

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.

Electronically Filed
May 19 2016 08:45 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 70098

APPENDIX VOLUME 13, part 2

TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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1 on the statute of limitations on the breach of contract claim, but I think that's what
2 prevents summary judgment.

3 I don't think we can grant summary judgment there, except as to the
4 tortious claim for breach of implied covenant. Like I said all along, I really had a
5 problem with that theoretically and I do not think you can have a tortious breach of
6 contract because as it's been pointed out, we have no special fiduciary relationship.

7 The duty that the State owes to property owners, even when they take
8 their property, it's a public duty for tort claims and just cite you to *Coty*, C-o-t-y,
9 *versus Washoe County* which relies on *Frye versus Clark County* in which they
10 define public duty and that's just the public that you owe to the -- the duty that you
11 owe the public at large unless there -- where a public agent acting within the scope
12 of official conduct assumes a special duty by creating a specific reliance on the part
13 of certain individuals.

14 I don't think -- I mean, I know that Mr. Olsen argued that this person,
15 this representative of the State represented this was going to benefit him, but I don't
16 think that creates a special reliance or where a public officer's conduct affirmatively
17 causes harm to an individual. It's part of this arm's length contract negotiation in
18 which arguably the State had information that Mr. Nassiri didn't have with respect to
19 what he might have been willing to pay for that additional land that he wanted for
20 his bigger assemblage, but would he have paid as much had he known -- he says
21 he wouldn't paid anything.

22 Those are all questions of fact, and so I think that precludes summary
23 judgment on the contract claims, except as to the tortious breach of the implied
24 covenant of good faith and -- I just don't think you can get that against the State. I
25 think that's a public duty doctrine bars that. There is no special duty that the State

1 just because they are the State when they're negotiating to sell you property they
2 owe you any special duty. It's public duty.

3 So unless they've done something to create some special reliance and
4 I just -- I didn't see it here. I understand there was supposedly this representation
5 made, but that's just -- I didn't see that as creating a special fiduciary relationship.
6 It's more in the nature of just what you're negotiating to buy land for as if you
7 bought it from a private individual, so I think this is a breach of contract case.

8 I understand there are some problems. We have some questions
9 there, but I think they're all questions of fact. I don't think they're -- those are issues
10 of law.

11 So my issue I guess remains is how that determination affects going
12 forward. We have a bunch of motions. We have a motion on the 7th for summary
13 judgment on plaintiff's prayer for rescission, and then on the 21st and also on the
14 28th we have motions in limine on expert witness testimony which I don't know if
15 you need to take a look at some of those and see if they're affected at all. If we
16 limit the case to this, are they going to affect your motions in limine, so maybe if you
17 can take a look at that and let us know tomorrow.

18 MR. OLSEN: We'll take a look at those, Your Honor. I'm not sure --

19 THE COURT: How that affects --

20 MR. OLSEN: -- what all the motions are --

21 THE COURT: And whether affects going forward now anyway.

22 MR. OLSEN: Could -- just so I'm clear, it sounds like you've granted the
23 motion as to inverse condemnation --

24 THE COURT: Correct.

25 MR. OLSEN: -- you've denied it as to contract and contractual bad faith, and

1 you've granted it as to tortious --

2 THE COURT: Tortious.

3 MR. OLSEN: -- bad faith?

4 THE COURT: Correct.

5 MR. OLSEN: Okay. Thank you.

6 THE COURT: It's a breach of contract case.

7 MR. OLSEN: Thank you.

8 MR. COULTHARD: So -- okay, so now I'm confused. So breach of contract

9 survives --

10 THE COURT: Correct.

11 MR. COULTHARD: -- as does the implied covenant of good faith and fair

12 dealing because --

13 THE COURT: Correct.

14 MR. COULTHARD: Okay. And --

15 THE COURT: The only thing that doesn't is tortious breach of -- I just don't

16 think you can get the tortious breach of --

17 MR. COULTHARD: So that's --

18 THE COURT: -- against the State.

19 MR. OLSEN: Understood.

20 MR. COULTHARD: -- that's granted. So --

21 THE COURT: Yeah.

22 MR. COULTHARD: Okay, well we're on the -- I guess the eve of moving

23 forward with trial --

24 THE COURT: Right.

25 MR. COULTHARD: -- and I don't understand what they allege we breached,

1 what --

2 THE COURT: Okay.

3 MR. COULTHARD: -- duty, Your Honor, and I -- and so I'm not certain that
4 the State's -- we're at a bit of a disadvantage here when they've never identified the
5 specific duty and I don't know that Your Honor has -- I mean, did you determine
6 there is a specific duty that was breached --

7 THE COURT: Right, I --

8 MR. COULTHARD: -- and what is it and --

9 THE COURT: And I --

10 MR. COULTHARD: -- so we can figure out how to defend this.

11 THE COURT: I think that Mr. --

12 MR. OLSEN: Well, I --

13 THE COURT: -- what Mr. Olsen said -- I thought it encapsulated pretty well
14 -- was just that it's -- there's a contractual duty in -- in the contract itself -- I forget he
15 -- he gave us the citation --

16 MR. OLSEN: Two things I said, Your Honor, the good faith -- express good
17 faith duty --

18 THE COURT: Express good faith, yeah.

19 MR. OLSEN: -- and the failure to deliver the property --

20 THE COURT: Right. And --

21 MR. OLSEN: -- as it was represented not subject to.

22 THE COURT: And he referenced us to the complaint where they've said all
23 along that it was supposed to have been 1,500 feet of visibility from I-15 after they
24 purchased it and then they reconfigured where the flyover was going to go and
25 eliminated that 1,500 feet of visibility.

1 So that's the question is when he negotiated to pay \$24 million for the
2 surplusage or whatever you want to call it, would he have paid 24 -- I understand
3 he says he wouldn't have paid anything. He wanted the land. What would he have
4 paid? Would he have paid less than \$24 million. Did they somehow overcharge
5 him because they knew that there was some value to the view? I don't know.

6 Those are all -- as I said, those are all questions of fact for a jury. It's a legal issue.

7 MR. OLSEN: You prepare the order and I'll look at it?

8 MR. COULTHARD: We will prepare an order, Judge. I think it is important
9 that we will put some findings and conclusions in your order if that's acceptable --

10 THE COURT: Oh, absolutely, you got to --

11 MR. COULTHARD: Okay.

12 THE COURT: -- have them for the summary judgments. And as I said, it
13 may or may not affect what motions you've got pending and whether some of them
14 are now --

15 MR. COULTHARD: Well some of them can -- deal directly with the evidence
16 in the inverse or --

17 THE COURT: Yeah.

18 MR. COULTHARD: -- the claims have been dismissed, then --

19 THE COURT: So you can take a look at them --

20 MR. COULTHARD: -- we'll get together and we'll let Your Honor know and
21 your staff know so you're not --

22 THE COURT: What you can vacate --

23 MR. COULTHARD: -- wasting precious resources on preparing --

24 THE COURT: Sure.

25 MR. COULTHARD: -- for motions that are now moot.

1 THE COURT: So with respect to coming in tomorrow on the calendar call
2 then, if you can give some thought to what you think that does to the -- to how
3 much time you need for trial.

4 MR. COULTHARD: Thank you very much for your --

5 THE COURT: Okay.

6 MR. COULTHARD: -- patience today, Your Honor.

7 MR. OLSEN: Thank you, Your Honor.

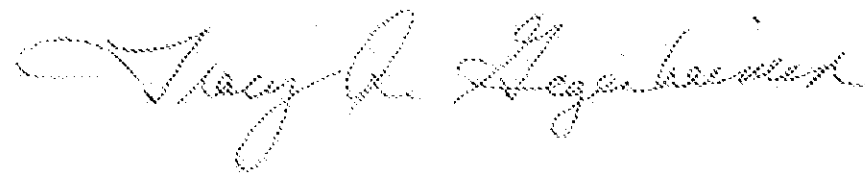
8 THE COURT: Good enough. Thanks. All right, we will see somebody
9 tomorrow and otherwise --

10 MR. OLSEN: Thank you for your time.

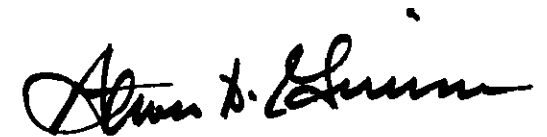
11 THE COURT: -- whatever future dates.

12 [Proceedings concluded at 1:05 p.m.]

13 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
14 proceedings in the above-entitled case to the best of my ability.

15 

16
17 Tracy A. Gegenheimer, CER-282, CET-282
18 Court Recorder/Transcriber
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

FRED NASSIRI,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

CASE NO. A-12-672841-C

DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

TUESDAY, MAY 19, 2015

TRANSCRIPT OF PROCEEDINGS
BENCH TRIAL - CLOSING ARGUMENTS

APPEARANCES:

For the Plaintiff:

ERIC R. OLSEN, ESQ.
DYLAN T. CICILIANO, ESQ.

For the Defendant:

WILLIAM L. COULTHARD, ESQ.
ERIC PEPPERMAN, ESQ.
MONA KAVEH, ESQ.
AMANDA B. KERN, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Tuesday, May 19, 2015 at 1:27 p.m.

2
3 THE MARSHAL: -- The Honorable Gloria Sturman presiding. Please be
4 seated.

5 THE COURT: Okay. All right. Good afternoon. We're going to go back on
6 the record then in Nassiri versus State of Nevada. We'll have counsel state their
7 appearances for the record. It's Case 672841.

8 MR. COULTHARD: Good afternoon, Your Honor. Bill Coulthard, Eric
9 Pepperman, Mona Kaveh on behalf of the State of Nevada. Also present is our
10 co-counsel, Amanda Kern, from the AG's Office and the NDOT representative, Mr.
11 Ed Miranda is also in court. Good afternoon.

12 THE COURT: Okay, thank you.

13 MR. OLSEN: Good afternoon, Your Honor. Eric Olsen and Dylan Ciciliano
14 making our first appearance on behalf of Garman Turner & Gordon. We filed our
15 change of firm today --

16 THE COURT: Okay.

17 MR. OLSEN: -- representing the plaintiffs. Mr. Nassiri is present with us at
18 counsel table.

19 THE COURT: Okay. Great. Well, then this is the time set and thank you for
20 accommodating us and getting a late start. We didn't finish until about 12:45, so
21 thanks for waiting for us to get started here. We're ready then for the closing
22 arguments in the -- on the statute of limitations issue.

23 MR. COULTHARD: Thank you, Your Honor. If I may work from the podium
24 here and before I begin, I just -- I do have a PowerPoint --

25 THE COURT: Okay.

1 MR. COULTHARD: -- and I have a courtesy copy for Your Honor.
2 THE COURT: Great, thanks.
3 MR. COULTHARD: And then I know -- think it's your practice to --
4 THE COURT: It's --
5 MR. COULTHARD: -- have the clerk mark and --
6 THE COURT: As a Court's exhibit.
7 MR. COULTHARD: -- (indiscernible) a set for the --
8 THE COURT: As -- just as a Court's exhibit, yeah.
9 MR. COULTHARD: Thank you. Also, we -- and I wanted to make sure that
10 we have filed -- we did electronically serve a bench brief related to the parol
11 evidence rule, so before we --
12 THE COURT: Is that in addition to the one that was filed before trial?
13 MR. COULTHARD: It is.
14 THE COURT: Okay.
15 MR. COULTHARD: And so it's I guess a supplemental bench brief on the
16 narrow issue of the parol evidence rule and the integration clause in relationship to
17 the right-of-way sketch maps that the -- Mr. Nassiri and his counsel relied upon, so I
18 think just provided courtesy copy for Your Honor of that also.
19 THE COURT: All right. Thank you.
20 MR. COULTHARD: Thank you.
21 MR. OLSEN: Sir, is that a document that was filed and served?
22 UNIDENTIFIED SPEAKER: Yes.
23 MR. COULTHARD: It was filed and served earlier this afternoon.
24 MR. OLSEN: Okay. We haven't seen that, Your Honor.
25 THE COURT: Okay. And it says electronically served so --

1 MR. COULTHARD: Oh. You know, I bet it went to your former firm.

2 UNIDENTIFIED SPEAKER: I have an extra copy --

3 MR. OLSEN: Well if it came -- I mean -- well, okay.

4 MR. COULTHARD: I'm not going to talk about it much.

5 THE COURT: Okay. All right. Okay.

6 CLOSING ARGUMENT BY THE DEFENDANT

7 BY MR. COULTHARD:

8 Thank you, Your Honor. May it please the Court.

9 First off, Your Honor, I'd like to thank you for your patience, your
10 attentiveness and your consideration during our week long bench trial. On behalf of
11 my firm, co-counsel and the State, we greatly appreciate you agreeing to hear this
12 case in the bifurcated manner as to the statute of limitations, so thank you.

13 I'd also like to thank your staff for the courtesy extended during the last
14 week. And I know we worked late several of the days and that impacts them
15 personally and so thank you for the courtesies and for putting up with all of the -- all
16 of us, so on behalf of the parties, thank you.

17 So as it's been 10 days since we were last here, and I know the Court
18 has a busy calendar, you have a lot of motion practice and I know you had another
19 jury trial last week, I'd like to circle back a little bit on -- touch on some of the
20 historical facts, the procedural posture of this case, the law applicable to the statute
21 of limitations, and then I'd like to discuss and summarize the evidence that was
22 presented at trial and at the end of the -- at these arguments, based upon the
23 multiple public notices, public meetings, public records that all document Mr. Nassiri
24 and the general public had notice of the State's intent to build the Blue Diamond
25 Highway I-15 connector flyover, we will ask the Court to dismiss these claims on

1 the basis that they are time barred under the applicable statute of limitations.

2 So turning to the PowerPoint, I think our starting place for all of this
3 and the historical starting place in this case is the Blue Diamond Highway Project.
4 And this was a significant highway project that was designed to widen and realign
5 the Blue Diamond Highway. Importantly, it was a phase project and it required the
6 State to acquire approximately four acres of Mr. Nassiri's property and through the
7 realignment of the highway and moving the highway from the preexisting alignment
8 to the realignment just south, it created approximately 24 acres of excess or surplus
9 property that was then defined as the exchange property in a settlement
10 agreement.

11 This Blue Diamond Project prompted the 2004 eminent domain action
12 against plaintiff, Mr. Nassiri, and importantly, the Blue Diamond Project always
13 included, and you'll see it throughout -- as early as 1999 throughout 2008 through
14 all the public notices that you heard about during trial, it included a proposed design
15 for a future eastbound Blue Diamond to northbound I-15 flyover ramp to be
16 constructed when traffic demand warrants have been met and funding is available.

17 From 1999 there's quite a bit of history, but ultimately in 2005 -- fast
18 forward to 2005 the parties enter into a settlement agreement and that settlement
19 agreement is a key document in this case and it effectively resolved the 2004
20 condemnation action and importantly it resolved that condemnation action through
21 a stipulated final judgment that was entered in July of 2005 and that's Exhibit 106.
22 Also part of that settlement agreement the State acquired the four acre strip of
23 Nassiri property for the realigned road for \$4.81 million and this was the fair market
24 value amount that was in the Gary Kent appraisal and it included not only the take,
25 but if you recall it included in excess of \$500,000 of severance damage for the

1 original -- Mr. Nassiri's original 40 plus or minus acres of land. And Mr. Nassiri
2 accepted that as a complete package of just compensation in the eminent domain
3 action.

4 As part of the settlement agreement, Mr. Nassiri purchased the 24
5 acres of surplus property for just over \$23 million and that price per acre coincides
6 with the price per acres paid by the State for the take.

7 Importantly, Your Honor, it was purchased via quit claim deed as-is
8 where-is with no warranties express or implied. And that's a statutory requirement
9 in Nevada when the State divests itself of surplus property or in this case the
10 exchange property, it needs to be via -- done via quit claim deed and it needs to be
11 at a fair market appraised value to ensure that in fact the citizens of this state are
12 getting a fair deal in the transaction.

13 The settlement agreement was fully executed in April of 2005 and the
14 land deals are completed. Thereafter on June 17th, 2005, and later in this
15 presentation that delay in that timeframe between execution of the settlement
16 agreement in April of 2005 and transfer of the land several months later is
17 important.

18 Now this lawsuit was filed on November 30th, 2012. That's nearly
19 seven years after the settlement was -- agreement was fully executed and the land
20 deals were completed. And this lawsuit and the breach of contract claim presently
21 seeks to rescind the 2005 settlement agreement on the basis of unilateral mistake,
22 and in this bifurcated trial, procedurally the State is seeking judgment in its favor on
23 plaintiff's mistake-based rescission claim because it is barred by the applicable
24 statute of limitations.

25 So just so we're clear and you saw this slide in Mr. Pepperman's

1 opening, but these are plaintiff's alleged mistakes and these are excerpts from his
2 most recent March 2015 opposition to the State's motion for summary judgment on
3 rescission. And they acknowledged that the mistake here, the mistake, the
4 unilateral mistake they're talking about is that plaintiff's were unaware that NDOT
5 intended on building a flyover, and we have the respective citations in the
6 PowerPoint.

7 The mistake again is defined at the time of the settlement agreement,
8 plaintiffs were unaware that NDOT intended on building a flyover. And those are
9 their words and intent is important because the State, beginning as early as 1999,
10 published its intent to build a flyover and it was always just a question of timing.

11 And then finally, plaintiffs did not have notice of the flyover and they
12 mistakenly believed that NDOT would not build a flyover. So that's the -- that's their
13 own alleged mistake.

14 The applicable law is under NRS 11.190(3) -- subsection (3)(d) and it
15 provides that an action for relief on the grounds of mistake is subject to a three-year
16 statute of limitations. And that claim can accrue upon the discovery of facts
17 constituting the mistake and this case involves the discovery rule.

18 And you saw a little bit about -- and you saw some give and take and
19 some pull -- push and pull related to the discovery rule in this case, Your Honor,
20 and the discovery rule really is designed to balance the equities between the public
21 policies of stability and finality with the plaintiff's ability to understand and
22 reasonably discover their cause of action before they're time barred.

23 And we saw some of that and specifically we had a challenge -- the
24 State in this case had the challenge of presenting evidence that was some
25 evidence as old as 15 years ago, late 1999, and we didn't have NDOT employees

1 who participated in many of the early 1999, 2000, 2001 and 2002 meetings. Those
2 folks had left NDOT, those folks had retired, and that's some of the push and pull
3 that I think the discovery rule is aimed at addressing.

