IN THE SUPREME COURT, STATE OF NEVADA

JAMES A. BOESIGER, an individual; MARIA S. BOESIGER, an individual, Appellants, vs. DESERT APPRAISALS, LLC, a Nevada Limited-Liability Company; TRAVIS T. GLIKO, an individual, Respondents.	Supreme Court No.: 75198 Case No. A-15-725567-C Department XXIV

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Jim Crockett, District Judge
D.C. Case No. A-15-725567-C

APPELLANT JAMES AND MARIA BOESIGER'S OPENING BRIEF TO APPEAL

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES A. BOESIGER, an individual; MARIA S. BOESIGER, an individual, Appellants, vs. DESERT APPRAISALS, LLC, a Nevada Limited-Liability Company; TRAVIS T. GLIKO, an individual; DOES 1-X, inclusive; ROE CORPORATIONS XI-XX, inclusive. Appellee.	Supreme Court No. 75198 District Court Case No.: A725567

NRAP 26.2 DISCLOSURE STATEMENT

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

1. JAMES A. BOESIGER;

2. MARIA S. BOESIGER;

3. DESERT APPRAISALS, LLC (This is not a publicly held company);

4. TRAVIS T. GLIKO.

Attorneys for Appellants:

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DATED this 9th day of August, 2018

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I. JURISDICTIONAL STATEMENT

An appeal was taken from a final order in the Eighth Judicial District Court in Clark County, Nevada. The appeal was taken under NRAP 3A(b)(1). It was an appeal from a final order entered in an action or proceeding commenced in the court in which the judgment was rendered. The Notice of Entry of Order was filed on or about January 25, 2018. The Notice of Appeal was timely filed on February 16, 2018.(Bates No. 267-268.)

II. ROUTING STATEMENT

This matter should be retained by the Nevada Supreme Court for multiple reasons under NRAP 17(a)(10) and (11). While only one ground is required for the case to be retained by the Supreme Court, there are two grounds to retain jurisdiction here.

First, this case "raises as a principal issue a question of first impression involving... the common law" under NRAP 17(a)(10). This case is an issue of first impression in published opinions in Nevada. There are no published decision in Nevada that addresses whether residential real estate appraisers have any liability to named prospective home buyers where the sale and loan approval are conditioned on the appraisal, the home buyer pays for the appraisal, but the lender company organizes and contracts with the appraisal company to complete the appraisal.

Secondly, this case "raises as a principal issue a question of statewide public importance" under NRAP 17(a)(11). It impacts every homeowner in the state with significant impact on the home buying process and the real estate industry. It is

common knowledge that mortgages are premised on appraised value of the property being purchased. The determination by the district court judge that as a matter of law real estate appraisers can never be liable to known home buyers when they are hired by a lender would mean that home buyers statewide would have no recourse or protection for faulty appraisals that cause them to overpay for their homes.

Overvaluing homes also inflates the profits of lenders through higher interest rates. Overvaluing homes give larger commissions to Realtors. Overvaluing homes keeps the appraisers in the good graces of the financial institutions and the real estate agencies that refer them business. The only people who suffer are the buyers who are left paying the inflated price over thirty years at compounded interest rates. The far-reaching impact of this issue clearly qualifies as "a question of statewide public importance" under NRAP 17(a)(11).

III. ISSUES PRESENTED

1. Whether the trial court judge made a mistake of law, or alternatively abused his discretion, when he granted summary judgment against the home buyers' tort claims against the appraiser of their residence for (1) professional negligence, (2) negligent misrepresentation, and (3) breach of the statutory duty to disclose under NRS 645C.470 where (a) the sale of the house was contingent on qualifying for a loan based on the appraisal, (b) the sale of the house was contingent on the appraisal itself, (c) the appraisal was paid for by the buyers (d) the lender organized for the appraisal to be done and (e) non-expert testimonial and documentary

evidence was offered to show mistakes in the appraisal that over-valued the home, resulting in an increased purchase price and an inability to refinance the mortgage to a lower-priced conventional loan. (e) there were allegations of mistakes in oversizing the square footage and inflating the home value with distinguishable properties of higher value.

2. Whether the trial court judge made a mistake of law, or alternatively abused his discretion, when he granted summary judgment against Plaintiffs' tort causes of action for negligent misrepresentation, professional negligence cause of action based on his opinion that an expert witness was required as a matter of law to establish negligent misrepresentation by a real estate appraiser?

3. Whether the trial court judge made a mistake of law, or alternatively abused his discretion, when he granted summary judgment against Plaintiffs' cause of action for a breach of the statutory duty to disclose under NRS 645C.470 based on his opinion that an expert witness was required as a matter of law to establish the breach of the statutory duty to disclose by a real estate appraiser?

4. Whether the trial court judge made a mistake of law, or alternatively abused his discretion, when he combined three different causes of action (professional negligence, negligent misrepresentation, and breach of the statutory duty to disclose under NRS 645C.470) into one for professional negligence requiring expert testimony to establish duty and

breach as a matter of law?

5. Whether the trial court judge made a mistake of law, or alternatively abused his discretion, in holding that an appraiser cannot be liable to designated home buyers as third party beneficiaries where the contract to perform the appraisal is between the appraiser and the lender; it is used to determine the value of the house to qualify to finance the purchase price of the home; the sale is contingent on qualifying for financing; and the home buyers paid for the appraisal report requested by the lender?

III. STATEMENT OF THE CASE

This is an appeal from the district court's final order granting summary judgment in favor of the Defendants on the grounds that real estate appraisers have no liability to named third-party home buyers when the lending company hires the appraiser to value the property for loan qualification and the prospective buyers' purchase of the home is conditioned on the result of the appraisal.

