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## LGC Prevails Against Chapter 40 Claims In Nevada

Partner [Shannon Splaine](#) and associate [Dillon Coil](#) recently obtained partial summary judgment of a Nevada Plaintiff's Chapter 40 claims. The case involved construction defect claims brought by an HOA on behalf of the owners of 378 units constructed in 2004. The project was originally bid and constructed as an apartment complex. Like many other projects in that era, though, the project was purchased before completion, converted, and sold as condominiums.

Nevada's Chapter 40 framework permits homeowners to recover damages for construction deficiencies. In *Westpark Owners' Assn. v. District Court*, however, the Nevada Supreme Court determined that the rights and remedies afforded under Chapter 40 exclusively applied to claims relating to "new" residences that have been unoccupied as a dwelling from the completion of construction until the point of sale.

In light of the authority of *Westpark*, LGC obtained rent rolls attached to the agreement for the sale of the project to the converter, which indicated that at least 114 of the units were leased at the time the project was sold. LGC also obtained financing documents showing the developer assigned all leases and rents as part of the sale of the project. A percipient witness also testified at deposition that several units were rented prior to sale. Based on this information, LGC argued the Chapter 40 claims were not applicable because the units were rented prior to sale, and thus not "new" pursuant to the precedent of *Westpark*.

In its opposition, the plaintiff argued that a witness testified that the units were only leased during construction to bring in revenue to complete the project. Thus, there was a material question of fact as to whether the project was intended to be a condo complex.

Ultimately, the Court agreed with LGC and granted partial summary judgment in favor of LGC's client. The ruling is significant because the application of Chapter 40 can dramatically increase the value of a typical construction defect case.

As seen in this case, the precedent in *Westpark* can be a powerful defense tool for developers and contractors in construction defect cases. However, Nevada, like California, has a 10-year statute of repose for construction defects. As a result, as seen in LGC's case, by the time construction defect claims are brought, the defending parties are often out of business and documents and witnesses are either limited or unavailable. Counsel in condo conversion cases should recognize a potential *Westpark* defense early and explore all options to obtain records, including third-party sources.

Congratulations to Shannon and Dillon.

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## Decision Expands Design Professional Liability

In *Beacon Residential Community Association v. Skidmore, Owings & Merrill, LLP*, the California Supreme Court held that a principal architect – that is an architect that is not subordinate to other design professionals – can be held liable to a plaintiff for negligence without privity of contract. The principal architect can be held liable even when it does not actually build the project or exercise ultimate control over the construction. In holding so, the Court expanded the scope of duty owed by design professionals to third parties, distinguishing the limitations for design professionals established ten years ago in *Weseloh Family Ltd. Partnership v. K.L.*

*Wessell Construction Co., Inc.* and similar precedent.

The case involved a 595-unit condominium building in San Francisco. The HOA sued the developer and various other parties, including the two architectural firms on the project, for construction design defects. The principal alleged defect was solar heat gain, which purportedly made the condos uninhabitable and unsafe during certain periods. Plaintiff alleged the solar heat gain was caused in part by the architects' improper design.

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## Nevada Demands For Jury Trial: A Reason For Caution

Rule 38 of the Nevada Rules of Civil Procedure provides for a right to jury trial. Typically the defense files an Answer and a Demand for a Jury Trial to preserve a right to have a jury trial. One can always opt to have a bench trial later in the case. However, the reverse is not true – a party cannot opt to have a jury trial later if one was not demanded.

The rule provides that a demand for a jury trial must be made prior to the first order setting trial. It is often assumed in construction defect cases that the Plaintiff or lead Defendant will file a demand. Such an assumption, however, can prove to be a significant mistake.

LGC's attorneys have recently seen cases where neither the Plaintiff nor the developer filed a demand prior to an order setting trial. Judges have ruled that even though a subcontractor filed a demand upon appearing, it was after the first order setting trial. Thus, the case was to proceed as a bench trial unless all counsel agreed and stipulated to a jury trial.

Construction defect cases in Las Vegas receive trial dates at the annual construction defect “sweeps” hearings. Many times the trial is set before any subcontractors have appeared. After the case noted above, LGC advised the panel of this issue and they ceased setting trial dates until at least some subcontractors had appeared. However, in more recent years, the panel has regressed back to setting trials before subcontractors have appeared. In reviewing court dockets, LGC Partner Shannon Splaine again found cases where the subcontractors have not appeared, a trial date was set, and neither the Plaintiffs nor the developer filed a Demand for Jury Trial.

