MINUTES OF THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
March 11, 2009

The Subcommittee of the Senate Committee on Judiciary was called to order by Chair Terry Care at 10:16 a.m. on Wednesday, March 11, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 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:

Robert C. Maddox, Nevada Justice Association
Frank Adorno
Ted Duzan
Art Hoage
Charles Litt, Nevada Justice Association
Gary Carr
James L. Wadhams, Coalition for Fairness in Construction
Craig Marquiz, Nevada Subcontractors Association
Scott Canepa, Nevada Justice Association

CHAIR CARE:
The meeting will come to order. Since there is no legislation before us, there is no for or against, but we are soliciting comments. We have a deadline of

Monday to begin drafting anything the Subcommittee determines it wants to have drafted.

There is a handout by the Nevada Justice Association (NJA) called "NRS CHAPTER 40 WORKS, Executive Summary & White Paper" (Exhibit C). Let me start with the representatives from the NJA who want to make a presentation.

ROBERT C. MADDOX (Nevada Justice Association):
With me at the table are homeowners Frank Adorno and Ted Duzan, and behind me is another homeowner, Art Hoage. We first came before you on Nevada Revised Statute (NRS) 40 on February 3. At that time, Scott Canepa gave you a brief summary of the history of NRS 40. You heard from three homeowners: Ralph Walker, Carl Kunz and Dave Bavol. Following our presentation that day, you heard from a series of representatives from the home building industry. Two weeks ago, you heard from a number of other representatives from the home building industry, and you received a paper from the Coalition for Fairness in Construction.

We do not have enough time to rebut everything that was presented. You heard a great deal of hyperbole and half-truths. We have come here today with a paper, Exhibit C, prepared by Charles Litt of the law firm of Feinberg Grant Mayfield Kaneda & Litt LLP in Las Vegas. Charles is in Las Vegas right now. Before your Subcommittee considers any changes to NRS 40, I urge you to read this paper. It is clear, concise, well written and to the point. Before you consider any changes, I urge you to consider the histories and stories of the people and homeowners who have gone through the NRS 40 process. People have made the biggest investment in their entire lives, buying what they think is their dream home, only to find out their dream home is not performing in the way it should.

Nevada Revised Statute 40 was first enacted in 1995 to assist in the process to help homeowners get through the construction defect process. At that time, it was deemed by the home building industry to be a great benefit. The passage of Senate Bill No. 395 of the 68th Session was a result of efforts made by trial lawyers, home builders, governmental entities and legislators all coming together.

This Committee approved that bill unanimously. The Senate and Assembly approved it unanimously. It was touted as a wonderful bill, done in the great spirit of compromise with benefits for everybody. It was going to help homeowners get through this process of construction defects as efficiently as possible.

In subsequent sessions, there have been some amendments agreed to by the home building industry. In 2003, the home building industry proposed the right to repair. All along, the industry has always been involved in this process, consenting to and approving every measure passed by the Legislature. Now, to have the industry tell you to junk NRS 40 is wrong. It is important for you to hear from the homeowners.

FRANK ADORNO:
I am a homeowner in the Caserro Ranch subdivision of Wingfield Springs by D.R. Horton. I will read my prepared testimony (Exhibit D). The builder has destroyed our faith in ever owning another new home.

CHAIR CARE:
Are you in litigation right now?

MR. ADORNO:
We are in the process of NRS 40 right now.

CHAIR CARE:
There has been no lawsuit filed. Is that correct?

MR. ADORNO:
That is correct.

CHAIR CARE:
You said initial communications were between you and D.R. Horton directly. Is that correct?

MR. ADORNO:
Correct.

CHAIR CARE:
How long ago was that?

MR. ADORNO:
January 2008. They did nothing except make promises until October 2008, when I hired Robert Maddox and Associates to represent me to have my defective home repaired. D.R. Horton will not address the real issue of the problem. They want to put Band-Aids on it and hope I go away.

CHAIR CARE:
You have talked about the settling issue, the patio pulling away and five doors. Are there other issues that you have not mentioned?