The Defendants' Motion for Summary Judgment also argued that an expert witness is required to establish any negligence by an appraiser, which the trial judge admitted at the hearing was not required as a matter of law. (Bates No. 40-195) However, in the order from the hearing prepared by Defendants' counsel, it states that the judge made a finding of law that an expert witness is required to establish negligence of an appraiser. The trial judge ultimately granted summary judgment on all causes of action because he held that there is no third party claims for potential home buyers where the appraiser is hired by a lending company, as indicated in the

Minutes and the Statement of Evidence. (Bates No. 272-277.) Due to this discrepancy in the record, this appeal addresses both third-party liability of appraisers to home buyers and whether expert witness testimony is required to establish negligence of an appraiser.

On October 2, 2015, the Boesigers filed a Complaint through counsel bringing four causes of action:1) Professional Negligence by the appraiser, (2) Third-Party Beneficiary to the Contract, (3) Negligent Misrepresentation, and (4) Breach of the Statutory Duty to Disclose under NRS 645C.470. (Bates No. 1-9) The trial court granted summary judgment against all four claims on May 22, 2018 based on holding that there is no third party liability to potential home buyers by residential real estate appraisers hired by lenders. On February 27, 2018, the Plaintiffs' file this Notice of Appeal.

IV. STATEMENT OF RELEVANT FACTS

Plaintiffs Maria and James Boesiger decided to purchase their family home at 5015 Adrian Fog Avenue, Las Vegas, Nevada 89141 (hereafter "House") in September 2013. (Maria's Depo p.30, ln. 19-23; p.28 ln. 19-22.) Like eighty-eight percent (88%) of recent home buyers, the Boesigers financed their home purchase. (See RPA 62-74; MARIA DEPO.) The financing of the home depended on an appraisal report supporting the value and purchase price of the home. (62-65.) Like many contracts to purchase a home, the Boesigers had a contingency clause in their contract that the purchase of the home was contingent on them qualifying for a loan and the home appraising at or above the purchase value in order to get the loan. (63,

65.) If the home had not appraised for the purchase price, the Boesigers would have walked away from the transaction or negotiated a lower purchase price. (63; DEPO OF MARIA p.93.)

On September 26, 2013, the Boesigers contracted to purchase the House for $337,000 to use as their personal residence. (62:5-11.) The contract was contingent upon the buyers qualifying for a new loan. (62:24-29.) The contract had a special provision for the effect of the outcome of the appraisal on the House. (63:15-20.) The acceptance of the offer to purchase was expressly contingent on the reserved right to conduct an appraisal paid by the buyer, with the box for appraisal checked in. (65:1-7.)

The contract had explicit provisions about how the appraisal would impact the Buyers in Clause 2(C) in the sale contract. (63:15-20.) It expressly states that the buyers could renegotiate the purchase price if the appraised value is lower than the contracted sale price or not purchase the property and get their earnest money deposit refunded. (63:15-20.) The clause reads:

C. **APPRAISAL:** If an appraisal is required as part of this agreement, or requested by Buyer, and if the appraisal is less than the Purchase Price, the transaction will go forward if (1) Buyer, at Buyer's option, elects to pay the difference and purchase the Property for the Purchase Price, or (2) Seller, at Seller's option, elects to adjust the Purchase Price accordingly, such that the Purchase Price is equal to the appraisal. If neither option (1) or (2) is elected, then Parties may renegotiate; if renegotiation is

unsuccessful, then either Party may cancel this Agreement upon written notice, in which event the EMD shall be returned to the buyer. (63:15-20.)

Mrs. Boesiger testified that they did not have sufficient savings to qualify for a conventional loan and they could only qualify for a Federal Housing Administration (FHA) Loan which required less money down. (125 40:14- 42:10). Thus, she did not have extra funds to put down and she was fully dependent on loan qualification to purchase the home. Id. Furthermore, Mrs. Boesiger testified that but for the overvaluing mistakes in the appraisal, she would not have purchased the home for that price. (137-138 88:21-90:2). "It means that if the square footage would have come back properly, I would have said, well, I'm not paying that for the house. I could buy a new one for $256,000." (Id.89:12-21).

She also testified that brand new construction for the same model was on the market from the builder for $257,000, so she would not have purchased her home for $337,000 when she could buy the same model brand new for $80,000 less. (137, 139. 89:8-25; 93). Furthermore, she testified that she would not have purchased it if it did not qualify for the loan amount. 127 (89:22- 90:8). **Thus, the results of the appraisal directly determined whether the Boesigers would and could buy the House**. Supra.

Prior to the closing, the Defendants performed an appraisal on the House as part of the loan application process. (TRAVIS DEPO p.10 ln. 13- p.13 ln. 8; 126 44:14-21). The Boesigers paid for the appraisal pursuant to the terms of the purchase agreement, and confirmed by Mrs. Boesiger's testimony. (65:1-7; 129) (55:22-23).

The lender arranged for the Defendants to appraise the home. (TRAVIS DEPO p.10 ln. 13- p.13 ln. 8; 126 44:14-21).

The original appraisal overvalued the House by relying on the wrong square footage, the wrong builder's model, and use comparison properties that were not equivalent due to location and other important differences. (133-134, 138, 142-143. TRAVIS DEPO -----.) The mistake was discovered a year later when the couple attempted to refinance the property. (133-135 69 -77). As a result of the errors in the appraisal, the Boesigers paid a higher purchase price, increased interest, higher taxes, and had the expenses caused by the inability to refinance the House. (148 130:19-131:4).

When they purchased the House, the Boesigers planned to refinance for a conventional loan in about a year to reduce their monthly payments. 139 (94:22-95:2). One year later, property values had gone up in their neighborhood and the new construction prices had increased. 133-135 (69 -77). So, they arranged to have the home appraised again through the same lending company. 133 (69:4-13).

The appraiser, Travis Gliko, came out to the property, met Mrs. Boesiger, and mentioned that he had completed the appraisal on the home the previous year. 133 (69:14-18). After coming to the house, he never completed the written appraisal report. 133 (69:19-70:11). Mrs. Boesiger was informed by the lender that the appraised value remained the same so the appraiser decided not to write the report and that she could not qualify for the refinance. Id. She was very confused about why the property value had not increased. Id.