4 And importantly, the limitations, the tolling limitation are the -- the
5 limitation is tolled until the injured party discovers or reasonably should have
6 discovered facts supporting a cause of action, and really that is the dispositive
7 question for Your Honor in this case to address is whether Mr. Nassiri and/or his
8 team of professional consultants knew, or through the exercise of reasonable
9 diligence should have known, of the State's intention to build the flyover at any time
10 before November 30th, 2009.

11 Now, why November 30th of 2009, Your Honor? That's the cutoff date.
12 Well because they filed the complaint on November 30th, 2012. If you back up
13 three years from that, working backwards, if Nassiri and/or his agents knew or
14 should have known of the State's intention to build the flyover before November
15 30th, 2009, then their claim is time barred and they didn't move forward. So that's a
16 key date, November 30th, 2009 and the notices we will -- we'll deal with will be
17 notices prior to that timeframe.

18 Finally, the -- this State, much like others, treats notice as knowledge
19 and if a party receives notice of a fact, they are deemed to have knowledge of that
20 fact. And that's a key theme throughout the defendant's case and in fact, we have
21 established through the evidence that Mr. Nassiri did receive notice, but he feigned
22 that he never knew. And you heard the arguments that well, I didn't understand
23 what a flyover was, I didn't know what an overpass was, I -- I'm not an engineer and
24 -- and so under Nevada law that equates notice with knowledge, it doesn't really
25 matter if he knew or not so long as he got notice and I would submit and I think we

1 established at trial that in fact his -- if Mr. Nassiri didn't understand what a flyover,
2 most certainly his professional consultants did.

3 But so that's sort of the history of the case, a snapshot of the law of the
4 case, and now I'd like to talk about the evidence of notice of the State's intent to
5 build a flyover that was presented at -- by the State at this trial. And much of this, if
6 not all of the notice evidence, was uncontested and I think that when you are in a
7 civil matter and the burden of proof -- it's a preponderance of evidence, the fact that
8 this -- these public records establish this notice and it was uncontested and came
9 in, albeit some of it objected to, but the evidence that came in, the vast majority of
10 the notice evidence is uncontested.

11 So let's talk about the notice evidence that we presented at trial, and it
12 began with the notice of the flyover in 1999 and this was the kickoff meeting, the
13 July 27th, 1999 intent-to-study meeting. It's the kickoff for the 2004 EA and if you
14 recall the environmental assessments take a number of years and in this case the
15 2004 started with this 1999 meeting and it ultimately gets approved in April of 2004,
16 actually May of 2004.

17 So this was the first meeting and what do we know about this first
18 meeting? Well, we know that Mr. Nassiri had the direct mail notice. That was
19 Exhibit Number 2. It was the -- you may recall the intent-to-study letter -- excuse
20 me. We actually had the intent-to-study letter go directly to Mr. Nassiri and he
21 acknowledged receipt of that and that's Exhibit 2.

22 We also know that Mr. Nassiri had publicized notices. That's actually
23 Exhibit 1, and if you recall, the evidence we have supporting the publications were
24 actually the State of Nevada's payment vouchers to the *Review Journal*, the *El*
25 *Mundo Newspaper* and they all have the three dates that they published the notice

1 and they all lead up to the various public informational needs. And Mr. Terry
2 walked through each of those public notices and explained this is how the State
3 communicates with the citizens through these public notices. So the first one for
4 this meeting of 1999, publicized notice, Exhibit 1.

5 And we know that Mr. Nassiri attended this July 27th, 1999 meeting
6 because we had the sign-in sheet and he testified that well I was only in, I walked
7 in, I walked out, 10 minutes, 15 minutes at most, but we also know that his
8 manager, his real estate manager, the licensed real estate broker, Mr. Ron Obser
9 who was working for him was also in the attendance at that meeting and that's
10 Exhibit 174 which is the sign-in sheet for the EAs.

11 But we also have the -- Mr. Nassiri's letter and I need to just step back
12 because we did have a -- and we spent quite a bit of time on Exhibit 3, which was
13 the handout -- the Proposed Exhibit 3 was the handout for this meeting and
14 ultimately, Your Honor, we got past all of the foundational exhibits -- objections, we
15 got past the hearsay, but ultimately you determined that it was untimely produced
16 and there would be prejudice.

17 And -- but Mr. Nassiri in his -- in this letter, which is Exhibit 152,
18 acknowledges in his own letter, dated August 10th, 1999, that he was in receipt of
19 the Blue Diamond Highway information package and he had the following questions
20 and comments. So 12 days, 13 days after that first meeting, Mr. Nassiri writes the
21 State of Nevada, acknowledging he has that highway information package and
22 commenting on it, and he also talks about the three options.

23 And those three options, Your Honor, were actually each of those
24 contained a -- the flyover and -- and we'll see -- these same options worked their
25 way through various meetings, but he's reviewed those options and commenting on

1 them and importantly page 2, he attaches a figure. Mr. Nassiri attached Figure
2 1-2a which is out of that informational package and it shows an east to northbound
3 flyover.

4 If you'll recall, here's the figure that's attached to Mr. Nassiri's August
5 10th, 1999 letter. I'm sorry, that's the next one. And it is -- it shows the flyover and
6 if you recall they had Mr. Terry come up and mark on the big board where the
7 existing flyover is and it's shown in orange, and not only does it show the flyover,
8 but it also shows the -- in all caps and I had every one of the witnesses read it on
9 the eight and a half by eleven and Mr. Nassiri included that it has the east to
10 northbound flyover designation with the big arrow pointing right to what is the
11 feature on that roadway configuration.

12 This goes back to 1999 so we know Mr. Nassiri had a document in his
13 hand in August of 1999 that had a flyover that had a flyover description and so
14 notice is knowledge. He had notice of the flyover as early as 1999.

15 Let's talk about his second notice. This is the second meeting,
16 February 23rd, 2000 public informational meeting. We had -- again, we saw the
17 direct mail notice to Mr. Nassiri, Exhibit 6. We had the publicized notice; again,
18 publications -- payment vouchers for the ads, Exhibit 4. Mr. Nassiri or his
19 representative -- we'll give him the benefit on the -- of the doubt on that, but Mr.
20 Nassiri or his representative, Mr. Obser, attended this meeting and we know that
21 from Exhibit 27, the sign-in roster commenting sheet.

22 But we also know it because he submits a comment form, Your Honor,
23 and that comment form was in Exhibit 27. It's Nassiri Bates stamp 2002 and that
24 comment form you get at the time you attend the public hearing. It is a blank form
25 that's handed out specifically by NDOT at that meeting and it was typewritten and

1 you -- if you recall that document -- actually it's two slides back, but we'll -- I'll show
2 you that after this slide.

3 But this is the -- actually the public information handout for the
4 February 23rd, 2000 meeting. And this did come into evidence. This came in as
5 Exhibit 6 and what does it tell you? Now this is the handout that's given to the
6 attendees and available to each of the participants and we know Mr. Nassiri or Mr.
7 Obser were present and it says, under the project description, the proposed
8 improvements will include constructing a new interchange at I-15, including an
9 eastbound to northbound flyover ramp. Well that's the flyover that they're mistaken
10 -- they allege they're mistaken about. Again, that's out of Exhibit 6, Bates stamp
11 7150 under the project text description.

12 But that's not all this handout did. It included three diagrams all
13 showing east to northbound flyovers, and each of these was on a board and this is
14 the Exhibit 6 that Mr. Terry spent some time marking up in orange. Again, the
15 exhibit -- Figure 2a which flows -- this is the same Figure 2a, nearly identical if not
16 identical to the 1999 diagram attached to Mr. Nassiri's prior letter from August of
17 '99. Shows the flyover, shows the east to northbound flyover.

18 And the additional documents actually blow these sections up and if
19 you recall looking at Exhibit 6, Mr. Terry also marked these up. But the flyover
20 begins in this left-hand corner in orange, SR-160 to Pahrump, so you're coming
21 connecting eastbound with the flyover. You do the match line also on the next
22 Exhibit 6, Bates stamped 17160, it ties in the balance of the flyover and then it -- if
23 you recall, it circles -- so it shows it here.

24 But then on the larger area, if you see the oval, it picks up and
25 enlarges it and if there's any question about what this roadway configuration is, be

1 it an overpass or an on and off ramp, any feigned confusion can be easily cleared
2 up by reading in all caps English flyover ramp. And it shows where the northbound
3 one lanes connect into the northbound I-15, the other will merge into the collector
4 distributor road.

5 So this is again back from 2002. So that's the second notice. And
6 here's the comment form submitted by Mr. Nassiri that evidences and shows that
7 he or his representative was at this hearing. What does he say? He says I had an
8 opportunity to look at the proposed layout for widening of SR160 that was
9 presented at the February 23rd, 2000 informational meeting.

10 So he had an opportunity to study and look at this, the documents we
11 just went through. So he admits it and he signs it on March 7th, 2000. Again,
12 actual notice, notice is knowledge, that's his second notice of the State's intent to
13 build the flyover.

14 Moving forward to the third public informational meeting for May 7th,
15 2002, we know that Mr. Nassiri again had direct mail notice, notice of intent to
16 study, Exhibit 11. We know he had publicized notice. Those were Exhibit 8, 9 and
17 10. We know he signed in on -- this was Exhibit 179. This was Mr. Nassiri's --
18 where he printed -- we printed those during trial, the sign-in sheet, and when I first
19 showed him that handwriting, I said is that your handwriting? He said yes, and then
20 he realized that it was for another meeting that he testified to that he'd only been to
21 one and now we had his signature on two sign-in sheets and then he wasn't sure if
22 it was his signature or not, but I believe Mr. Nassiri attended that and that is
23 confirmed -- his personal attendance is confirmed in his May 23rd, 2002 letter that
24 he writes shortly after this public meeting and he states, I attended the public
25 hearing of May 7th, 2002 regarding SR160 project. That's Exhibit 153 that was

1 also stipulated into the evidence.

2 So he doesn't say my representatives attended, he says I attended.
3 And I asked him in that letter, I said you wouldn't -- you -- this is true and correct,
4 right? Everything you say, and he said yeah. So he's backtracked a little on that,
5 but what we do know about that meeting is it was an open forum meeting and at
6 each of these open forum meetings, we know that there were display boards
7 present. They put the big boards up much like this and they had NDOT
8 representatives with a nametag present to answer any questions. So this is the
9 third opportunity for Mr. Nassiri to understand the State's intention to build the
10 flyover.

11 The next public meeting is July 28th, 2003. This is the fourth in a
12 series of public meetings. He had direct mail notice, Exhibit 18 and 19. Again,
13 NDOT and the State publicized its notice as required under the federal rules and
14 regulations. Exhibit 16 we stipulated that in. We talked about those. Another open
15 forum meeting with display boards and representatives present to answer
16 questions, and this is really the fourth opportunity for Mr. Nassiri to understand the
17 flyover. Now we don't have any evidence that Mr. Nassiri or his representatives
18 attended this, but it was certainly available to him and they had notice.

19 So those are the notices in public records and -- but these notices that
20 we ran through are not just available for Mr. Nassiri. Excuse me, Your Honor.
21 They are and they were available to Mr. Nassiri's team of professional consultants
22 by 2004 and let's talk about that team.

23 First Mr. Nassiri had Mr. Chapman and a fine eminent domain lawyer,
24 former Deputy Attorney General who during his 10 years with the Nevada Attorney
25 General's Office actually represented NDOT and so here's a lawyer who has a lot

1 of NDOT experience, knows his way around every office of NDOT and we know
2 from Exhibit 32 that Mr. Chapman was on the Nassiri team by April of 2004 when
3 we saw that first letter saying I'm representing him and by the way, I want to buy
4 this -- we want to buy -- Mr. Nassiri wants to buy the surplus property.

5 Mr. Nassiri also had a civil engineer on his team. He had Mr. Steve
6 Oxoby who was engaged in 2002, and if you recall that the last line of questioning I
7 believe with Mr. Nassiri in the cross that I had I showed him the Carter Burgess fax
8 sheet from Mr. Oxoby and I actually moved to admit it. There were some
9 objections about hearsay and I withdrew it.

10 But you understood, Your Honor, the reason and I -- and that was the
11 reason I was relying on that exhibit was to show the timeframe of when Mr. Oxoby
12 was engaged by Mr. Nassiri, and the date of that was February 21st, 2003. So --
13 I'm sorry, 2002. He was engaged in February, early February 2002, and when you
14 look at and you line up those notices, there's two -- actually three prior notices. The
15 second, third and fourth meeting that were available to Mr. Oxoby to attend, that he
16 was engaged and again, Mr. Oxoby was a former NDOT engineer, long career with
17 NDOT, knew his way around and we did the read in. Mr. Oxoby acknowledged in
18 his deposition read in that he always was aware of the State's intent to build a
19 flyover, he just didn't think it was relevant to Mr. Nassiri's take.

20 We also had Mr. Ron Obser -- Mr. Nassiri's team included Mr. Ron
21 Obser, a license Nevada real estate broker and we actually saw a letter where he
22 was in house for Mr. Nassiri's real estate division and his title was Director of
23 Nassiri Real Estate and that was Exhibit I believe 110.

24 We had -- finally we had two real estate -- licensed real estate
25 appraisers on the team, Mr. Tim Morse and John Kiehlbauch, license real estate

1 appraisers on the Nassiri team.

2 And finally we had Mr. Nassiri, the captain of the team who had 25
3 years worth of real estate experience, well educated and successful and
4 sophisticated businessman who knows his way and admitted working away --
5 working his -- in his prior business in contracts.

6 So there's the team and what do we know? We know after that team's
7 in place, there's another notice of a flyover in 2004. And this is an important
8 meeting, Your Honor, because this is sort of the culmination of the final approval of
9 the EA -- of the 2004 EA.

10 It set a meeting for May 19th, 2004. The environmental assessment is
11 really published at this meeting and that's Exhibit 37. We know that Mr. Nassiri had
12 direct mail notice of that hearing, just as he had the other ones, and we actually --
13 we had some foundational issues and were able to ultimately overcome those and
14 establish through Mr. Terry the admittance of Exhibit 28.

15 And this was the mailing list that every time I brought it up during trial
16 was objected to and we had a real dispute as to what it means, but when you look
17 at that, and I would urge the Court to take a look at it, it states a copy of the EA and
18 a copy of the transportation notice should be mailed to the following people and Mr.
19 Nassiri's on that list. And John Terry testified during his direct -- Mr. Terry, again
20 the NDOT Assistant Director, testified it was NDOT's practice to mail final EAs to
21 concerned or participating citizens, so he believed Mr. Nassiri received a copy of
22 the EA.

23 But that's really icing on the cake because what we know, Your Honor,
24 is Mr. Nassiri had publicized notice of that same meeting. Exhibits 33 through 36
25 were the publicized invoices evidencing that it was properly noticed. But we also

1 know that Mr. Nassiri's team of professional consultants also had notice. They
2 were on board. They know their way around. Mr. Chapman understands and
3 testified to the fact that every major highway project that's kicked off in the state is
4 commenced with an environmental assessment. That's the way these things work.
5 And he also acknowledged that these finalized environmental assessment
6 documents are public records housed and maintained by NDOT.

7 So here's the handout for the May 19th, 2004 meeting and this came in
8 -- I believe it's Exhibit 39. It is Exhibit 39. And this is the -- again, the public
9 informational handout. This isn't the EA. This is in addition to the EA and what
10 does it say? For those participants going to this May 19th, 2004 meeting it tells
11 them the project description. It includes a proposed design for a future eastbound
12 SR160 to northbound I-15 flyover ramp. That's the ramp at issue in this case.

13 And it also references the Code of Federal Regulations and CFR Part
14 771 and we asked during trial that Your Honor take judicial notice of that and I used
15 that during the direct of Mr. Terry. It's Exhibit 151. But that code, which the State
16 has to comply with -- the FHA, the Federal Highway Administration also has to
17 comply with it -- provides that the 2004 EA is present at this meeting. That is one of
18 the code requirements that the EA be present and also that the EA be available -- I
19 believe it's three weeks before that public meeting and after at -- and we saw in
20 those -- in the transportation notice that the EA was available at the Enterprise
21 Library, the local District 1 NDOT office and also at their NDOT headquarters in
22 Carson City. And that's Exhibit 400. I'm sorry, Exhibit 40.

23 That's actually ties to the notice and the notice advises where it can be
24 found, so that public handout was there talking about the flyover, telling you how to
25 get the EA, but the EA is also there and this is a copy of it. This is Exhibit -- this is

1 the final approved 2004 EA, Exhibit 27. What does it say about a flyover? It again
2 tracks the same language we've seen in the documents since 1999, the project will
3 also include a proposed design for a future eastbound SR160 to northbound I-15
4 flyover ramp.

5 Again, Mr. Chapman acknowledged that this was a public record and
6 that the EA kicks off the major roadway projects and it had in it the same or very
7 similar diagram again showing the flyover and Mr. Terry marked this one up during
8 trial. It's Exhibit 27. In orange again the flyover connecting eastbound SR160 to
9 northbound I-15 with the notation and an arrow pointing to it -- again, asked the
10 witnesses can they read it from the eight and a half and 11 and they could, east to
11 northbound flyover.

12 So the 2004 environmental assessment was available to Mr. Nassiri.
13 It's a public record. It's available to his attorney, Mr. Chapman. It's available to Mr.
14 Oxoby, his civil engineer. It's available to Tim Morse, his appraiser. It's available to
15 John Kiehlbauch, his appraiser. And I went through each one of those names with
16 Mr. Chapman and he acknowledged it. And finally to Ron Obser, the
17 broker/director, licensed civil engineer.

18 Notice equals knowledge, Your Honor, under *Costello versus Casler*
19 and clearly, that's I believe our fifth notice. And if you recall, we moved through
20 those notices and again, there were objections and evidentiary hurdles. I felt like I
21 was back in evidence class a few of those afternoons, but at the end -- during Mr.
22 Terry's redirect, I marked up and we went through this public meeting summary
23 chart and we took a big X and a big red pen and we summarized the notices that
24 we've just gone through.

25 And ultimately, Your Honor, we marked that as an Exhibit 173 and it

1 shows five direct mail notices to Mr. Nassiri between '99 and 2004, six published
2 notices from '99 through 2005 -- from the evidence we have, we know Mr. Nassiri
3 attended three meetings and out of the six meetings, four of them specifically had
4 references in the project documents and diagrams of the flyover. And as to those,
5 Mr. Nassiri attended two of them and had them in his possession.

6 So that really summarizes five years of the history of notices and -- so
7 what was going on during this five years, this 1999 to 2004 timeframe? That was
8 the notices, but what was Mr. Nassiri and Team Nassiri's focus at this timeframe?