In another recent construction defect case, some parties filed jury trial demands and others did not. Certain parties settled out of the case, which created an issue of whether or not a party can rely on another party's demand. Based on the trial court's comments, it appears the answer may be “no,” at least in construction cases.

LGC's attorneys have not seen the same concerns in general liability cases, because those Plaintiffs' counsel typically file jury demands as a matter of course. However, it certainly could occur in the general liability context as well. Defense counsel should always file a Demand for Jury Trial when first appearing. If a party's first appearance is after the order setting trial, the issue should immediately be addressed with counsel and the court.

Clark County previously required a deposit with the demand that was returned if the case settled before trial. The rule has since been changed and no deposit is required. Other Nevada counties still require the deposit, but the money is returned when the case resolves. Regardless, the deposit amount is trivial compared to the significance of potentially losing a right to a jury trial.

For more information, contact [Shannon Splaine](#), a partner in LGC's Las Vegas office.

## LGC Partner Speaks At Diversity Conference



Teresa Beck

Partner [Teresa Beck](#) recently participated in the Fifth Annual California Diversity & Leadership Conference, hosted by the National Diversity Council and the California Diversity Council, as both a speaker and a moderator.

Teresa spoke as a panel member at "Powerful & Influential Women." The panel offered insight into how mentorship helped them and others in progressing toward their goals, the pivotal role of sponsors in advancement, and

overcoming obstacles and failures.

Teresa also moderated the “Employee Resource Group (ERG) Best Practices Roundtable” and a panel on “Keys to Building High Performance Teams.”

ERGs are groups of coworkers with shared characteristics who seek to create opportunities for their business to utilize and benefit from diversity. The ERG roundtable discussed how to create an ERG in one's workplace and how to

create and implement a plan for the ERG to achieve its given goals.

The Keys to Building High Performance Teams panelists emphasized the need for communication of specific goals as a major key to high performance teams.

In the coming months, the National Diversity Council will proudly welcome General Colin Powell as a keynote speaker at several regional events. For more information about the Council, contact Teresa Beck.

## Decision Expands Design Professional Liability

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The architects in question provided the original design services and played an active role throughout the construction process by conducting weekly site visits and inspections, recommending design revisions as needed, and monitoring contractor and subcontractor compliance with the design plans. The architects were paid almost \$5 million for their services.

The architects filed demurrers, which were sustained on the grounds that the HOA was not in privity of contract with the design professionals, and thus the architects owed no duty of care to the HOA. The Court of Appeal reversed, holding that under both common law and SB 800 the architects owed a duty of care to the HOA.

The California Supreme Court affirmed the Court of Appeal and held that the principal architects on the construction project owed a duty of care to the HOA, even though the architects were not in privity of contract with the HOA. Based on the plaintiff's alleged facts, the Court found the architect owed the future homeowner a duty of care under common law and thus did not reach the issue of whether there was a legislative intent in SB 800 to impose a duty of care to future homeowners.

The Court noted that the requirement of

privity of contract for a negligence claim has been eroded, and it is well settled that an architect can be held liable to third parties for foreseeable injuries (typically in the context of physical injuries). In this context, based on a balancing of factors, the Court ultimately determined a duty was owed.

The Court distinguished this case from *Bily v. Arthur Young & Co.*, which held that an independent auditor did not owe a duty of care to its client's investors. In *Bily*, the Court limited the auditor's duty of care to those third parties who were specific intended beneficiaries of the report and who were known to the auditor, in order to prevent potential limitless liability.

The Court found *Bily* inapplicable here because of the closeness of the architects' conduct and the homeowner's injury, the fact that requiring a duty of care to a well-defined class of future homeowners will not incur infinite and undefined liability for the architects, and that requiring a duty of care from the architect protects the unsophisticated future homeowner in the most efficient way.

The Court also distinguished this case from *Weseloh*, which held that no duty

of care was owed to a property owner by a design engineer from whom a retaining wall contractor purchased the wall design. The Court found *Weseloh* distinguishable because, in this case, the architects were the sole design professionals and had applied their expertise to not only the design, but to ensure the construction would conform to the design plans. The Court noted that *Weseloh* merely stood for the proposition that a subordinate design professional's role can be so minor as to foreclose the design professional's liability in negligence to third parties.

