IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, on relation of its Department of Transportation,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

FRED NASSIRI, individually and as trustee of the NASSIRI LIVING TRUST, a trust formed under Nevada law,

Real Party in Interest.

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Case No._____

PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

Page

Relief Requested 1

NRAP 17 Routing Statement 2

Issues Presented 3

Summary of Reasons Why a Writ Should Issue 3

Statement of Relevant Facts 7

1. The Blue Diamond Project 7

2. The Proposed Future Flyover Ramp 9

3. Nassiri's Property 9

4. The State's 2004 Eminent Domain Action 10

5. The Settlement Agreement and Release of All Claims 11

6. The I-15 South Corridor Improvement Project 12

7. Nassiri's Ground Lease with Las Vegas Paving 13

8. Nassiri's 2012 Lawsuit against the State 14

9. Course of Litigation 15

   A. The State's Motion to Dismiss 15

   B. The State's Motion for Partial Summary Judgment on Nassiri's Contract and Inverse Condemnation Claims 16

   C. The State's Motion for Partial Summary Judgment on Nassiri's Prayer for Rescission 19

   D. The Limited Bench Trial 20

   E. The State's Second Motion for Summary Judgment on Nassiri's Rescission Claim 23

F. The State's Motion to Exclude Nassiri's Damages Evidence 24

Reasons Why the Writ Should Issue 25

1. Writ Relief is the Appropriate Remedy 25

2. The District Court Erred as a Matter of Law By Imposing Upon the State Obligations That Do Not Exist in the Integrated Settlement Agreement 28

A. Nothing Within the Four Corners of the Settlement Agreement Prohibited the State From Building the Flyover 29

B. Nothing Within the Four Corners of the Quitclaim Deed Prohibited the State From Building the Flyover 30

C. As a Matter of Law, the Implied Covenant of Good Faith and Fair Dealing Didn't Prohibit the State From Building the Flyover 31

D. In Imposing Upon the State a Duty that Doesn't Exist, the District Court Manifestly Abused Its Discretion 32

3. The District Court Erred as a Matter of Law by Granting Nassiri an Implied Negative Easement of Light, Air, and View 34

4. The District Court Erred as a Matter of Law by Determining That Nassiri's Mistaken Belief About the Future is a Valid Basis for Rescission 39

A. Nassiri's Alleged Mistake Doesn't Relate to a Basic Assumption on Which He Made the Settlement Agreement 39

B. Nassiri Didn't Make a Mistake, He Bargained With Uncertainty 39

C. Nassiri's Alleged Mistake Relates to a Future Contingency 40

D. Nassiri Bore the Risk of His Mistake 41

5. The District Court Manifestly Abused Its Discretion When It Held That Nassiri's Rescission Claim Wasn't Barred By the Statute of Limitations 43

6. If One or Both of Nassiri's Contract Claims Are Allowed to Proceed to Trial, Harper Should Be Precluded From Testifying 46

A. Harper's Testimony is Irrelevant 46

B. Even if Harper's Appraisal Testimony Had Some Tangential Relevance, the Evidence is Still Far More Prejudicial Than Probative 49

C. These Fundamental Relevancy Issues Undermine the Admissibility of Harper's Testimony, Not Its Weight as the District Court Found 51

D. The District Court Further Erred by Refusing to Impose Mandatory Sanctions Against Nassiri for his Failure to Disclose a Computation of his Claimed Contract Damages 51

Conclusion 53

TABLE OF AUTHORITIES

Page

Cases

ANSE, Inc. v. Eighth Jud. Dist. Ct.,
192 P.3d 738 (Nev. 2008) 25

Bemis v. Estate of Bemis,
967 P.2d 437 (Nev. 1998) 44

Bernhard v. Rockhill Dev't Co.,
734 P.2d 1238 (Nev. 1987) 28

Bill Stremmel Motors, Inc. v. IDS Leasing Corp.,
514 P.2d 654 (Nev. 1973) 43

Boyd v. McDonald,
408 P.2d 717 (Nev. 1965) 36, 37

Colorado Environments, Inc. v. Valley Grading Corp.,
779 P.2d 80 (Nev. 1989) 48

Diaz v. Ferne,
84 P.3d 664 (Nev. 2005) 28

Ellison v. California State Auto Ass'n,
797 P.2d 975 (Nev. 1990) 28

Easton Bus. Opp. v. Town Executive Suites,
230 P.3d 827 (Nev. 2010) 32

Frantz v. Johnson,
999 P.2d 351 (Nev. 2000) 31

Hallmark v. Eldridge,
189 P.3d 646 (Nev. 2008) 46

Hanneman v. Downer,
871 P.2d 279 (Nev. 1994) 30, 49

Home Savers, Inc. v. United Sec. Co.,
741 P.2d 1355 (Nev. 1987) 39

Int'l Game Tech, Inc. v. Second Judicial Dist. Ct.,
179 P.3d 556 (Nev. 2008) 25

Johnson v. Utile,
472 P.2d 335 (Nev. 1970) 48

Kassebaum v. Kassebaum,
42 S.W.3d 685 (Mo. 2001) 40

Keats v. Hugo,
115 Mass. 204 (1874) 36

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 51

Land Baron Inv. v. Bonnie Springs Family, LP,
356 P.3d 511 (Nev. 2015) 23, 41, 42, 43

Lenawee County Bd. of Health v. Messerly,
331 N.W.2d 203 (Mich. 1982) 43

Metcalf Const. Co., Inc. v. U.S.,
742 F.3d 984 (Fed. Cir. 2014) 31

Nelson v. Heer,
163 P.3d 420 (Nev. 2007) 31

Pope v. Gray,
760 P.2d 763 (Nev. 1988) 44

Probasco v. City of Reno,
459 P.2d 771 (Nev. 1969) 16, 17, 36, 37

Prudential Ins. Co. of America v. Jefferson Associates, Ltd.,
896 S.W.2d 156 (Tex. 1995) 43

Reno Club v. Young Inv. Co.,
182 P.2d 1011 (Nev. 1974) 16, 32

Ryan v. Ryan,
640 S.E.2d 64 (W. Va. 2006) 40

Shupe v. Ham,
639 P.2d 540 (Nev. 1982) 44

Siragusa v. Brown,
971 P.2d 801 (Nev. 1998) 44

State v. Eighth Judicial Dist. Ct. (Ad America),
351 P.3d 736 (Nev. 2015) 26, 45

Tarrant v. Monson,
619 P.2d 1210 (Nev. 1980) 39, 40

The Power Co. v. Henry,
321 P.3d 858 (Nev. 2014) 29

Rules

NRAP 17 2

NRAP 17(a)(1) 2

NRAP 17(a)(14) 2

NRAP 17(b)(8) 2

NRCP 16.1 51

NRCP 16.1(e)(3) 51

NRCP 37(b)(2) 51

Statutes

NRS 11.190(3)(d) 43

NRS 11.390(3)(d) 21

NRS 34.160 ..... 24, 25

NRS 34.170 ..... 24, 25

NRS 37.120(1) 47

NRS 37.120(3) 49

NRS 48.035(1) 49

NRS 113.130 31

NRS 408.376 13

NRS 408.533 27

NRS 408.533(3) 30

Other Authorities

23 CFR § 771.111 8

29 Richard A. Lord, *Williston on Contracts* § 12:3 (4th ed. 2003) 32

Black's Law Dictionary 362 (9th ed. 2009) 40

National Environmental Policy Act 8, 33, 45, 46

Restatement (Second) of Contracts § 153 (1981) 39

Restatement (Second) of Contracts § 205 31

RELIEF REQUESTED

Petitioner State of Nevada, on relation of its Department of Transportation (the "State"), is the only defendant in the underlying action, where Fred Nassiri (real party in interest) asserts three remaining causes of action: (1) breach of contract, (2) contractual breach of the implied covenant of good faith and fair dealing, and (3) contractual rescission on the ground of unilateral mistake.

The State hereby petitions this Court for a writ of mandamus directing the respondent district court to enter judgment in the State's favor as a matter of law on each of Nassiri's three remaining contract-based claims. In the event that one or both of Nassiri's breach of contract claims are allowed to proceed to trial—now set on a trial stack beginning May 31, 2016—the State alternatively requests a writ of mandamus compelling the district court to vacate its order of March 14, 2016. The order refused to exclude the irrelevant testimony of Nassiri's appraisal expert, whose opinions are admittedly limited to Nassiri's dismissed claim for inverse condemnation.

This petition is based upon the following grounds: first and foremost, there is no legal basis for Nassiri's remaining claims, so the State is entitled to judgment as a matter of clear Nevada law; second, the district court's 3/14/16 order was without any legal or factual basis, thereby constituting a manifest abuse of discretion; and third, the State has no plain, speedy, and adequate remedy in the ordinary course of law. *The trial in this case, which is expected to last approximately 6 weeks, is scheduled on a trial stack beginning on May 31, 2016.*

NRAP 17 ROUTING STATEMENT

The routing of writ petitions is addressed in NRAP 17. Under the rule, writ petitions challenging pretrial discovery orders or orders resolving motions in limine are routed to the Court of Appeals. NRAP 17(b)(8). Writ petitions relating to all other matters invoke the original jurisdiction of the Nevada Supreme Court and are routed to this Court. NRAP 17(a)(1). Because the instant petition challenges the district court's legal determinations in denying summary judgment, it falls within the purview of the Nevada Supreme Court.

This petition is also properly before the Supreme Court because it "rais[es] as a principal issue a question of statewide public importance." NRAP 17(a)(14). The State challenges multiple district court rulings that could drastically affect its ability to engage in efficient, long-term Nevada highway improvement projects, which is an important, statewide matter of public policy. Accordingly, this petition is properly presented to the Nevada Supreme Court.

