

ASSEMBLY BILL NO. 401—ASSEMBLYMAN OCEGUERA

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Makes various changes concerning constructional defects. (BDR 3-382)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

~

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to constructional defects; revising the definition of “constructional defect”; revising provisions governing attorney’s fees in claims concerning constructional defects; revising the statutes of limitation and repose relating to certain actions concerning constructional defects; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

- 1 Existing law provides that a defect in the design, construction, manufacture,
- 2 repair or landscaping of a new residence, of an alteration of or addition to an
- 3 existing residence, or of an appurtenance, which is done in violation of law,
- 4 including in violation of local codes or ordinances, is a constructional defect. (NRS
- 5 40.615) **Section 1** of this bill provides that there is a rebuttable presumption that
- 6 workmanship which exceeds the standards set forth in the applicable law, including
- 7 any applicable local codes or ordinances, is not a constructional defect.
- 8 Existing law provides that in a claim for damages as the result of a
- 9 constructional defect, reasonable attorney’s fees may be recovered as damages.
- 10 (NRS 40.655) **Section 2** of this bill provides that: (1) the court shall award to the
- 11 prevailing party reasonable attorney’s fees, which must be an element of costs and
- 12 awarded as costs; and (2) the amount of any attorney’s fees awarded must be
- 13 determined by and approved by the court.
- 14 Existing law sets forth the statute of limitations for various actions. (NRS
- 15 11.190) **Section 4** of this bill provides for a statute of limitations of 3 years for an
- 16 action for damages for certain deficiencies, injury or wrongful death caused by a
- 17 defect in construction if the defect is a result of willful misconduct or was
- 18 fraudulently concealed.
- 19 Existing law contains certain periods of limitation, known as statutes of repose,
- 20 in which certain actions for damages for certain deficiencies, injury or wrongful
- 21 death caused by a defect in construction must be commenced. These statutes of
- 22 repose apply to both commercial and residential construction. (NRS 11.202-11.206)



23 **Sections 3 and 5-8** of this bill exclude residential construction from the existing
24 statutes of repose and provide a new statute of repose relating specifically to
25 residential construction.

26 **Section 9** of this bill provides that the amendatory provisions of the bill relating
27 to claims for constructional defects governed by NRS 40.600 to 40.695, inclusive,
28 apply to claims that arise on or after October 1, 2011, and the amendatory
29 provisions of the remaining sections of the bill apply to actions based upon
30 construction that occurs on or after October 1, 2011.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** NRS 40.615 is hereby amended to read as follows:
2 40.615 1. "Constructional defect" means a defect in the
3 design, construction, manufacture, repair or landscaping of a new
4 residence, of an alteration of or addition to an existing residence, or
5 of an appurtenance. ~~and~~
6 2. *The term* includes, without limitation, the design,
7 construction, manufacture, repair or landscaping of a new residence,
8 of an alteration of or addition to an existing residence, or of an
9 appurtenance:
10 ~~1. (a)~~ (a) Which is done in violation of law, including, without
11 limitation, in violation of local codes or ordinances ~~;~~
12 ~~—2.], except as otherwise provided in subsection 3;~~
13 (b) Which proximately causes physical damage to the residence,
14 an appurtenance or the real property to which the residence or
15 appurtenance is affixed;
16 ~~3.] (c)~~ (c) Which is not completed in a good and workmanlike
17 manner in accordance with the generally accepted standard of care
18 in the industry for that type of design, construction, manufacture,
19 repair or landscaping; or
20 ~~4.] (d)~~ (d) Which presents an unreasonable risk of injury to a
21 person or property.
22 3. *There exists a rebuttable presumption that the term does*
23 *not include the design, construction, manufacture, repair or*
24 *landscaping of a new residence, of an alteration of or addition to*
25 *an existing residence, or of an appurtenance which is done in*
26 *violation of law, including, without limitation, in violation of local*
27 *codes or ordinances, if the workmanship of the design,*
28 *construction, manufacture, repair or landscaping exceeds the*
29 *standards set forth in the applicable law, including, without*
30 *limitation, the applicable local codes or ordinances.*
31 **Sec. 2.** NRS 40.655 is hereby amended to read as follows:
32 40.655 1. Except as otherwise provided in NRS 40.650, in a
33 claim governed by NRS 40.600 to 40.695, inclusive, the claimant



1 may recover only the following *costs and* damages to the extent
2 proximately caused by a constructional defect:

3 (a) Any reasonable attorney's fees;

