TAB 65

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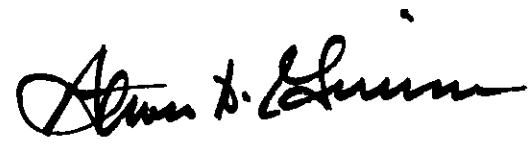


CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

FREDERIC AND BARBARA ROSENBURG LIVING TRUST, Plaintiff, vs. BANK OF AMERICA, ET AL., Defendants.	CASE NO. A689113 DEPT. NO. 1

BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE

WEDNESDAY, JULY 15, 2015 AT 9:21 A.M.

RECORDER'S TRANSCRIPT RE:
STATUS CHECK: RESET TRIAL DATE

Recorded by: LISA A. LIZOTTE, COURT RECORDER

APPEARANCES:

FOR THE PLAINTIFF:	KAREN HANKS, ESQ.
FOR THE DEFENDANTS FHP VENTURES, MICHAEL DOIRON AND MacDONALD HIGHLANDS REALTY:	SPENCER GUNNERSON, ESQ.
FOR THE DEFENDANT BANK OF AMERICA:	ARIEL E. STERN, ESQ.
FOR THE DEFENDANT MALEK:	J. MALCOLM DeVOY, ESQ.

(WEDNESDAY, JULY 15, 2015 AT 9:21 A.M.)

THE CLERK: Page 2 through 3, Frederic and Barbara Rosenburg Living Trust versus Bank of America, Case Number A689113.

THE COURT: Did Mr. Stern arrive? We got a phone call from Mr. Stern.

Oh, there he is.

MR. STERN: I was a bit of a speed demon on the freeway, Your Honor. I made it.

THE COURT: Oh, well, let's see, the –

MR. STERN: Avoided that –

THE COURT: -- some sort of privilege I'm sure attaches to that statement.

MR. STERN: I somehow managed to avoid that case, Your Honor.

THE COURT: All right. Did everyone receive the Court's order from yesterday?

MS. HANKS: No, Your Honor.

MR. GUNNERSON: No.

MR. DeVOY: No.

THE COURT: You didn't get it, Mr. Stern?

MR. STERN: No.

THE COURT: We decided it was all your client's fault.

MR. STERN: That doesn't surprise me, Your Honor.

THE COURT: So no one received it, then?

MS. HANKS: No, Your Honor.

THE CLERK: It was sent out this morning.

THE COURT: Okay. Oh, I'm sorry. Well, we were rushing to try and get that done because the purpose of today, of course, was to set trial and we had already submitted the motion to dismiss. Do we have a copy of it that we can hand out? Yeah. We'll print you out copies. I apologize for not getting this to you before because it probably impacts the trial settings.

Essentially what the Court has done is agree with the Defendants that – that the alleged covenant sought to be enforced in this case cannot be enforced as against them for reasons argued by the Defendants including the fact – this certainly isn't the only reason, but a part of it was the sophistication of Mrs. Rosenburg, the waivers of everything known to man which were signed, and it's the Court's conclusion that those causes of action as against these Defendants cannot be maintained.

That leaves, however, the Defendant's counterclaim against the Plaintiff, and I don't recall exactly what the nature of that was.

Oh, that was for slander of title. While I wouldn't judge that to be the strongest claim to ever hit the courtroom, it was one that I didn't feel that I could deal with on a summary judgment or a motion to dismiss basis. That leaves, as near as I can tell, the trial to cover the Plaintiff's claims against Bank of America as well as the counterclaim. I think that would be the extent of it, is that correct?

MR. GUNNERSON: Sounds right, Your Honor.

THE COURT: I have one question, and I know I went through this with my Law Clerk in the hours that we spent trying to sort out this whole thing, but remind me if you would what the nature of the deed was in this matter, the

deed to the Rosenburg Trust. Was it a grant, bargain, sale deed? Was it a warrantee deed? Was it a quit claim deed? What was it?

MR. GUNNERSON: Without the documents in front of me, Your Honor, I don't want to say for sure. I believe it was a grant, bargain, sale deed only because it was a – it was a pretty standard transaction, I don't think there was much more that went into it, but without the documents in front of me I don't know that I could say for certain.

THE COURT: And who was the conveyor?

MR. STERN: Typically, Your Honor – the bank was, and typically when the bank conveys a property from – it's REO portfolio it is a grant, bargain and sale deed but it is accompanied by a purchase agreement addendum that, in your phrasing, waives everything known to man, so there are those issues, the deed and whatever warranties come with it but it's accompanied by that purchase addendum that has waivers.

THE COURT: Am I correct that the Plaintiff's principal claim of the covenant that runs with the land, the easement would be as against the conveyor, then? In other words, there were various causes of action that really had to do with the expertise of the realtors with the knowledge, perhaps, of MacDonald's, et cetera, et cetera, but the gravamen of your easement claim would be against the conveyor, would it not?

MS. HANKS: Well, not – yes and no.

THE COURT: Okay.

MS. HANKS: So let me see if I can clear it up, at least my understanding.

THE COURT: Yeah, clear it up. When was the last time a lawyer cleared it up? Okay. Go ahead.

MS. HANKS: So we would argue that, yes, when Bank of America conveyed the property our understanding was a restrictive covenant would have existed over the golf parcel where the property was located, but in order to enforce that covenant there's nothing that Bank of America can do at this point because they're just selling the parcel at 590 Lairmont. Where the covenant attaches is to the golf course that surrounds 59 --

THE COURT: By virtue of the master deed?

MS. HANKS: Correct.

THE COURT: Yeah.

MS. HANKS: So that's where the claims were against FHP – well, MacDonald Highlands Realty.

Actually we didn't have that against MacDonald Highlands Realty or Doiron, that was more against FHP Ventures because they're the declarant under the CC&Rs and then Mr. Malek because he wanted to build on it, so that's where –

THE COURT: Well, to me – and I'll tell you what my thinking is although I would like the findings of fact, conclusions of law to contain, of course, the plentitude of reasons advanced by the movants and the arguing – and the arguments advanced by them, but it's just so difficult for me to see how what your client is seeking to do, given the configuration of these – of the plots, et cetera, et cetera, is anything other than a covenant – an easement for light and air and view, and in some of your arguments I saw that it – that you kind of switched off that track because I think it's probably not a winning –

MS. HANKS: Well, it's our position we never had that track. The Defendants were saying that was our track but that was never our track. The complaint doesn't even say that, it was that -- the change in the golf parcel.

THE COURT: Well, then, tell me – here I am opening Pandora's Box, but tell me, then, what is the nature of the covenant or easement which you seek to enforce?

MS. HANKS: It's keeping the golf parcel a golf parcel. In other words –

THE COURT: What kind of easement is that?

MS. HANKS: It's – well, if it's not express, which they can be which we thought it – we argue that it was to the extent of Mr. Malek's deed, but there's also implied, and that was –

THE COURT: Well, sure, and you can have implied covenants or implied easements, but you still must be able to make what you're claiming as an easement be one that fits within those kinds of easements which the law has in the past -- by stare decisis has determined these are enforceable easements.

MS. HANKS: Right. And that's where we had the case law in Nevada that did enforce it. Just the one off the top of my head – I haven't read my brief in a while, but the one was where people bought property in the community that had the airport strip, had a park and it had some other designated areas and someone came in after and decided to change that. And they said, no, when these people bought the property it was induced to buy it with the understanding that the surrounding property remain that way and that was what was at issue, and so that's exactly what we were arguing.

THE COURT: What did the Court in that case call the easement?

MS. HANKS: A restrictive covenant.

THE COURT: Nothing more than a restrictive covenant?

MS. HANKS: Yeah. I mean it wasn't an express in any of the deeds but they called it a restrictive covenant, and so you've seen the term and even the restatement has gotten rid of it and they discussed it. The people use it interchangeably.

THE COURT: And your contention is that that little piece of ground is tantamount to putting in air strips and et cetera, et cetera, et cetera?

MS. HANKS: Yes. When you advertise a community with a plat map – and the other case was the *Reno* case where they had platted the streets, the parks and said, look, people bought the property with the inducement – another one was access to, I think, the beach park area.

It's the same idea. The inducement is this area is going to stay the way we have built it because we've advertised it to you this way and this is what you're buying. You're not just buying your acre of land, you're buying the surrounding areas, that's why you're paying the premium for what we've already built and what we've already designed, and this is part of the 9th Hole of the golf course, and so when the Rosenburgs bought the property there, just like the house next to them, just like Mr. Malek next to them, you have an understanding that that golf course is going to stay that way. In other words –

THE COURT: Well, what's – what's – what are they being deprived of there, your clients?

MS. HANKS: The premium that they paid, in other words, the value they paid for the community that they bought in, so the golf course. In other words, it would be no different –

THE COURT: The golf course is still there.

MS. HANKS: Part of it but not all of it, and that's what the case law is saying. You can't --

THE COURT: Well, what is the fractional part of the golf course that's been lopped off by this sale?

MS. HANKS: I'm sorry?

THE COURT: What is the fractional part?

MS. HANKS: The fractional part is the tail end of the 9th Hole.

THE COURT: Right. But I mean given as a percentage of the entire square footage of the golf course –

MS. HANKS: Yeah, I don't know.

THE COURT: -- it has to be minuscule.

MS. HANKS: I don't – yeah. Well, I would agree with that. From an 18-Hole golf course it's probably a small portion, but the case law in Nevada said you don't get to have a portion. It's either an all or nothing. When you have a restrictive covenant to an area of land – even, in fact, the – I think it was the *Shearer* case the Supreme Court – the Nevada Supreme Court remanded for that very reason because the Court did just that. They said, well, I'll give you part of the covenant but I'll strike out another part, and the Court said, no, no, no, no, it's – when that person bought the property they either get the whole covenant or they don't get any of it.

THE COURT: That's not really what I'm saying. I'm not saying I give you part of it but not all of it. I'm not parsing the alleged covenant.

MS. HANKS: No. I'm pointing out that the fact that it might be minimal versus major, that's not the analysis. The analysis is are you changing what was agreed to stay there.

THE COURT: Let me just riddle you this, then. What if rather than that particular piece there was a three foot long piece that ran contiguous with the piece that is the subject plan, isn't there some point where it becomes de minimis where the essential character of the land has not been changed and where the only – the only rational that I can put to this type of an easement as a covenant is light and air and view?

MS. HANKS: Well, our position is no, Your Honor, because -- in other words, our position was, and at the time the lawsuit was filed, because the Rosenburgs didn't even know it was happening, if that covenant doesn't exist on even a portion of the golf course then tomorrow the Rosenburgs could buy the grass in front of Mr. Malek's property on part of that golf course and parse out a third of an acre there, and then Joe Smith can come the next day and they can keep on shortening and you could say, well, it's only a third of an acre and we can still have the 9th Hole, and that's the point of the restrictive covenants. You can start to chip away at something like that and then be left with no golf course. That was the whole point of the covenants, the whole point of the inducement to why they designed this community around the golf course, so it opens the door to –

THE COURT: Well, given that you could be right that if – that you could have – you could certainly foresee a situation where a conveyor or a declarant of a master covenant might somehow allow that sort of thing to happen, that really isn't the case here. The case here – I mean we're dealing

with what we're dealing with. We're dealing with the particular conveyance in this case, and I guess I'm persuaded somewhat by the fact also that particularly when enforcing an implied covenant -- am I correct we're dealing with equity here?

MS. HANKS: In terms of the relief, right. If you --

THE COURT: The fact that it's an implied covenant.

MS. HANKS: -- ask for declaratory injunctive relief, yeah, it's an equitable type of relief.

THE COURT: Then ought I not to take into account, again, the sophistication of the buyer that this was someone who had, what, 20 years' experience as a realtor?

MS. HANKS: Well, that may be –

THE COURT: And if there – well, you know, and is given warnings that say – which she signed off on that say essentially what you see is what you get.

MS. HANKS: No. And, Your Honor, I understand, but that's –

THE COURT: That's a bad way to put it.

MS. HANKS: No. Right. And I understand where, you know, Doiron was coming from and MacDonald Highlands but the claim is not against them. In other words, you could still dismiss the claims against Michael Doiron and MacDonald Highlands Realty and still find the covenant exist on the land. That -- that's – so those two were separate and distinct from us.

THE COURT: Do I – in analyzing the covenant as against one Defendant do I forget what I, you know, found to be the operative facts and which bear upon the application of the analysis of an implied covenant here –

MS. HANKS: Well, I ---

THE COURT: -- where you have a buyer who is a sophisticated buyer? What would have prevented her from taking – taking the tone of the documents that she signed off on and saying, I better go check?

MS. HANKS: Because it only dealt with 590 Lairmont. That's the point. That dealt with that little plot of land that she's buying a house that's already built.

THE COURT: A sophisticated realtor would not be aware that there could be –

MS. HANKS: Sale of a golf parcel that had been there since 1990 I would argue no, especially when the community – that's the center of it and that's the – I mean I don't go buy a house in Southern Highlands and think, well, I should check if that park is still going to be there. I mean these are planned communities in Las Vegas that – it's a unique feature, in fact, of Las Vegas you don't really find almost anywhere else, at least from my experience living on the East Coast, that these whole communities are planned, and MacDonald Highlands was planned around the golf course and –

THE COURT: Which is still there.

MS. HANKS: Right. Which is still there. There's a little less of the 9th Hole, and I don't know if tomorrow a little less will be on the 8th Hole or the 10th Hole. I don't know because –

THE COURT: Is there really a little less on the 9th Hole? Am I correct that this did not impinge on the actual course? Wasn't that that area that's – it looks like rocks or something?

MS. HANKS: Well, that was our – that's the issue of fact that we would say it is in play, it's inbound play, but you're correct, it's not green, it's not rough.

Well, I guess it could be considered rough by golf terms but it's in play, so it is part of the 9th Hole.

THE COURT: I have labored over this because this is obviously of supreme importance to the parties, and it greatly affects the amount of time that's necessary and costs that's necessary to the parties. Moving forward, you know, what will the shape of the trial be as opposed to – one way as opposed to the other way, but I remain convinced that I think the Defendants have the better part of it, that this is – that there is no implied covenant or implied easement of the nature that's being alleged by the Plaintiffs as to that particular sliver of ground.

Maybe I'll be wrong and if so then we'll be back and you'll be retrying the whole thing. Knowing that do you wish to reconsider your position on this?

MR. GUNNERSON: I do not wish to reconsider my position, Your Honor.

MR. DeVOY: No. Nor does Mr. Malek, and we'd just like to point out a few things about the cases that were cited. The precedent that was cited in the motions, and was brought up again here even after the Court's decision, is not apposite to the case before the Court right now. In the *Sandy Valley* case, which had to do with the airport landing strip if I'm not mistaken, that one is where people were actually building on the landing strip, the Defendant was to do that.

Here, as the Court has noted, there's a little sliver of property that was undeveloped desert land that's being used now so that Mr. Malek can build his house a little bit closer to the golf course. The hole has not changed. This isn't a situation where the 9th Hole –

THE COURT: Well, if this is such a nothing, unimportant piece of ground, then why doesn't your client let it go?

MR. DeVOY: I can't speak to that right now, Your Honor. I'd have to check with him.

MR. GUNNERSON: Your Honor, one question I do have is I believe we also have pending a motion for leave to amend to conform with the evidence that would include one of my parties who had filed a motion for summary judgment but they had asked for additional claims to be added. I don't know if this renders that moot or if forthcoming –

THE COURT: I don't either. I haven't taken it that far.

MR. GUNNERSON: Okay. So that may still be in play in that situation, then.

MS. HANKS: This was an alternative claim to the extent that the implied restrictive covenant didn't exist over the land, so we would argue it's not moot but –

MR. GUNNERSON: Okay. So we'll just wait to hear what the Court has to say on it.

MS. HANKS: But it would only be against FHP Ventures. It's not against the other – there's no amendments as to any of the other parties. It was just FHP Ventures.

THE COURT: And this is on your pending motion to amend?

MS. HANKS: Yes, Your Honor. You had it set for in chambers for July 2nd.

THE COURT: I don't want to rush to judgment on any of this, but with this kind of a matter I will tell you that I'm – unless I can see that it's really absolutely in vain I would be – sort of my default position would be to allow the amendment so that we can see. I mean I just have to work through these one step at a time, and I can't work through the question of whether or not such a new claim would lie unless we get it teed up and we do it, so –

MR. GUNNERSON: I believe those have been fully briefed, so --

MS. HANKS: They have been fully briefed.

MR. GUNNERSON: -- that's – I'm sure you're going to have an opportunity to look at that sooner than later, and that's been fully briefed and obviously we believe we have some strong evidence as to why – or reasons why it shouldn't go forward and I know Plaintiffs feel the opposite –

THE COURT: Sure.

MR. GUNNERSON: -- so we'll be waiting to hear your decision.

THE COURT: Remind me what the nature of the amendment is.

MR. GUNNERSON: The amendment was to essentially bring a breach of contract and –

MS. HANKS: Breach of fiduciary duty.

MR. GUNNERSON: -- breach of fiduciary duty claims against FHP basically under the CC&Rs. It was a motion to amend to conform with the evidence, which we believe is inappropriate in the procedure, but also insofar as based upon –

THE COURT: My first take on it, and I frankly have not looked at your briefs yet so I –

MR. GUNNERSON: I'd rather you take a look at the briefs because –

THE COURT: Yeah. My first take on it is –

MR. GUNNERSON: -- those identify much –

THE COURT: -- that one may have legal rights that are far different based on something far different than the real estate law –

MR. GUNNERSON: Understood.

THE COURT: -- involved with implied covenants, so anyway I'll take a look at it and we'll see.

MR. GUNNERSON: Okay.

MR. DeVOY: If there's nothing new against Shane Malek are we dissolved in terms of the Defendant's claims against him?

THE COURT: In the new motion you're saying?

MR. DeVOY: In the new amended complaint.

THE COURT: Okay. Well, I don't know.

MR. DeVOY: Plaintiff's counsel just represented there's nothing new.

THE COURT: Okay.

MS. HANKS: No. It was only to add claims – change the claims against FHP Ventures given their motion to dismiss.

THE COURT: All right. Well, then, let me ask you a question. If – I mean how could we set a trial date realistically if we don't know whether – what the scope of this case is?

MR. GUNNERSON: I think we –

MS. HANKS: I would agree with that.

MR. GUNNERSON: Yeah. I would agree we really need to have a decision on that motion to amend and understand if FHP is involved yet before we can set a trial date.

MS. HANKS: Right. I would agree with that particularly because if you do grant it they might ask for additional discovery, so I don't know how that's going to shake out either.

MR. STERN: The other issue, Your Honor, not to complicate things but –

THE COURT: I know you've got a stack of motions teed up. You were waiting to see how these guys made out.

MR. STERN: No. But I think that's a good idea. We'll take a look at it. It's a joke, yes. We were thinking about that.

But we also have – if this claim against the CC&Rs come in and this foreshadows some of the other cases we have to deal with today, we may have an arbitration problem under Chapter 38.

THE COURT: Oh, NRED, yeah.

MR. STERN: So –

MS. HANKS: Which we've – I mean we've opposed and we've explained why it doesn't apply.

THE COURT: Yeah, okay.

MS. HANKS: Your Honor, could I just get one clarification since – when we go do the order for the – the minute order that you have here, is the Court's finding that Nevada law does not recognize restrictive covenants or that

you just don't believe there's issue of fact as to one existing here? And I just need that point of clarification so that we don't get into the fact – because I want to – that's a big contention because that's what they argued, so I just want to make sure in case the client appeals what I know what we're appealing.

THE COURT: Not trying to remain too obtuse I will have to decline to – to answer that question. To make all of this fit in what I believe is the correct order of the day, I'm going to need to see both of the orders –

MS. HANKS: Okay.

THE COURT: -- the proposed orders.

MS. HANKS: Fair enough.

THE COURT: And if I don't agree with either one of them, then we'll have to fashion our own from it.

MS. HANKS: Okay. That's fair.

THE COURT: In other words, it's still – as you can tell from the fact that I asked you some questions this morning it's still – I've been wrestling with this a lot and I want to do everything I can to make sure that I come to the correct decision so that you all don't have to redo this whole thing if at all possible.

MR. GUNNERSON: Thank you, Your Honor.

THE COURT: So I'll have to key off of what I assume, then, will be differing findings of fact, conclusions of law. You're going to want me to say something outrageous, you're going to want to protect me from saying something outrageous.

MS. HANKS: I don't want you to say anything outrageous. I have no dog in the fight in terms of what it said. I just want to make sure -- because I think we could agree on an order. I just wanted to make sure what the real basis

was because that was really their lead argument, that it didn't even exist in Nevada, so I just wanted to make sure where we were going when we started drafting the findings of fact, but we can –

THE COURT: Well, that's a good –

MS. HANKS: -- leave maybe both in there. I don't know.

THE COURT: -- question, which will unfortunately not get a good answer today other than I will need to view the differing findings of fact, conclusions of law proposed so that I can finally cement, frankly, in my own mind that I have come to the right decision and if I conclude that I haven't I'll pull the whole thing back.

I wrestle with this issue, frankly, because you have so many different players, you have so many different parties and you're asserting it not against the conveyor in this instance – well, you are but that's for another day. You're really asserting it as against the master conveyor, and you're asserting something that even the nature of it could be questioned, what is this really, and so it becomes difficult to try and figure out precisely what does Nevada law say.

So all I can say is I'm having to take this one step at a time, and I'll look at your proposed findings of fact, conclusions of law and make a determination of whether -- which if either really express what the Court's – the full body of what the Court's reasoning is on this.

MR. GUNNERSON: And I believe the minute order said, Your Honor, we will draft that findings of fact, conclusions of law and we'll run it by you –

THE COURT: Okay.

MR. GUNNERSON: -- at least as far as my client's motion is concerned.

THE COURT: Yeah. Yeah.

MS. HANKS: We're setting a status check?

THE COURT: All right. So we're going to continue this out until – now, are we going to be able to – we're not going to be able to set a trial until we figure out whether or not NRED rears its ugly head.

MS. HANKS: That and whether FHP is still in on the amended claims.

THE COURT: Right.

MS. HANKS: Right.

THE COURT: Well, will we know both of those things by the next hearing date?

MS. HANKS: That's – the ball's in your court, Your Honor. It's fully briefed.

THE COURT: Now, deciding the motion do we decide whether it has to go to NRED?

MS. HANKS: Correct, yes.

THE COURT: All right.

MS. HANKS: You decide that issue and you decide if FHP is still in but on other claims, yes.

THE COURT: So obviously the reason I'm asking is because that means that everybody does need to be here for the next hearing because at that point we'll be setting a trial or we'll be imposing a stay and sending it off to NRED.

MS. HANKS: Right.

MR. GUNNERSON: All Right.

THE COURT: All right.

MR. GUNNERSON: Thank you, Your Honor.

MR. STERN: Thank you, Your Honor.

THE COURT: What date do we have for that hearing?

THE CLERK: Are you talking about the motion to amend?

THE COURT: Yes.

THE CLERK: It was on the chamber calendar.

THE COURT: Oh, yeah.

MS. HANKS: It was for July 2nd .

THE COURT: We're going to have to move that over.

Well, let's do this. Let's be clever so that we don't allow them opportunity to argue it again. Let's set the – move this status check and to set a new trial for immediately after the chambers calendar decision.

MS. HANKS: The chambers calendar has already passed, July 2nd.

THE COURT: Is this the one that we said we were working on today – for this week?

All right. We'll have that for you by Monday. So put this on for Wednesday, then.

MR. STERN: So we're back here on Wednesday, Your Honor, a week from today?

THE COURT: Wednesday, yeah.

MR. GUNNERSON: And just so Your Honor knows, my wife is due on Wednesday of next week, so I may have – I guess we're not going to argue,

we're just basically here to set trial, but I know in setting a trial date I might not be present depending on when this baby comes.

THE COURT: Oh, no. That can't be. What do you –

MR. GUNNERSON: Just so you're aware.

THE COURT: Where are you going to be?

MR. GUNNERSON: Well, maybe the hospital.

THE COURT: Well, you don't have to do that. Do the old style.

MS. HANKS: What, the husband doesn't go there and just let me know when the baby's here?

MR. STERN: Wait for the cigars.

MR. GUNNERSON: Now you're starting to sound like my partner, Will Kemp. He doesn't understand.

THE COURT: Well, then, let's not do that, then. Let's make it be the following –

MR. GUNNERSON: If we could I would appreciate that.

THE COURT: -- Tuesday or Wednesday.

THE CLERK: The 29th.

THE COURT: 29th.

MR. GUNNERSON: Thank you.

MS. HANKS: At 9:00 a.m.?

THE CLERK: 9:00 a.m.

THE COURT: Yes.

THE CLERK: Can I have counsel state their name on the record, please?

MS. HANKS: Karen Hanks on behalf of Plaintiff.

MR. STERN: Ariel Stern for Bank of America.

