IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as; Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,

Respondents.
_____/

No. 77780

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 19 OF 19

Submitted for all appellants by:

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
RICHARD D. WILLIAMSON (SBN 1001)
JONATHAN TEW (SBN 9932)
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, NV 89501
775-329-5600

ATTORNEYS FOR APPELLANTS
LARRY J. WILLARD, et al.

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

[1] This document was inadvertently omitted earlier. It was added here because al of the other papers in the 19-volume appendix had already been numbered.

Code #4185

SUNSHINE REPORTING SERVICES
151 Country Estates Circle
Reno, Nevada 89511
775-323-3411

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

-oOo-

LARRY J. WILLARD, et al., Case No. CV14-01712

Plaintiffs, Dept. 6

vs.

BERRY-HINCKLEY, et al.,

Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

January 10, 2017

Reno, Nevada

REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

Job No. 364978

APPEARANCES:

For the Plaintiffs:

BRIAN P. MOQUIN, ESQ.
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148
408-300.0022
Bmoquin@lawprismcom

And:

DAVID C. O'MARA, ESQ.
O'MARA LAW FIRM, P.C.
311 E. Liberty St.
P. O. Box 2270
Reno, Nevada 89505
775-323-1321
Fax 775-323-4082
David@omaralaw.net

For the Defendants:

BRIAN R. IRVINE, ESQ.
And ANJALI D. WEBSTER, ESQ.
DICKINSON WRIGHT, PLLC
100 West Liberty Street, 12th Floor
P. O. Box 281
Reno, Nevada 89504-0281
775-343-7500
Fax 775-786-0131
Birvine@dickinsonwright.com
Awebster@dickinsonwright.com

TUESDAY, JANUARY 10, 2017, RENO, NEVADA, 9:41 A.M.

-oOo-

THE COURT: This is the time set for oral arguments on Defendants' motion for partial summary judgment in case number CV14-01712, Willard, et al., versus Berry-Hinckley Industries, et al.

Please state your appearances.

MR. IRVINE: Brian Irvine on behalf of defendants, and with me is Anjali Webster.

MR. MOQUIN: Good morning, Your Honor. Brian Moquin. We have the plaintiffs with cocounsel, David O'Mara. And plaintiffs Larry Willard and Ed Wooley are also present.

THE COURT: Good morning.

Counsel, I have read everything, and I'm going to allow you to go ahead and make your arguments.

I do have some specific points that I want to address, but I don't want to foreclose whatever you would like to argue because we have the time set aside.

So you may proceed.

MR. IRVINE: Thank you, Your Honor. We appreciate you scheduling time for us to hear this motion today. And, obviously, jump in and ask me whatever questions you want. I'm very flexible in how I can present this, so it won't bother me.

Your Honor, we filed this motion for partial summary judgment for a couple of purposes.

The most important reason is, we want to focus the remaining issues in this case to allow us to streamline our presentation to Your Honor in what we anticipate will be future motions for summary judgment and trial in this case.

We want to make sure also -- second reason is that the plaintiffs, if they prevail in this case, get what they contracted for and nothing else, because a reading of the operative pleading, the first amended complaint in this case, shows that the plaintiffs are seeking unforeseeable, remote and overreaching damages that they are not entitled to as a matter of settled Nevada law, specifically, well beyond the more than $20 million in cumulative damages for future rent sought by the plaintiffs.

The plaintiffs are also seeking multimillions of dollars in damages for purported losses that don't result directly from any breach by the defendants and which are not foreseeable to the parties at the time the leases were executed.

Specifically, looking at the first verified amended complaint -- and, Your Honor, I'll be referring to two sets of plaintiffs here today.

We've got the Willard plaintiffs, which are Mr. Willard and his company, Overland, and the Wooley plaintiffs, which are Mr. Wooley and his wife and an entity there as well.

So with respect to the Willard plaintiffs, if you look at the first amended complaint, we've got the rent damages they are seeking in paragraph 14.

And then at paragraph 15, we've got what I'll refer to as the short sale damages, which Mr. Willard is claiming as a result of being forced to sell the property located at Longley and South Virginia Streets following a threatened foreclosure by the lender.

Specifically, they are seeking about 4.4, $4 million in earnest money that the Willard plaintiffs claim they invested in that property.

They are also claiming at least $3 million in tax consequences and $550,000, roughly, in closing costs. And those are all in paragraph 15 of the first amended complaint.

THE COURT: But the amounts really don't matter, correct? I mean, it's the principal that matters.

MR. IRVINE: That's correct, Your Honor. I'm just trying to be specific as to what we're going to ask for. But you are right, the amounts don't matter.

So I'll call those the closing -- excuse me, the short sale damages for the Willard plaintiffs.

The other category of damages that the Willard plaintiffs are seeking are what I'll call the attorney's fees damages.

And these are damages that the Willard plaintiffs are seeking for two purposes.

Firstly, as a result of the threatened foreclosure proceedings by their lender, Mr. Willard voluntarily filed for

Chapter 11 protection down in Northern California.

He later dismissed that bankruptcy voluntarily after he was unable to, apparently, renegotiate with the bank. But they are seeking all their fees and costs associated with that bankruptcy filing, which was voluntarily dismissed.

They are also seeking fees as damages here, not as attorney's fees as a prevailing party in this case, but as damages, the fees and costs that they incurred filing their original complaint in state court in Northern California.

That case was also dismissed by the Court. And we've got some exhibits in there that show that the case was pretty wildly overreaching with respect to not the only damages that were sought, but the parties that were named as defendants.

So I'll call those the attorney's fees damages.

Those are actually common to both the Willard and Wooley plaintiffs with respect to the California state court action. The bankruptcy court piece is unique to Mr. Willard.

Then with respect to Mr. Wooley, the other category of damages I'll be discussing today are the damages that they claim they incurred as a result of having to sell the Baring Boulevard property in Sparks, because, allegedly, the Baring Boulevard property and the Highway 50 property, which is actually at issue in this case, were cross-collateralized on the loan, meaning that if they defaulted under one, both were security for the note.

And so Mr. Wooley has indicated that he was forced to

sell the Baring Boulevard property in order to cure his default on the Highway 50 loan and lose -- and avoid losing that property.

He's claiming that as a damage in this case, even though the Baring Boulevard property was not operated by my client at the time he sold it.

We -- as we set forth in our motion, we believe that all of these damages are precluded under Nevada law on consequential damages.

You have to look to when the contracts were formed to determine whether the damages were foreseeable as a matter of law. And you also have to look as to whether plaintiffs actually incurred some of these damages.

As we briefed this, some of the short sale damages that the Willard plaintiffs are claiming, they have never paid those. They have never written a check, never actually been financially harmed.

And we can get to that, but that's another reason for this Court deciding that those damages are inappropriate.

THE COURT: Is there dispute as to whether they were paid or not?

MR. IRVINE: I think there may be as to the closing costs. I think the plaintiffs have certainly conceded that they never paid any taxes as a result of forgiven debt income from the short sale.

They never paid those taxes. They are claiming an

additional type of damage out of that now.

But it's very clear under Nevada law -- and I'm citing to the Hilton Hotels case, and I'll quote. "The damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."

And the Hilton case cites with approval, the restatement second of contracts at Section 351, which further defines "foreseeability."

It says "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."

It says, number two, "Loss may be foreseeable as a probable result of a breach because it follows from the breach, A, in the ordinary course of events; or B, as a result of special circumstances beyond the ordinary course of events that the party in breach had reason to know."

THE COURT: But doesn't the Hilton case really cut both ways for you, because the Court there found that the trial court erred by not submitting a third claim -- that was the loss of profits claim -- to the jury?

MR. IRVINE: Well, there is -- foreseeability, to be sure, Your Honor, is usually a question of fact. But here, we think that all the discovery that's necessary has been completed for this Court to determine these as a matter of law.

THE COURT: So you would distinguish that portion of that case?

MR. IRVINE: And that's the reason, Your Honor, because that usually is a question of fact.

We did all the discovery we wanted to do on this. We filed our motion. Plaintiffs opposed the motion. They didn't do so under Rule 56(f). They haven't taken a position that they need additional facts for this Court to decide.

So we would submit that it's appropriate for this Court to decide these issues on foreseeability as a matter of law at this point in the case.

THE COURT: And wasn't the supplement unopposed? Essentially, the additional information that you provided the Court, there was no opposition or any additional information provided by plaintiffs?

MR. IRVINE: That's correct, Your Honor. There was no response to that.

And by way of background, if it wasn't clear, we did that supplement because of some information that came later in the case after the briefing. And so we felt it would be appropriate for Your Honor to see what our expert had to say on the tax damages.

And there's been no rebuttal report disclosed to Ms. Salazar either, Your Honor. And the deadline for that has run, just so you know that.

THE COURT: Okay.

MR. IRVINE: So, getting back to where -- I left off with the restatement.

So there are two ways that something can be foreseeable. It can be a damage that flows in the ordinary course of events, something you would expect for this type of breach in all cases, or the breaching party had some special knowledge about the consequences of a possible breach.

And neither of those are met for any of the categories of damages we've identified. And the burden of proving foreseeability is on the plaintiff, as it is in all cases for damages.

So I would like to start with Mr. Willard's damages and the Willard plaintiffs' damages.

Specifically, I'll start with the short sale damages. And we've cited a number of cases about this, which all say the same thing.

We've got the Margolese case from the Ninth Circuit. We have the Enak Realty case from the Supreme Court of New York. And we have -- sorry. And we have the Boise joint venture case from the Court of Appeals of Oregon, all which say the same thing, which says, in the case of a lease -- and I'm quoting from Margolese.

"In the case of a lessee, the lessee generally does not expect that the lessor will lose his property if the lease is

breached. Rather, a lessee would expect to be liable for lost rent and any physical damage to the premises."

All three of those cases hold the same thing and we would submit that that's the case here.

Otherwise, if the Court were to hold that a commercial lessee assumes, essentially, the debt of the landlord, then he might as well set the lease aside and call the lessee a guarantor, because, really, they are signing up to pay the rent.

And in this case, the Willard plaintiffs are asking them not only to be responsible for rent, which is a very high amount, $15 million plus, they are also asking them to, essentially, be responsible for the debt service that the landlord is obligated to.

So we would submit that under the first prong of the restatement with respect to the short sale damages, the foreclosure on the property and the following short sale are not something that's foreseeable in the ordinary course when you breach a lease.

We would also submit that there was no actual special knowledge that defendants had at the time the parties entered into the contracts that it was probable that Willard would have the property foreclosed upon if the tenants stopped paying rent.

And this really goes to the summary judgment standard, Your Honor.

We provided an affidavit from Tim Herbst that

demonstrated that BHI had no reason to believe at the time the Willard lease was executed that a breach of that lease by BHI could force Willard to sell the property, incur tax consequences, closing costs, or lost earnest money.

We shifted the burden to the plaintiffs with the evidence that we produced as part of our motion. And the Willard plaintiffs didn't offer any evidence to contradict what Mr. Herbst said. So summary judgment should be granted under Rule 56(e).

In fact, not only did they not contradict it, they agreed with Mr. Herbst.

If you look at Mr. Willard's deposition testimony, which we attached as Exhibit 6 to our motion, pages 117 to 119, he testified that he only spoke to Tim Herbst several years after the execution of the Willard lease. The Willard lease was executed in 2005.

Mr. Willard testified that he had discussions with the Herbst family in 2008 and, again, in 2012 about the problems that it would cause if the Herbst family breached the lease.

But those discussions don't impose any special knowledge upon the defendants here, because you have to look at the time the lease was formed.

And there's no question, it's undisputed that all of these conversations about the consequences of a breach took place three years, maybe even as much as six or seven years after the lease was executed.

And you can't do that. You have to look at foreseeability at the time the lease was signed, because that's the time when the -- when the tenant has the opportunity to say wait a minute, what kind of liability am I going to assume here.

That's the chance they have to not assume that liability. After the lease is signed, it's a done deal. So that's when you have to look at foreseeability.

The only evidence that plaintiffs provided that the short sale damages might have been foreseeable to the tenants is the subordination agreement that they attached to their opposition as Exhibit 32, which they claim put the tenant on notice that a breach could result in a foreclosure, short sale, default, all that kind of stuff.

But if we look at the subordination agreement, that argument really doesn't hold water. The subordination agreement in Exhibit 32 was executed on February 21st, 2006. Again, we're looking at about three months after the lease was executed.

And it was recorded on February 24th, 2006.

So, again, this was signed by the tenant several months after the lease was executed and has no bearing on foreseeability.

In addition, it's important to note that this really would only put the tenant, at best, on notice that there was financing in place. It doesn't say anywhere in here that there would be a foreclosure if the lease was breached.

And thirdly, this subordination agreement shows that the

lender is an entity known as South Valley National Bank.

Well, that's not the loan that the Willard plaintiffs defaulted under, and that's not the loan that was eventually foreclosed upon or was satisfied by a short sale.

That's a different loan. That's the loan with a bank called Telesis.

And if you look at Exhibit 33, you'll see that that's the case, that a deed of trust was executed in favor of Telesis Community Credit Union in March of 2006.

And there's no evidence that this was given to the Herbsts, and it doesn't matter because it's several months after the lease was executed.

So the plaintiffs didn't even breach the loan that they provided to the tenants as part of the subordination agreement.

The next argument that the plaintiffs used in their opposition was to cite to a number of lease provisions to try to get around the requirement that all damages under Nevada law have to be foreseeable.

And this is at the opposition at page 14 where they run through a number of lease provisions and try to say that these lease provisions somehow eliminate the foreseeability requirement or help them meet it.

I'm sorry, Your Honor, bear with me one moment.

But, Your Honor, I would submit that all the provisions that the plaintiffs cite in this section, which starts at page 14,

don't do anything to obviate the foreseeability requirement.

The first provision that the plaintiffs cite there is Section 4-D of the lease, which talks about rent.

This is a provision that details the tenants' obligation to pay rent. It's entitled "Rental and Monetary Obligations." And sure, it says that the landlord is entitled to rent and the tenant has to pay it.

It doesn't say anything about foreclosure. It doesn't say anything about short sales.

THE COURT: What about the term "monetary obligations"?

MR. IRVINE: Well, sure, yeah. The plaintiffs have monetary -- excuse me. The tenant has monetary obligations to pay rent certainly, and it's a triple net lease. They have the obligations to pay taxes, they have the obligations to pay utilities and everything else that goes with that.

But in order for this to get around the foreseeability requirement, it would certainly have to say more than, hey, tenant, you owe money under this lease.

It doesn't say anything about damages that were caused by the breach of the loan that the plaintiffs had.

Same thing holds true for Section 8 of the lease, which is addressed later there. This is the section on taxes and assessments and also goes with the triple net nature of the lease.

And we won't dispute that it certainly says that the tenant has the obligation to pay 100 percent of the taxes on the

property during the lease term. We're not disputing that.

And if they had a claim that we hadn't paid some kind of tax damage, we wouldn't be here.

This provision doesn't say anything, again, about financing. It doesn't say anything about foreclosures. It doesn't say anything at all about the damages that the Willard plaintiffs are seeking here.

THE COURT: So your position is although they claim tax consequences, it's simply something different than what is intended by Section 8?

MR. IRVINE: Absolutely. Absolutely.

This says -- this says that the lessee shall pay -- and I'm paraphrasing a bit here --

THE COURT: I have it right here in front of me.

MR. IRVINE: -- "all taxes and assessments of every type and nature assessed against or imposed upon the property or the lessee."

The taxes that the Willard plaintiffs are seeking are personal income taxes to both Mr. Willard and to Overland. This doesn't address anything or impose any obligation upon the tenant to pay the personal income taxes of any of the plaintiffs.

Willard plaintiffs also cite to Section 15 of the lease, which is the indemnification provision. And I wanted to spend a minute on this because I think this is an interesting area.

The plaintiffs are claiming that the indemnification

provision somehow gives them rights for direct damages from my clients for the breach of the lease.

But that's not what indemnity is. Indemnity is there to serve against -- to serve to defend plaintiffs for claims that are brought against -- brought by third parties for actions that my client took or failed to take.

The best example might be taxes. For instance, if we didn't pay the property taxes on the property for the first quarter of 2012, and the County came after the plaintiffs, they would have indemnity from us from that claim against Washoe County.

That doesn't give them any additional rights against us for direct liability.

And that's what both the Boise joint venture case, which we cite on page 11 of our reply, the Pacificorp v. SimplexGrinnell case from Oregon, and the May Department Store case from the Colorado Court of Appeals all say.

"Indemnity clauses are intended to protect parties against claims made by third parties and do not apply to actions between the contracting parties directly."

Same thing with the May case. I'll quote, "Generally indemnity language is construed to apply only to claims asserted by third parties against the indemnitee, not to claims based upon injuries or damages suffered directly by that party."

So, again, this indemnification provision doesn't give

them any additional rights under this contract. This would give them the right to a defense from us against claims made by third parties.

And I would submit that they are simply misconstruing the effect of the indemnity provision.

Moving on, Your Honor, to the tax consequence damages specifically, we -- damages in this case, frankly, have been a bit of a moving target.

I read to you from the first amended complaint. We've never received a specific damages computation from any of the plaintiffs in this case under 16.1, as they are required to do, despite multiple demands from us.

We've done some written discovery and deposition discovery from them on their damages, specifically about the tax damages. And we were always told that it was income from debt forgiveness.

But then in the opposition, we learn for the first time that they never actually paid the debt forgiveness income. We raised that in the brief, and we said, hey, we don't have any evidence you paid this.

On page 10 of their opposition, the Willard plaintiffs conceded that they didn't claim any tax damages.

They say, since the Willard plaintiffs' respective total debt was greater than their respective total assets, these tax liabilities were not reported as income and are consequently no

longer being claimed as damages.

But then they change their position for the first time in this opposition and say that the damages they are now seeking are what they call capital loss carryovers that they have been carrying as an asset.

Well, we would submit that capital loss carryovers are even more remote and more attenuated than debt forgiveness income.

And we certainly, the plaintiffs -- excuse me. The tenant certainly had no reason to know what the accounting circumstances were for the Willard plaintiffs and that they were carrying these capital loss carryovers.

And in addition, as we put forth in our supplement, these aren't a dollar-for-dollar damage anyway. These would have to be multiplied by the applicable tax rate to arrive at plaintiffs' actual loss benefit.

But it doesn't matter because these are completely unforeseeable, and there's no chance that any of the tenants had special knowledge that would put them on notice that plaintiffs were carrying these on their books and would lose them as the result of a breach of the lease as result of the foreclosure.

I mean, there's multiple steps in between that cancel out the foreseeability here.

With respect to the earnest money component of the short sale damages, again, none of the lease provisions we've looked at remotely contemplate the tenants having to pay the landlords back

for their initial investment in the property. It's categorically unreasonable to require a tenant to be responsible for that.

I mean, Your Honor, I would submit that you could look at the hypothetical residential lease where a family rents a property and that's where they are going to live. Someone loses their job and they can't pay the rent on the property they are renting anymore.

Then all of a sudden, they are responsible for all the landlord's financing damages? It just doesn't make sense. It's a slippery slope that we can't go down.

It's also directly contradicted by the Margolese case. In that case, the plaintiffs were seeking to recover -- and I'm at page 1 here.

Plaintiffs/appellants brought the action for lost rentals, cost of tenant improvements and their lost equity in the property, which I submit is the same as lost earnest money.

And the Court held that because they are just a general lessee, there's no expectation that the lessor would lose his property if the lease were breached and the lessee's liability is limited to the lost rent and physical damages to the premises.

And I would say there's no reason to depart from that here based upon the evidence before the Court.

Finally, with respect to the closing costs component of the short sale damages, I won't repeat the foreseeability part of this. Again, it's not anywhere contemplated in the lease.

There's no special knowledge about that.

This one is interesting because there's no evidence that Willard actually paid any closing costs with respect to that short sale.

The closing statement, which the Willard plaintiffs disclosed in discovery and which is attached to our motion as Exhibit 9, simply shows that all of the proceeds from the short sale went to the lender and that the closing costs that were incurred simply went to reduce the amount of money that the lender received, which increased the amount of debt forgiveness that the Willard plaintiffs received.

And they are not claiming damages for that debt forgiveness income anymore.

So it's not as if Willard wrote a check here. He's not out of pocket for any of these closing costs. Certainly, no evidence to the contrary has been produced. The closing costs only impacted how much Willard lenders would receive in the payoff from that purchase price.

I think that's what I have with respect to the short sale damages, Your Honor, if you have any questions on any of that.

THE COURT: No. I addressed it with regard to Hilton. I wanted to ask that very question. You can move on to attorney's fees.

