IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC AND BARBARA ROSENBERG LIVING TRUST, Appellant/Cross-Respondent, vs. MACDONALD HIGHLANDS REALTY, LLC, A NEVADA LIMITED LIABILITY COMPANY; MIC Respondents/Cross-Appellants.	Supreme Court No. 69399 District Court Case No. A689113
THE FREDERIC AND BARBARA ROSENBERG LIVING TRUST, Appellant, vs. SHAHIN SHANE MALEK, Respondent.	

RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL

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RULE 26.1 DISCLOSURE

The undersigned counsel of record hereby 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.

Respondents MacDonald Highlands Realty, LLC, FHP Ventures, LP, and Michael Doiron (collectively referred to herein as "MacDonald") are all represented in this action by Kemp, Jones, & Coulthard, LLP. MacDonald Highlands Realty, LLC is a Nevada Limited Liability company. FHP Ventures, LP, is a Nevada limited partnership. No publicly-held company owns 10% of more of either MacDonald Highlands, LLC or FHP Ventures, LP. Michael Doiron is an individual currently residing in Nevada.

Dated this ____ day of December, 2016.

KEMP, JONES & COULTHARD, LLP

_____

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ROUTING STATEMENT

This matter should properly be assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(2) and 17(b)(7). While Appellant argues that a potential judgment of $750,000 *could have* been awarded by the trial court below, it was not. Fees and costs were granted to Respondents in a judgment in the amount of $141,043.24; therefore, the limit of $250,000 in NRAP 17(b)(2) is not met and this case should be presumptively routed to the Court of Appeals. Similarly, injunctive relief was denied when the district court granted summary judgment, rendering NRAP 17(b)(7) applicable.

Although the Trust further argues that its brief may address a legal issue that potentially has statewide importance because it could affect homeowners in Nevada, the same could be said of almost any appeal to this Court, and the Trust fails to distinguish why the issue of an alleged implied covenant rises to this level of importance, particularly given the fact that the implied restrictive covenant is not a topic of first impression before this Court. Further, there are other issues in the case that either diminish consideration of this issue or negate entirely the Court's need to address it.

ISSUES PRESENTED ON APPEAL

1. Nevada law provides that "[n]ondisclosure by the seller of adverse information concerning real property generally will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.'" *Mackintosh v. Jack Matthews & Co.*, 855 P.2d 549, 552 (Nev. 1993). Further, purchasers of real property "are charged with all knowledge that they actually had, as well as any knowledge that would have been discovered by reasonable inquiry." *Id*. at 553. Here, Appellant Frederic and Barbara Rosenberg Living Trust ("the Trust") insisted upon an "as-is" sale of the subject property, then signed an agreement providing that the property would be sold "as-is," along with a 12-day due diligence period for the trust to discover potential defects in and around the subject property. Did the district court err in granting summary judgment on the Trust's claims on the basis that the subject property was sold "as-is"?

2. In construing a contract, Nevada courts interpret the provisions of that contract by the "plain and ordinary meaning of its terms." *See Century Sur. Co. v. Casino W., Inc.*, 677 F.3d 903, 908 (9th Cir. 2012), *certified question answered*, 329 P.3d 614 (Nev. 2014). This Court has further recognized that it is "not free to modify or vary the terms of an unambiguous agreement." *All Star Bonding v. State*, 62 P.3d 1124, 1126 (Nev. 2003). The Purchase Agreement for

the Trust's property contained a bolded, capitalized waiver that, among other things, limited the Trust's post-closing damages for claims arising from or related to the purchase to $5,000.00, and the district court recognized this fact and cited it as a basis for summary judgment.

(a) May the Trust challenge on appeal this decision, which it has not discussed or argued in its Opening Brief?

(b) Did the district court err in interpreting and enforcing the Purchase Agreement, along with the waiver and limitation of remedies, according to the plain and ordinary meaning of its language?

3. "Nevada has expressly repudiated the doctrine of implied negative easement of light, air and view for the purpose of a private suit by one landowner against a neighbor." *See also Probasco v. City of Reno*, 459 P.2d 772, 774 (Nev. 1969). Both the Trust's Complaint and the testimony of Barbara Rosenberg indicate that the basis of their claims in this case are that the Trust's neighbor will build on property that previously belonged to the adjoining golf course and "the view at the SUBJECT PROPERTY will be substantially altered." *See*, *e.g.*, Joint Appendix ("JA") 1:97 (emphasis original). Did the district court err in granting summary judgment on the Trust's claims on the basis that Nevada does not

recognize an easement or implied covenant to maintain the view from the Trust's property?

4. A contractual waiver is valid where made with knowledge of all material facts, and it is intentional and voluntary. *See State, Univ. & Cmty. Coll. Sys. v. Sutton*, 103 P.3d 8, 18 (Nev. 2004). Barbara Rosenberg testified that, prior to signing the Purchase Agreement on behalf of the Trust, she thoroughly reviewed all of the terms of that Agreement, which included multiple waivers. JA 12:2480-81, 335-36, and 1501-03. She also testified that she could have, but did not, change any provision of that Agreement. JA 2:256. Did the district court properly grant summary judgment where there is no record that any Trust representative ever objected to any term of the Purchase Agreement, and therefore that any waiver therein was knowing, intentional and voluntary?

5. This Court has written that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981). In the briefs and in the hearing before the district court regarding summary judgment, the Trust never argued that Michael Doiron's duties under NRS § 645.252 were not waivable. The Trust now attempts to make that argument part of its appeal before this Court. Has the Trust waived its right to argue

waivability of statutory disclosure duties by failing to bring that point before the district court?

6. NRS § 645.252 is a statute designed to ensure that a realtor discloses material facts to parties who do not have that knowledge of those facts in a real estate transaction. In construing a statute like this one, this Court "considers the statutory scheme as a whole and avoids an interpretation that leads to absurd results." *State v. Tatalovich*, 309 P.3d 43, 44 (2013). Here, Respondent Doiron made a zoning map disclosure that gave the Trust sufficient information regarding zoning and potential future development of neighboring properties as well as how to obtain additional information regarding zoning. JA 2:348. Further, the Trust took upon itself a contractual duty of due diligence to discover any issues it subjectively found unacceptable with the property. JA 2:333-34 and 2:335-36. Did the district court err in granting summary judgment where the Trust's suggested enforcement of § 645.252 would lead to the absurd result of a party with inquiry notice, as well as a contractual obligation of due diligence, recovering from a realtor who actually *did* make a disclosure resulting in the inquiry notice?

7. A district court that awards fees should consider the factors of *Beattie v. Thomas*, 668 P.2d 268 (Nev. 1983) before doing so. Here, the briefs and oral argument before the district court indicate that the *Beattie* factors were extensively

argued to, and considered by, the district court, who granted the motion, but did not reiterate the *Beattie* factors in its order. The form and content of the order were approved by the Trust's counsel without objection.

(a) Did the district court abuse its discretion in granting attorney fees by considering those factors, but not including them in the text of its actual order in addition to what was already in the record?

(b) Did the Trust waive its right to challenge the form and content of the order granting attorney fees by approving that form and content of that order without objection?

ISSUE PRESENTED ON CROSS-APPEAL

Nevada law provides that all judgments, including judgments for attorney fees, accrue post-judgment interest. *See*, *e.g.*, *Waddell v. L.V.R.V. Inc.*, 125 P.3d 1160, 1167 (Nev. 2006) and NRS § 17.130(2). Did the district court err in failing to enter the requested amended judgment providing for post-judgment interest, despite granting an order in favor of MacDonald for $141,043.24 in fees and costs?

STATEMENT OF THE CASE

This is not a cutting-edge case regarding the recognition of implied easements or covenants under Nevada law. As decided by the district court on

Respondents' motion for summary judgment, this case involved the purchaser of real property (the Trust) not only agreeing, but insisting, to purchase that property "as-is" from a seller represented by Michael Doiron of MacDonald Highlands Realty, LLC. JA 2:313 and 2:326. As part of the Purchase Agreement for the subject property, which Barbara Rosenberg testified she carefully reviewed "in detail" and agreed to,[1] the Trust expressly agreed that it was not relying on Doiron's statements in making its decision. JA 2:335-36. It also agreed multiple times to waive all claims related to or arising out of the purchase of the subject property, and, to the extent any claims existed, to limit its remedies to $5,000. *See id*. and JA 7:1501. Even assuming none of those facts were present, the Trust fails to mention the very real zoning map disclosure (discussing land use in surrounding parcels and "probable indication for future development") made by Michael Doiron, in the record as JA 2:348, which the Trust then completely failed to investigate any further despite the notice imputed by that document. That is also an important fact because had the Trust even done the most rudimentary Internet research, it undisputedly would have discovered the alleged "defect" of which it now complains. JA 3:539 at 27:17-28:11. And finally, even if the Trust were able to navigate past all of those case-dispositive facts, it would still wrestle with a

[1] JA 2:256 (Barbara Rosenberg deposition at 89:1-17).

basic problem: the reason Appellant has objected to building on its neighbor's land is that the trust's borrowed view would be affected. Because, as a matter of basic and time-tested law, Nevada does not recognize easements for view,[2] the heart of the Trust's case crumbles at even the slightest legal inquiry.