MR. GUNNERSON: Spencer Gunnerson on behalf of MacDonald Highlands Realty, Michael Doiron and FHP Ventures.

MR. DeVOY: Jay DeVoy on behalf of Shane Malek.

THE CLERK: Thank you.

MR. DeVOY: Thank you.

MR. GUNNERSON: Thank you, Your Honor.

THE COURT: So are you going to be -- if this all goes down – well, we'll just wait and see.

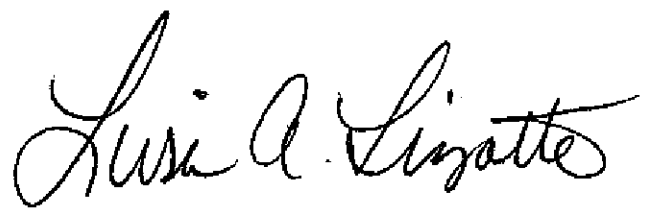
MR. GUNNERSON: Okay.

THE COURT: Okay.

(Whereupon, the proceedings concluded.)

* * * * *

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



LISA A. LIZOTTE
Court Recorder

TAB 66

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CLERK OF THE COURT

TRAN

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

FREDERIC AND BARBARA ROSENBURG LIVING TRUST, Plaintiff, vs. BANK OF AMERICA, et al, Defendants.	CASE NO. A-13-689113 DEPT. NO. I

BEFORE THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 22, 2015

TRANSCRIPT RE:
DEFENDANT SHAHIN MALEK'S MOTION FOR ATTORNEY'S FEES AND COSTS

DEFENDANT MACDONALD HIGHLANDS REALTY, LLC AND FHP VENTURES MOTION FOR ATTORNEY'S FEES AND COSTS

PLAINTIFF'S MOTION TO RETAX AND SETTLE MEMORANDUM OF COSTS AND DISBURSEMENTS

APPEARANCES:

For the Plaintiff:	KAREN L. HANKS, ESQ. JACQUELINE GILBERT, ESQ.
For Defendant Shane S. Malek:	JAMES M. DeVOY, ESQ.
For Defendants Michael Doiron, MacDonald Highlands Realty, LLC and Foothill Partners:	MATTHEW S. CARTER, ESQ.

RECORDED BY: Lisa Lizotte, Court Recorder

CLARK COUNTY, NEVADA THURSDAY, OCTOBER 22, 2015

PROCEEDINGS

(PROCEEDINGS BEGAN AT 1:41 P.M.)

THE CLERK: Frederic and Barbara Rosenburg Living Trust versus Bank of America. Case No. A-689113.

MS. HANKS: Karen Hanks and Jacqueline Gilbert on behalf of the plaintiffs.

THE COURT: Good afternoon.

MR. CARTER: Good afternoon, Your Honor. Matthew Carter on behalf of MacDonald Highlands, Michael Doiron and Foothills Partners.

MR. DEVOY: Good afternoon. James DeVoy here for defendant Shahin Malek.

THE COURT: Good afternoon. Let's take first Mr. Malek's motion for attorney's fees and costs.

MR. DEVOY: Okay. Your Honor, I think the motion speaks for itself. It was scheduled to be heard in chambers. I have not received an opposition to it. I looked at the docket before I came here.

THE COURT: Oh.

MR. DEVOY: It seems that the plaintiff has conceded to the motion.

THE COURT: Is the one where we got an opposition this morning?

MS. HANKS: Yeah, I believe yesterday we realized we did not send courtesy copies, Your Honor, so we should have sent them yesterday.

THE COURT: Oh.

MS. HANKS: But we did oppose it.

THE COURT: Have you seen the opposition?

MR. DEVOY: I have not seen a copy of this opposition.

THE COURT: Okay.

MR. DEVOY: Do you have a copy?

MS. HANKS: I don't. I'm sorry.

THE COURT: Well, I'll tell you what. Normally what I do is continue it out so you have an opportunity to look at it. I can either do that, but I think -- I can do that if you want, or you can just argue your opposition verbally. It's up to you.

MR. DEVOY: I would much prefer the opportunity to see the written opposition and file a reply brief at a further scheduled date for a hearing. If the Court would like to comply with that, I feel like that would be better so I'm not arguing in the dark here.

THE COURT: Okay.

MS. HANKS: And I defer to counsel. I agree. If he wants his reply time, I don't want to deprive him of that.

THE COURT: All right.

MS. HANKS: I'm sorry.

MR. DEVOY: That's okay; it happens.

MS. HANKS: I apologize.

THE COURT: All right.

MR. DEVOY: My position for the record is that it was consented to under EDCR 2.20 (e) and I want to preserve that.

THE COURT: Uh-huh.

MR. DEVOY: Notwithstanding the fact that an opposition was filed this morning, I believe the motion should be granted on that basis, just so we're all clear

on that. But if there was an opposition filed, I'd just like the opportunity to review it. And if the Court would like to set it out --

THE COURT: Sure.

MR. DEVOY: -- for a time at the Court's discretion, I'd just ask the opportunity to reply.

THE COURT: How long do you want to put it out?

MR. DEVOY: It depends on the Court's calendar.

THE COURT: And you'll want to file -- probably file a reply then?

MR. DEVOY: Yes, I would very much like the opportunity to file a reply.

THE CLERK: The 10th.

THE COURT: The 10th?

THE CLERK: That's going to be the earliest.

THE COURT: Okay. It looks like November 10th.

MS. HANKS: November 10th?

THE COURT: That's the quickest we can get back in.

MR. DEVOY: I believe that will be fine with me.

MS. HANKS: Your Honor, I'm sorry. I can always have someone from my office attend, but my daughter is getting a surgical procedure that morning.

THE COURT: Oh, okay.

MS. HANKS: So if it's an afternoon hearing, I can do it. It's at eight o'clock her appointment is scheduled for. She should be done by nine.

THE COURT: No, let's just --

MR. DEVOY: We can do another day. I don't want --

THE COURT: Let's just put it on another day.

MS. HANKS: I'm sorry.

MR. DEVOY: I don't want to put you through that, either.

THE COURT: Yeah.

MS. HANKS: Okay. I'm sorry.

MR. DEVOY: No, it's fine.

THE COURT: Christmas?

MR. DEVOY: That's actually the best day for litigation.

THE COURT: It is. A lot of stuff gets settled that day.

MS. HANKS: This is my whole game plan. Let's just hold this off as long as possible.

THE CLERK: It's probably going to be November 24th; that's the soonest.

MR. DEVOY: I have no travel plans.

THE COURT: Just in time for Thanksgiving.

MS. HANKS: And I am in Maryland.

THE COURT: Oh, sure you are.

THE CLERK: Are you guys back the week after?

MS. HANKS: I am back the week after. I come back Monday, the 30th, so I'll be back that Tuesday, which I think is December 1st.

THE CLERK: I can do December 1st or 2nd.

MS. HANKS: I'm clear either of those days.

MR. DEVOY: I don't believe I have any conflicts on those days.

THE CLERK: We'll do it December 1st.

MR. DEVOY: Okay.

MS. HANKS: And, Your Honor, I'll look into the filing that seems to have not

gone through. If I find it didn't go through, do you want me to file it to make the docket clear or just send the copy that I have to counsel and then he would just file a reply?

THE COURT: Do you have any attachments? Sometimes if we get it off -- I mean, we can print it off of Odyssey, but what we oftentimes don't get then is the attachments.

MS. HANKS: I believe there is one exhibit, Your Honor.

THE COURT: Okay. Why don't you get us a courtesy copy, if you would.

MS. HANKS: Okay.

MR. DEVOY: And if you could just get that to me, and then I'll have an opportunity to reply --

MS. HANKS: Okay.

MR. DEVOY: -- when the new hearing gets set. So I guess the matter is continued?

THE COURT: That's continued, yes.

MR. DEVOY: Thank you, Your Honor.

THE COURT: That takes us to on my list of things is plaintiff's motion to retax and settle the costs.

MS. HANKS: For Mr. Malek, Your Honor? Do you want to take that one?

THE COURT: No, this is -- I thought this was plaintiff's.

MS. HANKS: It is our -- as to Mr. Malek's request for costs or the MacDonald Highlands request? There's two motions to retax.

THE COURT: Oh.

MS. HANKS: That's why I was asking. Sorry.

MR. DEVOY: I believe just Mr. Malek's is the one on calendar.

MS. HANKS: Oh.

MR. CARTER: Yeah, I wasn't aware that ours was on calendar.

MS. HANKS: It was very minor.

MR. CARTER: I mean, our motion to retax is basically unopposed, so -- because it was like two hundred dollars.

MS. HANKS: It was a minor --

THE COURT: Yeah.

MS. HANKS: Yeah, so I don't think that one is as big of a dispute. You're right. But we did do a motion to retax the MacDonald Highlands one as well.

THE COURT: Uh-huh. Okay. Well, that's the one we're on.

MS. HANKS: Oh.

MR. CARTER: Okay. Well, Your Honor, I don't believe we filed an opposition. I think it was only a matter of a couple hundred dollars and we were fine retaxing that couple hundred dollars, so there wasn't a big deal about that one.

(The Court confers with the law clerk)

THE COURT: Okay. I'm not quite as far wrong as I thought. It is your motion to retax the costs for Malek.

MS. HANKS: Yes, Your Honor.

THE COURT: And as to that --

MS. HANKS: Yes.

THE COURT: -- what say you?

MS. HANKS: Your Honor, the first basis for our motion was under NRS 18.020.

THE COURT: Uh-huh.

MS. HANKS: The type of action that the plaintiff brought against Mr. Malek is not enumerated in that statute, so we would suggest that costs are actually not allowed. If the Court believes in its discretion that it can still allow costs for this type of action, we took issue with certain costs that were incurred by Mr. Malek, and those included deposition costs for witnesses that had no bearing on the claim that plaintiff was bringing against Mr. Malek, and that's specifically Mr. Jiu, which is plaintiff's damages expert; Mr. Tassi, who is a Henderson employee; Mr. Dugan, who was I believe Bank of America's witness, expert witness on damages; Mr. Lubawy, who I believe was MacDonald Highlands' expert witness on damages, and Ms. Woodbridge from Bank of America.

It was our position that those depositions had no bearing whatsoever on the claims against Mr. Malek and so there was no need to pay for the transcripts. Also, Mr. Malek, for whatever reasons, shared in the cost of the defendant's depo of our expert, Mr. Jiu, and I'm not really sure why that was done, as that expert had nothing to do with the claims against Mr. Malek and he didn't have any obligation to share in that cost.

Finally, with respect to the mediation, we cited several case law from other jurisdictions that state if the parties agree to equally share in a cost, they can't thereafter collect it as a cost for the prevailing party. And Mr. Malek is seeking to collect the mediation costs that both parties agreed to do and both parties agreed to bear equally those charges. So we would ask that reducing those costs -- if you are going to allow anything, our first position is no costs should be allowed, but if you are going to allow anything that it should be reduced to three thousand dollars --

three thousand, seven hundred and twenty dollars and twenty-five cents.

THE COURT: Okay. And you forgot the part about the late filing.

MS. HANKS: Your Honor, I think after I looked it up it's not jurisdictional --

THE COURT: Okay.

MS. HANKS: -- so I can withdraw that.

THE COURT: All right.

MS. HANKS: I did find that out, that it's not jurisdictional, it's discretionary.

THE COURT: Well, I'm sure he'll withdraw any objection he's vouchsafed for the late filing of opposition.

MR. DEVOY: Yes, I understand that that was an issue. Most of it was just getting the records together in time, and that was part of the issue that came up in the course of dealing with -- on behalf of Mr. Jiu with the reduction in the amount that's owed him. That's something that Mr. Malek is working with Mr. Jiu's office. If you'd like to reduce it to the amount that Ms. Hanks suggested was appropriate, around the amount of three hundred dollars in her motion to retax the costs, I don't think there would be a problem with that.

Where Mr. Malek does have a problem is with the idea that the depositions of Tassi and Woodbridge are not properly taxed to him. Those were relied heavily in his -- relied upon heavily in his motion for summary judgment. They were used extensively. They established the zoning issues that prevented the trust from claiming that there was any kind of easement or implied restrictive covenant in the property that he had purchased and seeked to move out into on the golf course. And Ms. Woodbridge was also instrumental in showing that he had complied through MacDonald Highlands in properly noticing the meetings necessary to get

the variance in the zoning that allowed him to incorporate the golf parcel into his property.

Now, with respect to Mr. Jiu, Mr. Dugan and Mr. Lubawy, my understanding is that there's a slight diversion from what Ms. Hanks said. Mr. Dugan was the expert for the MacDonald Highlands entities and Mr. Lubawy was the expert for Bank of America. The reason that those were necessary is because it was not clear from the timing that we had on the initial scheduling order for the motion for summary judgment that this was going to be resolved on summary judgment. This was very likely a case that was going to go to trial.

And one of the key issues for the award of injunctive relief, and it's detailed in the opposition, is that injunctive relief is available where legal relief is improper or unavailable or insufficient. If there is legal relief that compensates them for their damages -- that compensates the trust for its damages that could be recouped from MacDonald Highlands or from Bank of America, then there's no need for injunctive relief against Shane Malek. I understand that he had to be joined in order to have the potential for that to exist, but if they get compensated, if the trust is compensated for the damage for loss of view, such as it is as the case was -- the theory of the case was articulated in its outset, then allowing the trust to have an injunction against Malek's use of the land constitutes a double recovery. So being able to articulate and understand those theories of damages in order to prevent the entry of an injunction at trial was essential to prepare for the case. And even if it wasn't as heavily used in the motion for summary judgment, and I believe in Mr. Lubawy's case at all, it was necessary in furthering the case.

And moreover, I'd defer to Ms. Hanks with respect to the cost for

mediation. She has researched that position very well --

THE COURT: Uh-huh.

MR. DEVOY: -- and I defer to the federal courts that she had cited as to that proposition.

THE COURT: So what amount do you both agree on that one?

MR. DEVOY: I agree to an amount higher than what she is suggesting. Can I sit down and do some math? If I could do this in my head, I'd be a doctor. Can I have a moment?

THE COURT: Sure.

MR. DEVOY: Okay.

(Pause in the proceedings; off-record colloquy)

MR. DEVOY: All right. The number that I come out to, removing the mediation fees and reducing the amount owed to Craig Jiu to three sixty-seven fifty is seven thousand, five hundred and sixty-eight dollars and fifty cents.

THE COURT: And how much cents?

MR. DEVOY: Fifty.

THE COURT: Fifty cents.

MR. DEVOY: And then to speak more to the issue that Ms. Hanks raised about this not being a proper action under the statute that allows for taxes -- for costs to be taxed to another party, it was the trust that initially made this a case about the possession of property or land or rights therein, which is one of the bases that allows for the costs -- I'm sorry, for the taxing of costs to the non-prevailing party. Initially they filed a lis pendens and it had to be expunged. It's very clear from the outset that claiming an easement or an implied restrictive covenant on

somebody else's land is claiming some possessory right, and as was detailed in the briefing also in this case, claiming that you have a right on somebody else's property is claiming some right, some possessory right to either use it or to encumber somebody else's use for your benefit. I just don't think it holds up, given the other filings in this case and the positions that the trust has taken in the past that this is not somehow a case that deals with a possessory right.

At this point now that the Court has determined that here is no possessory right, now the trust is trying to align its position to say that it was never about that. But if we look back in the docket to the time that this was filed back in September of 2013, when they filed the lis pendens, this was very much a case about the trust's possessory or property rights in Mr. Malek's property.

THE COURT: Okay. Ms. Hanks.

MS. HANKS: Well, Your Honor, we disagree. And the damages claim, as we've always stated, was an alternative relief to the extent the restrictive covenant didn't exist. At no time was the trust seeking both a restrictive covenant and money damages. And unfortunately with the posture of the case you have to pursue both, depending on what happens, and then at that point I guess you can do an election of remedies, but it never got to that point. But at no time was the trust looking to double recover. And as this Court is well aware, the Rosenburg trust always wanted the restrictive covenant more than the money damages.

THE COURT: Uh-huh.

MS. HANKS: So we were not doing both, and so under 18.020 we don't think it falls under it. Your Honor, I'm just a little unclear on the amount that they're saying, because I thought the total amount asked for was in the rough neighborhood of

eight thousand. Am I wrong?

MR. DEVOY: No, it was around -- the deposition transcripts were around seven thousand initially.

THE COURT: Eighty-five fifty? Eighty-five fifty is the number I have.

MS. HANKS: Right. So if we take out the mediation, which I thought was almost four grand --

MR. DEVOY: No, the amount we were asking for was around twelve thousand.

MS. HANKS: Oh, I'm sorry.

THE COURT: Oh.

MR. DEVOY: The initial number was twelve thousand, two hundred and seventy forty-five.

MS. HANKS: Oh, okay. Sorry.

MR. DEVOY: That's okay. Like we've been saying, we'd all be doctors if we were better at math.

THE COURT: Okay. So what's -- Assuming I agree that the mediation comes out and the rest stays in, then what's the number?

MS. HANKS: That's what I'm asking. So I don't have that figure. You're saying it's seven thousand, five hundred and sixty-eight dollars? That's what I'm asking.

MR. DEVOY: Let me look at the calculator.

MS. HANKS: Yeah.

MR. DEVOY: I had seven thousand, five hundred and -- closer to seventy-six.

THE COURT: Fifty-eight fifty. Seven five five eight fifty is what you said before.

MR. DEVOY: Seven five sixty-eight fifty.

THE COURT: Oh.

MR. DEVOY: Oh, off by ten dollars.

THE COURT: Oh, okay, you see how that changes.

MR. DEVOY: That was done by reducing the amount due to Craig Jiu for the prorated amount. And the prorated amount that was agreed upon that MacDonald Highlands also paid was three sixty-seven fifty. And then the mediation fees would come out of that. I am standing firm that the deposition fees are proper.

MS. HANKS: Okay. And so that's -- and we would just add that because that was an alternative claim, Mr. Malek would have never been responsible for any money damages in this case.

THE COURT: I think the deposition fees have to be considered to be appropriately incurred in this case. The way this thing was going, I agree with counsel it would have been -- left his client at grave risk not to go ahead and participate in the deposition. I think it was appropriately incurred and it's presumptively, at least, reasonable. So I think that the other fees are the only ones that come out, so the amount appears to be seven five six eight fifty.

Okay, moving on to Highlands Realty's motion for fees and costs.

MR. CARTER: Thank you, Your Honor. Our motion is principled on two basic points, the first being the contractual agreement that was really forming the backbone of plaintiff's complaint against not only the other defendants but my clients as well. That was the purchase and sale agreement and you have the

addendum to the purchase and sale agreement. And -- I'm sorry, did you have a question?

THE COURT: What do you say to her argument that her client was not a party to that? Did I understand that right?

MR. CARTER: Well, Your Honor, I have a couple of responses to that. The first is I disagree with that characterization, the first being because my client was named both in the purchase and sale agreement and in the addendum as the agent for the seller in that transaction, being the agent or the individual -- or in this case we have an individual who's working for MacDonald Highlands Realty -- this person who was representing the seller in the transaction. It was acknowledged within the contract that he was acting on that seller's behalf and everybody knew that.

Furthermore, Your Honor, if you look at the specific causes of action against my client, for example, the statutory claims regarding the obligations of an agent --

THE COURT: Uh-huh.

MR. CARTER: -- those statutory obligations only come into play and are only the basis of a lawsuit when you do in fact have a contract like you have the one here that names an agent, much as this one did, which again was my client who was the agent for one of the parties to that contract. So I think strictly from the standpoint of was my client a party to that contract, my client of course was not the seller. I can't sit here and tell you that with a straight face, but I can tell you that as a matter of both that contract and as of that addendum, that client did represent that seller for legal purposes in that sale.

And I think that when the contract, this important document is being

cited in this action by the plaintiff and all the other parties as the key critical document and it's being wielded against us as much as it is for us, I think that, Your Honor, it's only fair that my client should be able as a matter of not only law but of equity to be able to use those provisions and come back and say, you know what, we got out completely on summary judgment, we're entitled to our fees and costs as a matter of contract. And I can assure you, Your Honor, had the situation been reversed and had the plaintiff prevailed against my clients in a motion for summary judgment, we would probably be arguing a motion for fees by them based on this very same contract, based on the exact same law that I'm citing you right now.

And again, this goes all the way back to the complaint where we were sued as the agent for the seller. And, Your Honor, I did brief this so I'm not going to go into it too deeply, but this goes back to the judicial estoppel arguments. There's a California case, Kitty-Anne Music, and Mainor v. Nault is the Nevada case that basically says once a party has taken a position, more or less successfully taken that position, they can't come back and then say the opposite and ask the Court for relief based on that. And here all of the actions against my client were based on this agency relationship, this idea that Bank of America and my client were tied with this very specific agency-principal relationship. If we're now severing that for the purposes of that contract, I see those as completely inconsistent, Your Honor. So that would be my first response to the party question.

My second response, and this was delved into both in the opposition and my reply, is the idea of a third party beneficiary and when can a third party beneficiary enforce a contract. And as Your Honor knows and as was in the briefs,

the Lipshie case says that when you have an intended -- an intention within the contract to benefit that third party, they then become an intended third party beneficiary.

And that is exactly what we have here, Your Honor. Both the original contract and the addendum name my clients as the agent for the seller. There is no clearer idea, in fact, that my clients were intended to benefit from this transaction because they were going to get their brokerage fee. If there is to be any third party beneficiary at all, I think this is absolutely the situation. So I think that from that standpoint as well in terms of being a party to the contract, I think there's a very strong argument, a very strong case to be made that my client is in fact also a third party beneficiary to the contract.

Now, I do want to go and I want to talk a little bit about the differences between the purchase agreement and the addendum because there was some -- there was some hair-splitting, I think, over that point in the opposition as, well, the addendum is specifically excluding you guys as the parties. And I don't believe that it does specifically exclude my clients as the parties, certainly not in the very specific way that the opposition seems to think that it did, and it certainly doesn't any more than the original purchase and sale agreement.

And as for what claims for relief can be recovered on under the addendum, I also -- I disagree with plaintiff's interpretation. I think it's far broader than they would like to believe, obviously, but it's for all of the claims that arise in or related to the enforcement of the contract or its terms, which I think, Your Honor, having decided the motion for summary judgment you know the contract and its terms were basically where a lot of this motion for summary judgment turned upon.

So I don't think there's really a dispute about that, but if there is I'm sure you'll correct me and we can talk about it.

So -- oh, and there was the other argument where there was a citation to Campbell v. Nocilla, which was also about this idea that the attorney's fees provision must be interpreted very narrowly. And the Campbell provision, I would just point out to the Court, it was very narrow in that that particular provision said if there is an action to enforce this contract then attorney's fees will be provided to the prevailing party. That obviously is much different than the language in this case. Again, if the Court has some doubt about that, we can get into the nitty-gritty of that, but I assume the Court has that pleading and has read that and I'm not going to bore you with that language here in oral argument.

THE COURT: Oh, don't worry about boring me.

MR. CARTER: Well, that's absolutely fine then. If the Court will look on -- we have that language particularly on page 8 of our reply, and it quotes page 47 of the addendum, which is the attorney's fees provision in the addendum. And it reads specifically: "In any action, proceeding or arbitration arising out of, brought under or relating to the terms or enforceability of the agreement, the prevailing party shall be entitled to recover" -- let me flip over to page 9 -- "from the losing party all reasonable attorney's fees, costs and expenses incurred in such action, proceeding or arbitration."

I think that it's a very clear statement that this is intending to be a broad attorney's fee provision. And I want the Court also to recognize, as we cited in our motion and in our reply and also I believe back in the motion for summary judgment, this isn't a contract provision that we're springing on the plaintiff right now.

This is something that Barbara Rosenburg in her deposition, she said I'm a realtor, I read every provision of this contract before I signed it, and I understood it and that was that. You know, I think at one point they had even asked, well, can we change a provision here and their realtor had said, no, no, no, you can't change anything, these are the terms of the agreement. And then it was, okay, well, this is the agreement then. So they understood this. We're not springing this on them. This isn't anything like that. It absolutely is what it is and I think the language should be interpreted very strictly here.

And one other point that I forgot to mention on the purchase and sale agreement, the original one, on that attorney's fees provision. It does use the language "party" in it, but if the Court looks at the language in the original attorney's fees provision, which is all the way back on -- it's in our original motion. I apologize. The original attorney's fees provision, it's on page 6 of our motion. It's paragraph 26 of the purchase and sale agreement. It does not define the term "party" in this strict way that the plaintiff would like to believe that it does. In fact, I don't believe you'll find a definition of party in that original purchase and sale agreement. But what that particular provision says, and again, I'm reading from the bottom of page 6: "Should any party hereto" -- to this agreement -- "retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including but not limited to reasonable attorney's fees and costs by such prevailing party."

Now, the Court certainly doesn't have to interpret it this way, but under the strict language of that agreement that's if a party to the agreement brings a claim

for any judicial remedy and there is a losing party to that lawsuit, it appears under this provision the prevailing party does indeed recover the attorney's fees from that.