MR. IRVINE: I'm going to actually do attorney's fees

last because that's common to both of the plaintiffs. So I'll skip over to Mr. Wooley's claim for damages on the Baring Boulevard cross-collateralization now.

That's a tough word.

Again, we're looking at the same law on foreseeability. And the leases in play here, Your Honor, are, if not identical, then 99 percent identical.

So the provisions that the plaintiffs have cited in their opposition brief about indemnity and the taxes and the monetary obligations and all of that, I won't repeat those arguments with respect to Baring because they apply to both.

But it's clear that the Wooley lease was executed in December of 2005. That's Exhibit 10 to our brief. And it's also clear that when that lease was executed, the Wooley plaintiffs did not own the Baring Boulevard property.

The Baring purchase was executed about six months later. That was in, I believe, May of 2006. And I think that's Exhibits 13 and 14 to the opposition brief.

Yes, that's -- let's see here. Yes, that's the lease and the guarantee for the Baring Boulevard property, which are both dated later in time.

And the deed of trust on that property and the note and the purchase and sale agreement are all attached to the opposition as well.

But it's undisputed that the Baring property was not

owned at the time of the Highway 50 lease, which is subject to this case, was executed.

And it's undisputed that there's no way that the tenants could have known about any cross-collateralization provisions between the two parties when they signed the lease because they didn't own Baring yet, didn't have financing on Baring yet. So there couldn't have been any cross-collateralization for them to be aware of.

There's certainly nothing in the lease that references cross-collateralization with another property, certainly nothing in there that says that if you breach the Highway 50 lease, that the Wooley plaintiffs are going to be forced to sell an unrelated property at a loss, which would cause them to incur liabilities.

Because foreseeability is measured at the time of entering into the contract, this precludes Wooley from claiming foreseeability as a matter of law.

And, Your Honor, I think a little background here would be helpful as well.

The first complaint in this case, the Wooley plaintiffs actually sought direct damages for breach of the lease on Baring. And we had to point out to them that we were no longer operating Baring and that it had been sold to Jackson's food stores and that Jackson's was fully performing.

It took a few months, but they eventually conceded that position and came up with this new damages model to try to get

another $600,000 for the loss on Baring, plus some tax damages.

And, again, we submitted the affidavit of Tim Herbst, saying that BHI had no knowledge of any of this cross-collateralization or financing consequences with respect to Highway 50 breach having an effect on Baring. His affidavit is pretty clear.

And, again, under Rule 56, the burden shifted to the plaintiff to come up with affirmative evidence, including affidavits contradicting Mr. Herbst. They weren't able to do that.

In fact, Mr. Wooley in his deposition admits -- I'm at pages 119 and 120 of his deposition. He admits that he didn't discuss any of that with any of the Herbst family and that they had no reason to know about it.

So I would submit for all of those reasons the Baring property damages from the cross-collateralization and the forced sale of that property, none of that was foreseeable as a matter of law.

Nothing -- it's not discussed in the lease. It's not a natural consequence of a breach of a lease, and there was no special knowledge that the Herbst parties had that would impose liability on them.

With respect to the attorney's fees damages, I'll start with the California action because it's common to both the Willard and Wooley plaintiffs.

They are claiming that they had to hire an attorney to file suit against BHI and Herbst in Santa Clara County and incurred $35,000 roughly in attorney's fees.

Well, Your Honor, the lease -- both leases, in fact, have a pretty clear venue and choice of law provision that requires lawsuits to be filed here in Nevada, not in California.

The California case, as I said before, included a number of parties that were in no way related to this case.

We attached a docket sheet, Your Honor, and a motion to dismiss at Exhibits 4 and 5 to our motion respectively. And you'll see, if you look at those, that in that case, they named Jerry Herbst's wife Mary Ann, who had nothing to do with the transaction between these parties; named Timothy Herbst, who, again, had no -- didn't sign a guarantee or anything else.

They named Terrible Herbst's, Inc. They named some financial consultants, Mark Berger, Crossroad Solutions Group. They named Union Bank, who is the successor in interest to Santa Barbara Bank.

There was significant motion practice over in the California court having to do not only with jurisdiction and venue, but also just that there were no viable claims against any of these parties.

The California court eventually dismissed that case and it was brought here.

Well, we think that these fees are not recoverable by

the plaintiffs in this action as damages for a number of reasons.

Firstly, they are not -- they are not special damages. The Christopher Homes case is the most comprehensive case the Nevada Supreme Court has on this issue. That's from 2014.

And it clarifies what was, I guess, kind of a mess that we had with the other previous cases, the Horgan case and the Sandy Valley Associates case.

But after the Christopher Homes v. Liu case, it's pretty clear that special damages -- attorney's fees can only be recovered as special damages in limited circumstances.

The first one is cases concerning title to real property, slander of title actions. You can get attorney's fees as special damages if you are suing to remove a cloud on title. That, obviously, doesn't apply here.

Or a party to a contract can seek to recover from a breaching party the fees that arise from the breach that caused the nonbreaching party to accrue attorney's fees in defending against a third party's legal action.

This was pretty similar to what I was arguing on the indemnity provision earlier. You can only get attorney's fees as special damages if somebody else sues you and you have to defend that. You can go back to the party you have a contract with and try to get your attorney's fees back from them.

And that would be, you know, fairly similar to an indemnification case. The example I used with Washoe County is

probably somewhat still good, although they probably wouldn't sue, but it's very similar to an indemnity.

And it's simply not one of the circumstances here that the Court contemplated in the Christopher Homes case.

Here, we've got plaintiffs making a deliberate choice to go sue in the wrong forum. They sued the wrong defendants, and their case was dismissed. And under the law, those aren't special damages that we have to pay for here.

We don't think that they would be recoverable -- assuming the plaintiffs someday prevail in this case, we don't think they would be recoverable as a prevailing party under the contract either.

We think, frankly, that the California court would be the proper forum to award those damages in the first place, not this court.

But because they don't meet the test in Christopher Homes, you don't really have to get there. They are simply not special damages and both plaintiffs should be precluded from seeking them in this case.

And then, finally, Your Honor, my last piece is the bankruptcy damages that are unique to the Willard plaintiffs.

Again, Mr. Willard filed for personal bankruptcy over in California. He testified specifically that he did that to try to stop the foreclosure and to renegotiate with the bank.

That was unsuccessful. The bankruptcy was voluntarily

dismissed by Mr. Willard.

There's certainly, again, no way that that bankruptcy was somehow foreseeable under the provisions of the Willard lease. My client certainly had no special knowledge of that.

Mr. Willard expressly admits that the defendants had no special knowledge of that. At his deposition, Exhibit 6 to the motion at page 115, he says that he never had discussions with BHI or Jerry Herbst about the possibility of filing bankruptcy, should rent on the property stop being paid.

So with that, Your Honor, we would submit that these categories of damages, the short sale damages for the Willard plaintiffs, the attorney's fees for the California action for both plaintiffs, the cross-collateralization damages for the Baring property for the Wooley plaintiffs, and the bankruptcy damages for the Willard plaintiffs are all precluded as a matter of law under Nevada law on consequential damages and the requirement that such damages be foreseeable at the time of the execution of the contracts.

THE COURT: Counsel, is it sufficient where the lease is signed by one principal, Berry-Hinckley, but your affidavit is signed by the treasurer --

MR. IRVINE: Uh-huh.

THE COURT: Is that sufficient to establish -- because you shift the burden to the plaintiffs, is that sufficient to establish those facts? They are all based on information and

belief?

MR. IRVINE: They are, Your Honor. And frankly, that's probably the best we could do. We would submit that we shifted the burden and they didn't come back.

Mr. Herbst talked to his father. He investigated it. And as a corporate representative of Berry-Hinckley, who is the lessee under the lease, he said that there was nothing that they knew as a corporation when the lease was executed that would lead them to believe that any of these damages would be a consequence of a breach.

THE COURT: And going back to the Margolese case --

MR. IRVINE: Yes.

THE COURT: -- now, you are arguing that that's factually persuasive, correct, that -- or binding?

MR. IRVINE: Well, I don't think it's binding on this Court, no, Your Honor. This is -- it's an unpublished Ninth Circuit disposition for a judge I used to clerk for, which I didn't realize until I read it last night, but Judge Brunetti.

But, no, it's not binding on this Court. We certainly aren't taking that position. Frankly, there's not that much law --

THE COURT: Right.

MR. IRVINE: -- on this type of factual scenario. So we found what we could for you.

I did note in that case, it is factually persuasive

because that plaintiff -- actually, it's not a plaintiff, it's a defendant and third-party plaintiff, was seeking as part of their damages their lost equity in the property, which is what Mr. Willard and Overland are seeking by way of their lost earnest money claim here.

And that was precluded by the Margolese court, so I thought it was factually similar. That's why we cited it.

THE COURT: At the end of the day, I mean, you are really taking the position that the damages that are allowable under 20-B, correct, Section 20-B of the lease?

MR. IRVINE: 20-B of the lease is the remedies provision, yes.

THE COURT: And that they should be restricted to that?

MR. IRVINE: Yes, yes. The lease, as they have noted in their opposition papers -- these leases, I should say, because they both have 20-B in common, have broad remedies for the landlord in the case of a breach.

THE COURT: But not as broad as they have asserted?

MR. IRVINE: No, you still have -- no matter what the contract says, you still have to determine whether the damages that are being sought are foreseeable. That's a fundamental premise.

And, you know, we cited law going back to the 1800s in our reply brief on this because that's how far it goes back.

And really, unless the lease specifically provides for

these type of damages, then you have to do the normal Hilton restatement foreseeability test to see if these damages flow in the ordinary course, number one, or if the tenant had some kind of special knowledge that would put them on notice that the consequences are foreseeable.

And neither of those are in play here.

In fact, the plaintiffs cited in their opposition, the Gilman case, which is the family law divorce case, which I thought was interesting. I hadn't found that case in my research.

But it says at -- I'll give you the Nevada cite -- at page 426, that when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended the prescribed remedy as the sole remedy for that condition.

And, Your Honor, I would submit that the parties here did just that with paragraph 20-B. It's a comprehensive remedies provision that allows the plaintiffs a lot of different options to seek recovery against their tenant in the event of a breach.

And we would ask that they be held to the four corners of the agreement on that and not the unforeseeable damages that we're addressing here today.

THE COURT: All right. Thank you, Counsel.

MR. IRVINE: Thank you, Your Honor.

THE COURT: Who will be arguing?

MR. MOQUIN: Brian Moquin, Your Honor. I apologize, I'm getting over the flu, so I'll try to keep my --

THE COURT: Many people have had it recently. If you need water, it's there.

MR. MOQUIN: Thank you, Your Honor.

I appreciate the opportunity to present argument.

First -- and, I guess, going in reverse order might be the simplest.

With respect to the last point that was just raised, 20-B is not the sole source of remedy provision in the lease.

If you look at page 18 of the lease, which in our opposition is Exhibit 2, 2-18, at the bottom, it says "All powers and remedies given by this section to lessor subject to applicable law shall be cumulative and not exclusive of one another or if any other right or remedy or any other powers of remedy is available to lessor under this lease." Okay?

So our argument is that although it is true that Section 20-B is quite broad, it is not the exclusive section with respect to remedies. It is the liquidated damages section for sure, but Section 15 also applies.

And I think it's a moot point whether or not indemnification, which is Section 15, would apply to first-party claims, because the vast majority in effect now, all of the claims that are flowing under that provision are third party. They are not direct first-party claims.

All the other claims, for example, attorney's fees, fall out of 20-B not under indemnification.

But the indemnification clause is quite broad. And what it does, and the way that I've structured our opposition, was not to say that Section 4-B and Section 8 provide any kind of remedies, it was to establish definitions of terms that were used later on.

But it gives rise to reimbursement for any and all losses caused by, incurred or resulting from, among other things, breach of, default under, or failure to perform any term or provision of this lease by lessee, which is clearly the case here.

If we look at the definition of "losses," it, too, is quite comprehensive. That is found on page 32 of Exhibit 2. "Losses" means "any and all claims, suits, liabilities, actions, proceedings, obligations, debts, damages, losses, costs, diminutions in value, fines, penalties, interest, charges, fees, judgments, awards, amounts paid in settlement, and damages of whatever kind or nature that are incurred."

I can hardly imagine a more comprehensive list of damages.

So just broadly speaking, with respect to this foreseeability issue, our argument is that, in fact, the parties did contract, and the types of damages that we're discussing here were contemplated because they are expressly provided for in terms of the damages that are recoverable.

THE COURT: So your position is that this definition of "losses" is so broad that it encompasses these additional damages, and that, actually, because it does, you do not have to apply a foreseeability test?

MR. MOQUIN: Well, that's not 100 percent accurate, but it's close.

The term "any and all" has been held to apply to virtually everything except for negligence of the person that's being indemnified. And the Nevada law is pretty clear that that is not the case.

But with respect to everything else, the Court is obliged to -- there's no ambiguity in terms of the language of the indemnification clause to read the plain language of the indemnification clause entry as it is, as it is written.

THE COURT: So if you look at these damages as a whole, and when I was analyzing the moving papers and the opposition and reply, and if you go one by one, does the fact that there really was a volitional act on the part of the plaintiff, in any way -- for instance, tax consequences resulting from cancelled mortgage debt.

For instance, the fact that there's -- this language doesn't exactly apply in a contract, but the concept does, and that is this, that if the plaintiff took an act, for instance, declaring bankruptcy --

MR. MOQUIN: Uh-huh.

THE COURT: -- does that obviate any kind of obligation for those damages, because, in other words, they are kind of creating their damages.

MR. MOQUIN: The only thing I can think that would fit into that would be attorney's fees and bankruptcy filing fees. Is that what you are referring to?

THE COURT: Well, the point is that they didn't have to declare bankruptcy necessarily.

MR. MOQUIN: Okay. Well, this --

THE COURT: So if he took an act, isn't he really creating damages?

MR. MOQUIN: No, he was trying to mitigate.

THE COURT: Okay.

MR. MOQUIN: And if you look at 20-B page 2, Exhibit 2, page 18, the numbers here are strange, but 20-B Section 5, lower case B in the middle of page 18 states, under the liquidated damages provision that the lessors would be able to recover from lessee "all costs paid or incurred by lessor as a result of such breach, regardless of whether or not legal proceedings are actually commenced."

Now, the definition of "costs" is important. And that, again, is in the appendix to the lease, which is on page 30 --

THE COURT: -6.

MR. MOQUIN: 36.

Well, actually, "Cost" is defined on page 29.

THE COURT: Great.

MR. MOQUIN: Means "All reasonable costs and expenses incurred by a person, including without limitation" -- "without limitation, reasonable attorney's fees and expenses, court costs, expert witness fees," and so forth.

THE COURT: And you don't think that that's restricted to the relationship -- the contracting parties' relationship, but that it encompasses any and all fees and expenses that could be paid to any lawyer for --

MR. MOQUIN: Arising out of the breach.

And I don't think there's any disputing that the sole reason that my predecessor, Mr. Goldblatt, was engaged was because of this breach.

And he chose to file in Santa Clara County, California. That was a year before I came on board.

With respect to the disposition of that matter, what had happened is Mr. Goldblatt was in a serious auto accident, was in ICU at Stanford for several weeks, and I was approached and I took on the case.

It was too late for me to file any kind of opposition or reply to their motion to dismiss in the discovery matter.

So I reached out to Mr. Desmond, who was the lead counsel for defendants, and, basically, said that I thought that I could dramatically simplify the matter, getting rid of a number of parties, and simplifying the claims, if I was given some time to

come up to speed and file the amended complaint.

We entered into a stipulation, which was filed with the Court prior to the hearing, in which they agreed to withdraw their motion to dismiss. And that never happened.

So nobody showed up for this hearing. The Court granted the motion, right? But that was not the way it was supposed to happen.

Subsequent to that, Mr. Desmond and I entered into conversations, and his argument was that the venue was improper.

Whether -- I mean, that's a debatable issue. That was never decided by the Court on the merits, but I agreed to transfer the case to Nevada.

So with respect to the damages incurred by the plaintiffs with respect to, you know, the attorney fees for the California case, it is not -- simply not the case that this dismissal was proper.

It was in direct violation of the stipulated filing, stipulated agreement between the parties.

THE COURT: And you said that stipulation was filed?

MR. MOQUIN: Yes. In fact, it's stamped. The copy that I have attached is file stamped.

And I received -- I mean, I reached out -- just to make sure everything had happened as requested, I reached out to Mr. Desmond's secretary the Friday before the Tuesday of the hearing. And she confirmed that the hearings had been taken off

calendar, which was not the case.

So I don't have any idea why that happened, but it -- the declaration of Mr. Desmond is not accurate, to put it mildly.

So I think that the question here -- and I appreciate the point that you are making. I think that the question is whether or not the fees that were incurred were reasonable, that is, is there a natural relationship, a reasonable relationship between the fees that were incurred and the breach; that is, are they -- are they a proximate result of the breach.

With respect to Mr. Willard having to declare bankruptcy, in fact, this is another point that is easily refuted.

In their reply, defendants claim that they had no knowledge of the terms of the note that Mr. Willard had taken out for approximately $13 million when he purchased the Virginia property.

If you look at Exhibit 32, page 2, Section 2.2, Defendants expressly consent to and approve all provisions of the note and deed of trust that was entered into.

Now, that was not attached to this particular filing or recorded document, but they have averred here that they looked at and saw the terms.

So in terms of foreseeability, when you have an 87,000 -- when you have an $18 million property with a $13 million mortgage in place, $87,000 a month in mortgage costs, and without warning, without notice, your income suddenly goes to zero, I

think it is a natural result that you are going to potentially have to seek bankruptcy protection.

I think that naturally flows. And that is a third-party cost. It's a third-party cost, which is, in fact, also recoverable under Section 20-B Subsection 5.

And that, of course, also holds with respect to the attorney's fees incurred by the Wooley plaintiffs.

THE COURT: So with regard to this and the assertion that there's no evidence that some of the claimed damages have been paid, did they -- you keep using the term "incurred." Did they actually pay the attorney's fees?

MR. MOQUIN: Yes.

THE COURT: And with regard to the closing costs?

MR. MOQUIN: We -- upon further scrutiny of the settlement agreement with the receiver for Telesis, it turns out that Mr. Willard would not have been entitled to any additional fees.

And so we are, basically, withdrawing.

THE COURT: On the closing costs?

MR. MOQUIN: That's correct.

THE COURT: Okay.

MR. MOQUIN: On the closing costs and the costs -- all costs associated with the short sale.

The only thing that remains with respect to the short sale, basically, the diminution in value, which is only tacitly

related to that because the diminution of value is not as great as if you were to use the value of the short sale. Okay?

But that was not a point that was brought up in the motion for summary judgment, so I don't think that's appropriate to argue it here.

But with respect to earnest money, we're not seeking that. With respect to --

THE COURT: That was the 4.4 million?

MR. MOQUIN: Yes.

With respect to the tax consequences, again, upon further research, I do not believe that -- because it is, in fact, the case that Mr. Willard did not have to pay them, they are not recoverable.

However, the loss of the net operating loss carryforward --

THE COURT: So this is a different damage model than is actually the subject of the motion?

So the motion with regard to Mr. Willard, or the Willard plaintiffs, more accurately, the short sale damages, one, you are withdrawing any claim for earnest money invested in the property; two, withdrawing any claim for tax consequences resulting from the cancelled mortgage debt --

MR. MOQUIN: Well --

THE COURT: -- and three, withdrawing any closing costs. And instead, you may be making a claim for some sort of diminution

in value.

And the next point is?

MR. MOQUIN: Diminution of value is actually part of the original amended complaint claim.

However, with respect to tax consequences -- and this is where it gets a little bit convoluted because it's not direct consequence -- it's not the direct tax liabilities that we're seeking.

It is the loss of the tax benefit in terms of the net operating loss and the loss carryforward.

THE COURT: I understand.

MR. MOQUIN: Okay. Now, with respect to that, I do agree that that needs to be -- there is not a dollar-for-dollar correspondence in terms of damages, but --

THE COURT: And one of the questions that I was going to pose to Mr. Irvine was that very thing.

You can assert that simply because -- if it's a dollar-to-dollar type of damage, do all damages have to be dollar for dollar, because it seems to me that there are damages that are collectible in some cases that are not dollar for dollar. Do you agree?

MR. MOQUIN: I do. I do.

And I think that, although it is not the case that -- well, let me first explain that the reason that these damages were not part of the complaint is because this all happened subsequent

to the complaint being filed, the amended complaint being filed.

Mr. Irvine made a statement claiming that we had never submitted a statement of damages --

THE COURT: Under 16.1.

