unfortunately, you have a mediator who is addressing the issues with respect to trying to manage this process. You have a claimant who is alleging all of these things are defective. They are having meetings of special masters or mediators, who are marshalling the parties through the process to identify what is wrong and then go through a process of mediation. In the event the parties are unsuccessful at the mediation process, then it triggers into litigation mode. No mechanism exists to allow a subcontractor who has been improperly brought into this NRS 40 process to challenge the exercise to remove himself out of litigation. It is based on the defect list. Unless a claimant removes that allegation from the defect list, the builder/developer in turn would indicate you no longer have to participate unless a final defect list comes out that brings you back into this process. There is no absolute out.

SENATOR PARKS:
Mr. Wadhams, can you provide the Subcommittee a list of those members of the Coalition for Fairness in Construction?

MR. WADHAMS:
I will get an itemized list for you.

SENATOR WASHINGTON:
Mr. Marquiz, in your closing statement, you said there is no process in place for the subcontractor to be removed from that list. Mr. Wilson indicated maybe the Contractors' Board can have a process to review the work completed, and if there are any remaining defects, give the subcontractors an opportunity to repair. Could there be a process in place where if the Contractors' Board reviews the alleged construction defect and finds no defect or a repairable defect, the subcontractors then have a certain amount of time to repair the defect, and with a satisfactory reinspection, the Board removes the subcontractor's name from the list? Would this process suffice?

MR. MARQUIZ:
I can address several of those implications. First of all, the process of the Contractors' Board is separate and distinct from NRS 40. In NRS 40, there is a provision where a claimant has the opportunity, if they choose, to avail themselves of the Contractors' Board for an advisory review and opinion, but it is not binding. The process itself would be better served by completely extricating NRS 40 and allowing the first step in any claim of a constructional defect: go to the people who have the responsibility in this State to assess and determine any deviations in construction codes and practice. The Contractors' Board is the most appropriate vehicle for that preliminary step. This would result in a quicker resolution for the homeowner to have their respective problems fixed because you are not dealing with a shotgun notice of everything claimed to be wrong. The Contractors' Board's representative/inspector will make an assessment and determination if there truly is anything wrong from a construction standpoint.

Because the definition of defect is so poorly drafted, many of these things are claimed as defects. A defect is defined as anything that potentially, in part, could deviate from the plans and specifications. I can tell you that in their installation methodologies, most subcontractors are doing above what is required by code. Thus their improved installation methodologies are actually defects. In these reports, items claimed for repair are improved methodologies which improve the homeowner's home. The Contractors' Board is a vehicle, and there is no cost or minimal cost associated to the homeowner to submit a claim. The Contractors' Board incurs that cost to investigate. The Board has the ability

to hold the subcontractors' feet and/or the builders' feet to the fire because their entitlement is the license they hold. A builder or subcontractor would receive marks against their license for not complying.

SENATOR WASHINGTON:
You indicated that codes for defects on a prelist may be changed. Is there a way to make sure those codes are verified and are in statute?

MR. MARQUIZ:
Most expert reports may not specify the code provisions. This brings up a larger topic with respect to experts. As it stands under NRS 40, there is no requirement for a claimant's expert to be licensed in the State of Nevada to provide testimony or their report. If there was a requirement mandating the experts be licensed contractors in Nevada through the Contractors' Board, they would then have some obligation to ensure the code sections they reference in their reports relate to the construction time period. Otherwise, you are forced to go through that process of disproving what actually is and is not.

BRUCE KING (Vice-President, Nevada Subcontractors Association):
I reside in Clark County. I am a member of the State Contractors' Board, but I am not speaking as a member of that Board and I do not speak on behalf of the Board. I would like to address three points brought up by members of this Committee. The question of specificity has been raised. In 2003, numerous meetings were held addressing specificity. Unless there is some language we were not able to provide, specificity was addressed.

