IN THE SUPREME COURT OF THE STATE OF NEVADA

COPPER SANDS HOMEOWNERS ASSOCIATION, INC., A NEVADA NON-PROFIT CORPORATION,
Appellant,
vs.
FLAMINGO 94 LIMITED LIABILITY COMPANY, A NEVADA LIMITED LIABILITY COMPANY; PLASTER DEVELOPMENT COMPANY, INC., A NEVADA CORPORATION; AND INTERSTATE PLUMBING & AIR CONDITIONING, INC.,
Respondents.

No. 59934

COPPER SANDS HOMEOWNERS ASSOCIATION, INC., A NEVADA NON-PROFIT CORPORATION,
Appellant,
vs.
FLAMINGO 94 LIMITED LIABILITY COMPANY, A NEVADA LIMITED LIABILITY COMPANY; PLASTER DEVELOPMENT COMPANY, INC., A NEVADA CORPORATION; INTERSTATE PLUMBING & AIR CONDITIONING, INC.; REYBURN LAWN & LANDSCAPE DESIGNERS, INC.; KFX BUILDING COMPANY, INC.; EXPERT AIR CONDITIONING & HEATING, INC.; AEC; NEVADA GYPSUM FLOORS, INC.; WILLIS ROOF CONSULTING, INC.; BRADLEY WINDOW CORPORATION; BRANDON, LLC D/B/A FIRST PREMIER DRYWALL & PAINT; BILL YOUNG'S MASONRY, INC.; AMERICAN ASPHALT & GRADING COMPANY; KUKURIN CONCRETE, INC.; NICHOLS

No. 60483

15-06738

CONSTRUCTION, INC.; AND CENTRAL VALLEY INSULATION, INC., Respondents.	
COPPER SANDS HOMEOWNERS ASSOCIATION, INC., A NEVADA NON-PROFIT CORPORATION, Appellant, vs. FLAMINGO 94 LIMITED LIABILITY COMPANY, A NEVADA LIMITED LIABILITY COMPANY; PLASTER DEVELOPMENT COMPANY, INC., A NEVADA CORPORATION; INTERSTATE PLUMBING & AIR CONDITIONING, INC.; REYBURN LAWN & LANDSCAPE DESIGNERS, INC.; KFX BUILDING COMPANY, INC.; EXPERT AIR CONDITIONING & HEATING, INC.; A.E.C.; NEVADA GYPSUM FLOORS, INC.; WILLIS ROOF CONSULTING, INC.; BRADLEY WINDOW CORPORATION; BRANDON, LLC D/B/A FIRST PREMIER DRYWALL & PAINT; BILL YOUNG'S MASONRY, INC.; AMERICAN ASPHALT & GRADING COMPANY; KUKURIN CONCRETE, INC.; NICHOLS CONSTRUCTION, INC.; AND CENTRAL VALLEY INSULATION, INC., Respondents.	No. 61039
COPPER SANDS HOMEOWNERS ASSOCIATION, INC., A NEVADA NON-PROFIT CORPORATION, Appellant, vs. FLAMINGO 94 LIMITED LIABILITY COMPANY, A NEVADA LIMITED LIABILITY COMPANY; PLASTER DEVELOPMENT COMPANY, INC., A	No. 61286

NEVADA CORPORATION; INTERSTATE PLUMBING & AIR CONDITIONING, INC.; REYBURN LAWN & LANDSCAPE DESIGNERS, INC.; KFX BUILDING COMPANY, INC.; EXPERT AIR CONDITIONING & HEATING, INC.; A.E.C.; NEVADA GYPSUM FLOORS, INC.; WILLIS ROOF CONSULTING, INC.; BRADLEY WINDOW CORPORATION; BRANDON, LLC; FIRST PREMIER DRYWALL & PAINT; BILL YOUNG'S MASONRY, INC.; AMERICAN ASPHALT & GRADING COMPANY; KUKURIN CONCRETE, INC.; NICHOLS CONSTRUCTION, INC.; AND CENTRAL VALLEY INSULATION, INC.,
Respondents.

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from a district court summary judgment in a construction defect action, certified as final under NRCP 54(b), and from post-judgment orders awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

This matter was originally resolved in a published opinion. *Copper Sands Homeowners v. Flamingo 94 Ltd.*, 130 Nev. ___, 335 P.3d 203 (2014). Appellant filed a petition for rehearing, and on January 29, 2015, we granted the petition for rehearing and withdrew our prior opinion. In rehearing this matter, we conclude that relief is warranted as to two points raised—specifically, the applicability of a tolling provision for a certain statute of repose and the appellant's standing to bring claims for misrepresentation and fraud—and therefore reverse and remand to the

district court for proceedings consistent with this order. As to the remaining arguments raised in the rehearing petition, we summarily reject them as they are the same as those already considered and rejected by this court, are being raised for the first time in this petition, or otherwise fail to justify rehearing under NRAP 40(c)(2).