In its Opening Brief, the Trust attempts to ignore these clear-cut, easily decided legal issues to make this case about the existence of an implied covenant for the use of land as a golf course. In truth, this case is not about a restricted covenant, or the use of a golf course, at all. The ninth hole of golf course that abuts the subject property is still there, and remains unchanged.

What this case actually springs from is the Trust's assertion that it did not get the view that it bargained for from the home it purchased. JA 1:97 (in which the Trust indicates that "the view at the subject property will be substantially altered") and JA 1:106 ("The [MacDonald Highlands Design Review Committee's] approval of Malek's construction plans violates the Design Guidelines because the Malek property will block [the Trust's] view" from the subject property). Now that the trial court has definitively ruled against the Trust on the point of whether it can recover for alleged partial losses to its view and privacy, the Trust is attempting to sell the same story to this Court, while ignoring

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[2] *See*, *e.g.*, *Probasco*, *supra*, 459 P.2d at 774.

the more substantial issues of law regarding "as-is" transfers of property, waivers, and limitations of remedies, which would prevent this Court from even getting to the substantive questions posited in the Opening Brief.

STATEMENT OF FACTS

A. The Trust and its neighbor, Malek, had a property dispute which was entirely focused on a partial obstruction of the view from the Trust's property.

The Trust purchased the subject property[3] from a seller in the MacDonald Highlands community, signing the Purchase Agreement on March 13, 2013. JA 2479. The subject property and its neighboring properties currently appear this way from above[4]:

[3] As used herein, the term "subject property" shall refer to the Trust's home at 590 Lairmont Place, Henderson, Nevada, 89012, and more particularly described as Assessor Parcel Number 178-27-218-003.

[4] In this image, in the record as JA 1:179, the red outline represents Plaintiff's lot. The dark green outline around the property depicted immediately to the left of the paved road, represents Malek's original lot, with the land on the northern half diagonal from the Trust's property represents the additional land purchased by Malek (sometimes referred to in the Opening Brief and record as the "golf parcel") that the Trust alleges impacted its views. To the extent that this image shows any setback lines, they are not germane to this particular illustration.

The golf-course view of the subject property to the north and northeast, which continues to be immaculate and meticulously preserved, was never at issue in this case. JA 1:6-13.

Subsequent to purchasing the subject property, the Trust found that its neighbor, Respondent Malek, had purchased the property that was between the golf course and Malek's parcel; in other words, the Trust discovered that Malek had purchased both parcels outlined in green on the map. There is no evidence in

the record indicating that the Trust or any of its representatives researched the zoning or boundary lines of the subject property or its neighboring properties prior to closing.[5] The only due diligence performed by the Trust was (1) an inspection of the pool by a licensed inspector, and (2) an inspection of the home by a licensed inspector. JA 2:262 (Deposition of Barbara Rosenberg at 115:12-116:15).

Due to its lack of research or interest in the matter prior to closing, the Trust claimed that it was surprised to learn that Malek had obtained the northern parcel. *See* JA 1:96-97. Seeking anyone else to blame for its own lack of diligence, the Trust claimed both that it had been misled about the state of the property, and that it was entitled to stop Malek from building on the property he had acquired. *See* JA 1:97.

The crux of the Trust's argument was that its view *in a different direction than the one facing the golf course*–of an embankment, a parking lot, a street, and a clubhouse structure not pictured on the map *supra*, located across the street–is the view that matters:

> Q. The trust has sued a number of people in this case related to the subject property, correct?
>
> A. Yes.

[5] In fact, the Trust even waived its right to perform a survey and determine the boundary lines surrounding the subject property. JA 2:331 at ¶ 7(c).

> Q. That is why we are here today, right?
>
> A. Yes.
>
> Q. It is my understanding that it is a result of the purchase of the bare lot which is that third acre behind the Malek property to Malek, that that is the basis for the litigation; is that correct?
>
> A. Yes.
>
> Q. And if I understand it correctly, the basis is that building on that property will affect your view and privacy; is that correct?
>
> A. That is correct.

JA 2:259 (Deposition of Barbara Rosenberg at 101:12-102:2). That view, across the golf course, is accordingly the reason the underlying lawsuit was filed.

B. Had the Trust conducted the due diligence it promised in its Purchase Agreement prior to closing, which Michael Doiron expressly advised it to do, it would have discovered the actual boundary lines for Malek's parcels.

This view apparently became important when the Trust learned that Malek was going to build on his lots – something that could have been discovered and surmised by the Trust had it deigned to perform the due diligence it promised to do *before* purchasing the subject property. JA 12:2482 at ¶ 20. All publicly recorded information the Trust needed to discover Malek's new property lines was available in February of 2013, a month *before* the Trust signed the Purchase

agreement for its property. *Compare id*. (indicating that maps showing Malek's new property lines were available on the internet in February of 2013) with JA 2:328 (the signed Purchase Agreement for the subject property dated March 13, 2013).

What's more, the Purchase Agreement signed by the Rosenbergs (on behalf of the Trust) on March 13, 2013, provided the Trust with an extra 12-day due diligence period to investigate and determine whether there were any problems with the property it was purchasing. JA 2:333. Specifically, that clause provided as follows:

> **During the Due Diligence Period, Buyer** [*i.e.*, the Trust] **shall take such action as Buyer deems necessary to determine whether the Property is satisfactory to Buyer including, but not limited to,** whether the Property is insured to Buyer's satisfaction, **whether there are unsatisfactory conditions surrounding or otherwise affecting the Property** (such as location of flood zones, airport noise, noxious fumes or odors, environmental substances or hazards, whether the Property is properly zoned, locality to freeways, railroads, places of worship, schools, etc.) **or any other concerns Buyer may have related to the Property** .... Buyer is advised to consult with appropriate professionals regarding neighborhood or property conditions, including but not limited to: schools, proximity and adequacy of law enforcement; proximity to commercial, industrial, or agricultural activities; crime statistics, fire protection; other governmental services; existing and proposed transportation; **construction and**

> **development**; noise or odor from any source; **and other nuisances, hazards, or circumstances.**

JA 333 (emphasis added). Rather than conduct any inspections or investigations during the due diligence period provided in the Purchase Agreement, the Trust apparently conducted no due diligence. Now, the Trust's view across Malek's second parcel (but not its golf course view, which remains unobstructed) may or may not[6] be impacted by construction on the adjacent lots, and the question is who to blame.

The answer cannot be MacDonald. Through Michael Doiron, MacDonald Highlands Realty served as the seller's agent in the bank sale of the subject property to the Trust. JA 1:95. The Trust claims MacDonald's error came when Doiron did not disclose that Malek was under contract to obtain his second parcel, which if built upon could potentially block a view of the parking lot, road, and building across the street, and that the associated zoning changes had been approved by the City of Henderson before the Trust purchased the subject property. JA 1:101-02. Whether Doiron actually had knowledge of the zoning

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[6] It should be noted that, as of the granting of summary judgment, nothing had actually been built on Malek's property. Plaintiff's damages, then, were speculative and would therefore be unrecoverable under Nevada law. *See Fireman's Fund Ins. Co. v. Shawcross*, 442 P.2d 907, 912 (Nev. 1968).

approval at the time that the property was sold to the Trust is in question[7]; what is *not* in question is that responsibility for discovering that information rested solely with the Trust, JA 333, and that the Trust was put on inquiry notice of these issues by the zoning disclosure that Doiron actually *did* make. JA 2:348.

C. The Purchase Agreement signed by the Trust contained waivers and a limitation of the Trust's remedies that has gone unchallenged by the Trust on appeal.

In addition to the "as-is" provisions that The Trust not only agreed to, but insisted upon, the Purchase Agreement for the subject property also contained multiple waivers applicable to the Trust's claims in this matter. *See*, *e.g.*, JA 12:2484 at ¶ 4, in which the district court found as follows:

> Plaintiff either waived its right to inspect the subject property and its boundaries or had an opportunity to conduct due diligence that it did not exercise. In either event, the facts show that Plaintiff either did not conduct diligence with regard to the property boundaries or did and failed to bring its findings to the attention of the seller or its agent.

Upon reviewing the agreements signed by the Trust, as well as the evidence at hand, the district held the Trust to its representations and responsibilities to conduct the due diligence review required of it under Nevada law. *See id*. In addition to those factual findings and conclusions, the Court also found multiple

[7] *See* JA 3:561 (Deposition of Michael Doiron at 204:5-15).

waivers by the Trust of claims and remedies that also required summary judgment. *See* JA 12:2484-85.

D. The district court granted summary judgment in MacDonald's favor on three independent bases: (1) the due diligence provision of the purchase agreement and the "as-is" nature of the sale, (2) the waivers and limitation of remedies, and (3) Nevada law providing that there was no easement for light and view.

MacDonald brought a motion for summary judgment on all the Trust's claims against it on June 10, 2015. JA 12:2492. That motion was based on a number of arguments, the last of which was whether the easement/restrictive covenant sought by the Trust was valid under Nevada law. JA 1:187-96. Before it even reached that analysis, the district court found that the Trust had first sought, then agreed, to purchase the subject property "as-is" from the seller. JA 12:2483-84. Noting that nondisclosure of adverse information on an "as-is" sale is not a basis for an action by a plaintiff under Nevada law, the district court held that the claims by the Trust simply could not stand. *Id*. Second, the court found that there had been knowing, voluntary, and intentional waivers by the Trust of *all* its claims in this matter. JA 2484-85. Third, even in the absence of a waiver, the court held that the Trust had voluntarily limited its remedies in this action to $5,000. JA 12:2485.

