Case No. 78341

In the Supreme Court of Nevada

In the Matter of the Estate of MILTON I. SCHWARTZ, deceased.

A. JONATHAN SCHWARTZ, Executor of the Estate of MILTON I. SCHWARTZ,

Appellant,

vs.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA J. STURMAN, District Judge
District Court Case No. 07-P061300-E

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. A. Jonathan Schwartz is an individual and the executor of the Estate of Milton I. Schwartz.

2. Alan D. Freer and Alexander G. LeVeque of Solomon Dwiggins & Freer, Ltd. and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and M. Dale Kotchka-Alanes of Lewis Roca Rothgerber Christie LLP represent Schwartz in the district court and in this Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 29th day of January, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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JURISDICTION

Plaintiff A. Jonathan Schwartz, executor of the Estate of Milton I. Schwartz, appeals from a final judgment pursuant to NRAP 3A(b)(1) and from a decision wherein the amount in controversy exceeds $10,000 under NRS 155.190(1)(n). Schwartz was served with notice of entry of the orders on February 20 and 21, 2019 and timely appealed on March 8, 2019. (27 App. 6598.)

ROUTING STATEMENT

The Supreme Court should retain this appeal to address the enforceability of a naming-rights agreement. This case presents the issues of when and how a promise to grant naming rights in perpetuity can be enforced, which has not yet been addressed by this Court in a published opinion. NRAP 17(a)(11).

ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment against the Estate on its claim for breach of oral contract based on a four-year statute of limitations, even though the obligation sought to be enforced was founded on an instrument in writing and inquiry notice occurred only three years before suit was brought.

2. Whether the district erred in its refusal to instruct the jury regarding contract modification.

3. Whether the district court erred in its refusal to instruct the jury on the implied breach of the covenant of good faith and fair dealing.

4. Whether the district court erred in determining that it could not rescind Milton I. Schwartz's lifetime gifts absent an enforceable naming-rights agreement.

STATEMENT OF THE CASE

This is an appeal from probate-court judgments in cross-actions to compel a testamentary bequest (brought by the Adelson Educational Institute (the "school")) and for declaratory relief, breach of contract, and alternatively revocation of lifetime gifts concerning the naming rights for a private school (brought by the Estate of Milton I. Schwartz (the "Estate")). The Eighth Judicial District Court, Honorable Gloria J. Sturman, District Judge, presided.

The Estate asked for a determination that Milton I. Schwartz ("Mr. Schwartz") had an enforceable perpetual naming-rights agreement with the school, which was formerly known as the Milton I. Schwartz Hebrew Academy. The district court granted summary judgment against the Estate on its oral-contract claim. And after the court refused to instruct the jury on contract modification or the covenant of good faith and fair dealing, the jury did not find an enforceable written naming-rights contract. The jury instead found that Mr. Schwartz had intended a bequest in his will to go only to a school known as the "Milton I. Schwartz Hebrew Academy" based on his belief that he had a perpetual naming-rights agreement.

The district court entered judgment denying the Estate's contract claims and claims for rescission of Mr. Schwartz's lifetime gifts to the school but found that the will bequest had lapsed.

STATEMENT OF FACTS

A. The Agreement

Milton Schwartz Donates $500,000 for Permanent Naming Rights to a Jewish School

In 1989, a Jewish day school known as the Hebrew Academy wanted to build a new campus in Summerlin and urgently needed donors. (17 App. 4239; 14 App. 3253.) So its board members Dr. Tamar Lubin, the school principal, and Dr. Roberta Sabbath solicited money from a known Jewish philanthropist, Milton I. Schwartz. (14 App. 3253.) As Mr. Schwartz later testified, he "donated $500,000 to the Hebrew Academy in return for which it would guarantee that its name would change in perpetuity to the MILTON I. SCHWARTZ HEBREW ACADEMY." (8 App. 1857; *see also* 28 App. 6880 (similar affidavit).) In news reports, Dr. Lubin characterized the donation as "very generous." (28 App. 6873.)

Contemporaneous board minutes confirm that Mr. Schwartz donated $500,000 to have the school named after him in perpetuity: "A

letter should be written to Milton Schwartz stating the Academy will be named after him." (28 App. 6870.)

