

## **CIVIL – RESIDENTIAL CONSTRUCTIONAL DEFECT**

### **Summary**

Petition for a writ of mandamus challenging a district court order denying partial summary judgment.

### **Disposition/Outcome**

Denied the petition for writ of mandamus and affirmed the district court’s denial for partial summary judgment. The Nevada Supreme Court held that subsequent owners of a “new residence” under NRS 40.615 may seek residential construction defect remedies under NRS Chapter 40 if instituted within the applicable statute of repose.

### **Factual and Procedural History**

The real parties in interest initiated a construction defect action against Sun City Summerlin’s developers, including petitioner Dell Webb Communities, Inc. alleging defects in the exterior stucco of their residences. Real parties in interest sought remedies available under NRS 40.600 through NRS 40.695. The action involved approximately 1200 residences in the Sun City Summerlin community in Las Vegas, Nevada.

Dell Webb then instituted a third party action against several subcontractors including ANSE, Inc., MS Concrete Company, Pratte Development Company, Inc., and Dean Roofing, Inc., petitioners herein.

Petitioners moved the district court for partial summary judgment asserting that because approximately 700 of the residences were occupied as dwellings prior to the subsequent owners obtaining title, the residences are not “new” residences under NRS 40.615 and are not subject to actions for constructional defects under NRS Chapter 40. Petitioners relied on the definition of a “new residence” set forth by the Nevada Supreme Court in *Westpark Owners’ Ass’n v. Dist. Ct.*<sup>2</sup> In *Westpark*, the court determined a “new residence” is “a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of sale.”<sup>3</sup> The district court denied the motion for partial summary judgment and petitioners filed a petition for mandamus relief.

The Court exercised its discretion to consider the petition because petitioners may gain a direct benefit from issuance of a writ of mandamus and because the petition raised an important legal issue requiring clarification with regard to the definition of “new residence” set forth in *Westpark*.

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<sup>2</sup> *Westpark Owner’s Ass’n. v. Dist. Ct.*, 167 P.3d 421, 427 (2007).

<sup>3</sup> *Id.* at 429.

## Discussion

The Nevada Supreme Court in *Westpark* defined “new residence” to mean “a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of sale.”<sup>4</sup> Relying on this definition, petitioners argued that homes which have not been continuously owned by the original purchasers do not qualify as a “new” residence. Accordingly, petitioners asserted that subsequent owners are precluded from seeking remedies under NRS Chapter 40, herein approximately 700 homes, because when a home has had multiple owners, the homes were not unoccupied from the date of completion to the most recent and latest sale.

The court responded by stating that petitioner’s expansion of the *Westpark* definition of “new residence” ignored the unique factual background of *Westpark*, violated the purpose of the statute, and lead to unreasonable and absurd results. In addition, the petitioner’s interpretation significantly diminishes the statute’s remedies and protections to homeowners and developers by forcing parties to resolve disputes outside the statutory scheme, conflicting with the statute’s intent and affecting nearly 60 percent of the residences in this case.

The court determined petitioner’s definition of “new residence” would produce unreasonable results. For example, the second owner of a one-year old residence would be precluded from seeking a remedy for a constructional defect because he is not the first owner. A neighbor who is the original purchaser of an identical residence could seek remedies under NRS Chapter 40 for the same type of defect. The court further explains petitioner’s definition would result in disparate treatment among similarly situated homeowners. NRCP 25(c) provides an action may be “continued by or against the original party” in case of any transfer of interest, therefore providing that subsequent homeowners could maintain a course of action so long as the original purchaser initiated it.<sup>5</sup> However, subsequent owners could not obtain NRS Chapter 40 remedies if the defect had not been discovered previously by the original purchaser.

The court explained that *Westpark* is factually distinguishable from the present action because it involved the distinct situation when, before its first sale, a residence is occupied as a dwelling. In *Westpark*, condominiums were leased as apartments and occupied as dwellings for as long as seven years prior to being offered for sale.<sup>6</sup> The court concluded that to classify such residences as “new” under NRS Chapter 40 would be erroneous.<sup>7</sup>

The court therefore rejects the petitioner’s expanded meaning of “new residence” and clarifies that, as *Westpark* implied, a residence is considered “new” for constructional defect purposes if it is a “product of original construction that has been unoccupied as a dwelling from the completion of its construction until its *original sale*.”<sup>8</sup> Thus, subsequent owners are not precluded from seeking NRS Chapter 40 remedies if the residence meets the aforementioned requirement. The court underscores that this definition is in harmony with NRS 40.610 which does not expressly require a claimant be the first owner and defines a constructional defect

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<sup>4</sup> *Westpark*, 167 P.3d at 429.

<sup>5</sup> NEV. R. CIV. P 25(c).

<sup>6</sup> 167 P.3d at 429.

<sup>7</sup> *Id.*

<sup>8</sup> ANSE, Inc. v. Dist. Ct., 124 Nev. Adv. Op. No. 74, 16-17 (Sep. 25, 2008).

claimant simply as “[a]n owner of a residence.” The fact that a homeowner may not be the original owner does not preclude the owner from seeking remedies under NRS Chapter 40 if the home remained unoccupied as a dwelling from the completion of its construction to the point of the first sale.

### **Conclusion**

The Nevada Supreme Court clarified that “new residence” under NRS 40.615 is “a residence that has remained unoccupied as a dwelling from the completion of its construction to the point of its first sale.”<sup>9</sup> In order for the term “new residence” to operate in harmony with the legislature’s intent, subsequent owners of that residence may seek NRS Chapter 40’s residential constructional defect remedies provided the action is brought within the applicable statute of repose.<sup>10</sup> The court therefore denied the petition for a writ of mandamus and affirmed the district court’s denial of partial summary judgment.

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<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.*