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.	Electronically Filed Oct 13 2016 11:51 a.m. Tracie K. Lindeman Clerk of Supreme Court
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. A-13-689113-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

The Frederic and Barbara Rosenberg Living Trust (the "Trust") is a living trust. Frederic Rosenberg and Barbara Rosenberg are the trustees of the Trust. Plaintiff-Appellant was originally represented by Peter C. Bernhard, Esq. and Lisa J. Zastrow, Esq., of KAEMPFER CROWELL RENSHAW GRONAUR & FIORENTINO in the District Court action. On January 21, 2014, a Substitution of Counsel was filed, substituting Howard C. Kim, Esq., Diana S. Cline, Esq., and Jacqueline A. Gilbert, Esq. of Howard Kim & Associates as the Trust's counsel. Plaintiff-Appellant is currently being represented by Howard C. Kim, Esq., Diana Cline Ebron, Esq., Jacqueline A. Gilbert, Esq., and Karen L. Hanks, Esq. of Kim Gilbert Ebron f/k/a Howard Kim & Associates in this appellate action.

DATED this 12th day of October, 2016.

KIM GILBERT EBRON

/s/Karen L. Hanks, Esq.
KAREN L. HANKS, ESQ.
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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3(A)(b)(1), as the District Court, on August 13, 2015, entered: (1) a final order granting MacDonald Highlands Realty, LLC, Michael Doiron, and FHP Ventures'[1] (the "MacDonald Parties") Motion for Summary Judgment, written notice of which was served electronically on August 13, 2015 (12JA_2490-2503)[2]; and (2) a final order granting Shahin Shane Malek's ("Malek") Motion for Summary Judgment, written notice of which was served electronically on August 20, 2015. (12JA_2505-2525.)

On November 10, 2015, the District Court entered an order granting the MacDonald Parties Motion for Certification Pursuant to NRCP 54(b) and an order granting the MacDonald Parties' Motion for Attorneys Fees and Costs and Motion to Re-Tax Costs. (13JA_2775-2777.) Written notice of each which was served electronically on November 10, 2015. (13JA_2779-2789.) On January 13, 2016, the District Court entered an order granting Malek's Motion for Attorneys Fees and Costs and granting in part the Trust's Motion to Retax Costs, written notice of which was served electronically on January 20, 2016. (13JA_2817-2827.) On March 10, 2016, a stipulation and order was entered dismissing Bank of America, N.A., with

[1] FHP Ventures was erroneously sued as The Foothills Partners.
[2] Joint Appendix ("JA"). All citations to the JA will include the volume number followed by _page number, e.g. 1JA_0001.

prejudice, written notice of which was served electronically on March 18, 2016. (13JA_2834-2840.) On May 18, 2016, a stipulation and order was entered dismissing Malek's claim for slander of title against the Trust. (12JA_2842-2845.) On August 9, 2016, a stipulation and order was entered dismissing BAC Home Loans Servicing, LP with prejudice, written notice of which was served electronically on August 10, 2016. (Docket 70478, Document 2016-24779, Ex. 1)

The remaining parties were all dismissed prior to entry of the first final order granting summary judgment in the District Court case. Specifically, DragonRidge Properties, DragonRidge Golf Club, MacDonald Properties were dismissed by order entered on January 10, 2014 (1JA_0053-0054), Real Property Management Group was voluntarily dismissed on April 29, 2014 (1JA_0087-0088), and Paul Bykowski and Foothills at MacDonald Ranch Master Association were voluntarily dismissed on April 22, 2015. (Docket 70478, Document 2016-20089, Ex. 4.)

ROUTING STATEMENT

This matter arises from a real property lawsuit filed in the District Court. The District Court impermissibly granted summary judgment against Plaintiff-Appellant when it rejected Nevada law that recognizes the existence of an implied restrictive covenant for use; specifically, an implied restrictive covenant over the Dragon Ridge golf course in the master planned community of MacDonald Highlands (the "Golf Course"). As the District Court failed to do the appropriate factual analysis to determine if such an implied restrictive covenant existed in this case, the summary judgment orders entered against Plaintiff-Appellant should be reversed. Plaintiff-Appellant believes that this case should remain with the Nevada Supreme Court as opposed to being sent to the Court of Appeals because it raises an issue of statewide public importance: whether Nevada recognizes an implied restrictive covenant for use over golf courses in planned communities, especially where so many of Nevada's homeowners now live in common-interest communities surrounding golf courses and are induced to pay premiums for homes based on the master plan and platted golf course. NRAP 17(a)(14).[3] The outcome in this case could apply equally

[3] There is at least one other case pending before the United States District Court, District of Nevada that is dealing with this similar issue in the context of golf course property. *See* Hellerstein v. Desert Lifestyles, LLC, 2:15-cv-01804-RFB-CWH.

to other platted common elements in such common-interest, planned unit developments, e.g. parks and recreational centers. Thus, this case could impact the expectations of millions of Nevada homeowners in both Clark and Washoe counties who have purchased homes in communities with the promise of golf courses, parks, recreational areas, and the like.

Additionally, as an alternative claim, a jury determined an implied restrictive covenant did not exist, Plaintiff-Appellant sought recovery of damages in the amount of over $750,000.00, for loss of value of the subject property due to the broker and realtor's failure to disclose material facts that impacted the overall value of the property. NRAP 17(b)(2)(stating that judgments of less than $250,000 in a tort case are presumptively routed to the Court of Appeals).

ISSUES PRESENTED

1. Whether the District Court erred in determining that Nevada does not recognize implied restrictive covenants?
2. Whether the District Court erred in granting summary judgment in favor of the MacDonald Parties and Malek when Rosenbergs established the existence of an implied restrictive covenant over the Golf Course, or at a minimum, set forth issues of fact that should have precluded summary judgment in this case?
3. Whether the District Court erred in finding that the Rosenbergs waived the

MacDonald Parties' statutory and common law duty to disclose material facts?

4. Whether the District Court erred in granting summary judgment in favor of the MacDonald Parties on the issue of disclosure because issues of fact exist regarding the materiality of Malek's purchase of golf course property and the Rosenbergs' ability to discover this information absent disclosure?
5. Whether the District Court abused its discretion in granting the MacDonald Parties attorneys fees when the Offer was unreasonable in time and amount?
6. Whether the District Court abused its discretion in granting Malek attorneys fees when the Rosenbergs' claim was grounded in law, and therefore was not vexatious?
7. Whether the District Court abused its discretion in granting Malek attorneys fees without conducting a *Brunzell* analysis?
8. Whether the District Court abused its discretion in granting Malek attorneys fees even though Malek did not prevail on his counter-claim?

STATEMENT OF THE CASE

This is an appeal from orders granting summary judgment in an action to enforce an implied restrictive covenant running with land over a golf course in a masterplanned golf course community, or in the alternative, seeking compensatory damages for failure to disclose material facts about converting a part of the golf course into a residential development. This is also an appeal from orders granting attorneys fees pursuant to NRCP 68 and NRS 18.010.

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

On or about May 15, 2013, Fred and Barbara Rosenberg (the "Rosenbergs") purchased their retirement home located at 590 Lairmont Place, Henderson, Nevada 89012 (the "Home") from Bank of America, N.A. ("BANA").[4] (1JA_0142.) At about age 70, Fred, an avid golfer, loved the fact that the Home was located on the 9th hole of the Dragon Ridge Golf Course ("Golf Course"). (2JA_0303.) The Golf Course is located within a master planned community known as MacDonald Highlands, and opened for play in 2000. (6JA_1262-1263.) MacDonald Highlands markets itself as a premier golf course community. (6JA_1263.) Richard MacDonald

[4] The Rosenbergs took title of their Home through the Frederic and Barbara Rosenberg Living Trust. (2JA_0262.)