9 Well, what we know going back to his very first letter in 1999 that he
10 was trying to purchase the surplus property. That's again Exhibit 152. And the
11 testimony came in that he was a very motivated buyer and he was motivated to buy
12 the surplus property as soon as possible because -- and if you recall, we saw the
13 negotiator's diary and that's the NDOT right of way outside consultants who assist
14 NDOT acquire right of way. And they keep a log, it was Exhibit 30. And that log --
15 excuse me, Your Honor -- evidenced that and summarized that Mr. Nassiri was
16 concerned about appreciating land values in Clark County in the Las Vegas Valley.

17 We all saw we were riding a wave during this '99 to 2005 timeframe.
18 Prices were rapidly appreciating and Mr. Nassiri wanted to lock those prices in at
19 2004, 2005 valuations because he anticipated appreciation and he acknowledged
20 that, and so that was his focus.

21 And ultimately they enter into a deal and his -- and so we then kind of
22 fast forward, Your Honor, into -- throughout the Fall of 2004, we fast forward to the
23 December 6th, 2004 what I called the letter of intent, and that was from Mr. Walch
24 to Mr. Chapman. And that's an important letter because it memorializes ultimately
25 what became -- what becomes the deal points in the settlement agreement and it --

1 the deal points are generally Mr. Nassiri takes the surplus property as-is where-is
2 with all faults, NDOT would take Nassiri's four-acre property as-is where-is with all
3 faults, and an exclusive look period would begin.

4 And if you recall, that -- so they know that they're taking -- Mr. Nassiri
5 and his team of professional consultants know that they are going to take this land
6 via quit claim as-is where-is, no express or implied warranties and they're granted
7 an exclusive look period, and that specifically spelled out what the purpose of that
8 is in several correspondence, but in this letter, this Exhibit 65, a December 6th
9 letter, the State tells Mr. Chapman, Mr. Nassiri's counsel, this -- he's granted an
10 exclusive look period, quote, so Mr. Nassiri has an opportunity to fully evaluate
11 NDOT's proposal.

12 Go do your homework, Mr. Nassiri. Go do your due diligence. Go look
13 at the public records, go look at the EAs that are public records, understand what
14 the plans are for I-15 and Blue Diamond because we're transferring it as-is where-is
15 with no reps or warranties.

16 But important -- this letter has another important point, Your Honor,
17 and sort of the theme we've heard and -- is these sketch maps and these sketch
18 maps created reliance or a misrepresentation and Mr. Nassiri and his group of
19 consultants rely on these sketch maps.

20 Well let's look at the purpose of the sketch map, and this is really the
21 first -- some of the first correspondence -- well, I will acknowledge that there was a
22 sketch map used for a meeting in May, but really when we see the sketch map
23 coming in between the lawyers, here's what it says. And this is right out of the
24 letter from the State to Mr. Nassiri: Attached a right-of-way sketch map to show the
25 land area. Quote, I have enclosed a copy of the map illustrating the general

1 locations of parcel one and two prepared by NDOT's right-of-way division. That's
2 the purpose of the sketch map.

3 So let's talk about the exclusive look period. Again, we saw in the next
4 correspondence -- actually two days later on Exhibit 67, if you recall the
5 correspondence right after that December 6th letter from Mr. Walch to Mr.
6 Chapman, Mr. Chapman writes back and says hey, can you give us the Gary Kent
7 appraisal for the surplus property. And the State says no, we're happy to exchange
8 appraisals, but we're not going to give you our appraisal unless you exchange.
9 That's not our practice. But he also says Mr. Nassiri has this exclusive look period
10 so that Mr. Nassiri is free to fully evaluate the matter with the counsel of appraisals
11 or other experts without the risk that NDOT will take -- will make the exchange
12 property unavailable for settlement during the 21-day period.

13 So take a look again, do your own due diligence with your appraisals
14 or other experts. That's what Mr. Nassiri was told in the December 2004. We know
15 that the exclusive look period was extended from December 6th to March 30th,
16 2005 and Mr. Chapman admitted that and if you recall the timeline, I had it at the
17 bottom of the timeline, but again, it's not just 21 days, it's -- it goes for months; 120
18 days for them to do their due diligence, all the while knowing that they're taking this
19 land as-is where-is. So again, Mr. Nassiri has a heightened obligation to do his due
20 diligence and he's given the opportunity from the State to go do that.

21 Finally, we in March -- March 2nd, 2005 we see the initial draft of the
22 settlement agreement. That's from Mr. Chapman. He took the first pass, the first
23 stab at it is the way he said, and what does he say? It's interesting when you take
24 a look at that -- it's Exhibit 74 -- it's telling -- most telling what it doesn't say. There's
25 no mention of restricting NDOT's road improvements in their I-15 right of way, no

1 restriction as to what NDOT can do in the roadway activities whatsoever, no
2 negative easement as to view or visibility or signage granted to Mr. Nassiri by the
3 State.

4 And again, it talks about the sketch map and it talks about a survey in
5 paragraph 10 from Mr. Nassiri's counsel to the State. And it states: Said
6 conveyance of the exchange property shall be proceeded by a survey conducted by
7 NDOT forces or NDOT expense, specifying by metes and bounds the area,
8 boundaries and location of the exchange property and a map based upon said
9 survey shall be prepared and attached to the settlement agreement.

10 That's why the sketch map was prepared. It was prepared to show the
11 area, boundaries and location of the exchange property and just as any survey
12 does, it surveys out and lays out the roadway conditions and the areas and the
13 physical improvements around that property at the time they do their survey. That's
14 why the map was attached to the settlement agreement in Mr. Nassiri and Mr.
15 Chapman's own words.

16 And finally paragraph 23 of Mr. Chapman's draft settlement has
17 actually the integration provision. This document evidences the complete and final
18 agreement of the parties. And it attaches the right-of-way sketch map. That's
19 Bates stamp 1231.

20 Then we move forward into the settlement agreement. It takes a little
21 bit of time, but the form of the settlement agreement ultimately gets entered into.
22 This settlement agreement fully and finally resolved the eminent domain just
23 compensation claims with NDOT for \$4.81 million payment by the State to Mr.
24 Nassiri. It's done by final judgment and order of condemnation. Importantly
25 resolves all severance damages, known and unknown. Mr. Nassiri acquired the 24

1 acres of exchange property via quit claim deed, and importantly it had broad mutual
2 releases. The State released Mr. Nassiri from any issues, Mr. Nassiri released the
3 State, broad -- very broad mutual releases.

4 And it had some acknowledgements and every time we wanted to talk
5 about these acknowledgements we got hit with an objection that it really wasn't
6 relevant; that it was -- it didn't go to notice and what he knew or should have done.

7 But I believe in fact it is relevant, Your Honor, and the reason it's
8 relevant is because the acknowledgements specifically assert and acknowledge
9 that there are no representations or warranties outside of the four corners of the
10 document. They're not relying on any promises of -- by the State. They're not
11 relying on anything, so they're relevant to the underlying claim of mistake that they
12 didn't know and they relied upon the sketch map, and they also are relevant to the
13 credibility of their argument.

14 So these acknowledgements I think are important and the parties
15 mutually agreed and understood and warranted that the releases contained herein
16 extended and applied to and covered -- and included all unknown, unforeseen,
17 unsuspected and unanticipated injuries, claims, damages, losses and liabilities, if
18 any, arising from the matters addressed herein. Very broad.

19 Importantly as to the mistake, 2.19 little iii states that no promise or
20 inducement has been offered except as herein set forth. Well, I can tell you the
21 sketch map -- you know, there's no sketch map reference in the four corners of that
22 document that's -- that there's no reference that this is all the State's ever going to
23 build in its I-15 right of way. No promise or inducement has been offered except for
24 in the four corners of that document and that this agreement is executed without
25 reliance upon any statement or representation by any party or its representatives

1 concerning the nature and extent of the claimed damages or legal liabilities.

2 They were on their own. It was quit claim deed. They needed to do
3 their due diligence and the deal was as codified in the four corners of the
4 agreement.

5 Importantly there was an integration clause. I asked Mr. Chapman do
6 you understand it, is it unambiguous, is it -- any concern you have with that
7 language? He acknowledge it was not an ambiguous provision and it's not. This
8 agreement constitutes the entire agreement by and between the parties and
9 supersedes and replaces any and all previous agreements entered into or
10 negotiated between the parties. Even if the State had somehow misrepresented or
11 misled them to believe that there was a flyover, which they didn't, they were
12 consistent through all of these notices that they intended to build it, but even if they
13 did, this integration clause -- unless there's some language in that agreement that
14 says otherwise, this document controls, and there is no language in that
15 agreement.

16 So okay, we know -- now this is an important meeting and I want to -- I
17 mentioned this earlier. We are at the -- we've signed the settlement agreement.
18 The team is engaged April 28th, 2004. One week later there's another public
19 meeting. One week after signing the settlement agreement the kickoff of the 2008
20 EA informational meeting goes forward on May 5th, 2005.

21 Publicized notice sets the May 5th, 2005 public hearing, again, one
22 week after the settlement agreement. That's Exhibit 89.

23 It's an open forum meeting. We had representatives -- and this is right
24 out of Exhibit 113, which is the actual EA -- representatives from Federal Highway
25 Administration and NDOT, and the consulting team explained the proposed project

1 and were available to receive comments and answer questions. This was another
2 opportunity for Team Nassiri to understand the flyover.

3 And what happens? Six weeks later, five weeks later, they record the
4 quit claim deed. So the May 5th hearing they still haven't closed on this property.
5 He hasn't bought that. He doesn't -- the quit claim deed is not recorded until June
6 17th, 2005. That's Exhibit 154. So when it's recorded, Mr. Nassiri accepts the
7 property as-is where-is and with all faults, and the grantor, NDOT, makes no
8 warranty, express or implied, of any kind with respect to any matter affecting the
9 property.

10 If that's not enough notice, Judge, we still have another prior to the
11 2009 date, so let's talk about the notice of the flyover in 2008. Again, this is one
12 year before the statute of limitations cuts off from the November 30th, 2009 cutoff
13 date. Again they filed November 30th, 2012. Backing up three years, giving them
14 the benefit of the doubt, this is a year before their -- they are time barred from -- a
15 year earlier to their time bar.

16 So what do we know about the notice of the flyover in '08? Publicized
17 notice for 2008 EA, Exhibit 114. The transportation notices set a November 18th,
18 2008 meeting. That's Exhibit 115. We had the public informational handout. It
19 states there's displays and NDOT representatives are available -- again, another
20 open forum meeting, Exhibit 116, and we know under the Code of Federal
21 Regulations that the EA is present at the meeting and posted both three weeks
22 before and available the library, NDOT's offices.

23 So what's it say? The 2008 environmental assessment document,
24 Exhibit 113, came into evidence. The project description continues just as the 1999
25 letter, a flyover ramp would be added to accommodate eastbound Blue Diamond

1 Road traffic destined for northbound I-15. Again that's Exhibit 113, Nassiri 330.

2 And what does it have in it? It's got Figure 10f. A little newer version
3 of 10f shows the flyover. Mr. Terry likewise testified about it. Again the flyover
4 connecting Blue Diamond to SR160 flying into -- actually the design at this point
5 was into the connector road, so the design had been modified, but it was again
6 evidencing the State's intent to build the flyover connecting that when traffic
7 warrants demanded it and when funding was available, consistent intent. And
8 again, this is over one year before the filing deadline, four years before they filed
9 their action.

10 Now despite all of this notice that we've gone through, we know it's a
11 public document. It's available at these libraries. But even after I think six notices,
12 six public meetings, Mr. Nassiri still claims the mistake here is the plaintiffs were
13 unaware that NDOT intended to (sic) building a flyover, that plaintiff were unaware
14 that NDOT intended on building a flyover and they did not have notice of the
15 flyover.

16 Well, their entire argument, Your Honor, really at the time of trial is they
17 did two things and I would expect them do it again in closing. They're going to put
18 the notices of the public hearings up and say these notices that went, they don't talk
19 about a flyover. Well, dig a little deeper, attend the public meetings, look at the
20 public information, look at the EAs because clearly that was in there, and so their
21 entire case boils down to this map. These -- that they were misled by the
22 right-of-way sketch maps.

23 Well what was the evidence that came in, Your Honor, and I think by a
24 preponderance of the evidence the State refuted that evidence. We established at
25 trial -- the State established at trial that the sketch maps were designed by right of

1 way to show the area of land. That was the purpose that was mentioned in the
2 December 6th letter of intent letter and followed through throughout, and when you
3 look at the settlement agreement, that was the purpose of the map; to define the
4 area and that's why right of way was preparing the map because they were in
5 charge of acquisition and disposal of land. I think it included also management.
6 That was right of way's role. They weren't roadway designers, so we know they
7 were prepared by right of way to show the land.

8 We also established that no NDOT representative said here's this
9 sketch map and this is all we'll ever build. I beat that dead horse through every
10 witness. Through Mr. Chapman and through Mr. Nassiri, I said no one ever told
11 you that and they all had to acknowledge no representative ever said here's this
12 map, this is all we're going to ever build.

13 The maps correctly show the project, Your Honor. They show the
14 realigned Blue Diamond Highway Phase 1. When they did that survey and they
15 were doing this transaction, they correctly showed the roadway. They weren't
16 supposed to show future roadway configurations on a survey map, they were
17 showing area, and they correctly showed what was built as part of the Blue
18 Diamond Highway Phase 1 which is the project that acquired the take from Mr.
19 Nassiri's property.

20 John Terry I asked specifically and did Heidi Mireles ever represent
21 that this sketch map is -- if you recall, Heidi Mireles was the chief of right of way
22 involved in the discussion with Team Nassiri. Mr. Terry testified Heidi Mireles never
23 would and did not have the authority to promise this was the final roadway build
24 out.

25 Further Mr. Terry testified to not build the flyover would violate the

1 2004 EA and require an amended EA. NDOT always intended to build a future
2 eastbound and northbound I-15 flyover when traffic demands warrant and funding
3 was available. That was clear from going back to 1999.

4 So I believe, Your Honor, that the State has established that Mr.
5 Nassiri had notice of this flyover in his hands going back to August of 1999.
6 There's the original Nassiri letter with the flyover in his hand. He saw it again at the
7 February 23rd, 2000 information package. It disclosed the flyover. The April 2004
8 environmental assessment again discloses the flyover. And finally the October
9 2008 environmental assessment discloses the flyover.

10 And interestingly enough, Mr. Nassiri actually relies upon the October
11 2008 environmental assessment in his complaint and cites it and acknowledges it in
12 paragraph 24 of his complaint that he was aware of it. So again, four years before
13 the statute's a year time barred.

14 So notice equals knowledge, Your Honor, in this state. He clearly had
15 notice. Mr. Nassiri's claim is time barred. It's time barred under the applicable
16 statute of limitations. An action for relief on the grounds of mistake is subject to a
17 three-year statute of limitations. He's deemed to have notice that NDOT intended
18 to build a flyover as early as 1999.

19 Your Honor, respectfully, this claim is time barred and this Court -- we
20 would request that this matter be dismissed. Thank you, Your Honor.

21 THE COURT: Okay. Thank you. Mr. Olsen.

22 MR. OLSEN: Yes, Your Honor. Let me -- give me a second to
23 (indiscernible) in order and I'll --

24 MR. COULTHARD: Thank you.

25 MR. OLSEN: I don't have a TV show so I'm going to move this up a bit.

1 THE COURT RECORDER: If you move --
2 THE COURT: Yeah, don't move it.
3 THE COURT RECORDER: -- a little bit (indiscernible) --
4 MR. OLSEN: It had been up a little bit before.
5 THE COURT RECORDER: Yeah.
6 MR. OLSEN: Yeah. Okay.
7 THE COURT RECORDER: It'll disconnect, Mr. Olsen, the --
8 THE COURT: Yeah, we had to move courtrooms on Friday.
9 MR. OLSEN: Okay.
10 THE COURT: So yeah, it's really touchy.
11 MR. OLSEN: I won't -- I'll try not to break it. I'll use the Elmo.
12 MR. COULTHARD: Excuse me, I'm going to get my pencil.
13 MR. OLSEN: Okay.

14 CLOSING ARGUMENT BY THE PLAINTIFF

15 BY MR. OLSEN:

16 Your Honor, I'm going to be a little shorter than Mr. Coulthard, although
17 he did a good job. One of the things that's going to shorten it up is I'm not going to
18 talk about the merits. And I didn't object. I was keeping my seat because this is
19 really, as we know and we've talked about at length through the process of the trial
20 and the objections that we went through, focused on the statute of limitations.

21 I'm going to put one picture up first just sort of to remind everybody, not
22 that we need reminding, of what this looked like after the realignment was initially
23 built and before a flyover was ever in place. And I want to say -- I'm looking at this
24 (indiscernible) I want to -- this picture is a picture of something that happened after
25 the settlement agreement. I mean -- but there's been a lot of talk from opening

1 statement through the case through the closing statement of the State about what
2 happened in a time before, starting 11 years before this flyover was actually built in
3 the timeframe from '99 to 2003.

4 The discussion has focused on the conceptual plans that were being
5 talked about, subject of some public meetings in that time period. During that time
6 period though, the -- I'm going to put up a picture. The interchange at Blue
7 Diamond looked like that. I'm going to turn this actually this way because it gives it
8 a north/south orientation. And the Court knows this and recalls what that looked
9 like back in those days.

10 But keep in mind because we're talking about all these things that have
11 happened since, that in 1999 to 2003, this is what it looked like and what was
12 proposed was to realign this and that realignment was going to affect Mr. Nassiri's
13 property. That was his concern. That's why he was involved -- everything was
14 conceptual. Mr. Terry said that at that point. Everything was conceptual in those
15 days, preliminary subject to change. But again, Mr. Nassiri's sole focus was on the
16 impact on his property.

17 Now again, the sole issue here is Mr. Nassiri's notice. The State has
18 the burden of showing that he had notice of breach, although I think really this trial
19 has been about not the breach claims. All they've talked about is the mistake
20 claim, three-year statute of limitations. They have that burden and it's a three-year
21 statute. They talked about what Mr. Nassiri said his mistakes were and if you put
22 those all in a bundle, his mistake was apparently trusting that the State of Nevada
23 is telling him the whole story.

24 So you have this timeframe, 1999-2003, where the project looked like
25 that and then you have Exhibit 146 which is what the project looked like after the

1 acquisition of the property, the move of the realignment, and what it looked like until
2 basically 2010. This is the real important period, the period from the acquisition or
3 the negotiation of the acquisition when the plan was for the interchange to look like
4 this until it changed and they build something else.

5 What's important really is not 1999 to 2003 when there were, you
6 know, bunch of public discussions, and we'll talk about those specifically. What's
7 really important is what was represented to Mr. Nassiri when he was talking one on
8 one with the State of Nevada about taking his property, which they're permitted to
9 do constitutionally so long as they provide just compensation.