MR. MOQUIN: -- per 16.1, that is -- I dispute that. Now, we will be supplementing, but --

THE COURT: Do you have evidence of that? Have you -- do you have a copy of the 16.1 information that you provided, or are you saying you are going to amend it?

MR. MOQUIN: No, I'm saying that we provided, and in discovery responses, went to great lengths to explain the basis.

Now, whether or not -- I'll have to search. Whether or not that was in the form of a formal 16.1 response, I can't answer without looking at my data entries here, but they were provided with a calculation of damages.

THE COURT: And that calculation of damages, did it include the amounts that you are advising the Court today that are withdrawn?

MR. MOQUIN: Part. In part. In part, it did.

THE COURT: So as we sit here today, have you provided an up-to-date and clear picture of plaintiffs' damage claims?

MR. MOQUIN: I was intending to before I came down with the flu and that knocked me out, but --

THE COURT: So no?

MR. MOQUIN: Not 100 percent.

With respect to the Wooleys, they do have --

THE COURT: Okay.

MR. MOQUIN: They do. But with respect to Willard, they do not.

THE COURT: Okay. All right.

So it's a work in process?

MR. MOQUIN: I thought that it best to wait for the decision with respect to the issues at hand here.

THE COURT: Okay. But as to the Wooley plaintiffs, this has been provided to them previously?

MR. MOQUIN: Yes.

THE COURT: Now, do you want to -- are you -- was there anything with regard to the Willard plaintiffs that -- I interrupted your flow.

And is there anything else you want to apprise the Court of?

MR. MOQUIN: Yes. With respect to this loss carryforward, I was saying that that is, you know, a tax issue, but it is not actual taxes.

And the way it works is that under the IRS code, if -- if you have debt forgiveness, that is considered taxable income. And to minimize that, what you need to do is go through and apply what are called tax attributes, one of which is any loss carryforward that you have.

So in order for him to avoid having to pay approximately

$6 million in taxes, pretty much the only way that he can minimize or get rid of that was by applying these loss carryforwards.

So the debt forgiveness was a direct result of the need for -- I mean, of the foreclosure, which was a direct result of the breach.

In terms of the loss carryforward damages, there was a statement made at the very end of the report that was submitted that because Mr. Willard didn't have to pay any taxes, he incurred no damages, which doesn't --

THE COURT: And the report you are referring to is their expert?

MR. MOQUIN: The supplement, yes. It was tendered after their response a couple of weeks ago.

THE COURT: Okay.

MR. MOQUIN: And the best analogy I can come up with to show that that just doesn't make any sense is if I -- let's say that somebody runs into my car and does $10,000 worth of damage. And I take my car to my friend at a garage, who happens to owe me $10,000, and he says, in return for you waiving what I owe, I'll fix your car, and he does.

For the person that hit my car, then, to say that I incurred no expenses, it's just not -- it's not correct because the amount of money that my mechanic friend owed to me is no longer there.

The same is true of this loss carryforward, which is no

longer available with respect, actually, to both of the plaintiffs because they had to be used to minimize the tax liabilities imposed by virtue of the breach.

So to that extent, although we're not seeking -- well, in terms of Willard plaintiffs, they are not seeking reimbursement for direct tax consequences.

THE COURT: I understand, but it's because they lost the use of this, essentially.

MR. MOQUIN: Exactly. And at law, that is considered an asset.

THE COURT: Uh-huh. Okay. All right. So with regard to -- you've talked about the attorney's fees. Did you want to add anything else to that with regard to the Willard claims? Because then I would like you to address the Wooley plaintiffs, Baring Boulevard property issues -- or, not "issues," claims.

MR. MOQUIN: Yeah, I would just point the Court to the section in my opposition in which -- in which I went through and talked about indemnification. Okay?

But other than that, I think we're done with respect to Mr. Willard.

THE COURT: Okay.

MR. MOQUIN: In terms of the Wooleys, again, the indemnification clause comes into play here because the bank foreclosing on both of these properties, were it not the case that both the Baring and the Highway 50 property happened to have loans

issued by the same bank, we wouldn't have this cross-collateralization issue.

But, in fact, they were, both loans. And that's the issue here.

So because of the breach, Mr. Wooley was no longer able to support the mortgages on both. And because the Highway 50 property was not income producing, he really had no choice but to sell one of the properties, and the only property that was viable to sell was the Baring property.

And he sold that, again, out of necessity, at a loss. The statement that was made in reply that Mr. Wooley somehow pocketed $870,000 in closing ignores the fact that he put up over a million in earnest money.

So there was actually a loss there.

THE COURT: But doesn't that actually -- didn't he sustain some benefit from that loss --

MR. MOQUIN: Not at all.

THE COURT: -- tax wise?

MR. MOQUIN: No. I mean -- what do you mean? In what sense?

THE COURT: Well, obviously, there are situations where a loss, not dollar for dollar -- that is a contrary argument to the Willards -- but there's some benefit to the fact that they sustained a loss?

MR. MOQUIN: No, I don't believe there was any. And in

fact, there was detriment because what that did was terminate his 1031 exchange, which made him liable for capital gains.

THE COURT: Right.

MR. MOQUIN: Right?

THE COURT: Okay.

MR. MOQUIN: So I do not believe there's any benefit in any way to him having -- have to sell this at loss.

THE COURT: Okay. Thank you for answering that.

MR. MOQUIN: Sure.

THE COURT: Go ahead.

MR. MOQUIN: So, again, in terms of this cross-collateralization, I think that the issue for the Court to really decide here is one of proximate cause.

That is, given the fact that we are somewhat removed from the actual breach -- property that was breached, are the damages that were incurred -- and I don't think there's any disputing that there were damages incurred by virtue of the sale of the Baring property. Are they recoverable?

And I think if we look to the indemnification clause and the definition of "losses," I think the answer is that this was, in fact, foreseeable. It was foreseen and it was bargained for.

Plaintiffs, to my understanding, did not write this lease. And, in fact, this lease and minor variations of it were used by -- I believe it was upwards of 30 different landlords that Berry-Hinckley had leased properties from.

So, you know, the lease terms are there because Berry-Hinckley put them in, and they should be held to them.

I think that it's clear -- you know, it's certainly the case that you do not have to explicitly spell out every conceivable type of damage in order for it to be recoverable. And the phrase "any and all damages," coupled with this list, I think, is dispositive of the issue.

THE COURT: All right. Thank you.

With regard to the Wooley plaintiffs now, you have already discussed the attorney's fees. So are there -- I'm assuming it's the same -- similar to the Willard claims?

MR. MOQUIN: Yes, it's identical.

THE COURT: Right. Is there anything else you would like to address in opposition to the motion?

I think your client may want to talk with you for a moment. So why don't we take a brief break.

MR. MOQUIN: Yeah, I would appreciate if I could go --

THE COURT: And I'll be back on the bench at 11:05.

(A recess was taken.)

THE COURT: You may continue, Counsel.

MR. MOQUIN: Your Honor, I just have three small points, and then I'm done.

The first is that, in fact, the Wooleys did pay all the taxes that were alleged.

THE COURT: Okay. The Wooleys or the Willards?

MR. MOQUIN: The Wooleys, yes. And those are damages that are being sought.

THE COURT: And that is due to the 600,000 in damages incurred when the Wooleys had to sell the Baring property?

MR. MOQUIN: That's correct.

And I think it's important -- there are two aspects to these leases which, I think, are important to note.

The partial nature of these leases, the fact that this was, as Mr. Irvine pointed out, a triple net lease, the landlords expected these things to, basically, cause them no problems; that is, they had triple net. They were not responsible for maintenance, taxes, property taxes, anything.

And in entering into these leases, there was an expectation, I think, on both sides that this was going to be a pretty turnkey situation, that the landlords own the properties, they lease them to the defendants, and wouldn't have to worry about them.

In fact, in March 2007 -- oh, there's another point. The subrogation agreement predates by over a year the amended lease. So the claim that it -- that this knowledge of the Willard lease -- I mean, the Willard loan was not prior to the lease being --

THE COURT: So it postdated the original lease, but predated the amended lease?

MR. MOQUIN: Correct. Correct. And that is when

Mr. Herbst came into the picture as guarantor.

He came into it -- bought Berry-Hinckley in 2007, renegotiated all the contracts, all the leases with all the landlords that Berry-Hinckley had been renting from, and demanded that -- well, actually, what he did was, he agreed to personally guarantee these leases in return for certain changes being made to the leases.

The most important one, I think, was that the modification of the first amended leases gave him the right to subrogate his leasehold without first obtaining the permission of the landlords, which he did in obtaining a $74 million line of credit from First National Bank of Nevada, which was secured by his leasehold interest in all of these properties, including the plaintiffs' properties.

And the only reason he was able to do that without seeking the permission both of the plaintiffs and the plaintiffs' lenders is because of this amendment.

So this amendment was, you know, material and, in fact, he was at that point apprised of the fact that there was this enormous loan in place.

THE COURT: But just because -- let's assume that that is correct, that this amended lease came after and that he knew that this other loan was in place.

Is it still foreseeable on his part that the payments wouldn't be met?

MR. MOQUIN: That the loan payments --

THE COURT: The loan -- I may have said "lease." I meant to say "loan payments."

MR. MOQUIN: I think, given the enormity of the loan, it's very easy to amortize out what the monthly payment would be.

I mean, this is not your normal -- in fact, I could not find a case anywhere close to this value in all of Nevada case law dealing with an $18 million property where the monthly rent at the time of the breach was $142,000 a month.

Now, to go from that, with $87,000 being due for a mortgage, to zero, I think it's reasonable to -- you know, I think that it's reasonable for somebody to suspect that there's going to be some serious fallout from that. There's going to be --

THE COURT: And that this was the plaintiffs' only source of income?

MR. MOQUIN: At the time of the breach, yes.

THE COURT: And that Mr. Herbst or Berry-Hinckley had reason to know that?

MR. MOQUIN: I don't think it's relevant.

In fact, whether or not -- see, we're getting into an area here where whether or not there was a mortgage on the property, okay, is not really important in terms of the damages.

Now, it does come into play now, given the fact that there was, okay, but given the language in the lease, the "any and all damages" provision under Nevada law, which I've cited in my

opposition, is binding and not subject to reinterpretation. There's nothing ambiguous about it.

And so the claim that this was not foreseeable and was not contemplated at the time of contract formation is simply untrue because they put those provisions in, into the lease.

It wasn't necessary for them to put the indemnification clause in. In fact, I think in Section 12 or 13, there's an environmental indemnification clause. So this additional Section 15, they put in as an added protection for the lessor.

But the "any and all" language is -- you know, under Nevada law and under California and everywhere that I have looked, it's not -- I mean, it would be infeasible to have to list all the different particular damages that could potentially arise.

The "any and all" language itself is interpreted, as far as I can tell, across the board to mean "reasonably proximate damages."

THE COURT: All right. Thank you.

Is there anything else?

MR. MOQUIN: No, Your Honor. Thank you.

THE COURT: Thank you.

Counsel.

MR. IRVINE: Thank you, Your Honor.

It struck me in briefing our reply that plaintiffs didn't address or didn't do much to address a couple of things that we argued in the motion. And we're still there today.

They haven't addressed the concept of foreseeability, number one.

And they haven't addressed the requirement under the Christopher Homes case for attorney's fees. Their arguments simply fly by those.

With respect to foreseeability, Mr. Moquin keeps coming back to the indemnity provision. And he says you don't need to look at foreseeability because of this broad boilerplate language that says "any and all."

Well, firstly, I would, again, talk about what an indemnity provision is. He didn't address any of the case law that I cited in the reply, the Boise case, the Pacificorp case, the May Department Store case, or the KMart case from the federal court -- federal bankruptcy court in Illinois, that says that indemnity provisions are designed to protect against claims brought by third parties, not for direct claims between the contracting parties.

The best example is a slip-and-fall. Someone falls while they are in a Terrible Herbst gas station and breaks their arm, and then they sue the owner, because they find out who the owner of the property is, and it's Mr. Willard.

Then Mr. Willard would certainly have a right to indemnity from the tenant for that act, because it's a triple net lease and they are responsible for the entire premises.

But that doesn't extend to cases like this with

Mr. Willard's personal income taxes that are remote from the breach we're talking about here. That's not what an indemnification provision is.

And with respect to the "any and all" language that he's relied on throughout his argument, I would direct the Court to the Boise case from the Oregon Court of Appeals where they are addressing a very similar argument where the party was seeking to recover its $600,000 investment in the property and was attempting to rely on the indemnity provision to do it.

And this is at -- I'll use the Pacific cite. This is at page 709.

In there, the Court analyzes the indemnity provision, which says "Tenant's Covenants of Indemnity," which reads that "Tenant further covenants and agrees to protect, indemnify and forever save harmless the Landlord and the Demised Premises of and from any and all judgments, loss, costs, charges," et cetera.

Again, a very broad indemnity provision.

But the trial court here says this doesn't apply. It's redundant to other paragraphs, remedies paragraphs, and it doesn't apply to direct claims between the contracting parties.

The Court goes on to say on page 710 of that decision, that "under the indemnity paragraph, defendant would be required to indemnify BJV for claims that might arise out of defendant's failure to perform his obligations under the lease, such as a failure to pay assessments or taxes.

A.App.4288

"But we agree with the trial court's interpretation that the indemnity paragraph does not apply to claims between the parties and does not provide a contractual basis on which BJV may recover its lost equity."

So it's the same type of language we're faced with here, and that Court said it didn't apply to direct claims between the parties.

I apologize for getting on my phone, Your Honor, but I didn't print the May Department Store cases, but that case is similar.

It analyzes an indemnity provision, which says that the tenant shall indemnify and hold harmless against -- it doesn't say "any and all," it says "all claims, damages, costs, expenses," on and on and on.

And, again, in that case, the May Department Store case, the Court said no. It said that indemnity language is construed to apply only to claims asserted by third parties against the indemnitee, not to claims based upon injuries or damages suffered directly by that party.

So, again, we're talking about a slip-and-fall. We're talking about a scenario where my tenant might have done a tenant improvement at one of these stores and not paid the contractor, and the contractor goes after the owner. This is not for the damages they are seeking here.

And frankly, Your Honor, if you buy their argument that

this sort of broad, "any and all" type indemnity language somehow obviates the requirement under Nevada law that damages be foreseeable, you can throw out the restatement, you can throw out Hilton, you can throw out Hadley v. Baxendale, because these go back that far.

Damages have to be reasonably foreseeable under a contract case, and the inclusion of boilerplate language like that doesn't eliminate that requirement.

With respect to the attorney's fees argument, we simply shouldn't have to pay for their decision to file in the wrong venue.

I would direct Your Honor to Section 38-H of the lease. And I'm at the Willard lease, which is Exhibit 2 to our motion. This is at page 25 of that lease.

Section 38-H clearly says that the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the state of Nevada. Nevada law applies.

And it says also that the lessor can commence proceeding in the federal or state courts located in the state where each property is located.

Again, these properties are located in the state of Nevada. They chose to go file these over in California. Frankly, we shouldn't have to pay for that, even if these damages were available under Christopher Homes, which they are not, which Mr. Moquin didn't address.

I'll touch on his improper dismissal argument briefly. I won't get into the details on that. I'll rely on Mr. Desmond's declaration attached to the reply.

I think our position is very clear there, but it doesn't matter because none of the fees that plaintiffs incurred in California were in any way caused by an improper dismissal, even if that were true.

These fees were all incurred in filing the motion -- filing the complaint and dealing with motions to quash and motions to dismiss over there.

All the work was done. The case was dismissed at the end, and that in no way changes the fact that they didn't have to bring either that or, in fact, the bankruptcy over in California.

As Your Honor noted, these were their choices. These were their voluntary choices, and we shouldn't have to pay for them.

And under Christopher Homes, these are not -- these are not special damages that are available for attorney's fees. This is not an action to remove a cloud on title, which is one of the prongs. And it's not an indemnity type case where they were forced to litigate against a third party due to our breach.

So under the clear authority of Christopher Homes, these types of damages aren't available anyway.

I'm sorry, Your Honor, I'm bouncing around a little bit, trying to keep this short.

The argument that Mr. Moquin made with respect to Exhibit 32 to the opposition, which is the subrogation agreement -- I'm sorry, I'll get there.

Again, this was entered into after the original lease was executed. And Mr. Moquin is correct, that this subrogation agreement happened between the execution of the original lease and the amendment of the lease and the guarantee by Mr. Herbst.

But that doesn't matter. You have to go back to the original lease because that is when Berry-Hinckley signed on the dotted line and agreed to be liable for all the obligations under the lease.

You have to go back to that date, because if Berry-Hinckley knew at that time that it would be responsible for all of these financing type damages that plaintiffs are going to assert, that was its chance to not enter into the lease.

After that, it's bound. And so anything that happens after that doesn't have any bearing on foreseeability.

Not only that, Mr. Herbst's guarantee under Nevada law is clearly limited to BHI's obligation under the four corners of the lease. He doesn't assume anything outside the four corners of the lease, and he doesn't assume anything that Berry-Hinckley wasn't responsible for.

And the language of the guarantee is consistent with that paragraph 1, which I won't read. It's a short paragraph. But it says that he's responsible for what BHI is responsible for.

In addition, I would note that the subordination agreement at Exhibit 32 -- I touched on this in my direct argument. This refers Berry-Hinckley and Mr. Herbst at best to the fact that a loan existed with the South Valley National Bank at that time.

They were never put on notice of the loan with Telesis, which is the loan they are seeking damages for. So I think that's significant.

And as Your Honor pointed out, BHI and Mr. Herbst had no way of knowing if Mr. Willard or his company could satisfy the debt service on this property without the loan. They had no way of knowing whether this was his only source of income or whether he could pay this on his own without the lease payments.

There has been no evidence of any special knowledge from the Herbsts on that fact.

Your Honor, I want to touch briefly on some of the damages that they had withdrawn. They said they withdrew their claim for the closing costs for the Willard short sale and for the earnest money and for the tax consequences, but that they wanted to continue with their claim for the capital loss carryover.

Again, Your Honor, these damages are even less foreseeable than the tax consequences damages they were seeking before.

If you play this out, it's not a probable result of a breach of the lease. You would have to have a breach of the lease

followed by a threatened foreclosure, followed by a threatened short sale, which was, then, completed.

And you would have to know about Mr. Willard's accounting and tax treatment over the years. There's no evidence in the record that the Herbsts had any way of knowing that they were carrying these capital loss carryovers as assets.

We don't have access to their bank records. We don't have access to their tax returns. We don't have access to their accountants at any point in time prior to the breach.

This is all brand-new arguments. And, frankly, it's not in the complaint. It's not in anything that they did in discovery.

The first time we found out about this new theory was in the opposition. But I still think it's appropriate for the Court to decide it and deny their ability to seek it, because it's simply not foreseeable.

In addition, they talk about trying to keep their claim for diminution in value on the Willard property. Your Honor, that is a new damage as well. There is nothing in the complaint about any diminution in value claim for Willard.

I will concede that they have a claim for Mr. Wooley. At paragraph 34 of the first amended complaint, they claim a $2 million diminution in value damage on the Highway 50 property, which is not subject to the motion that we're arguing here today.

But there's absolutely no claim in here about a

diminution in value claim for the Willard plaintiffs.

And, in fact, the only time we heard about that was, again, for the first time in the opposition at page 10, I believe, the very last sentence on page 10 where they say "Due to BHI's abandonment of the Virginia property and subsequent breach of the interim operation and management agreement, the Virginia property suffered a dramatic diminution in value, the amount of which is not relevant to the instant motion."

That sentence, Your Honor, is the first time we ever heard of that damage. We've never been put on notice of anything like that before.

Which takes me to the 16.1 damages disclosure issue. Now, Mr. Moquin doesn't practice here. I don't know if he understands this rule.

But as you know, Your Honor, 16.1 imposes upon plaintiffs an affirmative obligation to disclose their calculation of damages, along with any supporting documentation of those calculations.

We have never in this case received a 16.1 disclosure with any damages computation. We've had to pull damages from them through interrogatories and depositions, but that shouldn't, frankly, be our job.

It's their affirmative obligation to do that and to continue to do that as their damages claims change, which it continues to do in this case.

I'm not going to say we don't have some information about damages, but we certainly have never received a 16.1 damages disclosure.

And the Wooley damages computation that Mr. Moquin was referring to, we received after the deadline for disclosing initial expert witness reports. And the spreadsheet that I got from him, he gave me to use for settlement purposes only.

I'm, obviously, not going to discuss the contents with the Court because of that, but as of right now, I don't have even have authority to disclose that to my experts to do anything with.