THE COURT: That is provided that your client is a party to it.

MR. CARTER: Well, as I discussed, Your Honor, I do believe that to be the case.

THE COURT: Which, if nothing else, you're arguing that they're a third party beneficiary at least.

MR. CARTER: Right. Right. So, I mean, that was just something that I wanted to point out, that this isn't -- while it's not exactly the model of clarity in contractual drafting, it certainly is not as clean cut as the plaintiff would like the Court to believe. And it looks like you have a question.

THE COURT: If you -- yeah. If you go with the third party beneficiary line of thinking --

MR. CARTER: Yes.

THE COURT: -- then you drop off the party status, don't you? A third party beneficiary is almost by definition not a party to the contract.

MR. CARTER: Well, that would be correct, Your Honor. It would be one or the other. And the Court would have to look at -- as I said and I think as was indicated by our briefing here, you know, my initial reading of it in looking at it is looking at it as we're the agent of the seller, so I believe that we're entitled to enforce this agreement as a party. That would absolutely be my first argument to this Court.

THE COURT: And let me, as long as we're sort of circling back around to the first part of your argument, remind me the authority you cited for the notion that the

non-party agent -- well, the agent of one of the signing parties may lay claim to this language.

MR. CARTER: I don't believe there was specific authority for that point, Your Honor. We had cited some general authority regarding what an agent was in our reply and the nature of that relationship, and that was the Catholic Diocese case and that is 349 P. 3d 518, a pinpoint cite of 522. That's on page 5 of our reply. And that particular case said an agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which they were hired.

We also stated -- I'm sorry, we also cited the Restatement Second of Agency for the idea that the agent has the power to alter the legal relations between the principal and third persons and between the principal and himself. And it was that power that we were referring to when we were arguing to the Court that at least in terms of this particular contract and in this particular transaction our client, my client was acting on behalf of Bank of America as its agent, and I believe that we should therefore be able to enforce this particular term of this contract. As I said, we're asking for, you know, alternative legal interpretations, assuming that the Court doesn't agree with that, but I think the Court understands our position.

THE COURT: Let me tell you where you are right now.

MR. CARTER: Okay.

THE COURT: This is the lay of the land. And the reason I tell you is that you had me going. I thought that I had left something out of my analysis, but so far I'm struggling with either of your alternatives. The second one automatically knocks you out of the status of being a party to the agreement, so it really comes back to

the first one. And I'm struggling to see how someone who is known as the agent of a party, even named within the contract, is a party because they are -- their designated relationship is that of an agent. I'm struggling to see without some more concrete authority that they can use the party language -- you know, use the language that's intended to preserve or protect the parties, how they can rely upon that.

MR. CARTER: Well, and Your Honor, what I'm talking about -- I think Your Honor has perceived correctly the arguments. I think the difference is and our opinion comes is the fact that I'm looking at these particular authorities with regard to agency and what the function of an agent is, and in looking as an operation of law what does that agency relationship mean --

THE COURT: Yeah.

MR. CARTER: -- both in terms of this contract and in terms of a lawsuit that arises from that contract because --

THE COURT: The only --

MR. CARTER: Sorry.

THE COURT: Oh, go ahead.

MR. CARTER: I was going to say but for that agency relationship, Your Honor, and but for --

THE COURT: Yeah.

MR. CARTER: -- my client acting on behalf --

THE COURT: Sure.

MR. CARTER: -- of Bank of America, we wouldn't be in this case at all.

THE COURT: Sure.

MR. CARTER: So I believe that agency relationship --

THE COURT: Well, okay, and that leads to my question. What did your client get sued for?

MR. CARTER: We were sued under statutory duties for failure to disclose. I believe there was a negligence provision as well.

THE COURT: Was your client sued for breach of contract?

MR. CARTER: Our client was not sued for breach of contract, Your Honor, but again, that's not a --

THE COURT: Specific performance of contract?

MR. CARTER: We were not sued for performance of contract. It was not, Your Honor. But that's not a requirement of either of these provisions, Your Honor.

THE COURT: Okay.

MR. CARTER: It's simply -- remember, the first provision says any judicial relief related to the contract. That's what the first provision says. That's paragraph 26 of the purchase and sale agreement.

THE COURT: Uh-huh.

MR. CARTER: Paragraph 47 of the addendum says any claim that relates to or is arising from the enforcement or terms of the contract. So it's not simply a breach of contract.

THE COURT: Let me go back to that one now --

MR. CARTER: Oh, okay.

THE COURT: -- and review that.

MR. CARTER: Forty-seven, Your Honor, is on page 8 of our reply. It starts on the bottom of the page.

THE COURT: I'm looking at what you attached, although it's pretty much illegible.

MR. CARTER: It is very difficult to read. I apologize.

THE COURT: "In any action." (Reading) "Losing party." I don't know. Okay.

MR. CARTER: And, Your Honor, on that point I don't have a lot else to say. I'm certainly willing to answer any more of Your Honor's questions on this.

I do want to address -- well, the separate issue of the offers of judgment, which I think that there is maybe less moving parts in that particular area of the motion. But as the Court --

THE COURT: Do you want to know the lay of the land on that?

MR. CARTER: I would love to, Your Honor.

THE COURT: I think it's a hundred and twenty grand.

MR. CARTER: And a hundred and twenty grand is for the second offer of judgment, I believe.

THE COURT: It's the January 2015. Largely because of the argument that I agree with that by virtue of the subsequent offers of judgment, the prior ones are -- what's the word?

MR. CARTER: Extinguished.

THE COURT: Extinguished. Yeah.

MR. CARTER: And just so I understand Your Honor's inclination, Your Honor's inclination is, well, the fees were reasonable --

THE COURT: Yeah.

MR. CARTER: -- and all of the Beattie factors --

THE COURT: Yeah.

MR. CARTER: -- were taken care of.

THE COURT: Yeah.

MR. CARTER: Well --

THE COURT: Using all the appropriate tests, the parts and the subparts, I think what I'm inclined to do is a hundred and twenty.

MR. CARTER: Okay. I understand that, Your Honor, and with that then I'm not going to bend your ear --

THE COURT: Okay.

MR. CARTER: -- more than I have to on the offers of judgment. I would ask that the Court consider our contractual arguments --

THE COURT: Uh-huh.

MR. CARTER: -- understanding that it is a bit of an esoteric situation, it is a bit of a strange situation. But again, I would urge the Court, just as a matter of the operation of -- not only the operation of law, but also the operation of fairness --

THE COURT: Uh-huh.

MR. CARTER: -- that my client can be brought into court, like I said, with this particular agreement being used --

THE COURT: Uh-huh.

MR. CARTER: -- this particular agreement that the plaintiff admits that they were thoroughly familiar with and was using in the court against all of the parties, that that can be used to bring my client into this action, and yet my client cannot recover fees or costs under the terms of that agreement.

THE COURT: Well, that's kind of why I -- that's kind of why I was asking, you know, is there anything that you could hang your hat on that says that, well,

the plaintiff sued me as if I were a party. I mean, is there anything -- did they sue you for contract, did they sue you for specific performance?

MR. CARTER: They did not sue for specific -- and I cannot represent that to the Court. I can, however, represent to the Court that the capacity in which we were being sued was directly as a result of that contract, and but for that contract --

THE COURT: Yeah. Sure.

MR. CARTER: -- which was signed by my client as well, Your Honor.

THE COURT: Yeah.

MR. CARTER: My client I believe was named in the original one and I believe my client signed the addendum. That is all there, Your Honor. But I cannot claim that we were sued for breach of contract.

THE COURT: Just a moment. Hark. Is that going to make your --

MR. CARTER: Michael Doiron's name I believe is on the final page of the addendum.

THE COURT: Yeah. Is that going to make your client a party to the addendum?

MR. CARTER: Well, I don't think that that signature in and of itself makes her a party, no. I think that her relationship to the seller, as I've argued, by operation of law is what would make her a party.

THE COURT: Uh-huh.

MR. CARTER: But the signature itself, no --

THE COURT: Okay.

MR. CARTER: -- I don't think that I could credibly argue to this Court the signature itself would simply make her a party.

THE COURT: All right.

MR. CARTER: So if the Court has any other questions, I'm available.

THE COURT: I do not.

MR. CARTER: Otherwise, I will let Ms. Hanks talk for awhile.

THE COURT: Very good.

MS. HANKS: Your Honor, I won't belabor the point because I believe you're not convinced on the contract part of the argument, but I do want to just point out a few things. The Court is correct in that plaintiff did not sue Michael Doiron or MacDonald Highlands or FHP Ventures for breach of contract, breach of implied covenant of fair dealing. It was purely a violation of Ms. Doiron and MacDonald Highlands' statutory, independent duties from this agreement and it was also for negligent and fraudulent misrepresentation.

But I would like to address the Court to page 13 of the addendum, and it's paragraph 36. And it says: The Rights of Others. It says: "The agreement does not create any rights, claims or benefits inuring to any person or entity other than seller, successor and/or assigns that is not a party to the agreement, nor does it create or establish any third party beneficiary to the agreement." And this is Bank of America's agreement, Your Honor. So if there's any dispute or any ambiguity or lack of clarity, it has to be read in favor of my client as opposed to in favor of MacDonald Highlands and Michael Doiron. So I would like to point that out.

And, Your Honor, paragraph 44 of the addendum clearly provides that the addendum prevails if there's anything inconsistent with this addendum and the original purchase agreement, and that's why the attorney's fees clause at 47 is the one that prevails, and it clearly states that it has to be an action for the terms

or enforceability of the agreement.

And the claims brought by plaintiff had nothing to do with the terms of this contract, had nothing to do with the enforceability of the contract. Counsel indicated that plaintiff is the one who is using this agreement, and in reality we weren't. I know they've used the agreement in the motion for summary judgment to defeat our claims, but plaintiff never pointed to this agreement as the basis for claims against MacDonald Highlands or Michael Doiron. It was all statutory, independent duties and an independent tort for negligent misrepresentation. We never said Michael Doiron or MacDonald Highlands did anything with respect to the terms of this contract, didn't do something in accordance with this contract. In fact, it was my argument --

THE COURT: So what they really should have done, Mr. Malek should have turned around and cross-claimed against the bank, I suppose. I'm not sure if the bank --

MS. HANKS: You mean MacDonald Highlands and Michael Doiron could have cross-claimed?

THE COURT: No, I'm sorry. It would have been a counterclaim against your client, not -- I'm sorry.

MS. HANKS: You said Malek.

THE COURT: Who did your client buy the property from?

MR. CARTER: My -- oh, sorry.

MR. DEVOY: Mr. Malek, he brought his property from actually Tom Anderson, who was the original owner of Myspace, and he had nothing to do with this.

THE COURT: Okay. So he should have sucked him into the lawsuit, turned it into --

MR. DEVOY: Oh, he got sucked in, all right.

THE COURT: -- turned it into a contract, debating the enforcement of the agreement.

MS. HANKS: Who? Mr. Malek?

THE COURT: Uh-huh.

MS. HANKS: No, I don't think so. This is with Michael Doiron.

THE COURT: It would at least then have been about the enforcement of the agreement, would it not?

MS. HANKS: No. I don't know if the Court is confused.

THE COURT: No, that's not right.

MS. HANKS: Yeah. The Rosenburg Trust bought the property from Bank of America. It had nothing to do with Mr. Malek.

THE COURT: B of A.

MS. HANKS: Correct, B of A.

THE COURT: All right.

MS. HANKS: And this is B of A's contract, it's B of A's agreement. Yes.

THE COURT: Brother. I can't keep track of who's on first and who's on second. Okay.

MS. HANKS: Right. So it has nothing to do with Mr. Malek in that regard. And in fact, that was --

THE COURT: But what if it had included, let's just leave it at that, a cause of action disputing the enforceability of the agreement?

MS. HANKS: If we had included a cause of action for that?

THE COURT: Well, if somebody would have, under the terms of that --

MS. HANKS: Yeah, I think I would have to concede that, Your Honor. I mean, if it was certainly -- if someone brought a claim against a party, meaning Bank of America, which Bank of America is still in this case, then yeah, so maybe Bank of America might be able to argue this at some later date. We're still going to trial with them. But not Michael Doiron or MacDonald Highlands Realty because -- and certainly not FHP. Let's be clear about that. FHP Ventures is not even in this game.

THE COURT: Uh-huh. Okay.

MS. HANKS: And the paragraph states -- 36, though, I think is clear. Not only is there no other party created under this contract, and this is Bank of America's language, they're also not creating a third party beneficiary.

THE COURT: Uh-huh.

MS. HANKS: So that's where it fails on behalf of MacDonald Highlands, the broker, and Michael Doiron, the realtor.

THE COURT: Okay.

MS. HANKS: With respect to the January offer of judgment, I believe this Court has already stated that the prior April offers were extinguished by law and we would agree with that. However, I would like to talk about the Beattie factors because I believe this Court at least just indicated that it feels like it's all been met in favor of defendants.

THE COURT: Uh-huh.

MS. HANKS: I would like to clarify. FHP Ventures was not a party to the

offer of judgment. Only MacDonald Highlands and Michael Doiron issued the offer of judgment. So to the extent that any fees would inure to FHP, at this point they have no claim to attorney's fees because they were not the party making the offers of judgment.

THE COURT: Uh-huh.

MS. HANKS: We would like to, though, address the Beattie factors, and we believe that the first factor is brought the claims in good faith. The courts have already said that that actually switches to the defendant if it's the defendant issuing the offer of judgment. I don't think we would disagree that they defended the case in good faith. However, there's also no disagreement, I don't think, that plaintiffs at least brought their claim in good faith. Just because they simply lost on the issue doesn't mean it wasn't still a good faith claim.

THE COURT: Uh-huh.

MS. HANKS: Also, with respect to the timing and the amount, we believe it was unreasonable. The amount was -- the offer timing was done before the bulk of discovery in this case. I think only written discovery had issued and maybe one or two depositions had been taken. The key depositions, particularly the damages expert depositions, had not been conducted. The deposition of Michael Doiron hadn't been conducted.

THE COURT: Are you talking about the reasonableness of the offer or the --

MS. HANKS: The timing.

THE COURT: -- or whether or not it was unreasonable to not accept the offer?

MS. HANKS: I'm talking -- it's both. The other -- there's two factors. The first

factor is the timing and unreasonableness of the offer itself.

THE COURT: Right.

MS. HANKS: And then the third factor is was it grossly unreasonable for the plaintiff to reject it. And I think both of those are in favor of the plaintiff. I think the timing of the offer, January, before the bulk, really the majority and the key discovery had been done deprived the plaintiff of even actually analyzing the offer and saying should I accept this at this juncture. We had pretty much none of the discovery done in that case except for some written discovery and some minor depositions. None of the key players had been deposed. Mr. MacDonald hadn't been deposed. Mr. Bykowski on behalf of the entity hadn't been deposed. Bank of America hadn't been deposed. Mr. Malek hadn't been deposed. None of the experts have been deposed. So to simply say, hey, this is a reasonable timing and it's a reasonable amount, I think it was twenty-five thousand dollars, at that juncture of the lawsuit it really wasn't a good offer in terms of timing for the plaintiff to actually analyze am I in a position to say am I going to lose this case and what risk am I taking because none of the real discovery had been done. It also -- we also --

THE COURT: Does it always key off of when the discovery itself is done or when counsel has made their own inquiries enough to assess the firmness of their legal position?

MS. HANKS: I think you can look at it both ways, Your Honor, but it's all contingent upon when the discovery -- not only could plaintiff not have done that analysis, but I couldn't have done that analysis at that time, particularly because all I had at that time was one -- my expert's report that had an opinion of seven hundred and fifty thousand to a million dollars in a diminution of value. But none of the

experts had been deposed, not even the opposing expert. So I would argue that it's on both ends. Neither the plaintiff in an independent capacity or me as her attorney to be able to counsel her on this could advise her as to whether this is a risky proposition, given the lay of the land, because at that point the lay of the land was unknown.

But we also cited law, Your Honor, that stated that when you make a nominal offer, not really aimed at inducing settlement but simply just to set yourself up to be able to get attorney's fees should you win, that shouldn't be enforced. And we would argue that this is what that was. It was a nominal offer. In other words, that offer at that time was simply asking the plaintiff to accept a win/loss proposition. In other words, it was you take this or you have to lose everything. In other words, we would have no chance of winning to take that offer. We would have had to believe in January that we had no chance of winning even a modicum of damages; more than twenty-five thousand dollars. So essentially I would have had to advise my client you have to take this offer if you believe you're going to lose. That's what the offer was. It was such a minimal amount that it was saying you're going to lose.

And so that's where it was unreasonable in its amount and it was nominal. It wasn't really aimed at inducing settlement. It was so little that it was put a back up against the wall and say we only have the decision to say we have to say no to this; otherwise we're saying we have no chance of winning. That's the only way we could have ever accepted the offer for that low of an amount, when all we had was an expert report saying that if a restrictive covenant doesn't exist, you are looking at seven hundred and fifty thousand to one million dollars in diminution of value.

And I would like to point out, Your Honor, that Frazier court, that case that recently just came out discussing these elements, they were looking at whether it was grossly unreasonable for the plaintiff to reject offers of judgment in that case.

THE COURT: Is that one you cited?

MS. HANKS: Yes, Your Honor. It's the most recent supreme court case that came out. I believe it came out two or three months ago.

THE COURT: Do you recall where you cited that?

MS. HANKS: I don't, Your Honor. I don't have the brief in front of me.

THE COURT: Okay.

MS. HANKS: It's Frazier.

THE COURT: I'll find it.

MS. HANKS: Yes. It's a recent case. It was a personal injury action. And interestingly it was my prior firm, but when I wasn't working there.

THE COURT: Frazier v. Drake.

MS. HANKS: Yes. They actually made --

THE COURT: It's on page 9.

MS. HANKS: Right. They actually made offers of judgment. I believe it was for eighty thousand and sixty thousand dollars. And the difference in the medical expenses from those offers was a mere thirty thousand and fifty thousand respectively, because there was two plaintiffs. And the court in that case said it wasn't grossly unreasonable. This brings me to the next element. It wasn't grossly unreasonable for the plaintiffs to reject those offers of judgment --

THE COURT: Uh-huh.

MS. HANKS: -- because they believe they had more damages. And that

was a minor discrepancy in the offers. I mean, you're talking a difference of thirty thousand to fifty thousand in actual medical expenses and you have a plaintiff declining that and the court saying, no, that's not grossly unreasonable. The discrepancy here was nine hundred and seventy-five thousand dollars.

I mean, the parties can only look at what they think they're going to be able to prove at trial. No one has a crystal ball. We can't say, well, I have to anticipate this is going to -- we all go into trial or all go into a litigation thinking this is my best case, this is what I'm going to board at trial, this is what I'm going to ask the jury to award. And at the time of this offer my clients were looking at a discrepancy of nine hundred and seventy-five thousand dollars. That's essentially what the defendants were asking them to take. Just take the twenty-five and basically convince yourself that you are not going to have any chance --

THE COURT: Uh-huh.

MS. HANKS: -- at getting anywhere between twenty-six thousand and nine hundred and seventy-five thousand.

THE COURT: Uh-huh.

MS. HANKS: That's why it was not grossly unreasonable. That's the standard, Your Honor. And the Frazier court made it very clear that it doesn't matter if --

THE COURT: And at the time your client said no, they had possession of those facts?

MS. HANKS: Of the diminution of value?

THE COURT: The amount.

MS. HANKS: The amount. Yes, they knew --

THE COURT: Based on the expert report.

MS. HANKS: We had our expert report. We just didn't have the deposition testimony of the opposing experts or our own expert and none of the other key players. But yes, they at least had their expert disclosed and had their report saying this is the amount we believe you've been damaged.

THE COURT: Okay.

MS. HANKS: So looking at that, they basically had to say, yeah, I think I'm going to lose and so I have to take this, and that's where we believe it was not grossly unreasonable.

Your Honor, if the Court has no other questions, I have nothing further to add on that.

THE COURT: Okay. So remind me why it was unreasonable, grossly unreasonable for the plaintiff to refuse the offer.

MR. CARTER: Absolutely, Your Honor. And in support for my response, I'm going to go back to the deposition of Barbara Rosenburg, which again was litigated pretty substantially in our motion for summary judgment.

THE COURT: Which was done prior to the offer?

MR. CARTER: Which was -- I don't believe that was done prior to the offer, but that's not exactly germane to this inquiry, and let me explain why.

THE COURT: All right.

MR. CARTER: Because she said when she signed this contract --

THE COURT: Uh-huh.

MR. CARTER: -- she made a very big deal about saying I'm a realtor, I do this, I read every word of this contract, I understood it. And I don't know if she said

it in her deposition, but she'd even tried to change it at one point. She knew exactly what was in this contract, Your Honor. And if you want to go back to the MSJ for a moment, I'd rather not re-litigate that, but if we want to go back to that and think about that, remember what that contract said, Your Honor. That contract said if there is an issue regarding noise, regarding boundary lines --

THE COURT: Uh-huh.

MR. CARTER: -- regarding the suitability of the property due to conditions apart from the property, that is the responsibility of the buyer on due diligence to undertake.

THE COURT: So when it comes to unreasonableness, the dollar amounts don't really figure in.

MS. CARTER: That's absolutely correct, Your Honor.

THE COURT: It's on the liability end that you would say --

MR. CARTER: That's absolutely correct, Your Honor.

THE COURT: -- unreasonable to expect that you would win at trial.

MR. CARTER: That's right. And it goes a little bit back to what you were asking Ms. Hanks earlier about the attorney's inquiry into the facts. And I agree an attorney has to inquire into the facts, but so does the party, too.

THE COURT: Uh-huh.

MR. CARTER: And here we have a party who no doubt supposedly read every term in this contract, knew exactly what the division of labor, knew what the due diligence provision said, knew what due diligence was, which is more than a lot of home buyers do, and still signed it. Knew all of that information the day she brought this lawsuit. Presumably Ms. Hanks knew that information, too, because

she -- or someone in her firm, I don't mean to impute anything to her personally, but someone knew that and they filed this complaint. So that information was all there. They could have had an expert report, Your Honor --

THE COURT: This was a sophisticated buyer?

MR. CARTER: Yes, it was a very sophisticated buyer, Your Honor, and she made a very big deal of that in her deposition. And it doesn't matter if they had an expert report saying that there was twenty million dollars in damages, Your Honor. That's not an issue that -- first of all, we never got to litigate the reasonableness of that amount.

THE COURT: Tell me again why it doesn't matter at what point the deposition was taken.

MR. CARTER: Because she had already read the contract. She had read the contract before this and thought about this contract before this action even started. And presumably she thought about bringing the lawsuit before this action even started and looked at it and thought, yeah, this is a good idea, I have a good chance of winning this.

THE COURT: Wouldn't that be at least something, though, that counsel would want to be aware of, what was revealed in the deposition --

MR. CARTER: Well, presumably.

THE COURT: -- in framing their advice?

MR. CARTER: Remember, this is counsel's own client that knows this. Presumably she and her client had already spoken about this. The only people that didn't know prior to Barbara Rosenburg's deposition that she had read every word of that was my side and Mr. Malek's side. And at that point we say, well,

wait a minute, if you knew everything that was in this agreement, why are we even having this? Which, frankly, Your Honor, I'll tell you, I drafted the motion for summary judgment on our side. That was exactly the reaction that I had because I came into this case basically to draft that motion, and I said why are we fighting so hard about this when this is what the contract says? And I think that was an argument that was put forward to the Court. I don't want to speak for the Court, but I believe the Court accepted that. And they knew that from day one. We didn't know that until the deposition. So the only people that weren't -- that didn't have that information was my side, not their side, so that's the first point there.

Now, I'd like to go on and I'd like to address some of the other points that Ms. Hanks made, and first and foremost the idea that this contract should be construed against the drafter, which I guess in terms of this contract would be Bank of America, and of course we've had this conversation about the parties and mine is the agent. That's all well and good. The point is, though, under the particular provisions of the contract, and I believe it was the addendum, page 41 of the addendum says, if you take a look at it, this -- the parties had the chance to have their attorneys review the contract and the terms of this aren't going to be enforced as against -- or not enforced, not going to be construed as against any one party as the drafter of this contract. Again, that's paragraph 41. And as I'm sure Your Honor knows, that's a fairly standard thing --

THE COURT: Uh-huh.

MR. CARTER: -- that goes in a lot of big contracts, commercial contracts. So that particular rule of construction, while it's a good rule of construction and I agree with Ms. Hanks that is generally the rule, as the Court is aware the parties

are free in Nevada to put whatever they want in the contract. This is something that they agreed to. It's also something, presumably, that Barbara Rosenburg read when she went through this entire contract.

On the third party beneficiary argument on paragraph 36, I would have liked some more time to have put this in my reply, but what I will say is this. And again, I'll go back to my general history in commercial litigation, is you always have a provision like this in an agreement, that you're not going to create any unintentional third party beneficiary because that's just something that happens.