("MacDonald") developed MacDonald Highlands, and, for all intents and purposes, he remains the declarant-in-control under the community association's CC&Rs.[5] MacDonald is also a real estate broker who owns and operates MacDonald Highlands Realty. (2JA_0382.) Michael Dorion ("Doiron") worked for MacDonald as a licensed real estate agent at MacDonald Highlands Realty and represented BANA, the seller, in the Rosenbergs' purchase of the Home. (3JA_0556, 4JA_0676.)

When the Golf Course was sold in 2014 to Pacific Links, MacDonald testified that it would remain a Golf Course because "[t]hat's the condition of the community master plan." (6JA_1262-1263.) MacDonald testified that he always intended the Golf Course to be an amenity of MacDonald Highlands. (6JA_1264.) The MacDonald Highlands' website and other promotional materials also reference the Golf Course, and the community and plat maps reference the Golf Course. (7JA_1360-1364.)

[5] At the time of the Rosenbergs' purchase, DRFH Ventures, LLC, was the owner of the Golf Course, and MacDonald is the manager of DRFH Ventures, LLC. (6JA_1253,1264.) MacDonald is also the manager of The Foothills Development Company, which is the general partner for FHP Ventures, LLC. (6JA_1264.) FHP Ventures is the developer of MacDonald Highlands, and remains the declarant-in-control under the community association's CC&Rs. (*Id.*)

Likewise, the Golf Course is such an integral part of MacDonald Highlands that both the CC&Rs and the Design Guidelines reference the Golf Course and place restrictions on golf course parcels to preserve the integrity and value of those parcels. (6JA_1270-1306.) The CC&Rs burden all properties abutting the Golf Course with an easement for golf balls and golfers to enter the properties. (6JA_1306.) The Design Guidelines which govern undeveloped lots in MacDonald Highlands state:

> The community identity is further enhanced by an 18-hole championship golf course and destination resort. The golf course fairways meander throughout the neighborhoods within MacDonald Highlands, with many of the individual homesites featuring direct frontage on the course. In addition, significant view corridors to the golf course are provided at key locations along the community street system. (6JA1271-1272.)

The Design Review Committee is tasked with the authority "to protect and enhance owner value," and "preserve the natural character of the desert environment." (6JA_1271.)

When the Rosenbergs purchased their Home, the property adjacent to it, 594 Lairmont Place, owned by Respondent Shahin Shane Malek ("Malek"), was a one acre, empty dirt lot set back behind the 9th hole. (the "Malek Property"). (4JA_0737.) Malek purchased this lot on or about August 8, 2012. (1JA_0078.) MacDonald Highlands Realty and Dorion represented the seller in that sale. (3JA_0550.)

Unbeknownst to the Rosenbergs, at the same time that Malek purchased the Malek Property, he approached Dorion about purchasing 1/3 of an acre of the 9th

hole's in-play area that directly borders the Malek Property ("Golf Parcel"). (3JA_550.) Without the addition of the Golf Parcel to Malek's Property, express restrictive covenants imposing strict set-backs on all lots would require that any house built on the Malek Property sit next to the Rosenbergs' Home, in a contiguous line with the rest of the houses that border the Golf Course in accordance with the community plat map. (3JA_0466, 7JA_1552.) Malek believed that he could get around this restriction and increase his building envelope if he acquired part of the 9th hole. (*See* photo, 5JA_0146.) Such a house built with this increased building envelope would jut out substantially from the contiguous line of the houses bordering the Golf Course and detrimentally affect the property value of the Rosenbergs' Home. (*Id.*) Expert opinions disclosed by the Rosenbergs quantified the loss of value to the Rosenbergs' Home to be between $750,000.00-$1,000,000.00. (*See* 2JA_0279, 0285, 0413.) Ultimately, MacDonald agreed to sell the Golf Parcel to Malek "subject to" whatever restriction and conditions existed on the Golf Parcel. (3JA_0614; 7JA_1380.). Doiron represented both parties and wrote the contract for the sale of the Golf Parcel. (3JA_0550.)

As a term of the sale, MacDonald had to rezone the Golf Parcel from public/semipublic use to low-density residential. To accomplish this, MacDonald applied to the City of Henderson to amend MacDonald Highlands' comprehensive plan, change the public zoning, revise the land use, and vacate any utility easements.

(3JA_0551, 6JA_1163-1173.) In December 2012, the City of Henderson approved the zoning change. (6JA_1333-7JA_1343.) The physical maps with the City of Henderson reflecting the zoning changes to the Golf Parcel were updated on or about January 24, 2013. (3JA_0539.) However, these maps only showed the zoning change; they did not show any boundary line changes to the Golf Course or Malek's Property. (*Id.*)

At the time the Rosenbergs purchased the Home, both MacDonald and Doiron knew that the public zoning had been changed so Malek could build a house on what was still in-play area of the 9th hole. (3JA_0551.) Despite this, MacDonald Highlands Realty did not update its disclosure records to include current zoning and community maps that reflected the change made to the Golf Parcel. (3JA_0551.) It also failed to update the community map on its website to reflect the anticipated boundary line changes to the Malek Property, and it failed to update the topography table located in the MacDonald Highlands office to reflect the anticipated boundary line changes to the Malek Property. (3JA_0552.)

More importantly, even though she had intimate involvement in the sale of the Golf Parcel and knew about the zoning change, Doiron never disclosed to the Rosenbergs that part of the 9th hole bordering the Home would soon have a house built on it. (3JA_0556.) Instead, when Doiron showed the Rosenbergs a diagram of all of the lots in MacDonald Highlands, it showed no changes surrounding the 9th

hole. (2JA_0267-0268.) Moreover, during the due diligence period, Doiron intentionally misled the Rosenbergs by providing them with a binder that included outdated zoning maps while stating that it "contains the most recent zoning and land use information" for the subject property. (3JA_0554-0556; 6JA_1195; *see, also*, 2JA_0301-0302.) Furthermore, Doiron signed the Seller's Real Property Disclosure Form affirming full disclosure of any and all conditions and information known by the Seller that materially affected the value of the Rosenberg's future Home. (6JA_1211-1214.) Additionally, when the Rosenbergs conducted a visual inspection of their Home and the surrounding area, they did not observe anything that would indicate boundary line changes on the Golf Parcel or Malek's Property. (2JA_0266.)

Completely unaware that a residence was about to be built on the Golf Course directly in their backyard, on March 13, 2013, the Rosenbergs entered into a Purchase Agreement to buy their dream home. (3JA_0328-0338.) The Purchase Agreement contained a Waiver of Claims provision for the benefit of the seller (BANA) wherein the Rosenbergs acknowledged that the Home would be sold "as-is." (3JA_0335-0336.) The Rosenbergs understood "as-is" to mean "the structural problems that were inside the house, and the cosmetic problems that were inside the house." (2JA_0252.)

On April 8, 2013, Malek took legal title to the Golf Parcel. (3JA_0579-0580.) The final map delineating the new lot lines for Malek's Property, which now

included the Golf Parcel, was not recorded until June 2013, over four months after the Rosenbergs closed on their Home. (3JA_0545, 3JA_0620.) Upon learning this, the Rosenbergs brought the underlying action and sought to enforce the implied restrictive covenant limiting the use of the Golf Course, or in the alternative, monetary damages from MacDonald Highlands Realty and Dorion for their failure to disclose the change of the Golf Parcel into a residential lot. (1JA_0001-0021, 0089-0109.)

II. PROCEDURAL BACKGROUND

The Rosenbergs filed their Complaint seeking, among other claims, a declaration that an implied easement existed over the Golf Course which prohibited Malek from altering the Golf Course. (1JA_0019-20.) Thereafter, the Rosenbergs filed an Amended Complaint, and again alleged a claim for an implied restrictive covenant. (1JA_0105.) As part of this claim, the Rosenbergs alleged that the restrictive covenant "requires the Golf Parcel to be used as part of the 18-hole golf course and for no other purpose." (1JA_0105.) After the close of discovery, Malek filed a motion for summary judgment wherein he claimed that the Rosenbergs sought a view easement, and that Nevada does not recognize such an easement. (1JA-_0198.)

