MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 9, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:27 a.m. on Thursday, April 9, 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.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Janet Sherwood, Committee Secretary

OTHERS PRESENT:

James L. Wadhams, Coalition for Fairness in Construction
Craig A. Marquiz, General Counsel, Nevada Subcontractors Association
Charles M. Litt, Attorney at Law, Homeowners
Richard Peel, Peel Brimley

CHAIR CARE:
The meeting will come to order. We have had 68 Senate bills referred to this Committee, and we have heard testimony on 64. We took action on 57. There was no action on seven, two of which were withdrawn. We have had ten Assembly measures referred, and we have six to be heard.

This is a work session on Senate Bill (S.B.) 337 and S.B. 349. You have your work session document (Exhibit C).

SENATE BILL 337: Revises the statutes of repose relating to certain actions concerning construction defects. (BDR 2-1149)

SENATE BILL 349: Makes various changes relating to constructional defects. (BDR 3-1151)

I want to begin with S.B. 349. The best approach is to walk through this bill and gather the thoughts of the Committee. The first section of the bill redefines the definition of constructional defects. It does not change the words but takes some of the criteria for a cause of action and reads them conjunctively. The second section of the bill deletes the award of attorney fees. It would adopt the American rule. The third section addresses the notion of a declaration or affidavit from the homeowner stating that he or she understands that by filing suit under *Nevada Revised Statutes* (NRS), disclosure will have to be made that the residence was the subject of a NRS 40 lawsuit if the homeowner attempts to sell or convey the property.

Nobody would dispute the stand-alone line in section 1 that reads, "an unreasonable risk of injury to a person or property," is a cause of action for a construction defect. Does anybody disagree with or have an issue with that? Let us go to the remaining provisions of section 1, subsections 1, 2 and 3. Under the bill, none of these sections standing alone would be a cause of action under NRS 40. Subsection 1 reads, "Which is done in violation of law, including, without limitation, in violation of local codes or ordinances." That can be the basis for an NRS 40 action. If we were to do this, what is the remaining remedy for a homeowner if he or she detects a home is constructed in violation of the law to include a violation of a local code or ordinance? If he cannot sue under NRS 40, what could he do, Bradley Wilkinson?

BRADLEY A. WILKINSON, Chief Deputy Legislative Counsel
As the testimony on the bill indicated, the homeowner could file a complaint with the State Contractors' Board or any kind of contractual remedy existing under the contract for breach of contract or warranty.

CHAIR CARE:
Previous testimony stated there is a four-year period of limitations for filing a complaint with the State Contractors' Board under NRS 624.

MR. WILKINSON:
I would have to check into that.

CHAIR CARE:
There is a definition of substandard workmanship in that chapter. Subsection 1 of section 1 reads substandard workmanship as including, "violation of law, including, without limitation, in violation of local codes or ordinances." The applicable statute under NRS 624 specifically mentions violation of building codes. If I understand what you are saying, Mr. Wilkinson, if we were to do this under subsection 1, the homeowner would still have a remedy to go to the Contractors' Board and file the complaint within four years after learning of the work that is in violation of the law or ordinance. Any contractual remedy would depend on the purchase agreement.

Section 1, subsection 3 reads, "Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping." Mr. Wilkinson, if standing alone, what would be the homeowner's remedy in this section? Would it also be the State Contractors' Board?

MR. WILKINSON:
I believe that would be the case.

CHAIR CARE:
If you file a complaint with the Contractors' Board within four years, what is the authority that the Contractors' Board has vis-a-vis the home? What can the Contractors' Board order?

MR. WILKINSON:
The Contractors' Board can threaten discipline against the contractor and threaten revocation of a license if action is not taken to remedy whatever problem exists.

CHAIR CARE:
Section 1, subsection 2 reads, “Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed.” If you read these conjunctively they say that if work done in violation of ordinance was not completed in a good workmanlike manner and proximately caused physical damage, then you would have a cause of action under the bill. Is that clear to all the members of the Committee? I went from subsection 1 to subsection 3 and then back to subsection 2. We are saying that you can go to the Contractors' Board under subsection 1 or 3. If you read these with subsection 2, where physical damage is caused, now you would have a basis for an NRS 40 action.

SENATOR COPENING:
There are a few things I want to bring to the Committee’s attention for consideration. Section 1, subsection 1 talks about violation of local codes or ordinances. We heard in testimony that builders may exceed the code and have been taken into lawsuits for doing a better job. We need to have an amendment stating a job is not considered a defect if it exceeds code.

I have issue with lumping all three subsections together. We all have heard of the Kitec piping situation. Subsection 2 applies to Kitec. There is no reasonable risk of injury because everything was done according to code and in a good-will fashion. The product failed, and it has become a $90 million problem. When these piping fixtures started to fail, the company did not want to fix the problem, which is why many people have become involved in class action lawsuits. We may need to have a stipulation to addressing these folks. Otherwise, according to this, they would not have any recourse in a situation like Kitec.

CHAIR CARE:
Senator Copening, forgetting the issue of violation of the code or good and workmanlike manner, are you asking what happens if there is physical damage to the residence but no unreasonable risk of injury to the person or the property?

SENATOR COPENING:
Yes, I am. It has been shown that these homes having failed Kitec piping have expensive fixes. If all three of these criteria are lumped together, I am not certain those affected by Kitec would have the appropriate recourse.

SENATOR WASHINGTON:
If I understand my colleague correctly, this would be a product defect. Mr. Wilkinson, would product defects be covered in another section and statute other than NRS 40?

CHAIR CARE:
I think case law states a constructional defect is what you just described, Senator Washington.