ISSUES PRESENTED

Whether the district court erred as a matter of law (i) by rewriting the parties' integrated Settlement Agreement to create a legal basis for Nassiri's contract claims; (ii) by affording Nassiri an implied negative easement of light, air, and view, despite clear Nevada law repudiating the doctrine of implied negative easements; (iii) by determining that Nassiri's mistaken belief about the future can be a valid ground to rescind a contract under Nevada law; (iv) by finding that Nassiri had no actual or constructive notice of highway improvement plans that were publicly disclosed in compliance with state and federal law; and (v) by ruling that expert appraisal testimony applying an inverse condemnation theory of damages—after the inverse condemnation claim was dismissed—is still relevant to prove damages under entirely different breach of contract claims.

SUMMARY OF REASONS WHY A WRIT SHOULD ISSUE

The district court's multiple erroneous rulings have forced the State to defend against Nassiri's legally deficient claims for almost four years. The State has already devoted hundreds of thousands of taxpayer dollars to this case, which is groundless as a matter of law. And, without this Court's desperately-needed intervention, the needless devotion of resources to this case will go on for the foreseeable future.

Nassiri's remaining claims arise from a fully negotiated Settlement Agreement and Release of All Claims, dated April 29, 2005.[1] The Settlement

[1] For ease of reading, appendix citations will be omitted in this summary. Facts in this summary will be provided in the Statement of Facts section below, with appendix citations supporting each fact.

Agreement resolved a 2004 eminent domain action in which the State acquired approximately four acres of Nassiri's land needed to realign Blue Diamond Highway (SR-160) over and to the east of Interstate 15 (I-15) in Las Vegas. As part of the Settlement Agreement, Nassiri, a highly successful real estate entrepreneur, purchased from the State approximately 24 acres of surplus property, freed up by the realignment of Blue Diamond. This surplus land abutted his property to the north, and Nassiri strongly desired to acquire it from the State.

Seven and a half years after the Settlement Agreement was executed, the land deals were completed, and Nassiri acquired the property that he had so persistently sought to purchase, he filed this action seeking to either undo the deal or obtain millions of dollars in damages. The lawsuit is based on the State's 2010 construction of a flyover ramp connecting eastbound Blue Diamond to northbound I-15.

Although the original design for the flyover had been publicly disclosed beginning in 1999, Nassiri contends that he was unaware of the State's plan to eventually build it, and that it interferes with the visibility of his property from the adjacent freeway. By his remaining claims, Nassiri alleges that the construction of the new flyover amounts to a breach of the Settlement Agreement (or its implied covenant of good faith and fair dealing). In the alternative, he asserts that he should be allowed to rescind the more than 10-year-old Settlement Agreement because, in 2005, he mistakenly believed that the Blue Diamond interchange would never include a flyover.

Simply put, there is no legal or contractual basis for these claims. The integrated Settlement Agreement contains no mention of the flyover, the preservation of visibility, or an easement for light, air, and view. Under its plain language, the Settlement Agreement imposed no duty on the State to limit its future construction at the Blue Diamond interchange or to keep Nassiri subjectively satisfied with the visibility of his property going forward. It required the State to convey the surplus property via quitclaim deed, as-is, where-is, and with all faults. In the recorded quitclaim deed, the State expressly stated that it was making no warranties, express or implied, of any kind with respect to any matter affecting the property. The State acquired Nassiri's four-acre parcel in the same manner.

The Settlement Agreement was an arm's-length transaction between two unrelated and sophisticated parties, who were each represented by their own counsel, engineers, and real estate professionals and appraisers. Before he signed the Settlement Agreement, Nassiri had the opportunity to ask any questions he may have had regarding the State's publicly-disclosed future improvement plans or about the visibility of his property going forward. He never mentioned either. As a result, these matters weren't discussed, negotiated, or addressed in the integrated Settlement Agreement. Under Nevada law, the State can't be sued for breaching a duty that doesn't exist. In ruling otherwise, the district court violated clear legal authority regarding contractual construction and impermissibly rewrote the parties' fully negotiated and voluntarily accepted Settlement Agreement.

Nassiri's rescission claim fares no better. It relies on an alleged mistaken belief about the future, which is not a viable basis to rescind a contract under Nevada law. Even assuming otherwise, based on the State's lawful public disclosures, Nassiri should've known about the facts constituting his alleged mistake long before he filed his rescission claim. But the district court determined that Nassiri had no actual or constructive knowledge of these disclosed facts, effectively rendering the State's federally-mandated public disclosure process worthless.

Despite these glaring legal deficiencies, this case is moving toward a lengthy and costly jury trial—set on the district court's May 31, 2016, trial stack—where, according to the district court's legal rulings, the jury will be asked to decide whether Nassiri would have agreed to pay something less for the surplus property than the amount that he voluntarily and contractually agreed to pay, had the parties known at the time how and when the flyover would ultimately be constructed. This convoluted interpretation of a claim, which should've been dismissed, is certain to confuse the jurors and result in great prejudice to the State.

Under these circumstances, extraordinary writ relief is warranted and necessary. The State should not be forced to continue to incur costs and expenses, and to face significant exposure, associated with the upcoming jury trial when Nassiri's remaining claims are deficient as a matter of law.

The district court's erroneous legal rulings will impact more than this case alone. The State is presently acquiring property in connection with Project Neon, a massive multi-billion dollar highway improvement project in Las Vegas. Several

landowners, whose property is needed for Project Neon, have already inquired about acquiring surplus property in settlement. If the district court's legal rulings are allowed to stand, however, the State may have no choice but to cease its statutorily-authorized practice of making surplus property available in eminent domain settlements. This would hinder the State's ongoing efforts to acquire needed right-of-way for Project Neon and increase the financial burden on Nevada's taxpayers.

Moreover, allowing the district court's legal determinations to stand will severely undermine the benefits and finality of the State's settlement agreements. If the State can be forced to pay millions of dollars for violating obligations that it never undertook—and even disclaimed—its contracts will have no meaning. This uncertainty will further hamper the State's ability to efficiently move forward on Project Neon—and other highway improvement projects as well. Because these issues affect the State's ongoing ability to efficiently plan and acquire right-of-way needed for Project Neon, it's important to settle them now, not several years down the road after a trial and appeal.

STATEMENT OF RELEVANT FACTS

1. The Blue Diamond Project

The Blue Diamond Project was a 2004 Nevada Department of Transportation highway improvement project designed to address transportation needs for a segment of Blue Diamond Highway (SR-160) in Las Vegas. Vol. 2 Petitioner's Appendix 000086 ("2PA000086").[2] As part of this Project, the State

[2] Due to existing markings, the State wasn't able to number the pages of the

realigned Blue Diamond Road over and to the east of I-15 and constructed a new, full access interchange at I-15. 2PA000086.

The Blue Diamond Project was planned in cooperation with the Federal Highway Administration (FHWA), who helped fund the Project. 2PA000086. When the State receives federal funds for a highway improvement project, it must comply with various federal requirements under the National Environmental Policy Act (NEPA), including completing an environmental impact study and holding a series of properly-noticed public informational meetings to afford interested citizens the opportunity to understand and comment upon the proposed project. *See* 23 CFR § 771.111, *et seq.* The State's compliance with these obligations is memorialized in a comprehensive public document known as an Environmental Assessment (EA), which must be approved by the FHWA.

Between 1999 and 2004, to comply with these federal requirements, the State evaluated various design alternatives for the Project; it held numerous public hearings to present those alternatives to the public; and it completed its environmental impact study. 2PA000086-140; 1PA000015, 29, 46, 48, 67, 68, 318. On April 5, 2004, the federal government approved the Project's final EA, thereby determining that the State complied with its NEPA obligations during the environmental assessment process and that the Blue Diamond Project was eligible to receive federal funding for right-of-way acquisition of property needed for the Project. 2PA000076; 2PA000321.

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appendix in the lower right hand corner. The numbers are located on the bottom of each page in a location where they can be clearly read.

2. The Proposed Future Flyover Ramp

The Blue Diamond Project included a proposed design for a future overpass (a "flyover") connecting eastbound Blue Diamond to northbound I-15 at the reconstructed interchange. 2PA000086. Although this proposed conceptual flyover was studied and presented to the public during the environmental assessment process, the flyover was not to be fully designed or constructed until further traffic demand warrants had been met and additional funding was available. 2PA000086; 1PA000066.

3. Nassiri's Property

Nassiri is a sophisticated landowner and highly successful real estate entrepreneur. 12PA002359. He owns approximately 66 acres of undeveloped vacant land at the northeast corner of the Blue Diamond/I-15 interchange. 18PA003546-47. His property is an assemblage of five separate parcels that he acquired between 1995 and 2008. 18PA003546-47 (includes a map depiction of Nassiri's property). Nassiri acquired one of these parcels from the State in 2005 at the time that the State realigned and improved Blue Diamond Highway.

The realignment of Blue Diamond compelled the State to acquire approximately four acres of new right-of-way from Nassiri's preexisting 42 acres of property. 3PA000474. This realignment also freed up approximately 24 acres of right-of-way land that the State previously used under Blue Diamond's old alignment. 12PA002295. Nassiri strongly desired to acquire this surplus property, which adjoined his existing assemblage to the north. 2PA000167, 300. Because the State's proposed realignment affected his existing land, and because he was

interested in acquiring the surplus property, Nassiri actively participated in the Blue Diamond Project's environmental assessment process, attending several of the public hearings—beginning in 1999—and submitting various statements and correspondences for the public record. 2PA000132, 137, 167, 183, 185, 200, 212; 1PA000026; 12PA002281.

To assist him with these matters, during the nearly five-year EA approval process, Nassiri engaged a licensed Nevada real estate broker, a professional civil engineer, a real estate appraisal firm, and an experienced eminent domain attorney. 12PA002259—2350, 2374, 2375, 2389.