Despite the fact that the Rosenbergs denied seeking an easement for view, and reiterated time and time again they sought an implied restrictive covenant as to use,

the District Court accepted Malek's misinterpretation of the claim. (6JA_1124; 6JA_1369; 13JA_2866; 2868; 14JA_2931-35; 2937; 2977-2983; 3006; 3027; 3049.) This error permeated the District Court's decision granting Malek's motion for summary judgment, the MacDonald Parties' motion for summary judgment, and in awarding attorneys fees. (12JA_2466-2468; 2485.) This appeal followed.

SUMMARY OF ARGUMENT

This is a case about a retired couple, the Rosenbergs, buying a house on a golf course within a master planned community and discovering afterwards that a house was going to be built on a piece of the Golf Course directly bordering their Home. When the Rosenbergs sued to enforce an implied restrictive covenant limiting the use of the Golf Course, or in the alternative, to seek damages caused by the non-disclosure of the change in use of the Golf Course, the District Court found that Nevada does not recognize implied restrictive covenants, that there was no implied easement to light and air, and that the Rosenbergs waived all disclosures. The District Court compounded these errors by awarding the Respondents' attorneys fees, finding that the claim against Malek was vexatious and that the Rosenbergs should have accepted the MacDonald Parties' token offer.

To be clear, the Rosenbergs do not seek an easement as to light and air. Instead, the Rosenbergs seek to enforce the implied restrictive covenant which limits

the Golf Parcel to a use consistent with the Golf Course.[6] For example, prior to the sale to Malek, the owner of the Golf Course could have converted part of the 9th hole into a restroom for golf players. This would not have violated the implied restrictive covenant because this use, while unsightly and damaging to the view from the Rosenbergs' Home, would nevertheless still be consistent with the use of the land as golf course. Here, the Rosenbergs simply want the 1/3 acre of the 9th hole that was sold to Malek to continue to be used in a manner consistent with a golf course.

The concept of restricting/preserving land use relied on by the Rosenbergs has been recognized by Nevada since 1913 when this Court in *Shearer* recognized the concept of dedication or restrictive covenant. *Shearer v. City of Reno*, 36 Nev. 443, 136 P. 705 (1913). This Court reaffirmed this concept in 1965 in *Boyd v. McDonald*, 81 Nev. 642, 408 P.2d 717 (1965) (recognizing the concept of implied easement), and in 1968 in *Meredith v. Washoe Cnty. Sch. Dist.*, 84 Nev. 15, 17, 435 P.2d 750, 752 (1968) (stating a restrictive covenant is an easement or a servitude in the nature of an easement). Most importantly, while the principal of "an implied easement[/covenant] arises by operation of law, the existence of an implied easement[/covenant] is generally a question of fact." *Jackson v. Nash*, 109 Nev.

[6] The Restatement Third defines "restrictive covenant" as "a negative covenant that limits permissible uses of land." Restatement (Third) of Property, Servitudes, § 1.3(3) (2000).

1202, 1208, 866 P.2d 262, 267 (1993).

Despite this precedent, the District Court made a series of errors in granting summary judgment in favor of the MacDonald Parties and Malek. **First**, the District Court erred in finding that Nevada does not recognize implied restrictive covenants, and that the Rosenbergs were seeking a view easement. **Second**, the District Court erred in granting summary judgment because at a minimum, genuine issues of material facts exist regarding whether the Golf Course is burdened by an implied restrictive covenant. Actually, the facts of this case heavily favor the existence of an implied restrictive covenant. The Golf Course is the central identity of MacDonald Highlands; one does not exist without the other. The plat maps show the Golf Course at the heart of MacDonald Highlands. All parcels within MacDonald Highlands that abut the Golf Course were plotted to maximize views of the Golf Course, city, desert landscape, and mountains. The Golf Course has been in continuous operation since the parcels were first plotted and continues to be advertised as an essential amenity of MacDonald Highlands. The Golf Course is such an integral part of MacDonald Highlands that both the CC&Rs and the Design Guidelines reference the Golf Course and place restrictions on golf course parcels to preserve the value and integrity of those parcels. Finally, as consideration for being on the prestigious 9th hole in the premier master planned community of MacDonald Highlands, the Rosenbergs paid a premium of $2.3 million for their Home.

Together, these facts support finding the existence of an implied restrictive covenant—a concept long recognized by Nevada law—over the entire Golf Course. Once again, this is not a case about a claim to air and light. This is a case about an essential part of the consideration for buying in a master planned community (here a golf course) that adds materially to the value of every lot and benefits all persons who purchase and/or purchased property in MacDonald Highlands, such that the law recognizes the land use as a covenant which runs with the land. *See Shearer*, *supra*.

Third, the District Court failed to recognize a realtor's statutory duty to disclose material facts pursuant to NRS 645.252, and that this duty is not waivable. The District Court also failed to recognize a realtor's common law duty to disclose, and that issues of fact exist regarding whether the MacDonald Parties failed to disclose material facts affecting the Rosenbergs' Home. **Fourth**, the District Court erred in granting attorneys fees to the MacDonald Parties because it failed to do a *Beattie* analysis, the Offer was not reasonable in time and amount, and the Rosenbergs' rejection of the Offer was not grossly unreasonable. **Finally**, the District Court erred in granting attorneys fees to Malek under NRS 18.010 because (1) the Rosenbergs' claim against Malek was not frivolous or vexatious; (2) the Court failed to conduct a *Brunzell* analysis; and (3) Malek did not prevail on his counter-claim.

Accordingly, this Court should (1) reverse the District Court's orders granting summary judgment and attorneys fees, and (2) remand for trial the issues of whether an implied restrictive covenant exists and should be enforced, and whether the MacDonald Parties violated their statutory and common law duty to disclose.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews orders granting summary judgment de novo, without deference to the findings of the lower court. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Summary judgment is only appropriate when the pleadings and other evidence on file demonstrate that "no genuine issue of material fact exists[] and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. at 731, 121 P.3d at 1031. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.*; *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (same). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. at 729, 121 P.3d at 1029.

A district court's award of attorneys fees is reviewed for abuse of discretion. *Bower v. Harrah's Laughlin, Inc*., 125 Nev. 470, 493, 215 P.3d 709, 726 (2009) (citing *Barozzi v. Benna*, 112 Nev. 635, 638, 918 P.2d 301, 303 (1996)); *see also Rivero v. Rivero*, 125 Nev. 410, 440, 216 P.3d 213, 234 (2009).

IV. THE DISTRICT COURT ERRED IN FINDING THAT NEVADA DOES NOT RECOGNIZE IMPLIED RESTRICTIVE COVENANTS.

This Court must reverse the District Court's orders; otherwise every Nevada homeowner who has ever purchased property in a master planned community risks losing the benefit of the bargain they paid for, just as the Rosenbergs did in this case.

The majority of the Las Vegas housing market is made up of master planned communities. As part of these communities, certain promises are made; promises regarding parks, pools, walking paths, golf courses, and other common area amenities. Buyers pay a premium to live in a master planned community because of these various amenities, and the developer/seller in turn, promises that the community will remain as advertised.

Here, that promise was broken and the District Court erred in not acknowledging that an implied restrictive covenant exists over the Golf Course.