FACTS

The district court action underlying the instant case was brought in late 2008, since which time the facts upon which that claim was based—which are both disputed and convoluted—have been repeatedly belabored over. To the extent such facts continue to be relevant we highlight them herein, but we otherwise decline to repeat them, except to say, briefly, that Copper Sands Homeowners Association (the HOA) brought suit against the owner and developers of the Copper Sands project, Flamingo 94, LLC and Plaster Development Company, Inc. (collectively, the developers) based upon theories of construction defect, fraud, and misrepresentation, among others. The developers then impleaded various third-party subcontractor defendants, seeking indemnity.[1] The district court granted multiple motions for summary judgment in favor of the developers and awarded post-judgment attorney fees and costs to the various defendants. The HOA appealed.

In a published opinion, this court affirmed the grants of summary judgment and the award of costs to the defendants, but reversed and remanded in part so that the district court could determine whether it had improperly awarded costs to third-party defendants that they had

[1]We refer to the developers and subcontractors, collectively, where appropriate, as the defendants.

incurred after they "could have removed themselves from the action, but chose not to do so." *Copper Sands*, 130 Nev. at ___, 335 P.3d at 207. Though the opinion primarily addressed the question of whether third-party defendants, as a general matter, could recover costs from a plaintiff against whom the original defendant prevails, in a footnote it also disposed of numerous grounds upon which the HOA challenged the original judgment, specifically holding: (1) that the district court correctly determined that the HOA's claims were untimely under NRS 11.203, thus rendering "the HOA's arguments that Chapter 40 applied to this action and that the district court erred by dismissing the Chapter 116 claims on other grounds moot"; (2) that, the district court correctly determined that the HOA did not have standing to bring its claims of misrepresentation and fraud under Chapter 116 because those claims did not affect the common-interest community; (3) that the HOA failed to demonstrate a genuine issue of material fact as to whether willful misconduct caused any of the defects or whether the developers had fraudulently concealed any defects under NRS 11.202; (4) that the district court correctly denied the HOA's peremptory challenge to the assigned judge; (5) that the district court's error in granting the defendants an order to shorten time did not warrant reversal; and (6) that the district court did not abuse its discretion in awarding the developers attorney fees and costs. *Id.* at ___, n.1, 335 P.3d at 205, n.1. The HOA petitioned for rehearing.

DISCUSSION

This court grants rehearing in limited circumstances—the petitioner must demonstrate that we have overlooked or misapprehended material facts or questions of law, or that we have overlooked, misapplied,

or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(a)(2); *see also Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ___, ___, 245 P.3d 1182, 1184 (2010). As to the challenges the HOA raises regarding points three through six as laid out above, the HOA has failed to make the required showing inasmuch as the points of law and fact it raises were likewise raised in its original briefing and were already considered and rejected by this court. NRAP 40(a)(2). It is only with regard to the former two points that the HOA's petition finds traction.

Turning to the first issue, namely, our holding that "the district court correctly determined that the HOA's NRS Chapter 40 and 116 construction defect claims were untimely under NRS 11.203" (*Copper Sands*, at ___, n.1, 335 P.3d at 205, n.1), the HOA presses, as it did in its original briefing, that NRS 11.203(2), which tolls the statute of repose where "an injury occurs in the [tenth] year after the substantial completion of [ ] an improvement" and extends the time period for filing claims based on such injuries for two additional years, applies here. The district court set the date of substantial completion of the Copper Sands project as March 5, 1997, and the HOA submitted its Notice of Construction Defects to the developers in October of 2008. Thus, given the tolling provision contained in its subsection (2), NRS 11.203 would not bar claims for injuries resulting from defects of which the defendants knew or should have known, where those injuries occurred between March 5, 2006 and March 5, 2007, the tenth year after substantial completion of the project in question.