4. The State's 2004 Eminent Domain Action

On April 6, 2004, following federal approval of the Blue Diamond Project's final EA, the State offered Nassiri $4.81 million as just compensation for his four acres of property needed to complete the Blue Diamond realignment. 2PA000289. Two weeks later, Nassiri's eminent domain attorney (Michael Chapman, Esq.) responded on Nassiri's behalf. He wrote that Nassiri was interested in trading the needed four acres for the adjoining surplus land that was freed up by the realignment, with an adjustment in price "for any difference in the quality and quantity of land exchanged." 2PA000300.

The State was open to parallel negotiations over a possible land swap. But to avoid construction delays occasioned by outstanding right-of-way needs, on August 31, 2004, the State filed an eminent domain action for Nassiri's four acres of property (*State of Nevada v. Nassiri*, Case No. 04-A-491334). 3PA000474. In

the condemnation case, the State was represented by outside counsel, Gregory Walch, Esq.

5. The Settlement Agreement and Release of All Claims

On December 6, 2004, Walch wrote to Chapman with a settlement offer. In the letter, the State "agreed not to sell or otherwise dispose of the [24 +/- acres of surplus land] for... 21 days... so that Mr. Nassiri ha[d] an opportunity to fully evaluate [the State's] proposal." 3PA000511. This exclusive look period was extended twice, giving Nassiri and his team of consultants as much time as they needed to evaluate the proposed deal. 3PA000527, 536.

Following Nassiri's independent evaluation of the State's offer, with the counsel of his own attorneys, real estate appraisers, and other experts, the parties agreed to two deals: (1) to resolve the condemnation action, the State would acquire 4.21 acres along the southern boundary of Nassiri's property for $4.81 million; and (2) Nassiri would also purchase from the State the roughly 24-acre surplus parcel north of his existing land (the "Exchange Parcel") for approximately $23.65 million.[3] The two deals were memorialized in a single Settlement Agreement and Release of All Claims dated April 29, 2005,[4] which Nassiri's counsel took the lead on drafting. 4PA000582; 3PA000537.

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[3] The purchase price was based on the independent appraisal of Gary Kent, MAI, who the State commissioned to appraise the Exchange Parcel. 3PA000323. The State used Kent's appraisal to formulate its sales offer, which Nassiri accepted.

[4] On June 14, 2005, the Settlement Agreement was amended in part to correct an acreage error in the Exchange Parcel's legal description and to adjust the sales price to reflect the additional acreage. 4PA000594.

After exchanging several drafts, the parties agreed on the final content. 3PA000537-581. In the integrated Agreement, the parties expressly acknowledged that the terms of their deal "had been negotiated and discussed," that they each "had the benefit and advice of counsel of their choosing," that they each "freely and voluntarily" accepted the deal, and that the only promises or inducements made were set forth in the written contract. 4PA000587-88.

Under the Settlement Agreement, Nassiri took the property via quitclaim deed, "as-is, where-is, and with all faults," and he released "all unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages, losses, and liabilities arising from the matters addressed [in the Settlement Agreement]." 4PA000583-84, 586. The quitclaim deed was recorded on June 17, 2005. 4PA000599. It provides that the State made "no warranty, express or implied, of any kind with respect to any matter affecting the Property." 4PA000600. To close the pending eminent domain case, the district court entered a stipulated final judgment of condemnation. 4PA000604-658.

6. The I-15 South Corridor Improvement Project

In 2005, the State began studying a new program of improvements to the southern portion of I-15, including at the Blue Diamond interchange. 5PA000659. The State took its proposed flyover design from the Blue Diamond Project and made it part of the entirely separate and distinct I-15 South Corridor Improvement Project (the "I-15 South Project"), which similarly relied on federal funding. 5PA000711.

Between 2005 and 2008, the State completed the NEPA environmental assessment for this new Project. On October 28, 2008, the State published its federally approved EA document. 5PA000651. During these planning stages, the State complied with all public hearing requirements, as indicated by the federal government's approval of the EA. 5PA000651.

In 2009, the State elected to go forward with the I-15 South Project under a design-build contract. A design-build model allows the State to contract with third-party contractors to design and build a highway project's proposed improvements. NRS 408.376. The design-build contract was awarded to Las Vegas Paving Corp. 5PA000874. As part of its successful bid, Las Vegas Paving somewhat modified the existing flyover design to save construction costs and improve roadway efficiency. Because the new flyover's environmental impact was no greater than the previous design, no new environmental assessment was required. In 2010, construction on the modified flyover commenced.

7. Nassiri's Ground Lease with Las Vegas Paving

On April 15, 2010, Las Vegas Paving and Nassiri entered into a Ground Lease. The Lease allowed Las Vegas Paving to use a portion of Nassiri's property as a staging area in connection with its construction of the I-15 South Design-Build Project, including the new flyover. 5PA000894. To identify the property subject to the lease, the parties highlighted the general boundary lines on an attached map. 5PA000897.

This map, entitled "Build Alternative Figure 10f," came from the I-15 South Project's 2008 EA. 5PA000711. It depicted a proposed design for the Blue

Diamond interchange that was studied and presented to the public during the environmental assessment processes for both the Blue Diamond Project and the I-15 South Project. Build Alternative Figure 10f showed the State's early design for the proposed future flyover, before Las Vegas Paving redesigned it.

8. Nassiri's 2012 Lawsuit against the State

In late 2010, Nassiri approached the State with concerns about the new flyover. He contended that the "new overpass with a height of over 60 feet" obstructed the unfettered visibility of his property from I-15. 5PA000899.

On May 29, 2012, Nassiri submitted an administrative claim to the State Board of Examiners. 6PA000902-7PA001262. He challenged the State's decision to build the new flyover, as well as other events surrounding the 2004/2005 negotiation and execution of the Settlement Agreement. 6PA000902-06. He offered two alternatives to resolve his claim: (1) rescission of the 2005 Settlement Agreement to the tune of $42.5 million dollars, or (2) let him keep the Exchange Parcel and pay him more than $18.4 million in damages. 6PA000907-08. Because Nassiri offered no legal basis for his significant demands, the State rejected his claim.

On November 30, 2012, seven and a half years after the Settlement Agreement was executed, the land deals were completed, and the final order of condemnation was entered, Nassiri filed this action. 8PA001264. On March 27, 2013, he filed an amended complaint, which was the first and only complaint served upon the State. 9PA001471. Nassiri effectuated service on April 17, 2013. 10PA001857b.

In his amended complaint, Nassiri asserted six claims for relief: (i) inverse condemnation, (ii) breach of the Settlement Agreement, (iii) contractual breach of the Settlement Agreement's implied covenant of good faith and fair dealing, (iv) tortious breach of the implied covenant, (v) negligent misrepresentation, and (vi) intentional misrepresentation. He also requested equitable rescission of the Settlement Agreement in his prayer for relief. He failed to plead any legal or factual basis for this rescission request.

All of his claims generally centered on the State's alleged change of the Blue Diamond/I-15 interchange development plan to include the new flyover, which Nassiri contended interfered with the light, air, and view of his property. 9PA001486. While his amended complaint is filled with numerous other accusations of wrongdoing, he's since abandoned those allegations.

9. Course of Litigation

A. The State's Motion to Dismiss

On June 24, 2013, the State moved to dismiss the majority of Nassiri's claims. 10PA001688. In relevant part, the State sought to dismiss Nassiri's tort claims as barred by the discretionary-act immunity doctrine and statute of limitations. It also sought to dismiss Nassiri's breach of contract claims under the express terms of the unambiguous Settlement Agreement, which imposed upon the State no legal or contractual duties regarding the flyover or the preservation of Nassiri's view or visibility. Nassiri opposed the State's motion. 10PA001742. The State replied. 10PA001770.

On July 31, 2013, the district court held a hearing on the State's motion. 10PA001789. Ruling from the bench, the district court dismissed Nassiri's misrepresentation claims but denied the State's motion as to his remaining causes of action. In speaking about the contractual duty that the State supposedly breached, the court thought that Nassiri should be "entitled to do some discovery" on the issue. 10PA001853. The district court acknowledged, however, that the question of a contractual duty was a "legal issue," which could be "renewed at a later date." 10PA001855. A written order was entered on October 16, 2013. 10PA001857a.

B. The State's Motions for Partial Summary Judgment on Nassiri's Contract and Inverse Condemnation Claims

On February 19, 2015, after the close of the year-long discovery period, the State filed two separate motions for partial summary judgment. In its first motion, the State sought summary judgment on Nassiri's inverse condemnation claim. 14PA002642. The State directed the district court's attention to *Probasco v. City of Reno*, 459 P.2d 771, 774 (Nev. 1969), which holds that there is no right to compensation for the alleged "infringement upon an abutting landowner's right to light, air, and view over a public highway... unless such owner acquired a right to light, air, and view by express covenant." Because Nassiri admittedly never acquired a right to light, air, and view by express covenant, the State requested judgment as a matter of law on Nassiri's inverse claim.

In its second motion, the State sought summary judgment on Nassiri's claims for breach of the Settlement Agreement, contractual breach of the implied

covenant of good faith and fair dealing, and tortious breach of the implied covenant. 14PA002611; 15PA003055. As the district court invited it to do, the State renewed its purely legal argument on the duty issue. The State again pointed out that it had no contractual or legal obligation under the Settlement Agreement to either restrict its future construction of the flyover or preserve Nassiri's undefined expectations regarding the visibility of the Exchange Parcel after conveying the property to Nassiri via quitclaim deed, as-is, where-is, and with all faults. Because Nassiri never argued that the Settlement Agreement was ambiguous, the State asked the court to construe and enforce the Agreement according to its plain language.

Nassiri opposed each motion. 15PA002901; 15PA002881. The State filed replies. 15PA003018; 15PA002987; 15PA003055. On April 1, 2015, the district court held a consolidated hearing on both motions and ruled from the bench. 16PA003066.