10 What's important is what was -- in the plans presented to him, what
11 was in the final plans for what they call phase one? This that's in front of you. This
12 also apparently is, according to Mr. Terry, the plan that had the invisible
13 accommodation for a flyover.

14 As Mr. Coulthard said, they always intended to build a flyover. They
15 just didn't tell Mr. Nassiri from the time they began negotiating with him till they built
16 it. They didn't tell him at a time when they had an obligation to provide Mr. Nassiri
17 just compensation on all the information he needed to make sure that what they
18 were offering was just compensation.

19 And as far as what happened after, I mean they built it. They
20 represented what they were going to build, they acquired his land for a certain
21 compensation package which they represented was just compensation, then they
22 built it. Then after they built it, they released the easement the State had been
23 given for two years to say basically we're done building, so there it is.

24 What's also important is what they built in 2010. This is Exhibit 148.
25 And this is where things changed and this is when Mr. Nassiri noticed that

1 something was different. And the thing that's different is quite different. It's hard to
2 tell from this -- the Court's seen in argument the pictures from the ground, but you
3 heard Mr. Terry's testimony even that -- you know, that he was standing -- when he
4 was brought out to the location by Mr. Nassiri, standing in a hole is Mr. Nassiri's
5 word, but Mr. Terry acknowledged was a 25-foot wall and it's topped by a 60-foot
6 what's we now know is a flyover.

7 Those latter two pictures represent the important timeframe. This is
8 the thing, this in this picture, that NDOT planned to build all along, or something like
9 it, but did not show. This is the thing NDOT got the money to build in the 2007
10 legislative session which was the next session after they made the deal with Mr.
11 Nassiri.

12 You know this whole thing about well, you know, we were going to
13 build it when traffic warranted, Mr. Terry in the end testified basically that we
14 weren't waiting till 2020, we were going to build the thing and we were going to get
15 the money and they got the money in 2007. So they knew what they were going to
16 do when they were negotiating with Mr. Nassiri. Mr. Nassiri didn't know. He didn't
17 know until this was built in 2010 and his view was destroyed. That's when he was
18 on notice.

19 But since we spent so much time in this case, including through the
20 closings, on the meetings and the period 1999 to 2003, let me just briefly go
21 through it. Here's what we know. We know there were four meetings. One in '99
22 which was the intent-to-study meeting. One in 2000 which was -- I call it the reboot
23 of the intent to study. Mr. Terry didn't have a clear idea, because he wasn't
24 involved at the time, why the intent to study was restarted; something had changed
25 in the pictures. And then there -- in 2002 and 2003, two informational meetings

1 which we'll talk about in a second.

2 The notices for those four meetings -- and we looked at those. Those
3 are in Exhibits 2 -- I think it's 2, 5, 11 and 19 were the notices. We went through
4 those. The notices themselves say nothing about a flyover.

5 So if you just read the notices as they were published in the paper, if
6 you read the notices as they were mailed to people, they don't say anything about a
7 flyover. They talk about the design of the intersection. They talk about how the
8 realignment's going to occur and how the interchange with I-15 and Blue Diamond
9 is going to change. They don't say anything about a flyover or a bridge, if you want
10 to call it that, connecting from eastbound 160 to northbound I-15. That's not
11 present.

12 So we know there's no flyover mentioned there. We know that Mr.
13 Nassiri attended the 1990 (sic) meeting because he said so. He recalled that. Ten
14 to 15 minutes. We don't -- despite what counsel said, we don't know for sure
15 whether Mr. Obser was there. We know Mr. Nassiri was there. Mr. Nassiri wasn't
16 asked for sure if Mr. Obser was there or how long he stayed, but the only thing we
17 know is Mr. Nassiri was there for 10 or 15 minutes.

18 It appears we know that Mr. Nassiri may have attended the '02
19 meeting. He didn't recall that, but he -- it was suggested he signed the sign-in
20 sheet and he acknowledged it looked like his signature.

21 Of course, if you look at the 2002 and 2003 meetings, those -- the
22 meeting informational packets, Exhibits 12 and 18, what you find is there is no
23 reference to a flyover in those. So even if you'd gone to the '99 and 2000 meetings
24 and you had figured out that there was a flyover and figured out what it meant, if
25 you'd gone to the 2002, 2003, it appears you wouldn't have been presented with

1 any diagram containing a flyover.

2 So we know that. We know that Mr. Nassiri sent a couple of letters
3 and filled out a -- typed out. It wasn't done obviously at the meeting, a form for the
4 2000 meeting. The 1999 letter we looked at many times. This is the letter Mr.
5 Nassir sent in August of 1999 and this is the letter that attached a map.

6 Now again, we also know what Mr. Nassiri's sole focus in this letter
7 was, was the -- concerns about the realignment. He said, you know, my parcel will
8 be affected and I'm also interested in developing the parcel once the realignment is
9 finalized.

10 Of course he also says will you provide me with updated design and
11 construction schedules as the project continues. That never happened, unless you
12 count during the time of the condemnation when he was shown maps, diagrams
13 and the May 28th meeting plans which Mr. Chapman said didn't reflect any kind of
14 a flyover.

15 You know, Mr. Nassiri expresses interest in acquiring -- in this letter
16 and other letters, potentially acquiring the old intersection area, that -- if it became
17 surplus, that piece. Well, that's -- there's nothing wrong with that and it's perfectly
18 understandable. There's nothing wrong with wanting to acquire it at or about the
19 time of the settlement because price would presumably go up. That's just, you
20 know, being smart. That's nothing nefarious. His goal in the first instance as
21 expressed here and in the other correspondence is realignment, how's it going to
22 affect my property.

23 And if you look again at the map that's attached, which is -- says it's
24 preliminary and everybody agreed it's preliminary and Mr. Terry said these are
25 preliminary and conceptual and even the EA is only kind of like the final concept, it

1 isn't the way things are going to be built. Mr. Nassiri testified that what he was
2 focused on was the realignment piece of this. This map. His property was subject
3 to the realignment. What was going on, on the west side of the freeway, potentially,
4 was not his focus. He could not identify what's been identified by Mr. Terry as the
5 flyover in this picture, and there's a blowup down here. I don't know if this is that
6 one, but it's similar to this. Exhibit 6. I think this may be the one.

7 It's -- you know, Mr. Terry could identify it. And he could read that a
8 flyover's a flyover. He knows those things. He knows what a flyover is. He
9 understands looking at this diagram that these roads actually go over one another
10 and he can tell what it is. I mean, we know now kind of because we've been told.
11 Mr. Nassiri didn't have that luxury and Mr. Nassiri wasn't focused on what was
12 going on the other side of the freeway. He testified to that.

13 Similarly with the typed letter, Exhibit 7, I won't belabor this too much,
14 but you know, Mr. Nassiri had a letter typed -- statement typed up for him. He
15 signed it. Somebody got this information, this form either at the meeting in 2000 or
16 obtained the packet somehow. We have no information at any of these meetings,
17 any of them what happened. You know, Mr. Coulthard has speculated about what
18 happened. Mr. Terry speculated about what happened and you said what would
19 typically happen. Of course, he wasn't there. We don't know what was up on
20 boards. Probably something was up on boards, but we don't know. We don't know
21 who was there asking questions. We don't know if anybody asked questions. We
22 don't even know what personnel were there from NDOT.

23 So at none of those meetings -- there's no evidence what happened
24 any of those meetings and whether a flyover was talked about. No evidence of
25 whether anybody put up a board with a flyover or blew up this picture. It just didn't.

1 It just isn't in the record.

2 We know that Mr. Nassiri was concerned from Exhibit 7 with his
3 property and the alignment. The latest alignment has shifted north, he says as you
4 recall. That was his interest. I'm concerned that this new alignment not move any
5 further north. He said my second concern or request is that a right turn -- right
6 turnout and a left turn in the intersection be included with this project to provide
7 access to my property. Access and the impact based on the taking on this property
8 is his interest in all three of these letters.

9 He does mention again -- he mentioned acquiring the piece if it
10 becomes available, the adjacent abandoned property, but that's -- that's
11 understandable because he used to have -- at this time he had access to what was
12 then Blue Diamond Road. And he had in and out -- he was losing that so he
13 wanted to make sure he had access and he wanted to make sure he had -- took full
14 advantage the situation, was able to get additional property if he could. But the
15 interest he had was not on what was going on, on the other side of the freeway.
16 The interest wasn't what was going on in maps he couldn't read and terms he didn't
17 -- wasn't familiar with. It was an interest in his property was being taken.

18 And you know in Exhibit 153 which is the final of the three letters he
19 wrote that grew out of these meetings in the '99/2003 period is -- I think it's 153. It's
20 the letter he wrote May 23rd, 2002. Again, my main interest is in modification -- the
21 modification of SR160 at the I-15 interchange and particularly the realignment or
22 alignment of SR160 as it crosses my property on its way to tie into Windmill. My
23 preference is to leave the alignment at its existing location because it would leave
24 my property whole and therefore not reduce any of the options for its development.

25 Goes on to say although the new alignment will bring more traffic

1 through my property, this won't offset the impacts at the property -- on -- impacts of
2 the property. Again, during this period, we don't know what happened at these
3 meetings. We don't know what was presented. We do know that Mr. Nassiri was
4 concerned about the alignment and concerned about access.

5 Later by the way, and it's in the evidence, he was told, despite what's
6 been argued, that he wasn't going to be able to get access at Parvine because it
7 was -- there was not enough room for particularly RVs and other vehicles to cross
8 the road and get -- by the time it got to the intersection with I-15. So there's some
9 talk about, you know, you never applied for access and all -- in fact he was told
10 during the negotiation process he wouldn't get it.

11 So again, we know what he knew from these letters. We know there's
12 no evidence of what was on these boards or who discussed them. We also know
13 there was no presentation in any of these meetings. We know that, because they
14 didn't make presentations in those days until they got sued by somebody. NDOT
15 got sued by somebody, then they had to make presentations. It seems as though
16 there's a problem with the system. And certainly, at this time, you can imagine that
17 if there was a slideshow like we just saw and you say well here's a flyover, here's
18 what it means, here's where it's going to go, Mr. Nassiri would have a -- might have
19 a tougher time, but that didn't happen. We know that didn't happen. We don't
20 know what did.

21 But we also know that none of that matters, because this was all prior
22 to the time when the actual condemnation process was beginning. This is all prior
23 to the time when NDOT approached Mr. Nassiri and said we are going to need your
24 property for this realignment and let's talk about what we're going to need. Let's
25 talk about why we're going to need it.

1 Now, Exhibit 42 is what's important. This is the map that Mr. Chapman
2 testified Ms. Mireles gave him at the May 28th, 2004 meeting. By this time, and
3 really beginning in August of 2003 and I think I have that letter here, the State
4 expressed specific interest in acquiring this property for what it referred to as phase
5 one of the Blue Diamond Project which was the realignment and this is what they
6 provided to Mr. Nassiri to show what that realignment was going to look like.

7 And Mr. Chapman testified that this map and the maps that follow --
8 I've seen many and you'll -- I'll show you a couple -- is critical because it shows
9 everybody in the process what it is that's going to happen with the project is. Mr.
10 Chapman testified it's important to understand the project to understand how to
11 settle it and how to get just compensation. He said that's critical.

12 Well, and this is a map that Ms. Mireles gave my client and his lawyer
13 at that meeting. They also looked, by the way, at plans, none of which Mr.
14 Chapman said contain a flyover. They had that discussion. So it's not just maps.

15 Even if you look at what's filed with the court, you don't see the whole
16 intersection like you see here, the whole interchange, but you certainly don't see
17 any sniff of a flyover that was filed with the court back in the condemnation action.

18 This is what's important. What they were told at the time -- they were
19 now in negotiations with the State. There's no requirement that Mr. Nassiri go back
20 and look what happened in the past. He's in negotiations with the State of Nevada
21 which has an obligation to provide just compensation and obligation to provide all
22 the information necessary, as Mr. Chapman talked about, to describe the project
23 and evaluate the situation.

24 It's also worth noting that in the State's own appraisal report, which
25 was done October 9th, 2003 by Mr. Kent -- and I'm talking about the appraisal of

1 the -- of a taking of the realignment and the Nassiri property. This is the same plan
2 they showed Mr. Kent. There's no reference to looking at other diagrams that
3 happened in the past, '99 to 2003. There's no reference in his later appraisal of the
4 exchange property to have him having looked at the EA or being given the EA. He
5 was given this. He was given a diagram that looked like this that has no flyover.
6 And this is the guy who's assessing both the value of the property and the
7 severance damages that the State's going to offer. This is what they're showing
8 Mr. Kent.

9 Now -- let me see here. The map, sketch map, whatever you want to
10 call it, certainly was prepared by right of way, at least that's what they say. I don't
11 dispute that; right of way's design team. It wasn't sketched out by Heidi Mireles.
12 They had their own department that did these things.

13 And importantly this is what was shown -- along with plans that didn't
14 show the flyover either, this is what was shown repeatedly to Mr. Nassiri and his
15 counsel. Mr. Nassiri's counsel, who's an experienced guy who used to work for the
16 AG, has represented the Department of Transportation and claimants (phonetic)
17 said yeah, this is important.

18 And if you look at this exhibit, 86, this is the April 27th, 2005 letter we
19 looked at in trial where Mr. Chapman is responding to Mr. Walch and he's being
20 asked -- he's been asked to look at a map and say whether it's okay, whether the
21 legal description's okay. He's asked to -- he's being asked to look at these things
22 specifically and he's responding that they are -- let me backtrack just a little bit.

23 The settlement agreement which -- or the settlement proposal which
24 Mr. Coulthard talked about is Exhibit 65. And I say settlement offer because that's
25 what it says on the document in the subject line. As we know, this document also

1 contained that same -- it's -- same map. It's different in the way it shades the
2 exchange property. That's true. But it still depicts the exchange property, depicts
3 the realignment, depicts the interchange as shown here and as built, by the way, as
4 reflected in the final plans and built.

5 So this is what's shown -- is shown to them again in the context along
6 with a settlement agreement -- settlement offer I should say. You can't see a
7 flyover in here. It's -- apparently there's accommodation for it, according to Mr.
8 Terry, but it's -- you can't see it.

9 So then another map, another version of it, again, in the April 27th,
10 2005 letter which is at the time the settlement's being, you know, finalized. There's
11 a reference to the map that had been emailed the day before. Again, maps are a
12 critical part of this. The maps show the realignment as it was built. The maps show
13 the project as the State was representing it to Mr. Nassiri and his counsel. Again,
14 Mr. Chapman said this representation was important to the decision to settle the
15 claim.

16 And by the way, that map -- we looked at that. That map is the map
17 that's contained in -- the one that was attached in April 27th is the map that's
18 attached to Exhibit 176. You had to look at Exhibits 175 and 176 to piece the two
19 together. Mr. Ciciliano tried to rearrange the exhibits, but if the Court looks at those
20 two, it's clear that the map that's being approved by Mr. Chapman is a map that
21 was emailed based on the attachment that's in Exhibit 175 and it happens to
22 appear in 176, but this is the map and it needed to be approved. And it shows
23 again what's being purchased and why, and what the project's going to look like.

24 And that same map, Your Honor, I was going to put this up, but I think
25 the Court knows what this looks like. This is just a bigger color version of the -- well

1 this is -- yeah. The next map that -- Exhibit 95 was the map as amended to show
2 an additional, you know, point one acres or point two acres. This is the color
3 version. Again, the Court knows and you've seen before that is the same
4 realignment that was bargained for, compensated -- Mr. Nassiri was compensated
5 for, was built, was by all appearances completed when the easement was released,
6 and then later changed.

7 And there shouldn't be any question, Your Honor, about the obligations
8 of the State (indiscernible) as far back as Exhibit 20. Exhibit 20 is the initial letter
9 on August 25th, 2003 where the right of way division says to Mr. Nassiri we're in
10 the preliminary plan phase, it says, of a project to realign Blue Diamond Road and
11 the project goes all the way to Valley View. That's phase one is that -- in the terms
12 of the Blue Diamond Project, is the stretch from Las Vegas Boulevard to Valley
13 View. The interchange happens to be part of that, but that's -- when they talk about
14 phase one, that's what they're talking about.

15 Says, you know, we're going to -- there's likely to be highway
16 construction in your vicinity. So it's likely to happen, we've got preliminary plans,
17 and then it says as an owner of real property and tenant-owned improvements,
18 you're provided legal protections when all or part of your property is needed for
19 public use. These federal and state constitutional and statutory protections are
20 intended to ensure that just compensation is paid for the property.

21 So the State's saying it right out of the gate once they get down to
22 we're going to really do this. They're assuring Mr. Nassiri we're going to make sure
23 you get just compensation because it's your right. It's your right under the
24 constitution, it's your right under the statutes. And so there can't be any serious
25 contention that it's really Mr. Nassiri's responsibility to question the State in this way

1 right out of the gate. Why would he? I mean, the State --the constitution's behind
2 him. The statute's are behind him. He has no reason not to trust the State to tell
3 him everything he needs to know to obtain just compensation, and he doesn't have
4 that duty to do anything beyond that.

5 Mr. Nassiri said look, and this is a quote, I was dealing with the highest
6 level for condemnation in the State, Heidi Mireles. He didn't insist he talked to
7 Rudy or whoever the head was at the time of NDOT, or to the Governor for that
8 matter. He was dealing with the highest person you can deal with when you're just
9 someone who's getting your property condemned, Heidi Mireles. He wasn't going
10 to question Ms. Mireles and say well are you really going to do this or not, is there
11 really something on this diagram in invisible ink I can't see? Is there an
12 accommodation there? He didn't have to and he wouldn't have.

13 Now, counsel talked about the exclusive period. This is jumping ahead
14 to when there's an agreement. The thing about the exclusive period is this: What
15 you look at when you've agreed to a deal, any real estate transaction, is you look at
16 -- well right when you're -- when you've been offered a deal is the value and maybe
17 even at this time it's premature, but someone should look at title to see what's
18 there. Those are the things you're looking at.

19 Now in the case of Mr. Nassiri, we know from looking at the documents
20 that -- you know, that he -- it took a while to get his -- I think John Kiehlbauch's
21 opinion of value. There was this limited exclusive period initially to the 31st of
22 January and I don't think he got the -- he either got the feedback from Mr.
23 Kiehlbauch -- it's in the documents -- either the 20th or 25th, so Mr. Nassiri was
24 concerned about running out of time because we all know that once the exclusive
25 period was up, the State was at least free to market the property to others,

1 including Mr. Koroghli who owned the property to the south of the realignment.