When the trial court finally addressed the claim that the Trust places at the heart of its brief, the court recognized that what the Trust actually wanted, an easement for view, was not available under Nevada law. *Id*. Turning to the issue of whether there could be an implied easement requiring the small piece of property at the edge of the golf course (*i.e.*, Malek's second parcel, or the northern parcel diagonal from the subject property in the map *supra*) to remain undeveloped, the trial court held that there was no such legal mechanism. *See id*.; *see also* JA 12:2516-19. Finally, on the claims against MacDonald for injunctive and declaratory relief, the trial court held that neither of these could survive since none of the MacDonald entities had any remaining interest in the subject property. JA 12:2485 at ¶ 12.

E. The district court granted MacDonald's motion for fees and costs, but did not award post-judgment interest.

After granting the motion for summary judgment, the Court considered MacDonald's motion for attorney fees and costs, filed on October 22, 2015. JA 13:2782. The district court ultimately granted the motion based on a $25,000 offer of judgment by MacDonald on January 29, 2015. *See id*. In making that determination, the Court considered several factors under the Nevada Court of Appeals case *Beattie v. Thomas* before deciding that the Trust's rejection of the

offer of judgment had been "grossly unreasonable" and therefore granting the motion. Supplemental Appendix ("SA") 8-12 and 79-81, and JA 14:3038-40.

In the original motion for attorney fees and costs, MacDonald had requested that the Court enter an amended judgment providing that the amount awarded would be subject to post-judgment interest. JA 12:2536. There was no argument relating to that request by MacDonald. See SA 1-14 and JA 2995-3060. After the order granting the motion was entered, when the parties still understood that the seller of the subject property would have claims left to try below, MacDonald and the Trust's counsel agreed to have the court designate the fee order as final pursuant to NRCP 54(b). *See* JA 13:2787-88. The Court, however, never entered the amended judgment that was requested and undisputed by the Trust.

F. The Opening Brief makes several unsupported and incorrect factual assertions.

In addition to the basic facts of this case outlined *supra*, MacDonald must also correct several misstatements of fact made by the Trust in the Opening Brief. First, the Trust maintains that Malek's second parcel (what the Trust calls the "golf parcel") was originally part of "the 9th hole's in-play area" on the golf course behind the subject property. *See* Opening Brief at 3-4. This is a highly misleading statement for several reasons. The citation provided in the Opening

Brief (JA 3:550) makes no mention of this land being in the in-play area for the golf course. What's more, the land itself was not part of the golf green at all; it was non-grassy land adjacent to the green that had desert landscaping. *See* JA 2:365 (Richard MacDonald deposition at 61:12-62:13). The parcel was, in fact, a "slope area adjacent to the golf course and not a part of the area of home development or construction [that was] landscaped as a natural desert zone or natural area." *See id*. So, the Trust's implication that golfers were meant to play on this parcel is misleading at best. On a related note, the Trust argues that Malek acquired the golf parcel to "get around [a community] restriction," citing a photograph at JA 1:146 as evidence. Opening brief at 4. There is no evidentiary support for this assertion regarding Malek's intention, let alone for the imputation of that intention to MacDonald.

Next, the Opening Brief maintains that, even though as early as January 2013, the Trust had access to zoning maps demonstrating the zoning changes occasioned by Malek's acquisition of the golf parcel, those maps did not demonstrate boundary line changes. Opening Brief at 5. While it is not entirely clear what the Trust means by this or why the Trust could not learn of the sale to Malek from these maps, its contention is not actually supported by the evidence cited in the record at JA 3:539.

The Trust also argues that no zoning disclosures were made to it by Michael Doiron. That is false. As demonstrated in JA 2:348, the Trust was in fact given a zoning disclosure that indicated the information available as of February 2010, **and told the Trust exactly where to get the most updated information**:

> This information is current and plotted as of **February 2010.** Master Plan designations and zoning classifications, ordinances, and regulations adopted pursuant to the master plan are subject to change. You may obtain more current information regarding the zoning and master plan information from **The City of Henderson, Planning Department. 246 Water Street, Henderson, NV 89015, Te[l]: 565-2747.**

JA 2:348 (emphasis original). This disclosure is entirely consistent with the agreed-upon terms of the purchase, in which the Trust agreed to take the subject property "as-is" after a due diligence period. JA 12:2478-80 and 2:313.

SUMMARY OF ARGUMENT

The Opening Brief is focused on the argument that the Trust somehow possessed an implied restrictive covenant favoring the subject property that prevents its neighbor, Respondent Malek, from building on his second parcel, which was originally adjacent to the golf course behind the Trust's and Malek's homes, but not actually a part of the golf green. Against all Respondents, the Trust insists that it has the right to enforce this implied restrictive covenant to prevent

any change to any view from the back of its home. It also alleges that the MacDonald respondents, in their capacity as the real estate agent for the seller, failed to disclose the sale of the golf-course adjacent property to Malek prior to the Trust's closing on the subject property. While this argument is questionable in its own right, as discussed *infra*, it is subordinate to several other parts of the district court's decision that render the recognition or non-recognition of an implied restrictive covenant irrelevant.

The "as-is" nature of the sale, combined with the Trust's lack of due diligence, indicate that the Trust cannot recover as a matter of law. First, the district court recognized that the Trust not only signed a contract providing for the sale of the property in "as-is" condition; the Trust in fact *demanded* such a sale. JA 2:313 and 2:326. As a matter of Nevada law,[8] a sale of property "as-is" deprives the buyer of claims that it otherwise would have connected to the sale. What's more, the "as-is" provision in this particular Purchase Agreement contained extensive due diligence language that squarely placed the burden for discovering all issues with the property, including issues with zoning, boundary lines, and the surrounding area, upon the Trust. JA 2:333-34; *see also* JA 2:313 (the Trust's letter of intent stating that "[i]t is Buyer's obligation to conduct all necessary

[8] *See Mackintosh*, *supra*, 855 P.2d at 552.

studies, including but not limited to environmental, construction, market feasibility, title, zoning & CC&R' s. Buyer shall purchase the property 'As-Is' and 'Where-Is' and "With All Faults.'") And even if the Purchase Agreement provision did not have the level of detail it does, it is undisputed that MacDonald real estate agent Michael Doiron, representing the seller, made a disclosure regarding zoning maps, acknowledged she may not have the most current information, and directed the Trust where to go to get the most current information as part of the due diligence process. JA 2:348. Based on the undisputed facts and law, the first point of the district court's decision in MacDonald's favor was *not* whether an implied restrictive covenant existed, but rested upon the facts surrounding the "as-is" nature of the sale of the subject property. JA 12:2483-84. Because there is no dispute of material fact on those points, the district court properly granted summary judgment.

Second, the district court also properly recognized a limitation of remedies that was incorporated into the Purchase Agreement via an addendum agreed to by the Rosenbergs in March of 2013. *See* JA 7:1501. That limitation of remedies provided two remedies to the Trust: (1) a return of the Trust's earnest money if the sale of the subject property did not close, or (2) the lesser of the Trust's actual damages or $5,000 if the sale did close. *See id*. The district court prominently

featured this limitation of remedies in its decision, a point that went unchallenged by the Trust in its Opening Brief. *Compare* JA 12:2481 and 12:2485 *with* Opening Brief, generally. Given that MacDonald's last offer of judgment, for $25,000, easily beat the Trust's maximum recovery of $5,000, any error by the district court on the substantive claims would have been harmless. *See* JA 12:2587-88. Therefore, this provision offers the Court another independent reason to affirm the district court. Third, the "implied restrictive covenant" sought by the Trust cannot be imposed as a matter of law. What the Trust asks for is not a right that has been recognized by this Court. The reason that the Trust seeks to stop Malek from building on his second parcel is not because the Trust is concerned about the use of that property as golf course (which was never a use of that parcel); both the numerous pleadings on file and Barbara Rosenberg's own testimony indicate that the Trust's true concern is the view from its property. *See*, *e.g.*, JA 2:259 (Barbara Rosenberg deposition at 101:12-102:2). The Trust's current protest that it seeks only to preserve the "golf course" use of Malek's second parcel constitute little more than a sophistic end-run around the fact that Nevada does not allow it to obtain an implied view easement, even though the Trust has stated a number of times in the record that that is exactly what it wants. The district court, then, property granted summary judgment on this point.

Fourth, the Trust has waived most or all of its claims against MacDonald and the other defendants. The existence of these waivers is not in dispute, nor is the Trust's awareness of their existence at the time the Purchase Agreement was executed, nor is the Trust's admission that it could have tried to change them but did not. Because the undisputed facts show that these waivers were knowing and voluntary, the district court also made the correct decision to grant summary judgment on this point. As an additional matter, the Trust's argument that the waivers are invalid under NRS § 645.252 is an argument brand-new to this appeal that does not appear earlier in the record, and for that reason does not even deserve consideration by this Court.