Now, here I think there was a definite intent, despite this paragraph, in both the original agreement and in the addendum, because my client was specifically named. And like I said, all of the parties understood what was going to happen in terms of there was going to be a broker's fee and there was going to be all of that. So I would think that in terms of whether or not there's a third party beneficiary, I think the intent of the agreement is that if you have brokers that you're intending to benefit by reason of your agreement, I think by operation of law they would necessarily have to be a third party beneficiary. Now, of course we weren't trying to make, you know, the neighbors of the parcel, you know, who might benefit by the contract, obviously they couldn't sue as a third party beneficiary. That's how I read that particular paragraph of that contract. But the Court can obviously read the language as well as we can and can come to its own conclusions about that.

Now, I do want to talk a little bit about the Beattie factors and I know that the Court has said what its inclination is, but I think there's some things that Ms. Hanks said that need to be addressed. And the first being that FHP Ventures was not a party so the implication was that a fee award should be cut because

FHP Ventures was not a party. And, you know, I can explain to this Court and I believe this comes across in the pleadings but I want to be very clear about this, when you're representing multiple parties like this, I don't bill each and every one of the entities of my clients. This is work for FHP Ventures, this is work for Doiron, etcetera. When I did the MSJ it was for everybody. And when Spencer Gunnerson goes to the deposition of Barbara Rosenburg, he was deposing her for all of them. So there is no intelligible difference in terms of when we're splitting things up and who what is for. Everything was for Michael Doiron, everything was for MacDonald Highlands Realty, and to the extent after FHP Ventures came to the case everything was for them, too. I don't think there's any intelligible way that we can draw that line down here.

Now, on the actual Beattie factors themselves, Ms. Hanks said there's no disagreement that the claims were brought in good faith. And again, as I said in my pleadings, I'm not going to do it again, I'm not going to accuse anyone of bringing a complaint in bad faith. I don't think that's what happened here. But again, it goes back to this contract. This contract that not only Ms. Rosenburg had but her counsel had before they ever filed the complaint, that contract which was the star of the motion for summary judgment and was what this Court's decision appeared to me at least to hinge upon. And that, Your Honor, is -- like I said, I'm not going to accuse them of bringing it in bad faith, but do I think that was a claim they necessarily should have brought, having had that information? I wouldn't have brought that claim. But for the purposes of the Beattie factors, I believe that is not the good faith claim that it's represented that it is. And again, please understand that I'm not -- I'm not besmirching counsel --

THE COURT: Understood.

MR. CARTER: -- or the other side.

The second and third factors got a little bit smudged together, the reasonableness of the amount of the offer of judgment and the reasonableness of the acceptance. And we talked about this a little bit, but there is something else that I wanted to mention about the reasonableness of that offer. First of all, twenty-five thousand dollars is not an inconsequential amount of money, okay. Twenty-five thousand dollars, I'm still at a point in my life when that's still a lot of money to me. And additionally, I think if we look -- the subjectively of the belief of the other side. There is no case law they can cite you, Your Honor, that says the subjectivity of a plaintiff's belief in the value of their case should be what guides the reasonableness because, like I said, you could have a piece of paper from someone that's unvetted by anyone that says your claim is worth twenty million dollars. That's not a reasonable belief, Your Honor. Reasonableness is the word that we have to look for here.

THE COURT: Are you talking -- are you jumping across from your client's reasonableness to the plaintiff's reasonableness?

MR. CARTER: I apologize, Your Honor. Right now I'm trying to explain why twenty-five thousand dollars --

THE COURT: Yeah, okay.

MR. CARTER: -- is a reasonable amount of money, because you have to understand, Your Honor, from my client's perspective we get this complaint and we have this contract and we believe very firmly, Your Honor, that these claims are worth nothing. We believe this is zero. And, you know, I'll tell you about Rich

MacDonald. He is not a person who is just, you know, generally let's go, you know, let's just throw money at a problem and make it go away. He's not. This is something that we thought about. We thought about what it would cost us to carry on and defend this lawsuit and we thought even though we believe these claims have no merit, which by the way the facts bourne us out, they did have no merit, Your Honor, and we nonetheless made an offer to pay twenty-five thousand dollars to make it go away.

That is an inherently reasonable process. Just because the plaintiff had an expectation that its claims were worth one million dollars, that doesn't mean that our -- that the standard of reasonable now has to move for me; that now, say, well, gosh, I can't do a twenty-five thousand dollar offer of judgment because they're expecting a million. If I think they're unreasonable, I've still got to do what I believe is reasonable, and here what the facts have bourne out is reasonable, because again, we won. The claims were worth nothing. Twenty-five thousand dollars, as it turns out, would have been a good deal for them. So I think it was a reasonable amount.

In terms of the reasonableness of accepting, which I know Your Honor is very careful about keeping these apart --

THE COURT: Uh-huh.

MR. CARTER: -- the reasonableness of accepting is what we talked about a little bit earlier. If Barbara Rosenburg had this information from the time she signed the contract and her attorneys had this information from the time she came to them with that contract, why would it be reasonable to reject a twenty-five thousand dollar offer? Now, granted, they had an expert report. That doesn't make them

reasonable. I assume had we gone further into this case and we had gone to trial, we would be talking right now in a motion in limine about all the things that were wrong with Mr. Jiu's report and the Court would have to decide what -- you know, is this a good report, is this a bad report. But my point about this is the fact that you have a piece of paper that says your damages are one million dollars does not make your position inherently reasonable.

And when you look at the objective factors of what the contract says, what their due diligence was, that is key. And again, let's look back at the discovery, too, because they're saying, well, we haven't done discovery yet. You didn't need discovery to see the contract. But we did do some discovery and you'll remember Michael Tassi is a name that's come up I believe a couple times in this hearing. He was the guy that testified. He was an employee of the City of Henderson and he said, well, during their due diligence period the maps were up. They could have gone up, they could have looked at these anytime, you know. So you see Michael Tassi' deposition. That's another thing that I look at and I think, is that reasonable?

THE COURT: Had that taken place by the time the offer was made?

MR. CARTER: You know, Your Honor, as I sit here I'm not sure I can pinpoint when that was. I know I cited that in the motion for summary judgment.

THE COURT: Well, let me ask you this. Other than her professed understanding of the agreement itself, what would you look at on the plaintiff's side to say that it was grossly unreasonable for them to not just take the offer and go?

MR. CARTER: Well, I think there are a couple things about their positions that they were taking, one of which would be this idea of the restrictive covenant for view, Your Honor. And this I don't believe was an item that was discussed

thoroughly in the MSJ, but I happen to know that it was in the pleadings, is one of the items of relief that they were suing for was a restrictive covenant basically to stop any building so they could preserve their view of this particular piece of their property, Your Honor.

THE COURT: Uh-huh.

MR. CARTER: And if you'll recall, if you look back at our motion for summary judgment, we addressed that head on. There is case law -- I don't believe it's 100 years old but it's close to being 100 years old, that says there is no easement in Nevada for light or view; period, full stop. That is not a reasonable position to take, and if someone offers you twenty-five thousand dollars to get rid of that position, I think it's pretty unreasonable to say no, I think I'm going to win this. I think -- as a lawyer speaking, I think that's a fairly unreasonable position to take.

And so I think in addition to the contractual terms, and again, I think you could say the same thing about the statutory duties that my client had, there's no evidence that my client not only didn't have any duties under the contract, but breached any duties. I think that they specifically knew that. I think they were looking and they were going to go into discovery, as is their right, but that said, that fact cannot make what they did reasonable by virtue of the fact that, you know, they did discovery later and they turned up nothing. Does that make sense?

THE COURT: Uh-huh.

MR. CARTER: I'm trying not to repeat myself in here.

THE COURT: And remind me, what is the test on the plaintiff's side?

MR. CARTER: For?

THE COURT: It does need to be grossly unreasonable.

MR. CARTER: It does need to be grossly unreasonable, but I would say again it is grossly unreasonable, Your Honor, to assert claims against a plaintiff that, one, not only have no basis in fact, have no basis in the contract that forms the basis of your transaction, but also when you're asserting claims that have no basis in Nevada law in a Nevada court. If someone offers you money for claims that you should reasonably know are worth nothing, I believe, Your Honor, it is grossly unreasonable to reject twenty-five thousand dollars. And that's not a nominal amount. Like I said, that's a lot of money. That is a substantial amount of money for my client to put up, particularly when he has always believed that these claims were not viable. I believe, Your Honor, and I think the record supports that that is grossly unreasonable to take that position factually and legally that you just can't accept twenty-five thousand dollars for claims that have no reason to exist.

Now, I do want to just touch briefly on Frazier. I know we discussed it a little bit in Ms. Hanks' oral argument --

THE COURT: Yeah.

MR. CARTER: -- and she talked about the eighty and sixty thousand dollar offer of judgement and how it was not grossly unreasonable for the plaintiffs to reject because they believed they had more damages. And again, Your Honor, I would urge the Court to go back and look at that if the Court has any doubt. But the subjective belief of the plaintiff cannot -- it cannot serve as the basis for rejection of an offer of judgment because there's all sorts of altered states and viewpoints in which I could think twenty-five thousand dollars is reasonable or unreasonable, but you have to look at the facts and you have to look at the law and say what do the facts and what does the law say? And if objectively you can't support that it

was reasonable, then it must be unreasonable.

And if it's something that the plaintiff could have seen for herself the moment she signed the contract or that her attorney could have seen the moment that they took the case, well, then, Your Honor, I argue that has to be grossly unreasonable. Then there can be no other I think reasonable use of those terms. Otherwise we'd just call it bad faith or we'd call it a Rule 11 violation or something, which I'm not suggesting that happen here, but that would be the next step. You can be grossly unreasonable, I think is my argument, without violating Rule 11. And I think that's what happened here and I don't think I have to prove a Rule 11 violation to get fees and costs for my client under an offer of judgment.

I don't have anything else here, Your Honor. I'm happy to answer any other questions you have.

THE COURT: No, I don't have any.

MR. CARTER: Thank you.

THE COURT: Well, all things considered, I find that I must stick with my sort of leaning coming in here. I think that the last offer of judgment, all things considered, should have been taken by the plaintiff. I most particularly rely on the established fact which has been argued right from the start in this litigation that this was perhaps not your usual plaintiff. It was a sophisticated plaintiff who apparently was and claimed to be -- well, apparently was familiar with real estate law from her past life experience and particularly claimed to be entirely familiar with the agreement from the beginning.

It is not a happy thing to ever have to wind up telling a party that I think they've been grossly unreasonable in a case, meaning no disparagement

at all to the plaintiff. I think simply in terms of applying the test the factors come down to -- established to me that the offer was reasonable under the circumstances and that given the reasons that the Court ultimately granted a motion for summary judgment it would appear to the Court that the plaintiff must be held to be -- it must have been grossly unreasonable to not accept the offer under the circumstances. I would not expect anyone on the plaintiff's side to agree with that, but that's the best I can do.

That being the case, then the aware is the hundred and twenty thousand, three fifteen, and the costs in the amount of twelve thousand, six seventy-one forty-eight, which pretty much moots I think the decision on that case -- on that issue, moots the plaintiff's motion to retax and settle memorandum of costs and disbursements. If I'm missing something then -- because that was disputing the twenty thousand that the -- I'm sorry, the twenty-nine thousand, was it, that the defendant was originally requesting? Yeah, twenty-nine thousand, I think, the ruling on this motion.

MR. CARTER: Your Honor, I don't remember exactly what it was, but it probably was more than twelve thousand dollars. But, yes, you know, I would say, Your Honor, that under the motion to retax that our costs that we claimed were not as a result of the offer of judgment. They were costs that we had, you know, obviously offered to the Court in our memorandum pursuant to the statute. While I understand your holding today --

THE COURT: So does that mean that the appropriate number, inasmuch as I agree that it's that final offer of judgment that is the lynchpin here, does that mean the twelve thousand dollar figure is off for costs?

MR. CARTER: The twelve thousand dollar fee would be off, in my understanding, because you understand also when we drafted this motion we believed we were entitled to more costs than we had originally submitted.

THE COURT: Right.

MR. CARTER: So I would argue, Your Honor, that whatever we're entitled to under the statute would be our cost number --

THE COURT: All right.

MR. CARTER: -- and then obviously your fees number would be here.

THE COURT: All right. So what you're saying is we don't have that number as we sit here.

MR. CARTER: Yeah, I don't in front of me right now, Your Honor. I can get you that.

THE COURT: All right, then why don't you do this. Why don't you get that to the plaintiff, and see if you have any further objection to it.

MS. HANKS: Okay. I have that number if you -- from my --

THE COURT: You do? Okay.

MS. HANKS: -- motion to retax. It was twenty thousand, seven hundred and twenty-eight dollars and twenty-four cents.

MR. CARTER: I'm sorry, can you say that again, Karen?

MS. HANKS: Yeah. Twenty thousand, seven hundred and twenty-eight dollars and twenty-four cents.

MR. CARTER: That sounds right.

MS. HANKS: That was what I asked it to be retaxed to --

THE COURT: Uh-huh.

MS. HANKS: -- and I think they came in and said they didn't object to that retaxing.

MR. CARTER: And we're fine with that, Your Honor.

MS. HANKS: So that's the number I had.

THE COURT: Okay. So instead of the twelve thousand one, right?

MR. CARTER: Yes, that's correct, Your Honor. Yes. I'm sorry.

THE COURT: Okay. All right. So twenty thousand, seven twenty-eight twenty-four. You may need to take another look at that.

MS. HANKS: I can take another look at it. I just --

THE COURT: Let's do this. I'm just going to put that one over to a further chambers calendar just as a calendar control date. If you think there's something amiss with that, file something or send me a letter.

MS. HANKS: Okay.

MR. CARTER: What we'll do, Your Honor, is --

THE COURT: If you agree, send me a letter.

MR. CARTER: Yes. We'll compare our numbers and I assume what we'll do is we'll just send a joint letter to your chambers, Your Honor.

THE COURT: Okay.

MR. CARTER: Do you need us to prepare the order, Your Honor?

THE COURT: Please. On the -- there's also -- not on calendar today, but it was a 54(b) certification motion.

MR. CARTER: Yes.

MS. HANKS: Yes, Your Honor. And we would ask -- that was not our motion, Your Honor, but now after today's ruling we would ask for certification to

appeal this order once it's entered. I don't know if you've ruled --

THE COURT: I'm sorry?

MS. HANKS: That was not our request for certification, but today now we're asking for certification of your Court's order today.

THE COURT: Okay.

MS. HANKS: So if you want to combine both of them, that's fine; I'm just saying.

THE COURT: So at last you're all in agreement.

MR. CARTER: Yes, Your Honor. We don't have -- It was my motion. I don't have a problem with a final judgment that has the fees and costs number in it so we have all --

THE COURT: Okay.

MR. CARTER: I think the supreme court wants it that way now, so.

THE COURT: Yeah. So --

MR. CARTER: So if Your Honor could certify this as soon as we get you the final cost number, we would be fine submitting also an order on the 54(b).

THE COURT: And are we at the end of the hunt with your client as well? You have no objection to this?

MR. DeVOY: No. We still have to hear the -- well, I have no objection to their motion to certify it. As for Mr. Malek, we still have the counterclaim pending and we still have the motion for attorney's fees and costs pending.

THE COURT: Oh, yeah, sure, we've got the counterclaim. Yeah.

MR. DEVOY: Once we get the -- I mean, to follow up on that, the question I have is would you like me to submit more on the motion to retax costs as well?

MS. HANKS: Or wait until the motion for attorney's fees is heard.

THE COURT: Yeah, why don't you wait --

MR. DEVOY: Okay, that's fine.

THE COURT: -- and let's see what happens.

MR. DEVOY: I mean, that's the issue that we're waiting for as well to figure it out, just because there's a couple more moving pieces with respect to Mr. Malek. And I don't know where Bank of America is today, either.

THE COURT: Yeah. Okay. All right, does that do it?

MS. HANKS: So, I'm sorry, are you granting the certification, Your Honor? Are you granting the certification?

THE COURT: Well, I am unless there's reason that it needs to hang out until yours completes.

MR. DEVOY: We're content to wait.

THE COURT: All right.

MR. DEVOY: I mean, at least with respect to Mr. Malek.

MS. GILBERT: Your Honor.

THE COURT: Yes?

MS. GILBERT: I apologize.

MS. HANKS: She's our appellate guru.

MS. GILBERT: I usually handle the appeals. I don't think it would matter because even if we file -- if you certify Mr. Malek's order, we could just take it up and if we had to -- if we had to move upstairs, that's fine.

THE COURT: Link it up upstairs. You could --

MS. GILBERT: I would like to get this one certified so that we don't run into

the problem.

THE COURT: You could consolidate upstairs.

MS. GILBERT: We'll consolidate upstairs.

THE COURT: They like consolidation upstairs.

MR. CARTER: They do. So what we'll do then is we'll submit the 54(b) order also -- when we get together on the costs, we'll submit the 54(b) order to you as well.

THE COURT: All right.

MS. GILBERT: Can we just include the language -- oh, we already have -- there's already another order. Never mind.

MR. CARTER: Yeah.

MS. HANKS: Yeah.

THE COURT: Okay. Thank you.

(PROCEEDINGS CONCLUDED AT 2:57 P.M.)

* * * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

TAB 67

TAB 67

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREDERIC AND BARBARA ROSENBURG LIVING TRUST,	)	
Plaintiff,	)	CASE NO. A689113
	)	DEPT. NO. 1
vs.	)	
BANK OF AMERICA, ET AL.,	)	
Defendants.	)	

BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE

TUESDAY, DECEMBER 1, 2015 AT 10:37 A.M.

RECORDER'S TRANSCRIPT RE:
DEFENDANT SHAHIN MALEK'S MOTION FOR ATTORNEY FEES AND COSTS

Recorded by: LISA A. LIZOTTE, COURT RECORDER

APPEARANCES:

FOR THE PLAINTIFF:	NO ONE PRESENT
FOR THE DEFENDANTS FHP VENTURES, MICHAEL DOIRON AND MacDONALD HIGHLANDS REALTY:	NO ONE PRESENT
FOR THE DEFENDANT BANK OF AMERICA:	NO ONE PRESENT
FOR THE DEFENDANT MALEK:	J. MALCOLM DeVOY, ESQ.

(TUESDAY, DECEMBER 1, 2015 AT 10:37 A.M.)

THE CLERK: Page 3 and 4, Frederic and Barbara Rosenburg Living Trust versus Bank of America.

MR. DeVOY: Good morning. Jay DeVoy for Defendant and Movant Shane Malek.

THE COURT: Good morning.

MR. DeVOY: I am not sure why I'm the only person here. I spoke with Karen Hanks about this hearing prior to Thanksgiving. I left her a voicemail yesterday afternoon. I have not heard from her by email. I checked with the office. I have not heard anything from Howard Kim's office. This is now the second time that we've come here for a hearing on this motion, and –

THE COURT: Is it the second?

MR. DeVOY: Yes. The first one was on October 22nd. We dealt with the motion to retax costs because at that time the opposition to our motion for attorney's fees and costs hadn't been filed, it was not filed until the next morning and then that reset the calendar. We had a colloquy. There were two attorneys here from – the Plaintiff's counsel, Ms. Hanks and Ms. Gilbert. We agreed upon the December 1st date. I didn't think there were any issues with it. It was on the Court's calendar. We had communications about it.

I'm frankly at a loss as to why Mr. Malek has now had to prepare for this hearing twice, and presumably –

THE COURT: I agree with you.

MR. DeVOY: I assume you'd like to table it again but I'd like to go forward. I think – I made the argument under EDCR 2.20 last time that they consented by not filing an opposition. They have now opposed it. I've replied.

The hearing that was noticed and everyone agreed upon is now here. I ask the Court consider just the Plaintiff to have consented to the motion and if they want to fight it later that's fine. If there's any other questions the Court has, my position –

THE COURT: Okay. Well, let me ask you this. Inasmuch as they did file a response –

MR. DeVOY: Yes.

THE COURT: -- should I not consider that as well?

MR. DeVOY: It's untimely. It's within your jurisdiction. I don't think the response changes anything. They said a whole bunch of cases that I think are inept because this case and our motion for fees and costs comes under the premise that it was without reasonable grounds to be brought or maintained, and there's about 20 cases that are cited for the proposition that Nevada recognizes written covenants, they recognize easements, but the reality is that this case is premised on the fact that the Trust brought forward no evidence of anything other than the fact they sought an implied restrictive covenant or negative easement based on view, light and privacy, and in this Court's order that's the only thing that was recognized that the Trust ever articulated its reasons for stopping Shane Malek from building his house, view, light and privacy.

That has been disallowed by Nevada law expressly since 1965 in *Boyd versus McDonald* and it was reaffirmed in 1969 in *Probasco versus City of Reno,* and this case's determination turned almost entirely on those two cases. This isn't something that was new, this isn't something that was in question, and by the close of discovery we knew exactly what the Trust was seeking and its reasons for seeking an easement – or the implied easement, to keep Shane

Malek from building his house, and at the last hearing the Court found that the legal position of the Trust was so without legal merit based on the circumstance of the case and the people involved and the fact that the Trustee had extensive real estate experience and had access to very sophisticated counsel and it denied an offer for $25,000 from the McDonald Highlands' entities, and the Court found that to be objectively unreasonable.

So the question is how does that relate to whether it's without reasonable grounds to bring these claims, and I think at this point we've reached that point, and there's other language in NRS 18.010(2)(b) that allows for the imposition of fees in a case like this because the action is maintained to harass the prevailing party. We've now had two hearings on this, and it goes without saying that the entire litigation has been conducted in a way to try to outspend Shane Malek.

The Trust opposition makes the argument that they came to court, they made an argument and they lost and they shouldn't have to pay fees because of it and I don't think that holds up because the law is well known, they had knowledge of what was happening, as Ms. Hanks informed the Court in her motion to retax costs the parties went to mediation. There was time for the Trust to discontinue this action anytime it wanted.

Part of NRS 18.010(2)(b) considers not only if the action was brought without reasonable grounds but maintained as well, and this action was maintained right until the time that the Court decided as a matter of law that the Trust had no position and no legal claims against Shane Malek. It would be more tenable if the Trust made its argument that it took a run at it and it lost if it went to a jury trial, it was left to six people to decide what the law was, but it was

a matter of law that they lost, and the more apt analogy is that they went to a casino and they gambled but they levered up on the attorneys' fees and costs incurred by everybody else and now they don't want to pay it despite taking out that debt to everybody else.

So to the extent that NRS 18.010(2)(b) seems to act like a means of tort reform to disincentivize people from bringing actions for the sole purpose of outspending the adversary, and especially in this case outspending a neighbor to try to control their construction plans, I think this is a very accurate use for it. This is a case that went on for more than 2 years. We're now here after the 2 year mark. It was filed in September of 2013. We're at the second hearing of a motion that nobody has made a serious effort to oppose, and I think it should be granted at this point.

And, moreover, the case law in Nevada says that we have to look at the specific circumstances of each case to determine if it was without reasonable grounds. To go back to the circumstances that I think the counsel for McDonald Highlands very articulately stated last time, the circumstances were there that they should have known about this. The Trust had massive resources. They hired sophisticated counsel. This wasn't them proceeding pro se or with a new lawyer stumbling throughout the woods when they had no experience with this.

They hired the counsel that specifically won the *SFR* case and had experience with real estate litigation. They knew or should have known that this was the likely outcome, and they proceeded anyway and made Shane Malek incur more than $120,000 in attorney's fees and costs. To the extent they have any arguments about it they should have been made timely, and in the case of

the hearing today that we all agreed upon and somehow I managed to remember, you know, they should have shown up to argue that, and now here we are and they won't even dignify the expense that they imposed on him and that he continues to incur as we have successive hearings about this, we have reply briefing and continue to impose these costs that we should have resolved with finality at least a month ago, so that is the sum of my positon at this point.

THE COURT: All right. How much time did you rack up sitting around last time and this time?

MR. DeVOY: This time I got here around 9:00, it is 10:44, so about 1.8, and then last time I don't recall off the top of my head. I can look back to my billing records and figure that out, but including preparation time for both last time and this hearing and then the reply brief in between, it depends on how far the Court wants to go, I would say it could be as much as five hours, maybe a little bit more.

THE COURT: Well, I'm thinking more of the time you spent sitting around waiting because counsel didn't show up. Didn't we – didn't we wait a while before that came up?

MR. DeVOY: For here today?

THE COURT: No. For the last time.

MR. DeVOY: I don't remember last time. I believe that we were all on time last time. We were close to the top of the calendar. I don't believe it was that excessive. I don't know off the top of my head. I could find out for the Court.

THE COURT: All right. Unfortunately I think that in all candor I would probably have to disagree with you about whether or not this was a frivolous action. Maybe it – maybe it was frivolous and the Court was just a little

slow in recognizing that your client's position prevailed and the other side did not, but I don't really conclude that that was the case. I think the way that this action arose seemed to me to involve some somewhat novel circumstances, and it is not clear to me that this was an entirely frivolous action to be brought.