A. Nevada Law Has Historically Recognized Implied Restrictive Covenants.

The principal of implied restrictive covenants was first recognized by Nevada in 1913, in *Shearer v. City of Reno*, 36 Nev. 443, 136 P. 705 (1913), and has been

continually recognized thereafter. *See*, *Montesa v. Gelmstedt*, 70 Nev. 418, 270 P.2d 668 (1954); *Cox v. Glenbrook Co.*, 78 Nev. 254, 371 P.2d 647 (1962); *Charleston Plaza, Inc. v. Board of Education, Las Vegas Union School District*, 79 Nev. 476, 387 P.2d 99 (1963); *Boyd v. McDonald*, 81 Nev. 642, 408 P.2d 717 (1967) ("an easement by implication is, in effect, an easement created by law"); *Meredith v. Washoe County School Dist.*, 84 Nev. 15, 435 P.2d 750 (1968); *Brooks v. Jensen*, 87 Nev. 174, 483 P.2d 650 (1971); *Hynds Plumbing & Heating Co. v. Clark County School Dist.*, 94 Nev. 776, 587 P.2d 1331 (1978); *Alrich v. Bailey*, 97 Nev. 342, 630 P.2d 262 (1981) ("In Nevada, an easement may be created by express agreement, prescription, or implication."); *Valley Motor, Inc. v. Almberg*, 106 Nev. 338, 792 P.2d 1131 (1990); *Jackson v. Nash*, 109 Nev. 1202, 866 P.2d 262 (1993) ("It is well-settled that an easement may be created by implication without a written instrument."); *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001) (abrogated on other grounds); *Brooks v. Bonnet*, 124 Nev. 372, 185 P.3d 346 (2008).

In *Shearer*, the plaintiff sought to quiet title to a triangular piece of property bordering three streets in Reno, which he had purchased. *Shearer*, 136 P. at 706. This land, as well as the surrounding land, was owned by C.C. Powning ("Powning"). When Powning began selling off the property, he induced buyers by assuring them that the land in dispute would remain undeveloped. *Id.* at 707. The

City of Reno contended that an implied restrictive covenant or dedication (term used when land is for public purposes) existed over the area in dispute, which prohibited the plaintiff from building on the area. The Court found that an irrevocable implied restrictive covenant existed because the area was plated on the map as open area, and used to induce purchasers to buy property in that area. *Id.* at 708. The Court reasoned that,

> The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser…This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in the deed, but, as appurtenant to it, **an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights.** The grantor could no more recall this easement and covenant that he could recall any other party of the consideration. They added materially to the value of every lot purchased.

Id. (emphasis added).

In *Boyd*, building off of *Shearer*, the Court noted there are three essential elements to an implied easement: "(1) unity of title and subsequent separation by a grant of the dominant tenement; (2) apparent and continuous use; and (3) the easement must be necessary to the proper or reasonable enjoyment of the dominant tenement." *Boyd*, 81 Nev. at 647, 408 P.2d at 720. The Court further noted that necessity really means "intent," and explained that "'the reason that absolute necessity is not essential is because fundamentally such a grant by implication

depends on the intention of the parties.'" *Id.* at 648, 408 P.2d at 720, *quoting Marshall v. Martin*, 139 A. 348 (Conn. 1927). The Court stated that the inquiry is "what a reasonable grantee would be justified in expecting as a part of his bargain when he purchases land under the particular circumstances." *Id.* 408 P.2d at 721. As such, the Court stated that "reasonable necessity may be restated in terms of reasonable expectation." *Id.* at 649, 408 P.2d at 721. The Court further recognized that "[i]f an easement is created by implication at the time of initial severance, it then vests, and, absent evidence of termination, it cannot be diminished or abridged." *Id.* at 650, 408 P.2d at 722.

In addition to recognizing implied restrictive covenants, Nevada has also held that "[i]f an easement is created by implication at the time of initial severance, it then vests, and, absent evidence of termination, it cannot be diminished or abridged." *Boyd*, at 650. Moreover, "[a] zoning ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to invalidate restrictive covenants merely because of a zoning change." *Western Land Co. Ltd. v. Truskolaski*, 88 Nev. 200, 206, 495 P.2d 624, 627 (1972), *citing Rice v. Heggy*, 322 P.2d 53 (Cal. Ct. App. 1958).

Here, the District Court completely ignored long-established Nevada precedent when it found Nevada law does not recognize implied restrictive covenants.

B. The District Court Should Have Applied the *Shearer* and *Boyd* Analyses.

Had the District Court applied the *Shearer* standard, or even the *Boyd* elements, it would have found that an implied restrictive covenant exists over the Golf Course. Once again, the standard under *Shearer* is whether the area is platted and used to induce purchasers to buy property in that area. *Shearer*, 136 P. at 708. Here, the plat map recorded for MacDonald Highlands clearly shows the Golf Course. (7JA_1363.) Not only does the plat map show the Golf Course, but the actual Golf Course was in operation beginning in 2000. (6JA_1263.) Without doubt, the Golf Course was used to induce purchasers, like the Rosenbergs, to purchase property in MacDonald Highlands as the community was advertised as a premier golf course community. (2JA_0354, 3JA_0586.) Just like in *Shearer*, the Rosenbergs bought more than just the lot and house located at 590 Lairmont Place. They bought the surrounding area, and paid a premium for it. This surrounding area, the Golf Course, was used to induce the Rosenbergs to purchase property within MacDonald Highlands, and as such, was an "essential part of the consideration" paid for the Home. MacDonald himself even recognized this when he stated, "[w]e'll be adding foliage in certain places to beautify the course and upgrade the clubhouse … [o]ur community has some of the biggest, most expensive homes in the valley…I'm looking forward to increasing the quality of the club for our residents because it's a

focal point of the community and it's why a lot of people come to this community in the first place."[7]

Even under the *Boyd* test, an implied restrictive covenant exists here. *Boyd*, 81 Nev. at 647, 408 P.2d at 720; *Jackson*, 109 Nev. at 1209-1211, 866 P.2d at 268. With regard to the first element, it is indisputable that "unity of title and subsequent separation by a grant of the dominant tenement" exists in this case. Richard MacDonald ("MacDonald") is the individual who controlled all the companies relevant to this transaction. (6JA_1253, 1255, 1264.) He owned the dominant parcel and developed it into MacDonald Highlands, then severed the land into common areas such as the Golf Course and residential lots. Accordingly, the first element of *Boyd* is satisfied.

With regard to the second element, "apparent and continuous use," the Golf Course was open for play in 2000. (6JA_1263.) In other words, the Golf Course was in use for 13 years prior to Malek purchasing part of it. While Malek claimed the part sold to him was merely leftover land having nothing to do with the Golf Course, in actuality, the evidence shows that the 1/3 acre was part of in-bound play for the 9th hole and consisted of a desert palate approved by MacDonald Highlands.

[7] Ann Friedman, *Developer who sold DragonRidge Country Club now buying it back*, LAS VEGAS REVIEW JOURNAL online article, February 25, 2016, available at http://www.reviewjournal.com/business/developer-who-sold-dragonridge-country-club-now-buying-it-back.

(6JA_1265-1267.) Having lived in MacDonald Highlands since 2006, this use was readily apparent to Malek. In fact, neither Malek nor the MacDonald Parties could deny the continuous use of this land because they went through a lengthy re-zoning process knowing the area was not zoned for residential use. Moreover, both the community map and the plat map show the Golf Course. (6JA_1363.) Also, the Golf Course is such an integral part of MacDonald Highlands that both the CC&Rs and the Design Guidelines reference the Golf Course and place restrictions on golf course parcels to preserve the value and integrity of those parcels. (6JA_1270-1306.)

The "apparent and continuous use" element is further evidenced by the fact that MacDonald Highlands was and continues to be advertised as a golf course community, and when the Golf Course was sold in 2014 to Pacific Links, Richard MacDonald testified that it would remain a golf course because "[t]hat's the condition of the community master plan." (2JA_0353-0354; 6JA_1262.) In fact, MacDonald testified that he always intended the Golf Course to be an amenity of MacDonald Highlands. (6JA_1264.) Since this testimony, Pacific Links sold the Golf Course back to MacDonald. In explaining why he repurchased the Golf Course, MacDonald stated that it was vital for him to buy back the Golf Course because "[i]t's important that the golf course stays the way we left it when I sold it to keep

the integrity of the community."[8] Taken together, the evidence overwhelmingly shows that the "apparent and continuous use" element of *Boyd* is satisfied.