The Trust's final argument against MacDonald, on the issue of attorney fees, is that the district court did not properly consider all of the factors under *Beattie v. Thomas*, 668 P.2d 268 (Nev. 1983). That argument, however, overlooks the numerous instances in the record, including discussion by the district court, of those very factors. It is therefore not accurate for the Trust to argue that the district court did not consider the *Beattie* factors. Essentially, then, the Trust's argument is that because the *order* itself does not discuss those factors, it should be struck down by this Court. But once again, the Trust's objection was waived at the trial level when its own counsel approved the form and content of the order it is now

contesting. Assuming that the Trust had an objection regarding the inclusion of the *Beattie* factors when the order was prepared, it was under a duty to preserve its objection at the time. Its failure to do so then is fatal to its appeal now.

On MacDonald's cross-appeal, the issue before this Court is very simple. Nevada Revised Statutes § 17.130 provides that post-judgment interest be awarded on all judgments by the district court, a conclusion supported by multiple decisions from this Court. Here, in the motion for attorney fees and costs, MacDonald therefore requested an amended judgment awarding those fees and costs, in addition to post-judgment interest. Because the order granting fees and costs came at a time when other parties still had claims remaining before the district court, it certified the attorney fees and costs order as final pursuant to NRCP 54(b), but did not issue a final amended judgment. To the extent that this prevents the legally mandated (and conceded below) result that MacDonald is entitled to post-judgment interest on its award of fees and costs, it should be reversed, with instructions to the district court to enter an amended order explicitly providing that MacDonald's fee and cost award shall collect post-judgment interest.

STANDARDS OF REVIEW

A. Order granting MacDonald's motion for summary judgment

An appellate court reviews the granting of a motion for summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). A decision granting such a motion will be upheld "when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id*.; *see also Pressler v. City of Reno*, 50 P.3d 1096, 1098 (Nev. 2002).

B. Order granting MacDonald's motion for attorney fees and costs

The Nevada Supreme Court "reviews an attorney fees decision for an abuse of discretion." *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009). Cost awards are also reviewed for an abuse of discretion. *Univ. of Nevada v. Tarkanian*, 879 P.2d 1180, 1186 (Nev.1994).

ARGUMENT

A. The district court correctly determined that the Trust's insistence on, and acceptance of, the "as-is" nature of the subject property precluded the Trust's claims in this matter.

In Nevada, real estate professionals generally make a series of disclosures to buyers of real property pursuant to state law. *See*, *e.g.*, NRS § 645.252.[9] However, "[n]ondisclosure by the seller of adverse information concerning real property generally will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.'" *Mackintosh v. Jack Matthews & Co.*, 855 P.2d 549, 552 (Nev. 1993). And, as this Court most recently held, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 518 (Nev. 2015), *reh'g denied* (Nov. 24, 2015), *reconsideration* en banc *denied* (Jan. 22, 2016).

While this rule does not apply where information is available solely to the seller, there will be no basis for action against a seller unless "the seller knows [1]

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[9] Doiron and MacDonald Highlands Realty **did** make a disclosure regarding zoning and property lines. JA 2:348. That disclosure even provided the method for the trust to obtain the most up-to-date information on the subject. *See id*. MacDonald does dispute, however, that the central fact of the Trust's complaint – a pending minor adjustment to neighboring lots – was material information that was required to be disclosed under § 645.252.

of facts materially affecting the value or desirability of the property **which are known or accessible only to [the seller]** and [2] also **knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer**." *Id*. (*quoting Lingsch v. Savage*, 29 Cal. Rptr. 201, 204 (Ct. App. 1963)) (emphasis added). Only then is the seller under a duty to disclose those facts to the buyer. *See id*. Although Nevada does not have case law specific to off-site defects, courts that have considered the issue generally use the exact same test for off-site conditions as on-site conditions. *See*, *e.g.*, Florrie Young Roberts, *Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line*, 2006 BYU L. Rev. 957, 960 (2006). *See also Couturier v. American Invsco Corp.*, 10 F. Supp. 3d 1143, 1156 (D. Nev. 2014) (applying the same test – that a duty to disclose when "defendant alone has knowledge of material facts which are not accessible to the plaintiff" – where there was alleged fraudulent concealment of the fact that floor coverings in condominium units caused structural problems in a building).

The basis of the Trust's disclosure-based claims against MacDonald is that Doiron, as the agent for the seller of the subject property, knew or should have known, but did not disclose, the fact that the "lot lines [of the subject property and second parcel belonging to Malek] were other than presented and had in fact been

amended in such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an adverse manner." See JA 1:101 at ¶ 94. What this analysis fails to recognize, though, is that the Trust purchased the property on an "as-is" basis, specifically taking upon itself the duty to inspect the property and ensure that all aspects of it were suitable *prior* to close of escrow. JA 12:2478-80. See also JA 313 (the Trust's own letter of intent, indicating that it was the "Buyer's obligation" to investigate zoning prior to the purchase), JA 2:326 (confirming the Trust's desire to purchase the subject property "AS-IS"), JA 2:333-34 at ¶ 12 (detailing the Trust's due diligence obligations prior to closing), JA 2:335 at ¶ 22 (in which the Trust specifically agreed that it is not relying on the representations of Doiron or MacDonald Highlands Realty and that it was purchasing the subject property "AS-IS"), and JA 2:348 (advising the Trust to follow up with the City of Henderson for the most current lot line and zoning information applicable to and surrounding the subject property and describing how this could be done).

Documents and testimony further demonstrate that, beyond a doubt, the Trust had access to all pertinent information regarding zoning changes prior to closing on the subject property in March of 2013. *See* JA 12:2482 at ¶ 20 and JA 2:348. Also notable is the fact that the Purchase Agreement specifically states that

Plaintiff is "not relying on any representations" made by Doiron. JA 12:2480 at ¶ 13 and 2:335 at ¶ 22.[10] This fact alone destroys any chance that the Trust could demonstrate the "justifiable reliance" necessary for its fraud and negligent misrepresentation claims. *See*, *e.g.*, *Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007) (intentional misrepresentation), and *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998) (negligent misrepresentation).[11]

Therefore, the undisputed facts and evidence before this Court show that it was the Trust that took upon itself the duty to investigate the property, including zoning and boundary-line issues, prior to the closing of the sale, and failed to fulfill that duty. Far from failing to disclose information to the Trust, Doiron actually gave the Trust's representatives information *specifically designed* to ensure that the trust was made aware of the most current zoning and boundary line

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[10] Without authority, the Trust argues that the "as-is" and waiver language in the agreement applies only to the seller of the subject property, not its agents. As paragraph 22 demonstrates, however, the Purchase Agreement makes it clear that the Trust agreed to rely on its own investigation **over that of Doiron, MacDonald Highlands Realty, or anyone else.**

[11] Were this Court to allow the Trust to proceed in spite of the "as-is" provisions and facts showing the Trust had access to the information it claims was not disclosed, it would be violating its own long standing rule of construction that "when a contract is clear, unambiguous and complete, its terms must be given their plain meaning and the context must be enforced as written . . . ." *Ringle v. Bruton*,86 P.3d 1032, 1039 (Nev. 2004).

issues regarding the property. *See* JA 12:2482 at ¶ 19 and JA 2:348. Using that information, the Trust could have discovered the most up-to-date zoning map for the surrounding properties in five minutes or less in February of 2013, and with a visit or telephone call to the City of Henderson in January of 2013. *See* JA 12:2482 at ¶ 20 and JA 3:539 (Michael Tassi Deposition at 26:14-29:25). Given this testimony, there is no reasonable dispute that the relevant information would not have been available to Plaintiff in March of 2013, when the subject property was being purchased. *See id*. at 25:2-19. The scenario, then, is this: (1) Plaintiff willingly and knowingly accepted the duty to inspect the zoning and boundaries affecting the subject property; (2) Plaintiff was given sufficient information by Doiron to do so; and (3) Plaintiff failed to perform the investigations it agreed multiple times to undertake. Under those undisputed facts, then, summary judgment was properly granted.

B. Even assuming that this Court were to overlook *Mackintosh* and the related Nevada law, the Trust has failed to address or respond to the fact that it expressly limited its remedies to $5,000 in the Purchase Agreement.

Above and beyond any other argument put forward by the Trust in its Opening Brief, it essentially concedes a significant part of the district court's

decision: the fact that the Trust expressly agreed to limit its remedies in this matter to $5,000:

> **. . . BUYER'S SOLE AND EXCLUSIVE REMEDY IN ALL CIRCUMSTANCES AND FOR ALL CLAIMS . . . ARISING OUT OF OR RELATING IN ANY WAY TO THE AGREEMENT OR THE SALE OF THE PROPERTY TO BUYER . . . SHALL BE LIMITED TO NO MORE THAN . . . THE LESSER OF BUYER'S ACTUAL DAMAGES OR $5,000.00 IF THE SALE TO BUYER CLOSES.**

JA 12:2481 at ¶ 15 and JA 7:1501 (emphasis original).

First, even under *de novo* review, an appellant like the Trust cannot argue a point of law that it has waived by not challenging it on appeal. *See*, *e.g.*, *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011) and *Bongiovi v. Sullivan*, 138 P.3d 433, 443 (Nev. 2006). Accordingly, even if every one of the Trust's other arguments are meritorious, the most it could have recovered would have been $5,000. That amount, of course, would not beat MacDonald's offer of judgment of $25,000,[12] and therefore the district court's judgment awarding fees and costs was correct as a matter of law, with any alleged error being harmless.

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[12] *See* NRCP 68, which provides that the penalties for rejecting an offer of judgment come into force when the offeree "fails to obtain a more favorable judgment."