As to your argument about maintaining it, I find it difficult to say that it was frivolous to maintain it. I think you said right up until the time of mediation was it or the time after mediation?

MR. DeVOY: Well, no. I brought up mediation. I bring up the fact they could – well, they could stop it anytime they wanted. This was forced through summary judgment. The motions were filed in April and it wasn't set until July and the orders were entered in August, so it was a long timetable when the facts came out and the Court indicated that it was leaning toward just granting them. So there was a number of indications it was coming.

But to go to it, and this is the trap that I think the Trust fell into as well discussing if it was vexatious or frivolous, the standard under NRS 18.010(2)(b) is that if the claim is brought without regard to the recovery sought, was brought or maintained without reasonable ground or to harass the prevailing party.

It discusses that those kind of – this kind of award of attorney's fees and costs is particularly appropriate to punish or deter frivolous or vexatious claims but that's not the standard, just if it's without reasonable ground, so it's not as high as saying it's frivolous or vexatious, it's just without a reasonable ground to go forward, and I think we got to that last time when we were discussing the fact that it was unreasonable, objectively unreasonable for the Trust to reject an

offer of judgment of $25,000 in order to maintain this action in light of the law at the time and the discovery that was conducted in January of 2015.

Now, those circumstances aren't quite the same here because there's no pending offer of judgment, but the standard is whether it was with a reasonable ground, not if it was vexatious or frivolous.

THE COURT: Well, and so that would – you're saying that you filed your motion for summary judgment in January?

MR. DeVOY: No. No. It was filed in April.

THE COURT: Of this year?

MR. DeVOY: Yes.

THE COURT: I mean I could go so far as to say that it was unreasonable for them to maintain the action once – from the time that you filed the motion for summary judgment because by that point they had already seen the Court's response to every argument that they made, and your motion for summary judgment I mean obviously I granted it, so I think that perhaps should have been a tipoff for them.

I think the most I could go is to say that it was probably vexatiously -- or unreasonable, let us say, to maintain the position that forced us to go through the argument itself. I would probably only grant fees from the time of – from after you filed your motion for summary judgment.

MR. DeVOY: Okay. So from April 16th onward, and then I think also -- to supplement your point about it being frivolous or vexatious and especially the point about it being vexatious, I think the present conduct indicates that going back to the language of Section (2)(b) it's to harass the prevailing party. We've

won and we've now had to drag the other side to court to hear our motion and had to go through this numerous times, so –

THE COURT: Well, what I am going to do is separate and aside from what I've already said about awarding fees after the filing of your motion for summary judgment I would definitely probably sanction opposing counsel or the client for the time that you've spent here today as well as – you think that you were called right away last time?

MR. DeVOY: Excuse me?

THE COURT: You think that your matter was called right away last time?

MR. DeVOY: It wasn't a normal calendar day. It was scheduled on October 22nd. It was originally scheduled for calendar for October 12th, and then there was a – I'm sorry, go ahead.

THE CLERK: I can tell you.

(Court conferring with the Clerk.)

THE COURT: It was at 1:30 so there wasn't a wait, so I certainly would for the time you've had to wait here today there's no reason to – that should have to be. So I'm going to grant as a separate basis your fees for the time that you've had to wait here let's say for two hours it's taken us to get to this point.

MR. DeVOY: Would the Court like to make any calculations and enter an order today or are we going to –

THE COURT: Just put it in your order.

MR. DeVOY: Okay. So we're granting the fees from April 16th onward?

THE COURT: Yeah.

MR. DeVOY: And then separately two hours for today because –

THE COURT: Yeah.

MR. DeVOY: Okay. Great.

THE COURT: Their failure to show up. Okay.

MR. DeVOY: Anything else?

THE COURT: The costs. The costs are granted.

MR. DeVOY: Yeah. That was separately granted. I have in my notes here from last time it's $7,568.50, so --

THE COURT: I thought I had – I had it down today for 12,000 something. Is that not right?

MR. DeVOY: That's what we requested. We negotiated down to $7,568.

THE COURT: Oh, yeah. That's right. That's right. So that figure is granted. I guess we already did that last time, right?

MR. DeVOY: Correct.

THE COURT: Okay. Anything else?

MR. DeVOY: That's great. I'll get the calculations done and I'll submit everything to the Court. Thank you very much, Your Honor.

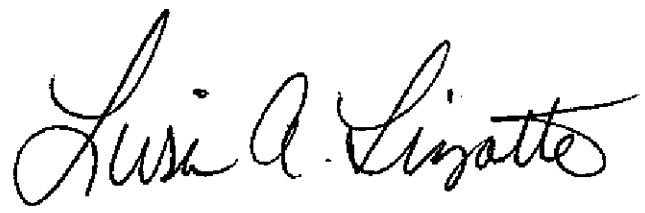
THE COURT: Thank you.

MR. DeVOY: Thank you.

(Whereupon, the proceedings concluded.)

* * * * *

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



LISA A. LIZOTTE
Court Recorder

Case No. 69399 c/w 70478

IN THE SUPREME COURT OF NEVADA

FREDERIC AND BARBARA ROSENBERG LIVING TRUST,
Appellant/Cross-Respondent,

vs.

MACDONALD HIGHLANDS REALTY, LLC, a Nevada Limited Liability Company; MICHAEL DOIRON, an Individual; and FHP VENTURES, a Nevada Limited Partnership,
Respondent/Cross-Appellants.

FREDERIC AND BARBARA ROSENBERG LIVING TRUST,
Appellant,

vs.

SHAHIN SHANE MALEK,
Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable KENNETH CORY, District Judge
District Court Case No. District Court Case No. A-13-689113-C

JOINT APPENDIX VOLUME 14

Respectfully submitted by:

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593

KAREN HANKS, ESQ.
Nevada Bar No. 9578

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, NV 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for Frederic and Barbara Rosenberg Living Trust

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mentioning the CC&R's. A couple points about the CC&R's. First of all, the CC&R's don't govern my client, FHP Ventures. CC&R's are recorded against the properties and effect the homeowners association and the property owners. So their attempts to bring the CC&R's into this is their attempt because CC&R's have the words covenant in them and have the word restrictions in them, and so the best they can tie these design guidelines to the CC&R's --

THE COURT: Uh-huh.

MR. GUNNERSON: -- then, you know, the better off they feel they are. But I will say that in the end if the CC&R's become an issue, that's an issue between them and the HOA, not between them and FHP Ventures. And by the way, if the CC&R's become an issue, that's subject to arbitration. So if they're really claiming the CC&R's have been violated, this whole thing might be stayed anyway to allow for them to proceed in arbitration against the HOA.

THE COURT: Well, you know, that's a good point. Let me just interrupt you just long enough to toss that at you. If you do go that direction, you do recognize that that's going to put the *quietus* on this whole thing until you --

MS. HANKS: Yeah. And they haven't answered, Your Honor. And I've been telling them to -- I was thinking about voluntarily dismissing them because what happened was when we deposed the HOA, the person most knowledgeable for it, we found out that FHP Ventures is the declarant. They're still the party in control of McDonald Highlands under the CC&R's. And they're the party who --

THE COURT: Well, as a declarant does that mean you're necessarily still in control?

MS. HANKS: Yes.

THE COURT: It does?

MS. HANKS: It provides that they're in control until 2042, I think.

THE COURT: Oh, okay.

MS. HANKS: That's why we had to --

THE COURT: All right.

MS. HANKS: That's why this amended came out to begin with.

THE COURT: Well, but so what you're saying is you want them in because -- but you recognize that, as Mr. Jones is pointing out --

MR. GUNNERSON: By the way, Mr. Gunnerson, by the way.

THE COURT: Oh, I'm sorry.

MR. GUNNERSON: Mr. Jones is my partner. But that's okay.

MR. SHEVORSKI: Mr. Jones is taller, Your Honor.

THE COURT: You don't mind being called Mr. Jones?

MR. GUNNERSON: No, I respect both my partners who are both Jones, so if you're confusing me with either one of them, I'm okay.

THE COURT: Okay. My apologies.

MS. HANKS: No, the HOA has --

THE COURT: As Mr. Gunnerson is arguing -- hey, any relation to big Al?

MR. GUNNERSON: No. Gunnerson with two n's.

THE COURT: Oh, okay.

MR. GUNNERSON: I'll tell you, Your Honor, that once somebody asked me that question when I first started, my dad's name is Alan, and so I said, yeah, that's my dad.

THE COURT: Yeah, yeah.

MR. GUNNERSON: And they said, oh, I knew him on the taxicab litigation. And I said, wait, no, no, my dad is not -- that's the wrong Al Gunnerson, I guess.

THE COURT: That could -- yeah, that could cut both ways.

MR. GUNNERSON: Yeah.

THE COURT: All right. What were you saying?

MS. HANKS: Sorry. The CC&R's provide that FHP Ventures is the declarant and they're still in control of McDonald -- they are in control right now.

THE COURT: All right.

MS. HANKS: The HOA does not have control.

THE COURT: Okay. But you do recognize that if you go down that path that he's probably correct, we wind up staying this whole thing while you go arbitrate those things.

MS. HANKS: I agree. And I'm really more or less arguing that point as to Mr. Malek and the entity who sold the golf parcel, that when they sold it they knew they had to get approval to do --

THE COURT: Let me ask you this.

MS. HANKS: Not --

THE COURT: Would I be correct that for now you including them in this complaint is really more by way of putting them on notice than it is asking for the injunctive relief or declaratory relief at this stage against FHP?

MS. HANKS: FHP. Well, it's probably two-fold. Yes, to put them on notice, but secondarily we do want them -- we want injunctive relief to enforce the design guidelines as originally contemplated --

THE COURT: Okay.

MS. HANKS: -- because they can be enforced even with Mr. Malek keeping the golf parcel.

THE COURT: Mr. Gunnerson, would your argument be if we were at that stage in the proceeding that they were, you know, here on a motion to do that, that whether or not that's going to happen is a matter of arbitration as part of the kind of issues that must go to arbitration, as opposed to this Court issuing an injunction?

MR. GUNNERSON: I would have to say, first of all, with the right to change whatever I say now --

THE COURT: Sure. Yeah.

MR. GUNNERSON: -- just because, I mean, at this point I think that would be. Now, I don't know, I haven't sat down, because the CC&R's aren't at issue in that way and so we have not sat down and discussed -- you know, their allegations as it pertains to my client pertain to them and the design review guidelines, not the CC&R's.

THE COURT: Yeah.

MR. GUNNERSON: So if that changes and they make a claim against us as it pertains to -- you know, for some kind of breach of the CC&R's, then that might be something we would definitely consider doing, Your Honor, no question.

THE COURT: You know --

MR. GUNNERSON: And there might be other parties here or involved and if the HOA gets involved, who I do not represent, they may consider that as well.

THE COURT: Sure.

MR. GUNNERSON: So I definitely think that's a real possibility.

THE COURT: Well, you know, this all makes me glad I'm poor, for once.

I don't have these kinds of issues.

MR. GUNNERSON: Well, Your Honor, if I --

THE COURT: Go ahead, Mr. Gunnerson, complete your argument.

MR. GUNNERSON: If I could note a couple things about the enforcement issue. First of all, they want -- One reason why this claim fails to state -- or why this claim fails is because they say we want the guidelines to be enforced as anticipated.

THE COURT: Yeah.

MR. GUNNERSON: Well, are you talking about the document itself or as the Rosenburgs intended for them to be enforced? Because the guidelines are being enforced as stated.

THE COURT: Well, it's a little difficult for us to grapple with that, just as some of these, you know, questions I'm throwing out here are difficult because they're not really on the table yet --

MR. GUNNERSON: But, Your Honor --

THE COURT: -- and, you know, they might be hard pressed to answer that today.

MR. GUNNERSON: Your Honor, it's their claim, okay, and we are at the end of discovery. If they can't answer it now, when are they going to answer it? So I would definitely say, though, that the fact --

THE COURT: So you want discovery to stay closed?

MR. GUNNERSON: Well, depending on what happens today --

THE COURT: Oh, oh, oh.

MR. GUNNERSON: Well, I represent other parties in this, so when you say "you," I represent those parties as well.

THE COURT: Oh, okay. FHP.

MR. GUNNERSON: And those parties -- those other parties have no desire to reopen discovery.

THE COURT: Yeah.

MR. GUNNERSON: So I guess that would be an issue I would have to take up, depending on what happens here today. I will say that they say they want the discovery (sic) guidelines enforced as anticipated, and yet they still have not pointed, Your Honor, to one single statement in there sufficiently that shows any restrictive covenant that we failed to enforce. In fact, they're not unhappy that we've failed to enforce the design review guidelines, they're unhappy because we did enforce them on the new parcel. That's what they're unhappy about. They're unhappy that we -- that when the design review committee went forward and looked at it, they looked at it as one parcel as it is right now.

THE COURT: Uh-huh.

MR. GUNNERSON: So there's nothing to go forward on --

THE COURT: Yeah.

MR. GUNNERSON: -- because we can't -- we can't guess.

THE COURT: You've already done the thing that they're asking the Court to order you to do.

MR. GUNNERSON: Well, we've already applied the design review guidelines to that. And what they're saying is, they're saying, well, the setbacks are gone. No. The setbacks in the design review guidelines are still there, and in fact they were still considered, you know, by the design review committee when they viewed the lot as a whole. They said, well, you know, the cone of vision. No. They may not like the

way the cone of vision was applied, but it was applied. They say, well, no, there's other issues that they didn't follow. Your Honor, they have still failed in their pleadings to point to what it was that was done because they know that in the end we're going to be able to show them, no, the design review guidelines were followed as it pertains to this lot as a whole.

What they want this Court to do is say design review guidelines create some kind of implication that when new property is added nothing can be put there and design review guidelines have no application whatsoever and nothing can be built. That is not in the guidelines that you were permitted to look at, you were permitted to review because it was brought in their complaint, without moving this to a motion for summary judgment, and you can find legally there's no legal basis to make this request to the Court. I mean, that's part of the complete astonishment my clients had when they're trying to understand why they're involved here.

THE COURT: Yeah.

MR. GUNNERSON: And again, I have to say, when she says, well, if Mr. Malek is found -- if a jury finds Mr. Malek to be innocent, okay. First of all, let's make it clear these are equitable claims for relief, so the jury is not going to be taking these into -- these aren't for the jury to decide.

THE COURT: Okay.

MR. GUNNERSON: These are equitable claims for relief for Your Honor to decide. So you have the power, Your Honor, to say, yes, I think Mr. Malek is an innocent party; however, I do believe there was some kind of restrictive covenant created somehow, we're not quite sure, but you would be sure at that time, I guess, and therefore I'm ordering Mr. Malek not to build. Right now as pled that's all they're

asking this Court to do. All they are asking is for this Court to use us as some kind of vehicle to keep him from building. You already have that at your fingertips. As an equitable claim, that's ultimately going to be your decision to have. Even if you feel Mr. Malek is innocent, you still can keep him from building if in fact there's some kind of restrictive covenant that applies to him and his property.

One last thing -- let me just check my notes real quick. The last thing is they say, Your Honor, what we're asking for you to do is have FHP undo what they have done. We're not even quite sure what that means because, Your Honor, there was an approval given, as they state in their complaint. A letter was given to the parties. If they've applied for a building permit, whether it's been granted or not, that letter has already been given. Ultimately the design review committee gives approval of plans, but they don't issue the building permits. Once the City issues the building permit, we can't go back to the City and say undo what you've done, we're now unapproving what we previously approved.

This is, I believe, ultimately going to be a request for equitable -- an equitable request here that ultimately in reality isn't going to be able to be handled. Now, you might say to me, well, Mr. Gunnerson, isn't that something we need more facts on what's going to happen? And perhaps that would be true. But I don't think the answer to that question is necessary for you to grant our motion to dismiss, because I think in the end what it comes down to is as they pled it there are no restrictive covenants and they already have the claims against Mr. Malek if this Court were so to decide that he should not build. And if they somehow deem that there are money damages and they bring that against us, then we'll address that at that time and then we will make the decisions we need to make as far as how

we proceed. But I don't want to make -- you know, try to make a decision now as to how we proceed on a money damage claim when nothing has ever been stated as much. There's never been any indication until twenty minutes ago that that was ever going to be an aspect, a potential aspect as it pertains to my client.

So we'd still ask that you grant our motion to dismiss.

THE COURT: All right, thank you.

MR. GUNNERSON: Do you have any questions, Your Honor?

THE COURT: No, not at this time.

MR. SHEVORSKI: Your Honor, just real briefly --

THE COURT: Oh.

MR. SHEVORSKI: -- from Bank of America.

THE COURT: Okay.

MR. SHEVORSKI: There's a new issue that just arose through Ms. Hanks' oral argument which I had not heard before which impacts this Court's jurisdiction.

THE COURT: Oh. What's that?

MR. SHEVORSKI: 38.310, subdivision 2, it says shall dismiss the complaint. So before -- not before you rule on Mr. Gunnerson's motion, but my client would like the opportunity at least to brief that issue because that is a subject matter jurisdiction issue.

THE COURT: Well, okay. My ruling on his motion does not impact your ability to bring that motion, does it?

MR. SHEVORSKI: I understand that, but I want to make sure. Your Honor mentioned the words staying the case.

THE COURT: Oh.

MR. SHEVORSKI: And before Your Honor considers what is appropriate in light of what Ms. Hanks has argued to this Court, my client would like to be heard on the issue and is not waiving that issue.

THE COURT: Okay.

MR. SHEVORSKI: Not that subject matter jurisdiction could be waived, but we would like the opportunity to address that issue before Your Honor through written paperwork.

THE COURT: Sure.

MR. SHEVORSKI: And so I didn't want to let that issue go --

THE COURT: All right.

MR. SHEVORSKI: -- and let Your Honor think that Bank of America was twiddling its fingers while that was going on.

THE COURT: I would never accuse Bank of America of twiddling their fingers. Although that's tempting, I will decline to follow that through.

But that doesn't, to my mind, impact whether I should go ahead and rule on this and I think it's appropriate for me to go ahead and rule on it. I'm going to continue to deny the motion at this time. I think the best thing that I can do, dealing in equity, I guess, is to say that the plaintiff -- while the plaintiff certainly may not have to forego one remedy in order to invoke another, give up one right -- you know, a putative right, at least, in order to invoke another, i.e., injunctive relief if it turns into you're going to go after FHP and others for money damages, that may happen. I don't want to see your client foreclosed from that. But there is also -- it is incumbent on the Court to make sure that a party's resources aren't sort of squandered by having to defend themselves in a lawsuit which is necessarily a little

undefined because you don't quite know whether you're going to turn that corner or not and go and turn it into a claim for money damages relief.

What I'm saying is that you need to make that election and make -- your client needs to make the determination of what this lawsuit is really about and what relief you're really going to go for, because if it appears to the Court at the end of the day that there really was no sound basis to hold this defendant in this litigation, then there remains the very real possibility that the Court might award them -- in the course of dismissing them might award them attorney's fees. I mean, that's always there. That's always there as a possibility, but I'm just kind of putting you on notice that while your client doesn't have to give up one right to pursue another, if they don't do it expeditiously and determine which direction this thing is going to go, then there is a very real possibility that your client gets to pay for two attorneys here today, you and Mr. Gunnerson (with two n's). So the motion is denied.

Does BofA wish to -- Do you anticipate filing a motion then that has to do with jurisdiction?

MR. SHEVORSKI: We do, Your Honor.

THE COURT: All right. I don't know that we're operating under any time lines. Oh, we certainly are.

MR. GUNNERSON: We are, Your Honor.

THE COURT: We're looking at a May trial. What does that do to the trial? Anything?

MR. GUNNERSON: Your Honor, before we get to that, can I --

THE COURT: Well, the most that it could do is carve your client out, right?

MR. SHEVORSKI: No, Your Honor.

THE COURT: No?

MR. SHEVORSKI: This is a subject matter jurisdiction.

THE COURT: For the entire litigation.

MR. SHEVORSKI: The entire litigation --

THE COURT: Okay.

MR. SHEVORSKI: -- shall be dismissed under 38.310, subdivision 2.

THE COURT: Because -- Is this if it goes to arbitration?

MR. SHEVORSKI: It has to go to arbitration first. When you're asking for an interpretation of --

THE COURT: Of CC&R's.

MR. SHEVORSKI: -- of CC&R's --

THE COURT: Okay.

MR. SHEVORSKI: -- or any aspect of the lawsuit turns on an interpretation of CC&R's --

THE COURT: Uh-huh.

MR. SHEVORSKI: -- the Nevada Legislature has made a policy decision that as a condition precedent to an action you have to go to arbitration first.

THE COURT: Uh-huh.

MR. SHEVORSKI: And what I just heard is that their entire case is seeking an interpretation of the homeowners association's governing documents.

THE COURT: Well, that's interesting. What I heard was that it might go that direction.

MS. HANKS: Yeah, the HOA hasn't answered yet and we haven't decided

if we even need to keep them in on that.

THE COURT: Okay.

MS. HANKS: But I want to be clear, though, the design review committee is created under the CC&R's.

THE COURT: Uh-huh.

MS. HANKS: But Mr. Gunnerson is arguing it's not the CC&R's and now we have Bank of America saying it is the CC&R's, and I just want to make sure we're going in the right direction. I mean, I'm not opposed to having to go to arbitration if that's the case, but that's not my understanding of what this case was about. But they are discussed in the CC&R's.

MR. GUNNERSON: Your Honor, this is their --

THE COURT: Your understanding is what controls.

MS. HANKS: Well, no.

MR. GUNNERSON: The CC&R issues aren't there. I mean --

MS. HANKS: What I mean is that it's not -- the design guidelines exist -- there's a whole set of guidelines that exist outside the CC&R's. They're a separate document. But they're discussed within the CC&R's. That's what created it. So if that's what they're arguing and they bring the motion then we'll deal with it, but that's never been -- we've been proceeding through this whole course of litigation as if we're not suing under the CC&R's per se.

THE COURT: Okay.

MS. HANKS: But if that's what they want to argue, that's fine. We can deal with that motion. I'm just putting it out there that Mr. Gunnerson, who is McDonald Highlands, is saying no, the design review committee is not under the CC&R's.

THE COURT: Uh-huh.

MS. HANKS: So there seems to be some discrepancy between --

MR. GUNNERSON: Well, I'm not arguing as McDonald Highlands, I'm arguing as FHP Ventures, just to be clear on that.

THE COURT: You've got a different hat on today.

MS. HANKS: He's got a different his hat on, yes, but he's --

MR. GUNNERSON: But, Your Honor, just to make clear, if counsel -- if the CC&R's aren't at issue and she's not going to claim any violation of them that somehow inures to my client, why are money damages being considered? And if what we're talking about here then is -- you know, we're as confused apparently as plaintiff is on what -- we've been going on this for a year and suddenly now FHP Ventures gets brought in under these design guidelines that they say are attached to the CC&R's. And like counsel for Bank of America brought up, this brings up a whole another --

THE COURT: Well, it's an odd case. It is an odd case. I mean, it's -- you know, it implicates --

MR. SHEVORSKI: Even more reason to have written briefing, Your Honor.

THE COURT: Huh?

MR. SHEVORSKI: Even more reason to have written briefing to lay it all out.

THE COURT: Well, sure, yeah. Yeah. All right. So I will await a motion from BofA and maybe in the course of that maybe that sheds some light and you guys can determine which direction you're going to go. And the only thing I'm going to put out there is what I already did --

MR. GUNNERSON: Your Honor --

THE COURT: -- but you do need to figure out which direction you're going. And I recognize it's a difficult decision under all these circumstances, but you've got to decide because if you ultimately -- if I wind up dismissing FHP out, I'd just -- if I need to to make it appropriate, I would consider their motion for attorney's fees.

MR. GUNNERSON: Your Honor --

THE COURT: I'm not ruling on it in advance, I'm just letting you know that's a real consideration, too.

MR. GUNNERSON: If I could, for a point of clarification on your order denying the motion?

THE COURT: Ah, yes, I love the point of clarifications.

MR. GUNNERSON: Just to be clear, your ruling granting the motion to dismiss is based upon their potential for bringing in other claims, other relief against my client which they have not done so yet?

THE COURT: I thought I denied your motion.

MR. GUNNERSON: Oh, excuse me. Denying the motion based upon that. I may have said granting.

MR. SHEVORSKI: Freudian slip.

MR. GUNNERSON: Well, I think it should have been granted, but.

THE COURT: You're in such shock.

MR. GUNNERSON: Yeah, I'm having a hard time with this.

THE COURT: You're in such shock that I didn't grant your motion that it's taken you by surprise.

MR. GUNNERSON: Yeah, I apologize. I slipped. I apologize. To repeat, your denial of our motion to dismiss is based then upon the fact that they might

bring additional money damages if in fact --

THE COURT: Not entirely.