As to the third and final element, "necessary to proper or reasonable enjoyment," the *Boyd* Court explained that the inquiry is "what a reasonable grantee would be justified in expecting as a part of his bargain when he purchases land under the particular circumstances." *Boyd*, 81 Nev. at 648, 408 p.2d at 721. As such, the Court stated that "reasonable necessity may be restated in terms of reasonable expectation." *Id.* at 649. In the present case, the Rosenbergs paid a premium of $2.3 million for the Home, because of its location on the 9th hole of the Golf Course in the premier community of MacDonald Highlands. (6JA_1308-1318.) The Rosenbergs relied on the fact that MacDonald Highlands is a master planned community specifically designed around the Golf Course. (6JA_1261.) The community map showed the Golf Course at the heart of MacDonald Highlands, and the Golf Course was advertised as a community amenity. (6JA_1263.) Additionally, the Design Guidelines which govern undeveloped lots in MacDonald Highlands state:

> The community identity is further enhanced by an 18-hole championship golf course and destination resort. The golf course fairways meander throughout the neighborhoods within MacDonald Highlands, with many of the individual homesites featuring direct frontage on the course. In addition, significant view corridors to the golf

[8] *See* n.6, *supra*.

course are provided at key locations along the community street system. (6JA_1271-1273.)

Thus, when the Rosenbergs paid this premium, they rightfully expected that the area surrounding their Home would remain the same, i.e. all portions of the Golf Course would continue to be used in a manner consistent with a golf course. But if no implied restrictive covenant exists over the Golf Course, then the Rosenbergs purchased A, but really got B. This is the exact reason why implied covenants are recognized by Nevada, and other jurisdictions.

In fact, this same covenant that protects the Rosenbergs also protects Malek and every other homeowner in MacDonald Highlands from the Golf Course changing into anything other than a golf course. If no implied restrictive covenant exists over the Golf Course, then the developer can sever and sell off parts of the Golf Course at will to any interested party without any restrictions as to what happens with the land after it is sold. Again, the Rosenbergs do not contend the sale to Malek was improper; just that when he purchased a portion of the Golf Course, he purchased it "subject to" the covenant that the land remain a golf course. This is no different than the burden found on the residential lot that Malek purchased within MacDonald Highlands, which is similarly subject to the restrictive covenants found in the community's CC&Rs and the Design Guidelines.

Again, the crux of this case (and really the purpose behind enforcing the restrictive covenants), is getting what you paid for, and ensuring what you paid for

remains that way. The Rosenbergs paid a premium for their Home because of its location on the Golf Course, and equity dictates that the Golf Course surrounding the Rosenbergs' Home remain golf course property. As such, the third element of *Boyd* is satisfied.

To sum up, the facts in this case outright prove that an implied restrictive covenant exists which prohibits the land from being used as anything other than a golf course. At a minimum, the evidence shows that genuine issues of material fact exist as to whether an implied restrictive covenant burdens the Golf Course because, under Nevada law, "the existence of an implied easement[/covenant] is generally a question of fact." *Jackson*, 109 Nev. at 1208, 866 P.2d at 267.

In addition to failing to find that genuine issues of material fact exist, the District Court further erred in making findings as to facts that were clearly disputed. (7JA_1369; 12JA_2489).

As such, the District Court erred in granting summary judgment against the Rosenbergs. The District Court's grant of summary judgment must be reversed and remanded for trial on whether a restrictive covenant exists over the Golf Course.

C. Several Other Jurisdictions Have Recognized Implied Restrictive Covenants in the Context of a Golf Course

New Mexico, Nebraska, Washington, Oregon, Arizona, Alabama, and the Eleventh Circuit have all recognized the legal principal of an implied restrictive

covenant in the context of a golf course.[9]

New Mexico dealt squarely with the issue of implied restrictive covenants in the context of a golf course, and applied the same reasoning as *Shearer* and its progeny. *Ute Park Summer Homes Association v. Maxwell Land Grant Company*, 427 P.2d 249 (NM 1967). In *Ute Park*, the defendant owned 160 acres of land in Cimarron Canyon. *Id.* at 251. The defendant prepared plat maps which divided the area into several lots, roads and a golf course. *Id.* The plat map was never recorded, but was distributed and used in connection with the sale of the lots. *Id.* Prospective purchasers were told that a golf course would be constructed. *Id.* After all the lots were sold, defendant undertook to sell the "golf course" area without any restrictions, which prompted the subject lawsuit. *Id.* at 252. The Court found that

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[9] *See Ute Park Summer Homes Association v. Maxwell Land Grant Company*, 427 P.2d 249 (NM 1967); *Skyline Woods Homeowners Association, Inc. v. Broekemeier*, 758 N.W.2d 376 (Neb. 2008); *Riverview Community Group v. Spencer & Livingston*, 295 P.3d 258 (Wash. 2013) (holding Washington law recognizes implied equitable servitudes limiting the use of land); *Mountain High Homeowners Ass'n v. J.L. Ward Co.*, 209 P.3d 347 (Or. 2009) (adopting the Restatement (Third) of Property: Servitudes § 2.10 (1998) approach to equitable or implied servitudes); *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682 (Ariz.App.1984) (finding implied restrictive covenant that land be used only as a golf course because of common plan of development); *Heatherwood Holdings, LLC v. First Commercial Bank*, 61 So. 3d 1012, 1026 (Ala. 2010)(finding that Alabama recognizes or will imply a restrictive covenant as to a golf course constructed as part of a residential development); *In re Heatherwood Holdings, LLC v. HGC, Inc.*, 746 F.3d 1206, 1219 (11th Cir. 2014) (affirming bankruptcy court's finding that an implied restrictive covenant exists over the golf course which requires the property to be used only as a golf course, and prohibits selling the property as residential lots).

"where land is sold with reference to a map or plat showing a park or like open area, the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated." *Id.* at 253. The Court explained that

> The rationale of the rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do.

Id.

The *Shearer* Court used similar language when it stated:

> The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser…This was an essential part of the consideration.

Shearer, 136 P. at 708.

Nebraska also dealt with the issue of an implied restrictive covenant existing over golf course property. *Skyline Woods Homeowners Association, Inc. v. Broekemeier*, 758 N.W.2d 376 (Neb. 2008). In *Skyline*, Liberty Building Corporation purchased a golf course in a Chapter 11 bankruptcy. *Id.* at 380. When Liberty attempted to develop the golf course for other purposes, the homeowners objected claiming an implied restrictive covenant existed that required the property to remain as a golf course. *Id.* The golf course was constructed first, and then a residential community was designed around the golf course. *Id.* The promotional materials for the community boasted the proximity to the golf course and the original

developer testified that the golf course was the "center and the heart" of the residential development project. *Id.* Additionally, the Declaration of Protective Covenants governing the residential community placed restrictions on lots abutting the golf course, and created an easement to allow golf balls to enter a homeowner's property. *Id.* at 382-383.

The *Skyline* Court recognized that "[i]f there is common plan of development that places restrictions on property use, then such restrictions may be enforced in equity." *Id.* at 387. The Court further defined "implied restrictive covenant" as a "covenant which equity raises and fastens upon the title of a lot or lots carved out of a tract that will prevent their use in a manner detrimental to the enjoyment and value of neighboring lots sold with express restrictions in their conveyance." *Id., quoting McCurdy v. Standard Realty Corporation*, 175 S.W.2d 28, 29 (Ky. 1943). The Court looked to other jurisdictions who had found the existence of implied restrictive covenants where there was a common scheme or plan, but no express covenants in the chain of title, including *Ute Park. Skyline,* 758 N.W.2d at 388-390 (analyzing *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682 (Ariz.App. 1984) (finding implied restrictive covenant that land be used only as a golf course because of common plan of development) and *Ute Park*, 427 P.2d 249 (NM. 1967)).