MR. WILKINSON:
I would have to look that up.

CHAIR CARE:
The language in section 1 reads, "... which presents an unreasonable risk of injury to a person or property or ... ." To me, unreasonable risk implies no damage or discernible damage yet, but there is the risk of damage. Senator Copening is talking about physical damage in subsection 2. Would you like to address these concerns, James Wadhams?

JAMES L. WADHAMS (Coalition for Fairness in Construction):
Kitec plumbing was originally brought as a products-liability case completely outside and independent of NRS 40. Another action was initiated with a notice, and the two crisscrossed in the courts. The products-liability case started independently as a class action, and that one has been resolved.

The intention of subsection 1 is to limit those elements of damage that go through NRS 40. This is the prelitigation process. Anything else, as Committee Counsel identified, would be under contract. There is a six-year statute of limitations on breach of contract. If your house contract says you build to code, the remedy is in a breach of contract suit. You have six years to bring that directly to the courts. While one remedy is to go to the State Contractors' Board, I urge the Committee not to forget there is a direct remedy of going to court. Something not covered by the proposed definition here, such as simple code violations, would be a breach of contract.

The intent of this amendment was to focus on the more serious elements of damage that could be identified. This would eliminate the shotgun approach, from paint on the doorknob, other punch list items or even the slight setback on the electrical outlet. Let us deal with the breach in the roof or the flooding in the

floors. The other remedies are going to court, but there is a six-year statute of limitations.

Kitec plumbing, as Senator Copening correctly identified, posed an unreasonable risk because the piping was deteriorating and causing damage. It started as a class action lawsuit independently of NRS 40. Multiple remedies exist under current case law.

CHAIR CARE:
I am not familiar with the case, but as I understand your testimony, one action came under NRS 40 and the second action was a products-liability case concerning the plumbing.

MR. WADHAMS:
Yes, Senator.

CHAIR CARE:
Let me go to section 2, which is the adoption of the so-called American rule. Subsection 1 of section 2 reads, "... the following damages to the extent proximately caused by a constructional defect." If the case proceeds all the way through trial, is there an argument to be made—that in that case, attorney fees or damages to the extent proximately caused by a constructional defect—as opposed to a case that settles? I need somebody to walk me through the process where there is an award of attorney fees. Apparently, upon motion to the court, the court has to approve. I am looking at subsection 2 of section 2 which has been stricken under this statute. What provisions are there for an award of attorney fees where a case is settled under NRS 40? Normally, when you get into litigation and the parties settle, one party writes a check to the other and it is not broken down. Apparently, it is done differently under NRS 40. Can somebody straighten us out on that? I am not talking about postjudgment; I am talking about up until that point.

MR. WADHAMS:
I can answer that question. I draw the Committee's attention to the sequence in the existing law. Section 2, subsection 1 reads, " ... may recover only the following damages to the extent proximately caused by a constructional defect: (a) Any reasonable attorney's fees, (b) The reasonable cost of [any] repairs ... and (c) The reduction in market value ... ." In part, the problem is attributable to the way this language is written. If I have a constructional defect identified or

alleged, part of the damage is not just the fixing of that broken part or the damage the defect has caused, it immediately commences the accrual of any attorney fees from the engagement. To partly answer your question, if the language said attorney fees may be awarded reasonably in the discretion of the court, that is a different issue than making the attorney fees an element of the damage. To use the question that Senator Copening raised as an example, assume that a corrosive pipe has a pinhole and has started to leak. Damage is accruing. It is the same thing here. As soon as an attorney gains that client, damage is accruing immediately upon that engagement and becomes an element of the claim that has to be settled. It is not a postclaim evaluation if you are successful. It is an element of the damage that commences at the moment the attorney engages, irrespective of the outcome.

We offered a copy of a case that illustrated this point. At the end of the line, the damage found by the court to have occurred in this particular project was less than $100,000, but the damages attributable to the attorney fees were over $3 million. That matter is still coursing its way through the courts. It tends to illustrate the point I am making about the way this law is written. The attorney fees, as they begin to accrue from the point of engagement, are part of the damage caused by the construction defect, making it part of the settlement process as opposed to negotiating in a normal civil action. Craig Marquiz, a practicing lawyer in this area, might be more precise in an answer.

CRAIG A. MARQUIZ (General Counsel, Nevada Subcontractors Association):
With respect to the attorney fee provision and the mandatory settlement process that parties deal with in NRS 40, it is important to understand that this distinction becomes one of the negotiated process. By removing the guaranteed or mandatory attorney fee provision of NRS 40.655 in subsection 1, paragraph (a), you allow the parties to make a negotiated determination as to what amount of fees and costs should be part of a settlement should they go down that road and settle. This is to be distinguished from the process where you are dealing in an actual litigation or lawsuit where that becomes an issue for the court to resolve pursuant to a petition for attorney fees and costs.

This chapter deals with the presuit process itself. This is the ideal of going forward with claims hoping to resolve them short of litigation. You will recall from my prior testimony that when an NRS 40 notice addresses issues of everything under the sun in a shotgun notice, the claim gets whittled down as to the legitimacy of the issues. You might only have one or few true issues for

the parties to resolve. This guaranteed-fee provision of NRS 40 in the existing legislation allows the plaintiffs to recover every penny of attorney fees, costs and expenses incurred throughout the entirety of this presuit process, chasing all the illegitimate issues and the well-founded issues going forward. The removal will allow the parties to negotiate what truly was incurred in pursuing legitimate issues versus illegitimate ones. Should the NRS 40 process not result in a settlement with those fees and costs resolved, the matter goes onto a lawsuit. This would be the subject of a petition for reimbursement of attorney fees and costs. The court would chime in, making the determination of what was reasonable and what claims were advanced versus those actually successful in the prevailing parties' part, as well as and take into consideration other factors.