Soon after, Mrs. Boesiger's attention was drawn to concerns about the appraised square footage of the home when she received her tax notice from Clark County. 133 (70-71). The tax notice appraised the home for $40,000 to $50,000 higher than the value appraised by the Defendants at $337,000. 133 (70:12-19). Mrs. Boesiger informed the County that this valuation was incorrect because she had just had it appraised for a lower amount. 133 (12-19). Since there was no written appraisal, the County sent out an appraiser to assess the value of the House. 133 (70:20-22). Mrs. Boesiger was there to let the assessor into the house and observed the assessor take a brief look around. 133 (70:22-24). Then he told her the home was listed as the wrong building model. 133 (70:22-71:6) Thereafter, the county decreased the square footage on the tax assessment. 133 (71:4-7).

Upon further research, Mrs. Boesiger uncovered other mistakes in the appraisal report. 133 (71:8-21), 135-137 (80:17-87:22). Mrs. Boesiger testified that the appraiser erred by using the wrong model of the builder causing an overvaluation of the house. 133 (71:8-21). She also testified that the appraiser erred by comparing to other property values that were distinctly different because (1) some were in gated communities where this House is not; (2) some were two stories that were more expensive to build than this three story House; (3) they were in very desirable and expensive neighborhoods that are adjacent but greatly higher in value than her own house; and (4) some had valuable additions, like an extra garage space, that her House did not include. 135-137 (80:17-87:22).

Mrs. Boesiger testified that she had personally researched and viewed the

comparable properties. 135 (79:16-20), 136 (81:4-17). She understood these distinguishing differences from her experience training at the real estate school, obtaining her real estate license, and interning with two real estate offices, along with common knowledge about the real estate market. 119-121 (15:19- 22:23). Thus, she has personal knowledge of many of the mistakes in the appraisal.

Plaintiffs believe the Defendants realized the error in square footage and sought to avoid accountability by refusing to complete the second appraisal. Plaintiffs also believe Defendants subsequently changed the records to hide the negligent mistakes that caused them to overpay for their home. Since this case was dismissed prematurely on summary judgment, the Plaintiffs were not given the opportunity to fully present the argument and supporting evidence on the cover up.

The record does show conflicting testimony and documentation by the Defendants creating genuine issues of fact. While the Defendants provided an appraisal report that it alleges is the original report from October 2013, its content conflicts with the appraiser's deposition testimony. 78-109; The appraiser testified at his deposition that he relied on the incorrect square footage amounts in the Assessor records and the MLS:

Q. How do you know what floor plan to look for?

A. Because of the square footage on the Assessor's records and the MLS listing.

Q. Say that again?

A. Square footage of the MLS and the assessor's record.

Q. Was the MLS and the assessor's record match?

A. Yes they matched.

See 224 (19:23-20:7) and compare 78-109.

The problem is that the MLS and the Assessor's records had the wrong model and the wrong square footage as admitted by the appraiser. Gliko Depo p.54 lines 5-16. The appraiser testified that he determined the size and builder's model based on the matching square footage listed in the Assesor's record and the MLS.224 (19:23-20:7). Yet these were incorrect. In his explanation of how he allegedly discovered the error in square footage, his only explanation was that he determined the floor plan of the house by looking at the wrong square footage of the Assessor and MLS. Id.

The appraiser testified that he personally viewed that the Assessor's office later changed the square footage of the House from 3,553 to 2,870. 233 (54:5-14). Yet he alleges he knew this before despite relying on the assessor's earlier assessment that was wrong. Supra. Oddly, in the same deposition he makes no reference of informing anyone of the wrong square footage in the Assessor's records and the MLS listing, which seems like vital information for the home buyers and the lender. Yet, the appraiser alleges he caught the error in the assessor's record back in October 2013 based on the appraisal report he only produced in discovery of this lawsuit after the allegations about the square footage error were brought by the home buyers. 233 (54:24-55:6). He also testified that he told the Boesigers of the error a year after they bought the house when he was sent to re-appraise for a refinance. 231 (47:12-18).

The home buyers brought suit against the appraiser and his company to recover

damages for the erroneous appraisal report and the resulting overpriced loan. (Bates No. 1-9.) To bolster their suit, their attorney contacted an expert witness to explain the error of the overage in square footage and on July 29, 2016, they designated expert Craig Jui. Unfortunately, the expert later became unavailable due to a new position and they withdrew his designation as an expert witness on May 22, 2017. (Bates No. 38-39.)

Plaintiffs presented other evidence of the appraiser's negligent misrepresentation and professional negligence. This includes (1) the testimony of Maria Boesiger through deposition, who was a licensed realtor and has specialized training in identifying comparable properties and determining valuation of homes in the resale market; (2) the affidavit of Maria Boesiger explaining the mistaken square footage; (3) the testimony of the appraiser, Defendant Travis Gliko, that he relied on the incorrect listings of the MLS and the county assessor. Supra. The home buyers had additional documentation to present on these issues but the ruling for Summary Judgment on December 5, 2017 precluded further presentation to the court.

On October 25, 2017, the appraisal company filed a Motion for Summary Judgment on two grounds. (Bates No. 40-195) First, they argued that an expert witness is required to establish duty and breach to establish any negligence by an appraiser and Mrs. Boesiger's testimony is legally insufficient to establish negligence. 45-55. Second, they argued that real estate appraisers have no liability to named third-party home buyers when the lending company hires the appraiser to value the property for loan qualification and the prospective buyers' purchase of the home is conditioned on

the result of the appraisal.(Bates No. 55-59.)