MR. ADORNO:
Yes.

CHAIR CARE:
What are those?

MR. ADORNO:
I have major cracks in my concrete where I can insert my whole hand down to the dirt. There are tiles cracked all over my house. My granite countertops have shifted to where they are not straight anymore. I have cabinets that have gaps. The whole house has continually shifted. There have been hydrometer readings done on these homes where there is over two inches difference between the front and the back of the house. It seems like the house is cracking in two. D.R. Horton is aware of this problem, but they do not want to address the real problem. They just want to put plaster on the cracks; they do not want to fix it the right way. This is very troublesome to my wife and me. We thought we bought our dream home when in fact we bought a nightmare.

CHAIR CARE:
If you were in a deposition, I would ask you if you were aware of any other problems. Before you answer that question, you may want to talk to Mr. Maddox.

MR. MADDOX:
I do not have any problem with you asking that question.

MR. ADORNO:
There should be more laws to protect the homeowners from builders.

CHAIR CARE:
If this were a deposition, I would repeat the question, but that is all right.

MR. ADORNO:
Yes, there are other problems.

CHAIR CARE:
What are those?

MR. ADORNO:
The house is falling apart.

MR. MADDOX:
Next is Ted Duzan.

TED DUZAN:
I will read my prepared statement (Exhibit E).

MR. MADDOX:
I will have a brief comment after Art Hoage's testimony.

ART HOAGE:
I will read my prepared testimony (Exhibit F).

CHAIR CARE:
Was there a lawsuit filed regarding your house?

MR. HOAGE:
There was.

CHAIR CARE:
Do you remember who was named other than the builder?

MR. MADDOX:
The homeowners only sued the builder. The builder then sued just about everybody who came into contact with the project. In northern Nevada, we have retired District Judge Michael Fondi of Carson City, acting as special master handling most of the cases. As a special master, Judge Fondi tries to get the players who do not belong out of the case and get the small players who

might have minimal responsibility settled out quickly. This is one of your concerns.

We have proposed an amendment (Exhibit G) to the good faith settlement statute, NRS 17.245, subsection 1, paragraph (b), which does not allow the plaintiffs to make a settlement with third-party defendants if there is a contractual indemnity provision. We propose you consider that change. Nevada Revised Statute 40.680, subsection 6, addresses the appointment of special masters. A change you might consider would add to the responsibilities of the special master to reflect what Judge Fondi does in northern Nevada: dealing quickly to resolve the claims against parties who might not have any significant responsibility. The countertop maker gets brought in because the countertop is splitting. The countertop is splitting because the house is built on poorly compacted soil. That party should find a way out of the case quickly. We have made suggestions we think would be helpful.

CHAIR CARE:
Let us go to Las Vegas.

CHARLES LITT (Nevada Justice Association):
I am an attorney representing homeowners. Nevada Revised Statute 40 is a process from a definition of construction defect as recommended and adopted from the Construction Liability Insurance Task Force in 2003 in an absolute right of contractors to make repairs to a process to resolve claims before litigation. It is along those lines that our next witness, Gary Carr, will be offering testimony.

GARY CARR:
I am the President of Garden Terrace Homeowners' Association. Garden Terrace is a 186-unit condominium project located in the Summerlin area of Las Vegas. I worked as an insurance adjuster for Reliance Insurance Company, adjusting construction defect claims in California for approximately 20 years. I retired to Las Vegas in 2003 and became President of the Association in early 2007.

Prior to September 2007, the Association was required to conduct a reserve study. During that study, an inspection was done on the property. The inspector found various construction defects, including but not limited to roofing, stucco and window defects. The Association retained counsel thereafter. In September 2007, our Association gave an NRS 40 notice to our developer, Westmark Homes. The developer and subcontractors who built Garden Terrace

declined to perform repairs. However, the NRS 40 statute required the insurance company for the developer to step into the case before a lawsuit was filed. The NRS 40 statute also required the developer and the Association to participate in mediation before a lawsuit was filed. Approximately one year after sending the initial NRS 40 notice, through mediation, our Association reached a financial settlement with the developer's insurance company without filing a lawsuit. As a result of the NRS 40 statute, our Association is undertaking the needed repairs.

