IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NATIONAL SURETY CORPORATION, A DELAWARE CORPORATION; AND FARMERS INSURANCE EXCHANGE,
Appellants,
vs.
R&O CONSTRUCTION COMPANY, A UTAH CORPORATION; WARE CONTRACTING, INC., A NEVADA CORPORATION; AND MWH CONSTRUCTORS NEVADA, INC., A NEVADA CORPORATION,
Respondents.

No. 75052-COA

NATIONAL SURETY CORPORATION, A DELAWARE CORPORATION; AND FARMERS INSURANCE EXCHANGE,
Appellants,
vs.
MWH CONSTRUCTORS NEVADA, INC.; AND WARE CONTRACTING, INC., A NEVADA CORPORATION,
Respondents.

No. 76394-COA

R&O CONSTRUCTION COMPANY, A UTAH CORPORATION,
Appellant,
vs.
NATIONAL SURETY CORPORATION, A DELAWARE CORPORATION; AND FARMERS INSURANCE EXCHANGE,
Respondents.

ORDER OF REVERSAL AND REMAND

National Surety Corporation (National) and Farmers Insurance Exchange (Farmers) appeal from a district court summary judgment

entered by the Eighth Judicial District Court, Clark County, Nancy L. Allf, Judge; and National, Farmers, and R&O Construction Company (R&O) appeal from a post-judgment order awarding attorney fees entered by the Eighth Judicial District Court, Clark County, Adriana Escobar, Judge.[1]

Facts and procedural history

On October 29, 2013, the North Las Vegas Fire Department responded to a report of flooding inside a commercial building. An investigation determined that the source was a corroded underground piping assembly.

R&O Construction Company (R&O) was the building's general contractor and Ware Contracting, Inc., (Ware) was a subcontractor that installed water lines for the building's fire sprinkler system. R&O substantially completed construction on February 17, 2005.

National and Farmers (collectively appellants), which respectively insured the property's owner and a tenant, filed their initial complaint against R&O and Ware on February 17, 2015, exactly ten years after substantial completion. The complaint alleged negligence, breach of contract, and breach of implied warranty. Appellants amended their complaint to add MWH Constructors Nevada, Inc., (MWH) which acquired Ware in 2010, and R&O filed a cross-claim against MWH and Ware (collectively MWH/Ware) for indemnity and contribution.

MWH/Ware moved for summary judgment in July 2017, arguing that statutes of repose NRS 11.203 (the ten-year statute), 1999 Nev. Rev. Stat., ch. 353, § 16, at 1444-45, and NRS 11.204 (the eight-year statute)

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[1]We have consolidated these appeals for dispositional purposes. *See* NRAP 3(b)(2).

1999 Nev. Rev. Stat., ch. 353, §17, at 1445,[2] and the doctrine of laches barred all claims and cross-claims against it, and that certain contract claims failed because appellants and R&O failed to produce a complete contract. R&O joined the motion but opposed MHW/Ware's contract argument.

Discovery had closed in June 2017, but the district court had extended the deadline through August 21, 2017, for depositions already noticed. Appellants deposed R&O's expert on August 7, and filed an opposition to the motion for summary judgment the next day. Appellants included a declaration from their own expert and deposition testimony from R&O's expert. Both opined that respondents knew or should have known of the deficiency because the allegedly deficient piping assembly comprised a component that violated the North Las Vegas fire code. Specifically, appellants' expert opined that the alleged deficiency not only caused the leak, but that it was a fire code violation. R&O's expert agreed that the alleged deficiency was a fire code violation and "a probable cause" of the leak. On the day before the hearing on the motion for summary judgment, appellants moved for leave to file a second amended complaint, seeking to add the ten-year statute's "known or through the use of reasonable diligence should have been known" language and a negligence per se claim.

The district court granted summary judgment, finding that the eight-year statute applied, and thus that appellants' claims were untimely. The court did not expressly deny appellants' motion for leave to amend. MWH/Ware thereafter moved for fees and costs, R&O filed a memorandum

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[2]These statutes were effective at the time of the district court's order but have since been repealed, 2015 Nev. Rev. Stat., ch. 2, § 22 at 21, which has no significance to the resolution of this appeal.

of costs, and appellants moved to retax costs. The court partially granted MWH/Ware's motion, awarding attorney fees but denying costs; denied R&O's motion; and denied appellants' motion as moot. Appellants appeal the summary judgment and the order granting attorney fees, and R&O appeals the order granting attorney fees.

Appellants argue that the district court erred by granting summary judgment, abused its discretion by denying their motion for leave to amend, and thus erred by granting attorney fees. We agree that the district court erred, and we reverse the summary judgment, vacate the order granting attorney fees, and remand with an instruction for the district court to reassess appellants' motion to amend in light of the reversal.

Summary judgment

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also* NRCP 56(c).[3] "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "A factual dispute is genuine when

[3]We note that the Nevada Supreme Court amended the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure, effective March 1, 2019. *In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rule of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the previous versions of the rules apply to this case, we cite those versions herein.

the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

Appellants argue that the district court erred by granting summary judgment. They argue that the court confused and misinterpreted the statutes of repose, and thus disregarded expert opinion evidence that raises a question of fact.

The ten-year statute limited actions based on deficiencies that are "known or through the use of reasonable diligence should have been known" to ten years from substantial completion of construction. 1999 Nev. Rev. Stat., ch. 353, § 16 at 1444-45. The eight-year statute limited actions based on latent deficiencies—those "not apparent by reasonable inspection"—to eight years after substantial completion. 1999 Nev. Rev. Stat., ch. 353, §17 at 1445.