CHAIR CARE:
Charles Litt has not appeared before this Committee this Session. When we get to section 3 of the bill, I am going to discuss a conversation I had with Mr. Litt yesterday. As to section 2 and the award of attorney fees, presuit or not posttrial, we have settled the case. What does this language do? Tell us how current law operates, Mr. Litt.

CHARLES M. LITT (Attorney at Law, Homeowners):
Nevada Revised Statute 40 does not provide for automatic or guaranteed attorney fees. The introductory language of NRS 40.655 states a claimant would have to establish a construction defect. They have to establish a meritorious claim to be awarded fees. The concept that a case can go to trial, there would be an award to the homeowner and the court would award fees on construction defects defended or not included in the award, is not consistent with what Clark County has done. The claimant is only entitled to recover attorney fees if they establish a construction defect as defined under NRS 40.615. In the event the case is resolved by way of settlement, just as the statute is drafted, there is now occasion for the homeowner to recover money to make their repairs, recover their costs and fees. After attorney fees and costs are deducted, they have enough money to make the repairs. Under NRS 40.655, the homeowner is limited to their actual damages. Generally, it is the cost of making the repairs. If this statute was amended, there would be no mechanism for the homeowner to ever be made whole. The Senate would be putting the homeowners in a difficult position if you combine this with the obligation that they have to disclose, under statute, the nature of the claim, the issues, what repairs were done and what repairs were not done. They would be

obligated to disclose they brought a claim identifying these defects and that they won on these defects but were only able to fix part of them because the attorney fees were deducted from the award.

In the event the homeowner establishes a constructional defect under NRS 40.615, other mechanisms would cause the homeowner not to recover attorney fees. Nevada Revised Statute 40 provides if there is an unreasonable rejection of an offer of settlement within the context of NRS 40, the judge has the discretion to deny the award of attorney fees to end costs to the homeowner and can deduct the developer or contractor's attorney fees and costs from the ultimate award at the end of the case. Not only are attorney fees not guaranteed unless you establish a construction defect, if the other side can establish that the homeowner acted unreasonably in NRS 40, they may not get their attorney fees or costs at all.

The second mechanism for the denial of attorney fees is offers of judgment. Offers of judgment are a sum or offer made by a contractor during litigation. At the end of the day, if the homeowner elects to proceed to trial and not accept the offer of judgment and they do not get an award in excess of the offer of judgment, they do not recover their attorney fees and costs and are obligated to pay the attorney fees and costs of the contractor from their ultimate award. Not only are there no guaranteed attorney fees, there are mechanisms in the law to penalize homeowners who act unreasonably, cannot establish a construction defect or reject a settlement offer during the case that they end up not exceeding at time of trial. If the statute is amended in this way, there is no doubt that during settlement discussions, there would be no discussion regarding what the homeowner should net in terms of the repair costs and whether attorney fees should be paid in settlement discussion. The discussions would be limited to the costs to fix the home and their costs of litigation. That is all you will be entitled to in court, so we are not going to talk about awarding or agreeing to settle and pay attorney fees to the homeowner in addition to their costs of repair and costs of litigation.

The current law is fundamental to the original NRS 40 of 1995 which provides if there is a real construction defect and the contractor does not make a repair after having an opportunity to do so, the homeowner is entitled to recover their cost of repair. In order to do that, the fees and costs have to be in addition to the cost of repair. To address Chair Care's point, there is never a settlement and then an application to the court for award of fees and costs. A settlement is a

compromise by which it resolves all of the claimant's damages under NRS 40.655. There is never an instance of a settlement and someone goes to the court. This statute leaves the award of attorney fees and costs within the discretion of the trial judge. We think that is appropriate.

CHAIR CARE:
You were not present, but we did have testimony that when the motion or application for petition for attorney fees is submitted, the trial courts sign off on it as a matter of course. Case law does say under NRS 40 the court is supposed to examine certain factors, but the courts do not really engage in that exercise. You may want to comment on that.

MR. LITT:
Few trials have gone to verdict where the judge has had to make that decision. In the scheme of construction defect cases, there has been testimony from all sides that far more than 90 percent of all cases are resolved by way of settlement. For the cases that have gone to verdict, the judge has made the decision on the appropriate award of attorney fees. The award of attorney fees by the trial court has consistently been in relation to the award that the homeowner received in the case. This is how the judges are determining attorney fees in relation to the verdict the homeowner gets in the case. If the evidence presented the judge shows the homeowner could have done better without filing a lawsuit, they do not get their attorney fees.

Furthermore, if an offer is given to the homeowner before trial and they do not do better, they are not going to get their attorney fees either. If the homeowner acted reasonably in NRS 40, established a constructional defect as defined by law, prevailed in the case and did better than any offer of judgment extended, then in limited circumstances within the judge's discretion, the judge can award reasonable attorney fees. The awards of attorney fees on limited verdicts have been in relation to the verdict obtained by the homeowner when they meet those criteria.

CHAIR CARE:
When you get into settlement negotiations, there is discussion about a client's damages; that can be an elusive figure. People are sometimes driven to settlement for a number of reasons, not just to pinpoint the amount of damages. Coming up with a precise figure not always makes the client whole. When you get into settlement discussions, why is it that if we do not have a

rule here for attorney fees, you still cannot negotiate for a higher figure? It may be that the third-party defendants of the builder want out of the litigation, understand what is going on and are willing to settle for a little more to take care of the compensation for counsel?