MR. LITT:
I would like to make one additional statement and offer testimony on the issue of subcontractor involvement and participation in the NRS 40 process. Nevada Revised Statute 40.640 states a developer is responsible for the construction work of the subcontractors. This statute is a codification of the common law principle of respondeat superior. Consequently, in most cases, the NRS 40 notice is sent by a homeowner directly and solely to their developer. It is within the discretion of the developer alone to determine which subcontractors should be placed on notice of the construction defect claims. Nevada Revised Statute 40.646 states if a developer does not provide notice to a subcontractor of the claim within 30 days of receipt, the developer cannot commence an action against the subcontractor without a showing of good cause. Subcontractors often argue that late notice of a claim constitutes a legal defense to liability. This provision of NRS 40 often causes developers to place more subcontractors on notice of an NRS 40 claim than are responsible.

In order to preserve their right to make a claim against the subcontractor at a later date, should the developer determine the subcontractors responsible for the construction defect claims? Nevada Revised Statute 40.646 could be amended to shift the burden to the subcontractors to demonstrate a developer was not acting in good faith when not initially naming the subcontractors within 30 days of receiving the NRS 40 notice. Shifting the burden of showing good cause to the subcontractors when challenging a late notice may keep subcontractors who do not belong out of the NRS 40 process. In the majority of cases, the involvement of subcontractors not responsible for construction defects ends in the NRS 40 process before litigation. However, in certain instances, developers will name subcontractors in a lawsuit where the facts and law do not merit their involvement in the case. In those instances, the subcontractors may petition the court by motion to be dismissed from that case.

In none of the foregoing examples is the homeowner responsible for a developer's decision to bring subcontractors into the NRS 40 process. Due to contractual terms between the developers and subcontractors, the homeowner has no ability to assist a subcontractor in getting out of the case.

In conclusion, the record should reflect that many of the warranted concerns expressed by subcontractors about being unfairly brought into and kept in the NRS 40 process are caused by factors outside the control of the homeowner and can be addressed through minor adjustments to existing statutory law.

SENATOR WASHINGTON:
Mr. Litt, can you give me an example of how this amendment would work, where the burden would actually be on a developer to prove the subcontractor was not involved in the construction defect?

MR. LITT:
The way the law reads now, if the developer does not place the subcontractor on notice within 30 days and later determines they do have some responsibility, it us up to the developer. The developer has a burden to show good cause to demonstrate in good faith they reasonably believe the subcontractor was not responsible. If they could not locate their documents or they simply made a mistake, the court could ultimately hold the developers barred from bringing the subcontractor into the case even if they end up having responsibility. If the subcontractor did not receive initial notice and a few months later the developer determined the subcontractor was responsible and sent the subcontractor a notice—instead of giving the subcontractor the opportunity to cause the developer good cause— the statute could be amended to shift the burden to the subcontractor. If the burden was changed, the subcontractor would have to show the developer acted in bad faith with some improper purpose by not putting him on notice. The result of this should be that developers will not put subcontractors on notice unless they are confident they have liability. The developers would then know that if by mistake they did not put a subcontractor on notice, they would have a later opportunity.

As the statute stands now, as Mr. Maddox referenced, developers generally use a shotgun approach and give notice to all subcontractors in a development for the purpose of preserving their rights to make claims against subcontractors. They are brought into the process and receive legal documents, notice and opportunities to inspect and conduct repairs. Their legal rights are being

affected. The burden should be shifted to minimize how many subcontractors are really involved in the process from the beginning.

CHAIR CARE:
Mr. Maddox, how would you like to proceed now?

MR. MADDOX:
That completes our presentation.

CHAIR CARE:
You have made two suggestions. The first is a proposed statutory change regarding good faith settlement between the homeowner and a third-party defendant and subcontractor. I ask that you quickly submit any proposed language to our staff because we have a Monday deadline to begin drafting.