The home buyers responded with an Opposition on November 17, 2017 detailing a good faith argument for professional negligence, negligent misrepresentation and third party beneficiary claims for breach of contract and tort liability through negligence torts. (Bates No. 199-236.) The Opposition cites and summarizes case law that supports liability by analogy in existing Nevada law and convincing case law from other jurisdictions holding appraisers liable to home buyers even when hired by the lenders. 199-236. The district court judge ultimately concluded in favor of Defendants' Motion for Summary Judgment because he believed there is no liability to home buyers for appraisers hired by lenders as a matter of law. Since there is no published decision on this point in Nevada and numerous other jurisdictions have found liability in these circumstances, the home buyers bring this appeal. Furthermore, expert testimony is not required to prove negligence of appraiser but rather is a genuine issue of fact.

Despite controlling law on point about an expert witness not being required to establish professional negligence and a good faith argument for clarification on the third party liability of real estate appraisers to designated potential buyers of the property, the judge granted summary judgment to the appraisal company. See the Statement of Evidence (Bates No. 272-277), and the Order Granting Defendant's Motion for Summary Judgment (Bates No. 256-266).

The home buyers were denied the opportunity to present evidence of the appraiser's negligence, including the appraiser's admission that used the wrong model.

Supra. As for the third beneficiary claims, the home buyers detailed in the record through pleadings how there is a good faith argument for third party liability based on current law in Nevada and areas of undecided law in Nevada. Supra. Plaintiffs should be able to present these arguments in full and not be denied on a motion for summary judgment where genuine issues of law and fact remain.

The home buyers filed a timely notice of appeal on February 16, 2018.. Subsequently, attorney fees were awarded to the appraisal company at a hearing after the notice of appeal based on the judge ruling the suit was frivolous and without merit in the law. The home buyers object to any payment of attorney fees to the opposing side where there is a good faith argument under existing law and unsettled areas of law to hold appraisers liable to home buyers.

V. SUMMARY OF THE ARGUMENT

The appraiser used the wrong model. It is very simple, as a result the appraiser negligently misrepresented the square footage of a home to be hundreds of square feet larger than the actual size, negligently labeled the home as a more valuable floor model, and negligently used higher-value properties to appraise the House at a substantially inflated value. As a result, the Boesigers lost money. They qualified for a loan amount larger than the true value of the home. They continue to make payments with compounded interest payments on the inflated valuation of the home. They were unable to refinance and lower their monthly payments due to the overvaluation of the appraisal and resulting loan. They overpaid on property taxes.

To recuperate their losses, The Boesigers sued the appraiser on four grounds:

(1) Professional Negligence by the appraiser, (2) Third-Party Beneficiary to the Contract, (3) Negligent Misrepresentation, and (4) Breach of the Statutory Duty to Disclose under NRS 645C.470.

On October 25, 2017 , the Defendants filed a Motion for Summary Judgment on the grounds that there is no third party beneficiary liability to known potential home buyers and an appraiser where (1) the named home buyers paid for the appraisal, (2) the sale contract was contingent on the house appraising for a certain value, (3) the loan was contingent on the house appraising for a certain value, (4) the lender contracted with the appraiser to determine the value of the house, (5) the appraisal report had a disclaimer, and (6) the third-party home buyers qualified for a loan and closed on the sale based on the appraised value of the house.

The Boesigers opposed summary judgment on two grounds. First, no expert testimony is required for the causes of action for negligence and misrepresentation by the appraiser as a matter of law. Controlling precedent from the Nevada Supreme Court in 2013 expressly held that expert testimony is not required for professional negligence claims except in narrowly, statutorily-defined medical professions that are not applicable here.

Secondly, real estate appraisers can be liable to third-party home buyers under third-party beneficiary liability in Contract Law and Tort Law based on analogous published case law in Nevada, an unpublished Nevada case on point, and numerous published decisions in other jurisdictions that have addressed liablity of appraisers to the third-party home buyers. At a minimum, since there is no published opinion in

Nevada on point, there is an issue of unsettled law that must survive summary judgment so the Plaintiffs have the opportunity to argue to establish published law on this point.

Therefore, summary judgment should be overturned. Furthermore, the subsequent award of attorney fees should be overturned.

VI. ARGUMENT

1. SUMMARY JUDGMENT IS IMPROPER WHERE THERE ARE UNSETTLED ISSUES OF LAW AND GENUINE ISSUES OF FACT.

"In cases posing complex issues of fact and unsettled questions of law, sound judicial administration dictates that court withhold judgment until whole factual structure stands upon solid foundation of plenary trial where proof can be fully developed, questions answered, issues clearly focused, and facts definitively found." Petition of Bloomfield S.S. Co. (S.D.N.Y. Apr. 11, 1969), 298 F Supp 1239, aff'd, (2d Cir. N.Y. Feb. 26, 1970), 422 F2d 728.

Summary Judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file and other matters presented to the court, together with affidavits, if any, show that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986).

On a summary judgment motion, the **inferences to be drawn from the**

underlying facts are to be in a light most favorable to the non-moving party. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513-14. Butler v. Bogdanovich, 101 Nev. 449, 705 P.2d 662 (1985). A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Anderson, 477 U.S. at 250, 106 S.Ct. at 2511.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which show that there is no genuine issue of material fact. Celotex, 477 U.S. at 322, 106 S.Ct. at 2552. Butler v. Bogdanovich, 101 Nev. 449, 705 P.2d 662 (1985). The non-movant may not rest on the mere allegation or denial in its pleading but must set forth specific facts showing that there is a genuine issue for trial. Matsushita, v. Zenith Radio Corp., 475 U.S. 574, 106 S,.Ct. 1348, 89 L.Ed.2d 538 (1986). Hickman v. Meadow Wood Reno, 96 Nev. 782, 617 P.2d 871 (1980). Maine v. Stewart, 109 Nev. 721, 857 P.2d 755 (1993). The court must determine the governing law. When the record is taken as a whole and with inferences viewed in the light most favorable to the non-movant and determined under governing law, summary judgment is appropriate.

The Nevada Supreme Court held:

"Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court **demonstrate that no genuine issue of material fact exists**, and the moving party is entitled to judgment as a matter of law. The substantive law controls which factual disputes are material and will preclude

summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."

Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

Here, there are both genuine issues of law and genuine issues of fact regarding the negligence of the appraiser and his credibility. The issues of law are (1) whether real estate appraisers have any liability to named home buyers where the appraiser is hired by the lending financial institution but the loan and sale for the buyers is contingent on the appraisal results. (2) Whether an expert witness is required as a matter of law to establish any grounds of negligence or breach of statutory duties to disclose by real estate appraisers.

The genuine issues of fact are numerous. The home buyers presented evidence of the appraiser's negligent misrepresentation and professional negligence, including: (1) the testimony of home buyer Maria Boesiger through her deposition, who was a licensed realtor and has specialized training in identifying comparable properties and determining valuation of homes in the resale market; (2) the affidavit of Maria Boesiger explaining the mistaken square footage; (3) the testimony of the appraiser admitting that he relied on two sources with erroneous square footage of the house and his testimony that he refused to provide a written second appraisal report for the property when he returned to reappraise it for a refinance. The home buyers were

denied the opportunity to fully present their case because of the court granted summary judgment.

Therefore, there were genuine issues of fact and issues of unsettled law that made summary judgment improper. Since summary judgment is only permitted where there are no genuine issues of material facts and law, the holding should be overturned.

2. APPRAISERS ARE LIABLE TO HOME BUYERS UNDER TORT LAW.

To the best of our knowledge, this is a new legal issue that has not been addressed by this court or within this court's jurisdiction, and there is no binding authority on the matter. The Court stated in an unpublished opinion in 2012 that "Nevada courts have not specifically dealt with claims brought by a borrower against an appraiser that was hired by the lender." Copper Sands Realty, LLC, 2012 U.S. Dist. LEXIS 38054, 11-12.

However, there is published case law adopting Restatement (Second) of Torts section 552, which was applied to make appraisers liable to third-party home buyers in an unpublished opinion. See: Stremmel Motors Inc. V. First Nat'l Bank of Nev., 94 Nev. 131 (1978); Copper Sands Realty, LLC, 2012 U.S. Dist. LEXIS 38054, 11-12.

Restatement Section 552 provides:

"(1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false

information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Stremmel Motors Inc. V. First Nat'l Bank of Nev., 94 Nev. 131

The only case found dealing with the liability of appraisers to home buyers in Nevada is an unpublished decision in 2012. Copper Sands Homeowners Ass'n v. Copper Sands Realty, LLC, 2012 U.S. Dist. LEXIS 38054. In Copper Sands Homeowner Ass'n, the U.S. District Court for the District of Nevada applied Restatement section 552 adopted in Stremmel to hold appraisers liable to potential buyers in certain circumstances even when the appraiser was hired by the lender. See Copper Sands Homeowners Ass'n v. Copper Sands Realty, LLC, 2012 U.S. Dist. LEXIS 38054.

Like the matter at hand, the Copper Sands case involved home buyers who sought negligence claims against an appraiser hired by the mortgage company and not the buyers. The court held:

"Nevada courts have not specifically dealt claims brought by a borrower against an appraiser that was hired by the lender...Nevada has adopted Restatement (Second) of Torts Section 552. (Citation omitted). Therefore, **this Court finds that it would be proper to apply the Restatement to the facts of this case. Accordingly, in some circumstances appraisers could owe a duty of care to borrowers.**"

Copper Sands Realty, LLC, 2012 U.S. Dist. LEXIS 38054, 11-12.

Outside of Nevada, there are numerous published decisions finding appraisers liable to home buyers even when hired by the lenders. There is **a Washington Supreme Court decision, a recent Arizona Court of Appeals decision, and a North Carolina Court of Appeals case establishing third party liability for appraisers to home buyers when the appraiser is retained by a lender to appraise a home in connection with a potential buyer's purchase-money mortgage**. Sage v. Blagg Appriasal Company Ltd., No. 1 CA-CV 08-0331 (Ariz. 2009); Schaaf v. Highfield, 127 Wn.2d 17 (Wash. 1995); Alva v. Cloninger, 227 S.E.2d 535 (N.C. Ct. App. 1981).

The Washington Supreme Court, held that a third party home buyer may state a claim for negligent misrepresentation against a real estate appraiser pursuant to Restatement (Second) of Torts Section 552 (1977). Schaaf v. Highfield, 127 Wn.2d 17 (Wash. 1995). Based on the same Restatement adopted by Nevada in Stremmel, the court held:

> "In summary, under Section 552, lack of privity is no defense to a claim of negligent misrepresentation. In Washington, however, only those in a limited class may advance such claims. [Plaintiff- the potential home buyer] is a member of that limited class. He was a **prospective home buyer** who had applied to the VA for a loan guaranty. The **VA hired Olson to do the appraisal solely because of [Plaintiff's] application**. [Plaintiff] is, therefore, the most proximal third party there will ever be to [the Defendant appraiser's] appraisal. It is possible that subsequent potential purchasers of the real estate, or others

with some interest in it, will have access to [the] appraisal, and rely on it. These people will all be more distal to the appraisal than [Plaintiff], however. Thus, if [the appraiser's] liability does not extend at least to [Plaintiff's] claim, no other third party will eve have a cause of action against the appraiser.

We conclude that a third party in Washington may state a claim for negligent misrepresentation against a real estate appraiser pursuant to RESTATEMENT (SECOND) OF TORTS Section 552. The liability of a real estate appraiser in these circumstances **extends** only **to those involved in the transaction that triggered the appraisal report, including**, but not necessarily limited to, **the buyer and the seller**." Id. at 26-27.