So they have not done their job of getting us what their damages are. And it's starting to become fairly critical with the deadlines that are approaching in this case.

I know that's not entirely relevant to your decision here today, but because it was raised, I wanted to address it.

And then finally, with respect to the Wooley damages for Baring, Mr. Moquin went back to the indemnification provision. I've already addressed that.

I would take issue with his argument that all you have to do is have a reasonable proximate cause to get these damages. I mean, the Hadley v. Baxendale case, the Hilton case, the restatements, they are all there for a reason.

They are there for policy reasons, to limit damages for contracting parties to what they contracted to do.

And that's what we're asking for here. We're asking the

liability on the defendants to be limited to what's in the four corners of the contract, not some proximate cause where you could see a lot of slippery slopes, including being, essentially, held as a guarantor for debt service and the like.

If you have any questions, I'm happy to answer them. Otherwise, I think I've covered everything he had.

THE COURT: No. I think I have asked all of my questions of both parties.

MR. IRVINE: Thank you, Your Honor.

THE COURT: I want to thank everyone for their substantial papers and opposition and the time that went into compiling these. I know that it takes a great amount of skill and time.

In reviewing this, and going back to the standards of Rule 56, where there is a partial adjudication, where it does not actually adjudicate the entire case, it appears that the Court, after the hearing the motion, by examining the pleadings and the evidence before it, and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually, in good faith, controverted, and thereafter, the Court must enter an order.

I have, as an overview, concern with regard to the affidavit that was submitted by Mr. Tim Herbst. Under 56(e), they must be made on personal knowledge. And the format of that

affidavit is very clearly on information and belief. And it begs the question of where Jerry Herbst is.

However, in reviewing this -- and the Court and my law clerk, Ms. Booher, spent a substantial amount of time carefully going through it -- and I'm prepared to rule, even with disregarding that affidavit, and I'm going to do so with an abundance of caution.

The depositions that are attached provide the Court what is sufficient information, and where both parties have submitted documents, that this Court can deem them as admissible evidence. And the Court finds that the motion for summary judgment should be granted.

In considering this, for the record, I am considering the following damage categories.

One, as to the Willard plaintiffs, the short sale damages incurred as a result of having to sell the property, including earnest money invested in the property; tax consequences resulting from the cancelled mortgage debt, and closing costs; attorney's fees with regard to the voluntary bankruptcy, attorney's fees for the California action.

With regard to the Wooley plaintiffs, the Court is considering summary judgment as it relates to the $600,000 in damages incurred with regard to selling the Baring property due to the fact it was cross-collateralized, and the attorney's fees the Wooley plaintiffs incurred from the California action that was

dismissed.

In doing so, I understand that you've indicated, and the record is clear, with regard to which damages the plaintiff has withdrawn.

Any damages that are not in these categories and the subject of the motions will have to be the subject of future motion practice, if the parties wish to narrow down the action.

In accordance with this, the Court finds as follows:

The Court concurs with -- as an overview, with the plaintiff that you cannot identify in every single contract each and every type of damage claim. However, the Court disagrees that foreseeability does not apply. And the Court finds that as a matter of law, that it does apply in the analysis.

In addition, the Court finds that the Christopher Homes versus Liu case applies with regard to the special damages requested in the form of attorney's fees.

Therefore, that being said, based on the motion, opposition, the reply and supplement, the Court finds as follows:

With regard to the Willard lease, in 2005, Willard and Berry-Hinckley Industries entered into a commercial lease, called -- which I will designate the Willard lease, for the lease of property in Reno, Nevada.

In 2013, Mr. Willard filed for bankruptcy. The bankruptcy was voluntarily dismissed shortly after filing it.

In March 2014, Mr. Willard sold the Willard property in

a short sale.

While under the Hilton case it can be construed that the type of foreseeability and the type of damages that are claimed in this case must be submitted to the jury, the Court finds, based on the deposition transcripts that were attached, specifically, that the plaintiffs admit that the defendant had no reason to foresee the items of damage which I have itemized, and that is sufficient without the submitted affidavit from Mr. Tim Herbst.

In addition, the Court finds that with regard to the Wooley leases, in 2005, Berry-Hinckley Industries and Wooley entered into a commercial lease for the lease of property on Highway 50 in Nevada, known as the Highway 50 lease.

In 2006, Wooley bought property on Baring Boulevard, which I'll designate the Baring property. And Berry-Hinckley, BHI, and Wooley entered into a separate lease for that property.

Wooley entered into a mortgage loan for the Baring property, which purportedly contained a clause which cross-collateralized the Baring property and the Highway 50 property.

Neither Berry-Hinckley Industries nor Mr. Jerry Herbst were parties to the mortgage loan.

The Wooley plaintiffs have not set forth any evidence to establish that BHI or Mr. Jerry Herbst knew about the cross-collateralization provisions.

Wooley entered into this loan after the parties had

entered into the Highway 50 lease.

Wooley sold the Baring property while Jackson's Food Stores, Inc., was a tenant and not Berry-Hinckley Industries. Berry-Hinckley Industries was not in default of the Baring lease when Wooley sold the Baring property.

The Court has applied all of the standards that are set forth in Rule 56 with regard to whether or not -- as I indicated earlier, the amounts are not -- for the Court's analysis, are not important, it is the type of damages that are sought.

And the Court finds, based on the facts before us, that the plaintiffs are not entitled to the damages that I itemized earlier based on the fact either they are not foreseeable, or with regard to the special damages, they are precluded by Christopher Homes versus Liu.

Accordingly, this Court orders the plaintiff to provide the Court with a proposed order. That proposed order will state the following:

Each and every finding of fact supported by a citation to the exhibits and not to the affidavit.

Secondly, that the plaintiff -- excuse me, I said "plaintiff."

The defendant will provide conclusions of law supported by the applicable authority. And specifically, it will include Hilton Hotels, Margolese, Christopher Homes, the Boise case, all of which the Court finds persuasive in ruling upon this motion.

Please, in addition, and separate and apart, the Court enters a case management order that directs the plaintiff to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure.

That's the ruling of the Court. I would like the proposed order within 15 days.

We'll be in recess.

MR. MOQUIN: Thank you, Your Honor.

(The proceedings concluded at 11:59 a.m.)

-oOo-

STATE OF NEVADA)
) ss.
WASHOE COUNTY)

I, CONSTANCE S. EISENBERG, an Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department 6 of the above-entitled Court on January 10, 2017, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That I am not a relative nor an employee of any of the parties, nor am I financially or otherwise interested in this action;

That the foregoing transcript, consisting of pages 1 through 69, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 16th day of January, 2017.

/s/Constance S. Eisenberg
_____
CONSTANCE S. EISENBERG
CCR #142, RMR, CRR

Code No. 4185
SUNSHINE LITIGATION SERVICES
151 Country Estates Circle
Reno, Nevada 89511

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

LARRY J. WILLARD, et al.,

Plaintiffs,

vs.

BERRY-HINCKLEY, et al.,

Defendants.
_____/

Case No. CV14-01712

Department No. 6

TRANSCRIPT OF PROCEEDINGS

PRE-TRIAL CONFERENCE

December 12, 2017

Reno, Nevada

REPORTED BY: DEBORA L. CECERE, NV CCR #324, RPR

JOB # 437679

A P P E A R A N C E S

FOR THE PLAINTIFF:

O'MARA LAW FIRM, P.C.
BY: DAVID O'MARA
311 East Liberty Street
Reno, NV 89505
323-1321
david@omaralaw.net

LAW OFFICES OF BRIAN P. MOQUIN
BY: BRIAN P. MOQUIN, ESQ.
3287 Ruffino Lane
San Jose, CA 95148
(408) 300-0022
bmoquin@lawprism.com

FOR THE DEFENDANT

DICKINSON WRIGHT
BY: BRIAN R. IRVINE, ESQ.
100 West Liberty, Suite 940
Reno, NV 89501
775-343-7500

DECEMBER 12, 2017, TUESDAY, 10:11 A.M., RENO, NEVADA

-oOo-

THE COURT: This is the time set for pretrial conference in Case No. CV14-01712, Larry Willard, et al. versus Berry-Hinckley, et al.

Would you please state your appearances?

MR. O'MARA: Good morning, your Honor. David O'Mara on behalf of the plaintiffs.

MR. MOQUIN: Brian Moquin on behalf of the plaintiffs.

MR. IRVINE: Good morning, your Honor. Brian Irvine on behalf of the defendants.

MS. WEBSTER: Good morning, your Honor. Anjali Webster on behalf of defendants.

THE COURT: Good morning.

All right. As this is a pretrial conference, I want to go over a couple of items.

And my intention is to go over the file motions and where there's a nonopposition ask the party to submit an order.

I want to set an oral arguments date for that big stack of paper that's sitting there on my desk. And then we're just going to go over some dates so everyone is

on the same page.

If there is anything that you would like to bring up, please feel free to do so.

We are set for trial. My new trial date is not on here. It is January 29th, correct?

MS. WEBSTER: Yes.

MR. IRVINE: Correct, your Honor.

THE COURT: And do you still believe that it will be eight days, or do you think it will be longer or shorter?

MR. O'MARA: Your Honor, I think that we're going to have to -- Mr. Moquin is going to have to ask the court today for an extension of time.

We notice that you want to do an order submitting nonoppositions. Mr. Moquin has been trying to finish those oppositions, and I told him he needs to discuss that with the Court today. And we would hope that the Court would have leniency on us to allow him to file such oppositions because they would be so devastating to our client if the Court just submitted orders on the nonoppositions.

THE COURT: Okay. Well --

MR. O'MARA: The defendants are aware that we have been trying to do the oppositions. And they have

provided us with extensions. We have filed an extension. So it would be up to the Court as well as Mr. Moquin. I just wanted the Court to be aware of that.

THE COURT: Okay.

MR. O'MARA: I'm sure Mr. Irvine will have his response and go from there.

THE COURT: Let's just go about it this way. A little bit different then.

We'll start with -- is anyone expecting to ask for a continuance of the trial date?

MR. IRVINE: We are not, your Honor. We think what would be a fourth continuance at this point, given the plaintiffs' lack of compliance with the rules, or a disregard of this Court's orders, and their failure to provide basic damages information or expert disclosures necessitate a dismissal. We've been clear in our moving papers.

The motion for case ending sanctions that we filed along with the two other motions, where the oppositions were due last Monday, we did give them a couple of brief extensions. We couldn't give them more than very brief extensions because all motions must be submitted to the Court for a decision by this Friday pursuant to the stipulation and order that was entered last February.

And they've just simply failed to oppose the motions. They filed with this Court a motion to extend the time for them to respond to the motions, where they asked until 4:30 on last Thursday.

I was assured by counsel that I'd receive hand-delivery or email service of the oppositions to all three motions by 4:30 last Thursday, and then nothing. I didn't get a phone call. I didn't get an email. We still don't have oppositions.

Your Honor, at this point, I mean my client spent a lot of time and money trying to prepare a defense to this case, and they've been thwarted in their ability to prepare a defense because we just don't have the information that the rules and this Court's orders would require.

So we are happy to provide you with proposed orders on all three motions. We're happy to set an oral argument on all three of those motions. But we don't think a fourth continuance of the trial is fair to our client given what's been going on.

They're entitled to put this behind them and move forward. And plaintiffs haven't played by the rules or followed this Court's orders.

THE COURT: All right. Thank you.

Here's how we're going to do this. One, I have the October 6th, 2014 Motion to Partially Dismiss Plaintiffs' Complaint. No opposition filed. No reply.

That's one of them that you're adjusting, correct?

Then I have a 10/28/2014 Motion to Associate Counsel. And no opposition was filed. Defendants' Notice of Nonopposition was filed on the plaintiffs at 10/29/2014.

So there's not an order entered on that, correct? I mean, I realize this has gone up and back and around. But I don't see an order on it.

MR. MOQUIN: I don't believe there is.

THE COURT: All right. So I want you to submit an order.

Okay? Is this yours?

MR. IRVINE: The Motion to Associate Counsel I'm assuming was --

THE COURT: It's yours. Filed by plaintiffs Larry J. Willard.

MR. MOQUIN: We'll do that.

MR. O'MARA: We'll file an order, your Honor.

THE COURT: Just submit one, please.

MR. MOQUIN: Yes, your Honor.

MR. O'MARA: It was my understanding, I think,

that there was no objection, and the Court granted an order at the previous hearing. But I'll, I'll get an order to you --

THE COURT: Right. I just want to make sure we have written orders on this.

MR. O'MARA: That's fine, your Honor.

THE COURT: And certainly we've been acting as though it was granted.

Okay. Next we had Defendants' Motion to Compel Discovery Responses filed by defendants with an Ex Parte Order Shortening Time, Notice of Nonopposition to Defendants' Motion to Compel Discovery Responses.

And, and later there was an Order Shortening Time Filed. And then Order Granting Defendants' Motion to Compel Discovery Responses was filed July 1st, 2015.

Has -- have you received those discovery responses?

MR. IRVINE: Your Honor, I didn't review that motion this morning. I think we certainly got substantial compliance to it. I don't remember the scope of that. I believe it was our first set of interrogatories, and I think we did get answers to all of those.

THE COURT: Okay. 7/24/2015, Motion for Contempt Pursuant to NRCP 45(e). And Motions for Sanctions

Against Plaintiffs' Counsel pursuant to NRCP 37.

Defendant filed an Ex Parte Motion for Order Shortening Time, and Order Shortening Time was filed on July 28th, 2015.

On this case there was no opposition, correct?

MR. IRVINE: That's correct, your Honor. But I don't believe we ever submitted that motion.

THE COURT: Right, that was the next thing I was going to say.

MR. IRVINE: I think that had to do with a subpoena to a third-party witness, who is actually also the expert that's the subject of our motion to strike. And I believe we got the documents in time for the deposition so we never submitted that.

THE COURT: Okay.

MR. IRVINE: So we would, we would withdraw that motion.

THE COURT: Okay.

Next, Defendants -- 8/7/15, Defendants' Second Motion to Compel Discovery Responses filed by Defendants Barry Hinkley and Jerry Herbst; a Defendants' Ex Parte Motion for Order Shortening Time was filed 8/7/15, Emergency Request for Status Conference was filed. Order Shortening Time was entered 8/11/2015, as well as an order

setting status conference of 8/12/2015.

Then we went to a status conference on August 17th. This Court granted the Defendant's Second Motion to Compel Discovery Responses. It was filed on 8/17/2015. So that's not at issue.

8/1/2016, Defendant/Counterclaimants Motion for Partial Summary Judgment with a Request, Motion to Exceed the Page Limit and a Supplement to Defendants/Counterclaimants Motion for Partial Summary Judgment filed 12/20. This was opposed and replied.

Defendants asked for page limit, to exceed the page limit. The Court granted. Filed an order granting Motion to Exceed Page Limit for both the motion and the reply. And we set a hearing at the 12/9/2016 -- that's the date the order was setting the hearing.

And then we had the hearing on January 10th, 2017, where the Court granted partial summary judgment and ordered the defense counsel to prepare an order, which then this Court entered on May 30th, 2017.

All right. The next one, it looks like, was completed. It appears that you did object, but then I filed the order.

Let's go to the next Motion for Summary Judgment dated October 17th, 2017. Motion for Summary Judgment of

Plaintiffs Edward Wooley and Judith A. Wooley. Defendants filed their opposition on November 13th, along with a Motion to Exceed Page Limit on the same date.

Now as to this one there's no reply, correct?

MR. O'MARA: That's correct, your Honor.

THE COURT: Okay. And was this the subject of an extension where you wanted to file a reply?

MR. MOQUIN: Yes, defendants gave an open extension until the end of -- until this Friday.

THE COURT: Okay. So then you have an open extension until Friday.

Okay. October 18th, Motion for Summary Judgment by Plaintiffs Larry J. Willard and Overland Development. Opposition was filed on November 13th along with a motion to exceed page limit.

This one is in the same circumstance, correct?

MR. MOQUIN: Correct.

THE COURT: Okay. All right.

11/14, Defendants/Counterclaimants Motion to Strike and/or Motion in Limine to Exclude the Expert Witness, Expert Testimony of Daniel Gluhaich, along with a Motion to Exceed Page Limit.

This one you have not filed an opposition, correct?

MR. MOQUIN: Correct.

THE COURT: And is this -- a Request for Submission After Notice of Nonopposition was filed by the Defendants' Request for Submission 12/7.

And Mr. O'Mara, is this one of the motions that you're wanting to file an opposition?

MR. O'MARA: Yes, your Honor.

THE COURT: Okay. And then 11/15, Defendants' Motion for Partial Summary Judgment filed by Defendants Berry-Hinckley and Jerry Herbst. No opposition was filed. A Notice of Nonopposition was filed by defendants on 12/7. And it was submitted.

This is in the same category?

MR. O'MARA: Yes, your Honor.

THE COURT: Okay. 11/15, Defendant/Counterclaimants Motion for Sanctions Requesting Oral Argument filed by Defendants Berry-Hinckley and Jerry Herbst. Motion to Exceed Page Limit was filed on the same date. No opposition was filed to this. And a Notice of Nonopposition was filed by the defendants on 12/7, and it was submitted on 12/7.

So this is the third one in that category, correct?

MR. O'MARA: Correct.

THE COURT: Okay. And lastly, the December 6th, 2017, Plaintiffs' Request for Brief Extension of Time to Respond to Defendants' Three Pending Motions and to Extend the Deadline for Submission of Dispositive Motions filed by all plaintiffs.

No opposition was filed, right?

Isn't it your -- you still have until next week?

MR. IRVINE: Yes, your Honor. And I can certainly file an opposition to that.

I think it had two requests for relief. One was for an extension through 4:29 p.m. on December 7th, to file the three oppositions that we just discussed.

And so I would submit that that portion of the motion is moot because that deadline has already passed.

We would certainly oppose any extension at this point, as I've already discussed.

The second relief that they sought in that motion was a continuance of the date to submit dispositive motions to this Court.

We stipulated that that would be done by this Friday, December 15th. We did that very deliberately, because we looked at the calendar and saw where these were going to fall with the Christmas holiday. We knew that we were filing some significant dispositive motions so we

built in 45 days before trial instead of 30.

We did that with much thought and intent to try to give this Court adequate time to consider the motions. We would oppose any extension to that submission deadline which the parties stipulated to last February.

THE COURT: So I want to hear from you, Counsel. Tell me why I don't have oppositions.

MR. MOQUIN: Your Honor, early morning of the date that my oppositions to these two motions were due, the application that I was writing them in, it just -- it just hung.

And so I killed it and started it up again. It would not let me save what I had done. So I killed it again. And everything was gone. I lost three weeks' worth of work.

So I contacted opposing counsel, and given the fact that I had extended a seven-day extension for them to respond to our motion for summary judgment, I was hoping that they would reciprocate. And they only gave me one day.

I did what I could, and the following day said, you know, I just haven't been able to, to make this up.

And that continued through that Wednesday. Wednesday morning I asked for another extension, and I was

granted, at 11:00 o'clock, until 5:00, I believe -- no, 3:00 o'clock. And so I filed this motion for, for an extension of time.

Meanwhile, my computer system, my primary computer system has been just a nightmare. And I've been migrating all of my assets off of it with respect to this case so that I can continue to work.

But that is the sole and, and just debilitating cause of the --

THE COURT: So do you have IT people working on it?

MR. MOQUIN: I'm solo.

THE COURT: Okay. All right.

So the -- I was just trying to pull up your motion again, because I think I left it on my desk.

So the time frame you want at this juncture?

MR. MOQUIN: For oppositions?

THE COURT: Yes.

MR. MOQUIN: If I could have -- my, my replies to plaintiffs' motion for summary judgment are due on Friday. If I could have until this coming Monday, that would be ideal. Otherwise, I would be grateful for Friday.

THE COURT: All right. And specifically that is on the three motions that I mentioned.

MR. O'MARA: The oppositions, your Honor, right?

THE COURT: Right. On the three motions that I mentioned that you wanted to file the opposition. That's the motion to strike filed on 1/14. 11/15, motion for partial summary judgment. And 11/15/2017, motion for sanctions.

All right. If I were to grant an extension, and I know this will make you unhappy, but if I were to, how much time would you want to file a reply?

MR. IRVINE: Well, your Honor, that's where the trouble comes in and why we did the 45 days.

If we get oppositions on Monday, then, you know, the following week you're into the Christmas holiday and everything else. I'm not even sure when -- you'd have four days. I mean --

THE COURT: Monday would be the 18th.

MR. IRVINE: Right.

THE COURT: And the 22nd is right before the holidays.

Now I took that following week off.