The district court found that appellants "presented no evidence that the claimed defect was known to anyone at the time of the installation, just expert opinions that it should have been [known]." The court reasoned that because the "allegedly defective pipe and coupling was installed below the surface of the ground, inspected by the City of North Las Vegas Division of Fire Prevention, then buried, and covered in concrete . . . [and] thereafter not visible or otherwise apparent upon reasonable inspection until after the flood occurred," it "cannot fairly be categorized as a known deficiency."

The district court appears to have conflated the eight- and ten-year statutes. The court reasoned that the ten-year statute was inapplicable because a deficiency buried under concrete is not apparent by reasonable inspection, and thus cannot be "known." The "reasonable inspection" language, however, appears only in the eight-year statute.

The district court also interpreted the ten-year statute too narrowly. The court's finding that the deficiency cannot be known because it was buried under concrete overlooked the possibilities that one may know of a deficiency *as* it installs the deficient component; may know of it after installation but *before* the component is buried under concrete; or *should have known* of the deficiency, at any time, through the use of reasonable diligence. The court's limitation of the actual knowledge component and its disregard of the constructive knowledge component are contrary to the plain language of the ten-year statute, which provides no such limitation on actual knowledge and clearly provides for constructive knowledge.

Further, the district court disregarded evidence of respondents' constructive knowledge because it applied the eight-year statute, which has no constructive knowledge provision. Though the court found that appellants' and R&O's respective experts opined that the deficiency "should have been known," it did not return to this evidence in its conclusions because, under its misinterpretation of the statutes, it apparently considered such evidence irrelevant. We also note that the court misinterpreted the evidence as well. The court found that the experts opined only that respondents "should have . . . [known]" of the deficiency, but both experts also opined that respondents may have in fact *known* of the deficiency because of the fire code violation.

We conclude that the evidence in the form of expert opinions raises a genuine issue of material fact, and thus precluded summary judgment. Appellants' expert examined the allegedly deficient piping assembly and opined in his declaration that "[t]he contractor knew at the time of installation or should have known that the . . . piping assembly failed to comply with [the North Las Vegas fire code] because it did not provide

the required protection from corrosive soil," and that the noncompliant component caused the leak. In deposition testimony, R&O's expert likewise opined that the piping assembly violated the city fire code, that the fire code violation was "a probable cause" of the leak, and confirmed that the installing contractor knew or should have known of the violation.

We therefore conclude that the district court erred by granting summary judgment because a rational trier of fact, viewing this evidence in a light most favorable to appellants, could find that respondents knew or should have known of the deficiency. Because we conclude that summary judgment was inappropriate, we also necessarily vacate the order awarding attorney fees.[4] *Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 178, 368 P.3d 1219, 1230 (Ct. App. 2016).

Appellants' motion for leave to amend

We note that by granting summary judgment, the district court denied appellants' motion for leave to amend their complaint implicitly and without explanation. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (explaining that a district court's omission to rule on a motion constituted a denial of the motion). We direct the district court to consider anew appellants' motion for leave to amend on remand. *See Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1106–07, 864 P.2d 796, 802 (1993) (reversing summary judgment, remanding for trial, and directing the district court to consider anew a motion for leave to amend that it denied in granting summary judgment), *superseded by statute on*

[4]Appellants' and R&O's respective appeals of the order are therefore moot. *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1491 n.7, 970 P.2d 98, 113 n.7 (1998), *disfavored on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P. 3d 11, 15 (2001).

other grounds as stated in Estate of Smith v. Mahoney's Silver Nugget, Inc., 127 Nev. 855, 858-59, 265 P.3d 688, 691 (2011). The court should consider any potential prejudice to respondents in granting appellants leave to amend by adding the negligence per se claim, as the court will set a new trial date and may or may not enter a new scheduling order. *See DeChambeau v. Balkenbush*, 134 Nev. ___, ___, 431 P.3d 359, 360-61 (Ct. App. 2018) (discussing new scheduling orders on remand after reversal of summary judgment).

Finally, we note that under Nevada's notice pleading standard, appellants need not have used the "known or . . . should have known" language of the ten-year statute in their complaint, but only pleaded sufficient facts to put respondents on notice of appellants' claims. *See Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) ("A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading.").

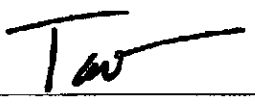
Conclusion

Because a genuine issue of material fact remains as to whether respondents knew or should have known of the alleged deficiency, we conclude that the district court erred by granting summary judgment. Accordingly, we

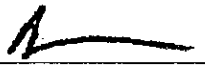
ORDER the judgment of the district court REVERSED and the

order granting attorney fees VACATED, and REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Nancy L. Allf, District Judge
Hon. Adriana Escobar, District Judge
Cozen O'Connor/San Diego
Snell & Wilmer, LLP/Las Vegas
Lincoln, Gustafson & Cercos
Eighth District Court Clerk

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[5]MWH/Ware argues that even the ten-year statute bars appellants' claims against it. The district court did not address this issue, however, and we therefore decline to address it in the first instance. *See, e.g., Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (declining to address an argument that the district court did not address). We also decline to address R&O's argument that the district court misapplied the eight-year statute to its cross-claim. The supreme court recognized that argument as mere criticism and not a formal cross-appeal. *Nat'l Surety Corp. v. R&O Constr. Co.*, Docket No. 75052 (Order Denying Motion, December 27, 2018).