Schaaf v. Highfield, 127 Wn.2d 17 (Wash. 1995), *Emphasis added.*

In Arizona, the Court of Appeals **also held that an appraiser is liable to buyers in facts almost identical to the facts in this case.** Sage v. Blagg Appriasal Company Ltd., No. 1 CA-CV 08-0331 (Ariz. 2009). Like this case, the appraiser contracted with the lender not the buyer. Id. Like this case, the appraisal had a disclaimer that it was not for other parties beside the lender. Id. Like this case, the buyers purchase agreement for the house was contingent on the appraisal coming back to approve the purchase price of the home and to obtain financing for the purchase price. Id. Like this case, the appraiser mistakenly used a higher square footage in appraising the home. Id. Like this case, the buyers discovered the error over a year later and sued the appraisal company for negligently misrepresenting the value of the home at the time of the purchase. Id.

The Arizona Court of Appeals held that the appraiser is liable to the buyers based on Restatement 552, which is also adopted by Nevada case law. Id. The Court concluded:

> "Public policy and common sense compels the conclusion that when a lender to which a prospective home buyer has applied for a loan contracts for an appraisal of the home, the appraise the lender hires owes a duty of care not only to the lender but also to the home buyer. For the foregoing reasons, we hold that an appraiser retained by a lender in connection with a purchase-money mortgage transaction owes a duty of care to the borrower who is the prospective buyer of the home to be appraised." Id.

North Carolina also published a case on point that details the grounds for appraisers to be liable to home buyers. In Alva v. Cloninger, 227 S.E.2d 535 (N.C. Ct. App. 1981), the appraiser was hired by lender during the plaintiffs' attempt to buy the appraised property and the Court held that the appraiser could be liable for negligence to the home buyers. The situation is similar to the case at hand:

> "In this case, there was evidence from which the jury could have concluded that defendant should have reasonably foreseen and expected that plaintiffs would rely on the appraisal report. For example, plaintiffs were named as "Borrowers" on defendant's work-order; plaintiffs paid the fee for defendant's services. By way of further example, defendant had transacted enough similar business with NCNB20 to 25 appraisals per month that he should have been aware of the

importance of his appraisals to borrowers and the reliance that borrowers would place thereon.

The Restatement of Torts 2d, § 552 (1977) provides that: "[o]ne who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The **evidence established prima facie that plaintiffs' reliance upon the appraisal was, or should reasonably have been, expected by defendant.** The evidence **also warrants an inference that plaintiffs actually relied on defendant's appraisal report** to NCNB and that defendant's failure to discover and disclose the alleged defects in the house was a proximate cause of plaintiffs' injury. **Dr. Alva testified that the contract to purchase the house was conditioned upon his obtaining financing. The contract to purchase specifically stated "[i]n the event [plaintiffs, after exerting their best efforts to obtain financing, were unable to do so,] this contract shall be null and void." Dr. Alva also testified that he understood the loan was conditioned upon the appraisal and "assumed everything was all right when the loan was approved."** Dr. Alva's assumption as to the import of the appraisal was

substantiated by the testimony of witness McGhee, the lending officer, who said "[e]ither the repair work had to be done or we would have had to decline the loan application."

Because the evidence of causation was sufficient, when viewed in the light most favorable to the plaintiff, to support a verdict in plaintiffs' favor, the court's directed verdict for defendant was error. See Young v. Barrier, 268 N.C. 406, 150 S.E.2d 734 (1966).

The facts in Alva are similar to the facts here. Both sets of home buyers testified that they relied on obtaining financing based on the appraisal to purchase their homes. Both testified to the actual problems and short-comings of the appraisal based on the lay witness testimony of the home buyers own observations and knowledge. Both were named borrowers on the paperwork given to the appraiser to conduct the appraisal. Both paid for the fee for the appraisal. Like the court in Alva, the home buyers here have grounds to proceed past summary judgment and address the genuine issues of fact to hold the appraisal company liable for its negligence and related torts.

The home buyers here also provided evidence on all the requirements for liability for a third party beneficiary claim under the elements in Restatement Section 552 as detailed in their Opposition to Defendants' Motion for Summary Judgment.

The record shows that the appraiser was working in the course of his business and profession on two occasions for the House. It was also a transaction for his pecuniary interest as he was paid or offered payment on both occasions. (Gliko at 11:13-13:8., 16:5-12.) Defendants' also provided a copy of the Older Report in Exhibit B of their Motion for Summary Judgment.

Second, Defendant Gliko supplied false information for the guidance of others in their business transactions. He testified in his deposition that he relied on the square footage of the assessor's record and the MLS listing. (Id. at 19:10-20:7.) The designated square footage in both the assessor's record and the MLS listing turned out to be wrong model by his own admissions. (Id. at 46:11-47:3.) Also see Deposition of Maria Boesiger, in Defendant's Motion for Summary Judgment (70:12-71:21). He also testified that he pulled the builder's plan based on the wrong model because he pulled the building plan based on the wrong square footage. Deposition of Travis Gliko (19:10-20:7.)

The appraiser also used properties for comparison value that were too distinguished from the House, resulting in overvaluation of the property. Deposition of Maria Boesiger, Exhibit F in Defendant's Motion for Summary Judgment , (80-87, 109:19-115:19.) As a result, Ms. Boesiger testified that she overpaid for the property by $50,000 to 81,000. Id. at (122:15-125:18, 128:13-129:13.)

Third, Mr. Gliko and Desert Appraisals, LLC. are subject to liability to the Boesigers for pecuniary loss caused to them by the Boesigers' justifiable reliance upon the information in the faulty appraisal. Mrs. Boesiger testified at her deposition:

"[W]ith the proper appraisal, the purchase price would have been different, Now, I would have had to tell the seller, your property is only worth 250- let's pick a number, the builder- 256, 257. That's all I'm willing to pay....[T]he loan would not have been approved on that size of a property for that amount, because that's not what it was worth at the time."(Id. at 93:5-19).

Fourth, the appraiser and his company Desert Appraisals, LLC failed to exercise reasonable care or competence in obtaining or communicating the information in the appraisal report. As discussed above, Mr. Gliko relied on the square footage in the Assessor's Report and the MLS listing for 5015 Adrian Fog Ave. that turned out to be off by over 500 square feet based on the wrong model. Supra. Furthermore, as discussed above, Mr. Gliko used properties for his comparable in his appraisal that were vastly different from the property at hand. Supra. Therefore, the appraiser is liable to the foreseeable and named home buyers, the Boesigers, under Restatement 552 that is adopted in published Nevada case law.