2 That's not unreasonable either, I mean, for Mr. Nassiri to want to have
3 that property, rather than have Mr. Koroghli had it -- have it. Be squeeze in the
4 middle. You know, that makes sense.

5 The point is though, during this period of time what he was looking at is
6 value. And that's what he looked at. And accepted the -- he accepted the offer just
7 shortly -- I think 27th of January just shortly before the exclusive period was up
8 initially.

9 The second phase of that exclusive period is after they've reached an
10 -- tentative agreement. That's when you're drafting the documents. You know, the
11 letter from Mr. Chapman where he takes the first crack at a settlement agreement,
12 there's reference to the fact that Mr. Walch hadn't been able to do it, hadn't been
13 able to get to it, so Mr. Chapman went ahead and took the first cut, because they
14 wanted to get it done because they even then had a limited time to get this done.
15 There was no assurance by virtue of the fact that they agreed to the general terms
16 that once that exclusive period expired -- that it wouldn't expire and then Mr.
17 Koroghli might be free or anybody else to buy the property.

18 So it's not about having some obligation to go out and look for say an
19 EA; to go scour the public library to see if there's something else out there. Maybe
20 it's not even an EA. We've talked about EAs, maybe there's something else out
21 there we haven't seen. Do you have to go look for that?

22 What you have to do before you close a deal is look at the recordings
23 in the county because that by law is constructive notice, and that's basic. There's
24 no requirement, especially when you've been dealing directly with the State, that
25 you go find other things. Mr. Chapman I won't say is contemptuous, but he

1 certainly -- he referred that he has like the environmental document. It wasn't
2 something that he as a lawyer was emphasizing was important at all to the
3 condemnation process.

4 And by the way, again as I said, there's no reference to any EAs or
5 other plans in the State's appraisals either. Isn't something that was important once
6 you're in a process where you're looking at the State acquiring this thing, telling you
7 they're going to build this thing, and knowing all along they're going to build
8 something else as soon as they can.

9 Mr. Chapman was very clear that NDOT had the duty to provide all the
10 information from -- for the project based on statute. That certainly is his belief as a
11 lawyer and what he expected to be provided.

12 I guess kind of the bottom line on this is NDOT had the duty to
13 disclose. Fred didn't have the duty to question. Mr. Nassiri didn't have the duty to
14 second guess the State. The State and he were in negotiations. That's a good --
15 that requires good faith. Good faith is a big issue here. Good faith -- they had both
16 express in the contract and implied.

17 Again, Mr. Terry at the same time, and counsel said this, admitted that
18 the flyover was always going to be part of the project at this interchange. He
19 acknowledged as well that the final plans for the Blue Diamond I-15 interchange at
20 that time didn't have a flyover. There was an accommodation. I -- he couldn't
21 identify where the accommodation was in the picture. There was an
22 accommodation.

23 So even if Mr. Nassiri had gone -- I guess he did see final plans. You
24 can't see a flyover. Yet Mr. Terry's deposition testimony made clear that in his
25 view, and he was the 30(b)(6) when he gave the deposition, that the interchange at

1 Blue Diamond and I-15 was not completed until there was a flyover. Nobody told
2 Mr. Nassiri that.

3 Now just briefly and I'll move on, Your Honor, the team, the Nassiri
4 team. NDOT loves to talk about the team. We know that they -- these people who
5 were working for Mr. Nassiri at different times, not as employees but on a contract,
6 had discrete tasks.

7 Mr. Obser -- I think counsel slipped when he referred to Mr. Obser as a
8 licensed engineer, but he was a licensed broker. He was a consultant. That's the
9 testimony. Yes there's a letter where he said that he was the director of real estate
10 or something and Mr. Nassiri said, you know, sometimes he -- we'd give him a lot of
11 -- if he was there helping us that day, we'd give him a secretary to help him and
12 then, you know, he'd typed up something. He was never on the payroll. He was
13 never employed.

14 Mr. Oxoby testified in deposition testimony that he was basically out of
15 the loop by the time of negotiations. He did have some involvement I think in that
16 Exhibit 95, the reconfiguration of the land slightly so the description included
17 another small piece of acreage, but that was -- but his task, and this was testified
18 to, his task was to basically make sure in the condemnation process that the State
19 wasn't taking too much; wasn't taking more than they needed. And his deposition
20 testimony that was read in stated he didn't have any recollection of ever telling Mr.
21 Nassiri about a flyover and Mr. Nassiri had no recollection of Mr. Oxoby ever telling
22 him, so there's no evidence to suggest that.

23 And then the final person -- well there are the appraisers and the
24 appraisers do what they do and Mr. Kiehlbauch, you know, did his review and he of
25 course wasn't provided, just as NDOT's appraisers weren't provided, with an EA or

1 some information about a flyover so he couldn't assess that.

2 The final member, again, of that so-called team but just an
3 independent guy who was helping Mr. Nassiri was Mr. Chapman. Mr. Chapman,
4 again, was very clear, very clear on what the State was supposed to do. Show him
5 -- understanding what's going to be built is critical to just compensation. Plans
6 affected the entire settlement. That's Mr. Chapman's position and he said that
7 NDOT had the absolute duty to provide the information.

8 Mr. Walch, very forthright testimony, didn't contradict Mr. Chapman's
9 testimony in any respect. Certainly not with respect to the State's duty with what
10 was disclosed. There's no evidence to contradict Chapman.

11 Mr. Nassiri and his attorney closed the condemnation settlement, and
12 it's one settlement, based upon the representations about what the project was
13 going to look like. Then the State built it, just like that. They built it just like the
14 diagram in that map.

15 And by the way, I think it's important to remember -- counsel didn't talk
16 about this, but there wasn't just the settlement agreement in April, there was the
17 amended settlement agreement. The amended settlement agreement specifically
18 refers to the changed diagram as well as the changed legal description. The
19 changed diagram which was in the custody of NDOT's counsel when it went to the
20 escrow for recording, the diagram wasn't included, but we know what the diagram
21 looks like because it was part of the evidence and the diagram looks like 5, the
22 exhibit that's in front of you. They have that same configuration. And that's what
23 the deal closed on.

24 And again as I've said this before, Mr. -- the thing gets built just like
25 that. Just what Mr. Nassiri expects. Then the next thing that happens two years

1 later so, the easement provided to the State for purposes of building that
2 configuration is released. There's no reason to think that something else is going to
3 happen with that project that it's not done.

4 Now, the environmental assessment, let's talk about that because in
5 May of 2005, an environmental assessment -- a meeting for the -- to discuss the
6 environmental assessment is noticed.

7 Exhibit 28 has been pointed to and fought over and to suggest that Mr.
8 Nassiri had notice of and the opportunity to go to a meeting and to go look at the
9 EA for -- the 2004 EA that was -- the meeting was in 2005. First of all there's the
10 question of why on earth would he do that. He had no requirement to do that. He's
11 in a deal where the State is one on one face to face saying here's what the project
12 is.

13 Number two, there's no evidence that Exhibit 28 despite repeated
14 protestations confirms that any notice of the EA or the meeting went to Mr. Nassiri.
15 One, we don't know whether this document -- it talks about adding people to a list,
16 one. It isn't the list confirming like the -- it's not like a bunch of certificate of mailing
17 cards they got back, certified mailing cards. Two, we don't know what EA they're
18 talking about, whether it's '04 or '08 or some other EA because it is completely
19 without any identification. Three, we know from the conclusion of Mr. Nassiri's
20 testimony that this isn't his address. The address on this document is 6950
21 Bermuda. We know from Mr. Nassiri's ultimate testimony and from Exhibit 7 which
22 was the statement that he filled out and -- somebody typed for him and signed that
23 his address is in fact -- or was 6590 Bermuda.

24 So there's no evidence that the EA went to him, that the notice went to
25 him. There's no duty on Mr. Nassiri's part to go find one and go look at it; to check

1 it out of the library or go to NDOT or anywhere else, particularly when he is
2 negotiating with NDOT including the head of NDOT's right of way.

3 Bear with me here.

4 The 2008 EA and similarly, certainly there's no evidence that Mr.
5 Nassiri received that. I think the argument is well it was published in the paper, but
6 okay. Well let's assume it was. Why -- that -- Mr. Nassiri has no obligation
7 forevermore to go look for potential changes in this freeway construction. He had
8 no duty of inquiry at that -- they represented -- NDOT represented to him what
9 they're going to build, they built it and he wouldn't have any indication at that point
10 that he should be looking for something else. No duty.

11 It was, again, NDOT's duty to tell him about the plans they had the
12 whole time. You've heard it from Mr. Terry. You've heard it from counsel. You've
13 seen the document. They had this plan the whole time. We don't know what it
14 looked like during some of this period of time because we know that, for example,
15 the 2002/2003 meetings that were scheduled there's no indication they talked about
16 it. We -- in the 2004/2005 sketch maps and the plans, including the final plans for
17 Blue Diamond interchange phase one didn't include a flyover. At some point this
18 plan they always had was expressed and -- but Mr. Nassiri had no duty to go seek
19 that out.

20 When was Mr. Nassiri on notice. That's kind of the bottom line. Again,
21 I think that -- I thought we were going to be talking about statute of limitations, a six
22 year and a three year in this trial. I think it's gone to really just the three year, but
23 that statute for mistake accrues -- counsel's right on this -- upon discovery by the
24 aggrieved party of the facts constituting mistake. Well, when Mr. Nassiri in fact
25 discovered that is when he saw the flyover. There's nothing that happened

1 between the time he was shown maps in 2004 or particularly when he signed an
2 agreement which was represented to be an acquisition settlement in -- according to
3 the diagram that you see up there. Nothing happened thereafter to give Mr. Nassiri
4 any clues that something different was going to be built. Again, he didn't have the
5 obligation to go find it. And there's no indication the State told him.

6 When Mr. Nassiri had notice was in December 2010. That's when he
7 had notice of a couple of things. He had notice that -- actual notice that, probably,
8 that the State had breached their contract, breached their duty of good faith and he
9 had six years from then so he could still bring it in 2016. He had six years from
10 then to file that claim, breach of contract, breach of the covenant of good faith and
11 fair dealing. He had three years, maybe more, he certainly was on inquiry notice
12 when he saw the flyover. I think it's fair to say Mr. Nassiri, when he saw the flyover,
13 was on notice that he needed to inquire as to what happened and what went wrong
14 and if he was mistaken, you know, to ferret that out. So I think that that timeframe
15 of December 2010 is a good start point for both claims. It is the start point.

16 Mr. Nassiri filed his complaint in November -- November 30th of 2012
17 so it was two years, not three years. So he was within the three-year statute. We
18 know that Mr. Nassiri, he testified he didn't even know what the term, flyover,
19 meant. I think, again, we're all a little jaded because we know what it looks like, we
20 know what it means, we even know how big it is now. Exhibit 126 was Mr. Nassiri's
21 email to Mr. Terry on December 7th, 2010. I showed these at -- in opening, so I got
22 to show it to you in the closing. Mr. Nassiri notes that they -- he met with Mr. Terry.
23 Even then he's referring to this construction as a wall and an overpass. He's --
24 doesn't even know the term, flyover. What he does know is it's destroyed his
25 visibility and he says as much. Certainly by that time he knew, Mr. Nassiri knew,

1 the State had not done what they'd promised to do.

2 Mr. Nassiri didn't have -- well, in fact, and even then, Your -- I -- before
3 that he couldn't sue. I don't think the claim was ripe. There weren't any damages
4 till then. He couldn't have sued till then. So until the wall was built certainly the
5 damage claim, it hadn't even accrued with respect to his mistake. There's no
6 reason to think, no evidence to say that he would have had some indication of his
7 mistake until he was faced with this view-destroying edifice.

8 So let me just cut to the chase, Your Honor. Again, we know that
9 NDOT showed Mr. Nassiri what they were going to show -- what they were going to
10 build in the context of a condemnation. A context wherein he's entitled to just
11 compensation. And we know his lawyer says in order to get just compensation you
12 have to understand the project. The State understands that and the State says in
13 the letter we looked at from August '03 in the review appraisal, interestingly, that it
14 did in 2003 just compensation is what we have to provide. Interestingly, there's a
15 view appraisal that even talks about visibility from the -- Mr. Nassiri's original
16 property. But that is clear. The State understands it.

17 I think, you know, honestly I think that -- I don't think this is a
18 conspiracy by the State. I think they're just used to doing what they do. And in this
19 context they did what they did it -- normally but they didn't tell Mr. Nassiri what they
20 were planning all along to do. I assume that's not the norm. But it's what
21 happened here. So in the context of providing and overall settlement for just
22 compensation -- and by the way, I mean, it's true Mr. Nassiri accepted, in the way
23 the agreement's worded, 4.81 million for his property and then there's a value
24 placed on the exchange property. But that's all a result of an overall settlement. If
25 there wasn't an exchange piece, well, Mr. Nassiri had said that -- had testified that if

1 he'd known about the flyover he wouldn't have done the deal.

2 So we can't say what Mr. Nassiri would have accepted, whether he
3 would have accepted 5.81 million without this overall package. We know there's no
4 overall package. So you can't really isolate the two pieces and say, well, you know,
5 he was good with it anyway. You can't do that. He was evaluating the overall
6 picture. He was evaluating it based on information provided by the State upon
7 which he relied, that the information they gave him in that context, NDOT built the
8 thing. They didn't tell Mr. Nassiri they'd planned all along to build a flyover. They
9 didn't tell him there's an accommodation in the plans that he was shown or in the
10 design sketch, if you will, that he was shown but it was there, apparently. They
11 didn't tell him, as Mr. Terry testified, that the Blue Diamond project wouldn't really
12 ever be complete till there was a flyover. They certainly didn't tell him that.

13 They told him that by building it. And then when they built it, at that
14 point he had to do something. He had to investigate. He had to figure out why this
15 thing was being built and he wasn't told about it. He was on notice that he better go
16 find out and he did that. He went and found out and within two years he sued the
17 State.

18 Part of that time he didn't have that obligation. Certainly not in 1999 to
19 2003 at some preliminary meetings, preliminary designs may have been shown.
20 We don't know what was there because he entered into direct negotiations and the
21 State told him what they were going to build. They built it, they told him they were
22 done building because they released the easement and then a few years later they
23 built something else.

24 He's not precluded -- Mr. Nassiri's not precluded because he sued the
25 State in 2012 from continuing this action. He's within the statute of limitations on all

1 the claims. And on those grounds, Your Honor, we would ask that the case be
2 allowed to go forward to trial on all the matters before the jury. Thank you.

3 THE COURT: Thanks. Mr. Coulthard?

4 REBUTTAL CLOSING ARGUMENT BY DEFENDANT

5 BY MR. COULTHARD:

6 Brief rebuttal, Your Honor. Again, I thank you for your patience today.
7 I think I would start on the just compensation arguments that has been a
8 reoccurring theme. Well, let me back up a little because, you know, I guess that is
9 the, sort of the beauty of our judicial system. We all come in and we present these
10 cases and what I can tell Your Honor is reasonable minds certainly differ between
11 these two parties. The -- we all sat and listened to the evidence and we could not
12 be any farther apart as what -- as to what we believe the evidence has
13 demonstrated and it will be for you, Your Honor, to sort through that and make a
14 decision and we thank you for that.

15 The just compensation argument, Your Honor, it is a tap dance that Mr.
16 Nassiri and his counsel has done the last several months. They did it throughout
17 the motions for summary judgment, they've done it throughout this trial and it is -- I
18 need to respond. And they are mixing, I believe, apples and oranges when we --
19 when they talk about a duty to pay just compensation. Make -- let me make it
20 absolutely clear. The State of Nevada met its duty to pay just compensation. They
21 paid just compensation to Mr. Nassiri in the amount of \$4.81 million. That was for
22 the take and that was for the severance damages associated with the take for the
23 entirety of Mr. Nassiri's then owned 40-acre parcel. They are mixing apples and
24 oranges because he wants to argue severance on a -- another piece of property,
25 the exchange property that he didn't own at that point in time and that was

1 separated by distance and not part of the just compensation take. And we've had
2 the map up a few times, and I'll put it at -- up again.

3 What the State had an obligation to do is pay for just compensation for
4 this property and the severance associated with this property, not to pay severance
5 associated with a future flyover on -- adjacent to property that Mr. Nassiri hadn't yet
6 acquired and not for a future flyover that was planned for some time in the future.
7 And, Judge, let's not lose sight of the fact when you talk about just compensation
8 Mr. Nassiri and his lawyer, experienced imminent domain lawyer, resolved and
9 settled the just compensation claim and under the settlement agreement, section
10 2.8 -- 2.09, Nassiri released any and all claims for future severance. So if they're
11 tap dancing themselves back into trying to convince this Court that they're
12 somehow entitled for -- to additional severance damages for viewer visibility
13 occasioned to damages by building the flyover on his now-owned exchange
14 property, he released those claims under 2.09. And it states, quote, Nassiri hereby
15 releases and forever discharges, quote, any and all claims of any severance
16 damage to the remainder of Nassiri's property.

17 And then he acknowledges in the subsection 2.19, little vii that this
18 agreement and the release set forth herein have been carefully read in their entirety
19 by the parties, who have had the benefit and advice of counsel of their choosing.
20 And this agreement and the releases set forth herein are known by the parties to be
21 full and final and complete compromise, settlement, release, accord and
22 satisfaction and discharge of any and all claims and actions as above stated.

23 Judge, they released any and all -- it was a negotiated settlement and
24 the just compensation argument is precluded because of the release agreement,
25 the terms and conditions of the contract that they argued. And let's not lose sight of

1 what Mr. Welch (phonetic throughout) said about the severance damages related to
2 the view and visibility. He represented the State of Nevada in multiple
3 municipalities for a number of years. He said it's not a compensable damage for
4 two reasons. Number one, it's completely separated from Nassiri's 40-acre piece
5 and, number two, the State and no municipality provides view and visibility
6 compensation, and that was part of our inverse condemnation action, Judge, and
7 our -- you granted summary judgment on that because of the *Probasco* case which
8 is controlling law in the State of Nevada that absent a -- an expressed negative
9 easement for view or visibility it is a non-compensable view and visibility. Implied
10 negative easements are not recognized in this State. So their just compensation
11 arguments, they just don't hold water.

12 Now, it's -- it seems the mistake -- and what's happened with this case
13 throughout is this case has morphed and it's a moving target. And I heard today
14 again, and I heard it a couple times in trial, that the mistake, despite what he's said
15 in the pleadings that the mistake was really the failure to disclose the flyover, I
16 wrote it down. Mr. Olsen stated the mistake was trusting the State to tell him the
17 whole story. Trusting the State to tell Mr. Nassiri the whole story. Well, let's back
18 up and let's see what the State did tell him. The State said, we're going to sell this
19 via quit claim deed as-is where-is, no express or implied warranties and we're going
20 to give you a hundred and twenty day exclusive look period to go work with your
21 appraiser or other consultants and do your own due diligence. So go do your
22 homework, Mr. Nassiri. Go look at anything you can.