Second, in the event that the Court did wish to consider this point of law on appeal despite the Trust's failure to address it in any way, the undisputed facts would still bring this Court to the same conclusion as the district court. In construing a contract, Nevada courts interpret the provisions of that contract by the "plain and ordinary meaning of its terms". *See Century Sur. Co. v. Casino W., Inc.*, 677 F.3d 903, 908 (9th Cir. 2012), *certified question answered*, 329 P.3d 614 (Nev. 2014). *See also Powell, supra* 252 P.3d at 672. ("If a provision in an insurance contract is unambiguous, a court will interpret and enforce it according to the plain and ordinary meaning of its terms."). This Court has further recognized that it is "not free to modify or vary the terms of an unambiguous agreement." *All Star Bonding v. State*, 62 P.3d 1124, 1126 (Nev. 2003).

Here, there is no question that the language of the limitation of remedies clause in the Real Estate Purchase Addendum, signed by Barbara and Frederic Rosenberg on or about March 21, 2013,[13] contained a limitation of remedies to the lesser of the Trust's actual damages or $5,000.00. JA 7:1501. There is no dispute that all of the claims asserted by the Trust "arise out of" or "are related" to the sale of the subject property as stated in JA 7:1501. There is also no dispute that MacDonald, through Michael Doiron, served as an agent for the seller, and

[13] JA 7:1515.

therefore was covered by the waiver and limitation of remedies as provided in paragraphs 1 and 26 of the Real Estate Purchase addendum. *See* JA 7:1501 and 7:1512. Nor is there any dispute that Barbara Rosenberg carefully reviewed and signed the Purchase Agreement and its addenda. *See* JA 2:256 (Barbara Rosenberg Deposition at 89:7-90:4). Barbara Rosenberg even admitted that, had she wanted to, she could have amended unfavorable terms of the Purchase Agreement:

> Q. If you didn't agree with something in the purchase agreement, what would you do?
>
> A. I could have amended it.
>
> Q. And how would you have amended it?
>
> A. I could have crossed out something and -- oh, this is my purchase agreement.
>
> Q. Correct.
>
> A. Yes, I could have just crossed it out or written in the addendum that I wouldn't accept that particular agreement.

See id. (Barbara Rosenberg Deposition at 90:2-11). Accordingly, even if this Court does not accept *Mackintosh* or the "as-is" analysis of the district court, the terms of the Purchase Agreement itself indisputably limit the Trust's remedies to $5,000, which was not sufficient to overcome the offers of judgment put forward by MacDonald.

C. Despite the Trust's protests in its Opening Brief, the entire record, including the testimony of Barbara Rosenberg herself, indicates that the Trust seeks to recover on its claims in order to preserve its view – a remedy that the district court correctly determined that Nevada law does not recognize.

1. The Trust's insistence that it only seeks a restrictive covenant for the benefit of the golf course is undermined by its own documents and testimony.

The core of the Trust's argument in the Opening Brief is that the district court misapprehended its position by understanding that the Trust sought an easement for light or view. *See Boyd v. McDonald*, 408 P.2d 717, 722 (Nev. 1965) and JA 2485. The district court got that idea, though, from the words of Barbara Rosenberg herself. *See* JA 2:259 (Deposition of Barbara Rosenberg at 101:12-102:2, quoted *supra*).

Neither MacDonald, nor Malek, nor the district court mischaracterized Barbara Rosenberg's testimony in any way. What she sought was a view and privacy, and what upset her about Malek building on his property was it would change the view from her property. *See id*.[14] For the Trust to change that story now is disingenuous and contrary to the record upon which the district court made its

[14] Incredibly, the Trust maintains in its Opening Brief that a restroom could have been built on the golf parcel and, the Trust would have been satisfied with that development. Opening Brief at 9. As noted *supra*, that contention is completely inconsistent with both Mrs. Rosenberg's testimony and the Trust's own pleadings in this matter.

decision. *De novo* review does not allow an appellant to change its position and try on different legal arguments in the hope one will find favor with the appellate court.

In reality, what the Trust seeks is in express contravention of Nevada law. The Nevada Supreme Court has stated that claims to such "implied easements" (though the Trust prefers to call them "implied restrictive covenants") cannot be upheld as a matter of Nevada law and public policy. *Boyd*, *supra*, 408 P.2d at 722. *See also Probasco, supra* 459 P.2d at 774 (acknowledging that "Nevada has expressly repudiated the doctrine of implied negative easement of light, air and view for the purpose of a private suit by one landowner against a neighbor").

Nowhere in the recorded rights against the subject property or the neighboring properties does the Trust have an express easement for view. In fact, such an easement would be impossible. As developer Richard MacDonald explained in his deposition, there is simply no such thing as a guaranteed view because, particularly in a community like MacDonald Highlands, property owners are constantly building new homes and other structures. *See* JA 2:364 at 60:5-21. According to expert witness Scott Dugan, a view across a piece of unimproved property is known as a "borrowed view" that, by its nature, cannot be preserved. *See* JA 2:395 at 12:17-22 and JA 2:463.

2. <u>Shearer v. City of Reno</u> is inapplicable here, as it was a case about an express public dedication of private property, not a transaction between private property owners of a golf course-adjacent parcel that has never actually been used as a golf course.

The Trust challenges the district court's ruling by arguing that Nevada has historically recognized implied restrictive covenants in general, starting at least with the case of *Shearer v. City of Reno*, 136 P. 705 (Nev. 1913). *Shearer*, though, is a poor fit for these facts. In that case, private purchasers of property in the City of Reno sought to enforce a public dedication of land, made by the original owner of property next to the Truckee River. *See id*. at 706. Four years after the map showing the dedication of the land to public use was filed (and after several sales had been made of neighboring lots), the owner filed another map indicating that the land previously dedicated to public use now consisted of two fractional lots. *See id*. at 706-07. After the filing of that amended map, the owner **expressly promised and agreed** "that he would not sell or improve" those two lots. *See id*. at 707. Roughly half a decade later, another individual named Hatfield purchased the lots and built a small house upon the premises, which subsequently burned away. *See id*. The plaintiff/respondent in that case, who had acquired rights to the lots from Hatfield, maintained that he had the right to build upon the property, and

the City of Reno disagreed, arguing that the lots had been dedicated for public use. *See id*.

The question before this Court in *Shearer* was not whether a restrictive covenant had been implied by these circumstances, but "**whether it is necessary to show acceptance by the town or city authorities** in order to make the dedication by [the original owner] of land for streets, avenues, or other public uses binding . . .." *See id*. (emphasis added). This Court held that it was not necessary to show acceptance because the owner had filed both original maps, and his intention to dedicate the land was "**confirmed by his express agreement**, made after the filing of the amended map, **that the land in controversy should forever remain open** as a part of the streets and avenue, and **by the fact that he kept this agreement and never sold nor improved this land**." *See id.* (emphasis added).

The differences between *Shearer* at the case at bar should be obvious. This is not a case whereby the land in question (the extra parcel sold to Malek abutting the golf course) was ever committed to public use, nor was there ever a promise on the part of MacDonald to do so. In fact, the disclosure provided by MacDonald to the Trust expressly noted that future development was uncertain, and urged the Trust to follow up regarding potential zoning changes and planned uses of the parcels surrounding the subject property. JA 2:348. Nor was any municipal entity

involved that could have accepted or rejected any dedication of land, should it have been made. None of the evidence relied upon by this Court to show a dedication to the City of Reno in *Shearer* is present in this case. To the extent that *Shearer* involved anything even remotely resembling the implied restrictive covenant the Trust argues for, it is clear that the source of that covenant was "a public declaration" by the original owner of the property when he filed the map with the County indicating a public dedication to the city. *See id*. at 708. Absent any public, recorded declaration or express promise regarding the golf parcel by MacDonald, *Shearer* simply is not applicable.

Even if this Court did believe there were some express, recorded dedication in this case like the one that existed in *Shearer*, the undisputed facts show that the parcel of property sold to Malek **was not even a part of the golf green – it was a small, desert-landscaped patch of land abutting the actual golf course**. *See* JA 2:365. The land in question here, then, did not have any function like the parcels in *Shearer*, which widened a public roadway. *See Shearer*, 136 P. at 706-07. Accordingly, neither the express promise nor the reasoning for the implied covenant recognized in *Shearer* are present here.

3. Boyd v. McDonald expressly disallows the kind of implied covenant that the Trust was seeking to create with its claims.

Whereas *Shearer*, with its focus on lands dedicated to public use, has at best tenuous relevance to the case at hand, *Boyd v. McDonald*, 408 P.2d 717 (Nev. 1965), completely undercuts the Trust's position. *See*, *e.g.*, JA 12:2485. *Boyd* involved the operation of a motel by the McDonalds. *See id*. at 718. The Boyds, who purchased a neighboring parcel to the hotel, discovered after their purchase that the McDonalds had been encroaching upon and using the Boyds's parcel for ingress and egress, among other things. *See id*. The McDonalds brought an action so that they could continue to use the Boyds's parcel as they always had. *See id*. After determining that the standard for an implied easement was what an ordinary purchaser would reasonably expect, this Court held that a 2.6-foot encroachment by the McDonald's building was "a typical implied easement," and that a sign for the motel placed on the Boyd's property was not subject to an implied easement because "**no reasonable purchaser could have considered it part of the transaction without at least some inquiry**." *See id*. at 722-23 (emphasis added). The Court could not determine from the facts below whether a driveway and an encroaching patio were entitled to implied easements. *See id*. at 723.