3. NO EXPERT WITNESS TESTIMONY IS REQUIRED TO ESTABLISH PROFESSIONAL NEGLIGENCE AND RELATED TORTS AS A MATTER OF LAW.

There is clear, unambiguous, and recent law by the Nevada Supreme Court that an expert witness is not required to prove duty and breach in professional negligence cases except in limited, statutorily-defined medical situations that do not apply here. See Egan v. Chambers, (299 P.3d 364 (2013). The primary argument for Defendant's Motion for Summary Judgment was that Plaintiff's failure to disclose an expert

witness is fatal to the claim for professional negligence because an expert witness is required to establish the elements of duty of care and breach. The Nevada Supreme Court expressly held that expert witness testimony is not mandatory for professional negligence claims except for narrowly-defined medical professionals. Egan v. Chambers, (299 P.3d 364, 365 and 367.) In Egan v. Chambers, the Court held that no expert testimony is required to establish duty of care and breach in professional negligence cases except in certain, statutorily-defined healthcare professions outline in Nevada Revised Statute section 41A.071. (299 P.3d 364, 365 and 367.)

The Court clearly explained the limited scope of the statute to certain medical professions. Id. at The court held an expert witness is only statutorily required in specified medical malpractice actions and not to causes of action for professional negligence as a whole. Id. It overruled the Eighth Judicial District Court's decision to dismiss the complaint of professional negligence against a podiatrist for the lack of a supporting affidavit of merit from an expert witness. (Id. at 367.) Podiatry is more closely related to the medical professions in the statute in contrast to real estate appraisers that are even further removed from the limited statutory requirement for an expert witness.

The Court explained: "The plain language of NRS 41A.071 makes no mention of professional negligence. NRS 41A.071 refers expressly to 'medical malpractice,' which in turn is defined as pertaining to physicians, hospitals and hospital employees. 'Physician' is defined as a person licensed under NRS Chapters 630 or 633. NRS 41A.013. Podiatrists are not licensed pursuant NRS Chapters 630 or 633; rather they

are licensed pursuant to NRS Chapter 635. As such, NRS 41A.071 does not, by its plain terms, apply to Egan's claims against her podiatrist." Id. Like podiatrists, appraisers are skilled, licensed professions and like podiatrists they are not "physicians" under the statute. Therefore, there is a good faith argument they do not require affidavits-of-merit or expert testimony to survive summary judgment for professional negligence as a matter of law.

Defendant did not cite any controlling law in Nevada contradicting this Nevada Supreme Court case. Defendant insisted expert testimony is required based on six cases in other states from other jurisdictions that are not Nevada law, including (1) Redden v. SCI Colo. Funeral Servs., Inc. 38 P.3d 75 (Colo.2001), (2) Hice v. Lott, 223 P.3d 139 (Colo App. 2009), (3) Tommy L.Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459 (S.C. Ct.App.2002), (4) Am. Family Mut. Ins. Co. v. Allen, 102 P.3d 333 (Colo.2004), (5) White v. Jungbauer, 128 P.3d 263 (Colo.App.2005), and (6) Brown v. Interbay Funding, LLC, 417 F.Supp.2s 573 (D.Del. 2006).

None of these cases are controlling here. Furthermore, none of these cases are relevant in light of the Nevada Supreme Court case directly on point holding that affidavit-of-merit by an expert witness are not required for professional negligence causes of action except for limited medical malpractice cases. Egan v. Chambers, (299 P.3d 364, 365 and 367.)

Defendant only cited one Nevada case for the point that expert testimony should be required in this case: Daniel, Mann, Johnson & Mendenhall v. Hilton

Hotels Corp. 98 Nev. 113 (1982). However, that case predated Egan by thirty-one years and also had a holding that could favor Plaintiffs' position. Daniel held that expert testimony was NOT required in causes of action against a surveyor who misplaced drill holes for foundational support. The court concluded: "We also disagree with appellant's contention that expert testimony is required to prove the breach of duty (by the surveyor)...Where, as in the instant case, the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp. 98 Nev. 113, 115.

Here, Plaintiffs had a good faith argument that the negligence of the appraisal was not beyond the knowledge of the jury to determine. A layperson can tell it is the wrong model, a lay person can understand that the actual square footage of the house based on the assessor's correction does not match the appraisal report. Furthermore, this is not the applicable standard in light of Egan. *Supra.*

Therefore, it is clear that there is controlling law supporting a good faith claim without an expert witness to show the negligence of the appraiser in this case.

4. THE COURT ERRED IN GRANTING ATTORNEYS FEES AND COSTS WHEN THERE WAS AN ISSUE OF UNSETTLED LAW AND PLAINTIFFS BROUGHT CLAIMS IN GOOD FAITH.

The general rule is that attorney fees may NOT be recovered by a party to litigation unless there is a statute or contract authorizing an award. Guild, Hagen &

Clark, Ltd. v. First Nat'l Bank, 95 Nev. 621 (Nev. 1979); Rowland v. Lepire, 99 Nev. 308 (Nev. 1983); First Interstate Bank v. Green, 101 Nev. 113 (Nev. 1985); Schouweiler v. Yancey Co., 101 Nev. 827 (Nev. 1985). Public policy and case law clearly indicates a preference for not penalizing parties for bringing good faith claims and exercising their rights to due process. Defendants erroneously cites various statutory grounds for awarding attorney fees for frivolous claims. Here, as detailed above, ," case law and evidence supporting all causes of action

1) Attorney fees are improper under NRS section 18.010(2)(b) because Plaintiffs' suit was brought in good faith supported by Nevada Supreme Court precedent and a good faith argument for third party liability for appraisers based on existing law.