23 And now he wants to tell you, and I don't believe this was any of the
24 evidence and -- but I didn't object and it's argument -- but the argument today for
25 the first time is all the due diligence Mr. Nassiri did was really value based due

1 diligence. All he was really looking at was value. Well, you know what? If that's
2 the case, shame on him and shame on his group of professional consultants who
3 were obligated under and notified to look at the -- all aspects under the exclusive
4 look. Go look -- go use your civil engineer. Go use your attorney. Go use your
5 appraiser or your real estate brokers and do your own homework. They were on
6 notice of a quit claim deed and I believe that heightens their obligation to go do
7 the -- their homework.

8 So we also heard that we don't know what went on at any of these
9 public hearings. Well, that's not true. We do know what was handed out. We
10 know that there was public handouts, Exhibit 6, we looked at that. That was from
11 the February 2000 meeting had three diagrams of a flyover, had a project
12 description of a flyover. We know that got handed out. We know what the May
13 15th, mid-May 2004 EA approval. We looked at that handout. I think it's Exhibit 39.
14 It is. Exhibit 39, May 19th, 2004. We know the EA was present. We know the
15 handout at that meeting referenced the description of the flyover and had three
16 maps of the flyover in it. We looked at those maps, Your Honor. So we do know
17 that happened.

18 Your Honor also took judicial notice of what happens at those meetings
19 when you took judicial notice of the Federal Code of Regulations, I believe it's
20 Exhibit 154 --

21 THE CLERK: 151.

22 MR. COULTHARD: 151, thank you.

23 And that spells out what the State has to do at these meetings.
24 Reasonable notice to the public has to occur, which we know occurred, and
25 explanation at the public hearing of the following information as appropriate.

1 Number -- A, the project's purpose, need and consistency of the goals and
2 objections of any local urban planning, the project's alternatives and major design
3 features, the flyover was always an alternative and a major design feature. And
4 then it goes on, the social, economic, environmental and other impacts. But clearly
5 we have testimony that the State complied with these federal obligations and they
6 couldn't have approved the EAs without complying with them. So we do know what
7 occurred and it's -- what occurred is consistent with the Federal Rules and
8 Regulations. So when he tells you we don't know what happened, that's just not
9 correct.

10 The sketch map, again, very creative argument but I think you have to
11 look at the four corners of the contractual agreement. The sketch map, the only
12 time it's referenced in both the settlement agreement, the prior correspondence and
13 the amendment, it is specifically referencing the area of land that it's defining. And I
14 actually have that amendment. I had that amendment.

15 When the sketch map is referenced, and if you recall the first
16 amendment to the settlement agreement all that really did is it adjusted the land
17 area by -- we went from like 24.41 to 24.42 acres. A very small discrepancy. And it
18 references in section 2.02. Exchange property legal description. The exchange
19 property shall be the 1,063,570 square feet set forth in the legal description and
20 diagram attached hereto as Exhibit A1 and incorporated herein by this reference.
21 The legal description set forth in Exhibit A1 shall be attached to and incorporated
22 into the quit claim deed and the exchange property easement.

23 Judge, again, it is an area map to show the actual square footage,
24 nothing more, nothing less, certainly no reference in the settlement agreement or
25 the amended settlement agreement that says, oh, yeah, and by the way, the

1 roadway configurations on this sketch map, this is all the State's ever going to build.
2 We promise this is all the State's ever going to build. No way. It doesn't say that in
3 there and the integration clause precludes them, as does the parol evidence, and
4 that's exactly the bench brief that we filed, precludes them from making that
5 argument.

6 Okay. Finally, Judge, and this one, again, I think that the parties could
7 not be more polarized where they are, and I wrote it down. Mr. Olsen argued this is
8 not about the obligation to go look at the public records.

9 Your Honor, under Nevada case law, yes, it is. The test is did Mr.
10 Nassiri know or -- and this is not just Mr. Nassiri's test, this is every citizen of the
11 State of this -- of Nevada and pretty much the majority of states across the nation.
12 Did that person know or through the exercise of reasonable diligence should have
13 known of the State's intention to build a flyover. He does have a duty. He has a
14 duty just as every other citizen in the State of Nevada has a duty to exercise
15 reasonable diligence to go look at public records, to go investigate this. And again,
16 that duty is heightened by a quit claim deed and a exclusive look provision.

17 There is not a shred of case law that has been advanced in any of the
18 briefings that supports the argument we heard today that there's no obligation to go
19 look at public records. That's not the state of the law and in fact in our trial brief we
20 cite law that says yeah, you do have an obligation and the public records and the
21 notice equals knowledge.

22 So the State did disclose the flyover. Absolutely they did, and they did
23 it in compliance with federal law. Nobody told Mr. Nassiri not to go do his
24 homework. It was quite the contrary. And John Terry stated it best. He said, how
25 does the State communicate with its citizens? He -- they do it through their public

1 informational meetings and through their public size notices. That's how this State
2 entity communicates with its citizens. That's how they communicated with the State
3 of -- with Mr. Nassiri. That's how the State fully disclosed, since 1999, that their
4 intention when traffic demands warrants and funding was available that they
5 intended to build this flyover.

6 This mistake-based claim or this rescission-based claim is time barred,
7 Your Honor. We submitted the law that shows notice is knowledge. Mr. Nassiri
8 clearly had notice. He's time barred and this case needs to be dismissed and end
9 this claim at this juncture. Thank you again, Your Honor, for your time and patience
10 and the State rests.

11 THE COURT: All right. Thank you. A very interesting and complex issue.
12 Appreciate everybody's time and, you know, the complicated issue that we have
13 here. The concerns that I have about assuming that we're have -- we have to find
14 the statute of limitations running from when the settlement was reached in 2005
15 and go back, you know, three years or whatever from that, the problem I have there
16 is I don't -- I understand the argument that the State always disclosed they were
17 going to be building a flyover. I -- they did. I don't have any question that
18 throughout very -- they always knew they were going to be doing it and made those
19 disclosures, as was indicated, to the public in these documents.

20 But they didn't actually know what that flyover was going to be or even
21 where it was going to be. And it was a continually evolving process, as Mr. Terry
22 testified, with these collector -- whatever those -- collector CD -- whatever those --
23 the other word was for those roads. It continued to evolve throughout this whole
24 period of doing these -- the I-15 to Sloan, Trop -- the Trop to Sloan, I-15 south
25 redesign.

1 So that's the concern that I have with this thing is that the actual flyover
2 was not really ever disclosed as to what it was going to be until the design-build
3 phase with Las Vegas Paving. And that's the problem I have is even if they
4 disclosed that we're going to be building a flyover, where it was going to be, how it
5 was going to tie in, none of that was ever actually known until Las Vegas Paving
6 designed it. And so that's what's kind of vague to me as to when anybody would
7 have been on notice of what Las Vegas Paving was actually going to be building.
8 And that's my problem here is I don't see how Mr. Nassiri could be on notice of
9 something that -- you know, I understand the State said conceptually we're going to
10 be building a flyover, but until Las Vegas Paving designed it, it was just we're going
11 to be building a flyover.

12 MR. PEPPERMAN: And, Your Honor, I think that goes back to the confusion
13 that I was hoping to resolve at the outset is when we moved for a separate trial in
14 this matter, it was related to the equitable claim of rescission which was further
15 bifurcated to be the statute of limitations against plaintiff's equitable claim for
16 rescission. So in that instance under his rescission claim, he's seeking to rescind
17 the 2005 settlement agreement.

18 THE COURT: Right.

19 MR. OLSEN: Your Honor --

20 THE COURT: But how --

21 MR. COULTHARD: Let him finish, Eric.

22 THE COURT: -- if it's notice is knowledge --

23 MR. OLSEN: When she's finished (indiscernible) then interrupt him.

24 THE COURT: -- nobody could have been on notice of what the State was
25 going to do until it's designed by Las Vegas Paving.

1 MR. PEPPERMAN: And --

2 MR. OLSEN: Your Honor, I just have a question --

3 MR. PEPPERMAN: -- by --

4 MR. OLSEN: -- and that's whether their closing is --

5 MR. PEPPERMAN: I'm sorry. If I could finish, Your Honor, I'm --

6 MR. OLSEN: -- if their closing is finished or not.

7 THE COURT: Yes. Okay. Yeah, I appreciate that if Mr. Pepperman is

8 concerned that the Court has a question. Certainly we'll let you have a comment

9 also, Mr. Olsen.

10 MR. PEPPERMAN: Well, I would just say if that's the concern then there

11 can't be a rescission claim based on the 2005 contract because the mistake is I

12 didn't know about the future intent of -- to build a flyover at the time I entered the

13 settlement agreement in --

14 THE COURT: Right.

15 MR. PEPPERMAN: -- 2005.

16 THE COURT: Right.

17 MR. PEPPERMAN: So if --

18 THE COURT: How could he? Nobody knew what the -- what it -- was going

19 to be built.

20 MR. PEPPERMAN: Well, they didn't know --

21 THE COURT: And maybe he would have been perfectly fine with it the way it

22 was originally planned. We don't know because --

23 MR. PEPPERMAN: Well --

24 THE COURT: -- it wasn't built that way. It was built the way Las Vegas

25 Paving designed it.

1 MR. PEPPERMAN: I --

2 THE COURT: Some time way later.

3 MR. PEPPERMAN: I agree. And if -- and I think those allegations would
4 relate potentially to a breach of contract claim. But when you're saying I was
5 mistaken about the State's plans in --

6 THE COURT: Right.

7 MR. PEPPERMAN: -- 2005 and if the Court is concerned that those plans
8 did not exist in 2005 --

9 THE COURT: Right. They didn't.

10 MR. PEPPERMAN: -- then there can be no rescission claim --

11 THE COURT: Okay.

12 MR. PEPPERMAN: -- based on mistake in 2005 because if he's mistaken
13 about plans that didn't exist, how can the State -- how can that form the basis of a
14 rescission claim?

15 THE COURT: Okay. Thank you.

16 MR. PEPPERMAN: So that's why it's --

17 THE COURT: Is there anything --

18 MR. PEPPERMAN: -- limited to rescission and if that's the concern --

19 THE COURT: Anything --

20 MR. PEPPERMAN: -- I think it can be --

21 THE COURT: -- further, Mr. Olsen?

22 MR. PEPPERMAN: -- addressed in that context. Yes.

23 MR. OLSEN: I have nothing to add.

24 THE COURT: Okay. Well, that's my problem is that I don't think that there
25 was actual knowledge. The question is whether he had constructive knowledge

1 and -- he -- or all of this team of his and nobody knew what the State was going to
2 build until it's designed. Then it's not designed until some time way later.

3 MR. COULTHARD: Which is absolutely the way NDOT --

4 THE COURT: Absolutely.

5 MR. COULTHARD: -- proposed it.

6 THE COURT: Absolutely. I --

7 MR. COULTHARD: And --

8 THE COURT: -- I understand it.

9 MR. COULTHARD: -- notified all parties, Your Honor.

10 THE COURT: I understand that. But the point is, Mr. Nassiri didn't know that
11 as far as he -- that he had made a mistake about what this was going to -- how this
12 would ultimately impact his property. If he's on constructive notice that there's
13 going to be a flyover, okay, he's on constructive notice there's going to be a flyover.
14 Nobody knew where it was going to be until it's designed, and how -- that it was
15 going to be 60 feet tall or that it's going to have a 20-foot wall. Nobody knew any of
16 that because it wasn't designed.

17 MR. COULTHARD: Judge, I think --

18 THE COURT: So there could have been no notice to anybody. In all of
19 these diagrams, and maybe Mr. Terry with his 20 plus years of experience can say,
20 I can look at that and I know that's a flyover, I know that's going to have to be like
21 some big huge tall thing that's going to cross over a whole bunch of levels of traffic
22 because I'm an engineer and I know that. And maybe Mr. Oxoby knew all that --
23 that's what it was. There's nothing that indicates that he ever told Mr. Nassiri that
24 and you can't impute Mr. Oxoby's notice to Mr. Nassiri because that's outside the
25 scope of what he was doing for Mr. Nassiri. So you can't impute an agent's

1 knowledge beyond the scope of the agent's agency. His scope of his agency was
2 you're to look at this take.

3 MR. COULTHARD: But, Your Honor, it --

4 THE COURT: You don't have to tell me about what this flyover is that
5 nobody's designed yet.

6 MR. COULTHARD: Understood, Judge. But that's not his mistake
7 allegation.

8 THE COURT: Okay.

9 MR. COULTHARD: That's not what he states in --

10 THE COURT: Okay.

11 MR. COULTHARD: -- in his rescission --

12 THE COURT: Okay.

13 MR. COULTHARD: -- and I guess that's why we painstakingly took his own
14 excerpts from his -- from their brief, the -- and, quote, and this is their words. And
15 again, this comes back to the tap dancing, to the moving target, Judge. Because
16 it -- originally in this lawsuit we believed and actually tried to elicit some testimony,
17 we believed their real complaint was the change of the proposed flyover to the
18 as-built because of the design-build change.

19 THE COURT: Yeah, it changed --

20 MR. COULTHARD: Well, they backed off of that allegation, Judge, and they
21 positioned this to be the mistake here, quote, is that plaintiffs were unaware that
22 NDOT intended on billing -- building a flyover. Wasn't the design, it wasn't how it's
23 going to look. It was our intent to build a flyover. They say it three different times.

24 At the time of the settlement agreement, plaintiffs were unaware that
25 NDOT intended on building a flyover. It's not the design that they're complaining

1 about. Plaintiffs did -- quote, the plaintiffs did not have notice of the flyover and
2 they mistakingly (sic) believed that NDOT would not build a flyover. That's their
3 alleged mistake and we refuted it with public records and public notice.

4 The rescission claim is based upon that allegation, Judge, not the
5 change in design. And, again, I think Mr. Pepperman's correct. If that's their
6 complaint, which again, they moved away from that and there's some real concerns
7 I have about judicial estoppel on that, but if that's the Court's complaint, then that
8 gets addressed in a breach of contract claim, not a rescission mistaked-base (sic)
9 claim.

10 Your Honor has an obligation to deal with the equitable claim of a
11 rescission as to their mistake, their admitted mistake. And that's what we defended
12 for a week. So for them to move away from it now after closings is absolutely unfair
13 to the State.

14 And recognize, Judge, that their rescission base claim is a \$40 million
15 claim and that's the only, until their untimely supplement, their ninth supplement,
16 which you have a motion in limine in front of you, they did not have a compensatory
17 damage claim and a compensatory damage model until after our summary
18 judgment briefing.

19 So, Judge, I think based upon the evidence we need to -- Your Honor
20 to take a good hard look at the trial briefs and --

21 THE COURT: Okay.

22 MR. COULTHARD: -- the mistake --

23 THE COURT: All right. What I'm telling you is the concern that I have here is
24 that nobody knew what the State was going to build.

25 MR. COULTHARD: We absolutely --

1 THE COURT: The State had a concept that they were going to build a
2 flyover, but nobody has pointed to me anywhere that there would have been up on
3 any of these walls of boards or whatever it is Mr. Terry talked about that they used
4 to take to these meetings that Ms. Morales never went to, she doesn't do that, that's
5 beneath her, nobody's told me that there's been anything that would have been up
6 that would have explained, this is what a flyover is going to mean to the adjacent
7 property. If you're going to buy this surplus property, that we're going to charge you
8 the exact same price that we're charging you for the take -- that you're going to
9 pay -- we're going to pay you for the take, this how it'll impact you and you can go
10 do your due diligence to see if you think that's a fair price. It hadn't been designed
11 yet.

12 MR. COULTHARD: Understood. But that's not their allegation.

13 THE COURT: So --

14 MR. COULTHARD: Their allegation is they never knew. They were never
15 told about a flyover. They never knew -- they were never aware the State intended
16 on building a flyover. Not, oops, the State changed its design in the 2010 design-
17 build. That's not their allegation, Judge. So we need to focus on their allegations
18 related to rescission in this case. And if you do that, then you look at what they
19 knew. Then you look at the public records. Then this case -- this claim, rescission-
20 base claim, is absolutely time barred, Your Honor. And to rule any other way based
21 upon the evidence is -- I think will be a miscarriage of our -- of justice in this case,
22 Judge, and I -- I'm very disappointed if that's your inclination is to --

23 THE COURT: Okay. I'm --

24 MR. COULTHARD: -- move away from --

25 THE COURT: -- sorry to disappoint you, Mr. Coulthard.

1 MR. COULTHARD: -- their own allegations.

2 THE COURT: I don't want to disappoint you. My -- but my concern, I'm
3 telling you, is this is the problem I have with this. Is first you tell me, well, they -- he
4 can't sue us for compensatory damages because he settled his claim. I agree with
5 you. He settled his claim. In 2005 he settled that claim. But he bought something
6 from the State that was not disclosed how what he's buying is going to be impacted
7 by something that the State has a vision for and that you can't sue, you can't sue
8 the State because I'm right next to you -- I mean, it -- the people all around there
9 are unhappy with this flyover, it's too bad. It's too bad. You can't sue for that. You
10 own the property, you can't sue for that.

11 This is different. Mr. Nassiri bought this land from the State. The State
12 knew they were building a flyover. Arguably, okay, I understand your argument,
13 there is notice of the -- that they were going to be building a flyover. Okay. But
14 here's my problem. Nobody knows what the flyover is, how the flyover is going to
15 impact the land they have valued at X, twenty something million dollars, they don't
16 even know because they haven't designed it. I don't -- I just don't understand.

17 MR. PEPPERMAN: And, Your Honor, my only comment on that would be
18 how can the State be sued for not disclosing something that hasn't been designed
19 yet.

20 THE COURT: Exactly.

21 MR. PEPPERMAN: It's same boat if we --

22 THE COURT: How -- but how would the statute start to -- how would the
23 statute run?

24 MR. PEPPERMAN: Well --

25 THE COURT: I just am trying to figure out how the statute would run.

1 MR. PEPPERMAN: -- and maybe that's -- that is a question in a breach of
2 contract issue, which is for a later day. But under rescission, what the law on
3 rescission is, which is from their own brief is that the mistake, to be a basis to
4 rescind a contract, has to be at the time --

5 THE COURT: Of the --

6 MR. PEPPERMAN: -- a contract is --

7 THE COURT: Okay.

8 MR. PEPPERMAN: -- entered into. So --

9 THE COURT: But here's my problem. How could he have known about --
10 how could he have known?

11 MR. PEPPERMAN: Well how could the State have disclosed --

12 THE COURT: Nobody could know.

13 MR. PEPPERMAN: -- the design for the flyover?

14 THE COURT: So how does the statute run? I'm just not -- I'm not getting
15 this, Mr. Pepperman.

16 MR. PEPPERMAN: Well, because it's --

17 THE COURT: Nobody knows and (indiscernible) it's a design-build that
18 wasn't even planned until Las Vegas Paving is told here's your pot of money. We
19 want you to build us a flyover. You plan it for us.