After the board meeting, Mr. Schwartz instructed his personal assistant Susan Pacheco to pay the $500,000. She testified: "They were going to name the school the Milton I. Schwartz Hebrew Academy in exchange for the $500,000 donation. So after the meeting, he told me to write the checks."[1] (13 App. 3161.)

Mr. Schwartz was also on the board, so the same day he had Ms. Pacheco (now in her capacity as the board's acting secretary) draft a letter from the board acknowledging the agreement:

> The Hebrew Academy acknowledges with thanks your generous gift of $500,000 to be used in the Academy's building program for the construction of the new campus at Summerlin. In appreciation and recognition of this gift, the Board of Trustees of The Hebrew Academy has decided to name the new campus the "Milton I. Schwartz Hebrew Academy," in perpetuity for so long as The Hebrew Academy exists and for so long as may be permitted by law, your name to be appropriately commemorated and memorialized at the academy campus.

(28 App. 6872.) While the letter was apparently never signed, it was

[1] There were three checks: two dated August 14, 1989 (the date of the board meeting) for $125,000 each, and one dated August 23, 1989 for the remaining $350,000. (28 App. 6871; 13 App. 3158–60.)

consistent with Ms. Pacheco's recollection about what transpired at the board meeting. (13 App. 3226–29.) The straightforward deal was that Mr. Schwartz gave $500,000 "in exchange for the naming of the school the Milton I. Schwartz Hebrew Academy"—"[f]orever." (13 App. 3156, 3157.)

Other board members from 1989 confirmed this agreement: Sam Ventura testified that Mr. Schwartz donated the money to have his name on the school in perpetuity. (17 App. 4100–01.) Lenard Schwartzer testified that Mr. Schwartz "donated a half a million dollars and arranged for most of the other donations for the school." (12 App. 2991.) In return, the "[B]oard agreed to name the school the Milton I. Schwartz Hebrew Academy . . . in perpetuity, meaning forever." (12 App. 2990.)[2]

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[2] *See also* 13 App. 3072 (testimony of Lenard Schwartzer):

> I think all of us [board members] understood that because Milton Schwartz was coming to the rescue, remember the school was not going to exist if he didn't—if this didn't happen, he came to the rescue, said I'm giving a half a million dollars and I will help you raise the remainder of the money you need. And in exchange for that, we agreed to name the school the Milton I. Schwartz Hebrew Academy.

(*Accord* 13 App. 3071 ("A half million dollars for the name of the

Board minutes from January 18, 1990 list amounts pledged and paid for the Summerlin campus between July 1, 1988 and February 21, 1990. The list confirmed that Mr. Schwartz pledged and paid $500,000, with "none" outstanding. (28 App. 6876.)[3]

The School Amends Its Articles of Incorporation and Bylaws to Permanently Name the School after Milton Schwartz

The school accepted Mr. Schwartz's offer (14 App. 3353), creating what board member Mr. Schwartzer described as "a legally enforceable agreement." (13 App. 3117; 13 App. 3049–50; *see also* 13 App. 3238 (Ms. Pacheco's testimony); 14 App. 3412–13 (executor's testimony).)

Consistent with this agreement, in August 1990 the school

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school."); 13 App. 3072; 13 App. 3073 ("the board had an understanding that in exchange for the half a million dollars and the intention to raise enough funds to build a school, that we agreed to name the school the Milton I. Schwartz Hebrew Academy").)

[3] Though present, Dr. Lubin raised no objection to the pledge memo. (13 App. 3009–10.) Nor did she claim Mr. Schwartz had promised more money. Nearly thirty years later, however, Dr. Lubin and Dr. Sabbath contended that Mr. Schwartz promised to pay $1 million, rather than to pay $500,000 and help fundraise. But Dr. Sabbath candidly admitted that Dr. Lubin "was the one who brought that [$1 million] number up." (14 App. 3252–53 ("[Dr. Lubin] was the one who brought that number up.").) And Dr. Lubin, now 85, misremembered several points, including the indisputably false claim that Mr. Schwartz's name "didn't go up" on the school. (17 App. 4220, 4224.) Dr. Sabbath later confirmed the accuracy of the pledge memo. (14 App. 3259).

amended its articles of incorporation: "This corporation shall be known as: The Milton I. Schwartz Hebrew Academy." (27 App. 6607.) Two months later, the board unanimously agreed to amend the school's by-laws to correct the name of the school. (27 App. 6610.)