The court granted the State's motion regarding Nassiri's inverse condemnation claim. It determined that "with respect to the view, [it's] totally a *Probasco* issue;" that Nassiri "didn't have a right to inverse condemnation with respect to the view;" and that "the motion [] has to be granted." 16PA003140. A written order was entered on July 16, 2015. 18PA003539.

As to the State's motion regarding Nassiri's three contract claims, the district court granted it in part and denied it in part. The court granted the motion with respect to Nassiri's claim for tortious breach of the implied covenant because no special relationship existed between Nassiri and the State. The district court

determined that Nassiri acquired the Exchange Parcel as "part of [an] arm's length contract negotiation" and concluded that the relationship between Nassiri and the State was no different than when someone is "negotiating to buy land [] from a private individual." 16PA003142.

The district court denied the State's motion as to Nassiri's remaining contract claims, saying again that "[t]his is a breach of contract case." 16PA003139, 3143. The State challenged this characterization because Nassiri had still failed to identify any contractual obligation that the State didn't fulfill. The State reminded the district court that the duty question was a matter of construing the unambiguous Settlement Agreement, which was a legal determination that the court was obligated to make. 16PA003075.

In response, the district court said, "I think there is a duty[;] I think it's in the settlement agreement." 16PA003140. When the State respectfully asked the court to please identify the provision to which it was referring, the court could only respond that "there's a contractual duty in -- in the contract itself." 16PA003143-44. Even though the Settlement Agreement contains no mention of the flyover (or any other future improvements to the interchange) or an easement for visibility, the district court effectively determined as a matter of law that the contract imposed a duty on the State to refrain from building the flyover and that a jury would determine damages, if any, at trial:

> [Nassiri has] said all along that [the Exchange Parcel] was supposed to have 1,500 feet of visibility from I-15 after [he] purchased it and then [the State] reconfigured where the flyover was going to go and eliminated that 1,500 feet of visibility.

> So the question is when he negotiated to pay $24 million for the [Exchange Parcel], would he have paid [$24 million].... What would he have paid? Would he have paid less than $24 million? Did [the State] somehow overcharge him because they knew that there was some value to the view? I don't know. Those are all questions of fact for the jury. 16PA003143-44.

While it's true that Nassiri ***alleges*** that the Exchange Parcel was supposed to have "1,500 feet of visibility," this ***allegation*** is entirely unsupported by the integrated Settlement Agreement. Instead of enforcing the unambiguous Agreement as required by law, the district court accepted Nassiri's unsubstantiated allegation as true. Based on nothing more than this conclusory assertion, the court basically established the State's liability under Nassiri's breach of contract claims and set a trial essentially to determine damages. On July 16, 2015, the district court entered its written order to this effect. 17PA003525.

C. The State's Motion for Partial Summary Judgment on Nassiri's Prayer for Rescission.

On March 4, 2015, the State moved for partial summary judgment on Nassiri's prayer for rescission. 15PA002853. At this point, Nassiri still hadn't revealed any factual or legal basis for his request to rescind the Settlement Agreement. So, the State's motion generally asserted that no ground for rescission existed.

On March 23, 2015, Nassiri filed his opposition. 15PA002967. In it, he revealed for the first time that he sought rescission on the sole ground of unilateral mistake. He claimed that, in 2005, when he negotiated and agreed to purchase the Exchange Parcel, he "mistakenly believed that the Blue Diamond [interchange]

would [never] include a flyover." 15PA002969. Even though his claims previously emphasized the flyover's 2009 design change, Nassiri now argued that he never knew anything about any flyover whatsoever.

The State filed its reply and, on April 7, 2015, the district court held a hearing on the State's motion. 15PA003147; 17PA003288. Nassiri's wholesale change in theory aside, the State presented legal authority establishing that, as a matter of law, Nassiri's newly-alleged mistake could never substantiate his rescission claim anyway. And even assuming otherwise, Nassiri's 2012 claim to rescind the 2005 contract was barred by the three-year statute of limitations.

The district court denied the State's motion from the bench. It gave no discernable reason, saying only that "[w]hile I am not convinced that rescission is the proper remedy here, I think that it's not, respectfully, an issue of law, I think it's a question of fact what the remedy is here." 17PA003320. Although the State's argument about the viability of Nassiri's mistake presented a purely legal issue, the court didn't recognize this point. A written order was entered on July 16, 2015. 17PA003517.

D. The Limited Bench Trial

The State moved the court to bifurcate the trial as to Nassiri's equitable rescission claim, which Nassiri opposed. 16PA003254; 16PA003203. The court declined to bifurcate the entire claim but agreed to conduct a limited bench trial on the State's affirmative statute of limitations defense against rescission. 17PA003535.

Under Nevada law, any cause of action on the ground of mistake is subject to a three-year limitations period, which is "deemed to accrue upon the discovery by the aggrieved party of the facts constituting the [] mistake." NRS 11.390(3)(d). Because Nassiri claimed that he mistakenly believed that the Blue Diamond interchange would never include a flyover, he was required to file his rescission claim within three years of discovering that the interchange might eventually include a flyover.[5]

During the one-week bench trial, the State established that its original plans for a future Blue Diamond/I-15 flyover were publicly disclosed on numerous occasions as part of the Blue Diamond Project in compliance with NEPA. 17PA003394. While the final plans didn't exist until Las Vegas Paving modified the flyover design in 2009, under the State's lawful NEPA disclosures, Nassiri was on actual and/or constructive notice that the interchange might include a flyover prior to executing the Settlement Agreement in 2005. Even though he attended some of the public hearings beginning in 1999 where the flyover was presented, sent a letter to the State attaching one of the State's diagrams depicting and labeling the flyover, and previously argued and alleged that he was aware of the State's original flyover design, Nassiri contended at trial that he knew nothing about any plans for a flyover until construction of the flyover commenced in 2010. 17PA003422.

[5] The State strongly disputed that Nassiri's alleged mistake is either true or a viable reason to rescind the Settlement Agreement under Nevada law. For the purposes of the limited bench trial on the statute of limitations, however, these matters weren't contested.

On May 19, 2015, the court heard closing arguments. Following closings, the district court "[didn't] have any question" that "the State always disclosed [its plans for] a flyover" in compliance with federal law. 17PA003448. But it did have a question about how Nassiri could be on notice of his claim in 2005, when the flyover's final design didn't exist until 2009. The State explained that Nassiri's mistake wasn't specific to the flyover's 2009 design; it related to the existence of any flyover plans whatsoever. 17PA003448-455. The district court did not recognize that in order to support rescission, a mistake must occur at the time of contracting, and it requested further briefing on this issue, which was submitted. 17PA003506; 17PA003485.

More than four months later, the court rendered its written trial decision. It adopted the order submitted by Nassiri's counsel, with some non-substantive, handwritten revisions. 18PA003549; 18PA003570. The order contained more than 20 pages of findings of fact and conclusions of law, the majority of which having no legal or evidentiary basis. Despite previously saying on the record that it had no doubt that "the State always disclosed [its plans for] a flyover," the district court found in its adopted order that there was "no evidence that the flyover was discussed at [any of the federally-mandated public] meetings." 18PA003564. It also determined as a matter of law that Nassiri had no constructive knowledge of the lawfully-published flyover plans because they were "not in the public record by way of recording." 18PA003563.

E. The State's Second Motion for Summary Judgment on Nassiri's Rescission Claim

In its trial ruling, the Court went much farther than simply determining that Nassiri didn't discover the facts constituting his cause of action until 2010. It concluded that the facts giving rise to Nassiri's claim didn't even exist until 2010. 18PA003561. Since this finding—and others—foreclosed any possibility that Nassiri would be able to establish his claim for rescission as a matter of law, the State moved for summary judgment based on the district court's trial order. 18PA003591.

In its motion, the State also argued that summary judgment was separately required under this Court's decision in *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511 (Nev. 2015), which was issued less than three weeks after the district court rendered its trial ruling. 18PA003600. *Land Baron* involved very similar facts and validated the State's prior legal arguments for summary judgment on Nassiri's rescission claim.

Nassiri opposed the State's motion and the State replied. 18PA003608; 18PA003749. On November 17, 2015, the district court heard oral arguments. 19PA003765. It denied the State's motion. Despite the contrary conclusions of law in its trial ruling, the court determined that Nassiri's alleged mistake about the State's contingent choice to later build the flyover somehow didn't relate to a future contingency. 19PA003804-05. The district court distinguished *Land Baron* because the land in that case was "purchased for development." 19PA002805. The court overlooked the fact that Nassiri purchased the Exchange Parcel for

development as well. The written order wasn't entered until March 14, 2016. 21PA004460.

F. The State's Motion to Exclude Nassiri's Damages Evidence

During the year-long discovery period, Nassiri only ever disclosed computations of his claimed inverse condemnation and rescission damages. 11PA001954; 11PA001984; 11PA002171. He didn't disclose a computation of his claimed contract damages until more than two months after the January 15, 2015 close of discovery. 11PA001958; 15PA002964-65. When he finally disclosed these damages, his computation merely duplicated his claimed inverse condemnation damages, as if these highly unique constitutional just compensation damages could be measured in the exact same way as breach of contract damages. 21PA004284. They cannot.

Nassiri's only evidence of any compensatory damages is the appraisal testimony of his expert, Keith Harper, MAI. 11PA001988. Harper's opinions were limited to Nassiri's claimed inverse condemnation damages, which have since been dismissed. Harper didn't disclose any opinions on Nassiri's claimed contract damages and expressly denied having any. 11PA001988; 12PA002224. Because Nassiri never timely disclosed his contract damages, and because Harper's opinion of dismissed inverse damages isn't relevant to Nassiri's contract claims as a matter of law, the State moved to exclude Harper's testimony. 18PA003642. Nassiri opposed the State's motion. 21PA004256; 19PA003815. The State replied. 21PA004286.