It should first be noted that *Boyd* is a case about implied easements, not implied restrictive covenants. *See id*. at 719.[15] That is not to say, however, that the *Boyd* Court did not address the type of property interest that the Trust is arguing for. Indeed, this Court wrote as follows:

> The preponderance of modern authority refuses to recognize an implied easement for light and air. *Taliaferro v. Salyer*, 162 Cal. App.2d 685, 328 P.2d 799; *Mannino v. Conoco Realty Corp.*, Sup., 86 N.Y.S.2d 855. We agree, and accept the rationale presented nearly a century ago, in 1874, by Chief Justice Gray in *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80:
>
> '**The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation**. The simplest rule, and that best suited to a country like

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[15] The Trust also cites *Jackson v. Nash*, 866 P.2d 262 (Nev. 1993) for rules regarding restrictive covenants, though that case only discusses easements. The term "restrictive covenant," in fact, appears nowhere in that decision or in many other decisions cited by the Trust to support its position, including *Montesa v. Gelmstedt*, 270 P.2d 668 (Nev. 1954); *Cox v. Glenbrook Co.*, 371 P.2d 647, (Nev. 1962); *Charleston Plaza, Inc. v. Board of Educ.*, 387 P.2d 99 (Nev. 1963); *Boyd*, *supra*, *Brooks v. Jensen*, 483 P2d 650 (Nev. 1971); *Hynds Plumbing & Heating Co. v. Clark County School Dist.*, 581 P.2d 1331 (Nev. 1978); *Alrich v. Bailey*, 630 P.2d 262 (Nev. 1981); and *Brooks v. Bonnet*, 185 P.3d 346 (Nev. 2008).

> ours, in which changes are taking place in the ownership and the use of lands, is that **no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed.**'

Id. at 722 (emphasis added). Here, the Trust disputes that it is seeking an easement for view, though its pleadings and the testimony of Barbara Rosenberg indicate that it is exactly the view with which the Trust takes issue. JA 1:97 at ¶ 57 and 2:259. Regardless of whether the Trust will admit that what it seeks is an easement for view, **it seeks a right over neighboring lands based merely on the fact that the subject property overlooks Malek's properties and the golf course**. That is a right that this Court has unambiguously held is not available to the Trust absent an express grant of an interest, like the first property owner's public declaration and promise to keep his parcels clear in *Shearer*. *See Shearer*, *supra*, 136 P. at 708.

The Trust argues that the reasonableness test for whether a restrictive covenant exists is the same as an easement under the language of *Boyd*. Opening Brief at 15-16. There is nothing in *Boyd* to indicate that is the case. However, even if it were true, the Trust would have trouble with elements 2 and 3 of the *Boyd* test. On element 2, there is no evidence indicating "apparent and continuous use" of the golf parcel by the owner of the subject property; nor is there any indication

for what that "apparent and continuous use" would even look like. *See Boyd*, 408 P.2d at 720. The fact that the golf course was used since 2000, which is what the Trust argues in the Opening Brief at 18, is a very different fact from how, or even whether, Malek's small, golf course-adjacent parcel was used. The Trust claims that Malek's parcel "was part of in-bound play"[16] at the golf course, but the part of the record cited for this proposition – three pages of Richard MacDonald's deposition where he discusses landscaping types in the community – does not support this assertion. In fact, MacDonald said precisely the opposite: that "[t]he piece [of golf-course adjacent land] that was sold [to Malek] was actually just a natural area, **because it wasn't used by the golf course**." JA 6:1267 and 2:365 (emphasis added). Accordingly, there was no "apparent and continuous" use of this land that could give rise to an easement, let alone a restrictive covenant.

As for element 3 of the *Boyd* test, the Trust does not explain how Malek's second parcel, which was a small, desert-landscaped piece of dirt abutting the golf course, was intended for "the proper or reasonable enjoyment" of the Trust's property. *See id*. The Trust argues that it paid a premium for a home near the ninth hole of a golf course, and that is exactly what it has today. There is no indication that any reasonable purchaser would think that a desert-landscaped piece of land,

[16] Opening Brief at 18.

not even a part of the golf green itself or directly abutting the subject property, was necessary or even intended for the enjoyment of a person who purchased a home near a golf course. The expectation of the presence of the golf course does not logically translate into the Trust's bizarre assertion "that the area surrounding their Home would remain the same." Opening Brief at 21. The golf course itself exists as it always has; it simply is unreasonable to think that everything surrounding the golf course must forever remain unchanged. Indeed, it is not even clear how this small patch of dirt was intended for the enjoyment of the golf course itself.

4. The Trust's expectation of an implied restrictive covenant over a parcel of land abutting the golf course, absent any inquiry, is objectively unreasonable.

Even assuming that this Court had not made it so painfully clear in *Boyd* that what the Trust seeks is not available, the undisputed facts show that the Trust's expectation that it would have complete control, including veto power, over the construction activity on Malek's parcels is patently unreasonable. The first reason comes from the appearance of Malek's second parcel itself: it was never a part of the golf green that directly abuts the subject property. Rather, it was a small parcel of desert-landscaped flora that abutted the golf course. *See* JA 2:365 and 6:1267.

Additionally, as stated in *Boyd*, if a reasonable purchaser would not believe that it had a right to a particular property "without at least some inquiry," then that purchaser cannot have an implied interest in the property. *Boyd*, *supra*, 408 P.2d at 722-23. Here, the Trust was indisputably put on inquiry notice regarding zoning and boundary line issues. Those issues were explicitly called out as points by the due diligence and waiver clauses of the Purchase Agreement. JA 2:333-34, and 7:1501-03. Even if the Trust hadn't been put on inquiry notice by those specific and repeated warnings, Michael Doiron herself put them on notice when she handed them a disclosure map with zoning information – **a map that specifically instructed them to seek out the most recent zoning maps available, and explained how to get that information**. JA 2:348. An employee of the City of Henderson confirmed in his deposition that the information upon which the Trust had inquiry notice was readily available even before the Purchase Agreement was executed. JA 3:539 (Michael Tassi Deposition at 26:14-29:1). Nor was there ever any express promise of a restrictive covenant. Accordingly, there is no genuine dispute that the Trust could not have had a reasonable belief that it was entitled to an implied restrictive covenant over either of Malek's parcels, and the Trust's claims properly failed before the district court.

5. The Trust's citations to other jurisdictions' law about implied restrictive covenants are not applicable to these facts.

In addition to its arguments based on Nevada law, the Trust also provides authority from no less than seven foreign jurisdictions that recognized restrictive covenants preventing developers from selling or removing golf courses from communities. *See* Opening Brief at 22. This case law, however, is completely inapposite to the questions before this Court. All of the cases cited by the Trust indicate that a golf course in a community must remain a golf course, and that its use cannot be changed in the future after parcels have been sold to the community. That, however, is not the issue presented to the Court by these facts; MacDonald is not trying to shut down the golf course (or even a part of the golf course) abutting the subject property and has no plans to do so. None of the cases cited by the Trust stand for the finer proposition that a property owner cannot change use of another parcel *abutting* the golf course – property that is not even part of the green – as Malek is attempting to do here.

D. The district court properly found that the Trust had knowingly, intentionally, and voluntarily waived its claims against MacDonald by virtue of their execution of the purchase and sale agreement for the subject property.

The Trust also argues in the Opening Brief that the district court erred in granting summary judgment on the basis of the waivers Barbara Rosenberg

admittedly reviewed and agreed to in the Purchase Agreement and addendum. *See* JA 2:256 (in which Barbara Rosenberg testified that she fully reviewed and understood the Purchase Agreement before she executed it, and could have changed it if she liked). Even if the "as-is" nature of the sale demanded by the Trust did not dispose of this argument, it still fails for multiple reasons.

1. The district court properly recognized that the Trust waived all claims against MacDonald on multiple occasions.

In Nevada, a waiver is "the intentional relinquishment of a known right." *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 152 P.3d 737, 740 (Nev. 2007); *accord*, *Wood v. Milyard*, 132 S. Ct. 1826, 1832 (U.S. 2012) (recognizing that "[a] waived claim or defense is one that a party has knowingly and intelligently relinquished"). *See also State, Univ. & Cmty. Coll. Sys. v. Sutton*, 103 P.3d 8, 18 (Nev. 2004) (recognizing that a waiver is valid where made with knowledge of all material facts). When a right is waived, the "right is gone forever and cannot be recalled." *Bernhardt v. Harrington*, 775 N.W.2d 682, 686 (N.D. 2009). A "party may not plead willful ignorance and escape [a] waiver." *BancBoston Mortgage Corp. v. Harbor Estates P'ship*, 768 F. Supp. 170, 172 (W.D.N.C. 1991). Waivers are enforceable to grant summary judgment against a claim where the evidence shows that the plaintiff willingly and

voluntarily signed the waiver, and the waiver is clear and unambiguous as to what claims were being waived against which parties. *See Cobb v. Aramark Sports & Entm't Servs., LLC*, 933 F. Supp. 2d 1295, 1298-99 (D. Nev. 2013).