MR. LITT:
The negotiations on behalf of homeowners are generally limited to discussions with the developer. Homeowners do not generally make claims against subcontractors. In terms of buying your peace, we have heard testimony from subcontractors about the difficult position they are in with their indemnity agreements. Small issues can put them in a position where they could be dragged into trial over a $5,000 repair; they would meet your criteria of just wanting to buy their peace. The negotiations between a homeowner and a developer are a bit different because they are focused on the most important construction defects, the cost to fix, attorney fees and additional costs. If the attorney fees are removed, that would be out of the settlement discussions because during those negotiations the developer would say what it is going to cost to fix. We are not going to talk about these because you have no hope of getting them under the law.

Cases in limited instances have not settled. If the case goes to trial—given an award for the homeowner who meets the limited criteria in establishing a construction defect and acting reasonably in NRS 40 and not doing worse than an offer of judgment given to them by a contractor during the case—and if they prevail, statutorily they would be precluded from being whole. By law, they can only be awarded their cost to repair and litigation costs. The award of the cost to fix the construction defects established in a court of law met the criteria under the law, given they would only be entitled to their costs, and the attorney fees would be deducted from that award. Statutorily, homeowners would never be made whole in cases that go to trial. In negotiations, those discussions about the net cost of making repairs to the homeowner should still be discussed.

CHAIR CARE:
Are there any thoughts on section 2 before we go to section 3?

SENATOR COPENING:
That was a lot for me to take in, and I am not sure I completely understand 100 percent of what Mr. Litt said. I wonder if Mr. Marquiz has anything to add.

MR. MARQUIZ:
I do have a few additional comments based on Mr. Litt's testimony. First of all, with respect to the rejection of an offer to repair and an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure, both of those considerations implicating what the trial court judge might do are again, post-NRS 40 process. When a lawsuit has actually been filed, the case proceeds through the normal course under Rule 68. A party has a right to make a formal offer to settle the case for a set amount which distinguishes between the amount of damages plus an additional amount to be awarded pursuant for attorney fees. If that offer is rejected and the plaintiff/claimant continues on with the lawsuit and a verdict is rendered where the offer amount ends up being greater than the actual award or verdict, provisions under Rule 68 provide the person who made the offer is entitled to reimbursement of fees, costs and expenses related to what they have expended from the date the offer was made going forward. This is a post-NRS 40 provision.

With respect to the rejection of a reasonable offer to repair by the builder/developer and its subcontractors in the confines of NRS 40 from the homeowner/claimant as not reasonable, after the case has been litigated, the court can make an assessment if the offer made in settlement for the repair was in fact reasonable. If that determination is made, then the court can address the issue of reimbursing the developer and/or the subcontractor certain fees and costs associated with the claimant or homeowner's denial of that offer.

Mr. Litt indicated with respect to the negotiation process that there would never be a discussion of attorney fees and costs. I respectfully submit that is completely wrong. Any party sitting at a table in negotiation must make a determination of risks versus benefits to be achieved. If they make a determination that the only thing driving this case now is attorney fees, the cost of repair or costs associated with that process is fixed. The parties make a reasonable determination as to what a jury might award with respect to those damages. That is within the realm of knowledge if parties can make reasonable assessments.

If the factor becomes the amount of attorney fees that would be awarded, keep in mind that they are all on contingent fees. The plaintiff's lawyers are seeking upwards of 40 percent of a contingent fee for all work done on the case. Whether they are finding legitimate versus illegitimate issues, that process requires a negotiation on the part of the homeowners' association as well as the

plaintiff's lawyers representing them. There should not be equity in fairness mandate, no recovery for attorney fees on issues not legitimately brought in the first place. If it is to be a true negotiation where all parties come to the table in good faith, then there should be those discussions. What legitimate issues are wrong with this home, which we can ultimately retain recovery for, that our expert supports with appropriate testimony or reports supported by code and prevailing market practice? We should not be penalized on the builder and subcontractor side of the fence for inefficiencies associated with the shotgun notice and illegitimate issues raised from the beginning of this matter.

Fees will be part of a discussion because by definition, they have to be. Any party sitting at the settlement table, whether it is the builder/developer with the initial demand from the plaintiff/homeowner or the subcontractors receiving pass-through demands from the builder/developer, incorporates the reasonable amount of attorney fees and costs in addition to the costs of repair. All of that will be taken into consideration because the deciding factor is what is going to buy peace for this particular case. If there is that mechanism of all parties coming to the process in good faith, that will occur during that process.

SENATOR WIENER:
We heard earlier about the recovery of $100,000 for the homeowner and a $3 million legal fee. You just testified to the 40-percent contingency fee. In that particular anecdote, that is 40 percent based on the recovery of $100,000, but the attorney fees were $3 million? When we do a listing in statute, it is in an order of the need to address. Are paragraphs (a) through (d) in section 2, subsection 1 the order in which recovery or compensation is rendered? Is this the order in which dollars are to be spent or considered to be spent?

MR. MARQUIZ:
Yes. Let me address your first comment with respect to the fee and cost issue. In the course of a trial, parties are incurring fees, costs and expenses. Because it is done by way of a motion or a petition to the court, it is for the court to determine what is reasonable. The court looks at the entirety of the case, from the beginning of the representation to the posttrial motion process, in determining what amount of fees and costs should be awarded. The fact that a jury has come in with a verdict and assessed the damage amount at $100,000 is separate and apart from that process of what the court must do to review and evaluate the fee petition. The court can take into consideration the amount

of attorney fees guaranteed by way of a contingent fee agreement and cap the expense at 40 percent of some amount.