On January 5, 2016, the district court held a hearing on the State's motion. 21PA004353. The Court took the issue under advisement. During a separate hearing two weeks later, the district court ruled from the bench on the State's motion to exclude Harper. 21PA004393. It determined that the fundamental relevancy issues affecting Harper's testimony went to the evidence's weight, not its admissibility. 21PA004455. A written order was entered on March 14, 2016. 21PA004462. This petition followed.

REASONS WHY THE WRIT SHOULD ISSUE

1. Writ relief is the appropriate remedy.

A writ of mandamus is available "to compel the performance of an act the law requires... or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech, Inc. v. Second Judicial Dist. Ct.*, 179 P.3d 556, 558 (Nev. 2008); *see also* NRS 34.160. Generally, writ relief is available only when there is no "plain, speedy, and adequate remedy in the ordinary course of law." NRS 34.170. While an appeal from final judgment is often an adequate remedy, this Court will exercise its discretion to consider petitions challenging interlocutory orders denying summary judgment when "summary judgment is clearly required by [law]." *ANSE, Inc. v. Eighth Jud. Dist. Ct.*, 192 P.3d 738, 742 (Nev. 2008).

In the past, the Court has also entertained such petitions when an important issue of law requires clarification, and considerations of sound judicial economy and administration militate in favor of granting the petition, *Int'l Game Tech, Inc.*, 179 P.3d at 559, or when the petition raises important policy questions about the State's ability to engage in efficient, long-term highway improvement projects,

State v. Eighth Judicial Dist. Ct. (Ad America), 351 P.3d 736, 740 (Nev. 2015). The decision to consider any petition is solely within this Court's discretion. *Id.*

In this case, the State respectfully asks the Court to exercise its discretion to consider this petition and to issue a writ of mandamus directing the district court to dismiss Nassiri's remaining claims. Summary judgment on these claims is required as a matter of law. In ruling otherwise, the district court manifestly abused its discretion. It rewrote the parties' integrated Settlement Agreement and imposed upon the State significant legal obligations that were never discussed, negotiated, or agreed to under the contract. It granted Nassiri an implied negative easement of light, air, and view, even though Nevada doesn't recognize the doctrine of implied negative easements. It determined that Nassiri could unwind a contract based on an alleged mistake that isn't really a mistake under Nevada law. It held that the State's federally-mandated public disclosure process is ineffective, even as to a sophisticated party who actively took part in the process himself. And it allowed Nassiri to belatedly repackage his dismissed inverse condemnation damages into his entirely separate and distinct breach of contract claims.

These clear errors of law will cause the State to proceed through a lengthy and costly jury trial on claims that have no cognizable legal basis, not to mention no evidentiary support. The State shouldn't be forced to devote more taxpayer dollars to defending against Nassiri's legally deficient claims. Preventing the unjust burden of a lengthy trial would be a valid exercise of this Court's discretion.

This petition also raises important legal issues and matters of public policy that will have significant impacts beyond the present case. To put this in context,

the Court needs to look no further than Project Neon—the largest highway improvement project in Nevada history. Several landowners, whose property is needed for Project Neon, have already inquired about acquiring surplus property in settlement, which is a procedure authorized by statute. NRS 408.533. Under the district court's legal rulings in this case, however, it could be legally impracticable for the State to continue this statutorily-approved practice out of fear of similar lawsuits. This would not only hamper the State's ongoing efforts to acquire needed right-of-way in connection with Project Neon—and future projects—but it would also be a disservice to both the State and Nevada landowners, who often find common settlement ground in eminent domain matters through the sale and/or exchange of surplus property.

The vast majority of the land acquired for Project Neon will be acquired through settlement agreements, similar to the one at issue in this case. The State should be allowed to rely on the settlement terms that it negotiates and memorializes with these landowners in written settlement agreements. But if the State can be sued for breaching contractual obligations that it never undertook and, in fact, disclaimed, its settlement agreements will have little meaning.

Importantly, Project Neon is an ongoing design-build project. Like the proposed flyover in this case, the Project's proposed improvements are subject to modification. If the State's settlements can be unwound for alleged "mistakes" over these possible future changes, or for conceptual future projects that have not yet even been designed, the State's settlement agreements in connection with the massive Project Neon could be subjected to costly legal challenges long after the

settlements were purportedly final. Nassiri's end-run around the 2005 final judgment of condemnation, if allowed to stand, further jeopardizes the benefits, certainty, and finality of the State's settlements.

There is no plain, adequate, and speedy remedy available at law to address these significant concerns. Because these issues affect the State's ongoing ability to efficiently plan and acquire right-of-way needed for Project Neon, it's important to settle them now, not several years down the road after a trial and appeal.

2. The district court erred as a matter of law by imposing upon the State obligations that do not exist in the integrated Settlement Agreement.

Under Nevada law, a breach of contract is the material failure to perform "a duty arising under or imposed by agreement." *Bernhard v. Rockhill Dev't Co.*, 734 P.2d 1238, 1240 (Nev. 1987) (quotation omitted). In the absence of a contractual duty, there can be no failure to perform and, hence, no breach of contract.

This fundamental issue presents the Court with a straightforward question of contractual construction: do the terms of the Settlement Agreement support Nassiri's claims? Because Nassiri has never argued that the Settlement Agreement is ambiguous, this is a question of law. *Ellison v. California State Auto. Ass'n*, 797 P.2d 975, 977 (Nev. 1990) (holding that in the absence of ambiguity or other factual complexities, issues of contractual construction "present questions of law that are suitable for determination by summary judgment."). Questions of law are subject to this Court's de novo review. *Diaz v. Ferne*, 84 P.3d 664, 665 (Nev. 2005).

Nassiri's sole contention in support of his breach of contract claims is that the State breached the Settlement Agreement (or its implied covenant of good faith and fair dealing) by building the flyover. But unless the State had an obligation ***not*** to build the flyover, it can't be forced to pay tens of millions of dollars in breach of contract damages for doing so. As no such obligation exists, Nassiri's claims fail as a matter of law.

A. Nothing within the four corners of the Settlement Agreement prohibited the State from building the flyover.

"A settlement agreement is a contract governed by general principles of contract law." *The Power Co. v. Henry*, 321 P.3d 858, 863 (Nev. 2014) (citations omitted). Like a contract, the interpretation of a settlement agreement is an issue of law. *Id.* As with any other contract, when a settlement agreement's language is unambiguous, courts must construe it and enforce it according to that language. *Id.* (citation omitted).

The Settlement Agreement contains no mention of the flyover or any other future Blue Diamond interchange development plans. And it contains no mention of the preservation of view or visibility to Nassiri's property. None of these matters were discussed or included in the integrated Settlement Agreement, which Nassiri and his counsel largely drafted and approved. 3PA000537. The State's sole obligation with respect to the 24-acre Exchange Parcel was to convey it to Nassiri via quitclaim deed, "as-is, where-is, and with all faults." 4PA000583-84. That is exactly what the State did. It had no duty to restrict its future construction

of roadway facilities, including the flyover, within the public right-of-way near Nassiri's property.

B. Nothing within the four corners of the quitclaim deed prohibited the State from building the flyover.

The Settlement Agreement was in large part a contract for the purchase and sale of land. "The general rule concerning a contract made to convey [real] property is that once a deed has been executed and delivered, the contract becomes merged into the deed...." *Hanneman v. Downer*, 871 P.2d 279 (Nev. 1994) (quotation omitted). "This does not mean that a contract no longer exists, just that the deed controls as the contract, rather than the terms of the prior sales contract." *Id.* (quotation and emphasis omitted). "Stated differently, when the terms of the deed cover the same subject matter as the earlier contract and the two are at variance, the deed controls." *Id.* (citation omitted).

Here, as mandated by NRS 408.533(3), which requires all property conveyances by the State to "be quitclaim in nature," and pursuant to the terms and conditions of the Settlement Agreement, the State conveyed the Exchange Parcel to Nassiri via quitclaim deed. The quitclaim deed provides that "[the State] makes no warranty, express or implied, of any kind with respect to any matter affecting the [Exchange Parcel]." 4PA000600. Nassiri cannot succeed on his breach of contract claims without squarely contradicting the plain, controlling terms of the quitclaim deed. The district court has refused to acknowledge this legal mandate, thereby continuing to proceed toward a jury trial on a breach of contract claim that is legally deficient.

C. As a matter of law, the implied covenant of good faith and fair dealing didn't prohibit the State from building the flyover.

"An implied covenant of good faith and fair dealing exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one party that disadvantage the other." *Frantz v. Johnson*, 999 P.2d 351, 358 (Nev. 2000). When a court applies the implied covenant of good faith, the boundaries of a permissible application are defined by the contract's purpose. Restatement (Second) of Contracts, § 205, comment a. The "implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Metcalf Const. Co., Inc. v. U.S.*, 742 F.3d 984, 991 (Fed. Cir. 2014) (citation omitted), *accord*, *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007).

In *Nelson*, the purchaser of property (Heer) asserted that the seller (Nelson) breached the implied covenant of good faith and fair dealing by failing to disclose prior water damage. *Id.* Nelson, however, did not have a duty under the contract to disclose the water damage. *Id.* The contract between the parties obligated Nelson to make only those disclosures that were required under NRS 113.130. *Id.* Because Nelson bore no contractual duty to disclose the water damage under that provision, this Court held as a matter of law that Nelson's omission couldn't constitute an arbitrary or unfair act that worked to Heer's disadvantage. *Id.*

Nelson is dispositive here. Although Nassiri contends that the State breached the implied covenant of good faith and fair dealing by building the flyover, the State bore no duty under the Settlement Agreement that prohibited it from constructing this publicly-beneficial roadway improvement. The Settlement

Agreement required the State to convey the Exchange Parcel to Nassiri via quitclaim deed, and it contained no additional obligations going forward. Because the State bore no contractual duty with respect to the flyover or any other future construction at the Blue Diamond interchange, its decision to further improve the public highway at that location cannot as a matter of law constitute an arbitrary or unfair act that worked to Nassiri's disadvantage. Again, the district court refused to acknowledge this controlling Nevada law.