The *Skyline* Court concluded that homeowners who bought property relying on the proximity and existence of the golf course should be protected, and that an

implied restrictive covenant existed requiring that the golf course be used only as a golf course, and this covenant burdens and runs with the golf course property. *Skyline*, 758 N.W.2d at 390. The Court found there was ample testimony to support the existence of a common scheme of development. *Id.* Specifically, the developer testified he "owned both the golf course property and the developmental property adjacent to the golf course, and he testified that he developed the residential lots in the subdivision 'specifically with the belief and it panned out that the lots would be more valuable if there was a successful golf course—actually a country club." *Id.* The developer "also testified that the golf course was the 'center and the heart' of the residential development project…that when he sold the golf course property, he sold it to a buyer, American Golf, that he was sure would maintain the golf course." *Id.* Moreover, the developer testified that he "sold the residential lots using advertisements that centered around the existence of the golf course and country club. [The developer] testified that the marketing plan for the sale of the residential lots 'was an elegant or country club or leisure lifestyle." *Id.*

The Court also noted that "[s]everal homeowners whose homes abut the golf course testified that they bought their property and paid a premium price for the property because of the proximity of the golf course and the lifestyle offered." *Id.* Finally, the Court also factored in that each homeowner had restrictions/easements against their property in connection with the golf course. *Id.*

Just like Nevada in *Shearer* and its progeny, all of these jurisdictions recognized that the "essential part of the consideration" was the area surrounding the property purchased and that by virtue of designing, developing, advertising and platting a golf course, all to induce people to purchase property surrounding the golf course, an implied restrictive covenant existed that ensures the golf course will always remain a golf course.

V. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE ROSENBERGS.

A. The District Court Erred in Finding that the Rosenbergs Waived the MacDonald Parties' Statutory and Common Law Duties to Disclose

The MacDonald Parties had both a statutory and common law duty to disclose that (1) there was a pending purchase agreement between Malek and DRFH Ventures, LLC for the purchase of golf course property; (2) this purchase altered Malek's lot lines; and (3) the golf course portion being sold to Malek was re-zoned for residential use. NRS 645.252 provides in pertinent part:

> A **licensee** who acts as an agent in a real estate transaction:
>
> 1. **Shall disclose to each party** to the real estate transaction as soon as is practicable:
>
> (a) **Any material and relevant facts**, data or information **which the licensee knows**, or which by the exercise of reasonable care and diligence should have known, **relating to the property which is the subject of the transaction**.

(Emphasis added).

NRS 645.255 states "no duty of a licensee set forth in NRS 645.252 or 645.254 may be waived." *See Davis v. Beling*, 128 Nev. ___, ___, 278 P.3d 501, 511 (2012). As such, the District Court erred in finding that the Rosenbergs waived this statutory duty.

Further, the Nevada Real Estate Division Residential Disclosure Guide states that "**Sellers** . . . are **responsible for disclosing material facts**, data **and other information** relating to the property they are attempting to sell.[10] (Emphasis added). Additionally, "a real estate licensee is required to provide a form setting forth the duties owed by the licensee."[11] The form provides in pertinent part:

> A Nevada real estate licensee shall:
> 1. Not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent, or dishonest.
> 2. Exercise reasonable skill and care with respect to all parties to the real estate transaction.
> 3. Disclose to each party to the real estate transaction as soon as practicable:
> a. **Any material and relevant facts**, data or information **which licensee knows**, or **with reasonable care and diligence the licensee should know, about the property**.

Id. (Emphasis added).

[10] The Guide can be found on the Nevada Real Estate Division website, *available at*:red.nv.gov/uploadedFiles/rednvgov/Content/Publications/References/RDG_oct2015%2032booklet.pdf.

[11] Per NRS 645.193, this form is distributed to licensees and "sets forth the duties owed by a licensee who is acting" for one or more parties in a real estate transaction. *Available at* red.nv.gov/uploadedFiles/rednvgov/Content/Forms/525.pdf.

Under Nevada common law, even in instances where a property is sold "as-is," a seller must disclose "facts materially affecting the value or desirability of the property which are known or accessible only to [the seller and where the seller] knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer." *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 632, 855 P.2d 549, 552 (1993) (setting forth standard where a claim may arise even where property is sold "as is"). The Rosenbergs dispute the "as is" language contained in the purchase agreement for their Home can shelter a realtor, as it is intended to protect the seller, BANA—but even so, the court erred in finding that the Rosenbergs waived this duty because even contracts with "as is" language require a seller to disclose material facts.

B. The District Court Erred Because Material Issues of Fact Exist as to Whether the MacDonald Parties Breached Their Duties of Disclosure

The MacDonald Parties admitted that the issue of whether a fact relating to property was "material" was an issue of fact for a jury. (14JA_2967.) This alone is grounds to reverse the District Court's order. If that were not enough, the Rosenbergs offered sufficient evidence to overcome summary judgment and showed issues of material fact existed as to whether Malek's purchase of golf course property and the effect of such purchase was "material" and therefore required disclosure. Specifically, genuine issues of material fact exist as to (1) the meaning

and applicability of the "as-is" provisions in the purchase agreement; (2) the extent and impact of Barbara Rosenbergs' California real estate experience; (3) whether the Rosenbergs could have discovered Malek's secret purchase; and (4) whether Malek's secret purchase, and the resulting re-zoning and lot line change, was a material fact affecting the Rosenbergs' Home.

First, the "as is" provisions of the purchase agreement (upon which the Court so heavily based its erroneous decision) create issues of fact. Every single "as is" provision in the documents pertain ***only*** to the condition of the Rosenbergs' Home and **not** to the Golf Course, the Golf Parcel purchased by Malek, the re-zoning of the Golf Parcel, or the change in lot lines of Malek's Property. (2JA_0313, 2JA_0326, 2JA_0335-0336.) In addition to the documentary evidence, Barbara Rosenberg testified that she understood "as is" in terms of "the structural problems that were inside the house, the cosmetic problems that were inside the house." (2JA_0252.) Therefore, at worst, the meaning and application of the "as is" provisions created issues of fact.

Second, the District Court improperly made a factual determination that Barbara Rosenberg's California real estate experience absolved the MacDonald Parties of their duty to disclose material facts. Whether Barbara Rosenberg's real estate experience impacted any of the elements under either NRS 645.252 or *Mackintosh*, at worst, creates an issue of fact, and therefore the District Court erred

in granting summary judgment against the Rosenbergs.

Third, issues of fact exist regarding the Rosenbergs' ability to discover Malek's secret purchase. The MacDonald Parties never disclosed the sale of the Golf Parcel to Malek. (2JA_0267.) In fact, Doiron showed the Rosenbergs a diagram of all of the lots in MacDonald Highlands, and the diagram did not show the sale of the Golf Parcel to Malek. (2JA_0267-0268.) Furthermore, as of December 8, 2014 the topography map in the MacDonald Realty office still did not reflect the sale of the Golf Parcel and the change to Malek's lot lines. (2JA_0268.) The Rosenbergs never learned of the sale of 1/3 of an acre of the 9th hole from the MacDonald Parties; instead, they learned of the Golf Parcel sale from a third party approximately one to two months *after* they purchased their Home. (2JA_0273.)

Additionally, when the Rosenbergs conducted a visual inspection of their Home and the surrounding area, they did not observe stakes on the Golf Parcel, (2JA_0266), or anything else that would have led them to believe the Golf Course had been altered. Furthermore, Dorion signed and disclosed the Zoning Classification and Land Use Disclosure, required by NRS 113.070 (4)-(5), which stated that it "contains the most recent zoning and land use information." (2JA_0348.) Despite her statutory duty to provide the most current information, Dorion knowingly provided outdated and inaccurate zoning information. As such,

issues of fact exist as to the Rosenbergs' ability to discover Malek's secret purchase and the subsequent rezoning of the Golf Parcel.