If you look at a case proceeding over a five-year period in a typical hourly contract, time entries are made when an attorney, paralegal or someone from an individual office has performed a task. There is a certain dollar amount associated with these entries. The fee petitions require the courts to look at these entries and make a determination as to what is reasonable, furthering the claims that were recovered or not. In the context of a contingent fee process, I submit to you this issue will find its way to the Nevada Supreme Court. In addition to the attorney fees, Rule 68 offers of judgment were implicated. The court makes a determination as to what trumps what particular provision with Rule 68 offers of judgment coming into play. There are occasions with this process that the fee petitions supported and submitted to the court for consideration would exceed an amount, if you will, of 40 percent of the $100,000 in that case. It is for the court to decide what is reasonable and what is appropriate.

Addressing your second point of the order or listing, it is my understanding that the practice generally takes into consideration the reimbursement of attorney fees and costs first and then makes its submission of the damage amounts, awarding to the different components. To answer your question, yes, the attorney fees come off the top first, reimbursing them for the fees, costs and expenses with their representation of the plaintiff. From the amount left, there would be segregation for the specific items of damage.

SENATOR WIENER:
The 40-percent contingency fee, or whatever the arrangement between attorney and client, is not relevant in this conversation unless it is a huge sum of money. The attorney fees are the first thing to come off; what is left over belongs to the harmed party depending upon the sum of money.

MR. MARQUIZ:
The amount of money awarded is a dependent factor of what the homeowner/claimant would receive for the repair of the issue. The order of priority of most contingent fee agreements in practice reference the fees allocated first to reimburse the fees and costs and then to the homeowners for the elements of damage.

CHAIR CARE:
Are there any other questions for section 2?

SENATOR AMODEI:
With the way the statute reads now, you have a provision for attorney fees, cost to repair, and pain and suffering. Where are the damage elements?

MR. MARQUIZ:
With elements of damage, you typically see most claims brought forth for the cost of repair—interest, primarily prejudgment interest, is another issue. Ultimately, that recovery and considerable sums are awarded if the matter goes to trial.

Let me give you an overview to help explain the process. When the NRS 40 notice is first submitted, whether it is a complete, detailed notice compliance with NRS 40.645 or a shotgun notice, the process starts. The builder/developer receives a copy of that notice and is statutorily obligated under NRS 40.646 to send that notice to all subcontractors whose work might be implicated. Because the notices are generally shotgun form, the builder/developer places every subcontractor who walked on that job with notice. Everyone goes out and does their inspections. They write their reports, make the determination of what is legitimate and the parties sit down at a process for settlement. The initial defect lists that the plaintiffs submit are overencompassing and broad. As the NRS 40 process continues, those lists are whittled down. You have damage numbers that start off high, and they work their way down over time. The prejudgment interest, an element of damage that all claimants seek, is triggered from Day One as though the amount ultimately at issue was the liquidator's some certain amount.

Fast forward a year or two, and let us say you have determined the cost of repair is $1 million. The interpretation is we take $1 million back to the beginning of this process. One element of damage is prejudgment interest on $1 million from the date of the NRS 40 notice as opposed to some certain point in time where that $1 million is known. One large element of damage is prejudgment interest in addition to the cost of repair and the attorney fees. The statute has ruled out other forms—previously punitive damages, pain and suffering—as not appropriate for purposes of the statute under NRS 40. The three main elements of damage are the cost of repair, the prejudgment interest, as well as the attorney fees and costs which incorporate the expert costs.

CHAIR CARE:
Section 3 would require the homeowner to attach an affidavit to the complaint in a NRS 40 action stating that he has read and understands the provisions of this section. It means the homeowner understands that some day upon trying to sell or convey the house, disclosure will need to be made that the house was the subject of a NRS 40 action. We heard three objections in testimony. The first was this is not necessary because other provisions in the statute address this issue. Secondly, it might be intimidating for the homeowner to see some documents. The third objection is it requires disclosure of communications between the attorney and the client. Mr. Wilkinson, could there be a way to draft this where the homeowner says that he has read the disclosure requirements and not get into the issue of discussing this with the attorney?

MR. WILKINSON:
It could be drafted in a way so it focuses on the homeowner reading and being aware of the provisions rather than the attorney explaining the provisions.

CHAIR CARE:
There are times in certain kinds of actions where the plaintiff has read the complaint and signs off on the verification. The idea of having a plaintiff sign a document attached to part of the complaint is not new.

I want to share the conversation I had with Mr. Litt yesterday. If we were to do this, the question of who would sign the affidavit when you have a homeowners' association may arise. You are not going to get every member of the association to sign off on an affidavit. In light of what happened yesterday with section 20 of S. B. 182, the corresponding affidavit would be from the board or a board member of the association verifying that a majority of the homeowners within that association have approved of the lawsuit and understand the disclosure requirement.

SENATE BILL 182: Makes various changes relating to common-interest communities. (BDR 10-795)

Section 20 of S.B. 182 changes the law to say that in the case of a homeowners' association (HOA) or common-interest community, no NRS 40 action could commence until a majority of the unit owners agree to it. In smaller HOAs where you have 500 members or 1,000 units, it is easier to obtain that sort of approval. The argument was you may have an HOA with 7,000 or

8,000 units, and it would be impossible to get the approval of every unit owner. If this is too onerous, then there may be a threshold figure or a majority of the owners who show up at a meeting called for the purpose of determining whether the association wants to go forward with such an action. There was no opposition to section 20 of S. B. 182. I promised Mr. Litt if he wants to submit language as an amendment on that issue, I would look into it and share it with members of the Committee. That is a fair characterization of what we discussed yesterday. To be consistent with section 20 of S.B. 182, we would have to say that in the case of an HOA, an affidavit is needed from the board saying a majority of the members understand that by commencing this lawsuit, they have to make disclosures. Does anybody have any thoughts or suggestions on section 3?