Your second suggestion regarded the scope of the master, using Judge Fondi as an example. Do you have statutory language for this suggestion?

MR. MADDOX:
I did make that suggestion, and I am happy to present some language.

CHAIR CARE:
On the issue of some recent statutory changes in California regarding indemnification changes between subcontractors and builders, I have the materials, Exhibit G. Do we need to make some changes under NRS 40 regarding that issue, or should we leave it alone?

MR. MADDOX:
The California provision outlawed, as against public policy, an indemnification provision saying a subcontractor is going to be liable even though the subcontractor did not do anything negligently and even though the sole negligence was on the part of the builder. This California provision seems fair. We do not see that this would be a problem to be adopted in Nevada.

CHAIR CARE:
Then you have had a chance to review the suggested change regarding NRS 17.245, subsection 1, paragraph (b) from Victoria Coolbaugh, Exhibit G.

MR. MADDOX:
I drafted that.

JAMES L. WADHAMS (Coalition for Fairness in Construction):
I do owe Senator Parks an answer, and I am going to put it on the record since I was negligent in getting it in writing. The Coalition for Fairness in Construction consists of Associated General Contractors South Chapter, Southern Nevada Homebuilders Association, Nevada Subcontractors Association, Builders Association of Northern Nevada, Builders Association of Western Nevada and Nevada Chapter of Associated General Contractors. The combined membership of these various organizations is in excess of 2,000 members. This same group has been supporting the Coalition's efforts for the last several sessions.

I would note as an observation of these discussions that most of the solutions proposed by the plaintiffs' attorney deal with litigation. This is precisely the area where this should be, in litigation. The homeowners have said they are grateful for their lawyers having achieved repairs on their houses. This is what our recommendation is based upon. This has become a process where we end up with lawyers in court, not with contractors and homeowners doing these deals, but among the lawyers. The simplification of the process is to eliminate the six-month waiting period before we get to the inevitable filing of a lawsuit where the lawyers are in courts in front of judges.

This is not the first time an effort to make a system work better has failed. Other witnesses and I thought this would work, but it has not worked; it has cost a great deal of money and immense amounts of time. It continues to add to the frustration of homeowners who have problems with their houses and who have successfully, as these witnesses have attested, achieved some relief by resorting to attorneys. This is why our courts exist.

The amendment to repeal NRS 40.600 through NRS 40.695 is a very simple document (Exhibit H). I have taken the liberty of preparing it and will leave it with the Committee Secretary. If we were to leave this precursor to litigation in the interest of making sure there is clarity of the problem, we develop a narrowing of the language of construction defects (Exhibit I). This could reduce the shotgun pleadings which necessitate bringing in a wide range of subcontractors to those elements of construction represented by the testimony of the prior homeowner witnesses.

The membership of the Coalition consists of general contractors and subcontractors. We have no interest in attempting to further divide this industry among itself and create collateral litigation. This is simply about the construction of residences and the repair. As the witnesses testified, once they gain access to legal counsel and access to the courts, this is when the action begins. We strongly recommend the Committee not consider tinkering with any of the relationships between general contractors and subcontractors but focus on providing the homeowners direct access to the courts in those situations where the builders will not respond. We are not going to support and suggest that the actions represented by any builder were being nonresponsive or appropriate. That is why our courts exist, to bring them to heel. We suggest the Committee entertain a simple relief for the homeowners. Letting them have direct access to the courts without delay is the appropriate solution.

CHAIR CARE:
This may be a question for Craig Marquiz. We did not go into detail of how Judge Fondi acting as a master in these cases works. Mr. Maddox is going to propose some statutory change that would codify what Judge Fondi does right now. I do not know if that is done on a handshake, but are you familiar with this process?

CRAIG MARQUIZ (Nevada Subcontractors Association):
With respect to that process, special masters routinely are appointed in large-scale construction defect litigation cases. The purpose of the special master is to marshal the parties through the process of inspections if they are going to perform any destructive testing. The special masters make sure the expert reports are submitted timely and assist in the parties separately getting ready for the mediation process which is mandatory.