4 (b) The reasonable cost of any repairs already made that were
5 necessary and of any repairs yet to be made that are necessary to
6 cure any constructional defect that the contractor failed to cure and
7 the reasonable expenses of temporary housing reasonably necessary
8 during the repair;

9 (c) The reduction in market value of the residence or accessory
10 structure, if any, to the extent the reduction is because of structural
11 failure;

12 (d) The loss of the use of all or any part of the residence;

13 (e) The reasonable value of any other property damaged by the
14 constructional defect;

15 (f) Any additional costs reasonably incurred by the claimant,
16 including, but not limited to, any costs and fees incurred for the
17 retention of experts to:

18 (1) Ascertain the nature and extent of the constructional
19 defects;

20 (2) Evaluate appropriate corrective measures to estimate the
21 value of loss of use; and

22 (3) Estimate the value of loss of use, the cost of temporary
23 housing and the reduction of market value of the residence; and

24 (g) Any interest provided by statute.

25 2. *The court shall award to the prevailing party reasonable*
26 *attorney's fees, which must be an element of costs and awarded as*
27 *costs.* The amount of any attorney's fees awarded pursuant to this
28 section must be *determined by and* approved by the court.

29 3. If a contractor complies with the provisions of NRS 40.600
30 to 40.695, inclusive, the claimant may not recover from the
31 contractor, as a result of the constructional defect, anything other
32 than that which is provided pursuant to NRS 40.600 to 40.695,
33 inclusive.

34 4. This section must not be construed as impairing any
35 contractual rights between a contractor and a subcontractor, supplier
36 or design professional.

37 5. As used in this section, "structural failure" means physical
38 damage to the load-bearing portion of a residence or appurtenance
39 caused by a failure of the load-bearing portion of the residence or
40 appurtenance.

41 **Sec. 3.** Chapter 11 of NRS is hereby amended by adding
42 thereto a new section to read as follows:

43 1. *No action may be commenced against the owner, occupier*
44 *or any person performing or furnishing the design, planning,*
45 *supervision or observation of construction, or the construction of*



1 *a residence more than 7 years after the substantial completion of*
2 *the residence, for the recovery of damages for:*

3 (a) *Any deficiency in the design, planning, supervision or*
4 *observation of construction, or the construction of the residence;*

5 (b) *Injury to real or personal property caused by any such*
6 *deficiency; or*

7 (c) *Injury to or the wrongful death of a person caused by any*
8 *such deficiency.*

9 2. *Except as otherwise provided in subsection 3, for the*
10 *purposes of this section, the date of substantial completion of a*
11 *residence shall be deemed to be the date on which:*

12 (a) *The final building inspection of the residence is conducted;*

13 (b) *A notice of completion is issued for the residence; or*

14 (c) *A certificate of occupancy is issued for the residence,*

15 *↪ whichever occurs later.*

16 3. *If none of the events described in subsection 2 occurs, the*
17 *date of substantial completion of a residence must be determined*
18 *by the rules of the common law.*

19 4. *The provisions of this section do not apply to:*

20 (a) *A claim for indemnity or contribution.*

21 (b) *An action brought against any person on account of a*
22 *defect in a product.*

23 5. *As used in this section, "residence" has the meaning*
24 *ascribed to it in NRS 40.630.*

25 **Sec. 4.** NRS 11.190 is hereby amended to read as follows:

26 11.190 Except as otherwise provided in NRS 125B.050 and
27 217.007, actions other than those for the recovery of real property,
28 unless further limited by specific statute, may only be commenced
29 as follows:

30 1. Within 6 years:

31 (a) An action upon a judgment or decree of any court of the
32 United States, or of any state or territory within the United States, or
33 the renewal thereof.

34 (b) An action upon a contract, obligation or liability founded
35 upon an instrument in writing, except those mentioned in the
36 preceding sections of this chapter.

37 2. Within 4 years:

38 (a) An action on an open account for goods, wares and
39 merchandise sold and delivered.

40 (b) An action for any article charged on an account in a store.

41 (c) An action upon a contract, obligation or liability not founded
42 upon an instrument in writing.

43 (d) An action against a person alleged to have committed a
44 deceptive trade practice in violation of NRS 598.0903 to 598.0999,
45 inclusive, but the cause of action shall be deemed to accrue when



1 the aggrieved party discovers, or by the exercise of due diligence
2 should have discovered, the facts constituting the deceptive trade
3 practice.

4 3. Within 3 years:

5 (a) An action upon a liability created by statute, other than a
6 penalty or forfeiture.

7 (b) An action for waste or trespass of real property, but when the
8 waste or trespass is committed by means of underground works
9 upon any mining claim, the cause of action shall be deemed to
10 accrue upon the discovery by the aggrieved party of the facts
11 constituting the waste or trespass.