MR. GUNNERSON: Okay. Because in essence you've said that we might bring another motion and get out of this. We are still unclear as to what we're responding to, as you can tell from the arguments that we presented, so we still don't know exactly what claims against us. And I guess we're going to have to deal with that if you're denying our motion and just try to make that determination. You said if they're going to make decisions as it pertains to money damages, they need to do it expeditiously. I don't know if there's a time limit for them to determine that --

THE COURT: That's --

MR. GUNNERSON: -- or when can I bring this back and say, Your Honor, they haven't done money damages, we still have the issue we had before, we'd like this dismissed again, and bring it back for your consideration?

THE COURT: Well, it may be that having denied your motion to dismiss you file your answer and now if discovery is closed or nearly closed you might decide you want to reopen it. That's up to you. In any event, I would anticipate, as is often the case, that even though I need to because of the way the law works, I need to deny issues -- deny a motion to dismiss that raises issues which later those same issues armed or buttressed and supported by facts become determinative of the issue.

MR. GUNNERSON: We can do that. We can bring a motion, Your Honor, and we'll do that. I guess two quick points. Number one, I guess one of my fears is that we bring a motion for summary judgment and they come back and say, well, Your Honor, you know, everything had been closed and now we see a motion,

we think we're going to try to amend the claim --

THE COURT: Yeah.

MR. GUNNERSON: -- and we want to bring in money damages, then we're right back where we started and I'm getting a denial on my motion for summary judgment based on the same reasons.

THE COURT: Yeah.

MR. GUNNERSON: I just don't know how long they have to make this decision and how long my client is going to have to be involved and be involved in motion practice and trial prep and all this.

THE COURT: I understand your point and I think I've kind of apprehended that point, which is why I have made the comment that if you have to jump through a bunch of hoops to defend your client and then it turns out there's really no relief to be granted against your client, I would anticipate you'll probably file a motion for attorney's fees and I would listen to it.

MR. GUNNERSON: You've got a good nose for those things.

And then finally, right now we have a motion for summary judgment deadline that's set for April 16th, and obviously my client will -- FHP Ventures will want to file a motion for summary judgment. We have not answered yet and we have not yet made the decision as to whether or not we need additional discovery. I don't know if there's a way to -- you know, I know the parties had agreed to put aside -- to try and get the trial extended. We tried to file a stipulation, which Your Honor sent back --

THE COURT: Yeah.

MR. GUNNERSON: -- saying file a motion. And so --

THE COURT: Yeah. I don't -- that's just a general policy. I don't just have counsel just stipulate trials away and then we wind up with 11th hour crushes on the five year rule, etcetera, etcetera. I can see, though, that in this case there appears to be some -- Are you really going to be taking this thing to trial on May 26th?

MS. HANKS: No, Your Honor. All the parties agreed to move it, and so we are looking at the motion being submitted today.

THE COURT: Well, I can see that there is reason to do that at this point, so -- Have you already filed the joint motion?

MS. HANKS: No. I was filing it today is the plan, and then --

THE COURT: Well, let me save you some paper then. I'm going to go ahead and vacate the trial, based on everything that's happened here today. I can see that there is a basis to do that. And I'm not going to reset the trial because --

MS. HANKS: Based on what happens.

THE COURT: -- I'm not sure what shape or form this lawsuit is going to be in. The only thing I can caution you is what I've already said. You do need to reach a point where you determine which road you're going to go down, whether that means this just gets dismissed and you go to arbitration first or whether you bypass that and stick with this. Whether that means you turn it into money damages, I have no idea. I don't have to decide all those things.

MS. HANKS: Okay.

MR. GUNNERSON: And, Your Honor, to be clear, I think the request at this point for us is an extension of time to file our motion for summary judgment as well. I know that that's usually set by Discovery and we are not asking at this time to extend discovery, so I would hope that maybe the parties would be open to giving

us some extra time, FHP Ventures, to file a motion.

THE COURT: Well, let's do this then. I'm going to vacate the trial. So far you don't have to go back to the Discovery Commissioner and get a whole new, you know, timeline, which is what sometimes happens, and it may be that we can just do some motion work and reset this for trial and take it then.

MS. HANKS: I would agree with that.

MR. GUNNERSON: Okay. So as long as plaintiff will work with me on our deadline for filing a motion for summary judgment, we're okay and we'll just work with the trial deadline for now, Your Honor, and those deadlines, and I don't think we need to go back to the Discovery Commissioner at this point as well, so.

THE COURT: All right. Then I'm going to vacate this trial and I'm going to have this come back in about, what, sixty or ninety days for the purpose of resetting the trial?

MS. HANKS: Can we do sixty?

THE COURT: By that time you will have filed your motion --

MR. SHEVORSKI: Certainly, Your Honor.

THE COURT: -- and we'll know better where we're going.

MR. GUNNERSON: Sixty is fine.

MS. HANKS: Can we do a sixty day status check?

THE COURT: Sixty?

MS. HANKS: Yes.

THE COURT: Okay. So a sixty day status check and to reset trial date.

THE CLERK: June 10th at 9:00 a.m.

MR. GUNNERSON: Thank you, Your Honor.

MR. SHEVORSKI: Thank you, Your Honor.

THE COURT: All right. When you come in to reset the trial, I hope you'll be prepared to give me an up-to-date trial time estimate as well --

MS. HANKS: Yes.

THE COURT: -- which means I hope we know by then what kind of animal this is.

MR. GUNNERSON: Thank you, Your Honor.

THE COURT: All right. You'll do order on this, please.

MS. HANKS: The order. Yes, Your Honor.

THE COURT: Thank you.

(PROCEEDINGS CONCLUDED AT 10:02 A.M.)

* * * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

TAB 64

TAB 64

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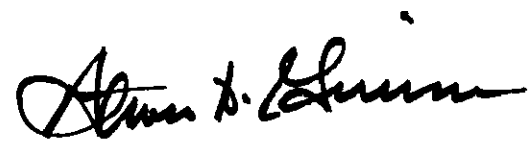

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

FREDERIC AND BARBARA ROSENBURG LIVING TRUST, Plaintiff, vs. BANK OF AMERICA, et al. Defendants.	CASE NO. A-689113 DEPT. NO. I **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE

STATUS CHECK: RESET TRIAL DATE
COUNTER DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
DEFENDANT SHAHIN SHANE MALEK'S MOTION FOR SUMMARY JUDGMENT
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANT SHAHIN SHANE MALEK

WEDNESDAY, JUNE 10, 2015

COURT RECORDER:	TRANSCRIPTION BY:
LISA LIZOTTE District Court	VERBATIM DIGITAL REPORTING, LLC Englewood, CO 80110 (303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFF:	KAREN HANKS, ESQ. JACQUELINE GILBERT, ESQ. MELISSA BARISHMAN, ESQ. JESSIE PANOFF, ESQ.
FOR THE DEFENDANTS:	JON RANDALL JONES, ESQ. SPENCER GUNNERSON, ESQ. PRESTON P. REZAEE, ESQ. JAMES M. DeVOY, ESQ. WILLIAM HABDAS, ESQ.

LAS VEGAS, NEVADA, WEDNESDAY, JUNE 10, 2015, 9:13 A.M.

THE CLERK: -- versus Bank of America.

THE COURT: Good morning. Wow, should we enter appearances?

MS. HANKS: Good morning, Your Honor. Karen Hanks on behalf of the plaintiff.

MS. BARISHMAN: Melissa Barishman on behalf of the plaintiff.

MS. GILBERT: Jacqueline Gilbert on behalf of plaintiff.

MR. PANOFF: Jessie Panoff on behalf of the plaintiff.

THE COURT: Hum.

MR. DeVOY: Jay DeVoy on behalf of defendant, Shane Malek.

THE COURT: Um-hum.

MR. GUNNERSON: Spencer Gunnerson on behalf of MacDonald Highlands Realty, and Michael Doiron, and FHP Ventures.

MR. JONES: Randall Jones on behalf of the same parties as Mr. Gunnerson.

MR. HABDAS: William Habdas here for Bank of America.

MR. REZAEE: And good morning, Your Honor. Preston Rezaee on behalf of Mr. Malek.

THE COURT: Good morning. I don't suppose you all are ready to go to mediation?

Can we go ahead and set the trial date? I realize that there are Motions for Summary Judgment on, as well.

MR. GUNNERSON: Your Honor, I was just going to say, in addition to there being Motions for Summary Judgment on for today, we also have -- I believe they filed a Motion to Amend to conform with the evidence that's to be heard early July. Obviously, you know, we will be opposing that. We don't think there's a lot of merit to that.

So we -- I don't know if maybe we push this off on -- as far as the trial date goes, until then, and wait and see what happens today.

THE COURT: That makes more sense.

MR. GUNNERSON: And wait to see maybe what happens July 6th. I don't know.

MS. HANKS: I would agree with that, Your Honor. You put it -- or the master calendar put it on the chambers calendar, so I don't know if you want to make it a hearing instead.

THE COURT: What we'll do is we'll just set a reset date after the decision on those motions.

MS. HANKS: Okay.

THE COURT: Do you know -- let's see, I have chambers calendar for 7/6, Motion to Amend.

MS. HANKS: Correct.
THE COURT: Is that the only motion --
MS. HANKS: Yes, Your Honor.
THE COURT: -- that's hanging out there? So if we put it -- if we have you come in after July 6th -- boy, that's going to be a terrible day. I come back from family reunion that day. So sometime after July 6th to reset the trial.
THE CLERK: July 15, at 9:00 a.m.
THE COURT: I'm sorry?
THE CLERK: July 15.
THE COURT: July 15th. July 15th. And obviously, if I grant all -- all the motions -- well, if I grant some of the motions, it appears that the case may be gone, hum? How about that?
MR. GUNNERSON: That'd be great.
MR. DeVOY: Works for me.
THE COURT: All right. Well, let's do Motion for Summary Judgment by the counter defendant, plaintiff.
MR. GUNNERSON: I saw that it was identified that way. I don't know if there's actually a counter defendant motion. But --
MS. HANKS: Oh, Your Honor, that's -- yes, you mean plaintiff's summary judgment against Mr. Malek on his slander of title claim?
THE COURT: Um-hum.

MS. HANKS: Yes, we'd be a counter defendant. So you want to start with that one?

THE COURT: Yeah.

MS. HANKS: Okay.

THE COURT: Let's just do the order we have them written down in so --

MS. HANKS: Sure. Your Honor, this is a Motion for Summary Judgment by the Rosenburg Trust on Mr. Malek's claim for slander of title, he brought a counterclaim for slander of title, based on the Lis Pendens recorded by the Rosenburg Trust.

The basis of the motion, mind you, we do not concede that the Lis Pendens was false. But for purposes of the motion, we wanted to focus on the other two elements that we believe there just clearly is no issue of fact.

THE COURT: Okay.

MS. HANKS: And that is, there's no evidence of malice. Under the slander of title claim, the party, Mr. Malek, has to prove that the Rosenburg Trust when it recorded the Lis Pendens did it with malice, i.e. reckless disregard for the truth of that document.

And the only testimony on file is Mrs. Rosenburg's testimony. And they ask, basically, two questions regarding that issue and she explained, I believed that the Lis Pendens was filed to thwart any construction on that golf parcel that

was at dispute.

And then when later drilled about, well, do you know what a Lis Pendens is, and what was the purpose, she said, I don't know, I'm not an attorney. That's the full extent of the questioning of Mrs. Rosenburg on what was the intent behind recording the Lis Pendens.

Now, we've also had written discovery answers by the Trust, where they indicated that the impetus for filing a Lis Pendens was the reliance of counsel. And we attached Mr. Bernhardt's (phonetic) declaration in that regard. He was the counsel at the time. My firm did not represent the Rosenburg Trust at the time the Lis Pendens was recorded. And he explained that he believed in good faith, under the Rule 11, that he had a good faith basis under the law to file a Lis Pendens. And then it was at his advice that they file the Lis Pendens.

So based on that evidence, Mr. Malek cannot prove malice. That's the quintessential element of the slander of title claim. That's all the evidence that we have as of now and that just -- that does not rise to the level of maliciousness.

Even if that were enough to prove maliciousness, he still fails under his claim because he hasn't proven the special damages. So the case law in Nevada states that you have to plead special damages specifically under Rule 9. It

is not sufficient to do the general allegation in excess of $10,000 or attorney's fees and costs. And that's exactly how his counterclaim is plead.

The case law has also interpreted that Rule 16.1 to provide, you have to provide a computation of damages for special damages and support it by documentation. He has not done that in this case.

In fact, I even asked him during his deposition, what are your attorney's fees that you're claiming with respect to this claim, the slander of title claim? And he did not know. And I said, well, do you know when I can expect to get that information, and he still didn't know, and nothing came. Discovery closed.

Now, I know Mr. Malek, in his opposition, indicated that a fourth supplement was provided. That was not served on our office. Still has not been served on our office. And I provided my own declaration that it was e-mailed, and I understand counsel was having trouble with Wiznet.

But even so, that disclosure merely alleges $45,000 in attorney's fees. It doesn't have any specific documentation to support that.

And, in fact, the opposition would suggest that they're including all of their attorney's fees for opposing this entire lawsuit, which would not be the special damages related to just the slander of title, which is why the Supreme

Court requires that documentation for special damages.

If he's allowed to come to court and say, it's just $45,000, we have been deprived of any right to defend that claim. We have no records to dispute. We don't know what that money is related to. It'd be hard to imagine that he paid an attorney $45,000 to draft one motion to lift a Lis Pendens. So really, we're only talking about a Lis Pendens that was recorded on the property for, I think, 57 days.

So if anything, the damages would be limited to that. But he hasn't produced any damages, so that's where we say that there's no issues of fact and summary judgment in favor of the Rosenburg Trust on the slander of title claim is appropriate.

THE COURT: Okay. Thank you.

MR. DeVOY: Good morning, Your Honor.

THE COURT: Good morning.

MR. DeVOY: Jay DeVoy. I represent defendant Malek. To respond to those two points, first of all, the question of actual malice as Ms. Hanks pointed out is a question as to whether the statement is knowingly false, or made with a reckless disregard from the truth.

Ms. Rosenburg goes on to say that she is not an attorney, but she has substantial experience as a real estate agent. She testified in her deposition that she knew what a Lis Pendens was. She knew what the effect of it was. And she

did not want Shane Malek to build his house. As a result, we have evidence to show that she knew what the purpose was.

And even though she could say, well, I don't know what the legal meaning is, I'm not trained in that, we have evidence that she knew exactly what she was doing. She worked with her counsel and she retained someone specifically to file the Lis Pendens to obfuscate Mr. Malek's ability to build his home, which seems to be the entire purpose of this litigation.

The declaration of Mr. Bernhardt is devoid of any useful details that might exculpate the Rosenburgs' conduct in this regard. There is one statement saying that he believed it was proper, and it discharged his duties under Nevada Rule of Civil Procedure 11, but it says nothing about if his client actually relied upon him. There's no information about any kind of conversations they might have had, and what the consultative process might have been.

THE COURT: Well, okay, but you understand at this point it -- it's not enough to just say there's no evidence of this, no evidence of that. What have you got that counters?

MR. DeVOY: As submitted in the opposition, there's testimony from Barbara Rosenburg that contradicts her idea that she doesn't know what a Lis Pendens is. She knew what she was doing. She knew what she was doing when she was filing it, and it was with the intent to keep Mr. Malek from building on his property.

THE COURT: What is the malice requirement on this -- on this --

MR. DeVOY: Oh, the malice requirement essentially goes --

THE COURT: -- on this cause of action?

MR. DeVOY: It essentially goes back to New York Times vs. Sullivan (phonetic). It's the actual malice requirement that would apply to a defamation action. It requires knowledge of falsity or reckless disregard for the truth. And it's that reckless disregard for the truth that applies here, and there are facts --

THE COURT: Where -- where do you get -- what is the evidence as to any of those elements?

MR. DeVOY: It comes back from Barbara Rosenburg's deposition testimony where she knew what a Lis Pendens was, she knew that she didn't want Shane Malek to build on the -- on his property, and she had her counsel file the Lis Pendens with that purpose in mind.

THE COURT: Okay.

MR. DeVOY: Now, going to the issue of damages, and Ms. Hanks' declaration on the reply, I have the e-mail that I responded with. Can I forward this to you and approach the bench to supply it?

THE COURT: I'm sorry?

MR. DeVOY: I have the e-mail that I responded to

with Ms. Hanks. She identified it in her declaration --

THE COURT: Oh.

MR. DeVOY: -- in the reply. Can I approach the bench and submit a copy?

THE COURT: Sure. Show counsel what it is.

MR. DeVOY: All right. Let me give it to everyone else, too.

THE COURT: Just give it to me, if you would.

MR. DeVOY: Oh, okay. Absolutely.

So as seen in this e-mail, it was sent the same day that Ms. Hanks identified her e-mail. There are a number of attachments showing numerous attempts to serve the disclosures through Wiznet. And then finally there's an e-mail from the Trust's own counsel regarding its own inability to serve its expert disclosures through Wiznet, and nobody had an issue with that.

THE COURT: Um-hum.

MR. DeVOY: This is an issue where I didn't see the thing -- I didn't see the disclosures go through and they weren't served in the time for the deadline. I wanted to make sure they went through.

In the past when this issue would have arisen, technology is not perfect, and everyone went along with it, and to disregard the initial -- the supplemental initial disclosures on that basis would put form over substance and

require compliance with the substantive -- with a procedural rule when the substance has been given to everyone in time.

Now, the issue is that within the calculation of damages there is a bit of contrast in the Nevada law as to when attorneys fees are allowable in slander of title claims.

THE COURT: Um-hum.

MR. DeVOY: It goes to when the slander and the cloud over title is removed and that can't be adjudicated until the end of the lawsuit.

Now, the measure of damages may well be just the damages that were incurred to remove the Lis Pendens and expunge it and that was resolved in 2014. But attorneys fees continued to accrue in this case, and that's the relevant measure of damages. This Court or a jury can adjudicate the amount of damages that are properly awardable for what was necessary to clear the cloud on title, which is the relevant standard. But the damages that were incurred --

THE COURT: Are you satisfied that your last 16.1 includes all of the evidence that you want to put in on that issue?

MR. DeVOY: I frankly wish I had the ability to put in more, because more attorneys fees have accrued since that time.

THE COURT: Well, and what is it that's been given; just a dollar amount, isn't it?

MR. DeVOY: Yes. It's the dollar amount that have been incurred in the case, because it's not yet been resolved and the Nevada case law indicates that it is at the resolution of the action that this title cloud is fully clear.

THE COURT: Well, at trial wouldn't you be submitting timesheets and all that sort of thing?

MR. DeVOY: That's the goal. It's briefed in our Motion for Summary Judgment. We only wanted to establish liability on this and show that there have been damages. We could submit fee affidavits and have the Court adjudicate what the proper measure of damages is.

THE COURT: So the -- the jury would be determining that the amount that you ask at trial for attorneys fees is appropriate, right?

MR. DeVOY: Yes.

THE COURT: But they'd be doing it without the timesheets?

MR. DeVOY: The timesheets would be submitted later. I -- that would be the plan for that. There's some issues with confidentiality that --

THE COURT: How --

MR. DeVOY: -- would have to go into that.

THE COURT: How would they do that if you're -- isn't -- wasn't the final -- I'm sorry, when is this set for trial?

MS. HANKS: It's not, Your Honor. Remember, we're resetting it?

THE COURT: Oh, okay. Okay. Never mind what I said then. All right. Okay.

MR. DeVOY: Well, the point is we've submitted evidence to these damages, that's all that is necessary at this point. There are questions of fact that are created by Barbara Rosenburg's own testimony which I believe leads to the opposite conclusion; that she knew what she was doing when she filed the Lis Pendens. She did it for an improper purpose.

She was not claiming title or possession to Shane Malek's property. She did it solely for the purpose of keeping him from building. And the Trust has been on notice of the fact that he has incurred attorneys fees and costs as damages in this action to remove the slander of title.

Just because Shane Malek didn't have the number at the tip of his tongue in his deposition doesn't mean that those damages don't exist.

THE COURT: Um-hum.

MR. DeVOY: It just means exactly what he said at his deposition; he didn't know as he sat there that day. The evidence is --

THE COURT: Well, it -- it would be nice to have something documentary in hand to --

MR. DeVOY: And they received it. And if the Trust

is able to amend its Complaint they will receive more of it.

THE COURT: And you're talking about these documents?

MR. DeVOY: Yes, the disclosures. The disclosures are not attached in there. Those are just the e-mails in response to the e-mail Karen Hanks identified.

THE COURT: All right.

MR. DeVOY: Anything further? Oh. Thank you.

MS. HANKS: Your Honor, I don't have much to add. You've -- you've hit the nail on the head. We don't have documentation of the attorneys fees. Those are documentation that even setting aside the lack of service of the fourth supplement, should have been produced during the course of discovery. It's their burden of proof. This is their claim. I'm basically going to trial by ambush right now.

And the jury would decide damages, not this -- not Your Honor. This is not an attorneys fees motion.

THE COURT: Discovery is closed, you said?

MS. HANKS: Correct. Discovery is closed.

THE COURT: Okay.

MS. HANKS: All right. So at this point, we don't have any documentation to defend against. We don't know what they're claiming. We don't know what the $45,000 entails. Frankly, it's impossible to believe it's an even number like that. So it seems like they've even approximated it

themselves within their own 16.1 disclosure. I mean, that's the point.

And then the other point with respect to the malice, as Your Honor was pointing to, you have two statements made by Mrs. Rosenburg in her deposition testimony, which was, well, I believe the reason for the Lis Pendens was to halt any construction. And then when further pressed, I don't know. I'm not a lawyer. That's it.

THE COURT: Um-hum.

MS. HANKS: There's nothing -- and her experience as a real estate agent has no bearing on whether she filed the Lis Pendens falsely. She testified she's not a lawyer, and then Mr. Bernhardt further is going to testimony, it was my advice, it was my belief it was in good faith.

So there's just nothing that they have proven to show malice. There's nothing that the jury is going to hear that's going to rise to the level of malice.

MR. DeVOY: Your Honor, if I may be heard on those issues. Proof is unnecessary at this point. It's just creating a question of material fact. Here we have Barbara Rosenburg's own testimony from her deposition about her apparent true motives --

THE COURT: Okay. All right. All right. Well, that's the same thing I heard.

MS. HANKS: Yeah, I have nothing further, Your

Honor, unless you have any questions.

THE COURT: All right. I'm going to deny the motion, but I am troubled, and I don't think it's -- I don't think it's over because if discovery has closed and the final 16.1 has been done, I mean, it may -- it may not be that there is opportunity for you to put in the documents which you would pretty much need to have, I would think, unless you're going to -- I'm not sure what you do -- generally, that's what we get is on these kinds of causes of action when attorney's fees are alleged as damages. It -- because you don't leave the sorting process until the very end.

So I'm denying it, but it's almost on the 56(f) basis. And I don't -- it may be this issue is not over, because I don't know what plaintiff's, counter defendants' response is going to be if they start getting more documents after discovery is closed. But we'll leave -- we'll leave that for a later day.

MS. HANKS: So, Your Honor, just --

THE COURT: I will -- I will clarify that I'm denying it without prejudice. Yes?

MS. HANKS: And with regard to the 56(f) relief, are they then going to produce some documentation and then we will file motions with respect to that or we will be able to do discovery? That's where I'm confused as to how we actually go -- I mean, we've already, you know, issued our written

discovery to Mr. Malek. We've already deposed Mr. Malek. So if that's -- if they're able to produce documentation then I would need a second deposition.

THE COURT: I suspect somebody's going to be appearing before the Discovery Commissioner is what I suspect.

MS. HANKS: Your Honor, if the discovery is closed --

THE COURT: How are you going to do any of that if -- if discovery is closed?

MR. DeVOY: We can resolve that between counsel later on. If -- if the Court wishes to deny the motion without prejudice, we can resolve that and talk about the next steps, depending on the adjudication of the other motions that are pending before the Court.

MS. HANKS: I hate to be difficult. I would like to be in that group that can resolve things, but I'm not going to go leave here today and then say, yes, you can produce documentation and I'm not going to do any further discovery. So I'm going to be left in the same position I'm standing in right now.

THE COURT: There's just one step in there somewhere that I can't quite get across and grant the Motion for Summary Judgment. Particularly, when as you know the standard on that is pretty high in Nevada, to say that there is no issue as to any of this, and that to characterize the statements made as

impugning no bad intent, that's a little difficult.

But I don't think this issue's over. So, I'm denying it. I am going to deny it, but without prejudice. I don't think we have the full picture here. I mean, if you get -- if you're staring trial in the face and you start getting documents now, then the Court may wind up having to make a decision as to whether that evidence is going to come in. And if it's not, then it's very possible that your Motion for Summary Judgment could be renewed.

MS. HANKS: What about the issue of if they do produce, which I imagine they're going to. We're closed, so discovery is closed.

THE COURT: Um-hum.