In December 1990, the bylaws were amended and signed by the board members, including Dr. Lubin and Mr. Schwartz himself:

> The name of this corporation is The Milton Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity.

(27 App. 6612, 6620; 13 App. 3116.) These amendments were "in furtherance of the agreement that . . . the board members had with the school." (14 App. 3264.) Lenard Schwartzer, the board's then-secretary who drafted the bylaws, testified that he included the naming provision "[t]o reflect the decision of the board of trustees to name the school the Milton I. Schwartz Hebrew Academy in perpetuity." (13 App. 3012.) This provision "was supposed to be in perpetuity. So that's what it means, forever, to me, which means it's not going to be changed." (13 App. 3013; *accord* 13 App. 3115–16.)

The minutes affirm these actions: "The Board corrected the draft of the revised By-Laws by . . . naming the corporation after Milton I.

Schwartz in perpetuity." (29 App. 7004.) The school even executed a quitclaim deed to reflect the change: the "Hebrew Academy" deeded the property to the "Milton I. Schwartz Hebrew Academy." (27 App. 6621.)

"In Perpetuity" Was a Material Term of the Agreement Between Mr. Schwartz and the School

When Dr. Sabbath and Dr. Lubin collected Mr. Schwartz's donation, they understood as a material term of their agreement that Mr. Schwartz's naming rights would be perpetual. Dr. Sabbath recalled even 29 years later that "[t]here was discussion of the perpetuity piece that was very important to him. He wanted the school named after himself in perpetuity." (14 App. 3253.) As Dr. Sabbath testified:

> Q. So in your capacity as representing the board, did you agree to accept the money that Mr. Schwartz gave you in exchange for perpetual naming rights to the school?
>
> A. That was the gentleman's agreement.[4] And we were representing the board and the intention of the board and the goodwill that generous gift engendered.
>
> Q. But did you agree to be bound by that promise that the school would be named for him in perpetuity?

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[4] Dr. Sabbath later explained that she used the term "gentleman's agreement" because she had not seen a written contract and could only surmise "that maybe it was in [oral] conversation that this promise was made." (14 App. 3363–64.)

A. I did not personally agree to be bound. As a board member, that was the intention that I understood.

Q. Of the whole board?

A. Yes.

(14 App. 3254.)[5]

Ms. Pacheco testified that "it was extremely important to him that the school be named after him in perpetuity, forever. He even taught me how to say that word." (13 App. 3163.)[6] He never would have "given the school a half million dollars if it was not going to be named after him in perpetuity." (13 App. 3165.)

And Mr. Schwartz's son Jonathan explained that Mr. Schwartz

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[5] 14 App. 3255–56:

> The agreement was the quid pro quo of the donation . . . . And to have the school be named after him in perpetuity. And that was the spirit of what the board intended. * * *
>
> [Q.] [D]o you have an understanding one way or the other whether board agreed to be bound by that promise?
>
> A. Yes, we agreed that that would be the agreement.

[6] *See also* 13 App. 3167 ("I used to say forever. And he said no, in perpetuity. . . . in perpetuity, he liked that word. He would often refer to the school as the Milton I. Schwartz Hebrew Academy in perpetuity throughout the office. He would add that at the end.").

"was extremely proud that the school was going to be known as the Milton I. Schwartz Hebrew Academy in perpetuity. It was[,] other than his four kids, the most important thing in his life." (14 App. 3383–84.) The "in perpetuity" piece of the deal "was incredibly important to him." (14 App. 3386.)

The Other Material Terms of the Naming Agreement Were Clear

The school seized on purported ambiguities and differences in recollection 30 years after the fact,[7] but Mr. Schwartzer, the former board secretary, testified that the basics were clear: "[T]he agreement with Milton Schwartz was to name the school Milton I. Schwartz Hebrew Academy in perpetuity and changing the name would be a violation of that agreement between the board of trustees and Mr. Schwartz." (13 App. 3125.)