Here, the undisputed facts before the district court indicated at least two separate waivers of all claims that strongly militated in favor of summary judgment. JA 12:2480-81. First, as discussed in Barbara Rosenberg's deposition, the Purchase Agreement that she and her husband both signed and read very closely specifically waived all claims against the Brokers to the sale and their agents, which includes both MacDonald Highlands and Michael Doiron. See JA 12:2480 at ¶ 13 and JA 2:335-36 at ¶ 22; *see also* JA 2:258-59. Those waivers extended to claims for zoning-related issues as well as "factors related to Buyer's failure to conduct walk-throughs, inspections and research" related to the property. *See* JA 2:335-36 at ¶ 22.

Because of the clear language of this waiver, which demonstrates its knowing intent, and Barbara Rosenberg's testimony that it was signed and reviewed by both her and her husband, there can be no dispute that all of the instant claims against MacDonald were properly summarily adjudicated as a matter of law. While the Trust may argue, as Barbara Rosenberg did, that the

waiver was limited only to construction defects, the plain language of the waiver, set out in JA 2:335-36, conclusively forecloses this line of argument.

The Purchase Agreement also contained a second waiver, located in the Real Estate Purchase Addendum executed by Barbara and Frederic Rosenberg. *See* JA 12:2481, JA 7:1501-02, and JA 7:1510. Michael Doiron was also named in the addendum as the seller's agent. JA 7:1515. Because the Trust's claims, which relate to the view from the subject property over a neighboring property, regard information that was undisputedly in the public record before Plaintiff purchased the subject property, the waiver of "ANY CLAIMS ARISING OUT OF OR RELATING IN ANY WAY TO . . . EASEMENTS, BOUNDARIES, . . . OR ANY OTHER MATTER THAT WOULD BE DISCLOSED OR REVEALED BY A SURVEY OR INSPECTION OF THE PROPERTY OR SEARCH OF PUBLIC RECORDS" applies to those claims and renders them unsupportable as a matter of law. JA 12:2481 and JA 7:1502-03. Summary judgment was therefore properly granted by the district court.

2. The Trust cannot now argue the non-waivability of statutory duties under NRS § 645.252, because it never made that argument before the district court when MacDonald brought the motion for summary judgment.

This Court has historically held that it "generally will not consider arguments that a party raises for the first time on appeal." *State ex rel. State Bd. of Equalization v. Barta*, 188 P.3d 1092, 1098 (Nev. 2008); *see also Nevada Power Co. v. Haggerty*, 989 P.2d 870, 877 (Nev. 1999). More specifically, "**[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.**" *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981) (emphasis added).

Here, the Opening Brief's argument that Doiron's statutory duties could not be waived as a matter of law was raised for the first time in the Trust's Opening Brief, appearing neither in the Trust's opposition to MacDonald's motion for summary judgment (JA 6:1125-39; the only mention of waivers appears on JA 6:1134 and does not make the Opening Brief's statute-based non-waivability argument), nor in oral argument on the motion (JA 14:2899-2968).[17]

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[17] The Trust's counsel did mention in oral argument their belief that the waiver did not extend to conditions outside of the Trust's property (JA 14:2958-59) and that the waivers were not valid because the Trust did not have all material facts (JA 14:2963). While NRS 645.252 is mentioned once by the Trust's counsel, it was never discussed in the context of a non-waivability argument. *See* JA 14:2960-63.

While this Court may occasionally consider issues of pure law that were not discussed below,[18] the issue that the Trust wishes to place before this Court is one of both fact and law. The duty argued by the Trust under NRS 645.252(1)(a), to disclose "[a]ny material and relevant facts, data or information which the licensee knows, or which by the exercise of reasonable care and diligence should have known," requires factual findings by the district court as to what Michael Doiron knew or should have known at the time the Trust purchased the subject property. As it is, Doiron's knowledge of the facts is unclear,[19] and there is no clear record indicating what she "should have known" or when as it relates to this statutory duty. What *is* undisputed, however, is that Doiron did make a zoning disclosure to the Trust that its representatives ignored. JA 2:348. That undisputed fact alone appears to put the disclosure issue to rest.

Based on the foregoing, this Court should not now allow the Trust to make a brand-new argument in its attempt to reverse the district court, particularly when the Trust had every opportunity to do so back when MacDonald originally brought its motion for summary judgment. This procedural problem, in addition to the fact

[18] *See Haggerty*, *supra*, 989 P.2d at 877 (considering a statutory interpretation issue "presented to the court in the amicus curiae brief"), and *Old Aztec Mine*, *supra*, 623 P.2d at 983 (indicating jurisdiction could properly be considered on appeal).

[19] JA 3:561 (Deposition of Michael Doiron at 204:5-15).

that the Trust expressly stated it was not relying on Doiron's representations, JA 2:335, would result in a grossly unfair second bite at the apple for the Trust.

3. For this Court to hold that NRS § 645.252 invalidates the Trust's multiple waivers, when Doiron did actually make a disclosure, would be an absurd and legally prohibited misinterpretation of the statute.

Finally, to the extent this Court is willing to consider The Trust's late-asserted argument that this waiver does not properly apply to NRS § 645.252, the Court should also consider not only that this information was arguably not in Doiron's possession, **but that it was indisputably available to the Trust during the due diligence period set forth in the purchase agreement**. *See* Argument subsection (C) (4), *supra*, and JA 2:348. For the Trust's argument to have any merit, then, this Court would have to interpret NRS § 645.252 to allow a claim by a buyer who had **undisputed** notice of a potential problem, and contractually took legal responsibility for its discovery, against a relator that only had **arguable** knowledge of the same problem.

"In construing a statute, this court considers the statutory scheme as a whole and avoids an interpretation that leads to absurd results." *State v. Tatalovich*, 309 P.3d 43, 44 (Nev. 2013). The United States Supreme Court agrees, writing that "to construe statutes so as to avoid results glaringly absurd[] has long been a judicial

function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586 n. 16 (1982). Here, **Doiron undisputedly made a disclosure to the Trust** (JA 2:348), and the Trust had the contractual responsibility to follow up on that disclosure, but did not. It would be "glaringly absurd" for this Court to then interpret NRS § 645.252 to impose liability on Doiron, who did not undertake the specific contractual duties of the Trust.

4. The Trust's argument that there were material issues of fact regarding disclosure is contradicted by the record and irrelevant on the bases of the district court's actual decision.

The Trust further argues that there were several issues of material fact that should have prevented summary judgment on the disclosure-based claims. Whether or not there is a dispute on the point of materiality of the disclosure, that dispute itself was immaterial to the Court's decision to grant summary judgment, which was based on the "as-is" language, waivers, remedy limitation, and several other issues that remove the necessity to consider the materiality of facts disclosed or not disclosed.

Nor do the specific factual issues cited in the Opening Brief give rise to reversible error. The first "factual issue" cited by the Trust is "the meaning and

applicability" of the "as-is" provisions in the subject property's Purchase Agreement. The issue of contract construction, though, is and always has been a question of law, not fact. *See Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). The Trust insists that these provisions only apply to the subject property and not any surrounding properties, but the provisions themselves unambiguously state otherwise. *See* JA 2:333, indicating that the Trust was required to "take such action as [it] deemed necessary to determine whether the Property is satisfactory to [the Trust] including, but not limited to . . .**whether there are unsatisfactory conditions surrounding or otherwise affecting the Property**" (emphasis added). The Trust's continued insistence, therefore, that this language was limited only to the subject property or "structural" problems is just not supported by the facts.

On the second issue, the district court did not find that Barbara Rosenberg's real estate experience "absolved the MacDonald parties of their duty to disclose material facts." Opening Brief at 30. In fact, there was never any such finding by the district court, although the district court did properly acknowledge that Barbara Rosenberg was a "sophisticated" real estate buyer in determining whether the Trust's rejection of an offer of judgment was reasonable. JA 14:3041:14-42:5. The parties and the district court also acknowledged, as is written here, that

Barbara Rosenberg reviewed and understood the Purchase Agreement, as well as the fact that she could have requested changes to that document but did not do so. *See* JA 2:256 (Barbara Rosenberg Deposition at 90:2-11).

As to whether the Trust could have discovered the sale to Malek, that was never a material question before the district court or this Court. The material question has always been whether the Trust could have discovered the status of Malek's second parcel in a way that would have alerted it to the potential future development on that parcel. As indicated *supra*, it is undisputed that Doiron *did* provide a disclosure on this subject on which the Trust never followed up. JA 2:348. The Trust attempts to argue that Doiron "knowingly provided outdated and inaccurate zoning information," Opening Brief at 31, but also fails to acknowledge that **as part of her disclosures, Doiron explained exactly how and where to get the most up to date information from the City of Henderson**. *See* JA 2:348. This evidence was supported by the testimony of Michael Tassi, who indicated that, had the Trust followed the instructions in Doiron's disclosure, it could have accessed information and updated zoning maps regarding the area around the subject property in January 2013, **as early as two months before the Purchase Agreement was signed**. *See* JA 3:539.

The final "material fact" argued on the disclosure issue in the Opening Brief is the amount of the Trust's alleged damages. Opening Brief at 32. However, nowhere in the district court's findings of fact and conclusions of law is the amount of damages an issue that bore upon any point of the decision. JA 12:2477-88. Furthermore, the limitation of remedies from ¶ 1 of the Addendum, which has been conceded on appeal, renders the issue of damages immaterial as a matter of fact and law. *See* JA 7:1501 and 12:2495 at ¶ 10.