20 MR. PEPPERMAN: Because it -- they're two separate concepts, Your
21 Honor. So if they're -- if we're going to go on their allegation, that is, we were
22 mistaken at the time we entered the contract --

23 THE COURT: Okay.

24 MR. PEPPERMAN: -- that a flyover was ever going to be built, then public
25 notice that a flyover would eventually be built, no matter what design that ultimately

1 is or what configuration is ultimately built, that is public notice that refutes the
2 mistake that starts the statute of limitations running from the point --

3 THE COURT: Okay.

4 MR. PEPPERMAN: -- he signed the contract.

5 THE COURT: Here -- here's the -- that's my concern here is I am not
6 convinced, we go back to 2005, but I understand your argument this is rescission
7 because you want to rescind the deal that was done in 2005. My problem with this
8 whole thing is that it was all done as part of the settling of the take. And that's --
9 this, to me, is where I just -- that's my problem with it is it seems to me that you
10 have a different burden than just if this was Mr. -- let's say Mr. Koroghli owned this
11 land and he sold it to Mr. Nassiri. Whole different problem because that's just one
12 person selling land to another person.

13 This was in the context of this take that puts this burden on the State.
14 It's a different -- you're in a different position there and you have to compensate him
15 fairly for the land you're taking from him because you're burdened with having to do
16 that. The State can take his land to rebuild this road, which was a crazy road, in a
17 way that makes a lot more sense and is better for traffic, and it's great. It -- traffic
18 moves wonderfully through there. It's fabulous. Great. Good plan. No problem.
19 Here's my problem. But it puts you in an unusual position because you're not just
20 one property owner selling to another property owner. You're the State in the
21 context of taking land from this man and you tell him, well, as part of this deal we'll
22 sell you this other land, but we've got it -- we're going to build a flyover on it, but
23 nobody knows that that flyover's going to be. But we're going to value this land at X
24 based on what we're -- we're going to charge you the same amount we're going to
25 pay you for the land that we're taking but we don't really know how we're going to

1 impact your land. And you're not going to be able to sue us for it in the future
2 because there's no cause of action for that and we got this case out here that says
3 you can't sue us if we build something -- a freeway next to your property. You're
4 just out of luck. But you're not in that position at the time.

5 MR. PEPPERMAN: Well, Your Honor --

6 THE COURT: You're not the State saying, Mr. So-and-so, you own this
7 property and we're going to build a freeway next to you. Sorry. Too bad. You're
8 out of luck because we're in our right of way.

9 MR. PEPPERMAN: Well, Your Honor, the -- I think you're getting very far
10 outside of the narrow issue that is --

11 THE COURT: Okay.

12 MR. PEPPERMAN: -- before you on the rescission and the --

13 THE COURT: Okay.

14 MR. PEPPERMAN: -- mistake-base claim.

15 THE COURT: If you would like to make me a nice, little, simple this is why
16 this matters, because I got to tell you I don't get it. To me this is a problem. I
17 mean, the State's in a different position. You -- you're saying, you can't sue us for
18 taking away your view because you're just the adjacent property owner. You can't
19 sue us for that. If he had gotten that property any other way than from the State
20 through the condemnation process I might agree with you.

21 MR. PEPPERMAN: Well --

22 THE COURT: But --

23 MR. PEPPERMAN: -- Your Honor --

24 THE COURT: -- this is a problem for me.

25 MR. PEPPERMAN: Well, what -- when we get into that aspect of it, he was

1 paid just compensation for that land. And he was also sold the surplus --

2 THE COURT: He was paid --

3 MR. PEPPERMAN: -- parcel.

4 THE COURT: -- just compensation for the land that was taken.

5 MR. PEPPERMAN: Correct.

6 THE COURT: And in the context of paying him compensation for the taking,
7 it was negotiated that he would buy the surplus land.

8 MR. PEPPERMAN: Correct.

9 THE COURT: Here's the problem. The chart -- the -- you told me yourself --
10 Mr. Coulthard told me himself, same price per acre. And all those things that were
11 being compensated for in the taking were apparently rolled over into the land that
12 was the surplus land. But nobody took into consideration how is this going to be
13 impacted by our future construction? We're charging you what it's worth today
14 without the flyover.

15 MR. PEPPERMAN: Well, Your Honor --

16 THE COURT: But we know we're going to build the flyover. We just can't tell
17 you what it's going to be because it's not going to be designed for five more years.

18 MR. PEPPERMAN: And I agree with you that it was disclosed that we would
19 eventually build a flyover and it was incumbent upon the Plaintiff to negotiate the
20 contract for the surplus parcel to say, I want my view protected. I want these
21 limitations on the State. I want to know when I'm buying this property that I'm
22 protected in the future. And it's not just related to additional phases of the Blue
23 Diamond project or something five years from now. Take this out a hundred years
24 and that interchange is being reconfigured or reconstructed and whoever the
25 successor in interest is to Mr. Nassiri's property, I hope it's his great-great-great

1 grandson, and does that mean they have a claim against the State because Mr.
2 Nassiri bought it from the estate -- from the State so many years ago and it was
3 part of a transaction in which a small portion of his property was also condemned?
4 It --

5 THE COURT: Maybe. I don't know.

6 MR. PEPPERMAN: It -- well --

7 THE COURT: It's not really my problem.

8 MR. COULTHARD: You know, I guess, Judge, we -- I can understand, I
9 think, where we're headed based upon the bench's comments. And I guess I need
10 to focus the --

11 THE COURT: Yeah.

12 MR. COULTHARD: -- Your Honor on what is before you and what has been
13 before you in this equity-based rescission claim and that is their allegation that they
14 never knew a flyover was going to be built and that's just factually untrue. We
15 acknowledge that the design changed and that may be for another day if the breach
16 of contract, which they've prayed for a jury, which we're entitled to a jury and,
17 frankly, given the Judge's expressions I will demand a jury in this case because --

18 THE COURT: Yeah. I think you want a jury.

19 MR. PEPPERMAN: -- there is not a contractual duty in this contract, Judge,
20 but that's for another day.

21 THE COURT: Right.

22 MR. COULTHARD: What you have the unenviable task of dealing with is the
23 equitable claim of rescission addressing the mistake and whether or not they made
24 a mistake as to whether we -- the State intended to build a flyover at the time they
25 entered into the settlement agreement. And were they on notice at -- through the

1 public records and did they have a duty to do a diligence search, have notice, and I
2 clearly believe they did and the case law supports they did, as to our intent to build
3 a flyover. And there is --

4 THE COURT: But -- okay. Here's what --

5 MR. COULTHARD: -- that is the issue.

6 THE COURT: -- even without, Mr. Coulthard, even with that, here's my
7 problem with that. Nobody knows what it's going to be.

8 MR. COULTHARD: It doesn't matter. That's not what they're complaining
9 about.

10 THE COURT: Nobody knows what it's going to be.

11 MR. COULTHARD: That is for your breach of contract, your change in your
12 design in your breach of contract claim for the jury. And, frankly, Judge, we've got
13 the one expert report dealing with view and visibility says the way the I-15 design-
14 build, the way it was built is less intrusive and less visually --

15 THE COURT: Right, well, that's the merits.

16 MR. COULTHARD: -- impactive (sic) -- it's -- right.

17 THE COURT: That's not the statute of --

18 MR. COULTHARD: So that's a whole another --

19 THE COURT: That's not statute of --

20 MR. COULTHARD: -- day --

21 THE COURT: Correct.

22 MR. COULTHARD: -- for the jury.

23 THE COURT: Right. That's not statute of limitations.

24 MR. COULTHARD: But --

25 THE COURT: My problem on this whole thing is I understand the argument.

1 I understand it. But here's my problem is as it goes to a mistake, how can you say
2 the statute of limitations runs on mistake when he doesn't know what's going to be
3 built?

4 MR. COULTHARD: That's not --

5 THE COURT: And --

6 MR. COULTHARD: -- their allegation --

7 THE COURT: -- nobody knows.

8 MR. COULTHARD: -- Judge.

9 THE COURT: Nobody knows --

10 MR. COULTHARD: You look at their --

11 THE COURT: -- what's going to be built.

12 MR. COULTHARD: -- their mistake --

13 THE COURT: Until it's designed.

14 MR. COULTHARD: Their mistake, again, is that NDOT intended -- that
15 NDOT intended on building a flyover. At the time of the settlement agreement
16 plaintiffs were unaware that NDOT intended on building a flyover. There's no
17 mistake there, Judge.

18 THE COURT: Right.

19 MR. COULTHARD: And that's what you have to deal with in this rescission
20 base claim.

21 THE COURT: Right. And that's where we get into this whole issue --

22 MR. COULTHARD: And then --

23 THE COURT: I understand your --

24 MR. COULTHARD: -- it --

25 THE COURT: -- that you say that the sketch maps aren't controlling because

1 it's just the dimensions and it doesn't -- it just -- because that doesn't show a flyover
2 doesn't mean he was unaware of a flyover because there's all these other places
3 out there where he would have been on inquiry notice of a flyover.

4 MR. COULTHARD: I mean, I would encourage the -- Your Honor to go back,
5 look at the trial briefs --

6 THE COURT: Okay.

7 MR. COULTHARD: -- the case law in that trial brief, look at what the -- what
8 is properly before you now is the equitable claim of rescission, their claim of
9 unilateral mistake at the time they entered into the agreement. That's the focus for
10 the Court and whether or not we disclosed our -- the State's intent to build a flyover.
11 That is the question in this equitable claim.

12 The issues you're considering now, whether Mr. Nassiri was damaged,
13 whether it was fair of the State to do this, whether the --

14 THE COURT: No.

15 MR. COULTHARD: -- viewer disability is impacted --

16 THE COURT: It's notice.

17 MR. COULTHARD: -- those are for the jury in a breach --

18 THE COURT: Okay.

19 MR. COULTHARD: -- of contract claim --

20 THE COURT: I --

21 MR. COULTHARD: -- and another day.

22 THE COURT: I understand. But here's my problem, I keep -- I'm going to try
23 to make this, because I may not be properly articulating what my problem is with
24 this rescission. If we go back to 2005 how is he to be on notice when he hears the
25 settlement agreement, how is he to be on notice that he's made a mistake because

1 there's a flyover when nobody really knows what, where or how this flyover's going
2 to be built until it's designed by Las Vegas Paving? So he --

3 MR. COULTHARD: Well, Judge --

4 THE COURT: -- the issues isn't --

5 MR. COULTHARD: -- if we didn't prove that --

6 THE COURT: -- you're on -- he's on notice of a mistake. When would that --

7 MR. COULTHARD: He is --

8 THE COURT: -- statute start to run?

9 MR. COULTHARD: Well --

10 THE COURT: How do --

11 MR. COULTHARD: His -- we never intended to build a flyover is his alleged
12 mistake --

13 THE COURT: Okay.

14 MR. COULTHARD: -- not the final design and, oops, you changed the
15 design from a 15 or 20 percent level design to the as-built. That's not their claim to
16 mistake, Your Honor. Again, the tap dancing, the moving target, what their claimed
17 mistake is, is that the State never disclosed a flyover. Any flyover. And in fact we
18 did as early as 1999 and if we didn't prove that to you, Your Honor, then I don't
19 know what I been doing the last week.

20 THE COURT: Well, I -- and that's what I'm saying is I understand that the
21 State disclosed the flyover, but here -- but this is the --

22 MR. COULTHARD: That is the operative question.

23 THE COURT: -- his cause of action is I had -- I made a mistake. When does
24 that run? Does -- it runs from when he discovers he made the mistake, right?

25 MR. PEPPERMAN: Well, Your Honor, actually --

1 MR. COULTHARD: No, that's not --

2 MR. PEPPERMAN: -- if -- his --

3 MR. COULTHARD: -- correct.

4 MR. PEPPERMAN: -- allegation --

5 MR. OLSEN: I -- I'd at least have to stand up for this --

6 THE COURT: Yeah.

7 MR. OLSEN: -- because I don't know how long we're going to keep going. I

8 mean, I thought --

9 MR. PEPPERMAN: -- his allegation is that he made a mistake.

10 THE COURT: Right.

11 MR. PEPPERMAN: And the mistake is I didn't know about the State's intent

12 to build the flyover. What the statute runs, what the law says is that -- under the

13 discovery rule that a statute of limitations commences when they learn of the facts

14 giving rise to their cause of action.

15 THE COURT: Right.

16 MR. PEPPERMAN: So when you look at the mistake --

17 THE COURT: When did he learn that he'd give -- he has a cause of action?

18 When they build the thing because nobody knew what they were going to build.

19 MR. PEPPERMAN: No. It's when did he learn that he mistakenly -- he made

20 a mistake that the State wasn't going to build the flyover.

21 THE COURT: Okay.

22 MR. PEPPERMAN: That's what the cause of action is. That's the facts we

23 need to look at. When did he know or when should he have known of the State's

24 intent to build a flyover, any flyover whatsoever.

25 THE COURT: Okay.

1 MR. PEPPERMAN: Not I made a mistake, I'm not going to tell you what that
2 mistake is, and I couldn't have known I made the mistake until 2010 when the
3 flyover was built. He said he made a mistake. His mistake is, I didn't know of the
4 State's intention to build the flyover. Under the law we look to when did you know
5 or should have known the facts of your mistake. The facts supporting it,
6 underneath it. Which those facts are the State's intent to build a flyover. The
7 answer to that, as been -- as has been presented at the trial is he knew of the
8 State's intent to build a flyover since before he even entered into the contract.

9 THE COURT: Okay.

10 MR. PEPPERMAN: So the statute starts to run from the moment he signed
11 the contract because that's the moment he makes the mistake. And, Judge, if
12 you're -- if you disagree with that concept, if you think he couldn't have made his --
13 the statute on that mistake couldn't have run because the State hadn't designed the
14 final --

15 THE COURT: Right.

16 MR. PEPPERMAN: -- flyover yet, then we're in a whole new area that
17 requires dismissal of the rescission claim because what the law is very clear, the
18 mistake has to be based on facts that exist at the time of the contract. You can't
19 enter into a contract, not be mistaken about any facts, wait 10 years and then point
20 back to it and say, oh, I didn't know about that -- this design that hadn't existed 10
21 years ago when I signed my -- the contract --

22 THE COURT: Okay.

23 MR. PEPPERMAN: -- so I'm going to use that as a basis to rescind it. That
24 would be --

25 THE COURT: This --

1 MR. PEPPERMAN: -- it's a no win situation for the State.

2 THE COURT: Mr. Olsen?

3 MR. OLSEN: Your Honor, just -- I -- I'm not going to try to combat all that.
4 You said a few things that are important -- well, many things that are important
5 particularly that caught my attention. First of all, the State is in a different position
6 in this deal. It is not -- you can talk about an arm's length transaction all you want,
7 but it was a situation where in the context, as you said, just -- of just compensation,
8 the State needed to make full disclosure and they failed to.

9 One -- two, the analogy (indiscernible) a hundred years down the
10 road? It -- they -- those aren't the facts. As soon as the deal was closed they went
11 and got the money to build a flyover. So it's not about something happening a
12 hundred years from now.

13 THE COURT: Yeah. I think it was like 2009, was it?

14 MR. OLSEN: The very next opportunity they had --

15 THE COURT: Was 2000 --

16 MR. OLSEN: -- was the next legislative --

17 THE COURT: -- 2007?

18 MR. OLSEN: -- session because they closed the deal in June. We closed in
19 June, too late for the legislature that time. The next session, because we go every
20 other year of course, is 2007. They were loaded for bear as soon as that
21 opportunity came up.

22 THE COURT: Right.

23 MR. OLSEN: The only -- the third thing I'll say, and this is what you've said a
24 couple of times, and it's right. Mr. Nassiri wasn't on notice of his mistake until the
25 thing was built. There's no other way for him to --

1 THE COURT: Their argument is a legal argument that rescission is
2 something that is your -- the mistake that you make at the time of your contract. So
3 the -- we're getting into something else here if he didn't have notice of something at
4 the time.

5 MR. OLSEN: Right. And --

6 THE COURT: It's like some other kind of a claim. Maybe it is. But that's my
7 problem here --

8 MR. OLSEN: Yeah. And that's --

9 THE COURT: -- because it seems to me that we -- nobody knew what this
10 flyover was going to be because they didn't -- they hadn't designed it. They
11 hadn't -- they got the money in -- two years later. They -- then they went out to bid.
12 Then Las Vegas Paving designed it. And it moved.

13 MR. OLSEN: Yes. I have nothing further, Your Honor.

14 MR. COULTHARD: Your Honor, if -- just a housekeeping matter. I do not
15 want to argue in this any more.

16 THE COURT: Yeah?

17 MR. COULTHARD: But I think this has been an instructive dialogue. I would
18 ask that we be allowed to reopen the case to have this part of the post-argument
19 question and answer for -- by the Court as part of the record on appeal --

20 THE COURT: Oh.

21 MR. COULTHARD: -- in the transcript. And it -- I don't think it would --
22 because I -- my sense is, and Mr. Olsen is a very fine attorney, a good friend, but
23 when he stands up and says, I want to be clear, the State's rested, I anticipate an
24 argument that everything we've done the last 45 minutes will not be part of the
25 record and I think it should be part of the record, Your Honor.

1 THE COURT: Okay.

2 MR. COULTHARD: You've talked about your concerns and findings. We've

3 tried to respond. Mr. Olsen has. Let's have a full and complete record in this

4 proceeding. So I would ask to reopen our case in chief to --

5 THE COURT: Well, I -- what --

6 MR. COULTHARD: -- to incorporate --

7 THE COURT: -- my question was --

8 MR. OLSEN: Well, wait.

9 MR. COULTHARD: -- incorporate everything that's been said.

10 MR. OLSEN: Wait a -- whoa. Okay. I don't know about reopening the case

11 in chief. I think if the perception was when I said is oral argument over, then I think

12 that this should be part of the record. But it's not part of the case in chief. It's not

13 part of the evidence.