According to Mr. Schwartzer, under the terms of the agreement, the corporation itself had to be named the Milton I. Schwartz Hebrew

[7] Even the school's counsel readily acknowledged that "[s]o far nobody has a perfect memory about these things going back 20 years." (14 App. 3329.)

Academy, and there had to be "appropriate signage on the building saying it was the Milton I. Schwartz Hebrew Academy in some way . . . and what we actually did complies with that understanding." (13 App. 3005.)[8] While specific buildings or individual rooms might be named after other people, the campus—the property and whatever other buildings were on it—"would be Milton I. Schwartz Hebrew Academy." (13 App. 3006; 14 App. 3269–70.)

B. Mr. Schwartz's Donations Were Conditional

Mr. Schwartz Ceases Donations When the School Temporarily Changes Its Name

Mr. Schwartz loved the school. (14 App. 3344.) It was his legacy.[9] As his son testified, Mr. Schwartz donated annually to keep the school operating:

> These kind of schools never cover their operating expenses, so every single summer, the school would be at a deficit and my dad would get on the phone and raise a bunch of money from people, and he would write a

[8] *See also* 14 App. 3384–85 (executor's testimony that "his name was going to be on the letterhead of the school, his name was going to be on the pediment of the building[,] [h]is name was going to be at the entrance to the school[,] [a]nd that the school was going to publicly be known as the Milton I. Schwartz Hebrew Academy forever").

[9] *See* 28 App. 6877 (Lenard Schwartzer encouraging Mr. Schwartz in 1992 that "[i]t's your school, it has your name on it forever").

> large check himself to keep it operating. So he was dedicated to it like it was one of his businesses.

(14 App. 3385–86.)

But in 1992, a new board excluded Mr. Schwartz. Mr. Schwartz disputed whether the new board was duly elected, so on the old board's behalf he sued the new board. (27 App. 6622.)[10]

The new board then removed Mr. Schwartz's name from the school and the school's letterhead (28 App. 6878)—changes that, according to Ms. Pacheco, made Mr. Schwartz "furious":

> [W]e were going to go to war is what he told me. He was very—he was extremely upset that they took his name off because he gave the money and the name of the school is Milton I. Schwartz Hebrew Academy. And he really did not like the idea of his picture coming off the wall. He likes things on walls. And [the removal of his name from] the letterhead also upset him.

(13 App. 3171–72; *see also* 14 App. 3389 (Mr. Schwartz's son testifying that Mr. Schwartz "was depressed and sad about the whole thing").)[11]

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[10] The old board was considering terminating Dr. Lubin, but the new board was negotiating a "long term contract" with her. (2 App. 289.) Dr. Lubin instructed board member Michael Novick to offer Mr. Schwartz the $500,000 that he "donated to the Hebrew Academy" before being elected board chairman. (2 App. 288.)

[11] Being recognized for his charitable gifts "was extremely important to [Mr. Schwartz]. You just needed to walk into our office to see that and talk to him. Every major gift he gave was connected to naming rights

After the school renamed itself "The Hebrew Academy" (28 App. 6868; 28 App. 6870), Mr. Schwartz stopped visiting the school (13 App. 3183–84) and stopped making donations. He even began investigating naming rights with another Jewish school. (14 App. 3391.) Ms. Pacheco testified that this was because "his name was taken off the school" and "he was kicked off the board." (13 App. 3169.)

The School Makes Amends and Restores Mr. Schwartz's Name

But on May 19, 1996, while Mr. Schwartz was still within the statute of limitations to sue for the school's breach, the school relented and restored Mr. Schwartz's name. (27 App. 6626; 28 App. 6883.) The board "passed a resolution returning the name of the school to the Milton I. Schwartz Hebrew Academy. The name would be returned to the stone outside of the school as well as to the school letterhead and other appropriate places." (27 App. 6626.)