Finally, Malek's purchase of Golf Parcel altered his lot lines, thereby allowing him to increase his building envelope, which in turn impairs the value and affects the desirability of the Rosenbergs' Home. (2JA_0379-0380, 3JA_0621-0623.) Expert opinions disclosed by the Rosenbergs quantified these damages at $750,000.00-$1,000,000.00. (2JA_0279, 2JA_0285.) Additionally, Malek's purchase of 1/3 of an acre of the 9th hole involved re-zoning that area from golf course use to residential use. (2JA_0381.) All of these facts were material and relevant to the Rosenbergs because the re-zoning was a prerequisite to Malek's lot line changes, which detrimentally altered the value of the Home that the Rosenbergs purchased. When the Rosenbergs purchased their Home, they purchased it based on the understanding that the surrounding area (i.e. the 9th hole of the Golf Course) would remain intact. The MacDonald Parties argued the re-zoning and the change in lot lines were immaterial or minor, but the mere description of the transaction as "minor" or "immaterial" proves that the MacDonald Parties acknowledge a material issue of fact exist. Whether the sale of the Golf Parcel to Malek was minor (immaterial) or major (material) is an issue of fact for the jury, and therefore the District Court erred in granting summary judgment against the Rosenbergs.

While these issues of fact are merely a snapshot of the plethora of issues of fact that surround the Rosenbergs' claims, they alone are sufficient to reverse the District Court's order.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEYS FEES TO THE MACDONALD PARTIES

When exercising discretion to award attorneys fees based on an offer of judgment, courts must consider:

> (1) whether plaintiff's claim was brought in good faith, (2) whether defendants' offer of judgment was reasonable and in good faith in both its timing and amount, (3) whether plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith, and (4) whether fees sought by offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-589, 668 P.2d 268, 274, (1983), *quoting* NRCP 68.

The *Beattie* Court also emphasized that offer of judgment provisions "should not be used as a mechanism to unfairly force plaintiffs to forgo legitimate claims." *Frazier v. Drake*, 131 Nev. ___, 357 P.3d 365, 371-372 (Nev.Ct.App. 2015), *citing Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. Although no one factor under the *Beattie* analysis is determinative,[12] the *Frazier* Court noted that the first three factors of the *Beattie* analysis:

> [R]equire an assessment of whether the parties' actions were undertaken in good faith. Specifically, the district court must determine whether the plaintiffs claims were brought in good faith, whether the defendant's

[12] *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998).

> offer was reasonable and in good faith in both timing and amount, and whether the plaintiffs decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.

Frazier, 357 P.3d at 372.

Here, despite the absence of any *Beattie* analysis, the District Court granted the MacDonald Parties motion seeking attorneys fees. In its Order, the District Court made no findings as they relate to the *Beattie* factors. Indeed, the District Court did not even state the basis for its fee award, noting only that "Defendants' Motion for Attorney Fees and Costs is hereby GRANTED pursuant to the offer of judgment served on Plaintiff on January 29, 2015." (13JA_2775-2777.) Such an Order is insufficient to support an award of attorneys fees.

Under somewhat similar circumstances, in *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), this Court reversed and remanded an order granting attorneys fees because the district court did not make any factual findings as to the basis of its attorneys fee award:

> Nothing in the record indicates that the district court attempted to determine if there was any credible evidence or a reasonable basis for Ms. Rivero's motion to disqualify. Because the chief judge did not hold a hearing or make findings of fact, no evidence demonstrates that Ms. Rivero's motion was unreasonable or brought to harass. Therefore, we conclude that the district court abused its discretion….

Rivero, 125 Nev. at 441, 216 P.3d at 234.

Similarly, here, the District Court failed to issue an order that included findings. Moreover, the District Court's pronouncements at the hearing included only a brief, extremely inadequate statement:

> 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. … 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 give 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. (14JA_3041-3042.)

If that were not enough, the MacDonald Parties' Offer was not reasonable/made in good faith in both timing and amount. The Offer was made on January 29, 2015. At that time, with the exception of written discovery and a few depositions, the bulk of the discovery was still outstanding. Without this discovery, the Rosenbergs could not possibly analyze the Offer in an effective and meaningful way. Not only was the timing unreasonable and in bad faith, but so too was the amount, which was for the nominal amount of $25,000.00. This case dealt with real property that the Rosenbergs paid $2.3 million to purchase. The Rosenbergs would not have pursued their claims, and incurred significant amount of attorneys fees if

they truly believed their claim was only worth $25,000.00 or somewhere in that range. In fact, at the time of the Offer, the Rosenbergs had already identified its real estate experts who, after conducting an independent poll on the effect of Malek's purchase of the Golf Parcel, opined that the Rosenbergs had suffered between $750,000.00 --$1,000,000.00 in loss of value to their Home. (2JA_0279, 2JA_0285.) Clearly, the Rosenbergs believed, and rightfully so, that much more than $25,000 was at stake here.

Other jurisdictions have held that where an offeror makes a nominal offer simply for the potential of recovering attorneys fees and costs down the road and not in an effort to actually resolve the dispute at issue, the offeror should not be permitted to recover attorneys fees and costs. *See Arrowood Indemnity Co. v. Acosta, Inc.*, 58 So.3d 286 (Fla.Dist.Ct. 2011) (analyzing similar offer of judgment rule as Nevada); *Warr v, Williamson*, 195 S.W.3d 903, 907 (Ark. 2004) (finding that a $1.00 offer was not a good faith offer of judgment and was made only to recover sanctions against the plaintiff); *Foreign v. DBA Holdings, Inc.*, 787 A2d 966, 967-68 (N.J. Super. Ct. App. Div. 2002) (recognizing that although the statute did not expressly prohibit nominal or token offers, such offer undermined its purpose to encourage settlement).

In the present case, given the magnitude of the damages calculated by the Rosenbergs' experts, as well as the price paid by the Rosenbergs (a premium for the

value of being on the 9th hole of the Golf Course), the Offer of $25,000.00 can only be viewed as a nominal offer not really intended to encourage settlement. Simply put, the Offer was made in bad faith. The analysis is was the Offer reasonable at the time it was made, and here it was not.

Additionally, the Rosenbergs' rejection was not grossly unreasonable or in bad faith. While key discovery was yet to be completed, the Rosenbergs knew that the MacDonald Parties had actual knowledge of Malek's purchase and rezoning of the Golf Parcel, yet failed to disclose this material information. This is a case of meritorious claims for fraud, negligent misrepresentation, and violation of statutory and common law duties which damaged the Rosenbergs up to $1,000,000.00 in devaluation of their Home, not to mention attorneys fees. Given the huge range between the Offer and the damages the Rosenbergs intended to board at trial, it was not grossly unreasonable to reject the Offer. In fact, the *Frazier* Court, upheld a district court's same finding when the difference in figures was not so drastic. Specifically, the plaintiffs in that case had $81,459.46 and $125,714.84 in medical expenses respectively, but rejected offers in the amount of $50,000.00 and $70,001.00 respectively. Certainly, if rejection of offers that were only $30,000.00-$50,000,00 different from a party's actual damages was not grossly unreasonable, the Rosenbergs' decision to reject an offer that was $975,000.00 lower than their claimed damages cannot be grossly unreasonable.

Moreover, even the District Court waffled on its decision. Specifically, the District Court noted, "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." (14JA_2988.) The District Court even went so far as to say, "I 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." (14JA_2989.) If after having the benefit of full briefing, after the close of all discovery, and oral argument, the District Court still grappled with its decision, the Rosenbergs' decision to reject an offer made well before the completion of the case for a nominal amount could not be deemed grossly unreasonable.

For all intents and purposes, the Offer here was a defense verdict offer. In other words, to accept the Offer, the Rosenbergs would have had to believe that they had no chance of success on their claims against the MacDonald Parties. But the Rosenbergs would have never pursued costly and time intensive litigation if they truly believed they had no meritorious claims against the MacDonald Parties. Thus, any reasonable person would have rejected the nominal offer of $25,000.00, and therefore it was not grossly unreasonable for the Rosenbergs to reject the Offer.

For all of these reasons, the District Court abused its discretion in awarding attorneys fees to the MacDonald Parties

VII. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEYS FEES TO MALEK

The District Court erred in granting attorneys fees to Malek under NRS 18.010 because (1) the Rosenbergs' claim against Malek was not frivolous or vexatious; (2) the District Court failed to conduct a *Brunzell* analysis; and (3) Malek did not prevail on his counter-claim.