E. The district court did not err in granting fees and costs, and the record clearly demonstrates that it considered the necessary factors required by Nevada law, even if those factors are not included in the order itself.

1. The Beattie factors were argued at length before, and considered by, the district court.

Finally, the Trust argues in its Opening Brief that the district court abused its discretion by awarding attorney fees to MacDonald because it allegedly failed to consider the factors listed in *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983). This is, however, a complete misrepresentation of the record. What the documents show is that not only were the *Beattie* factors discussed in the moving papers, they were argued at length before the district court at a hearing on MacDonald's motion, as well as an integral part of Judge Cory's decision.

The Trust apparently does not believe the discussion with the district court at the hearing to be sufficient, and cites *Rivero v. Rivero*, 216 P.3d 213 (Nev. 2009), as authority. *Rivero*, though, is distinguishable from the instant case in several key respects. First, the attorney fee award in *Rivero* was not pursuant to a routine offer of judgment, but was for filing a "frivolous motion." *See id*. at 234. Second, the *Rivero* court focused on not only what the order said, as the Trust does here; the decision went as it did because "the chief judge did not hold a hearing or make findings of fact." *See id*. Here, a hearing was held and, as discussed *infra*, the record reflects that the *Beattie* factors were not only considered, but a key part of the district court's decision.

The Nevada Court of Appeals recently considered an award of attorney fees made pursuant to offers of judgment in *Frazier v. Drake*, 357 P.3d 365 (Nev. Ct. App. 2015). In that case, two personal injury plaintiffs received and rejected offers of judgment from the defense, which prevailed at trial. *See id*. at 368. The trial court awarded attorney fees to the defense based on the fact that the fourth *Beattie* factor – reasonableness of fees – weighed in favor of the defense. *See id*. at 372-73. The other three factors – whether the claims were brought in good faith, whether the offers of judgment were reasonable, and whether the plaintiffs' rejection was reasonable – all undisputedly weighed in favor of the plaintiffs. *See*

id. The Court of Appeals then determined that the one factor in favor of the defense could not overrule the other three, and reversed the award. *See id*. at 373.

Here, the facts are different because the district court did not misapply the *Beattie* factors in the way that the court in *Frazier* did. While it is true that the district court's *order* did not specifically mention the *Beattie* factors, it is completely untrue, and contrary to the record, to say that the district court did not consider them. Indeed, both the briefs on MacDonald's motion and the transcript of the oral argument on that motion contained detailed discussions of precisely this topic.

This very point on the *Beattie* factors was argued by the Trust in its opposition to MacDonald's motion for fees, which was not included in the joint appendix prepared by the Trust for this appeal:

> When exercising discretion to award attorney fees based on an offer of judgment, courts must consider: (1) whether plaintiffs 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 plaintiffs 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.

See SA 8-9. The Trust then went on to argue that the factors militated in its favor and against MacDonald's then-nascent motion. SA 9-12. For its part, MacDonald

responded to these charges in its reply, which similarly was not included in the joint appendix. SA 78-81. Nor was the analysis of the *Beattie* factors confined to the pleadings themselves; the record clearly demonstrates that the parties and Judge Cory discussed the *Beattie* factors at length in the hearing. JA 14:3025-30 (in which the Trust's counsel argued regarding *Beattie*); JA 14:3030-41 (in which MacDonald's counsel argued regarding *Beattie*). During all of these portions of the hearing, Judge Cory actively participated and asked questions, challenging counsel on what he saw as issues with their respective analyses. *See id*.

At the hearing, the first factor, whether the Trust had brought its claims in good faith and whether MacDonald had defended in good faith, was not disputed by the parties. JA 14:3025:6-12 and JA 14:3035:12-15. Though the Trust initially appeared to dispute the reasonableness of MacDonald's fees (the fourth *Beattie* factor), its criticism and analysis at the hearing went more to the reasonableness of the timing of MacDonald's offer of judgment in the middle of discovery in the case. JA 14:3025:14-3028:3 (in which the Trust's counsel brings up *Frazier* in terms of the reasonableness of an offer of judgment made during discovery).

For this particular motion, then, the factors of reasonableness of the offer and its refusal correctly weighed heavily upon the court in its decision. At one point Judge Cory and counsel for MacDonald had the following exchange

regarding the third *Beattie* factor of the reasonableness of the Trust's refusal of the $25,000 offer of 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.

JA 14:3038-40 (hearing transcript at 44:19-46:7). The parties fervently argued, and the Court considered, the "grossly unreasonable" test mentioned in *Frazier v. Drake*. *See*, *e.g.*, JA 14:3028-29 (hearing transcript at 34:1-35:4) and 14:3040-41 (hearing transcript at 46:13-47:10). Given this continued focus on the second and

third factors from *Beattie* (when the first and fourth were not fiercely litigated), that was how Judge Cory framed his decision:

> **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 . . . 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.

JA 14:3041:15-3042:5 (emphasis added). It is therefore inaccurate to represent to this Court that there was an "absence of any *Beattie* analysis." Opening Brief at 34. Quite to the contrary, Judge Cory inquired and heard argument regarding all four factors, and focused on the reasonableness factors, which counsel primarily

argued at the hearing.[20] In no sense, then, did the district court abuse its discretion in granting MacDonald's motion for attorney fees.

2. To the extent there is a procedural defect in the district court's order granting attorney fees, the Trust has waived its right to object to the order by approving that same order as to form and content.

Furthermore, the Trust is at least partly responsible for the form of the Order granting attorney fees, to the extent that the order was prepared and circulated to the Trust's counsel, Karen Hanks, for approval "as to form and content." JA 13:2777. To the extent that the Trust objected to the fact that the Court's order did not reflect the pleadings and the hearing by specifically addressing *Beattie* factors, the Trust had a chance to object that it did not take, and instead *approved* the form of the order it now objects to. Nor did the Trust file a motion for reconsideration or to amend the judgment on that basis.

MacDonald does not dispute that the trust may properly appeal the *effect* of the district court's order, which the Trust certainly did not consent to. But the Trust absolutely had control and input into the language and contents of the order,

[20] The Opening Brief does attempt to re-argue the question of reasonableness under *Frazier* at 35-38. That argument is not substantively different and was discussed and disposed of by the district court at JA 14:3038-42. Nor does the Trust cite any more authority here than it did below that the Rosenbergs' *subjective* beliefs about their damages should shape the district court's *objective* assessment of the reasonableness of the Trust's actions.

and, through its counsel, approved the order as sufficient. The current objection, then, that the order itself did not include references to *Beattie*, is not a proper basis for this appeal. *See Basic Refractories v. Bright*, 286 P.2d 747, 749 (Nev. 1955) (recognizing that "[a] party who voluntarily acquiesces in, ratifies, or recognizes the validity of, a judgment, order, or decree against him, or otherwise takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives, or is estopped to assert, his right to have such order, judgment, or decree reviewed by an appellate court"). Accordingly, to the extent that there is an even an issue here for the Court to address, it was waived prior to the appeal and should not be considered by this Court. *See also Old Aztec*, *supra*, 623 P.2d at 983.

F. The district court should have entered an amended judgment granting post-judgment interest on MacDonald's fees and costs award pursuant to NRS § 17.130(2).

Nevada Revised Statutes § 17.130 provides that "[w]hen no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied." Where a law like NRS § 17.130 provides that all judgments accrue post-judgment interest, "the award of post judgment interest [by] a district court judgment is mandatory."

See Barnard v. Theobald, 721 F.3d 1069, 1078 (9th Cir. 2013). This Court has recognized that "failing to award post-judgment interest creates an incentive for the defendant to exploit the time value of money by frivolously appealing or otherwise delaying timely payment." *Powers v. United Services Auto. Ass'n*, 962 P.2d 596, 605 (Nev. 1998) (*cting Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1995)). Finally, this Court has concluded that, just as an award of post-judgment interest is appropriate on punitive damages, it is also appropriate on an award of attorney fees. *Waddell v. L.V.R.V. Inc.*, 125 P.3d 1160, 1167 (Nev. 2006).

Here, the district court appears not to have issued the requested amended judgment less out of an outright refusal to do so than out of procedural confusion caused in part by the certification, pursuant to NRCP 54(b), of the order granting fees and costs itself. Accordingly, the record does not contain an amended judgment indicating the amount of the fees and costs awarded, despite the fact that the Trust did not oppose the issuance of such an amended judgment; nor did the Trust oppose an award of post-judgment interest. Considering that the language of NRS §17.130 requires the imposition of post-judgment interest anyway, this Court should only reverse the district court to the extent that its judgment and order granting attorney fees and costs is inconsistent with that edict.

CONCLUSION

Accordingly, and for all the foregoing reasons, MacDonald asks that the judgment be affirmed as to all respects of the district court's decision on MacDonald's motion for summary judgment. MacDonald also asks that the award of fees and costs be upheld, with a partial reversal and remand instructing the district court to issue an amended judgment explicitly providing that MacDonald's fee and cost award is subject to post-judgment interest pursuant to NRS § 17.130.

Dated this 14th day of December, 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 type-face 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 2010 in Times New Roman, 14 point.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 28.1(e)(2)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 17,495 words.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2016, the foregoing **RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL** was served via this Court's electronic e-filing system to all parties listed on the service list.

/s/ Angela Embrey
An employee of Kemp, Jones & Coulthard, LLP