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or being recognized in some way." (14 App. 3399.) For instance, he would have his secretary walk through Valley Hospital on an annual basis to "make sure that the plaque that said Milton I. Schwartz founded was in the entryway." (13 App. 3164.) When the reception area moved without the plaque, Mr. Schwartz "was very upset about that. So we would have to write a letter and make a formal complaint and then they would move the plaque to the front of the building." (13 App. 3164.)

On behalf of the board, then-school head Dr. Sabbath wrote Mr. Schwartz to reiterate the terms of the naming agreement:

> On behalf of myself, President, Geri Rentchler and the entire Board of Directors of the Milton I. Schwartz Hebrew Academy, I am pleased to inform you that we will immediately commence action to implement as soon as practicable the following:
>
> (1) Restore the Hebrew Academy's name to the "Milton I. Schwartz Hebrew Academy."
>
> (2) Amend the Hebrew Academy's Articles of Incorporation to restore its former name of the "Milton I. Schwartz Hebrew Academy."
>
> (3) Restore the marker in front of the Hebrew Academy identifying it as the "Milton I. Schwartz Hebrew Academy."
>
> (4) Change the Hebrew Academy's formal stationary to include its full name, the "Milton I. Schwartz Hebrew Academy", in a form consistent with this letterhead and include our full name on future brochures.
>
> (5) Where practicable, display the full name of the Hebrew Academy. In print advertising of sufficient size, the full name of the school will be displayed in a design consistent with the letterhead. Where impractical by reason of size, utilization of voice media, informal correspondence, informal memoranda, etc., and in answering the telephone, the school will utilize the shorthand version of its name as Hebrew Academy or simply, its logo. You can rest assured it is the intention of the School Head and the school's Officers and Directors that the utilization of the school's full name will be consistent with an intent to recognize and honor your contribution and assistance.

(28 App. 6883; 27 App. 6626.) The school fulfilled these promises, including by amending the bylaws to provide that "[t]he name of the Corporation is the Milton I. Schwartz Hebrew Academy and will remain so in perpetuity." (14 App. 3304–05; 13 App. 3178; 27 App. 6629.)

The letter also discusses restoring Mr. Schwartz's name and acknowledges having accepted Mr. Schwartz's earlier contributions, consistent with the naming-rights agreement:

> The restoration of the name of the "Milton I. Schwartz Hebrew Academy" has been taken as matter of "menschlackeit" in acknowledgement of your contribution and assistance to the Academy; your continued commitment to Jewish education reflected by the establishment of the "Jewish Community Day School" and last but not least, your recent action as a man of "shalom."
>
> Your invitation to me as new School Head to meet and resolve differences and to work with me and the Board to bring "shalom" to our Jewish community will serve as a much needed example of Jewish leadership.
>
> Please accept our assurance and commitment that we welcome with joy the establishment of the Jewish Community Day School which will provide Jewish parents a choice between the Jewish education offered by the "Milton I. Schwartz Hebrew Academy" during normal school hours and a school composed entirely of students with a Jewish parent and many more hours of Jewish education than can be offered in a normal school day.
>
> You have our pledge that we are committed to make the "Milton I. Schwartz Hebrew Academy" a source of honor and a place of Jewish learning of which you and your family will always justly be able to take great pride.
>
> Please accept our wishes for you and your family to have long, healthy, prosperous and joyous lives.
>
> Very truly yours,
>
> Dr. Roberta Sabbath
> School Head

(28 App. 6884 ("Sabbath letter").)[12]

[12] If Mr. Schwartz had made (and broken) a promise to pay $1 million in 1989, there would have been no reason for the school to authorize the Sabbath letter, with its voluntarily agreement *again* to name the school

Dr. Sabbath explained that "menschlackeit" is Yiddish for "[d]oing the right thing" and "has a very warm, positive feeling other than doing exactly what according to legal right, the higher bar of the ethical and human appropriate thing to do." (14 App. 3305.) Regarding the statement that the board was "committed to make the 'Milton I. Schwartz Hebrew Academy' a source of honor and a place of Jewish learning of which you and your family will always be able to take great pride," Dr. Sabbath testified that this "certainly reflected the 'in perpetuity' piece." (14 App. 3306.)