SENATOR WIENER:
Many of us have experience living in an HOA. If we change requirements for something that engages the membership, it is important to have a substantial notice requirement, giving people who want to participate in the meeting enough time to make arrangements to attend. This should not be a three-day notice, but one that is meaningful to engage the members of the HOA. If they choose to not participate, at least they have been noticed.

CHAIR CARE:
We will have that discussion if and when we get the anticipated proposed amendment to S.B. 182. If we do anything with section 3 concerning HOAs, keeping the current language of S.B. 182 in mind, we would have to say that a majority of the members understand the requisite disclosure under NRS 40. If we do something with section 3 and S.B. 182 is later amended, then we would have to amend section 3 so the two correspond. Are there any thoughts on the requirement that the homeowner or HOA has to execute an affidavit saying that the owner knows disclosures will have to be made when the time comes to sell the unit or the property?

SENATOR COPENING:
There is a big difference between understanding and reading.

CHAIR CARE:
Could the language say the homeowner is aware?

SENATOR COPENING:
Yes, it could. I would equate this to initialing the most important elements of a sales contract when purchasing a home. Perhaps as it pertains to NRS 40, we might look at some of the most important areas they need to understand and require they initial next to these areas. At the minimum, they need to acknowledge having seen it.

SENATOR WIENER:
I appreciate your concerns about keeping the language clean in S.B. 349, section 3, subsection 2 where it states, "... the attorney has advised the claimant ... . " In Scott Canepa's previous testimony, he said it interferes with the attorney-client privilege. He felt it was unconstitutional that the owner signs off and takes responsibility and the attorney gets out of the statement.

CHAIR CARE:
We can take the language about the attorney out of section 3 if the Committee so chooses. In summary, section 1 would amend the law to say that unreasonable risk of injury to a person or property standing alone would be a basis for an action under NRS 40. Subsections 1, 2 and 3 would have to be read conjunctively. Senator Copening offered the concern that it should not be a cause of action if the workmanship exceeds existing codes.

SENATOR WIENER:
I am looking at the statement in S.B. 349, section 1 that reads, "... which presents an unreasonable risk of injury to a person or property ... ." Subsection 2 of section 1 reads, "... physical damage to the residence, an appurtenance or the real property ... ." For clarification, how are we defining property? Is that inclusive of residence and appurtenance in real property?

MR. WILKINSON:
I am not sure I follow.

SENATOR WIENER:
The stand alone in section 1 reads, "... unreasonable risk of injury to a person or property." When we look at subsection 2, one of the three that is required to be joined, we have, "... proximately causes physical damage to the residence, an appurtenance or the real property ... ." Is property in the first one inclusive of residence and appurtenance and real property? How are we defining property in the stand alone?

MR. WILKINSON:
Real property is not a defined term in NRS 40. Residence is defined as appurtenance is defined.

SENATOR WIENER:
Does property in the stand alone include residence, appurtenance and real property?

MR. WILKINSON:
Now I understand what you are saying. That is a good question. That is the way it is in existing law. I am not aware of any interpretation of that. I think residence, appurtenance or real property would encompass those.

CHAIR CARE:
There was a concern by Senator Copening in section 1 if there is no cause of action where the workmanship exceeds the current building codes. In section 2, I raised the issue of the distinction between attorney fees as approximate cause of the damage where you proceed all the way through trial. How does the attorney get compensated after trial where you have proceeded all the way through verdict as opposed to the issue of attorney fees in the course of settlement? In section 3, I suggested we delete the language about the attorney and rewrite it saying that the homeowner is aware. In the case of the HOA, use the current language we have in section 20 of S. B. 182 saying that a majority of the members of the HOA or unit owners are aware of the disclosure requirements.

SENATOR WIENER:
Based on Senator Copening's concern, do we need an amendment about better than code standard?

MR. WILKINSON:
No, because if it violates the code, then it violates the code. If it exceeds the code, it clearly will not constitute a violation of the code. I am not sure there is a way of addressing that. I do not know whether something that exceeds the code but still constitutes, under existing law, a constructional defect—because it is not completed in a good and workmanlike manner, causes damage or meets one of the other prongs. The fact that it exceeds code should not violate the code.

SENATOR COPENING:
What you are saying makes absolute sense, and that is why I would like to have that in here. There have been builders sued because they did not build according to code; they made it better. Even though the home was better, it was still considered a violation of code. There have been lawsuits based upon this scenario, and that is the reason why we need to address this issue. An example of language could be: "One which is done in violation of the law including without limitation in violation of local codes or ordinances unless the workmanship exceeds the code resulting in an improved product." I will let you figure that out. Something needs to be included so people stop taking advantage of the laws.

CHAIR CARE:
If there is no further discussion, the Chair will entertain a motion.

> SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED S.B. 349 BY: ADDING NEW LANGUAGE TO SUBSECTION 1 OF SECTION 1 STATING THAT WORKMANSHIP EXCEEDING CODE WOULD NOT BE IN VIOLATION OF THE CODE, AND AMENDING SECTION 3 TO REMOVE ANY REFERENCE TO A CONVERSATION WITH AN ATTORNEY BUT INCLUDE AN AFFIDAVIT STATING THE HOMEOWNER IS AWARE OF THE CHANGE; IN THE CASE OF HOMEOWNERS ASSOCIATIONS, A BOARD MEMBER SHALL VERIFY THAT A MAJORITY OF THE OWNERS ARE AWARE OF THE DISCLOSURE REQUIREMENTS.