D. In imposing upon the State a duty that doesn't exist, the district court manifestly abused its discretion.

Absent a recognized basis for avoidance, courts have "the obligation to enforce an unambiguous agreement as written." *Easton Bus. Opp. v. Town Executive Suites*, 230 P.3d 827, 835 (Nev. 2010). "Neither a court of law nor a court of equity can interpolate in a contract what the contract does not contain." *Reno Club v. Young Inv. Co.*, 182 P.2d 1011, 1017 (Nev. 1947). This Court has routinely held that it is "[legal] error to read into [an agreement] a clause or condition which does not exist." *Easton*, 230 P.3d at 835 (quotation omitted). "'[P]arties of full age and competent understanding must have the greatest freedom of contracting, and contracts, when entered into freely and voluntarily, must be upheld and enforced by the courts.'" *Id.*, quoting 29 Richard A. Lord, *Williston on Contracts*, § 12:3 (4th ed. 2003).

The district court failed to enforce the unambiguous Settlement Agreement as written. It interpolated a duty that the contract does not contain. In doing so, the court wrongly impinged upon the parties' freedom to contract. Nassiri had the

opportunity to raise any issues or ask any questions that he may have had with respect to the State's future construction at the Blue Diamond interchange or his property's view or visibility. He never mentioned either as a concern. As a result, these matters weren't discussed, negotiated or addressed in the integrated Settlement Agreement. When the State raised this argument in the district court, the court surprisingly responded:

> So Mr. Nassiri should have said: okay State, whatever you do in your right of way in the future, it better not block my [visibility]... I mean – I'm sorry. I just don't see it. It doesn't fit. 19PA003808.

But this is exactly the point. If Nassiri wanted the State to restrict its nearby construction in the future, then it was incumbent on him to attempt to negotiate for those rights. If, as he alleges, the property's visibility from the adjacent freeway traffic was an important factor for him, he should've included language to that effect in the Agreement. His failure to do so leaves no basis to sue the State.

Yet, under the district court's legal determinations in this case, the State is facing a May 31, 2016 trial, where a jury will be asked to award damages, if any, that the State should pay for building a publically noticed, NEPA approved flyover completely within State owned right-of-way. Thereafter, the State could be infinitely obligated to restrict its future construction near Nassiri's property, as the Settlement Agreement inures to the benefit of Nassiri's successors and assigns—another significant consequence that the district court failed to consider:

> The State: Take this out a hundred years and that interchange is being reconfigured or reconstructed and whoever the successor in interest is to Mr. Nassiri's property... does that mean they have a claim against the

> State because Mr. Nassiri bought [property] from the State so many years ago and it was part of a transaction in which a small portion of his property was also condemned?
>
> The district court: Maybe. I don't know. [] It's not really my problem. 17PA003460-61.

The district court is correct. It's not the court's problem. It's the State's problem. But when the State sought redress for this problem in a court of law and equity, the district court failed to apply basic principles of law or equity.

The Settlement Agreement must be recognized for what it is: an arm's length transaction between two unrelated and sophisticated parties, who were each represented by counsel, engineers, and real estate professionals and appraisers. Nassiri "freely and voluntarily" entered into the Settlement Agreement, and the district court should honor and uphold the terms of the parties' fully negotiated contract. Certainly, the district court should not rewrite the Settlement Agreement because Nassiri is unhappy with the settlement he entered into in 2005.

3. The district court erred as a matter of law by granting Nassiri an implied negative easement of light, air, and view.

During the discussion following closing arguments at the bench trial, the district court shed some light on its rationale for refusing to dismiss Nassiri's remaining claims. It was apparently the court's policy position that landowners who acquire property from the State in the context of settling condemnation actions should have an inalienable right to visibility over adjacent public highways:

> My problem with this whole thing is that it was all done as part of settling the take.
> . . .

> [I]t puts you in an unusual position because you're not just one property owner selling to another property owner. You're the State in the context of taking land from this man and you tell him, well, as part of this deal we'll sell you other land, [] but we're going to build a flyover [near] it, but nobody knows what that flyover's going to be. But we're going to value this land at X... but we don't really know how we're going to impact your land [in the future]. And you're not going to be able to sue us for it in the future because there's no cause of action for that and we've got this case out here that says you can't sue us if we build something -- a freeway next to your property.
> . . .
>
> To me, this is a problem. I mean, the State's in a different position. You're saying, you can't sue us for taking away your view because you're just the adjacent property owner. You can't sue us for that. If he had gotten that property any other way than from the State through the condemnation process I might agree with you.[6] 17PA003458-59.

Despite previously concluding that the relationship between Nassiri and the State was no different than when someone is "negotiating to buy land [] from a private individual," 16PA003142, the district court suddenly changed its tune.

Under its new take on the parties' relationship, the district court effectively held that whenever the State negotiates to sell surplus property as part of an agreement to settle a condemnation action, a negative easement of light, air, and view over adjacent public highways is implied in the settlement agreement, regardless of what the unambiguous contract actually says. This legal

[6] The district court seemed to forget that, in light of this set of uncertain circumstances, Nassiri had the option to (i) negotiate a lower price for the Exchange Parcel, or (ii) decline to buy the Exchange Parcel. He instead agreed to the State's price without even pursuing a counteroffer.

determination, which reaches much farther than this case alone, cannot be sustained because Nevada doesn't recognize implied negative easements.

More than 50 years ago, this Court expressly repudiated the doctrine of implied negative easements of light, air, and view for the purpose of a private suit by one landowner against a neighbor. *Boyd v. McDonald*, 408 P.2d 717, 722 (Nev. 1965). In refusing to recognize this doctrine, the Court accepted the rationale presented nearly a century earlier, in 1874, by Chief Justice Gray in *Keats v. Hugo*, 115 Mass. 204:

> '***To imply the grant of such a right [], without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation.*** The simplest rule, and that best suited to a country like ours, in which changes are taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed.' *Id.* (emphasis added).

A mere four years after *Boyd*, this issue came up again—this time in the context of eminent domain. *See Probasco*, 459 P.2d 772. In *Probasco*, the Court held that there is no valid claim for damages allegedly resulting from the infringement upon an abutting owner's light, air and view over a public highway, "unless such owner acquired a right to light, air and view by express covenant." *Id.* at 774. As the Court explained, "[n]ot every depreciation in the value of property not taken can be made the basis of an award of damages." *Id.* "Neither constitution nor statute contemplates compensation for that which does not exist." *Id.* In the five decades since *Boyd* and *Probasco*, this Court has never recognized a

cause of action that relied on the existence of an implied negative easement of light, air, and view.

Contrary to this well-settled law, the district court's order denying summary judgment essentially relies on the existence of an implied negative easement of light, air, and view. But the court's order is wrong as a matter of law for the same reasons articulated in *Boyd* and *Probasco* so long ago. As these cases establish, Nevada law requires an ***express covenant*** so that parties can understand their mutual rights and obligations and conduct themselves according to those defined standards. This isn't a case where, for example, the State promised to limit its nearby construction to nothing taller than 50' and then built a 60' flyover. In that instance, the State would know its limitations (build nothing beyond 50'); it could act within them; or it could expect to be sued for failing to do so.

Here, the State had no idea that it could be sued for building the flyover until after it was built. Under the district court's orders, the State had two options with respect to improving the public right-of-way near Nassiri's property: (1) build nothing, or (2) risk being sued for offending Nassiri's subjective expectations regarding an undefined right to light, air, and view. This conundrum is precisely what Chief Justice Gray warned about nearly 150 years ago when explaining why there can be no such thing as an ***implied*** negative easement—a warning and rule adopted as Nevada law but ignored by the district court.

Rather than apply this law, the district court effectively faulted the State for offering to sell the Exchange Parcel at a price that didn't factor in the future impact of a flyover design that hadn't yet been created. But the factors that the State

considered in formulating its asking price for the Exchange Property are irrelevant because Nassiri accepted the State's offer. Property is worth only as much as someone is willing to pay for it. The district court's ruling relies on the faulty premise that the State's ***independent opinion*** regarding the Exchange Parcel's fair market value was required to include specific factors. It wasn't. If Nassiri believed that the State's asking price was too high, he could've either negotiated for a lower price or refused to buy the property. He did neither. Instead, he voluntarily and contractually accepted the State's sales offer, on the State's proposed terms:

> This letter follows up on our letter of January 25, 2005. After further reflection, it seems unnecessary to draw out negotiations for Mr. Nassiri's purchase of the Exchange Property. ...Mr. Nassiri accepts the price of $21.83 per square foot for the Exchange Property, and the additional terms outlined in your letter of December 6, 2005. 3PA000535.

Although Nassiri now asserts that he would've either paid less for the Exchange Parcel or asked for more money for his four-acre condemnation parcel had he known that the State would later redesign the flyover, the unambiguous Settlement Agreement belies this claim. 4PA000587-88 (acknowledging that payment "is solely in compromise and settlement of disputed claims, and the amount of the Condemnation Proceeds is not an admission by any party as to the fair market value of the Subject Property, or any claims for damages"). Nassiri further released any claims—whether known or unknown—for future damages related to the fully negotiated values of the Exchange Parcel and four-acre condemnation parcel. 4PA000586, 588.

4. The district court erred as a matter of law by determining that Nassiri's mistaken belief about the future is a valid basis for rescission.

Nassiri's mistaken belief "that the Blue Diamond [interchange] would [never] include a flyover" cannot substantiate his rescission claim as a matter of law because: (i) it doesn't relate to a basic assumption on which he made the Settlement Agreement; (ii) it involves uncertainty about the future; (iii) it relates to a future contingency; and (iv) Nassiri bore the risk of his mistake.