MS. HANKS: So I -- it would a Motion to Strike before Your Honor as a Motion in Limine.

THE COURT: It's a lot of extra work, isn't it?

MS. HANKS: And I don't -- and I'm not really pointing that out. What I am pointing out is that I can't -- I don't want to rely on the Motion to Strike being granted and not doing my discovery on those documents.

THE COURT: Uh-huh.

MS. HANKS: So am I entitled -- can you rule that I'm entitled to a continued -- a deposition of Mr. Malek on any documents that they may produce?

THE COURT: Well, yeah, I'm not going to. That's

why I said, I think somebody's going to be back in front of the Discovery Commissioner, because it may be that you decide that rather than --

MS. HANKS: Do the Motion to Strike.

THE COURT: -- move to block it and strike it, that you're going to do discovery on it, and be prepared. And, well, you know, there are decisions to be made yet by both sides and probably the Discovery Commissioner -- I'm not sure -- before this issue can be fully resolved, before --

MR. DeVOY: Your Honor, whatever the case may be, if we go before the Discovery Commissioner, or if we work it out independently, I think that it can be tabled until the other pending motions are resolved. As I indicated previously, the more you discuss it, the more it seems there's a thicket of other issues that may be ripe for further discovery. And I think that after the July 6th deadline for determinations on the motion file a further amended Complaint, that might be a good time to take it up with the Discovery Commissioner, if at all.

THE COURT: Well, I would suggest that if you -- whatever you're going to do, you ought to do it soon.

MR. DeVOY: Understood, Your Honor.

THE COURT: These are your documents back.

MR. DeVOY: Oh, thank you.

THE COURT: Um-hum.

All right. Next motion is, defendants' motion.

MR. GUNNERSON: Your Honor, there are two defendants' motions remaining, one filed by my clients and one filed by Mr. Malek. I would say that Mr. Malek's motion concerns predominantly the easement issue.

THE COURT: Um-hum.

MR. GUNNERSON: And our motion deals with multiple issues, including the easement issue. I don't know if perhaps addressing the easement issue all at once and perhaps let me argue that small part of ours, along with them, would be a way to perhaps deal with this --

THE COURT: All right.

MR. GUNNERSON: -- avoiding having us to --

THE COURT: Okay.

MR. GUNNERSON: -- argue the same thing twice. But I don't know if counsel's okay with that, so.

THE COURT: Well, it'd be a good day not to say things twice.

MR. GUNNERSON: All right.

THE COURT: All right? Um-hum.

MR. JONES: Your Honor, I just wanted to make a point.

THE COURT: Yes.

MR. JONES: I have a hearing in front of Judge Allf at 10:00. So if you see me get up and leave, I -- it's no

offense to the Court. I just wanted to let you know why I'm leaving if I have to go.

THE COURT: I just put it down in my little black book. No problem.

MR. JONES: Thank you.

THE COURT: No problem. Okay.

MR. DeVOY: Your Honor, this is a case about a Trust bringing a lawsuit to prevent its neighbor from building its house. To do that, the Trust has asserted four causes of action against Mr. Malek. The first is easement.

The basis for the Trust easement is that it believes Mr. Malek's construction on a sliver of out-of-bounds golf parcel that was part of the out-of-bounds area with the DragonRidge Golf Club, that both Ms. Rosenburg and Richard MacDonald have described as brush desert land, they believe that any construction that will affect their view and their privacy. They have stated this in their discovery responses to both MacDonald Highlands Realty and to Bank of America, and that is the basis for bringing this lawsuit.

Unfortunately, this is contradicted by Nevada law that prohibits easements from being granted to protect a view and privacy. This goes back to 1967, the case of Boyd v. McDonald (phonetic), where the Nevada Supreme Court specifically said that you are not entitled to easements to protect view and privacy. Yet, the Trust has identified no

other concerns in the course of this litigation that would entitle it to any form of relief.

THE COURT: Um-hum.

MR. DeVOY: Now, the Trust had tried to use a number of watch words to masquerade the fact that its true intent here is to protect its view and its privacy which is impermissible under Nevada law. It says it wants to retain the character of the golf course. It wants to protect the golf course.

Number one, this is an interesting proposition coming from somebody who in her deposition testified she knows nothing about golf and is not golfer and has no real strong feelings towards the game. But secondly, looking through the words of these allegations, the substance of them, and what they truly go to is the privacy and light inherent to living on a golf course.

There is no other reason why they concerned about this (sic) and they believe that what is going to going to happen is that their view and privacy is going to be changed and that is what they have testified to throughout discovery in this case, notwithstanding the current post-fact rationalization that was enunciated in their opposition to the Motion for Summary Judgment.

This is a new theory, and the reason for that is, because it was invented to try to hide the fact that this is a

case about view, light and privacy which is prohibited by Nevada law.

Second, the Trust attempts to pull and end-run around this by alleging a claim from implied restrictive covenant. Now, implied restrictive covenant is a recognized legal concept in Nevada, but it hasn't been turned into an offensive cause of action. For example, Nevada law recognizes estoppel, but I cannot bring a claim against somebody for estoppel. It's a legal principal. It hasn't been weaponized and turned into something I can assert against another party.

Now, this has been recognized in other states, but the tests vary greatly, and this has been detailed in pages 22 through 23 of the Motion for Summary Judgment. The tests have certain common elements, but they diverge widely. And the Nevada Supreme Court looks disfavorably upon new causes of action, especially where they have inconsistent elements.

In Bidio v. American Brands (phonetic) the Nevada Supreme Court declined to recognize a cause of action for medical monitoring because the standards across the states were widely disparate and had very few common elements, and it was difficult for the Nevada Supreme Court, if not impossible, to synthesize a consistent standard for the Court to apply.

Second, this claim, for the same reason why the Nevada Supreme Court has previously refused to allow for implied restrictive covenants and easements in order to

protect a view and privacy is highly subjective. In both Bidio and in Greco v. United States (phonetic) the Nevada Supreme Court declined to recognize cause of actions that have difficult or highly subjective standards of proof.

In Bidio, the medical monitoring that we discussed previously, it was a difficult standard of proof. But in Greco v. United States, the question was whether there could be causes of action for wrongful life. In that case, an infant was born with horrible defects that would ruin its life, essentially, and the Court declined to recognize that cause of action as a alternate theory of liability to medical malpractice, because the Court determined that the question of whether it's better to not be born at all is better left to theologians, academics and philosophers rather than the Court.

It's too subjective, much as, what is -- the question of what is a harm to one's privacy, light or view? It's that reason why the Nevada Supreme Court didn't recognize it in cases going back to Boyd and is not going to recognize it now.

And the Nevada Supreme Court recently affirmed its commitment to looking skeptically at new causes of action in Brown v. Eddie World (phonetic) which was decided on the very day that Mr. Malek filed his Motion for Summary Judgment. In that case, the Nevada Supreme Court refused to recognize a cause of action for wrongful discharge in violation of public

policy.

This is not cherry-picking cases out of the Nevada Supreme Court's long history of jurisprudence to say that there are a few causes of action that haven't been recognized. This is the norm in Nevada. And that's the norm that this Court should abide by, and not recognize this new cause of action just because there's a legal principal that supports it.

There is a big difference between having a legal principle that supports something, which is codified in many places throughout the Nevada Revised Statutes, that does not give rise to its separate cause of action and that is the case here.

And finally, the Trust asserts two other tag-on causes of action that aren't causes of action at all. They're requests for relief. Declaratory relief is entirely duplicative of the two existing claims. It says that, basically, we want a declaration of this, but it doesn't assert any other right. And without an underlying finding of liability, there's no declaration to be made.

And the same logic applies to its claim for injunction. Without an underlying finding of liability, there can be no injunctive relief. As the United States District Court of -- for the District of Nevada has opined, it is a remedy. It is not a standalone cause of action, and there has

to be some basis for it to issue from the Court.

Here, there is none. And if nothing else, those two causes of action can be resolved in Mr. Malek's favor with judgment entered against the Trust, simply on the basis that they aren't causes of action at all. But the original two causes of action do not have any evidentiary basis to support that one neighbor can sue another to prevent building on the property that they own with plans that have been approved and by taking all the necessary steps to build their house. Thank you.

THE COURT: Notwithstanding -- they can't do that even notwithstanding restrictive covenants?

MR. DeVOY: Assuming the -- I'm sorry, assuming that a restrictive covenant exists.

THE COURT: Yeah.

MR. DeVOY: Here there is none. There has been no evidence of one.

THE COURT: Okay.

MR. DeVOY: The only evidence that has been produced that there might be a restrictive covenant, MacDonald Highlands, is that the Rosenburgs thought there might be one, and that's it. And that kind of subjective intent shows wishes and dreams. It does not show an applied restrictive covenant that prevents somebody from building their house.

THE COURT: Okay.

MR. DeVOY: Thank you.

THE COURT: Thank you.

MR. GUNNERSON: Your Honor, is -- the following motions also going to argue on the easement issue, I would ask that I can also be heard at this time.

THE COURT: All right. Is that all right?

MS. HANKS: Sure.

THE COURT: Does that work for you?

MS. HANKS: Sure.

THE COURT: I usually separate them out the other way, but I agree with you, that what you're going to say is -- you probably can't talk as fast as he does, but you're going to sound much the same.

MR. GUNNERSON: That is true. That is true. I don't have a lot to add. In fact, I think with our motion we would adopt many of the arguments presented by Mr. Malek in his motion, as plaintiff has adopted their arguments in that motion as it pertains to our motion. The easement issue is one that affects all the parties here.

Just to be clear, I want to make three, I think, very important points. Number one, there is no easement for view or privacy recognized in Nevada, period. There just is none. Now, they've attempted to put lipstick on this one and --

THE COURT: The lipstick argument, yes. Okay.

MR. GUNNERSON: -- by using a different terminology. They -- instead of saying that this is an easement for view, or an easement for privacy, which they know is unsuccessful in Nevada, they've called it now an easement for use of land, which -- which the only use they have for this land is view and privacy.

So they've kind of tried to switch horses mid-stream with their terminology in order to avoid the difficult legal issues that are presented to them. But the fact remains the same; what they want is an easement for view or privacy.

A second important point to note is that this third acre of bare land wasn't used for anything at all. They want that land to be continued to used (sic) as it was, but it wasn't used for anything. It was a bare lot, scrub oak, rocks, perhaps the errant teenage golfer approaching the green who bladed his shot might have had to have trampled in there to try and find their ball and bring it out.

THE COURT: Um-hum.

MR. GUNNERSON: There's otherwise -- this was not a part of the golf course as laymen use it as it pertains to the actual grass area of the course. This is behind the green. This is behind the sand trap behind the green. This is behind the rough behind the sand trap behind the green. This was not used for anything.

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So the fact that they're now asking for an easement to allow the land to continue to be used for what it was previously is simply -- has no merit and this is simply an attempt to avoid the negative law regarding view and privacy.

Lastly, if they could apply the easement law that they've identified in their motions, I think the ultimate question is, what use do the Rosenburgs have for that land? How have they been using it, how do they intend to use it? If they claim they have some kind of an easement, which they have stated in their own motions that easement and restrictive covenant are one in the same -- I don't know that I necessarily agree, but that's what they've stated -- then what use are they going to have for that land? The only use would be to protect their view and their privacy.

So we ought to call a spade a spade and address this for what it is. And I think as was -- been presented by Malek's counsel, there simply is no law that supports their request for any type of implied easement or implied restrictive covenant whatsoever.

THE COURT: Okay.

MR. GUNNERSON: Thank you.

THE COURT: So do you have a cause of action or is it just, you know, an equitable estoppel of some sort?

MS. HANKS: Your Honor, we do have a cause of action, and the cause of action is -- you can ask for

equitable relief in the term of an implied restrictive covenant. The case law that I cited on page 7 of our opposition shows that. Every single one of those Nevada cases dating back from 1913, I think the last one I cited was 2008, all dealt with an implied restrictive covenant.

And it was in the confines of usually declaratory relief, or injunctive relief, or equitable relief. But there was a claim. Clearly, there was a claim that the Court was considering and the jury had to consider of whether an implied restrictive covenant existed to limit what someone could do with their property to the benefit of the other person neighboring the property.

It belies reality to say that this doesn't exist when there is a whole page citation of cases where courts and juries have analyzed whether an implied restrictive covenant exists between one property owner and another property owner.

And in all of those cases it was couched as injunctive relief because you're essentially asking someone to say, tell this other property owner that an implied restrictive covenant exists on that particular property that limits what they want to do with it, whether it be build, use it in a certain way, and that's what all those cases did.

And the Boyd case actually laid out the elements in Nevada for when an implied restrictive covenant exists. And that was actually a jury trial that the Supreme Court remanded

back to state court because the trial judge changed the covenant. He recognized a covenant existed, but he changed it. And the Supreme Court said, no, it's an all or nothing approach, so we're remanding this case.

So it seems axiomatic that if it wasn't really a cause of action the Supreme Court would have remanded this and set a standard that has been followed since that time from the 1960s all the way up until present date.

THE COURT: Remind me, what gives rise to your implied covenant?

MS. HANKS: Restrictive covenant? Your Honor, if you look at the Boyd elements, it is the unity of title it's the apparent and continuance use, and then the necessary element would be it is the intention of the parties.

So what we have in this case, and similar to other jurisdictions that have actually looked at it in the context of a golf course, in the cases that we cited, the Skyline is almost exactly on point to what we have here.

You have a community, MacDonald Highlands, that developed a golf course, DragonRidge Golf Course, first. Then everything around that golf course was designed around it. It was designed as a golf course community. It was advertised as a golf course community. Restrictions were placed on properties abutting the golf course in both the CC&Rs and the design guidelines.

So all of those covenants run with all of those properties in MacDonald Highlands. So that goes to the continuous use. So what this case is about is not view and privacy. In our Complaint -- and I do want to address that -- our Complaint does allege restrictive covenant and the easement. And the terms have been used interchangeably through the case law, and even the restatement has done away with the term "easement" and has just used implied -- or excuse, restrictive covenant. And they could be both express or implied.

But -- so we're not changing the game plan here. It's always been alleged that way. Who's changing the game plan is, they want to keep on saying that we're asking for an easement for view and privacy and light and air. And we've never even said that. Those words don't even appear anywhere in the Complaint.

Now, does -- does view get affected? Yes. That's a byproduct of what we're talking about. That's a byproduct of every implied restrictive covenant. But what we're talking about is value. When the Rosenburg Trust purchased property in MacDonald Highlands, they purchased it with the expectation that they were purchasing property on a golf course. And because of that, they paid a premium, just like everyone else did, with the expectation that that community would stay as advertised and as it appeared.

Just like all the CC&Rs, every owner gets a benefit from having those covenants and restrictions on all the property owners around them, because unlike a non-CC&R community, your neighbor can paint their house purple, or pink, or bright blue and you can't say anything about it.

But when you come into a community like MacDonald Highlands that is governed by restrictive covenants, you are buying -- paying a premium and having the reliance that all the other owners are not going to be able to change their house in such a way that would affect the value of your property. And that's what happened here.

Now, the interesting thing about the -- how they describe this golf parcel, it's false. It's just flat out false. It was inbound play based on the evidence that we've adduced during the discovery. It was specific desert palette. Mr. MacDonald testified to that. They have three palette's in MacDonald Highlands. It was the third palette. It has an irrigation system.

So to suggest it's this sliver brush almost just ridiculous piece of land that no one cares about it's a misstatement of the facts. And this is a Motion for Summary Judgment. So if there's any question of what that piece of land was, that has to be determined by a jury. And the facts that we produced and the deposition shows, it's actually one-third of an acre of property that was a specific palette of

desert landscape that was inbound play for the golf course.

In fact, Mr. Bykowski (phonetic) even testified that before he severed it and sold it to Mr. Malek he talked to the golf company and asked, how much do you need of this still to be considered part of the golf course.

And so that's where those issue of facts and a jury needs to consider that, that when the Rosenburg Trust bought their property, they were taking in the whole surrounding area. And this is where it gets -- this is where the crux of it comes in, Your Honor. If you accept -- if Mr. Malek is right and there's no restrictive covenant, that means someone can buy the one-third acre of the golf course right in front of him, and then the next guy can come the next week and buy the one-third acre of golf course in front of him, and you can just start slowly and surely severing the golf course to the point where it no longer exists. And that is the reason why the implied restrictive covenant exists.

That's the -- all those cases were talking about that. When you buy property, all the Nevada cases, and even the Skyline case talked about that. When you buy property and you pay a premium and you're induced to pay more money because we've advertised, it's going to look like this. You're going to be on a golf course. You're going to have this premier view. You're going to have this premier surrounding area. You don't then get to change it, because once you've selled

(sic) one property, that right to that property staying that way, it vests immediately, and Nevada law has held that.

And that's where Mr. Malek knew it. When he purchased that golf parcel, he knew there were restrictive covenants. He knew that it was part of the golf course. He had lived in the community since 2006. The golf course was built -- this goes to the continuous use element -- the golf course was built and open for play as early as 2000. Mr. MacDonald admitted, it's a centerpiece of the community. It's the heart of the community. It's in the center of the maps, everything show it, and the plat maps show it. The community maps show it.

And the restrictive covenants even exist on people who buy property on the golf course. People who buy properties on the golf course have different restrictions on them than someone who bought a house within MacDonald Highlands that is not on a golf course. And why is that? It's to preserve the golf course. And that's -- that's what this is about.

The byproducts of view and just the esthetic pleasingness of the property, yes, that's a byproduct. But we -- what we're trying to prove here and what we're trying to show here is that the Rosenburg Trust bought A, and they're ending up with B. And that affects their value, and that's why they're entitled to that restrictive covenant.

The statement by counsel that -- and it's probably not as important but they said, well, Mrs. Rosenburg doesn't even play golf. Well, they should have deposed Frederic Rosenburg, because he does play golf. And he will testify at trial that he picked this particular property. They put a lot of time and effort and research into the property they wanted to buy. And he picked it because of its proximity to the clubhouse, because of its location on the 9th hole, and because of how it's situated and looked. And he liked the view from his property.

So to suggest that somehow because Mrs. Rosenburg doesn't play golf, that she -- don't worry about the value she paid for this house, $2.3 million, let her pay for it, and then lose the value of it, don't worry about her. But Mr. Malek, he can increase the value of his property to the detriment of another owner. I mean, that's what this is about. One owner is not allowed to increase the value of their property by changing the scheme and overall look of a community to the detriment of other property owners, depriving them of the value that they paid for.

Your Honor, if you don't have any other questions --

THE COURT: No, not at this point.

MS. HANKS: Well, actually, Your Honor, they didn't address the zoning changes. I don't know if you want me to address that. They kind of cut their argument a little short.

THE COURT: Yeah. Why don't you go ahead, because I'm sure they will when you --

MS. HANKS: Okay.

THE COURT: -- you plan to address those, right?

MR. DeVOY: Yes, they were addressed in the --

THE COURT: The zoning?

MR. DeVOY: -- motion, but.

THE COURT: Okay.

MS. HANKS: And, Your Honor, the case law in Nevada says that zoning changes cannot alter a restrictive covenant. The zoning -- the zoning change itself does not change the nature of the land. So the fact that it happened, and then possibly the Rosenburgs observed some stakes, again, an issue of fact, that the Rosenburgs dispute that they observed any stakes. The only stakes they observed was the golf stakes showing inbound play and the out-of-bound play. So that would be an issue of fact.

But regardless, even if they had observed those stakes and the zoning changes were made, they cannot change a restrictive covenant under Nevada law.

And they also suggest, well, the MacDonald Highlands has done this before. They have sold pieces of the golf parcel. Well, that's another fact that's not true. When you look at the deposition testimony of Mr. Bykowski and Mr. MacDonald, there are three instances where some change to the

golf course was made, so to speak.

The one was Mr. MacDonald's property. He added to his property and took a piece of the golf course. But he had testified it was an out-of-bound play area. Has not changed it in any way. It's still the desert palette that it had always been.

So other than the fact that he may be able to do something to it, and maybe when he tries to do that, there'll be someone else who will argue that he can't. But right now, it's remaining the same. That also happened, by the way, after this litigation was already instituted, so it's not something that happened prior.

The second one is there was a large -- or a small hill, so to speak, that was blocking the view of some houses to the golf course. Mr. Bykowski testified it wasn't even a part of the golf course. That hill was not any part of the golf course. But they just leveled it so that now the houses had a straight view to the golf course. That's it. They didn't change anything. They didn't sell it to anyone. No one's building a house on that piece.

And the third example of doing something different to the golf course is whereby they -- they say -- Mr. Bykowski testified that there was a corner piece between a tee box that they just extended someone's lot so he could fit his house on there. Didn't sell the lot to him. It didn't -- he says a

small corner piece. There was not -- it's not a third of an acre. It's not changing the nature of it.

Those do not give rise to the general and -- changes that's required by Nevada law. It has to be so pervasive that someone would know that no longer. The example would be, the golf course, first nine holes were completely changed and started building houses on it. That would be the example of what Nevada law has recognized as a pervasive change, whereby no one can then depend on the restrictive covenant. That's just not happening here. It hasn't happened here.

And nevertheless, you can look at the fact that even if you believe what they're saying, there's clearly issues of fact as to whether those three instances did rise to the level of a severance that would take away the implied restrictive covenant that exists on the golf piece.

We also argue, Your Honor, there's an express covenant. You don't even need to get to the implied covenant because we believe there's an express covenant in Mr. Malek's deed. It says he'll take, subject to, all covenants, restrictions and easements. And Mr. Malek admitted that he knew when he took the property he was taking it subject to those guidelines.

And the Nevada law provides, you can look at parole evidence, extrinsic evidence, to determine what do you mean by that. Because admittedly, the language is broad. But if we

look at the community maps, the plat maps, the CC&Rs, and the design guidelines, all of them are recognized in the golf course being the centerpiece of that community. They're putting restrictions on property owners so that golf course is protected and maintained. And that's where we argue that that's the express covenant that exists. We don't even need to get to the implied covenant.

Just lastly, Your Honor, that's the gist of it, Your Honor. This case is not about view, light or air. It's about maintaining value and maintaining an expectation that the property you purchased, and the surrounding area will stay the same.

THE COURT: Okay. Back to you. It's your motion.

MR. DeVOY: Thank you. A number of issues that have arisen, and I'll try to work through them as efficiently as possible.

First of all, this idea that the Rosenburgs paid $2.3 million for the house, that is true. $2.3 million is not nothing, but it's not as if they sunk their life savings into this. They are a group of people that have five houses -- own five additional houses owned between them and their Trust in numerous other states -- well, no, just California. But numerous other communities. So these are sophisticated real estate investors. Barbara Rosenburg is a realtor. They could have done more research about this to understand that the

zoning is not what they thought it was.

First of all, we're not denying that an implied restrictive covenant exists as a legal principle. It doesn't apply here. The fact that going back to 2004, people have been able to break off little parts of land that arguably may or may not be part of the golf course, but were not in-play, does not show that the golf course is completely sacrosanct. It can never be moved.

What Mr. Malek is proposing is not paving a road down the fairway of the 9th hole or building a cul-de-sac on the green. He is taking a sliver of area, the desert palette that was referenced just means undeveloped desert land, and it was clarified in Richard McDonald's deposition testimony, and using it in the same manner that Ms. Hanks identified as Richard MacDonald and another owner had done to move their property a little bit closer.

There might be some construction in it, but he's not building up right to the end. The fact that Mr. Malek has to -- wants to use that property to move his house closer to the golf course doesn't mean he's building up right to the end of it. He still has to abide by the same rules that everybody else does for getting their house design approved. And he has done that to date.

Additionally --

THE COURT: Why does he want to move his house?

MR. DeVOY: Just because of the size of the house. That's my understanding. It's the footprint of the house. It's kind of a Frank Lloyd Wright style house, is my understanding of the plans that I've seen.

THE COURT: Hum.

MR. DeVOY: Additionally, going back to that point, and related to this case law that plaintiff cites, namely, the Skyline and the Ute Park (phonetic) decision, those relate to an entire golf course being developed, at least in Ute Park. And Skyline relates to a golf course being left to basically die in the desert, and left to stop operating (indecipherable) neglect.

Again, those are inapposite here. We're talking about a little bit of land that was potentially (indecipherable) play being used in a manner that's consistent with the way that it's been used in other areas of the community and has been used in other communities throughout Las Vegas. This is perhaps the poorly kept -- the worst kept secret in high-end real estate in Las Vegas, that this is a routine practice.

Additionally, the question here is not whether there's any fact that causes a question; it's a question of material fact. The fact that there is some idea that maybe the Rosenburgs wanted that and they thought there was a question as to what they thought they were getting, that

doesn't mean it's a material fact.

What the Rosenburgs thought they were getting does not mean they get to protect that. They talk about in terms of property value and maintaining that property value, but what they're really getting to is the view and the privacy that create that.