12 (c) An action for taking, detaining or injuring personal property,
13 including actions for specific recovery thereof, but in all cases
14 where the subject of the action is a domestic animal usually included
15 in the term "livestock," which has a recorded mark or brand upon it
16 at the time of its loss, and which strays or is stolen from the true
17 owner without the owner's fault, the statute does not begin to run
18 against an action for the recovery of the animal until the owner has
19 actual knowledge of such facts as would put a reasonable person
20 upon inquiry as to the possession thereof by the defendant.

21 (d) Except as otherwise provided in NRS 112.230 and 166.170,
22 an action for relief on the ground of fraud or mistake, but the cause
23 of action in such a case shall be deemed to accrue upon the
24 discovery by the aggrieved party of the facts constituting the fraud
25 or mistake.

26 (e) An action pursuant to NRS 40.750 for damages sustained by
27 a financial institution or other lender because of its reliance on
28 certain fraudulent conduct of a borrower, but the cause of action in
29 such a case shall be deemed to accrue upon the discovery by the
30 financial institution or other lender of the facts constituting the
31 concealment or false statement.

32 *(f) An action against the owner, occupier or any person*
33 *performing or furnishing the design, planning, supervision or*
34 *observation of construction, or the construction of a residence, for*
35 *the recovery of damages for:*

36 *(1) Any deficiency in the design, planning, supervision or*
37 *observation of construction, or the construction of the residence*
38 *which is the result of his or her willful misconduct or which he or*
39 *she fraudulently concealed;*

40 *(2) Injury to real or personal property caused by any such*
41 *deficiency; or*

42 *(3) Injury to or the wrongful death of a person caused by*
43 *any such deficiency.*

44 *↳ The cause of action in such a case shall be deemed to accrue*
45 *upon the discovery by the aggrieved party of the deficiency. As*



1 *used in this paragraph, "residence" has the meaning ascribed to it*
2 *in NRS 40.630.*

3 4. Within 2 years:

4 (a) An action against a sheriff, coroner or constable upon
5 liability incurred by acting in his or her official capacity and in
6 virtue of his or her office, or by the omission of an official duty,
7 including the nonpayment of money collected upon an execution.

8 (b) An action upon a statute for a penalty or forfeiture, where the
9 action is given to a person or the State, or both, except when the
10 statute imposing it prescribes a different limitation.

11 (c) An action for libel, slander, assault, battery, false
12 imprisonment or seduction.

13 (d) An action against a sheriff or other officer for the escape of a
14 prisoner arrested or imprisoned on civil process.

15 (e) Except as otherwise provided in *this section and* NRS
16 11.215, an action to recover damages for injuries to a person or for
17 the death of a person caused by the wrongful act or neglect of
18 another. The provisions of this paragraph relating to an action to
19 recover damages for injuries to a person apply only to causes of
20 action which accrue after March 20, 1951.

21 (f) An action to recover damages under NRS 41.740.

22 5. Within 1 year:

23 (a) An action against an officer, or officer de facto to recover
24 goods, wares, merchandise or other property seized by the officer in
25 his or her official capacity, as tax collector, or to recover the price or
26 value of goods, wares, merchandise or other personal property so
27 seized, or for damages for the seizure, detention or sale of, or injury
28 to, goods, wares, merchandise or other personal property seized, or
29 for damages done to any person or property in making the seizure.

30 (b) An action against an officer, or officer de facto for money
31 paid to the officer under protest, or seized by the officer in his or her
32 official capacity, as a collector of taxes, and which, it is claimed,
33 ought to be refunded.

34 **Sec. 5.** NRS 11.202 is hereby amended to read as follows:

35 11.202 1. ~~[An]~~ *Except as otherwise provided in section 3 of*
36 *this act, an* action may be commenced against the owner, occupier
37 or any person performing or furnishing the design, planning,
38 supervision or observation of construction, or the construction of an
39 improvement to real property at any time after the substantial
40 completion of such an improvement, for the recovery of damages
41 for:

42 (a) Any deficiency in the design, planning, supervision or
43 observation of construction or the construction of such an
44 improvement which is the result of his or her willful misconduct or
45 which he or she fraudulently concealed;



1 (b) Injury to real or personal property caused by any such
2 deficiency; or

3 (c) Injury to or the wrongful death of a person caused by any
4 such deficiency.

5 2. The provisions of this section do not apply in an action
6 brought against:

7 (a) The owner or keeper of any hotel, inn, motel, motor court,
8 boardinghouse or lodging house in this State on account of his or
9 her liability as an innkeeper.