Defendant's statutory claim for attorney fees is limited to claims "brought or maintained without reasonable ground or to harass the prevailing party." The statute also expressly states the legislative intent was "to punish for and deter frivolous or vexations claims." There is no merit to this statute being applied here.

This case hinged on two matters for deciding Defendant's Motion for Summary Judgment: (1) For Plaintiffs' first three causes of action (professional negligence, negligent misrepresentation and breach of the statutory duty to disclose material facts), the issue hinged on whether an expert witness is required to establish the duty and breach as matter of law. If so, the next issue is whether Mrs. Boesiger qualifies as a witness. (2) For Plaintiffs' fourth cause of action for breach of a third-party beneficiary contract, whether an appraiser may be a liable to a third-

party prospective buyer when the appraiser is retained by a lender to appraise a home in connection with the granting if a purchase-money mortgage.

As detailed above, the Plaintiffs had valid grounds and good faith arguments that expert testimony was not necessary to prove negligence and other liability grounds. Therefore, it is clear that there is controlling law supporting a good faith claim without an expert witness to show the negligence of the appraiser in this case. Moreover, a court must determine if the case was frivolous **at the time the claim is filed**. At the time of filing, Plaintiffs had reasonable grounds to believe he would have the additional support of expert witness testimony to bolster their claims. In addition, Plaintiffs offered testimonial evidence and documentation from Mrs. Boesiger, a previously licensed realtor, about mistakes in the appraisal regarding square footage and faulty comparable properties used in the appraisal report raising a good faith question of fact for the causes of action.

The second issue regarding third-party liability of the appraiser also involved a good faith claim by the Plaintiffs, as detailed above. Plaintiffs raised claims based on being a third party beneficiary to the appraisal report in good faith. Appraisers' liability to third parties is unsettled law and there are numerous cases to support a good faith claim for liability in these facts. The State of Nevada adopted Restatement (Second) of Torts Section 552 in a published decision, which creates liability to third parties who rely on certain professional conclusions. Stremmel Motors Inc. V. First Nat'l Bank of Nev., 94 Nev. 131 (Nev. 1978). Then, this Restatement was the basis of an unpublished decisions in Nevada, along with a

published decision by the Washington Supreme Court and other jurisdictions, to hold that appraisers have liability to third-party potential home buyers in situations similar to the case at hand. See Copper Sands Homeowners Ass'n, 2012 U.S. Dist. LEXIS 38054, 11-12 (Nev. 2012); Sage v. Blagg Appriasal Company Ltd., No. 1 CA-CV 08-0331 (Ariz. 2009); Schaaf v. Highfield, 127 Wn.2d 17 (Wash. 1995). Therefore, Plaintiffs had a good faith basis to bring a third party beneficiary suit against the Defendants..

2) Attorney fees are improper under EDCR 7.60(b) because the Plaintiffs claims were warranted and not frivolous or unnecessary.

As detailed above, Plaintiffs previous pleadings detail good faith claims, supporting case law that is controlling or persuasive case law for a change or clarification of the law in Nevada to support all of Plaintiffs causes of action.

3) Attorney fees are improper under NRS 7.085 because Plaintiffs' suit was Plaintiffs' civil action was well-grounded in fact, warranted by existing law, or warranted by a good-faith argument for changing the existing law.

NRS 7.085 prevents Defendant from getting attorney fees if only one of the above are true about Plaintiffs' claims. Here, Plaintiffs claims meet ALL THREE standards for denying attorney fees to the opposition. (1) The record shows the causes of action as detailed in Plaintiffs' Opposition to Summary Judgment, the previous expert witness submission, the depositions of Plaintiff and Defendant, and submitted documents. (Bates No. 199-236) (2) This motion along with the previous

opposition submitted by Plaintiffs details the existing law in support of Plaintiffs' positions. (3) As described in detail above, any issue that is unclear in existing state law is supported by a good-faith argument for changing or creating new law on point. Supra.

4) Attorney fees are improper under NRS 17.115(1) and NRCP 68(a) because Plaintiffs' rejection of the offer of judgment was not grossly unreasonable or in bad faith.

The Plaintiffs' damages far exceed the small amount of $5,000 in Defendants' Offer of Judgment. Plaintiffs were not grossly unreasonable or acting in bad faith to pursue legal action that could compensate them for the large loss in value of their home and the financial damage of not being able to refinance based on the mistaken appraisal.

VII. CONCLUSION

The State District Court erred in granting summary judgment on all four causes of action on the grounds that there is no third party liability to home buyers where a residential real estate appraiser is hired by the lender. Furthermore, any finding that an expert witness is required to show negligence of an appraiser is wrong as a matter of law. As a result, the order of summary judgment claim must be reversed.

The State District Court also erred by granting attorneys fees and costs when there are good faith claims based on unsettled matter of law and supporting case law

from Nevada and other jurisdictions. Therefore, the award of attorney fees and costs to Defendants must be reversed.

DATED this 9 day of August, 2018

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Corel Wordperfect 8, Times, 14 points.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP32(a)(7) (C), it is either: Proportionately spaced, has a typeface of 14 points or more and contains 9,815 words.

3. I hereby certify that I have read this respondent 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 N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference 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 Procedures.

Dated this 2 day of August, 2018

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I deposited a true and accurate copy of the foregoing APPELLANT'S OPENING BRIEF by depositing same in the United States Postal Service, via first class mail, postage prepaid in Las Vegas, Nevada, on the 9th day of August, 2018 addressed as follows:

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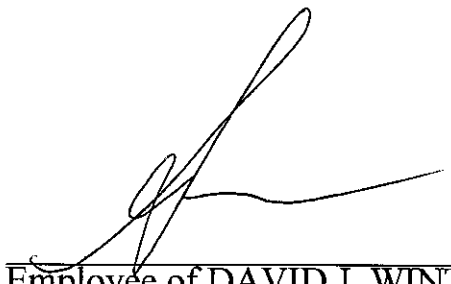

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