A. Nassiri's alleged mistake doesn't relate to a basic assumption on which he made the Settlement Agreement.

To determine when the mistake of one party makes a contract voidable, Nevada has adopted the rule set forth in the Restatement (Second) of Contracts:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake....

Home Savers, Inc. v. United Sec. Co., 741 P.2d 1355, 1356-57 (Nev. 1987) (emphasis added), quoting Restatement (Second) of Contracts § 153 (1981). *Id.*

The Settlement Agreement contains no whisper of the flyover or the future Blue Diamond interchange development plan. An alleged mistake as to matters that aren't mentioned in the Settlement Agreement can't logically relate to a basic assumption of that contract.

B. Nassiri didn't make a mistake, he bargained with uncertainty.

Under Nevada law, "a mistake is a state of mind not in accord with the facts... [a]t the time the [] contract was formed." *Tarrant v. Monson*, 619 P.2d 1210, 1211 (Nev. 1980). Uncertainty about the future is not the same thing as a

mistake of fact. *Id.* "One who is uncertain assumes the risk that the facts will turn out unfavorably to his interests." *Id.* In *Tarrant*, this Court held that a contract to replace a lost ring couldn't be rescinded when the ring was later found because, at the time the contract was formed, "there was uncertainty as to the loss and there was the possibility that the ring would later be found." *Id.*

Nassiri didn't make a legally cognizable mistake for rescission purposes. Like in *Tarrant*, he bargained with uncertainty about the future. At the time that the Settlement Agreement was formed, there was uncertainty about the future configuration of the Blue Diamond interchange and there was the possibility that the existing configuration would later change.

C. Nassiri's alleged mistake relates to a future contingency.

Because a majority of states follow the Restatement, there is no shortage of case law applying Nevada's rules regarding mistake-based rescission. It is well-settled under the Restatement that "a contract may not be reformed or rescinded based upon a [] mistake of fact if the mistake relates to a mistaken belief, judgment, or expectation as to future, rather than past or present, facts, occurrences or events." *Ryan v. Ryan,* 640 S.E.2d 64, 69 (W.Va. 2006). "A mistake must relate to the existence or non-existence of a material fact as it exists at the time of the agreement, not to a future contingency." *Kassebaum v. Kassebaum*, 42 S.W.3d 685, 695 (Mo. 2001). A future contingency is "an event that may or may not occur; a possibility." *Black's Law Dictionary*, 362 (9th ed. 2009).

Nassiri's mistaken belief in 2005 "that the Blue Diamond [interchange] would [never] include a flyover" relates to a future contingency. In 2005, the

flyover was nothing more than a proposed plan—i.e., a future event that may or may not ever occur. 2PA000086; 1PA000066.

In its bench trial ruling, the district court recognized this exact point. It determined that Nassiri's claim was timely filed because the facts giving rise to his cause of action didn't exist until it was certain that the flyover would be built:

> Prior to 2010, NDOT ***might*** have ***chosen*** to not build the flyover at all. If NDOT had not built the flyover, then Mr. Nassiri could not have rescinded the Settlement Agreement. Therefore, Mr. Nassiri could not rescind the Settlement Agreement, as a matter of law, until it was reasonably certain that the flyover would be built. 18PA003561.

When the State moved for summary judgment under this conclusion of law, the district court backtracked. It found that the flyover was "not a contingency for Mr. Nassiri" because he didn't control the decision to later build it. 19PA003804. But that doesn't make the flyover any less of a contingency in 2005.

The flyover was a contingency in 2005 because it may or may not have ever been built. The flyover was always planned to be constructed "when traffic demand warrants had been met and funding was available." 2PA000086. But traffic demands may have never warranted the flyover; funding may have never become available; or, by the time these conditions were met, the State may have prioritized other improvements. None of this was known in 2005, which is why Nassiri's alleged mistake over these facts relates to a future contingency.

D. Nassiri bore the risk of his mistake.

If the State's arguments sound familiar, it's because this Court recently addressed the same issues in *Land Baron Inv. v. Bonnie Springs Family LP*, 356

P.3d 511, 517 (Nev. 2015). The facts in this case are extremely similar to those in *Land Baron*. In *Land Baron*, the buyer (Land Baron) sought to void a contract for the purchase of vacant land. *Id.* Land Baron argued that both it and the seller (Bonnie Springs) mistakenly believed that there would be sufficient access and water rights for a subdivision on the property. *Id.* This Court didn't bother determining whether the parties were mistaken over these issues because Land Baron bore the risk of the alleged mistake, foreclosing any possibility that it could rescind the contract:

> Land Baron is a sophisticated and experienced land buyer and developer, and in this instance, it contracted to purchase property that was well beyond the outskirts of Las Vegas, surrounded by land that was mostly undeveloped, flanked by dirt roads, and only a few minutes away from Red Rock Canyon, a well-known conservation area. Land Baron also drafted the contract and its amendments. Yet, despite including a section for contingencies, Land Baron failed to include language to address the possibilities that a narrow gravel road may not provide sufficient access to a subdivision, or that water may not be available to support a neighborhood complete with large homes and horse pastures. At best, this was a significant oversight for this type of project, and it can be fairly inferred that by failing to provide for such contingencies, Land Baron assumed the risk of mistake as to these issues. *Id.*

All of this is true here. Like in *Land Baron*, Nassiri is a sophisticated and experienced land buyer, 12PA002359; he contracted to purchase property, 4PA000582; he and his attorneys largely drafted the Settlement Agreement; he was given ample time to perform his own evaluation of the property;[7] he could've

[7] During the limited rescission statute of limitations bench trial, it was established that Nassiri and his team of professional real estate brokers, appraisers, and engineers had an exclusive due diligence review period of more than three months. 3PA000536.

attempted to negotiate for visibility rights but never raised the issue; and he (and his team of lawyers and real estate professionals) failed to include any language in the contract to address the reasonable possibility that the State might further improve the Blue Diamond interchange.

Nassiri not only failed to consider or address these matters, he expressly "accepted full responsibility" for his agreement and acquired the property "without warranty, 'as-is,' 'where-is,' and 'with all faults.'" 4PA000599. An "as-is" provision is an "indication that the parties considered that, as between them, such risk as related to the present [and future] condition of the property should lie with the purchaser." *Lenawee County Bd. Of Health v. Messerly*, 331 N.W.2d 203, 211 (Mich. 1982); *accord Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 514 P.2d 654, 657 (Nev. 1973). "By agreeing to purchase something 'as is,' a buyer agrees to make his own appraisal of the bargain and accept the risk that he may be wrong." *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). As in *Land Baron*, Nassiri bore the risk of his alleged mistake. And the district court should have granted the State's motion for summary judgment on this basis.

5. The district court manifestly abused its discretion when it held that Nassiri's rescission claim wasn't barred by the statute of limitations.

An action for relief on the ground of mistake is subject to a three-year limitations period, which "shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the [] mistake." NRS 11.190(3)(d). The

"plaintiff must... exercise reasonable diligence in discovering [his or her claim]." *Bemis v. Estate of Bemis*, 967 P.2d 437, 440 (Nev. 1998).

The discovery rule "does not operate to save those who have slept on their rights." *Pope v. Gray*, 760 P.2d 763, 767 (Nev. 1988). A statute of limitations period is not tolled by the discovery rule where a party is aware of facts that would cause a reasonable person to investigate a potential claim. *Shupe v. Ham*, 639 P.2d 540, 543 (Nev. 1982). Where there is uncontroverted evidence proving that a plaintiff discovered or should have discovered the facts giving rise to a possible claim, a determination that the plaintiff failed to timely bring that claim can be made as a matter of law on summary judgment. *Siragusa v. Brown*, 971 P.2d 801, 812 (Nev. 1998).

In this case, Nassiri contends that he "mistakenly believed that the Blue Diamond [interchange] would [never] include a flyover," and he didn't learn that the interchange might eventually include a flyover until 2010, when the flyover was under construction. 15PA002969. But the State's flyover plans were publicly disclosed in compliance with federal law and given to Nassiri long before he signed the Settlement Agreement in 2005. 2PA000075. Had he examined these public plans—at any time either before or after he agreed to purchase the Exchange Parcel—he would've discovered the facts of his so-called mistake.

Instead, he made no effort to investigate the State's published plans to improve the public right-of-way near his property; he agreed to acquire the Exchange Parcel as-is, where-is, and with all faults; and he never raised any concerns about the State's future construction. The district court excused Nassiri's

failure to exercise any reasonable diligence toward discovering his claim and determined that he had no individual knowledge about plans that were disclosed in compliance with federal law. This was legal error.

The NEPA federal disclosure process is how the State publicly discloses its proposed plans for a federally-funded highway improvement project. As this Court recently recognized in *Ad America*, when the State discloses its proposed plans in compliance with NEPA, it establishes public knowledge of those lawfully-disclosed plans. *Ad America*, 351 P.3d at 744 ("the reason there was public knowledge of Project Neon's anticipated need for Ad America's property was because NEPA required disclosure of the plans and an opportunity for public comment.") (Citations omitted).

The State publicly disclosed its proposed plans for the Blue Diamond Project, which included a proposed future flyover, in compliance with NEPA. 2PA000075. This was confirmed when the FHWA signed and approved the Project's 2004 EA. Accordingly, there was ***public knowledge*** of the State's proposed plans for a future flyover. *See Ad America*, 351 P.3d at 744.

Despite this public knowledge, the district court determined that Nassiri couldn't be charged with even constructive knowledge of the State's lawfully-published plans because they were "not in the public record by way of recording." 18PA003564. This legal determination should not be allowed to stand. If it is, the State's federally-compliant public disclosure process would be rendered meaningless. The purpose of publicly disclosing highway improvement plans

would be entirely defeated if individual members of the public could simply ignore the public information that's made available and then deny any knowledge about it.