A. The Rosenbergs' Claim Against Malek was Not Frivolous or Vexatious.

Under the long-standing American Rule, each party pays its own attorneys fees. One policy reason supporting the rule is to encourage parties to legitimately "vindicate their rights," without fear of being penalized. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407, (1967). It has been well recognized that just because litigation is uncertain at best, one should not be penalized for merely defending or prosecuting a lawsuit. *Id*. Under Nevada law, an exception to this general rule is NRS 18.010(2)(b), which allows for the award of fees only when a party brings a claim without reasonable ground or to harass.

As evidenced by the text of NRS 18.010, this exception to the general rule should only be exercised "to punish and deter **frivolous or vexatious actions**. In other words, if a party's claim was reasonably grounded in law, and not brought for

any reason other to resolve a genuine dispute, then fees are not warranted. The determination of whether a claim is brought without reasonable ground is made at the time of filing. *Rivero*, 125 Nev. at 441, 216 P.3d at 234, *citing Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995). "'If an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of fees.'" *Duff v. Foster*, 110 Nev. 1306, 1309, 885 P.2d 589, 591 (1994) (*overruled on other grounds by Halbrook v. Halbrook*, 114 Nev. 1455, 1460-1461, 971 P.2d 1262, 1266 (1998)), *quoting State, Dep't. of Health & Rehabilitative Servs. v. Thompson*, 552 So.2d 318 (Fla. Dist. Ct. App. 1989).

Thus, in order to support an award of attorneys fees to a prevailing defendant, a district court must make a finding that the claim at issue was brought for purposes of harassment or was without reasonable ground when filed, and that finding must be supported by evidence. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 495, 215 P.3d 709, 726 (2009) ("[T]here must be evidence supporting the District Court's finding that the claim or defense was unreasonable or brought to harass.") (*citing Semenza*, 111 Nev. at 1095, 901 P.2d at 687)*; see Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486-487, 851 P.2d 459, 464 (1993) (same).

Here, the evidence establishes that the Rosenbergs claims against Malek were well-grounded in Nevada law, and not brought to harass Malek, but instead, brought to resolve a genuine property dispute that if left unresolved resulted in damage to the

Rosenbergs to the tune of $1,000,000.00.

The District Court even agreed stating:

> 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 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. (14JA_305503056.)

These comments cement the notion that the litigation was not brought or maintained without reasonableness grounds. Specifically, the District Court indicated, "I have labored over this because this is obviously of supreme importance to the parties…" and even recognized, "[m]aybe I'll be wrong and if so then we'll be back and you'll be retrying the whole thing." (14JA_2983.) The District Court further noted, "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." (14JA_2988.) The District Court even went so far as to say, "I 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." (14JA_2989.) These comments demonstrate that this case was in no way groundless.

If the District Court, even after making its decision, still considered changing its mind, the claims brought by the Rosenbergs must be considered reasonably grounded. Otherwise, the decision of the District Court would have been easy, and not involved any doubt whatsoever. But such was not the case—and the fact that the District Court recognized the seriousness of the claims shows that the Rosenbergs did not bring baseless claims and certainly did not bring their claims to harass Malek.

Despite this, the District Court granted Malek's request for attorneys fees and costs under NRS 18.010(2)(b) on the basis that the Rosenbergs lacked reasonable grounds to maintain the litigation, even if it initially had reasonable grounds to file suit. In so doing, the District Court completely ignored the determination in *Foster* that if an action that was not frivolous when initiated later becomes frivolous, an award of fees is not supported. The District Court made this clear:

> 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. (14JA_3057.)

Essentially, in granting attorneys fees to Malek, the District Court went directly against prior case law and the legislative intent of the statute, all while acknowledging valid grounds for bringing the suit initially. The inquiry should have

ended there. But to suggest the Rosenbergs should have anticipated the motion for summary judgment would be granted (even though the District Court itself was waffling on its own decision after making it), and that this would be the basis for finding unreasonableness, flies in the face of Nevada law. For these reasons, the District Court abused its discretion in awarding attorneys fees to Malek.

B. The District Court Failed to Conduct a *Brunzell* Analysis

The District Court failed to conduct a *Brunzell* analysis and its award must be overturned. To determine the reasonableness of attorneys fees, the court must analyze the list of factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Specifically, the Court considers: (a) the qualities of the advocate; (b) the character of the work to be done; (c) the work actually performed by the lawyer; and (d) the result. *Id*. at 349, 455 P.2d at 33. Here, Malek provided completely redacted invoices to support his request for fees. (13JA_2720-2759.)

Thus, the Rosenbergs were deprived of any meaningful opportunity to challenge the fees, making it impossible for the District Court to analyze the fees under *Brunzell*. *See Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151–152 (D.C. Cir. 1997) (explaining that a party asserting a claim for attorneys' fees is obligated to "disclose the billing statements itemizing those fees in [their] entirety . . . . [A party] may opt to withhold billing statements under a claim of attorney-client privilege; however, where [the] assertions of a privilege results in the withholding

of information necessary to [the opposing party's] defense to [the] claim against it, the privilege must give way to [the opposing party's] right to mount a defense."); *In re Stisser*, 818 N.W.2d 495, 509–10 (Minn. 2012) (affirming district court's denial of attorneys' fees because redacted invoices "did not supply the [opposing party] with any documentation on which to make a reasoned decision"). Even though the Rosenbergs highlighted this deficiency, (13JA_2770-2771), the District Court ignored it. In so doing, the court never conducted a *Brunzell* analysis but merely said it found the fees to be "reasonably incurred," despite having no descriptions of the work done. (13JA_2812.) Therefore, the District Court abused its discretion in granting Malek's motion.

C. Malek Did Not Prevail on His Counter-claim.

Malek's motion for summary judgment was two-faceted: it asked for summary judgment as to the Rosenbergs claims and it asked for summary judgment on his own counter-claim for slander of title. (1JA_0199.) The District Court, however, denied Malek's motion for summary judgment on his counter-claim. (12JA_2469-2470.) Despite this, the District Court never determined what fees pertained to the prevailing part and what fees pertained to the non-prevailing part. Instead, the District Court arbitrarily set the date of calculation as the date the motion was filed and thereafter. (13JA_2810-2815.) This was error. *See Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 773 (8th Cir. 2000) (holding that a plaintiff who

prevails on only some of his claims is not entitled to any fees for unsuccessful, unrelated claims and, if the success on the prevailing claims is limited, then he is "'entitled only to an amount of fees that is reasonable in relation to the results obtained'" (*quoting Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997))).

Because Malek's award of fees included fees incurred for an issue he did not prevail on, the District Court abused its discretion in awarding Malek his entire fees from the date of filing the motion for summary judgment.

CONCLUSION

In granting summary judgment in favor of the MacDonald Parties and Malek, the District Court improperly found that Nevada does not recognize implied restrictive covenants, it improperly found that the Rosenbergs waived a non-waivable statutory duty, and it ignored issues of material fact that existed regarding the MacDonald Parties' common law duty of disclosure. Moreover, the District Court abused its discretion when it granted the MacDonald Parties and Malek attorneys fees.

Accordingly, as to the orders granting the motions for summary judgment, this Court should reverse and remand with specific instructions that Nevada does recognize implied restrictive covenants; that the statutory duty of disclosure is not waivable; and that issues of fact exist regarding the MacDonald Parties' statutory

and common law duties of disclosure. As to the orders granting attorneys fees, this Court should reverse and vacate said orders.

DATED this 12th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 46 pages long, and contains 12,537 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

…

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of October, 2016. Electronic service of the foregoing **Appellant's Opening Brief** shall be made in accordance with the Master Service List as follows:

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Dated this 12th day of October, 2016.

/s/ Karen L. Hanks
An employee of KIM GILBERT EBRON