MR. WILKINSON:
I understand the first part of the motion about Senator Copening's change regarding things that exceed the code, and I understand the discussion about the affidavit in section 3, but I am unclear about section 2. Is there no change to the bill in section 2 or is section 2 being removed entirely?

SENATOR COPENING:
There should be no change to section 2.

> SENATOR AMODEI SECONDED THE MOTION

CHAIR CARE:
Is there any discussion on the motion?

SENATOR WASHINGTON:
I want to support the bill, but I have trepidation about the proposed amendment in regard to local codes and ordinances in section 1, subsection 1. I understand Senator Copening's suggestion, but when you supersede the local codes and ordinances in a craftsman and workmanlike manner, that issue is already covered. Therefore, the provision is not necessary. I am basing my preference on Mr. Wilkinson's statement.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CARE:
Tomorrow is the deadline. There is always the possibility of a floor amendment, but that closes the business on S.B. 349.

Let us now go to S.B. 337. This is actually NRS 11 to shorten the period of statutes of repose, patent defect, latent defect and the like. There was opposition, no proposed amendments and a suggestion about having a one-size-fits-all statute.

RICHARD PEEL (Peel Brimley):
The answer is no. We floated the proposition of having one statute of repose that would have a certain time period with a two-year extension built into it rather than having four separate statutes of repose with differing time periods. Our proposal was not responded to by the opposition.

CHAIR CARE:
The bill is fairly straightforward. We have these periods to commence an action in NRS 11. As I recall, in those cases, the periods were halved. In section 1, no time limit was reduced to six years. Testimony stated that this is all over the place from state to state. Some states have a single statute; like Nevada, some have several statutes. There is the issue of the commencement of the period. When it begins to run substantial compliance in Nevada, it can be a much later period in other jurisdictions. In the states that have statutes similar to Nevada, these periods can be longer or shorter. Please share your thoughts or questions.

SENATOR COPENING:
I would like to better understand where the numbers came from and if there are any unintended consequences based upon lowering these statutes of repose.

MR. PEEL:
The courts in southern Nevada are interpreting the statute of repose sections to give a claimant up to 12 years to file a complaint with respect to the various issues that are the subject of the statute. Most contracts provide for a one-year warranty with respect to workmanship and materials. The problem comes up when you have a 12-year statute of repose recognized by the courts. This is too long a period to allow a claim to be made. We are finding that many owners of property, both residential and commercial, do not properly maintain the property and make a claim for things that are a lack of maintenance. We are looking to shorten the time period from 12 years down to 6 years for willful misconduct or fraudulent concealment. With respect to known or should have known claims, we are looking to shorten the time period to three years. With respect to latent defects, claims that could not have been recognized or determined by a reasonable inspection of the site, we are looking to reduce the time period to four years. And with respect to patent defects, claims that could have been determined from a reasonable inspection of the site, we are looking to reduce the time period to three years. The time periods are fair under the circumstances because it does not take but one or two years to determine what problems you have with your property and what claims should or could be made.

SENATOR COPENING:
What about in those situations like Kitec where a defective product or process did not show until quite a few years later? Nobody could have known these things would happen, but they ended up as a construction defect. How do we account for those situations?

MR. PEEL:
A provision in NRS 11.202, subsection 2, paragraph (b) says, "... the provisions of this section do not apply in an action brought against any person on account of a defect in a product." You already have a built-in carve out with respect to the claims that would arise under subsection 1 of NRS 11.202.

SENATOR AMODEI:
I would like to see some additional information. If we do nothing with the bill today, the discussion on the issue stops, and this is a legitimate issue to keep

discussing. When the Chair is ready, I am going to make a motion to process the bill for no other reason than to keep the discussion alive.

CHAIR CARE:
In section 1 where you have willful misconduct and fraudulent concealment, the limitation is to apply a cap of six years where there currently is none. For that kind of conduct, I am uncomfortable coming down to six years. If the responsible party makes an effort to conceal with the intent to deceive, I do not know if that party should be off the hook after a certain period of time.

SENATOR AMODEI:
Instead of leaving it open, put in a time certain after discovery. If you never discover it, you never bring it. Tie it to something as opposed to nothing.

CHAIR CARE:
What period of years would anyone suggest? The statute of limitations for fraud is three years or three years after the discovery you have been damaged or through the use of due diligence. We are making it three years after discovery or should have discovered through the use of reasonable due diligence.

MR. WILKINSON:
Keeping in mind what the bill does, as a statute of repose, this does not speak to the date of discovery. It is six years after substantial completion, so the statute of limitations works in conjunction with this and requires somebody to bring the action within the specified period. If you tie it back and make it the same as the statute of limitations, it has the effect of eliminating the concept of the statute of repose.

CHAIR CARE:
We could make it more than six years or we could remove the six years altogether. Senator Amodei made his suggestion to keep the discussion going. He has not made a motion yet, but I gather he intends to move that we pass it out of here as drafted, knowing it will be worked over down the road. The Chair will entertain a motion.

SENATOR AMODEI:
I move that we do pass or amend and do pass depending on what Mr. Wilkinson said. If there is an amendment, it should be in section 1.

CHAIR CARE:
As I understand it, Senator Amodei, you want something in here that deals with a certain period of time after discovery.

SENATOR AMODEI:
Ideally, but I am not sure whether Mr. Wilkinson said that was a wrong approach in view of other statutes.