MR. IRVINE: I'm back East on a vacation that week myself, your Honor. I won't be back until the 4th.

THE COURT: And it was purposeful because I saw all the documents. So I'm hoping to get caught up with

reading all the documents.

MR. IRVINE: I think the effect of an extension through Monday, we would need, you know, a decent amount of time. We'd have to be looking at the week of the 8th to file our replies. I don't see how we could get it done before then.

THE COURT: Well, when are you departing?

MR. IRVINE: I'm leaving the 26th, and I'll be back on the 4th. I'm leaving for the East Coast.

THE COURT: Okay.

MR. IRVINE: The other complicating factor is I have a very significant set of Ninth Circuit briefing that is due on the 28th, which is going to take all my time basically between now and then, for the most part.

So I'm pretty jammed up, which is why we hoped to have everything done by the 15th.

THE COURT: I understand.

MR. IRVINE: Again, respectfully, in response to what Mr. Moquin is saying, I can buy what he's saying, but if you look at the motion for sanctions, this is a part of a very significant repeated behavior.

We've had to file multiple motions to compel in this case, because they won't provide us with basic discovery information.

When we file those motions to compel, they simply don't oppose them. And then we have to get orders from this Court and go and enforce those.

We were here almost 11 months ago to the day, and I was standing in Court explaining to your Honor that we hadn't received damages disclosures from them; that we hadn't received an appropriate disclosure for Mr. Gluhaich. They stipulated to that, but they haven't done their job on those two issues.

We have a stip and order, it was entered by this court. It set forth very specific deadlines and a very specific approach to how we were going to handle the rest of the case.

Lo and behold in October, we still don't have damages disclosures. We still haven't seen anything from Gluhaich. And we get summary judgment motions from plaintiff where they seek three times the amount of damages than we've ever seen before.

So I'm sensitive to any computer issues and problems counsel has, but this is simply part of a very consistent pattern of behavior. That's why we think the case should be dismissed.

I just, these motions are very important to my client, and I want your Honor to have the appropriate time

to look at them. We need to have time to do our replies.

I don't know what the solution is. I'm just strongly opposed to any continuances from here on out.

THE COURT: I'm not inclined to continue the trial, number one.

Two, it's the seriousness of the relief, which is substantial, and my serious consideration of imposing sanctions.

So I am going to allow you to file oppositions and I will tell you why. We had the very same thing happen this week on a document. My law clerk did. And we could not recover it.

And so that's the only reason that -- but I appreciate defendant's extreme frustration. And you need to know going into these oppositions, that I'm very seriously considering granting all of it. And they have been beyond courteous to you.

So you will have until Monday, the 18th, to file any papers, any oppositions, and they must be filed by 10:00 a.m.

MR. MOQUIN: Thank you, your Honor.

THE COURT: Now I want to accommodate, which is just a hard schedule for all of us. You have your Ninth Circuit argument on the 28th, did you say?

MR. IRVINE: I have two Ninth Circuit briefs due on the 28th.

THE COURT: Wouldn't it be better for you to have your replies due on the 22nd, or for me to extend it out? I mean, my intention is to get the motion and the opposition all read and outlined so that I only need to look at your reply.

MR. IRVINE: Okay.

THE COURT: It would be easier if it was not excessively long for the reply.

MR. IRVINE: We'll keep that in mind, your Honor.

THE COURT: So I'll give you whatever time you need. And what that means is I'll be a bit jammed up, but we'll do it.

MR. O'MARA: Why don't you give them until the 8th, and they can file it, and that gives them plenty of time. And if they get it done beforehand, they can file it beforehand. That way if something happens with Brian and his travels or whatever, I mean --

THE COURT: And what I would like you to do --

MR. IRVINE: I'm sorry to interrupt. Your Honor, we'll certainly get at least one of our replies filed by the 22nd, because it's the one that I'm going to

be primarily writing, and I'm going to do that before I go --

THE COURT: Okay.

MR. IRVINE: -- on my trip.

THE COURT: Okay.

MR. IRVINE: And that will be the motion to strike. That one will definitely be submitted -- resubmitted, I guess, by the 22nd.

Ms. Webster was primarily responsible for the other two briefs. And she's got another appeal that I didn't mention to you in the Sixth Circuit that she's got working as well. So I think we're going to need to ask for the Court's indulgence for the other two.

THE COURT: That's fine. These are very significant motions. There's a lot to read. And I have outlined a couple of areas of our own research I want to do. So I will give you until the 8th.

Now let's set a date for oral arguments.

I had a three-week trial starting on the 8th, but I'm somewhat remembering that they may be just now talking about either it's going to shorten up or they're going to ask for a continuance.

So do you have any hearing dates? I think we need allow some significant argument time.

MR. O'MARA: Your Honor, if you're talking about the 8th, 9th, we are trying to schedule settlement that week.

THE COURT: On this case?

MR. O'MARA: And I don't know if it's been revoked because they may do that.

MR. IRVINE: It hasn't been revoked. But I don't think those dates are magic. We're trying to schedule mediation with retired Judge Adams, and he was generally available those first two weeks. So I'd rather get an oral argument date that works for you, and we'll figure out a settlement conference date.

THE COURT: And you want it while the motions are pending, or decided, after oral arguments?

MR. IRVINE: The settlement conference?

THE COURT: Right. Right, there would be no need for one --

MR. IRVINE: Right.

THE COURT: -- if I roll one way.

MR. IRVINE: Right.

MR. MOQUIN: Or there would be no need for oral argument if we could settle.

THE COURT: Right.

MR. IRVINE: True.

THE COURT: So what do we have?
THE CLERK: We have the afternoon of the 18th.
THE COURT: That's close to trial.
What do we have on the 12th?
THE CLERK: That would just be the end of that first week of a three-week trial. Nothing else is set that day.
THE COURT: I have two trials behind that three-week trial, though.
So going back to the, if we have a trial starting on the 29th, you're still expecting it to be eight days, correct?
MR. O'MARA: I think maximum.
THE COURT: Okay. Let's go backwards from there.
THE CLERK: Okay. The week of the 8th you only have the one.
THE COURT: So the other went off?
THE CLERK: (Nods head.)
THE COURT: Okay. So we could do it on the 12th, correct?
THE CLERK: Yes.
MR. O'MARA: That's just the day we were trying to find, but I mean, I think defendants are really going to

be the ones that push the settlement date. So if they want to do it after --

MR. IRVINE: The 12th is fine for us.

THE COURT: So then you would be -- okay.

So how much time do you think you need?

Generally, I mean, because I have extra time now with this. I'm going to have my outline done, and I will have very specific questions, and I will have the opportunity to check all the case law. And then we'll do our own independent research.

And so I expect to allow you to do your initial presentations, but I'll probably interrupt you and go right to questioning. Okay?

MR. O'MARA: Are you planning on having the whole day, your Honor, and we just schedule it at 9:00 a.m., or do you want to start at 1:00 and go to 4:00?

THE COURT: What works better?

THE CLERK: We can start at 1:00.

THE COURT: Either one. Whatever you would like.

Do you have a preference?

MR. IRVINE: I can't imagine that the argument will take a whole day. I think three hours is probably ample.

THE COURT: Okay.

MR. MOQUIN: Your Honor, the only issue I have is I will be driving from San Jose, as I did this morning. So it would be more convenient for me if it was this time or later.

MR. O'MARA: So 1:00?

MR. MOQUIN: 1:00 would be great.

MR. O'MARA: Is that okay, Mr. Irvine?

MR. IRVINE: Sure. I'm free the whole day.

THE COURT: 1:00.

MR. MOQUIN: This would be on all five pending motions?

THE COURT: Yes, it's going to be on everything that is outstanding.

Now, in light of the fact that we set that on the 12th, and you will have your oppositions, your replies done by the 8th, that should give us enough time.

Does that give you enough time between filing your replies and argument?

MR. IRVINE: Sure.

THE COURT: Okay. All right.

And will you be arguing all the motions, or will you be splitting them?

MR. MOQUIN: I'll be doing them all.

MR. IRVINE: We'll being splitting them.
THE COURT: Okay.
MR. IRVINE: I know Ms. Webster will take at least one of the briefs.
THE COURT: Okay. All right.
I will tell you this. This is it for extensions. All right. And, and there will be no more.
And you know going into this motion for sanctions that you're -- I haven't decided it, but I need to see compelling opposition not to grant it. Okay.
MR. MOQUIN: I understand.
THE COURT: Anything else we need to do today?
MR. IRVINE: I don't think so, your Honor. Thank you.
THE COURT: Okay. Thank you.
We'll be in recess.
MR. O'MARA: I'm sorry, your Honor.
Could you just restate when you want the trial statements, or will you just --
THE COURT: Isn't it in our scheduling order?
MR. IRVINE: It is. Five judicial days from the 29th.
THE COURT: Yes. Where did I put my outline?
And you should be aware that I may ask for

follow-up briefing during the trial since it's a bench trial, and there are specific areas that I want briefing on.

But it is five days before trial. It's always welcome if it comes a little early. But that is your deadline.

And you do know that pursuant to local rules, or the applicable rules, that you must submit proposed findings with your trial statement on a bench trial.

MR. O'MARA: Okay.

THE COURT: Okay. All right.

We'll be in recess.

MR. MOQUIN: Thank you, your Honor.

THE COURT: Thank you, Counsel.

MR. IRVINE: Thank you, your Honor.

MS. WEBSTER: Thank you.

MR. O'MARA: Thank you, your Honor.

(Whereupon the proceedings were concluded.)

-oOo-

STATE OF NEVADA)
) ss.
WASHOE COUNTY)

I, DEBORA L. CECERE, an Official Reporter of the State of Nevada, in and for Washoe County, DO HEREBY CERTIFY:

That I was present at the times, dates, and places herein set forth, and that I reported in shorthand notes the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 28, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 14th day of December, 2017.

/s/ Debora Cecere
_____
DEBORA L. CECERE, CCR #324

4185
SUNSHINE LITIGATION
151 Country Estates Circle
Reno, Nevada 89512

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
BEFORE THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

-o0o-

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation, Plaintiffs,	:	Case No. CV14-01712
	:	Dept. No. 6
vs	:	
BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	:	

==========

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENTS - PLAINTIFFS' RULE 60(b) MOTION

WEDNESDAY, SEPTEMBER 4TH, 2018

Reno, Nevada

Reported By: ERIN T. FERRETTO, RPR, CCR #281

Job No.: 494048

ORAL ARGUMENTS - 09/04/2018

APPEARANCES

FOR THE PLAINTIFFS: RICHARD D. WILLIAMSON, ESQ.
JONATHAN J. TEW, ESQ.
Roberston, Johnson, Miller & Williamson
50 W. Liberty Street
Suite 600
Reno, Nevada 89501

Also Present: LARRY WILLARD

FOR THE DEFENDANTS: BRIAN R. IRVINE, ESQ.
BROOKS WESTERGARD, ESQ.
Dickinson Wright
100 W. Liberty Street
Suite 940
Reno, Nevada 89501

-o0o-

RENO, NEVADA, WEDNESDAY, SEPTEMBER 4TH, 2018, 1:30 P.M.

-o0o-

THE COURT: Good afternoon. Please be seated.

This is Case No. CV14-01712, Larry J. Willard; et al, versus Berry-Hinckley Industries.

Please state your appearances.

MR. WILLIAMSON: Good afternoon, your Honor. Richard Williamson and Jon Tew on behalf of Larry Willard and the Willard plaintiffs, and we have Mr. Willard here in the courtroom with us.

THE COURT: Good afternoon.

MR. IRVINE: Good afternoon, your Honor. Brian Irvine on behalf of defendants, and with me today is Brooks Westergard, who just joined our firm and he came to observe.

THE COURT: Welcome. You're going to be doing all the argument?

MR. WESTERGARD: Of course.

THE COURT: All right. Before the court are several motions -- I guess two, essentially -- the Motion to Strike or, in the Alternative, Motion for Leave to

File Surreply, plaintiff's opposition to that motion and the defendant's reply. Would you like to present -- I've read everything, would you like to present any additional argument on those points?

Counsel, it's your motion.

MR. IRVINE: Briefly, your Honor.

As noted in our briefs, we think that the reply attached a number of exhibits that were not present in the Rule 60(b) motion, although those exhibits were characterized as rebuttal to what we put in our opposition brief. I think they were really mostly exhibits that could have been attached to the Rule 60 motion and they simply were not.

We filed a motion to strike under the Providence case because we didn't have a chance to respond to any of those exhibits in our opposition papers, so we're asking the court to either strike those -- those papers or to consider the surreply that is focused only on those exhibits that we filed as an attachment to the motion to strike.

THE COURT: Okay.

MR. IRVINE: I don't think I have anything besides that, your Honor. It's pretty simple.

THE COURT: Counsel?

MR. WILLIAMSON: Yes, your Honor. Thank you, if the court will allow argument on the Rule 60 motion ultimately but certainly on the motion to strike.

We do believe all those were properly rebuttal'd exhibits that were offered in response to what the defendants' filed in their opposition but, more importantly, the defendants now have had a chance to respond. They really had two chances to respond, they filed not only the motion to strike but also the proposed surreply. I don't think that was necessary because I do think they were rebuttal exhibits, but I have no objection to the filing of the surreply. We'll admit -- or we'll accept that.

THE COURT: So your Opposition to Defendants' Motion to Strike or, in the Alternative, Motion to File Surreply, at this time, even though you contend that what was attached was appropriate, you're stipulating that they can file a surreply?

MR. WILLIAMSON: We'll stipulate to the surreply that they have already placed in the court's record.

THE COURT: All right. So there's no need for that stipulation for me to rule on the motion to strike or the --

MR. IRVINE: I agree, your Honor.

THE COURT: Okay. Thank you.
MR. WILLIAMSON: Thank you, your Honor.
THE COURT: Let's move to your Rule 60(b) motion for relief.
MR. WILLIAMSON: Yes, your Honor.
Would you mind if I use the lectern?
THE COURT: Oh, please.
MR. WILLIAMSON: Thank you, your Honor.
THE COURT: And I need to -- I want to have you present your argument in the fashion that you would like but I would like you to stick really, really, really close to the NRCP 60(b) standards.
MR. WILLIAMSON: Thank you, your Honor. I would do that, and obviously if I appear to be trailing or if the court has any questions, please don't hesitate to interrupt me.
That's right, we are here, your Honor, asking for relief under Rule 60 from several of the sanction motions that were entered earlier this year. They were entered simple because Brian Moquin failed to respond to them. He failed to respond to them because he is suffering from mental illness, and he did effectively abandon Mr. Willard and the other Willard plaintiffs.
Mr. Willard is anxious to help mitigate the

problems that Brian Moquin caused not only to him but also to the court and to the defendants, and try to get this case back on track. We also recognize that that Rule 60 relief is not automatic. We understand that and the decision is in the court's discretion. In this case, however, due to the specific factual circumstances here, the court should grant Rule 60 relief.
And I want to come back to the question of mental illness, but as the court requested and I think is appropriate, I do want to focus on the Rule 60 standards.
I think originally derived from Hotel Frontier and then stated more succinctly in the Yochum case, there are really four factors that the court needs to look at. Number one, was there a prompt application for relief; number two, is there any intent to delay the proceedings; number three, a lack of procedural knowledge on behalf of the moving party; and, number four, good faith on behalf of the moving party.
As to the first question, whether or not we moved promptly for relief, we did. We filed our motion in mid-April, that was approximately three months after the court entered the first sanctions order and I think a little more than one month after the findings of fact and conclusions of law were entered in March of 2018. So we

have -- obviously, under Rule 60, the outside time limit is six months and so moving within one to three months, I believe, demonstrates prompt relief, particularly when here the Willard clients had to get replacement counsel, get us as up to speed as we could with very difficult and non-responsive former counsel and present quite a lot of material to the court. So I do think we moved promptly for relief.
The second factor, is there an intent to delay the proceedings? There is not. Certainly, I think if you look at Mr. -- actually what Mr. Willard did, everything he could to try to push this case forward, to push his counsel to file things on time, to be an active participant in the case, the plaintiffs did not evidence any intent to delay the proceedings.
I do recognize there's been several delays and several stipulations to continue trial, but those were stipulations, they were entered between both parties. I realize there are stipulations within those agreements that provided why it was done, but it was certainly not to advance any intent to delay.
And as the facts before the court demonstrate, Mr. Willard was financially devastated by the defendants' strategic decision to breach their contract and vacate

the Longley and South Virginia property. He wants nothing more than to get a quick, speedy determination on the merits, and that's certainly what he was asking his attorney, Mr. Moquin, to do. And, if allowed, that's certainly what we will pursue. There's no intent to delay the proceedings, your Honor, so, again, we've met that factor.
The third factor is lack of a procedural requirements, and this is, candidly, a little bit of a difficult one. There isn't a situation where someone was served, got a default judgment entered against them because they thought they had 30 days to respond instead of 20 days. It's a situation where the defendants filed motions with the court, filed dispositive motions, motions for sanctions, there was a straight deadline, and Mr. Moquin, the plaintiffs' former counsel, failed to meet that deadline.
THE COURT: Does it make a difference, really, against Mr. Irvine's vehement opposition, that I gave him additional time, I gave him my deadline?
MR. WILLIAMSON: Yeah. You know, I think, your Honor, it certainly demonstrated extensive generosity on behalf of the court. It doesn't change Mr. Willard's lack of procedural knowledge. I think there is no doubt

Mr. Moquin knew better and should have acted better. Again, we'll get to it in a minute why he didn't act better, but the plaintiffs did have a lack of procedural knowledge; and, two, more importantly, the Stoecklein case, your Honor, that's 109 Nevada 268, actually does say, quote:

> "A lack of procedural knowledge on the part of the moving party is not always necessary to show excusable neglect under Rule 60 -- under NRCP 60(b)(1)."

Close quote. And I do think we have a lack of procedural knowledge here on the plaintiffs, not on Mr. Willard -- excuse me -- not on Mr. Moquin but on Mr. Willard and the other plaintiffs, but under Stoecklein that's not a determining factor one way or the other.

THE COURT: I was just trying to recall, at the hearing that we held on January 10, 2017, my recollection is Mr. Willard was not here.

MR. WILLIAMSON: That's correct, your Honor.

THE COURT: And so he chose not to be here.

MR. WILLIAMSON: I don't know that any -- again, I wasn't there, I don't know that any of the parties were there. I don't know that Mr. Willard was -- I don't know

that. I don't know whether anyone was invited -- any of the parties were invited to appear, and I don't know whether Mr. Willard declined. I believe he was relying on his counsel to be here for him and expected Mr. Moquin and was told Mr. Moquin would be here and would do his job.

So but thank you for clarifying that, your Honor, because I do think it's an important point. The defendants, in their opposition, rightly pointed out it's not like they've been absentee plaintiffs; they haven't been. Mr. Willard has been here and he's been involved, and he understood his appearance was appropriate he has been was here. He was here, I think, in January -- I may be messing up the dates -- January '16 or January '17 conference with the court, and he was here for that, but he was not here most critically in December was 2017 so he did not know that these procedural issues were pending.

He did, candidly, know that things needed to be filed, he knew that. He knew trial was coming up and he knew that they were both motions that he wanted to see filed and oppositions that he understood needed to be filed because he was an active participant in this case and he wants to continue to be.

THE COURT: Has Mr. Willard or the plaintiffs been involved in litigation previously?

MR. WILLIAMSON: They have, your Honor, and this is admitted. I'm going beyond our submissions but they have both been involved in litigation previously and have been represented by Mr. Moquin previously, and he successfully went through a trial. And so they really had every reason to believe and understand that Mr. Moquin would do his job and I think his track record up until late 2017 was that he did do his job, then something terrible did happen.

That's really the issue here, is that Mr. Willard certainly is not recalcitrant, and although I didn't know him and we have no evidence in the record at this point, all facts indicate that Mr. Moquin was not recalcitrant. He doesn't have a history of bar disciplinary matters, he doesn't have a history of getting sanctions against him or any of that kind of thing. All indications were that the plaintiffs could rely on him, that he was a reasonable and responsible attorney that could be trusted to do his job, and that's really what they expected.

And I think that then brings us to the fourth factor, your Honor, that's whether the moving parties are proceeding in good faith. Again, Stoecklein defines --

or rather it intentionally doesn't define, it says:

> Good faith is not subject to a precise technical definition but it encompasses, quote, "an honest belief, the absence of malice, and the absence of design to defraud."

Close quote. I absolutely, having been on the other side, I understand the court's frustrations and the defendants' frustration. There is nothing more aggravating than having non-responsive counsel on the other side, so I don't -- I don't blame any anger or frustration that has been exhibited towards this side of the table, but I think, as our submission shows, that is not Mr. Willard.