The district court found that "there was no evidence presented to demonstrate that any injury occurred during the tenth year after the

substantial date of completion," and we initially agreed. But our review of the record demonstrates that we had, in fact, overlooked two affidavits filed by the HOA—one by a lay person stating, "In November of 2006 ... or shortly thereafter, the [HOA] Board discovered that the buildings and streets throughout the project were suffering injury as a result of defects and/or problems which were not previously apparent"; and one by an expert stating, "It is my opinion that based on the type of the water intrusion defects and structural defects found during the investigation of the project, results [sic] in an ongoing injury to the buildings which certainly occurred between 2006 and 2007"—which, viewed in the light most favorable to the HOA as non-moving party, *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005), support that the defects in question had caused injury that occurred in the relevant time frame. Indeed, in its oral findings the district court noted as much, but declined to credit the evidence, in part because, "it's extraordinarily difficult under [these] circumstances to convince the Court that an expert there could tell that any defect occurred reasonably within the tenth year." This reasoning was improper given that the affidavits were submitted by the non-moving party in the summary judgment context. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031. Thus, the affidavits may have revealed certain of the HOA's claims to be timely, to the extent those claims were based on the relevant injuries. NRS 11.203(2).

As to the second point, we originally held that the HOA lacked standing to bring misrepresentation or fraud claims because such claims "did not affect the common-interest community." *Copper Sands*, 130 Nev. ___, at n.1, 335 P.3d at 205, n.1. But this was based on the assumption that the HOA's common-law misrepresentation and fraud claims were all

brought on behalf of the individual unit owners, therefore implicating the concept of third-party standing sanctioned by NRS 116.3102(1)(d), to which the condition of the common elements is relevant. In actuality, the HOA also asserted its standing under NRS 116.4117, which is not a third-party standing statute, and it appears that the HOA's fraud and misrepresentation claims are based, not upon frauds performed against the individual purchasers, but upon the developers having "represented to [the HOA itself] that the dwellings at the Subject Property were constructed in conformance with the approved plans and specifications and applicable building codes and ordinances, and that said structures were structurally [sound], and would remain so." The common-law "principles of law and equity, including ... the law relative to ... fraud [and] misrepresentation ... supplement the provisions of [NRS Chapter 116]." NRS 116.1108. Thus Nevada's ordinary rules of common-law standing—which only require the existence of an actual case or controversy regarding which the HOA possessed a right to enforce a claim, *see Arguello v. Sunset Station, Inc.*, 127 Nev. ___, ___, 252 P.3d 206, 208 (2011); *In re Amerco Derivative Litig.*, 127 Nev. ___, ___, 252 P.3d 681, 694 (2011)—were sufficient to allow the HOA to bring on its own behalf claims, such as these, that are ultimately derived from the common-law. *See Perry v. Tonopah Mining Co. of Nevada*, 13 F.2d 865, 867 (D. Nev. 1915) (turning to statutory grants of standing only because "[t]he common law afforded no remedy in damages for [the action brought by the plaintiff].")

Even setting that aside and assuming that a statutory grant of standing were necessary here, it seems that NRS 116.4117 would provide such a grant. That section authorizes an entity that is part of a common-interest community, here, the HOA, to bring on its own behalf a civil

action for damages or other appropriate relief for a failure or refusal to comply with any provision of NRS Chapter 116, here, the supplemental common-law incorporated by NRS 116.1108, against a "declarant" affiliated with the community, here, the developers. *See* NRS 116.4117(1) & (2). The district court determined that NRS 116.4117 did not apply in the instant case because the HOA did not demonstrate that the developers were "declarants" within that section's meaning. But, for the purposes of NRS Chapter 116 a declarant is "any person or group of persons acting in concert who ... [a]s part of a common promotional plan, offers to dispose of the interest of the persons or group of persons in a unit not previously disposed of," NRS 116.035(1), and as the HOA continues to press, there was evidence that the developers marketed the property as a common interest community, via the final map, their notice of completion, conveyance deeds, and marketing brochures. Thus, we hold that the HOA had standing to bring fraud and misrepresentation claims for its own injuries.

Given its findings that the HOA's construction defect claims were time-barred, and that the HOA lacked standing to bring those for fraud and misrepresentation, the district court declined to examine their merits. We therefore reverse and remand to the district court to determine which, if any, of the claims brought by the HOA under NRS 116.3102(1)(d) and on its own behalf for fraud and misrepresentation are based upon the injuries occurring in the tenth year after substantial completion of the Copper Sands project, and whether the claims otherwise survive summary judgment. *See Yellow Cab of Reno, Inc. v. Dist. Court*, 127 Nev. ___, ___, 262 P.3d 699, 705 (2011) (declining to consider an issue

that the district court failed to address in denying a summary judgment motion in the context of a writ petition).

Based on the foregoing, we reverse and remand this matter to the district court for proceedings consistent with this order.

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Susan Johnson, District Judge
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