The Contractors' Board is not staffed for construction defect. In 2007, the Nevada Subcontractors Association specifically had a bill trying to make the Contractors' Board a mandatory process in NRS 40. This is where the problem with staffing was raised. We are not asking for a mandatory Contractors' Board step in what we are trying to do this Session. The homeowner should have immediate access to the courts and/or if they choose, they should have immediate access to the Contractors' Board. We are not asking any of those be mandatory prior to the homeowner submitting a lawsuit. The Contractors' Board is the proper place for homeowners to take many of these issues to get them resolved. The Contractors' Board is capable of playing a role, but we are not asking for a mandatory process through the Contractors' Board prior to a lawsuit. This should be entirely up to the homeowner.

In 2003, over $600 million had been settled in construction defect litigation. I do not know how many billions of dollars are spent on construction litigation today. This has been a tremendous burden on the State of Nevada and its citizens since the start of the construction defect process.

SCOTT CANEPA (Nevada Justice Association):
Inasmuch as the majority of this morning's hearing has been devoted to those who seek to repeal or change the bill in manners detrimental to the rights of homeowners in the State of Nevada, we would ask for the right, at a later time, to rebut what we consider to be gross mischaracterizations of both the law and facts pertaining to this issue.

I offer for the Committee's consideration the fact that no complete and intellectually honest discussion of this process, regarding construction defects and the way by which those are resolved, is complete without a discussion of the contractual indemnity obligations that exist between general contractors and subcontractors. This is the single largest reason why subcontractors are brought into cases when they may not have had anything to do with defects alleged to exist by homeowners. After the last informational hearing, we gave the Committee examples of how other jurisdictions, specifically California, have dealt with Type 1 indemnity provisions which obligate a subcontractor to participate and defend in the matter even though their work may not have been implicated. I was surprised and equally disappointed today that no one from the industry mentioned the indemnity obligations and the effect they have on subcontractors brought into cases when there are no directly traceable defects to them.

We provided the Committee a skeletal proposal, advanced in 1999 and 2001, extricating subcontractors brought into lawsuits on account of a general contractor's overzealousness or the insurance defense lawyer on behalf of the contractor who names a lot of subcontractors because of these indemnity provisions. One proposal we offered was to have a good-faith finding entered by a judge, not only to extinguish the equitable claims for contribution in equitable indemnity but also to extinguish the contractual indemnity claims so contractors could walk free from the claim and be done with it once and for all. The industry's representatives, who spoke today, in particular Mr. Wadhams, know those proposals are out there. I was disappointed there was no discussion today concerning those proposals.

Although I disagree with most of what Mr. Wilson said, there is one thing in which we share common agreement: the fear and loathing we all feel when we turn on the nightly news and hear reports about the foreclosure crisis, when in fact, 92 percent of all Americans pay their mortgage on time. In response to a question by Senator Parks asking what percentage his 250 claims represent of the total amount of his business, Mr. Wilson's answer was 5 percent. The perfect should not be the enemy of the good.

The majority of residences built in the State of Nevada are delivered without defects to the ultimate users. We are talking about situations where contractors have been negligent or have delivered a defective residence to an unsuspecting consumer who would have no reason to know the home was defective unless it failed. As a matter of policy, the civil justice system should not be substituted with an executive branch of the government—in this case, the Contractors' Board. Neither should a minority of less fortunate people who bought a lemon house be saddled with the additional burden of filing a lawsuit when we have notice provisions in place.

CHAIR CARE:
Members of the public, this is all informational background. We will continue to take written suggestions or opposition to suggestions made. In a few weeks, our Subcommittee will meet again and begin working in public on any changes to NRS 40. There is nothing else to come before the Committee. The meeting is adjourned at 11:02 a.m.

RESPECTFULLY SUBMITTED:

_____
Janet Sherwood,
Committee Secretary

APPROVED BY:

_____
Senator Terry Care, Chair

DATE: _____