Mr. Willard has always acted in good faith and wants nothing more than to proceed to a trial on the merits of this case. And, frankly, I don't even think Mr. Moquin was proceeding in bad faith, and, you know, a design to defraud or with malice or with some dishonest belief, because that would be the worst case strategy in the world, your Honor, would be to allow summary judgment and sanctions and motion to strike an expert witness be leveled against you. That's no way case strategy or design that I'm aware of. So there is no question that

Mr. Willard has been proceeding in good faith, and he intends to do so and that's why he's here, your Honor.

So, again, I think we've satisfied all four of the requirements under Yochum to get Rule 60 relief. There is one other that is not delineated in Yochum but that the Supreme Court has since pointed out needs to be presented, and that is that the party seeking relief must demonstrate a meritorious claim or defense; that is unequivocally the case.

We went -- in fact, even in our motion, perhaps too much so, we focused on the merits of this case, and why he should be entitled to his day in court and why, based on the facts that we're aware of, he's entitled to a judgment in his favor. And the defense did not oppose that prong, they certainly haven't conceded the case by any means, but they don't oppose that we have demonstrated a meritorious claim, and therefore, again, Mr. Willard has satisfied all the requirements for Rule 60 relief, and we do think the court should grant it.

But I want to come back to what I think is the core issue of why we're here. One of the factors that the court was required to analyze before dismissing the case as a sanction, was the extent to which what has gone on in this case was attributable to the attorney, to

Mr. Moquin.

Under Young v. Johnny Ribeiro Bldg., 106 Nevada 88, the court analyzes I think eight factors that should be evaluated before entering a dismissal, and one of those factors is, quote, "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney," close quote.

That factor was not included in the findings of fact and conclusions of law that the court received that were submitted to the court, but I do think that factor should be the deciding factor here today. It is --

THE COURT: Doesn't misconduct imply some sort of deliberate action and I thought that you were indicating that it's really a mental illness that has resulted in Mr. Moquin's decline?

MR. WILLIAMSON: Very good question, your Honor.

The reason why I raise it is this is a factor that I think was not provided to the court for consideration but what should be considered, is just does the blame reside with the party or does the blame reside with the attorney? And I'm not here saying that -- I'm absolutely not saying that Mr. Moquin was acting out of any sort of deliberate design, I don't think that he was. What am saying is when I'm attributing blame with what I think

the Young court was trying to get the district courts to do is decide in attributing blame between the party and the party's attorney, who is at fault, where should that blame reside. Here, it certainly should not reside with Mr. Willard.

It is undisputed that Brian Moquin suffers from mental illness and that he constructively abandoned the plaintiffs when they needed him most. The defendants have not presented any contrary facts, just presented arguments on why the court should disregard some of the evidence we submitted, and we can talk about -- we can talk about the hearsay rule, we can talk about what is in, what is out, but there are some crucial undisputed facts in the record, based on Mr. Willard's personal knowledge, that the court has before it.

First, in late 2017 Mr. Moquin was oscillating between sort of periods of frantic activity and total silence. He was swinging between irrepressible optimism and days of unresponsiveness, while at the same time Mr. Moquin was assuring Mr. Willard and the other plaintiffs that he had everything under control, that everything was fine.

Mr. Willard had contemporary observations that Mr. Moquin suffered a mental breakdown in 2017. Mr. Willard

recommended in early 2018 a psychiatrist in the Bay Area named Dr. Douglas Mar and Mr. Willard made payments to Dr. Mar to treat Mr. Moquin. So the only truly disputed issue is the technical diagnosis of bipolar disorder.

Mr. Moquin told Mr. Willard, "I was diagnosed with bipolar disorder." Mr. Moquin is not here, that is an out-of-court statement offered for the truth of the matter asserted.

THE COURT: When was that?

MR. WILLIAMSON: That was in early 2018.

So that would be hearsay, but for I believe those statements do fall within the state of mind exception under NRS 51.105, so I do think that comes in as well. But even without the name diagnosis, we still have overwhelming and uncontradicted evidence of mental illness, that Brian Moquin was mentally ill.

THE COURT: That was the first time he was diagnosed?

MR. WILLIAMSON: To our knowledge -- to Mr. Willard's knowledge, that's exactly right, your Honor.

THE COURT: During the period of time that this was going on and Mr. Willard was recommending treatment for him, was Mr. Moquin representing other clients?

MR. WILLIAMSON: I don't know that. As

separately, you know, as we all have a duty, professional responsibility, that is my concern. I do not think he should be practicing. I don't think he should be representing anyone. I do not know whether -- whether he was representing anyone. I only know that he abandoned Mr. Willard. I don't know if he abandoned others.

One of the cases we cited, your Honor, Boehner v. Heise, it's a 2009 Southern District of New York case, it quotes to another published New York case for the proposition that, quote -- excuse me -- quote:

> "When an able attorney which former counsel appears to have been suddenly ignores court orders and is unable to be reached despite diligent attempts, it does not require medical expertise to know that something is obviously wrong with counsel."

Close quote. That is the case here, your Honor. I do believe the admission -- Mr. Moquin's admission of being diagnosed with bipolar disorder does and should come in. But his erratic behavior departs from the normal bounds of how people act and that alone is undisputed evidence of mental illness.

As the Nevada Supreme Court explained, and this is

Passarelli v. J-Mar Development, 102 Nevada 283, quote:

> Counsel's failure to meet his professional obligations constitutes excusable neglect. The disintegration of this attorney in his law practice was the result of a recognized psychiatric disorder. Passarelli was effectively and unknowingly deprived of legal representation. It would be unfair to impune such conduct to Passarelli and thereby deprive him of a full trial on the merits.

THE COURT: But in that case, where were they procedurally?

MR. WILLIAMSON: You know, your Honor, that is an extremely good question, and I cannot for the life of me off the top of my head --

THE COURT: Because there would be a difference if it was before warnings and judgment entered.

MR. WILLIAMSON: You know, that's a good point, your Honor. I mean, I think -- there's a couple of critical issues about where we were in this case. Number one, what I think the court is alluding to is exactly correct, that sanctions should be escalating in nature,

and they are progressive and they get progressively worse if you keep it up. And there were -- there was a prior order to supplement NRCP 16.1, but this is -- some other cases that I'm sure the court has seen recently and I know I've dealt with, deal with truly repetitive and recalcitrant conduct, destruction of evidence, withholding of evidence, on and on and on.

THE COURT: Really as a design to -- many times by a defendant, though, to hog tie the case.

MR. WILLIAMSON: Exactly right, your Honor. Exactly right, and that's our concern is that was not the case here.

And the other thing I think is all of these sanctions, as the courts are very clear, sanctions should be designed to address the wrong that was committed. The 16.1 complaints, the issues with Mr. Gluhaich's testimony, all of those surround the question of diminution in value damages.

The calculation is set forth in the lease and there wasn't any allegations of destruction of evidence or anything else, and so it was, number one, a very compartmentalized issue; and, number two, it was not part of some grand scheme or design.

Again, I think it was Mr. Moquin, which none of

us -- no one in this room, certainly I wasn't around, and certainly Mr. Willard, and I doubt counsel or the court recognized what was happening in Mr. Moquin's life because it does seem that progressively things -- you know, maybe there was difference of opinions but there were no major red flags until everything reached a crescendo in December of 2017, and to the point of where we are in the case, to me, that's all the worse.

This isn't a situation where, oh, you know, maybe it was shortly after a -- shortly after a case got started and counsel can just -- you can dismiss it without prejudice and counsel can start over, there wasn't a lot invested. The case was on the eve of trial, and rightfully should be on the eve of trial. The defendants, I'm sure, have put in a whole lot of work, I know Mr. Willard has put in a whole lot of work, we've done a whole lot to get up to speed, obviously the court has had to deal with this case for years right now on the precipice of what should be a trial on the merits. Let's get this case back on track and allow it to go. Unequivocally, the State of Nevada prefers cases to be tried on the merits, let's do that. That can still be done.

As I mentioned, Mr. Willard is here ready to try.

If there is information that the defendants need, you can trust me, they can have it. Let's get this case back on track, let's do it right. But because one attorney went completely off the rails, and not just off the rails in terms of misconduct and what I think Passarelli, what the other cases cited, Cirami, which is a Second Circuit case, and also that Boehner case I mentioned earlier, what they're all showing there and why this -- why this exception exists for mental illness is it's not -- it's not the case that there was a recalcitrant bad attorney that -- that the plaintiff should have known was representing them. It was mental illness is so unanticipated and can strike so suddenly and completely, that it shatters what is normally the expectations and understandings between an attorney and his client, and it leaves that client flat foot, surprised and vulnerable, and had no way of knowing that that was coming.

By all means, if Mr. Willard could have known or anticipated that Brian Moquin was going to have a mental breakdown, he would have done something, but he didn't. I don't think he knew, I don't think the court knew, I doubt Mr. Moquin even knew. I mean, that's the whole point, it's not something that is subject to rational forethought. It is irrational, unanticipated, and under

those circumstances courts have said, this is too outside the bounds of what anyone can reasonably understand, we're going to give the moving party another chance.

THE COURT: Wasn't he -- you mentioned in your papers, I want to say late 2016, his wife reported -- Mr. Moquin's wife reported a change in his behavior, your statement had to do with significant abuse.

MR. WILLIAMSON: That's right, your Honor. That is right. That is something obviously we weren't in possession of, that's what we found in preparing for the Rule 60 motion. Mr. Willard did not know that and was not aware of that. We got that -- we actually got that from Mr. Moquin. The few files we were able to gather from him, that was in there.

THE COURT: So when between -- when was your firm actually retained?

MR. WILLIAMSON: I believe we were first contacted in January, your Honor, and I think we were officially retained either late January or early December.

THE COURT: Or early February?

MR. WILLIAMSON: Sorry. Yeah, late January or early February, and only retained to get up to speed, figure out what was going on, try to get documents from Mr. Willard -- from Mr. Moquin.

THE COURT: And were you the first attorney that he visited with and requested representation?

MR. WILLIAMSON: As far as I know. Yeah, as far as I know, your Honor.

THE COURT: And obviously I want to be delicate and certainly respectful of any persons that have mental illness, we see it in this court all the time, but he had -- I heard you say it was the first-time diagnosis in 2018, was that diagnosis by Dr. Mar?

MR. WILLIAMSON: It was.

THE COURT: And as a result of the diagnosis, do you have an understanding of whether or not Mr. Moquin started taking medication?

MR. WILLIAMSON: I do think he continued -- it is our understanding he did not continue that treatment; that Mr. Willard paid for some. We were, again, hoping to get some documentation that we could provide to the court. It's our understanding Mr. Moquin then left town and is either in Arizona or New Mexico somewhere. He has cut off communication with us, cut off communication with Mr. Willard.

And so the short answer is, I don't know, but my guess -- my suspicion is he has not continued treatment. And I think that's a -- I think that's a huge problem.

I mean, I know it's a huge problem for us. I know it's huge problem in the sense I would have liked to have more documentation to provide to the court, I would have liked to have had a letter from Dr. Mar, but also I think it's a huge problem that here is Mr. Moquin, whether he was representing other clients or not, he is still a licensed attorney. I don't harbor any ill will towards him, but I don't think he's safe for the public.

I mean, that is a huge issue and it's something that concerns us, but also, as a result, has significantly prejudiced us because we can't get documents from him, we can't get evidence of his diagnosis from Dr. Mar, he refused to sign an affidavit for us, he refused -- he provided us kind of an smattering of electronic documents and then fell off the map, so it's really placed -- I mean, I understand the concept of prejudice here is even if this case continues, the plaintiffs will be prejudiced. I mean, we have to basically start from scratch, and my guess is even if the court is inclined to exercise its discretion and put this case back on track, probably we're going to be under the gun and that's going to be a challenge for our firm and for Mr. Willard. But, given the alternative, I think it's the best we can ask for.

THE COURT: But let's talk about prejudice for a bit. There's not only the plaintiffs' claim against the defendants but the defendants' counterclaim?

MR. WILLIAMSON: Correct.

THE COURT: And what is your proposal if the court were to exercise its discretion and grant the relief requested? The Berry-Hinckley and the related entity persons and entities have spent a lot of money and -- and frustration to finally get an answer in this lawsuit, while there is a policy to make decisions based on the merits, in some cases where a court has given the opportunity to address the merits and that hasn't happened, is it your position that the court should say, No harm, no foul, we're back, I grant it? Or, it seems to me, at a very least there would have to be some fees and costs paid.

MR. WILLIAMSON: And that -- candidly, in preparing this and preparing for today, it's -- this is a difficult issue. It's an issue I've struggled with. I want to come in here and say, Oh, your Honor, they're fine, put us back, let's move on, but if I'm sitting in your chair, I wouldn't -- I recognize that's something you would be struggling with and I think that's fair.

I think here is -- I guess thinking out loud,

number one, I understand the defendants' move to dismiss their counterclaim, again, just trying to get this case to a judgment, of course that be rescinded. They should be able to proceed on their counterclaim.

Number two, in terms of prejudice, I think, as the court is aware, certainly we're all aware, just delaying the case is not prejudice but this -- there is something there and the court is right that some provision must be made to the defendants, and I get that.

I think -- it does seem to me that if -- certainly if I had the opportunity to oppose those motions, and I think if Mr. Moquin had the opportunity to oppose those motions --

THE COURT: Mr. Moquin had the opportunity.

MR. WILLIAMSON: Fair point, your Honor. If Mr. Moquin had exercised that opportunity, as he was ethically and morally required to do, I don't know that the court would have entered dismissal. I think the issues that were before the court, as I mentioned a moment ago, dealt with this diminution in value damages that took the plaintiffs' claimed damages from 15 million to 50 million. I don't know that those were necessarily in bad faith, but I do recognize that because of the lack of disclosing calculations of those damages, because

discovery proceeded, because we were on the verge of a trial on the merits, that the defendants had been deprived their right of discovery into those damages.

And I think the punishment should fit the crime. So if the court is trying to figure out how do we square this up, there is no question that the defendants knew they were going to have to answer for their breach of the lease, but perhaps it is fair to concede maybe they hadn't anticipated the diminution in value claims and didn't get the opportunity to fully discover that.

I think they had some discovery. I believe they deposed Mr. Gluhaich, I believe they disposed Mr. Willard, but I can't with a straight face say, It's fine, this didn't impact them at all. When you don't have a 16.1 calculation of damages on this diminution in value claim that is novel, you're stuck trying to figure out, How do I defend against this? So that is a difficult issue and I think, again, if there's going to be a punishment, it should fit the crime.

The court asked about attorney's fees and costs, and that's a fair question. I -- it's difficult for me because, again, I don't think Mr. Moquin was acting out of ill will but I think he was acting out of illness. And, at the same time, as Young tells us, the court

should decide if blame is to fall where does it fall.

And Mr. Moquin did appear in front of this court. The court does have ability to sanction not just parties but attorneys that appear before it. So if there's a question as to attorney's fees and costs, I really think that should more appropriately borne by Mr. Moquin, not by the plaintiffs.

But I do recognize the plaintiffs can't get out of it scot-free, and that's why it seems to me that if there is going to be some kind of sanction against the plaintiffs, it should focus on the -- where Mr. Moquin felt short, where the defendants truly prejudiced, and that would be with those diminution in value damages.

THE COURT: All right. Thank you.

MR. WILLIAMSON: Thank you, your Honor.

THE COURT: Counsel?

MR. IRVINE: Thank you, your Honor.

I'm going to move the lectern so I can get to some of the binders.

THE COURT: It has casters so it's very easy to move.

MR. IRVINE: That's great.

Thank you, your Honor. Thank you for taking the time to hear this today. It's been a long haul for the

parties and the court.

Your Honor, essentially the plaintiffs are asking this court for a do-over of this entire action after the court rightfully dismissed plaintiffs' claims due to years of systematic abuse of the Nevada Rules of Civil Procedure and years of ignoring this court's express written orders.

These abuses prejudiced my clients significantly by requiring them to spend significant time and resources attempting to force plaintiffs to meet very fundamental discovery obligations. The obligation to disclose your damages is in Rule 16.1. Those disclosures are supposed to be made, as your Honor knows, shortly after the answer and initial case conference and we just simply never, ever got them in this case, despite probably ten letters, despite multiple orders from this court, despite three different continuances of the trial date, and despite your Honor's warnings to counsel late last year.

We were also prejudiced in that we had to, again, attempt to force plaintiffs to meet their obligations under 16.1 to appropriate disclose an expert witness, Mr. Gluhaich, who ended up being very critical to the summary judgment motions which were filed late last year.

Despite all of their refusals to give us this

fundamental information, my clients were then ambushed with summary judgment motions in October of 2017 in which plaintiffs sought four times the amount of damages that they had sought in the complaint, which was the only basis that we had to gauge their damages.

THE COURT: But a party isn't required to state all of their damages in the complaint, isn't it just to put notice that there is damages? The requirement really comes when a party is obligated to supplement their 16.1.

MR. IRVINE: Correct, your Honor, that is exactly the problem here. All they have to put in the complaint is damages in excess of $10,000 to give the court jurisdiction. Fortunately, I guess, or unfortunately they put actual numbers in their complaint, about $15 million, but when we got the summary judgment motions they were then seeking $54 million, and it was -- respectfully to Mr. Williamson, who hasn't been in this case that long, it wasn't just the diminution in value claims, it was more than that, and I'll get to that in a moment.

But, your Honor, getting to the Rule 60 piece of this, plaintiffs are attempting to essentially use the alleged psychological condition of Mr. Moquin as a magic bullet to explain away all their bad conduct from the

start of this case forward, and that goes to their initial disclosures in this case which were signed by Mr. O'Mara, who wasn't mentioned by Mr. Williamson but who has been in this case from the very start. He signed the initial disclosures, they didn't include a damages calculation.

They failed to meet their burden of proof on the issue of whether or not Mr. Moquin had the alleged psychological condition. I'll certainly touch on the evidentiary issues in a moment, but it's very clear under the Stoecklein case that they've got an obligation to provide this court with competent admissible evidence and to meet a burden of substantial evidence before Rule 60 motions will be granted. I don't think they've done that here.

Even if the court considers plaintiffs' evidence, I think at best -- at best that evidence provides some explanation for plaintiffs' failure to oppose the motion for sanctions and the motion to strike Mr. Gluhaich as an expert. It doesn't at all explain away their consistent refusal over the entire course of this case to comply with the Nevada Rules of Civil Procedure and this court's orders, all to my client's prejudice.

Despite all this, they want to blame everything on

Mr. Moquin and essentially start over with 16.1 disclosure and begin discovery, at least on damages, anew, which is fundamentally unfair to both my clients and this court.

That argument ignores the involvement of not one but two attorneys. Mr. O'Mara, as I said, has been in this case from the start, we briefed his obligations under Supreme Court Rule 42 to ensure compliance with local rules, to ensure compliance with court orders, and to make sure cases are tried as they should be tried in the local jurisdiction.

That also ignores -- their argument ignores Mr. Willard's involvement. Mr. Willard was, in fact, present at the hearing in January 2017. That's Exhibit 2 to our opposition.

THE COURT: I saw that, and that's why I asked, I could not remember --

MR. IRVINE: Yes, your Honor.

THE COURT: -- if he was present or not.

MR. IRVINE: It's at -- the appearance page, your Honor, page three of the transcript, which I said Exhibit 2 to our opposition, Mr. Moquin introduced --

THE COURT: Oh, I see it. And Mr. Wooley.

MR. IRVINE: Yeah, I was panicked for a second. I

certainly remembered him sitting there, but I went back and checked, so they were there.

And, as your Honor may recall and we've cited to this transcript a number of times, the discovery deficiencies with plaintiffs was brought to the court's attention at that hearing. I raised it. I said, "Look, we've never received a damages disclosure," Mr. Moquin acknowledged that, your Honor, issued an oral order that day saying that they had to do a damages disclosures within 15 days of the order granting our motion for partial summary judgment.

That was followed up after that hearing with a stipulation and order that reset the trial date and discovery deadlines in which Mr. Moquin represented that he was apprising his clients of the continuance, as he has to do it under the local rules, and they again promised in that stip and order to provide us not only with the damages disclosures but also a disclosure of Mr. Gluhaich as an expert that complies with Rule 16.1, and they just didn't do that.