14 THE COURT: Well, yeah, well it's in the -- it's totally -- it's in --

15 MR. OLSEN: Just a request.

16 MR. COULTHARD: As long as it's in the record, Judge, I --

17 THE COURT: It's in the record.

18 MR. COULTHARD: -- don't that we need --

19 MR. OLSEN: I don't object to that, Your Honor.

20 THE COURT: It's in the record and I -- yeah. I don't have any problem with

21 that. But here's my question is do you feel that this is adequately addressed in

22 the -- we -- the previous briefs that we got -- we had before, oh, they aren't filed, the

23 two previous briefs that the parties filed before and this -- because, I mean, I -- this

24 is my problem. And maybe I'm --

25 MR. COULTHARD: Well --

1 THE COURT: -- maybe this is not something that was ever briefed, maybe
2 I'm totally wrong on this and this doesn't really, as Mr. Pepperman (indiscernible)
3 this has nothing to do with the whole issue of rescission but, you know, that's my
4 stumbling block here is I understand that all the evidence the State has about all
5 the notice that was out there that should have -- the inquiry notice -- I don't think
6 there's any actual notice. That's what I think I said first is I don't think there was
7 actual notice. We're -- so we're beyond that. We're into this whole other issue of
8 should he have known. Was he on inquiry notice, should he have been on inquiry
9 notice, should he have done something to inquire. But there's my -- here's my --
10 the problem that I run up against is how would anybody have known what it was
11 going to do? That's my problem. Nobody knew until it got designed.

12 MR. COULTHARD: Understood. We would like an opportunity to brief the --
13 this in supplemental briefing on the narrow issue of the issues that are before you in
14 the --

15 THE COURT: Yeah. Because that's --

16 MR. PEPPERMAN: -- equitable rescission claim.

17 THE COURT: And how about -- how that impacts. It may not, Mr. Olsen, it
18 may not.

19 MR. OLSEN: Just --

20 THE COURT: But, I mean, it's my problem and I just didn't hear anybody --
21 and Mr. Terry didn't explain it to me, nobody explained it to me.

22 MR. OLSEN: Your Honor, if I may, I heard the description of what NDOT
23 would like briefing on and I just want to make sure. I am opposed to any briefing go
24 to the merits in any way. And maybe that's not the intent. That -- certainly the
25 description was wide enough open for that.

1 THE COURT: No, I'm just saying --

2 MR. OLSEN: If we want to brief --

3 THE COURT: -- I have a legal question.

4 MR. OLSEN: I understand.

5 THE COURT: About this. And my -- because I've told you what my concern
6 is. I have this concern about the fact that I don't think there's actual notice. There's
7 inquiry notice clearly triggered by all these -- this process, this public information
8 process. That's how government entities deal. Okay. But even if a person going
9 through all that and we have -- and as I said, I don't think you can impute Mr.
10 Oxoby's notice to Mr. Nassiri. He's an agent --

11 MR. OLSEN: No.

12 THE COURT: -- and he would only be bound by the scope of his agency and
13 nobody testified that he was doing anything other than the take. So we have this
14 whole flyover thing on notice. Mr. Terry says, I look at that and I -- that's a flyover.
15 I can tell, because I'm an engineer and I've got 20 years of experience. The
16 average person out there looking at that, it's a line on a two-dimensional diagram.
17 Nobody's going to know until Las Vegas Paving gets the money and says, go
18 design this for us, we want a flyover.

19 MR. OLSEN: I --

20 THE COURT: Nobody knows.

21 MR. OLSEN: I understand what you're saying, and --

22 THE COURT: What this is going to be.

23 MR. OLSEN: -- I think Counsel does, Your Honor.

24 THE COURT: So that's my question is how does that affect rescission.
25 That's my problem here is how can I -- how do I factor that into what he's supposed

1 to know? Now, Mr. Pepperman has told me it doesn't matter because rescission is
2 at the -- by the terms of the cause of action of rescission it's what you know at the
3 time you do your deal. The fact that nobody knew what this actual design was
4 going to look like until five years later when NDOT gets the money and contracts
5 with Las Vegas Paving and they design it and start building maybe that's not
6 relevant to rescission. I don't know. I -- that's what I -- that's my question that I can
7 get answered, so --

8 MR. OLSEN: I understand, Your Honor. And I think so long as we --

9 THE COURT: I'm not talking --

10 MR. OLSEN: -- limit --

11 THE COURT: -- about merits, I'm not talking about -- I'm talking about a
12 legal issue.

13 MR. OLSEN: Yes.

14 THE COURT: Is the Court's concern that Mr. Nassiri not -- I -- that's a
15 finding. Mr. Nassiri didn't have actual notice. He arguably should have been on
16 inquiry notice because there's plenty in the record to show that there was going to
17 be a flyover. But what does --

18 MR. OLSEN: Well --

19 THE COURT: -- that mean?

20 MR. OLSEN: Well --

21 THE COURT: I mean, what does that mean?

22 MR. OLSEN: -- Your Honor, plus, and I --

23 THE COURT: Until it's designed, what does that mean?

24 MR. OLSEN: Plus I just want to be --

25 THE COURT: That it's not designed till later.

1 MR. OLSEN: -- clear and now I'll take my turn to go one step --
2 THE COURT: Yeah.
3 MR. OLSEN: -- beyond this. The very -- on the notice issue, I mean, I would
4 ask the Court, and I'm sure the Court will, whether there's briefing or not, to
5 scrutinize very closely the case authority that's been offered for the point you just
6 made.
7 THE COURT: Right.
8 MR. OLSEN: And the *Wagner* case absolutely does not say anything other
9 than --
10 THE COURT: And, besides, isn't it unreported? I think it's unreported.
11 MR. OLSEN: Oh, you know what, I don't know that.
12 MR. COULTHARD: It -- it's --
13 MR. PEPPERMAN: It's what?
14 MR. COULTHARD: Unreported.
15 MR. OLSEN: It is unpublished.
16 MR. COULTHARD: I think it is unreported.
17 THE COURT: It's unpublished. Yeah.
18 MR. OLSEN: Okay. But even if you --
19 THE COURT: You know, they -- he --
20 MR. OLSEN: -- looked at the facts --
21 THE COURT: -- I think they're going --
22 MR. OLSEN: -- they don't match --
23 THE COURT: -- I think Hardesty's going to change that --
24 MR. OLSEN: -- these facts.
25 THE COURT: -- but for right now it's unreported. So --

1 MR. OLSEN: That's -- that case had public recordings, like a deed of trust,
2 you could find them in the public record.

3 THE COURT: Right. And it was public notice so, I mean, it's not -- we're not
4 record of notice, but it's public notice. So that -- my -- that's my concern is what is a
5 person supposed to be on notice of at the time of rescission. Mr. Pepperman's like
6 it's a legal issue, what it is at the time. All these other issues go to other causes of
7 action. They don't go to this cause of action, which is rescission. That is, can you
8 unwind this deal.

9 MR. OLSEN: Right.

10 THE COURT: Which, quite frankly I'm kind of puzzled by how you'd even try
11 to unwind this deal, but that's a -- that's the merits and that's not for us today. It's --
12 what is the fact that nobody knows what's going to be built until years later when
13 NDOT first goes to the legislature, gets the money, then enters into the contract
14 with Las Vegas Paving to design it, then Las Vegas Paving designs it and then they
15 build it. How does that affect this concept of should you have been on notice such
16 that you could unwind this deal.

17 Because remember -- and that's why I said, normally none of this
18 would matter. In a normal transaction between two arm's length, you know,
19 individuals who own property, this isn't the kind of thing that's going to even come
20 up. It's only because this is in the concept -- context of this taking that I even have
21 a concern because I think that is a different, you know, you're just in a different
22 position there.

23 MR. OLSEN: Understood, Your Honor. And so long as we're focused on
24 that narrow issue --

25 THE COURT: Right.

1 MR. OLSEN: -- I --

2 THE COURT: And, as I said --

3 MR. OLSEN: -- I'm fine --

4 THE COURT: -- because, remember --

5 MR. OLSEN: -- with briefing. I --

6 THE COURT: -- case law says years later down the road bystanders,

7 people, you know, people along the State's right of way, the State can do anything

8 it wants in its right of way. And you're just out of luck. That's what case law says.

9 So Mr. Nassiri's in a little bit different position because he bought this land from the

10 State as part of them taking his other land and so that's my problem here is -- but

11 nobody knew. Nobody knew what it was going to be.

12 MR. OLSEN: And, Your Honor, that --

13 THE COURT: The concept that there was going to be a flyover is just a

14 concept that there's going to be a flyover.

15 MR. OLSEN: That --

16 THE COURT: You know.

17 MR. OLSEN: -- context you put the case in that distinguishes Mr. Nassiri

18 from other either --

19 THE COURT: Yeah.

20 MR. OLSEN: -- transactions with an individual or other transactions --

21 THE COURT: Yeah.

22 MR. OLSEN: -- like an inverse condemnation --

23 THE COURT: People on the right of way.

24 MR. OLSEN: -- that's the color of the case. It is --

25 THE COURT: Yeah.

1 MR. OLSEN: -- different.

2 MR. COULTHARD: Well --

3 MR. OLSEN: It isn't *Probasco*.

4 MR. COULTHARD: -- I guess it -- we have not seen any case law that

5 support --

6 THE COURT: Right. So that's what --

7 MR. COULTHARD: -- that there's some heightened duty --

8 THE COURT: That's what --

9 MR. COULTHARD: -- on the State in that --

10 THE COURT: Well, that's -- okay.

11 MR. COULTHARD: -- and there wasn't -- it was --

12 THE COURT: Okay.

13 MR. COULTHARD: -- while they defined it as exchange property, Your

14 Honor, it wasn't. It was a take, just compensation --

15 THE COURT: Right.

16 MR. COULTHARD: -- and it was as purchase and sale.

17 THE COURT: I know.

18 MR. COULTHARD: And how you're going to --

19 THE COURT: But they put it all in --

20 MR. OLSEN: That's been the State's position from --

21 THE COURT: And I don't understand why they --

22 MR. OLSEN: -- the beginning.

23 THE COURT: -- put it into one transaction. That -- that's, you know, that's

24 for Mr. Chapman and Mr. Welch to explain. I don't understand why you'd do that.

25 MR. OLSEN: Because of the settlement of the overall --

1 THE COURT: Yeah. And it doesn't make any sense to me but in --
2 MR. OLSEN: It -- Mr. Nassiri expressed specifically he didn't want to go
3 approach the State later about some piece of property --
4 THE COURT: Right. Okay. Fine. But here --
5 MR. COULTHARD: I guess I'd still like to know the contractual duty --
6 THE COURT: There --
7 MR. COULTHARD: -- in the four corners --
8 THE COURT: There --
9 MR. COULTHARD: -- of the contract --
10 THE COURT: Yeah, okay.
11 MR. COULTHARD: -- we're defending in this case.
12 THE COURT: We're not talking about contracts.
13 MR. OLSEN: At a minimum --
14 MR. COULTHARD: But anyway, we'll --
15 MR. OLSEN: -- at a minimum, good faith.
16 THE COURT: We're not going to talk about the contract. We're not going to
17 talk about the contract.
18 MR. COULTHARD: You're going to amend in good faith?
19 MR. OLSEN: At a minimum.
20 THE COURT: We're -- all -- we're only talking --
21 MR. OLSEN: At a minimum --
22 THE COURT: -- that's my question.
23 MR. OLSEN: -- it's a good faith express obligation.
24 THE COURT: This is my problem and Mr. Pepperman has told me it doesn't
25 matter. It has no impact on rescission because rescission is a very specific cause

1 of action and this fact that it was not a specifically designed flyover doesn't matter
2 because that's not the mistake. The mistake is what was there at the time, did he
3 know. And, as I've said, I don't think he had actual notice, but there's a lot of stuff
4 here in this record that --

5 MR. OLSEN: Do we --

6 THE COURT: -- I don't think how --

7 MR. OLSEN: -- Your Honor, want to set a --

8 THE COURT: -- how you could --

9 MR. OLSEN: -- schedule, a briefing schedule, or?

10 THE COURT: Yeah. So, I -- that's a very good plan. How much time do you
11 need? I mean, because it's a real specific issue --

12 MALE VOICE: Two weeks.

13 THE COURT: -- and I know Mr. Pepperman's got --

14 MR. OLSEN: Yeah, two weeks.

15 THE COURT: -- nothing else to do but this.

16 MR. OLSEN: And, Your Honor, I -- if this is going to be briefed at State's
17 insistence, I would request brief and response as opposed to --

18 THE COURT: Okay.

19 MR. OLSEN: -- simultaneous --

20 MR. COULTHARD: Well --

21 MR. OLSEN: -- briefs.

22 MR. COULTHARD: Well, that's not the way trial briefs typically work.

23 THE COURT: Trial briefs. Right.

24 MR. COULTHARD: I mean let's do simultaneous responses --

25 THE COURT: Right, it's trial briefs so --

1 MR. COULTHARD: Trial briefs --
2 MR. OLSEN: It's worth a shot.
3 MR. COULTHARD: -- supplemental trial briefs.
4 THE COURT: Supplemental trial briefs in -- Mr. Ciciliano, you're --
5 MR. OLSEN: At least two weeks.
6 THE COURT: Can you -- do you agree with Mr. Pepperman that two weeks
7 is reasonable because we got a holiday here in the middle.
8 MR. OLSEN: Your Honor --
9 THE COURT: And we're losing some time to --
10 MR. OLSEN: What date is that, Your Honor?
11 THE COURT: That would be the 4th. Will that be the 4th, Linda?
12 THE CLERK: 2nd.
13 MR. COULTHARD: I'm looking at Mr. Pepperman. I'll let --
14 THE COURT: Or 2nd.
15 MR. COULTHARD: -- him decide.
16 THE COURT: Yeah.
17 MR. OLSEN: The only problem --
18 MR. COULTHARD: And Mr. Ciciliano.
19 MR. OLSEN: -- I've got in that timeframe, Your Honor, is I've got to be in
20 New Zealand the 28th through the 4th.
21 THE COURT: Yeah.
22 MR. OLSEN: And in Seattle the 6th and 7th.
23 THE COURT: Okay.
24 MR. OLSEN: So we could do it -- have them due -- we can do them in the
25 meantime, have them due just right after that?

1 THE COURT: How about 30 days? Have simultaneous exchange of brief in
2 30 days?

3 MR. COULTHARD: Thirty days is fine.

4 MR. PEPPERMAN: That's fine with me, Your Honor.

5 THE COURT: Thirty days.

6 MR. CICILIANO: That's fine, 30 days?

7 MR. OLSEN: Thirty days?

8 THE COURT: Okay. Because --

9 MR. COULTHARD: And they would be simultaneous exchanges of briefs
10 and --

11 MR. OLSEN: Yeah.

12 THE COURT: Exactly.

13 MR. OLSEN: Understood.

14 THE COURT: And that --

15 MR. COULTHARD: -- and no --

16 THE COURT: -- and --

17 MR. COULTHARD: -- responses.

18 THE COURT: -- I'm running into a problem with this in another case where --
19 because I will accept an unfiled courtesy copy. Somebody never got around to
20 filing and serving their post-trial brief --

21 MR. OLSEN: Oh, we're not concerned. That --

22 THE COURT: -- and it --

23 MR. OLSEN: -- we'll work that out, Your Honor.

24 THE COURT: -- caused a huge problem and so, you know, it does ultimately
25 still have to be filed and served under the local rule. I -- that's my question. And it's

1 like a -- and I -- Mr. Pepperman's argued very eloquently that it doesn't matter, but
2 that's my question is how does that affect rescission in that, you know, you don't
3 know what you're going to get until it's designed and built.

4 MR. OLSEN: Understood, Your Honor.

5 THE CLERK: You're not setting a hearing. You're just -- that's the
6 (indiscernible) --

7 THE COURT: Trial briefs in 30 days.

8 THE CLERK: -- to get them to you and then you'll take it under advisement --

9 THE COURT: And then I'll tell them if I want argument, yeah.

10 THE CLERK: What?

11 THE COURT: And then we'll -- and we'll decide if we're going to have
12 another argument or not.

13 THE CLERK: At the time you read --

14 THE COURT: Yeah. So do -- because we do -- do we have a trial date or
15 anything (indiscernible) no. Okay. All right.

16 MR. COULTHARD: No, there's nothing else that's --

17 THE COURT: Okay.

18 MR. COULTHARD: -- been set.

19 THE COURT: So then 30 days, and then I'll let you know if we need to have
20 an argument based on that because it's just -- like I said, I have no idea if this thing
21 that's -- that I'm hung up on affects this, but I just can't get past it, so --

22 MR. OLSEN: Fair enough. We'll try to help the Court out.

23 THE COURT: Okay.

24 MR. COULTHARD: Thank you --

25 THE COURT: Thank you.

1 MR. COULTHARD: -- Your Honor, for your time and your patience again.
2 THE COURT: Yes.
3 MR. PEPPERMAN: Your Honor, I mean, is there a specific calendar day,
4 just so we're on the same page?
5 THE COURT: Oh, I'm sorry.
6 THE CLERK: When they're due?
7 MR. PEPPERMAN: June 16th?
8 THE CLERK: Yes. June 16th.
9 MR. OLSEN: 16th?
10 THE CLERK: Did we set that?
11 THE COURT: Yeah.
12 THE CLERK: Or am I just dreaming?
13 MR. COULTHARD: June 16th.
14 THE COURT: It's 30 days.
15 THE CLERK: That's 30 days.
16 THE COURT: Thirty days?
17 THE CLERK: Yeah. It's Tuesday, June 16th.
18 MR. OLSEN: Very well.
19 THE CLERK: That's business --
20 THE COURT: Interesting.
21 MR. OLSEN: That'll be the day. Thank you.
22 MR. PEPPERMAN: Thank you.
23 MR. OLSEN: Thank you, everyone.
24 MR. COULTHARD: We'll get our -- we'll clean up this courtroom and get
25 our --

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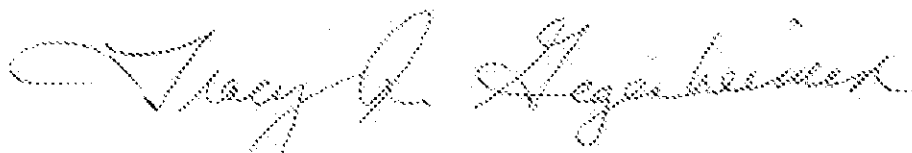
THE COURT: Thanks very much.

MR. COULTHARD: -- get out of your hair. Thank you, Your Honor.

THE COURT: And thanks for rearranging your travel so we could do this today. Yes.

[Proceeding concluded at 4:15 p.m.]

ATTEST: We hereby certify that we have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of our ability.



Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber



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