MR. WILKINSON:
There is already a statute of limitations for an action of this nature. The point is there is no statute of repose, or it is in a limited period under the statute of repose, whereas all these other ones set a certain number of years regardless of discovery in which an action has to be brought. For this one, there is no limitation on the statute of repose so, in effect, there is no statute of repose. Under this bill, there would be one of six years. However, if you were to amend it to the same as the statute of limitations, it would have the same effect as making no change at all.

CHAIR CARE:
Mr. Peel, you heard Senator Amodei's discussion. If we make the change based upon the discovery rule, what does that do to section 1, subsection 1 in light of the existing statute of limitation for fraud?

MR. PEEL:
Six years does give a long enough period to identify, discover and make the claim even where you have willful misconduct or fraudulently concealed workmanship on the part of the contractor. With respect to the statute of limitations, it would work in the normal course if they found or discovered within a year of the date the project was substantially completed. The statute of limitations would kick in, and they would have to make the claim accordingly. The outside limit would be the six-year period. To make it any longer than that gives an open-ended period of time for anybody to make a claim when they should have used reasonable diligence in discovering the problem. Most, if not all of these claims, will arise within a six-year period, specifically where you could have inspected, you are required to maintain, etc. My request would be to leave it at six years as presented by way of the bill.

CHAIR CARE:
Senator Amodei, do you want to amend your motion?

SENATOR AMODEI MOVED TO AMEND AND DO PASS AS AMENDED S.B. 337 BY ADDING LANGUAGE TO SECTION 1 SIMILAR TO THE FRAUD LANGUAGE THE CHAIR DISCUSSED ABOUT THREE YEARS AFTER DISCOVERY OR SHOULD HAVE DISCOVERED THROUGH REASONABLE DILIGENCE.

SENATOR McGINNESS SECONDED THE MOTION.

CHAIR CARE:
Is there any discussion on the motion?

MR. WILKINSON:
I was suggesting if there was the desire to have that, the appropriate way to do this would be to delete the section from the bill and make no change to the existing law.

CHAIR CARE:
If we do that, would the period in which to commence an action where you have fraudulent conduct, fraudulent concealment and willful misconduct actually run shorter than the period in which to commence an action for an obvious defect? I am looking at the other provisions of the bill. We have three years where there is personal injury, wrongful death. I am looking at section 4 of the bill where we get into patent deficiency, meaning a deficiency apparent by reasonable inspection, where the bill would shorten the period from six years to three years. That is where—after reasonable inspection as opposed to what I guess would be three years because it would just have the statute of limitations if we delete section 1—you have the fraudulent conduct. For me, that is dicey.
Nonetheless, we have a motion and we have a second. Is there any further discussion, or do you need to make some clarification, Mr. Wilkinson?

MR. WILKINSON:
It is becoming a bit confusing as to what this would be because we are talking about a statute of repose. If we mirror the statute of limitations, it would make more sense to simply remove this section from the bill rather than have a statute of repose. I have not held these things side by side to see if there might be circumstances under which they could be different. If the desire is to have the statute of repose match the statute of limitations but have no limitation on the period of repose, all we would be doing is repeating the statute of limitations a second time in a different statute.

SENATOR WIENER:
What is the statute of limitations under this cause of action? ... cause of willful, fraudulent behavior? What would it be?

MR. WILKINSON:
I was checking to determine the cause of action under NRS 11.190.

SENATOR WIENER:
That would help us resolve this issue. If that remedy is already there, rather than muddy this, if counsel is recommending we just take this section out for the fraudulent concealment, there would be a remedy through statute of limitations. But let us see the time frame on that.

MR. WILKINSON:
The Chair mentioned three years as the statute of limitations in NRS 11.190. Subsection 3, paragraph (d) mentions, "... an action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." That would appear to be the standard statute of limitations for a fraud action.

SENATOR WIENER:
For clarification, if I were to discover it ten years in, I still have a three-year window to bring a cause of action which would bring suit?

MR. WILKINSON:
Exactly.

SENATOR WIENER:
Does it require reasonable discovery or knowing whatever should have been due diligence in discovering? Something buried in a defect might lead to, "Wow, my house is ready to fall down." It is actual discovery for a reasonable person in the certain period of time.

MR. WILKINSON:
I have to think about that a bit.

CHAIR CARE:
We have been discussing Senator Amodei's motion to get it straightened out. Senator Amodei, do you have anything further you want to say?

SENATOR AMODEI:
With the permission of the second, I withdraw the motion on S.B. 337.

SENATOR MCGINNESS:
I withdraw the second on S.B. 337.

SENATOR AMODEI:
I would like to move amend and do pass with the amendment being the elimination of section 1 of the bill based on Mr. Wilkinson's discussion that that will allow the applicable, traditional statute of limitations to apply to the circumstance addressed. Thus requirements in NRS 11.202 would stay the same under that proposed amendment. We would not create any false finish lines for people who have engaged in fraud. We would still protect those folks who are victims of fraud in terms of discovery and allow them a generous amount of time to discover that fraud.

CHAIR CARE:
I think everyone understands this is to keep the subject matter alive because we have the deadline tomorrow.

> SENATOR AMODEI MOVED TO AMEND AND DO PASS AS AMENDED S.B. 337 BY ELIMINATING SECTION 1.
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> SENATOR COPENING SECONDED THE MOTION.
>
> THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
Members of the Senate Committee on Judiciary, there being no further business, the meeting is adjourned at 10:08 a.m.

RESPECTFULLY SUBMITTED:

_____
Janet Sherwood,
Committee Secretary

APPROVED BY:

_____
Senator Terry Care, Chair

DATE:_____