So, your Honor, the plaintiffs have a remedy in this case if this motion is denied, as we think it should be, and that remedy is they have malpractice claims against their attorneys. The Huckabay case that we've

cited consistently in our briefing lays that out. It says just that. It notes that a civil case, unlike a criminal case, does not afford a constitutional right to effective assistance of counsel, and if counsel fails to do their job then there's a malpractice remedy against the attorneys. And we would certainly submit that that is the avenue that Mr. Willard should be pursuing, not the relief sought in the Rule 60 motion.

THE COURT: But if we just step back and just weigh if it was attributable completely to Mr. Moquin -- I understand that you're parsing it out that it isn't --

MR. IRVINE: Sure.

THE COURT: -- and what is the right thing to do? Should a party be penalized for the act or inactions of his attorney?

MR. IRVINE: Well, I think the answer is maybe. I think the Supreme Court in the Huckabay case -- Huckabay Properties v. NC Auto Parts, which is 130 Nevada Advisory Opinion 23, the court shows, I think, a very distinct trend -- I've read a number of cases in this arena recently -- that essentially says, based upon general agency principles, a civil litigant is bound by the acts or omissions of a voluntarily chosen agent, and it says:

> The dissatisfaction --

I'm on page one here -- I guess I don't have the cites for the Nevada Advisory Opinion page numbers, but it's page 430 of the Pacific Reporter. It says:

> Appellant's dissatisfaction with their attorney's performance does not entitle them to reinstatement of their appeals.

And then it goes on to cite the Link v. Wabash case from the United States Supreme Court which essentially sets forth these agency principles as a reason for dismissing these claims when attorneys don't comply with court rules and court orders, which is exactly the case in Huckabay, that counsel ignored the rule for his opening brief, sought several extensions, the Supreme Court granted those extensions, conditionally accepted a late brief, and then ultimately dismissed the appeal.

So I think the question that you asked is whether this should all fall on the client. I think sometimes it should. I think in this case where there was not one but two attorneys -- I mean, you have to consider Mr. O'Mara's presence and his obligations under the Supreme Court Rules, as well as Mr. Moquin, so I don't think you can carve Mr. Moquin's acts out and put them in a vacuum given the fact that they had two attorneys

present.

And, as your Honor knows, Mr. O'Mara filed the motion to extend time for them to oppose the motions for sanctions and the motion to strike Mr. Gluhaich, he was present here in December of last year, he was well aware of these deadlines, and certainly never came over and asked the court for help.

Mr. Willard, if you look at the text messages that are attached to their reply brief, I think they're Exhibit 2, the start of them, the brief was initially due -- the oppositions were initially due on December 4th after we gave them some extensions. We couldn't give them as much extension as they were asking for because we were running up against the deadline to submit motions to your Honor for decision, so we gave them all the time we could.

These text messages, Exhibit 2, seem to show that Mr. Willard was aware that there was a deadline around September 4th. If you look at page of that exhibit, he says, "Aren't you supposed to file by noon," so he knew that there were deadlines going, he knew those deadlines weren't being met, and he didn't come over to the court and ask for help, say, "I need more time to find a new attorney," he didn't have Mr. O'Mara do that either. And

Page 38

in his declaration he admits that the reason he didn't do that was financial. He said that, "I simply didn't have the resources to pay another attorney at that point and I thought I had to continue with Mr. Moquin," and I think there has to be some responsibility for that decision.

He came up with the money to hire Mr. Williamson to -- after the court dismissed the case, and he certainly could have done that prior to that and he just chose not to. So I think under these circumstance -- I know it's a long answer -- some of the responsibility has to fall on the client and dismissal is appropriate.

THE COURT: I also am reflecting on this. As I indicated, we all have heard and I see it every day persons that have mental illness that are evaluated but there's differing kinds, and antidotally it seems that there is many persons that -- in every profession that may have an equivalent condition, and isn't it a slippery slope for the court to put on a medical hat and start saying, Well, this is sufficient to excuse those actions and put the case back where it is, but this type of mental illness is not -- I mean, should the court be put in that position?

MR. IRVINE: I don't think so, your Honor. First of all, I think you don't have the evidence in front of

Page 39

you that this an undisputed fact, as Mr. Williamson characterized it. I can touch on that later. But I wholeheartedly agree. I mean, there have to be quite a few attorneys practicing in the state of Nevada right now that have a bipolar condition. I mean, statistically it's got to be the case. And I think they manage their condition and they practice successfully.

So I think it's not only a slippery slope asking the court to sort of parse out, you know, which omissions or bad acts in this case were attributable to his alleged conditions and which ones weren't. They don't really do a good job of that in their briefing. Everything they seem to point to is right at the end when he didn't oppose our motions, but they don't explain if he had opposed the motions what his opposition would have said, why they didn't comply with the NRCP or something like that.

So I think it's a difficult situation to put the court in to try to say, Well, I'm going to excuse this because of this condition and not this because of another. And, you know, it's -- I guess it's somewhat problematic for those attorneys who are out there practicing successfully that have the same problems that Mr. Moquin may have.

Page 40

THE COURT: And although that you're serving the responsibility on the part of Mr. O'Mara, it seems to me from the hearings it was clear who was intended to be the lead counsel.

MR. IRVINE: No doubt, your Honor. I agree with you that he was -- that he was local counsel and Mr. Moquin was lead, but Supreme Court Rule 42, sub 14, is abundantly clear as to what the responsibilities of Nevada counsel are. 14(a), says they shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule; sub (b) says they have to be present at motions, pre-trials and other matters in open court; and then sub (c) that they are responsible to make sure that any proceedings subject to this rule for compliance with all state and local rules of practice and orders, and make sure that the case is tried and managed with applicable Nevada procedural and ethical rules.

So regardless of what arrangement Mr. O'Mara may have had with Mr. Willard or Mr. Moquin, his responsibilities to the judiciary are the same. And his responsibilities to the judiciary are essentially the same as primary counsel, make sure that rules and orders get followed.

Page 41

And, you know, I -- Mr. O'Mara didn't do that. He signed the initial disclosures, didn't have a damages disclosure. I called him on it in letters, and it never, ever got fixed. And then at the end of the case, when Mr. O'Mara certainly knew that things weren't getting filed as they should be -- I'm trying to look for the right exhibit in their reply, your Honor -- there's an e-mail from Mr. O'Mara where he's asking, When are these things going to get filed, he's not getting appropriate responses, Mr. O'Mara did nothing. He had every opportunity to call chambers, to ask for an emergency status conference and say, "Your Honor, help. This guys has gone dark, he's not opposing these motions, can you please give us 30 days to find new counsel?"

We didn't hear anything from Mr. O'Mara until his notice of withdrawal in March. Just silence from the time we were in this courtroom, I think it was December 10 or 11 of last year, until he withdrew, we heard nothing, and neither did the court.

THE COURT: So really what the assertion then is that I don't look at it in a vacuum but if I evaluate the proof that they must establish, I really need to look at the involvement of both attorneys, or lack thereof.

MR. IRVINE: And Mr. Willard, I think, your Honor.

THE COURT: And Mr. Willard.
MR. IRVINE: That's the way we see it, your Honor.
THE COURT: If you were to identify the amount of fees that you've incurred due to either Mr. O'Mara's -- which I haven't reached the conclusion that he hasn't met his obligation because we don't know what correspondence went back and forth internally, if there was any --
MR. IRVINE: Right.
THE COURT: -- attorney/client privileged documents going back and forth, or his to Mr. Moquin, we don't know that, but if you had to calculate the attorney's fees and costs that have been incurred that brings us to this situation as opposed to going to trial --
MR. IRVINE: Uh-huh.
THE COURT: -- do you have a calculation or would you have to undertake that?
MR. IRVINE: I'm sorry, your Honor, I would have to go back and look at quite a few bills.
THE COURT: Because the papers filed in this are substantial so I have to believe that that number is very substantial.
MR. IRVINE: I'd be shock if it wasn't six figures.

THE COURT: Right. That's what I thought.
MR. IRVINE: And, your Honor, while we're on that topic, I really think, you know, a sanction in the form of attorney's fees to my client is a very, very hollow remedy. Mr. Willard has testified in his affidavit -- I guess, declarations provided in this case that he's not financially sound, that he's essentially living off Social Security, which I think it was about $1,600 a month, so his ability to satisfy any attorney's fees award, I think, is really not possible based on what he's presented to the court. And, you know, an attorney's fees awards in our favor against Mr. Moquin, given what we've heard about his situation, kind of fleeing California and residing now in Arizona or New Mexico, is likewise going to be a hollow remedy.
I'll touch on the other piece, the diminution in value a little bit later, but I don't think that works well either.
Moving on, your Honor, to the Rule 60 standard, I wanted to touch on the evidentiary stuff real quick. First, I wanted to touch on what Mr. Williamson put in his reply brief and that he just argued before your Honor today that we failed to bring the Young v. Johnny Ribeiro Building, Inc., case to your attention in our sanctions

motion and that we didn't address some necessary factors in that motion, and that your Honor's findings of fact and conclusion of law also didn't. I don't think those arguments are valid.
They argued in their reply that the factors listed in Johnny Ribeiro, which include whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, they characterize those as required elements that the court has to look at, and if you read the case that's not just true. And I'm at page -- so this is 106 Nevada 88, I'm at page 93. They say that:

> We will require -- excuse me -- we will further require that every order of dismissal with prejudice as a discovery sanction be supported by an express, careful and peripherally written explanation of the court's analysis of the pertinent factors.

And then it says:

> The factors a court may properly consider include --

And then there's a list of about seven.
THE COURT: The court determines the pertinent

factors.
MR. IRVINE: Exactly. So I just wanted to correct that, that these are not required factors that had to be addressed or had to be raised by us as a controlling authority in our sanctions motion. I just don't think that's true. It's a list of, you know, discretionary factors that the court can look at, and I think that the court's findings and conclusions entered earlier this year are careful, detailed, and meet the standard there.
Moving on to the evidentiary issues, your Honor, it's undisputed that it's plaintiffs' burden to prove excusable neglect by a preponderance of the evidence, and they meet this burden by producing competent evidence. And that's the Stoecklein v. Johnson Electric case that Mr. Williamson cited, 109 Nevada 268. And I'll quote the Stoecklein court. It says.

> The court has significant discretion but this discretion is a legal discretion and cannot be sustained where there was no competent evidence to justify the court's action.

So they have to have competent admissible evidence to support excusable negligent. Here, their only argument for excusable negligent is Mr. Moquin's alleged

Page 46

psychological condition, and I really wanted to focus on Mr. Willard's declarations when arguing this. He submitted two; he submitted the Declaration in Support of Rule 60 Motion at Exhibit 1, and I think he did, I think, nearly an identical Exhibit 1 to the reply brief, which I think mostly served to authenticate the new exhibits that were attached to that.

But if you look at what he actually says at paragraph -- I think it starts about paragraph 66, Mr. Willard states that he's convinced that Mr. Moquin was dealing with issues and demons beyond his control; that he learned that Mr. Moquin was struggling with a constant marital conflict that greatly interfered with his work, that's paragraph 67; that Mr. Moquin had suffered a total mental breakdown, that's paragraph 68; and that Mr. Moquin explained to Mr. Willard that his doctor told him he had bipolar disorder, at Exhibit 70.

And then --

THE COURT: Paragraph 70?

MR. IRVINE: Sorry, paragraph 70. My apologies.

Then he goes on to sort of talk about what he believes the disorder to be. He says it's severe and debilitating, at paragraph 73; and that he now sees that Mr. Moquin was suffering from symptoms of bipolar

Page 47

disorder through his work on the case, paragraph 76.

I really struggle with the statements here. Mr. Williamson characterized this as based on his own perception. I'm not sure how that could be the case. You know, he had to hear it from Mr. Moquin at some point and, I think, you know, frankly what happened was he heard that he had bipolar disorder and kind of filled in the rest of the declaration later.

Obviously, the statement from Dr. Mar through Mr. Moquin to Mr. Willard is hearsay, Mr. Williamson has acknowledged that, and I don't think that that statement meets the standard under NRS 51.105, which is the exception to the hearsay rule for the -- your own present physical symptoms or feelings.

If you look at the McCormick on Evidence -- 2 McCormick on Evidence, Section 273, which the Supreme Court has cited McCormick favorably in the past, it says that these statements are a general exception to the hearsay rule but that they get special reliability and therefore an exception based on the spontaneous quality of the declarations.

And the examples of those that they give in the comments to that section of McCormick are, I feel pain, I am light-headed, My leg hurts, stuff that is happening to

Page 48

that person right now, and that's not what Mr. Moquin is saying. He's not saying, "I feel scattered" or "I feel depressed" or anything like that. He's saying, "My doctor told me I have X."

THE COURT: But wouldn't it go to his motive?

MR. IRVINE: Whose motive?

THE COURT: Couldn't it be used, or lack thereof, in addressing the case? In other words, if it's used for a different purpose -- I mean, I -- this isn't ideal evidence, clearly --

MR. IRVINE: Right.

THE COURT: -- but there probably is an exception that could be fashioned based on to determine whether excusable or inexcusable, in essence, neglect or whether it was intentional or not intentional, or what his motive was for acting the way he was, whether it was mental illness driven or something else? Nonetheless, I concur that this is not ideal.

MR. IRVINE: I don't think it can be used for motive. I think they're clearly offering it for it the truth of the matter asserted, that he has bipolar. I don't think there's any doubt that's why they want to use it. I haven't certainty heard from them that they are trying introduce it for something else. But that

Page 49

statement and the statement in I think at least one of the court documents on the spousal abuse issue have the same problems for hearsay and there's simply no exceptions to those statements.

THE COURT: But your position is even if, one, evidentiary-wise that it's not sufficient --

MR. IRVINE: Right.

THE COURT: -- but, number two, even if it was sufficient, it's still not there?

MR. IRVINE: Yes, your Honor, absolutely.

Just let me make sure I'm not missing anything on the evidence stuff. You know, I went through the statements that Mr. Willard was making. I don't think he has personal knowledge to testify to much of what he said. I don't think he personally observed this. I don't believe that Mr. Willard and Mr. Moquin lived in the same state at the time this happened. I believe Mr. Willard is in Texas. I could be wrong about that. I know Mr. Moquin was in California.

I mean, he's testifying about Mr. Moquin's personal mental status and the status of his marriage, and I would -- it would be very difficult to perceive those, to observe those on your own. It's really much more likely that he obtained the information from

Page 50

Mr. Moquin himself or from Mr. Moquin's wife and, therefore, I think the testimony that Mr. Willard is offering constitutes inadmissible hearsay under NRS 51.035 and 51.065.

The documents that they've provided as well also lack foundation. I went through those arguments, I don't need to touch on those again, but 51.015 and 52.025 don't apply to get the California TPO documents in. Mr. Willard simply has no personal knowledge of these documents, he's not the author, he wasn't involved with those situations, he simply can't authenticate those or lay foundation for any of those to come in.

Then, lastly, on evidence, Mr. Willard sort of speculates about some of the -- the symptoms that Mr. Moquin might be experiencing. He uses an internet printout that they submitted as part of their moving papers. We would certainly submit that that is inappropriate lay witness testimony despite Mr. Willard's degree in psychological years ago. He certainly didn't practice as a psychologist, he was a real estate developer, I believe.

And, your Honor, these evidentiary issues are very important because of the standard set forth in the Stoecklein case; you have to have competent evidence, it

Page 51

has to be substantial. And if you look at the cases that the plaintiffs cited in support of their Rule 60 motion, the United States v. Cirami case, 563 F.2nd 26, that case had an attorney's affidavit where he talked about his condition, had a letter from a psychologist; we don't have that here. The same with the Boehner v. Heise case that Mr. Williamson cited earlier, they had an attorney's declaration and a psychologist's written evaluation.

As your Honor notes, the evidence we have here is not ideal. I think it's further than that. I don't think it's admissible. I don't think it can form the basis to grant the Rule 60 motion, we just don't think it's competent and can't be used.

THE COURT: Did you look at the Boehner v. Heise case?

MR. IRVINE: Yes.

THE COURT: And you're distinguishing that as well? Was that the one that you indicated that --

MR. IRVINE: Yes. Boehner v. Heise is distinguishable because of the evidence that was given in that case. If you look at that case, starting at page three, it talks about the attorney submitted a declaration in support of plaintiff's motion, talked about exacerbation of his psychological problems, he

Page 52

testified about his own condition; we don't have that here.

Going on down farther on that page, it talks about Dr. Robbins, who was the lawyer's psychologist who submitted a copy of his clinical neuropsychological evaluation of the lawyer, including a brief letter and a sworn declaration --

THE COURT: That's what I recalled, there was an evaluation.

MR. IRVINE: We don't have that here either, so I think the cases they relied on are very distinguishable as far as the evidence that was presented to the court, which we certainly don't have, but I'll move on, your Honor.

I think we've addressed the evidence issues in the briefing pretty well, unless you have any questions about that.

THE COURT: No. Thank you.

MR. IRVINE: So even assuming the court accepts and admits all the evidence that they've provided both attached to the Rule 60 motion and the reply, I still think they haven't met their burden of proving excusable neglect, and I think the Huckabay case from 2014 is very instructive.

Page 53

In that case, although it was not a Rule 60, it was a case that was on appeal, the appellant was represented by not one, but two attorneys, just like here; the court granted two separate extensions to file appellant's opening brief; they eventually filed the brief late, along with the appendix. The court conditionally accepted those but then later dismissed; there was a motion for reconsideration, which was denied, and then the opinion got to us through en banc reconsideration because the court wanted to talk about these issues.

And then the Nevada Supreme Court in the Huckabay case addressed a lot of the policy reasons that Mr. Williamson talked about, and I'm quoting from page 437, the Pacific Reporter cite. It says:

> While Nevada's jurisprudence expresses a policy preference for a merit-based resolution of appeals and our appellate procedure rules embodied in this policy among others, litigants should not read the rules for any of this court's decision as endorsing non-compliance with court rules and directives, as to do so risks forfeiting appellate relief. An

appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies including the public's interest in an expeditious appellate process. The parties' interests in bringing litigation to a final and stable judgment, prejudice to opposing side, and judicial administration consideration such as case and docket management.

And then it says:

As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel and not the client, that reasoning does not comport with general agency principles under which a client is bound by a civil attorney's action or inactions.

And the court in Huckabay was really taking that last bit of reasoning from the case that I had mentioned earlier, which is the Link v. Wabash case from the United

States Supreme Court, which they went with that case which was actually a Rule 41 dismissal for failure to prosecute and sort of took that reasoning and brought it up to the appellate level, so I think the court is comfortable with that reasoning at the trial level as well.

But the Link court was very interested in this agency principle relationship and talking about how in civil cases, unlike criminal cases, the civil litigant has the right to choose their attorneys and they have to bear the consequences of lawyers that don't do things exactly right because of that.

And then they specifically note, citing the Kushner case from the Third Circuit Court of Appeals, that unlike a criminal case, an aggrieved party in a civil case does not have a constitutional right to the effective assistance of counsel. The remedy in a civil case in which chosen counsel was negligent is an action for malpractice, and I think that's what we've got here.

The court in Huckabay does note an exception to this general rule citing to the Passarelli case that Mr. Williamson cited earlier. The Passarelli opinion, which I read again this morning, leaves a lot to be desired on background facts that your Honor asked where that case

was when it was dismissed.

That case, the parties showed up for trial and neither Passarelli nor his lawyer showed up, so that's where that one was. I don't think there were any -- there's no statement in that opinion that there were any warnings or prior incidents.

THE COURT: I thought it was unknowingly deprived of legal representation; in other words, they didn't really know.

MR. IRVINE: They didn't even know about the trial date in Passarelli. Again, I don't think that's the case here as we've seen from the text messages and e-mails that they've sent. They knew about these deadlines and Mr. Willard was certainly present in January of 2017 when we discussed the lack of a damages disclosure, and where his counsel promised to provide one.

The other distinguishing factors from Passarelli that I think your Honor noticed -- noted there was evidence in the record in Passarelli that the attorney was suffering from substance abuse. There was direct testimony from his legal assistant and from some of his colleagues about what they had seen and what they had done to try to help him. We don't have that here. All we have, as we talked about, is hearsay and sort of

third-party evidence about that.

Second, the attorney in Passarelli had voluntarily closed his law practice; that has not happened here. We submitted to your Honor a printout from the California Bar as one of our exhibits to the Rule 60 motion, Mr. Moquin, when we filed the Rule 60 motion, was still active with no discipline on his file in the state of California, and I can represent to the court that I checked that this morning and that remains the case, he's still --

THE COURT: Well, he would be because it's assessed annually, unless there was some action that had been taken to suspend him.

MR. IRVINE: But he certainly hasn't voluntarily turned over his license --

THE COURT: Right.

MR. IRVINE: -- as the lawyer did in Passarelli.