The analysis here is straightforward. By complying with NEPA, the State established public knowledge of its proposed flyover plans no later than 2004. As a result, Nassiri knew of the facts constituting his alleged mistake as a matter of law from the moment he signed the Settlement Agreement on April 29, 2005. The three-year limitations period on his rescission claim, therefore, ran on April 29, 2008. Because Nassiri didn't file this action until more than four years later, his rescission claim is time-barred. The district court erred as a matter of law by not dismissing Nassiri's rescission claim as being too late.

6. If one or both of Nassiri's contract claims are allowed to proceed to trial, Harper should be precluded from testifying.

A. Harper's testimony is irrelevant.

To be admissible, expected expert testimony must "assist the trier of fact in understanding the evidence or determining a fact in issue." *Hallmark v. Eldridge*, 189 P.3d 646, 651 (Nev. 2008). "An expert's testimony will assist the trier of fact only when it is relevant." *Id.* (citation omitted). "'Relevant evidence' means evidence having any tendency to make the existence or non-existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Harper's appraisal of dismissed damages won't assist the jury. Harper's opinions are limited to the claimed value of Nassiri's inverse condemnation damages, which have since been dismissed on summary judgment. 11PA001988;

12PA002224; 18PA003539. Evidence of these highly unique, constitutional damages isn't freely transferrable to Nassiri's separate and distinct contract claims at his whim. As even Harper concedes, his testimony was rendered irrelevant by the Court's order dismissing Nassiri's inverse condemnation claim 12PA002212 (in his deposition, Harper acknowledged that if the court rules that Nassiri's loss of visibility is not a compensable taking, it would be the equivalent of the "judge throw[ing] my appraisal in the trash.").

Harper's testimony also relates to damages from a different decade than Nassiri's claimed breach of contract damages. Nassiri's dismissed inverse claim sought just compensation for an alleged "taking" based on his property's value in ***2013***. 11PA001995. According to the district court, however, the relevant question regarding his claimed contract damages is whether Nassiri overpaid for the Surplus Parcel in ***2005***. 17PA003531. If this case actually goes to trial, Harper's 2013 appraisal opinions won't assist the jury in determining whether—or by how much—Nassiri overpaid.

Furthermore, Harper's opinion of just compensation relates to a specific date of value (April 17, 2013) that has no bearing on Nassiri's claimed contract damages. "To assess compensation and damages [in an eminent domain action], the date of the first service of the summons is the date of valuation." NRS 37.120(1). In this case, April 17, 2013, was the date of the first service of the summons.

While this date of value may have been legally significant to his dismissed inverse claim, it's irrelevant to Nassiri's contract claims. These claims allege that

the State somehow breached the ***2005*** Settlement Agreement by building the ***2010*** Flyover. Based on his own allegations and arguments, there is no scenario in which Nassiri would ever be entitled to breach of contract damages based on his property's value on a date anywhere near ***April 17, 2013***.

Harper's opinion of just compensation also includes damages to ***42 acres*** of Nassiri's property that are not at issue under his contract claims. Contract damages "are intended to place the nonbreaching party in as good a position as if the contract had been performed. *Colorado Environments, Inc. v. Valley Grading Corp.*, 779 P.2d 80, 84 (Nev. 1989) (citations omitted). They're limited to the reasonably foreseeable losses naturally flowing from the breach. *Johnson v. Utile*, 472 P.2d 335, 338 (Nev. 1970) (citations omitted).

Harper's opinion is based on an alleged diminution in value to Nassiri's ***entire 66-acre assemblage*** as a result of the flyover. 11PA001995. Nassiri's claimed contract damages, however, do ***not*** relate to his entire 66-acre assembled parcel; they're limited to the ***24-acre Surplus Parcel*** that he acquired under the Settlement Agreement on which his contract claims are based. As stated in the district court's order denying summary judgment on Nassiri's breach of contract claims, breach of contract damages will be determined by looking at the amount that Nassiri would have paid for the 24-acre Exchange Parcel had he known about the flyover. 17PA003531. Nassiri acquired his other 42 acres in ***separate transactions*** that didn't involve the State. By allowing him to present evidence on damages related to 42 acres of property that aren't part of the contract at issue, the district court is inviting the jury to place Nassiri in a ***better*** position than if the

Settlement Agreement hadn't been hypothetically breached.

Moreover, damages to these 42 acres aren't reasonably foreseeable losses naturally flowing from any breach of the Settlement Agreement. Nassiri didn't even acquire at least some of his property until ***after*** he and the State entered into the Settlement Agreement.

B. Even if Harper's appraisal testimony had some tangential relevance the evidence is still far more prejudicial than probative.

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). Here, admitting Harper's opinion of just compensation as evidence of Nassiri's contract damages confuses the separate issues of these vastly different forms of damages. Just compensation for a taking is measured by the "sum of money necessary to place the property owner in the same position monetarily as if the property had never been ***taken***." NRS 37.120(3) (emphasis added). Breach of contract damages, on the other hand, are determined by the amount of money needed "to make the aggrieved party whole," as if a contract had been fully performed. *Hanneman v. Downer*, 871 P.2d 279, 283 (Nev. 1994).

The district court's decision to allow this confusion unfairly prejudices the State. The State could be forced to pay just compensation for a taking that never occurred, under an inverse condemnation claim that it successfully defeated on summary judgment.

Admitting this evidence could also result in a highly inflated damages verdict. The district court plans to allow Harper to testify that Nassiri's damages are $10 million. 21PA004455. As discussed above, this number relates to the diminished value of 42 acres that aren't at issue under Nassiri's breach of contract claims. It also relates to the value of Nassiri's property on April 17, 2013. This has a huge impact. Land values were significantly lower in 2010, when Nassiri contends that the Settlement Agreement was breached, than they were in 2013. Placing Harper's highly overstated damages figure within the sphere of the jury's consideration would severely prejudice the State.

Moreover, a $10 million award would reimburse Nassiri nearly half of his fully negotiated, agreed-upon purchase price for the Exchange Parcel, which—according to Harper's appraisal—has since appreciated in value by millions of dollars, even considering the new flyover. 11PA001996. Although Nassiri is suing the State for more than $12 million for allegedly eliminating the visibility of his property from I-15, he is simultaneously marketing his property as being "visible from the I-15 interstate," as having "exposure to the growing Las Vegas traffic," and as "the first property of its type that is visible to incoming Nevada traffic" from California. 10PA001910. Nassiri's marketing materials are consistent with the testimony of his 2005 engineering consultant, who agrees that the flyover doesn't meaningfully impact the visibility of Nassiri's property:

> Q. Do you think the flyover impacts Nassiri's view or visibility to his property?
>
> A. No, [] I don't believe it impacts the visibility to his property, at least where it's important.... If he wanted

> visibility to his property, he would want that visibility to be before you leave the freeway. Otherwise, you can't get there. So if you are driving up from Los Angeles, you see his property, you take the exit, which is long before you even get to the flyover.... [M]ost people - - like, you know, Mandalay Bay, they have got those big signs right on the edge of the freeway there, so you can see it for a long ways north and south. So from that aspect, I don't see how [the flyover] impacts his property. 12PA002343.

Awarding Nassiri the additional windfall that he seeks (at the State's expense) would be unjust.

C. These fundamental relevancy issues undermine the admissibility of Harper's testimony, not its weight as the district court found.

When dealing with experts, a trial court's basic gatekeeping role requires it to ensure that proposed testimony is both relevant and reliable. *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 147 (1999). In this case, the district court dismissed the above-discussed relevancy issues, telling the State that "it sounds like you have a good cross-examination." 21PA004455. By treating the issue as one of reliability, the court ignored its obligation to first ensure that Harper's proposed testimony is relevant.

D. The district court further erred by refusing to impose mandatory sanctions against Nassiri for his failure to disclose a computation of his claimed contract damages.

When a party fails to make the initial disclosures required by NRCP 16.1, a district court must impose sanctions, which can include any of the sanctions available under NRCP 37(b)(2). NRCP 16.1(e)(3). While the sanction provisions set forth in different rules are discretionary, sanctions under NRCP 16.1(e)(3) are mandatory. *Id.* In this case, Nassiri not only failed to disclose a computation of

his claimed contract damages as part of his initial disclosures, but he failed to disclose this computation at any point during discovery. The district court was obligated by the law to impose some form of sanctions against Nassiri but did not do so, further warranting writ relief compelling the district court to exclude Harper's irrelevant testimony.

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CONCLUSION

There is no legal basis for Nassiri's remaining claims. The State is entitled to judgment as a matter of clear Nevada law. Accordingly, and based upon the foregoing reasons, the State respectfully asks this Court to issue a writ of mandamus requiring the district court to vacate its orders denying summary judgment as to Nassiri's remaining claims and directing the district court to enter judgment as a matter of law in the State's favor in the underlying action.

In the event that one or both of Nassiri's breach of contract claims are allowed to proceed to trial—now set on the district court's trial stack beginning on May 31, 2016—the State alternatively requests a writ of mandamus compelling the district court to reverse its order denying the State's motion to exclude the irrelevant testimony of Harper.

DATED: April 6, 2016

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VERIFICATION

Eric M. Pepperman, Esq. declares under penalties of perjury as follows:

That he is an attorney with the law firm of Kemp, Jones & Coulthard, LLP, attorneys for Petitioner in the above-entitled Petition; he has obtained copies of district court papers relating to this case and he is familiar with the facts and circumstances set forth in the Petition; and that he knows the contents thereof to be true, based on the information he has received, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

This verification is made pursuant to NRS 15.010.

Dated this 6 day of April, 2016.



Eric M. Pepperman, Esq.

CERTIFICATE OF SERVICE

Under NRAP 25(c)(1)(A), I certify that I am an employee of Kemp, Jones & Coulthard, LLP and that on this date I caused to be served, via personal delivery, a true copy of the Petition for Writ of Mandamus and a thumb drive containing Petitioner's Appendix delivered to a clerk or other responsible person at the offices of the following people:

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