10 (b) Any person on account of a defect in a product.

11 **Sec. 6.** NRS 11.203 is hereby amended to read as follows:

12 11.203 1. Except as otherwise provided in NRS 11.202 and
13 11.206, *and section 3 of this act*, no action may be commenced
14 against the owner, occupier or any person performing or furnishing
15 the design, planning, supervision or observation of construction, or
16 the construction of an improvement to real property more than 10
17 years after the substantial completion of such an improvement, for
18 the recovery of damages for:

19 (a) Any deficiency in the design, planning, supervision or
20 observation of construction or the construction of such an
21 improvement which is known or through the use of reasonable
22 diligence should have been known to him or her;

23 (b) Injury to real or personal property caused by any such
24 deficiency; or

25 (c) Injury to or the wrongful death of a person caused by any
26 such deficiency.

27 2. Notwithstanding the provisions of NRS 11.190 and
28 subsection 1 of this section, if an injury occurs in the 10th year after
29 the substantial completion of such an improvement, an action for
30 damages for injury to property or person, damages for wrongful
31 death resulting from such injury or damages for breach of contract
32 may be commenced within 2 years after the date of such injury,
33 irrespective of the date of death, but in no event may an action be
34 commenced more than 12 years after the substantial completion of
35 the improvement.

36 3. The provisions of this section do not apply to a claim for
37 indemnity or contribution.

38 **Sec. 7.** NRS 11.204 is hereby amended to read as follows:

39 11.204 1. Except as otherwise provided in NRS 11.202,
40 11.203 and 11.206, *and section 3 of this act*, no action may be
41 commenced against the owner, occupier or any person performing
42 or furnishing the design, planning, supervision or observation of
43 construction, or the construction, of an improvement to real property
44 more than 8 years after the substantial completion of such an
45 improvement, for the recovery of damages for:



1 (a) Any latent deficiency in the design, planning, supervision or
2 observation of construction or the construction of such an
3 improvement;

4 (b) Injury to real or personal property caused by any such
5 deficiency; or

6 (c) Injury to or the wrongful death of a person caused by any
7 such deficiency.

8 2. Notwithstanding the provisions of NRS 11.190 and
9 subsection 1 of this section, if an injury occurs in the eighth year
10 after the substantial completion of such an improvement, an action
11 for damages for injury to property or person, damages for wrongful
12 death resulting from such injury or damages for breach of contract
13 may be commenced within 2 years after the date of such injury,
14 irrespective of the date of death, but in no event may an action be
15 commenced more than 10 years after the substantial completion of
16 the improvement.

17 3. The provisions of this section do not apply to a claim for
18 indemnity or contribution.

19 4. For the purposes of this section, "latent deficiency" means a
20 deficiency which is not apparent by reasonable inspection.

21 **Sec. 8.** NRS 11.205 is hereby amended to read as follows:

22 11.205 1. Except as otherwise provided in NRS 11.202,
23 11.203 and 11.206, *and section 3 of this act*, no action may be
24 commenced against the owner, occupier or any person performing
25 or furnishing the design, planning, supervision or observation of
26 construction, or the construction of an improvement to real property
27 more than 6 years after the substantial completion of such an
28 improvement, for the recovery of damages for:

29 (a) Any patent deficiency in the design, planning, supervision or
30 observation of construction or the construction of such an
31 improvement;

32 (b) Injury to real or personal property caused by any such
33 deficiency; or

34 (c) Injury to or the wrongful death of a person caused by any
35 such deficiency.

36 2. Notwithstanding the provisions of NRS 11.190 and
37 subsection 1 of this section, if an injury occurs in the sixth year after
38 the substantial completion of such an improvement, an action for
39 damages for injury to property or person, damages for wrongful
40 death resulting from such injury or damages for breach of contract
41 may be commenced within 2 years after the date of such injury,
42 irrespective of the date of death, but in no event may an action be
43 commenced more than 8 years after the substantial completion of
44 the improvement.



1 3. The provisions of this section do not apply to a claim for
2 indemnity or contribution.

3 4. For the purposes of this section, "patent deficiency" means a
4 deficiency which is apparent by reasonable inspection.

5 **Sec. 9.** The amendatory provisions of:

6 1. Sections 1 and 2 of this act apply to any claim that arises on
7 or after October 1, 2011.

8 2. Sections 3 to 8, inclusive, of this act apply to actions based
9 upon the design, planning, supervision or observation of
10 construction, or the construction of a residence that occurs on or
11 after October 1, 2011.