I think the third distinguishing factor in Passarelli and then the reason that exception to Huckabay doesn't apply is that Passarelli only had one attorney. And here, we come back to Mr. O'Mara again, who was certainly present, certainly was aware of court deadlines, was aware that those deadlines weren't being met, and simply we have no evidence that he did anything

about it. Certainly no filings, didn't approach us, didn't approach this court, and we don't have any kind of declaration or documents from Mr. O'Mara save one e-mail, I believe.

Your Honor, Huckabay is not a standalone. The Supreme Court has certainly expressed, I think, a more aggressive approach towards sanctioning, including case sanctions against parties for their attorney's inaction. It's definitely a different playing field than it was back in 1986 when Passarelli was decided, and I think that the court's analysis in Huckabay when applied to the fact here really compel the conclusion that the Rule 60 motion should be denied in its entirety.

The standard for excusable neglect requires that the attorney be completely unable to respond or appear in the proceedings; that was the holding in Passarelli, meaning he had to shut down his practice. Here, it's been a much different experience dealing with Mr. Moquin.

As your Honor will recall, he's been present at every status conference and hearing that the court has ordered and scheduled. We filed pretty significant motions for partial summary judgment. In 2016, he opposed those, the work was, you know, competent, and he came in and argued. He didn't win the motion but there

was certainly nothing to say that he's not been performing during the entirety of the case and, at the same time, he was refusing to give us the information we needed.

And then I think really most telling are the summary judgment motions that he filed last October. And those motions, I know there's a plaintiff that's no longer here, we've settled with Mr. Wooley and he's dismissed his claims, but between those two parties, Mr. Moquin was certainly able to file 40 pages of briefs and over 70 exhibits seeking summary judgment and seeking damages, as I said, four times what he ever asked for in the complaint or anywhere else.

And I know that Mr. Williamson has done his best to characterize that as sort of symptomatic of Mr. Moquin's alleged psychological condition. Having lived this case and having tried to pull teeth and get this information from Mr. Moquin, I have a different view. I think it was strategic. I think they intended to make it impossible for us to rebut their damages and try to sneak it by. I really do.

THE COURT: That's your belief?

MR. IRVINE: That's my belief.

THE COURT: You don't have any independent

evidence of that?

MR. IRVINE: I don't, but he said all their actions are in good faith and it's just sort of just saying that. I don't have anything to support that other than circumstantial, we got this --

THE COURT: And that we --

MR. IRVINE: -- we got this three weeks before the close of discovery and we can't do anything about it now. And certainly Mr. Willard signed declarations as part of that summary judgment process last October so he was working with his attorney very closely at that point to come up with very significant filings. And then, you know, a couple of months later they oppose our motions. Again, I wonder, even if you accept their evidence and he has bipolar condition, how much does that excuse? Does it excuse Mr. O'Mara not providing a damages disclosure when he signed the 16.1? Does it excuse them from never providing one despite numerous, numerous letters from us, numerous orders from this court, motions to compel which they didn't oppose and they never paid the attorneys' fees that you ordered as part of it.

I mean, I just don't think that even if what they're saying is true that it can be used as an eraser to forget about everything that happened. At best, maybe

they get a chance to go back and oppose our sanctions motion and our motion to strike Mr. Gluhaich now, but we certainly don't have any explanation from them in their moving papers here as to how they would address those. They don't explain why it's now okay that they didn't comply with 16.1, that they didn't comply with the expert disclosure requirements in 16.1. We just haven't heard any of that. It's all been focused on the late part of last year and early part of 2017 when they didn't oppose the sanctions piece and motion to strike Gluhaich.

THE COURT: There is one more question I wanted to ask you, and that is regarding the meritorious defense -- or meritorious claim portion. My -- when counsel was talking about that, I was recalling that that is not an analysis that has to be made in every case, so isn't there a recent Supreme Court case that actually says that sometimes you don't even get to that piece of the analysis?

MR. IRVINE: I don't know.

THE COURT: Okay.

MR. IRVINE: Your Honor, I frankly --

THE COURT: I know I have it in chambers.

MR. IRVINE: I looked at the standard and the standard for meritorious defense is pretty low. I mean,

there's some case law, I think that they cited in their moving papers that basically filing an answer is enough for a meritorious defense is present.

THE COURT: Whether it's not -- it's whether or not a court is obligated to undertake that analysis or whether the analysis stops before that --

MR. IRVINE: Right. Well --

THE COURT: -- and there is some case law -- I -- I have it from drafting something else and I am going to review it but either way, I know what their position is with regard to it.

MR. IRVINE: And with the standard that they have to meet to show a meritorious defense, I simply didn't brief it because they've got their claims. Do I think we have defenses? Yes, but the meritorious defense standard is not high so we didn't choose to spend time in the briefing on that issue.

THE COURT: All right. I interrupted both of you -- I interrupted your flow so, of course, if you want to wind up your argument, then I'm going to allow you the chance to respond.

MR. IRVINE: Your Honor, I apologize, I'm getting close. I just want to make sure I didn't miss anything. My outline is much longer as it needs to be, they always

are. I wanted to just focus on a couple more things.

We talked about Mr. O'Mara's role, and I'll leave that alone for now. I think that's spelled out in our brief and Supreme Court Rule 42 and everything else.

But when you talk about looking at this not in a vacuum but in its totality and everyone's involvement, the last piece I wanted to bring up with Mr. Willard is that hearing January 10, 2017, on our motion for partial summary judgment. At that hearing, at pages 42 and 43 of the transcript, which is Exhibit 2 to our opposition to the Rule 60 motion --

THE COURT: I have it.

MR. IRVINE: Okay -- we raised it, we talked about how we never received a damages computation from the plaintiffs despite a bunch of demands. Mr. Moquin admitted in open court that with respect to Willard they do not -- I'm quoting here --

> With respect to Willard, they do not have an up-to-date, clear picture of plaintiffs' damages claims. At that hearing when Mr. Willard was present, the court ordered -- entered an oral case management conference directing them within 15 days of the entry of summary

judgment an updated 16.1 damages disclosure.

So Mr. Willard was certainly aware of that issue which was -- you know, the most primary reason for our sanctions motion, and I think one of the key focuses in the findings and conclusions dismissing the case, Mr. Willard was aware of that, you know, nine or ten months before we filed the sanctions motions and no damages disclosures were ever made.

Bear with me, your Honor, I'm about done.

Oh. Mr. Williamson, when you sort of asked him about what lesser sanctions might be there that would work, he talked about the diminution in value being the only real issue that was affected by the lack of a damages disclosure and a lack of proper disclosure of Mr. Gluhaich. That's not accurate.

And I know he hasn't been involved in this case that long, but if you look at the First Amended Complaint and plaintiffs' interrogatory response, which I think is Exhibit 5 to our sanctions motion, you'll see the damages that they disclosed that we were aware of when we got the summary judgment motions.

They were seeking accelerated rent of $19 million and change, discounted by four percent per the lease to

about $17,700,000. They were also seeking property related damages of about $21,000. And this is in a chart in our sanctions motion. We laid it out in a pretty user friendly chart. It's on page 17 of our sanctions motion. So that's what we knew about before we got the summary judgment motions.

When we got the summary judgment motions, we had a new category of damages called liquidated damages. We hadn't the heard them use that phrase before. We had heard accelerated rent but not liquidated damages, so that's a new damages model that they included in the summary judgment motion. They were seeking about $26 million there.

Then they have the diminution in value claim that Mr. Williamson referred to, that was about $27,600,000. Then they had a new amount for property related damage that went from about 21,000 to about 48,000.

Then they had another new category of damage called unpaid rents and late payment charges, which was $786,000. So, I mean, all told, they sought three new categories of damages and the one category that they continued with was a new amount, so we would certainly submit that any sanctions order that was less than dismissal we need to preclude those categories of damages

which were certainly brand new and never disclosed before.

And both -- two of the new categories, the liquidated damages category and the diminution in value category of damages, both of those exclusively rely on Dan Gluhaich as an expert to prove, so we would submit that all of that is inappropriate and should be excluded if the case were to go forward, which we don't think it should.

Then, your Honor, I would just take -- take you back to December of last year. We were in this court, I think it was the last time I was in here for this case, they were asking for more time. Your Honor was gracious enough to give them more time, and you told them, you said:

> You need to know going into these oppositions that I'm very seriously considering granting all of it. You know going into the motion for sanctions that you're -- I haven't decided it, but I need to see compelling opposition not to grant it.

Your Honor, I would submit that we haven't seen that. We've seen some explanation as to why they didn't

file opposition to the sanctions motion but we haven't seen the compelling opposition that your Honor was asking for last December as to why the sanctions motions themselves shouldn't be granted. They don't address any of that in their moving papers here other than just saying bipolar.

With that, your Honor, I think I'll sit down, unless you have any questions for me.

THE COURT: No, you've answered them along the way. Thank you.

MR. IRVINE: Thank you.

THE COURT: Counsel?

MR. WILLIAMSON: Yes, your Honor. Thank you.

Your Honor, I may jump around a little bit but I wanted to make sure I addressed Mr. Irvine's points.

First off, as an initial matter, Mr. Irvine said, I don't think that Mr. Willard really had a chance to observe Mr. Moquin. I don't think he really had personal knowledge of that. With all due respect, Mr. Willard says he does and obviously he's here, he'd be available for cross-examination. And, most importantly, he does -- he did experience what Mr. Moquin -- what he was going through with Mr. Moquin.

In fact, I think tellingly and correctly,

Mr. Irvine pointed out that, as you can see from what was filed in October, Mr. Willard was working closely with Mr. Moquin and that Mr. Moquin was doing his job and was able to get a comprehensive motion for summary judgment on file. We agree with that. I mean, that is the whole issue.

Mr. Willard had the benefit of working with him, seeing him, talking to him on the phone. In fact, he -- at various times in that previous trial I mentioned, he stayed with Mr. Moquin so he had this opportunity to personally see him and interact with him. And, as he tells you, all signs pointed to, Hey, this guy has got it under the control -- until he didn't.

And on that point, let's turn and talk to both -- talk about both Mr. O'Mara -- excuse me -- before we jump to that, I do want to clarify one other point. I think when the court asked me in my initial presentation about Mr. Willard's appearance, I believe I answered that correctly, he was here in January 2017.

THE COURT: He was.

MR. WILLIAMSON: He was not here in December of 2017.

THE COURT: Correct.

MR. WILLIAMSON: I wanted to make sure I didn't

misspeak and make sure the court -- that, you know, we were all on the same page. I think everyone agrees with that, he was not here in December 2017 when the court said, "I'm very seriously considering granting all of this." Mr. Willard was not here for that.

But so now turning to Mr. O'Mara and Mr. Moquin. Number one, unequivocally, Mr. O'Mara has duties under SCR 42. We are not disputing that. But SCR 42 is very different than NRCP 60(b), and what -- I'm certainly -- I'm not here to go after Mr. Moquin and point the finger at him, but what his duties are to the bar and the bench are different than what the requirements are for Rule 60 relief, and that's why we're here today.

So turning to those issues, Mr. Irvine pointed to the Huckabay case. And as he correctly pointed out, though, Huckabay talks about Passarelli and in footnote 4, it's a very large footnote note in the Huckabay case, and the Nevada Supreme Court case there emphasizes that Passarelli is still good law and is still an exception.

First they talk about the Supreme Court recognized exceptions when there's been actual abandonment and then also talks about abandonment in the circumstances in Passarelli, lawyer's addictive disorder and otherwise either criminal conduct or abandonment, and that is the

Page 70

case. There was no evidence of abandonment and mental illness in Huckabay, which is why they didn't get Rule 60 relief. There is evidence of that here and that's why Passarelli comes in.

Mr. Irvine also pointed out that a lot of these cases stem from the Link v. Wabash case and, again, yes, it is absolutely the rule that a civil litigant is normally stuck with what his attorney chooses, strategic decisions, what he does, what he doesn't do. But as the US v. Cirami case -- that's the Second Circuit case we've been discussing, it's 563 F.2nd 26 -- there's a very detailed analysis of that Link v. Wabash case and explains that the United States Supreme Court in that case noted that there was nothing to indicate that counsel's failure to attend the pre-trial conference was other than deliberate or the product of neglect, and then after citing a series of cases they point out that the lawyer's conduct in that case, in the Cirami case, was engendered by a mental illness which manifested itself to his clients only after they had relied on him for months.

That's the case here. That's why Link doesn't apply, that's why Huckabay doesn't apply because in both of those cases, the United States Supreme Court in Link and the Nevada Supreme Court in Huckabay acknowledged

Page 71

when there's mental illness or constructive abandonment, it's different. We treat it differently because that normal attorney/client relationship has been severed by something unforeseeable and unanticipated, and that is the case here in terms of the evidence of what we have.

I would point out that Mr. Willard was prejudiced more than the parties in Cirami and in Boehner. As the court pointed out, in those cases at least those attorneys stayed engaged. Maybe they shut down their law practice but they stayed engaged and helped gather evidence, helped transition the file, helped submit affidavits. Mr. Willard didn't have the benefit of that, didn't have the benefit of Mr. Moquin staying engaged and helping us with this motion. So, if anything, in those cases, where you at least had a former attorney partly engaged and trying to fix the situation, if those deserve relief, then certainly Mr. Willard deserves relief here where he didn't have that benefit. He was truly abandoned by Mr. Moquin and --

THE COURT: When did he last speak with Mr. Moquin? That wasn't clear to me when he went to Arizona or wherever he is now.

MR. WILLIAMSON: I believe it was right around the time that we filed our Rule 60 motion, I think it was in

Page 72

April -- you know, essentially trying to get him to provide the stuff, and it was I think one of the last texts was that --

THE COURT: That's the last communication?

MR. WILLIAMSON: I believe so. It was in that string and that, What part of F-off don't you understand. I think that also points out a good situation on the evidence. That is certainly not effort -- not offered to prove the truth of the matter asserted, that Mr. Willard doesn't understand the meaning of F-off. Why that is offered is to show that Mr. Moquin went so far beyond the bounds of what could be expected in a normal attorney/client relationship, and it is so far beyond what about he had demonstrated to Mr. O'Mara and to Mr. Willard prior to that time that he was a reliable attorney that could go through trials, that could put together motions for summary judgment, and then suddenly, poof, he stopped responding --

THE COURT: But don't we have to balance that with the continued failure to comply with this court's order along the whole way to ultimately where I indicate on the record that I'm going to need to be convinced essentially by your opposition that I shouldn't grant this?

MR. WILLIAMSON: I think that's -- and I know the

Page 73

court is struggling with that and I think it's fair to struggle with that. That's why I mentioned before -- and as the Nevada Supreme Court's guidance has pointed out, the punishment for sanctions really does need to fit the crime. And regardless of motive, you're exactly right, the defendants have been prejudiced to some extent so we've got to mitigate that, but it doesn't mean that just because he failed to oppose that motion due to his mental illness and due to his abandonment of Mr. Willard that then you grant every single piece of relief that the defendants, as good advocates, asked for.

We should still say, "Okay, how do we make this right," "How do mitigate this wrong that was there?" Again, when I heard Mr. Irvine explain, well, it wasn't just diminution of value, there was some other categories of damages, but what I also heard was acknowledgement that right from the complaint everyone understood that $15 million of rental damages were at issue, and that it was only in this motion for summary judgment where they asked for four times that they felt caught unawares and that they felt that they were prejudiced by that.

Well, I don't know that they were, I think there were some indications in the discovery, but if that's the case, if it's that four times, all right, let's put it

back where it was in the complaint, where it was from the beginning where they knew it would be.

THE COURT: The 15 million?

MR. WILLIAMSON: The 15 million, your Honor. If we can't come after 15 million -- I mean, the loss of $35 million is a pretty severe sanction, the loss of a $35 million claim.

THE COURT: It's a claim.

MR. WILLIAMSON: It's a claim, fair enough. It was not -- it was not in the bag, by any stretch. I think that's a fair characterization. But the loss of a claim of that size is significant. I mean -- and it hampers -- as Mr. Irvine pointed out, I haven't been in the case that long. I'm getting the feeling like if I'm lucky enough to see this case move forward, my hands are going to be pretty constrained, and that's a sanction. That's problematic for Mr. Willard and for whoever represents him to not have the full array of claims and damages that you thought you had and that you think, rightly or wrongly, you're entitled to. That is a punishment, that does set things right, and it cures any claimed prejudice on behalf of the defendants because now they're not defending against something they didn't anticipate.

So I really do think when the question is asked, what are we going to do about -- let's go back to December -- and that is one other thing. Mr. Irvine said we can't reopen all discovery. We're not advocating that, by no means. What I am saying is if there is something they need from us, we will give it to them.

But let's go back to December and say, okay, what is the prejudice, what is the basis for the motion for sanctions, and what's your response? And the response is, we think there's a valid claim, we think through discovery responses and deposition testimony you knew these things were coming, but -- and in one of the few conversations I had with him, Mr. Moquin did assure me that he believes that the 16.1 was disclosed, but I haven't seen a shred of it and I don't think the court or the defendants have, so I am constrained to conclude that there is no evidence that he did comply with that 16.1, although he says he did and Mr. Willard thought he did.

But so if we're going to try to make that right, if we assume that disclosure was never given despite the fact that there may have been evidence of it, despite the fact that there may have been deposition testimony of it, despite the fact that there was motion, as he pointed out, Mr. Gluhaich offered opinions in October and let him

know what their positions were, despite all of that, if we want to make this right and have the punishment fit the crime, then the punishment has got to focus on those things. It's not dispose of this whole case.

I appreciate Mr. Irvine -- the court asked me that question about where was Passarelli. Passarelli was even further down the line and was entitled to restate that case; somebody didn't show up for trial. Mr. Moquin stopped showing up a month before trial and so the thing to do is put this case back on track as best we can, mitigate the inconvenience and the prejudice that the defendants have faced, and move forward so we can at least get some determination on the merits.

That's what Rule 60 is designed to do and that's why we're here today, that's the relief we would ask for.

THE COURT: All right. Thank you.

MR. WILLIAMSON: Thank you, your Honor.

THE COURT: I asked both of you for proposed orders and I did receive them. What I would like to do is give you two days to add, if you wish, based on my questions and the presentations that have been raised, or you may simply notify Ms. Bo that you don't need to add anything. I just -- I want to allow anything that may have been raised today to keep people from thinking, I

wished I would have included that in my proposed order, and then after -- today is Tuesday, so after Thursday at 5:00, then I'm going to undertake completing my decision on that. All right?

Thank you very much.

MR. IRVINE: Thank you, your Honor.

MR. WILLIAMSON: Thank you, your Honor.

THE COURT: We'll be in recess.

(At 3:15 p.m., court adjourned.)

* * *

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, ERIN T. FERRETTO, an Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department No. 6 of the above-entitled Court on WEDNESDAY, SEPTEMBER 4TH, 2018, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: This 20th day of June, 2019.

/s/ Erin T. Ferretto

ERIN T. FERRETTO, CCR #281

FILED
Electronically
CV14-01712
2018-01-04 05:32:39 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466867

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada Corporation; and JERRY HERBST, an individual,

Defendants.
_____/

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.
_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

Before this Court is *Defendants' Motion for Partial Summary Judgment [Oral Argument Requested]* ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motio*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

I. FACTUAL AND PROCEDURAL HISTORY

This case arises out of two commercial lease agreements entered into between Plaintiffs, as lessors, and Defendants, as lessees, for the Subject Properties located at 1820 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") and 7605 – 7699 S. Virginia Street, Reno, Nevada (the "Virginia Property"). See *Complaint*, pp. 3-7. On November 15, 2017, Defendants filed their *Motion*, seeking an *Order* of this Court granting summary judgment for Defendants with respect to Plaintiffs' claim for "diminution in value" damages arising out of Defendants' alleged breach of the lease agreements. See *Motion*, generally. Plaintiffs failed to oppose the *Motion*. As a result, Defendants filed a *Notice of Non-Opposition* and submitted the matter for decision on December 7, 2017.

/ /

/ /

/ /

On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

II. LAW AND ANALYSIS

Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion* constitutes both an admission that the *Motion* is meritorious and Plaintiffs' consent to granting said *Motion*.

However, in light of this Court's *Order Granting Defendants/Counterclaimants' Motion for Sanctions [Oral Argument Requested]*, the Court finds Defendant's *Motion* is moot at this

[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

juncture.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED *Defendants' Motion for Partial Summary Judgment* is DENIED as moot.

Dated this 4th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

JOHN P. DESMOND, ESQ.

ANJALI D. WEBSTER, ESQ.

BRIAN MOQUIN, ESQ.

DAVID O'MARA, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Pore