This case certainly increases the potential liability of design professionals in construction defect cases. Whereas design professionals often previously avoided liability based on lack of privity, HOAs and property owners will now have the power to sue principal design professionals in construction defect cases regardless of privity.

That said, the Court's decision was guided by the fact these particular architects had such a high level of involvement and oversight in the project. Sub-consultants or other design professionals who have limited involvement may still not owe a duty to third parties.

## LGC Continues To Expand Its Trusts & Estates Practice

LGC is continuing to expand its trusts and estates practice. Aside from drafting all forms of wills, trusts, advanced health care directives, and other testamentary instruments, LGC is also representing clients in probate litigation matters.

For instance, LGC recently resolved a contested probate estate involving a holographic will. LGC is also currently

representing a surviving spouse trustee against claims by another beneficiary in probate court, including attempts by the beneficiary to remove the trustee.

For more information about how LGC can assist with your estate planning or probate litigation matter, contact [Randy Gustafson](#) or [Darcie Colihan](#).

Click [here](#) for more information about LGC's trusts and estates practice, on LGC's website.

## LGC Attorney Successfully Leads USD Moot Court Team



Patrick Klingborg

Patrick Klingborg, an associate in LGC's San Diego office, completed a successful year as a coach of the moot court team at University of San Diego School of Law.

As an adjunct professor at the law school, Patrick guided his law students to a successful showing in the 23rd Annual Saul Lefkowitz Moot Court Competition focusing on trademark infringement and counterfeiting issues. The student teams (comprised of two students each) finished second place and third

place in the Western Regional in San Francisco. The second-place team earned the right to compete in the national finals in Washington, D.C. where they ultimately finished second overall out of 86 teams.

Patrick used his real-life experience to provide the students with guidance on appellate brief-writing and oral argument strategies, with obviously successful results. Congratulations to Patrick and the moot court team.

## New Appellate Case Opens Door For Inadvertent Waiver Of Privilege

In the new case of *Las Vegas Dev. Assoc., LLC v. District Court*, the Supreme Court of Nevada held that, when a proper foundation is established at a deposition, a party must disclose any documents used to refresh the witness's recollection before or while testifying, regardless of the attorney-client privilege.

The situation arose in a dispute regarding a real-estate transaction when KB Home Nevada, Inc. (KB Home) took the deposition of one of LVDA's principals. At the deposition, the principal testified he reviewed two memoranda prepared by his attorneys and his own handwritten notes. The principal stated that his intent behind reviewing the memoranda and notes was to refresh his "memory about the strategy of the case going forward." KB Home requested the two memoranda and the handwritten notes, but the witness refused to produce the documents, asserting the attorney-client privilege and work-product doctrine. KB Home filed a motion to compel the production of the memory-refreshing documents. The trial court granted the motion and ordered the production of the entire unredacted documents, agreeing with the discovery commissioner that "so much of the information was intertwined" and that he "reviewed the entirety of the documents and relied upon them in their entirety in preparing for his deposition." LVDA sought writ relief from the Nevada Supreme Court.

The Court denied LVDA's request for a writ of prohibition or mandamus challenging the trial court's order. The Court explained that it previously addressed a similar issue in the case of *Las Vegas Sands Corp v. District Court* and determined that under Nevada Rules of Civil Procedure 50.125, unlike its federal counterpart Federal Rule of Evidence 612, the "district courts lack discretion to halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying."

The Court held the lack of discretion to prevent disclosure of privileged documents used to refresh memories is not limited to testifying in court. The Court looked to legislative history in

defining "hearing" within the meaning of NRCP 50.125. The Court concluded FRE 612 and FRCP 30(c) were used as models rules and those rules provide that "examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence." The Court noted that NRCP 30(c) was substantially similar to FRCP 30(c) because both rules provide that deposition examination proceed as permitted at trial. Based on this reasoning, the Court held that memory-refreshing documents used by a witness at a deposition should not be treated differently from those used by a witness before or at a trial.

This case serves as an important warning for counsel not to permit a witness to review privileged documents in preparation for a deposition, because such documents will later be discoverable and lose their attorney-client protection. For more information about the case and its impact, contact [Shannon Splaine](#) in LGC's Las Vegas office.

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