And going to boilerplate language that shows up repeatedly in Exhibit 16 and 17 to the Motion for Summary Judgment, this clause is used in responding to Bank of America, MacDonald Highlands Realty in its substantive -- and its substance a number of times. "Plaintiff's use, enjoyment and value of the Rosenburg property will be substantially altered in terms of, among other things, the view of the golf course and mountains, privacy and light entering the Rosenburg property if Malek begins construction on the golf course parcel."

This case cannot be about anything but view, light and privacy. The Trust did not have any prior use of the land. And if anything, the fact that it was rezoned is probative of the fact that there was no implied restrictive covenant or any covenant that would prohibit it. Every one except the Rosenburgs knew about this, because the Rosenburgs didn't bother to look. My client contacted Michael Doiron and contacted and got in touch about buying this parcel so that he could expand his lot and build closer to the golf course on

it.

MacDonald Highlands Realty signed off on it. They were the ones who filed the applications with the City of Henderson to get it approved, and the City of Henderson approved it, that it had done before, and continues to do during this process.

If there had been a problem, somewhere along the way, whether MacDonald Highlands Realty, or the MacDonald Highlands entity, Foothill Partner -- I'm sorry -- FHP Ventures -- I know the name has changed in the course of the facts of this case -- whether it's FHP Ventures, MacDonald Highlands Realty, the City of Henderson, if there were a problem that would have inhibited this, someone would have noticed it in the approximately 10 years that this has been happening before this case started.

Additionally, the golf -- I'm sorry, let me get it back together on this. The onus shows that the golf course was not meant to be used solely to be kept there. It had been rezoned in the past. It was sold with the purpose of rezoning. Everyone knew what the purpose of it was going to be along the process, as I mentioned. Paul Bykowski knew about it. He was the one who signed off in the applications.

And again, if it alters the value, that's a question of damages, it is not a question of whether there's an injunction. This is a question about whether the value of the

property is being altered. Respectfully, if that is the case, then the losses fall someplace else and it's a question of legal value -- a question of legal damages.

If there's a change in value, whether there's a remedy for that at all, it can be measured monetarily. It doesn't warrant an injunction against Mr. Malek's construction on the property.

And finally, the Trust makes an issue about the fact that Mr. Malek signed a deed that accepts the covenants that exist on the land. That's true. Much like the idea that Mr. Malek recognizes that the principle of an implied restrictive covenant exists, but not here.

There may be covenants that run with the land. For example, people who live on the golf course have to accept the fact that golf balls might fly onto their property. But that doesn't mean he exists -- covenants that exist solely in the minds of the Rosenburgs. Just because they believe something was the case, does not mean it rises to the level of implied restrictive covenant, and it doesn't mean Mr. Malek accepted it, especially when everyone -- I'm sorry -- every -- especially when MacDonald Highlands Realty sold him the land, FHP Ventures approved it, the City of Henderson approved it for rezoning, and nobody had raised a problem with it.

This is -- the evidence before the Court shows that there isn't an implied restrictive covenant. If there had

been, it wouldn't have gotten to this point. And it wouldn't have gotten to this point, not just for Mr. Malek, but for the other people who have bought portions of the out-of-bounds area of the golf course.

At the end of the day, the idea here is that the Rosenburgs wish to have the owners have plans that accommodate its needs. The idea that there's this hypothetical that somebody might be able to buy land in front of Mr. Malek is not a reason to deny the Motion for Summary Judgment. It requires evidence, it requires genuine issues of material facts, not hypotheticals that if this is accepted, then other people can buy land. That hasn't happened. That's not a credible scenario to deny the Motion for Summary Judgment.

But what has happened here is that the idea that there's an implied restrictive covenant because the Rosenburgs believed one existed has allowed this litigation to go on and for somebody to be sued and prevented from building their house because somebody didn't like the plan, because by their own admissions in discovery it would affect their view, light and privacy, which is prohibited under Nevada law.

THE COURT: Okay.

MR. DeVOY: Thank you.

MR. GUNNERSON: Your Honor, there are no genuine issues of material fact as it pertains to the issue of whether or not an easement exists. To create an easement now, the one

they're suggesting, would -- is quite frankly an absurd proposition. You're talking about taking someone's property and without consideration for the covenant, being able to restrict golf course owners, anyone who ever purchases a piece of golf course owner, they're asking you to create new law.

And now they say there's express covenants, as was stated, those express covenants have nothing to do with not building on the land. They have to do with maintenance, they have to do with people being able to come on the property to grab a ball. They don't have anything to do with building on the property.

They're asking this Court to do something that has, quite frankly, never been done before. They say that they expected a golf course community. And guess what; they still have it. They said they wanted their -- the location of the proximity of the 9th hole, the location of the clubhouse, as well as the view of the golf course all remains. Nothing is being changed here.

So even if they could create some kind of an easement, it is not effective. The things that they have argued are putting them or creating their damages. They still have it. The golf course is still the centerpiece of the community. The green has not changed, the fairway has not changed, and their view of those have not changed.

In fact, if you look at page 4 of our reply that's

coming up you can see there's a picture on there that shows the way the house is built. And the house is built to take in the view of the fairway and the green and the grass and valley, and catch some mountainviews in the distance. The home was not built to get a view of this bare lot of land.

And to now create some kind of -- state that there's implied or express covenants that create an implied covenant, it's just so beyond the pale that it's -- that it would create an absurd result.

Again, there are no genuine issues of material fact. They don't get to mischaracterize the facts to create one. They say it was inbound play. I've looked at their citations to the inbound play. I would encourage the Court to do so as well. What they've cited to states nothing about inbound play.

So they -- they've -- they've hung their hat on that. Quite frankly, even if there was an issue there, it's not a genuine issue. So I don't think that that creates a covenant. Covenants must be created by contact or action or consideration. None of that is here.

They said that if --

THE COURT: When you say a consideration; what about her argument that they paid more for that lot than they otherwise would have?

MR. GUNNERSON: They paid more for the golf course

views. That may be true. I think there is a premium --

THE COURT: Um-hum.

MR. GUNNERSON: -- placed on those, and those golf course views remain intact, exactly as they were before. I don't know, quite frankly, I think golf courses change from time to time. I think that holes change, things change. And I have never, as of yet, seen in Nevada a court rule that there is a restrictive covenant, an implied restrictive covenant over golf course land. I just -- I have not seen it. And they're asking you to be the first to do that.

The law is clearly in favor of finding that no easement existed. And we'd request and admonish the Court to please find that so that we don't have to go on with this view and light and privacy easement that's really what is at stake here. Thank you.

THE COURT: All right. I am going to take another look at some of the authorities. This is a fairly -- reading the authorities sometimes leads to opposite conclusions about what -- what would be the result in this case and I need to look at those some more.

So I'm going to take these under submission for approximately three weeks. I'm going into trial, so it will take me a little while to plow through these at night. So can we go out about three weeks? We can just do it on a chambers calendar. Is that a chambers? Yeah.

THE CLERK: June 29th.

THE COURT: June 29th. It's a chambers calendar, no appearance necessary.

Okay. What about the other one?

MR. GUNNERSON: The last one.

THE COURT: Okay.

MS. HANKS: I'm surprised you didn't hear a collective cheer from the back of the room.

THE COURT: Or at least a sigh of relief.

MR. GUNNERSON: Again, Your Honor, Spencer Gunnerson on behalf of MacDonald Highlands Realty, Michael Doiron, the real estate agent, and FHP Ventures.

We've talked a lot about view and privacy and easement, and I'll note again that that was also part of our argument in our motion. And so I would ask that insofar as you take that issue under advisement on their matter, that at least as to that part of our argument, will probably likely have to be taken under advisement as well. So I won't go over that again.

The claims against my clients range from -- range from misrepresentation, unjust enrichment, negligent -- fraudulent misrepresentation, statutory disclosure violations, as well as the easement, which I won't talk about.

And yet this is ripe for summary adjudication at this time. The reason being, and as we've put in our motion

papers, the Rosenburgs bought this property as-is. They knew when they bought it that there were problems potentially with this property. They, in fact -- they -- they really wanted this property. They made aggressive efforts to buy it.

THE COURT: Um-hum.

MR. GUNNERSON: They -- in fact, before it was ever even listed, they were seeking to get it. They -- this was what they wanted, and they wanted it as soon as possible.

In fact, it began with an original Letter of Intent. And I think it's -- it's important to note that original Letter of Intent states that the buyers would be obligated to conduct all necessary studies and that would include zoning, as well as other environmental construction, marketable, feasibility and title. They presented very -- from the get-go, look, we'll get this as-is and we'll conduct -- we'll do the due diligence on this and we'll figure out what it is we have.

They were put off for a time so it could be listed. But eventually, when they did their final offer in March of 2013, again, they reiterate that they will take the property as-is.

Now, Mrs. Rosenburg has stated and her counsel has argued that when she said -- they said they were taking the property as-is, they meant, you know, the structure. That -- that if -- if there was a hole in the wall, they would deal

with it, or if there was a broken tile, that was on them.

But that's not the extent of an as-is property. You take it with all its defects. And I would note that Mrs. Rosenburg testified in her deposition that she considers this sale of the property to Mr. Malek as a defect in the property. They took -- they took as-is, and they should not now be able to walk away from -- from having taken the property as-is.

Furthermore, in -- as they proceed on with the litigation -- or excuse me, as they proceeded on with the purchase, they signed the Purchase Agreement. Now, not only did they say they'd buy it as-is, not only did they say we'll do the due diligence on issues, including zoning, they continued to say that they will waive claims against the brokers and their agents.

This is a piece of property people don't know a lot about, and they're willing to waive -- again, "Buyer waives all claims against brokers or their agents for defects in the property." But not just that, they say, it only has to do with the property though, not outside the property.

But they also waive it as it pertains to the property's proximity to freeways, airports or other nuisances. So obviously, it's -- expands outside the property, these defects potentially could. The zoning of the property. Factors related to buyer's failure to conduct walk-throughs, inspections and research are also waived.

Well, we're claiming that they had the ability to research. In fact, they took it upon themselves to be obligated to do the research as it pertains to this property. And they failed to do one important thing, and that was to look at the zoning of this property. They failed to go to the City of Henderson, look at a map. A short drive from MacDonald Highlands and take a look at it. They failed to go online for five minutes, and in that five minutes be able to pull up a map.

And if they had done that, what they would have seen is what we attached to our reply, which is, residential property that extends beyond what they believed Malek's property to be. They had the ability to do this. They waived any claims against my clients in an effort to get this property as quickly as possible.

Not only did they waive these rights in the Purchase Agreement, these rights to bring claims, they did it then again in an addendum. In fact, that addendum is even -- I think is even broader and more applicable in this situation.

Now, that -- Section 1 of the addendum, which applies not just to the seller. If you'll look at the last paragraph of the addendum, or of Section 1 of the Addendum, it says that it also applies to brokers -- well, it says it applies to implied parties, and implied parties is identified as my clients, brokers and agents.

And that Section 1 says that they waive to the fullest extent permitted by the law any claims arising out of or relating in any way to encroachments, easements, boundaries, shortages, or any other matter that would be disclosed or revealed by a survey or inspection of the property or search of public records.

Zoning maps are public records. They have waived their claims for anything that could have been revealed from a search of the public record. This case should be over as it pertains to my clients. I don't know why my clients are required to continue on in this matter when they affirmatively and actively waived those rights.

Now, in their opposition they say, well, you've cited law that says, you know, we can only waive facts that we know about. No, that's not what it says. It's a -- waiver has to do with rights that you know about.

THE COURT: Um-hum.

MR. GUNNERSON: We're talking about the Rosenburgs. We're talking about multiple homes. Mrs. Rosenburg, 25 years of real estate experience, over 500 sales she testified doing. They knew what they were giving up when they signed here. They knew the rights they were giving up. They knew the claims they would be able to make, otherwise that they were giving up, by not searching the public records when they signed this document. They knew it. So they are very well

aware of what was -- what was happening.

Additionally, in that Section 1, the damages are limited. So even if somehow they can make it past this idea that our waiver doesn't apply, or their waiver doesn't apply, and they can still bring claims regarding this public record that they should have reviewed and they didn't, their damages are limited to $5,000.

And so as a -- as a -- you know, I would say as an alternative, although I don't think we even get there -- this -- they should be limited this time to understand that that's all they get from my clients.

Now, they've made some arguments and said well --

THE COURT: That -- does that apply to all defendants or some of the defendants?

MR. GUNNERSON: That applies to the seller -- that would also apply -- I would argue, although Bank of America has -- doesn't seem -- have a horse in this motion -- that would apply, I believe, to the seller as well.

THE COURT: Um-hum.

MR. GUNNERSON: That's -- I think that was the language in that document. They have stated, well, Michael Doiron should have disclosed it. She knew about it. Well, let's talk about what the facts really say. And I -- there's no dispute with this. Michael Doiron was aware that a property -- that a sale was pending for Mr. Malek. She knew

that. But she did not know -- she has stated that she doesn't remember when she found out the zoning was changed. She doesn't remember. So any statement that she knew before they bought the property, there's simply nothing to base that claim on.

She knew that the property lines were going to be changed, but she didn't have the new final map yet. The final map showing the change in the lot lines was finalized after the Rosenburgs bought the property. So any representation they say she's making where she's showing him a final map --

THE COURT: Um-hum.

MR. GUNNERSON: -- and they're saying, well, this is from 2004, well, that was the only final map available, was that one from 2004. She discloses that zoning -- that they -- that the zoning information she's given -- they signed a zoning disclosure statement. She hands it to them and on there in bold it says, this is current as of 2000 -- I think it was February 2010. If you want more information, go to the City of Henderson. They didn't care.

You know, I bought a home 10 years ago, three-story, a little -- on a postage stamp, big empty lot behind me. I was so eager to get into a house I didn't even look at it. Didn't even consider it. I thought, communities all around me. I'm going to get a neighborhood behind me. This will be great. A year-and-a-half later I had a tropical smoothie

drive through right behind my backyard. Was that on me? Yes. And I took responsibility for that, because I did not check the zoning of that property.

THE COURT: It sounds like plaintiff's counsel might get a new client.

MR. GUNNERSON: That's potential. It depends how she does today.

But in any event -- in any event, there is -- so then they say, well, she should have still disclosed these issues. Well, we don't have evidence that she knew the zoning had actually changed yet. We know the final map hadn't been done yet. But any duty to disclose, which they cite to, it's mitigated by the fact that this was an as-is property. And as-is properties, the duty to disclose is limited.

Now, it's limited, and it's in our briefing, there's still a duty to disclose if the information is unavailable to the buyer.

THE COURT: Um-hum.

MR. GUNNERSON: Now, here we have public records showing a zoning change, showing that this property that they're very concerned about was made residential. That was available to them. They had availability to that information, and therefore, there's -- the duty to disclose is mitigated, eliminated, quite frankly, all together.

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So in any event, Your Honor, as we've stated, this waiver is express, it's direct. I believe if you confined that, in fact, this waiver, they should live by what they waived and my client should be dismissed. I think that there's no reason to keep us in because of the fact that the easement issue, which we've been tied to, doesn't apply the real estate company or the real estate agent.

THE COURT: Um-hum.

MR. GUNNERSON: Unjust enrichment wouldn't apply in that case. And therefore, we're requesting that there be a summary adjudication dismissing my clients from this -- from this matter.

THE COURT: Okay.

MR. GUNNERSON: Thank you.

MS. HANKS: I'm struggling with the fact that they want to say on the one hand that the Rosenburg Trust waived any defects, nuisances, and you're stuck. And on the other hand, hey, that meaningless scrub piece of land, don't worry that it's changed, it's meaningless. It doesn't change your house. It can't be a defect and a nuisance that Rosenburg Trust waived, and at the same time be meaningless and not affect the value of the Rosenburg Trust. It's one or the other.

And the bottom line is, they did not waive anything with respect to restrictive covenants or surrounding areas of

the community. It was just the as-is only relates to 590 Lairmont Place (phonetic) and that specific lot, those lot lines, those zoning for that lot, the residential zoning, nothing to do with the surrounding area, the golf course. Those are all believing -- they've bought that property believing all that's going to stay the same. They had no reason to believe that they had to research the zoning of a golf course, in a community that was advertised as a golf course.

THE COURT: Well, is that -- is that really enough to get around the duty, the due diligence duty?

MS. HANKS: I believe so, Your Honor, because they're trying to put -- they're trying to ignore their duties under the statutes to disclose material relevant facts affecting the property and imposing some type of duty of detective on the Rosenburg Trust, when the Rosenburg Trust would have no reason to believe there was going to be anything different. Because you have to understand, the golf course is set, unlike -- you know, I appreciate Mr. Gunnerson's situation. That's not evidence. But when he's buying property, it's not yet built.

But when the Rosenburgs bought this particular property --

THE COURT: Right. You don't want to dis your --

MS. HANKS: My future client.

THE COURT: -- potential client.

MS. HANKS: That this property was not built -- or at least not purchased in a community that was not yet built. The golf course was there, it was in place. The surrounding lots were in place. The house on this lot was even built. Some of the other lots were unbuilt up. But their -- this particular property that the Rosenburg Trust purchased already had the house constructed.

So there really is no reason and when looking at that landscape to say, okay, no one has told me anything about the surrounding area so now I'm going to go down to the zoning -- City of Henderson, look up the zoning and make sure the lot next to me is going to be what? They had every expectation that the lot next to it was going to be a residential lot and that someone was going to build a home there. There was no reason for them to look at the zoning of the golf course because the golf course was already in place, everything was designed already. There was no suggestion there was construction there or any changes there.

And so that's where they ignore their duties. And I want to address that. The -- NRS 645.252 imposes a duty on a real estate agent to disclose material and relevant facts affect or relating to the property. And they want to classify the zoning and the changing of the lot lines, the sale of the golf parcel as immaterial or minor. I think, in fact, the

zoning applications were even classified that change as minor, and even state in there, it doesn't affect any surrounding property owners, which is, that's the issue of fact that we contend was not true and that was misleading.

And it intimates when someone is using those types of terms, minor, immaterial, it intimates that you know that if you don't classify this that way, then you did have a duty. Because if it's material or major then you do have a duty under the statute.

And that's where, again, we're at a Motion for Summary Judgment phase. A jury, upon hearing those facts, could reasonably differ and say, yes, this fact was material. It was relevant and it did affect the Rosenburg property and you should have disclosed it.

Now, they're going to argue it wasn't, but that's -- the fact finder has to determine that. That is not an issue that can be determined summarily.

The next duty to disclose is under the statute for the seller, NRS 645.259, they have a duty to correct, if they know their seller is making misrepresentations. And Bank of America, on the seller disclosure form, made several misrepresentations. The one representation, the major misrepresentation they made was there was no expected construction around the surrounding areas. Well, that's not true. They even made a very basic misrepresentation about the

property being subject to CC&Rs. And it was the Rosenburg Trust's own agent who had to point it out.

So it just goes to show you that this was almost a robotic type of situation where a seller is just checking things off and Michael Doiron was not doing her job under the statute and making sure her seller was not making incorrect disclosures.

And it's really -- that's what it comes down to, Your Honor. They want to avoid liability and attach this as-is condition of the property and say that's -- affects everything around you.

And even though Doiron and MacDonald Realty is the party with this knowledge, they can tell the Rosenburgs at any time about this, they want to say, well, we didn't have liability even though we're the party with all the knowledge, but you, Rosenburg Trust, with no knowledge, no reason to doubt anything was wrong with the surrounding area, you had a duty to go and figure this out on your own.

And I would also suggest, Your Honor, if they -- even if they did have a reason to look at the zoning, all they would have seen is a change in zoning. Mr. Malek's purchase was not finalized until after the Rosenburg Trust purchased their property.

So all they would have seen is a change in zoning; no change in lot lines, no purchase by Mr. Malek, no

suggesting Mr. Malek was going to build his house on the lot. It still would not have even given them all the information.

Now, may it have raised some questions? Certainly. But again, they had no reason to even consider looking at the zoning of the golf course that was already in place since 2000. It's in place, it's constructed, there's no evidence that it's going to change at any time.

And when Ms. Doiron is handing over maps that still show the current zoning as a golf course, they certainly have no basis to go and play detective. She's the party with all the knowledge. She should have disclosed it.

And finally, Your Honor, with regard to the waiver argument, it's not just -- the case they cited is the State University v. Sutton, it's 120 Nev. 972, and they stated in their motion, it says, "Recognizing that a waiver is valid where made with knowledge of all material facts." That's the case they cited. And the Rosenburgs just did not have knowledge of all the material facts. But Michael Doiron did, and MacDonald Realty did, and they chose not to disclose it, and that's why we're here.

And to the extent that the Rosenburg Trust does not get the equitable relief, the implied restrictive covenant, that they're entitled then to damages. Even if they get the implied covenant, they're entitled to damages, because they had to bring the lawsuit to preserve the value of their

property because they did not make these disclosures.

And that's why this issue should go before a jury to determine all of these issues.

MR. GUNNERSON: They shouldn't have waived their rights to any claims on information that can be found in the public record. Why did they have a reason to search the public record regarding all aspects of their property? Because they said if they didn't they're waiving the rights to them. That's why. It's that simple.

They say waiver cannot happen unless you have all material facts. They didn't have them. But they had access -- first of all, materiality is not at issue in this -- in our motion. That would -- whether or not it is or is not material is ultimately going to be a question of fact. That does not have to be decided here. It was not presented in our motion and it was not presented in our reply. It doesn't matter. What matters is they had access -- if it is material, as they claim, they had access to it.

And they say, you know, all it would have shown is a change; that map we show at the back of our reply that shows what would have come up if they'd gone, taken what the City of Henderson said would be less than five minutes to look at, they would see out of the blue this residential property that jets out. And plaintiff's counsel is right, it would have definitely raised questions and required them to look further

into what was going on and then they could have found out what was happening.

What else actually leads them to the need to look -- check out zoning, Your Honor? Apparently, as a result of this case, this piece of bare land, according to their client, made the property worth zero. If this had such weight and would have affected their complete decision, and their -- the way they valued this property, I would think that would be the first thing they would do, would see what the zoning was like around their property if how the property is kept and who owns what.

Mr. Malek's lot was bare next to them. He hadn't built yet. They were on notice that there was going to be development coming. Who know when? Development, what does that mean? How much? How far in the future? They say, well, there were misrepresentations made regarding water. Whether they were or weren't, it was discovered by the -- before the close and it was agreed that they were okay with it.

And their third misrepresentation has directly to do with the issue that could be found in the public record, and that is the change of the zoning.

So, look, they bought it as-is. They could have had the knowledge that would have led them to understand what they were dealing with.

Now, they brought up the fact that Michael Doiron

had a duty to disclose material issues. We cited the McIntosh (phonetic) case and we believe and would submit that the McIntosh says, yes, unless it's an as-is property, in which case, if they had the ability to check that then, in fact, that duty is no longer there.

They also cite to 645.259. They conveniently, as we've noted in our reply, don't reference section 2. Section 2 actually limits the duties in cases where -- where information was available as a matter of public record. So the two issues they say, well, disclosure should still be an issue and Michael Doiron should still remain, just don't hold any water.

They -- at the beginning they said, we're trying to argue two points. There is a such thing as meaningless defects. So they -- they say we can't claim there's a defect that's meaningless or that's meaningless and a defect at the same time. Sure, we can. If -- we think it's meaningless. They're calling it a defect. Insofar as it's a defect, they had the ability to discern that and discover that and therefore, Your Honor, we would ask that you grant our Motion for Summary Judgment.

THE COURT: Okay.

MR. GUNNERSON: Thank you.

THE COURT: I'm going to put this with the -- with the other motion.

Except I have one more question for plaintiff's counsel and that is, who determines the materiality?

MS. HANKS: Of the disclosure?

THE COURT: Yeah.

MS. HANKS: The jury.

THE COURT: So you think that's a jury issue?

MS. HANKS: I do.

THE COURT: And you have instructions in mind --

MS. HANKS: Yes.

THE COURT: -- that are tested in time in the Nevada courts that the --

MS. HANKS: I don't know if I can guarantee Nevada courts, but --

THE COURT: Oh.

MS. HANKS: -- but --

THE COURT: You're going to branch out?

MS. HANKS: But yes, I do believe that that -- that would be the issue of fact, of whether that particular disclosure -- whether it was material; yes, Your Honor.

THE COURT: Okay. Do you agree?

MR. GUNNERSON: I would agree that materiality is a question of fact --

THE COURT: Okay.

MR. GUNNERSON: -- for the trier. However, I would also emphasize significantly that the materiality has nothing

to do with our motion and that this motion can still be granted without a determination of materiality.

THE COURT: All right. Thank you. You'll get notified.

THE CLERK: So, under submission?

THE COURT: Yes. Submission until --

THE CLERK: Same date, June 29th?

THE COURT: -- yeah.

MS. HANKS: Thank you, Your Honor.

THE COURT: Um-hum.

MR. GUNNERSON: Thank you, Your Honor.

THE COURT: Thank you.

(Proceeding was concluded at 10:36 a.m.)

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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