As I testified previously, this is a process. What is important to understand, in light of the comments you heard from Mr. Litt, if the burden is shifted onto subcontractors, we have completely validated the shotgun notice which starts this process. This forces the subcontractors themselves to go look for the needle in the haystack and disprove they were properly brought before them in this proceeding. In litigation, there is a process called burden of proof. A party who is bringing a claim has the burden to prove they legitimately have the claims and they meet all the requisite elements for what it is they are claiming. Nevada Revised Statute 40.645 statutorily sets forth the detail: what is wrong, where it is wrong, the nature and extent, and the causes known. The burden is

put onto the claimants making these allegations of construction defect. It is a preliminary notice refined throughout this process. We cannot shift the burden onto subcontractors because it improperly places the focus. It should start at the very beginning, and only legitimate issues should be advanced. I reiterate the process of the State Contractors' Board, an independent industry from our government tasked with individuals who make these inspections and determine whether something is legitimate, drawing into the difference between legitimate issues versus those that are cosmetic.

I am not here to testify that there are no legitimate construction defects but to suggest putting unbiased people in this process who can make that determination and have a license held in advance in the event the developer or the subcontractor do not step up to the plate to make it right. This clearly is the way this should go.

CHAIR CARE:
That was in response to a question.

SCOTT CANEPA (Nevada Justice Association):
Bothersome are the comments, with due respect to Mr. Wadhams, who said it is all about the courts and lawyers. The testimony today said that many of the claims are getting resolved before litigation. It should be the objective of the courts to encourage parties to settle before a lawsuit becomes necessary and we burden the courts with additional claims. The idea that we should now abandon NRS 40 and force all homeowners to hire lawyers and become part of the court system is contrary to everything the court system stands for and everything the Judicial Branch has done in trying to stop the fomentation of litigation. Offering a definition of construction defect, and I have not seen Mr. Wadhams' definition, is not the answer. People should have recourse to have their homes fixed prior to litigation. There is no fundamental reason why we should part from that precept. The elephant in the room is this: doing away with NRS 40 also does away with the vast majority of the legal rights homeowners will have against faulty construction. Mr. Wadhams and the industry have not addressed this, and they need to do so.

What is going to happen to a homeowner's right to bring a negligence claim if NRS 40 is repealed? It is gone. What happens to the homeowner's rights to be made whole, to be reimbursed for reasonable attorney fees and reasonable expert fees? They are gone. What they are asking you to do is commit the

homeowners to the legal system and simultaneously take away their right to be reimbursed for their legal fees. It is the modern-day equivalent of let them eat cake. I appreciate the effort saying there is now solidarity amongst the industry representatives. The whole basis of Darren Wilson's testimony in the February 3 Committee meeting and the other subcontractors' testimonies was subcontractors being unfairly named in these cases and having no way out. We have offered legitimate solutions to end that problem. We stand on that and are available to give you honest, truthful answers about what effect repealing NRS 40 will mean to people in the State of Nevada. It is not good.

CHAIR CARE:
We began on February 3 with testimony stating no changes to NRS 40 were needed. We now have testimony to do away with NRS 40 altogether.

Committee members, you received suggested statutory changes from Jack Juan of Marquis & Aurbach (Exhibit J, original is on file in the Research Library). We have materials from Mr. Maddox and we are going to get some additional written material submitted from Mr. Maddox. Members of the Committee, do not be surprised if I call a meeting at the bar during floor tomorrow so we can determine what instructions we want to give the Legal Division for purposes of beginning a draft. As soon as you get the materials, I implore you to go through those items. We can give instructions of the basis of concept, but it works better if we have something in writing.

CHAIR CARE:
There is no further business for the Subcommittee of the Senate Committee on Judiciary. The meeting will adjourn at 11:02 a.m.

RESPECTFULLY SUBMITTED:

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Janet Sherwood,
Committee Secretary

APPROVED BY:

_____
Senator Terry Care, Chair

DATE:_____