Dr. Sabbath testified that her letter was "a memorialization of what we had agreed on, that for the donation, his name would be on the school, whether it was a monument or the physical building." (14 App. 3340, 3345, 3393.)

Ms. Pacheco recalled that Mr. Schwartz was "ecstatic" with the letter because "his name was put back on the school and the letterhead was changed." (13 App. 3176; *see also* 14 App. 3393.) He again visited the school, returned to the board, and resumed donations. (13 App.

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after Mr. Schwartz. Instead, the letter confirms that the school accepted the consideration Mr. Schwartz paid and found it adequate to name the school after him forever.

3184, 14 App. 3394.)

Mr. Schwartz Donates Only When the School Bears His Name

In all, Mr. Schwartz donated more than $1 million to the school, but only when it bore his name:

Year	Amount
1989	$500,900
1990	$9,000
1991	$150
1992	$69.66
1993-1996	None
1997	$2,100
1998	$22,500
1999	$26,600
2000	$7,400
2001	$88,535
2002	$57,130
2003	$51,323
2004	$135,277
2005	$9,622
2006	$100,000
2007	$100,000
TOTAL	$1,110,606.66

(13 App. 3184–88; 28 App. 6860; 13 App. 3169.)

Mr. Schwartz Devises a Bequest to the School Bearing His Name

In 2004, Mr. Schwartz dictated to his son Jonathan a new will with a $500,000 bequest to the Milton I. Schwartz Hebrew Academy:

> 2.3 The Milton I. Schwartz Hebrew Academy. I hereby give, devise and bequeath the sum of five hundred

> thousand dollars ($500,000.00) to the Milton I. Schwartz Hebrew Academy (the "Hebrew Academy"). . . . In the event that no mortgage exists at the time of my death, the entire $500,000.00 amount shall go to the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only.

(27 App. 6640, § 2.3; 14 App. 3400–01.) Mr. Schwartz specifically instructed Jonathan not to include a successor clause because he wanted the gift to go to the Milton I. Schwartz Hebrew Academy and nowhere else, not even a successor entity with a different name. (14 App. 3402, 3404–06.) "If the Milton I. Schwartz Hebrew Academy didn't exist as the Milton I. Schwartz Hebrew Academy, he didn't want it going to any other school on that land. It was only supposed to go to a school named the Milton I. Schwartz Hebrew Academy." (14 App. 3410, 3420.)

Rabbi Lorne Wyne had explained to Mr. Schwartz that naming buildings after oneself had both "earthly significance" and "heavenly significance" in the Jewish faith. (16 App. 3932.) "[Y]our children and grandchildren will be connected to whatever you put your name on," and naming something after yourself had eternal significance because "whatever commandments are being fulfilled through that institution . . . are permanently attached to your identity in which case God rewards you, not only in this world, but in the next world." (16 App.

3933.)[13]

C. New Donations

New Donors Arrive

In 2006, Dr. Miriam and Sheldon G. Adelson agreed to donate money to build a high school on the Milton I. Schwartz Hebrew Academy property. (14 App. 3413–14.) Mr. Schwartz was "very happy" about this, as it was a realization of the "vision of the school from the beginning that at some point there would be a high school on the campus." (14 App. 3414.) He understood that "the high school was going to be known as the Adelson high school," but that the rest of the campus would remain named after him. (14 App. 3420–22.) As the school had been complying with the Sabbath letter for ten years, Mr. Schwartz understood that his naming rights were unaffected. (14 App. 3421.)

[13] *See also* 13 App. 3180 (testimony of Ms. Pacheco) ("This was his love. The school was his love, and so this was really important to him, that his name be on there for his legacy. And he just—he wanted his name on that school in perpetuity for the legacy for his kids and his grandkids and their kids. He was very proud of it.").

The Adelsons and the School Honor Mr. Schwartz

On May 6, 2007, the school "threw a massive party" in honor of Mr. Schwartz. (14 App. 3424). He received the "Dr. Miriam and Sheldon G. Adelson In Pursuit of Excellence Award" for "generously support[ing]" the school's creation and "continued growth." (28 App. 6890; 14 App. 3424.)

The gala announcements made clear that only the "adjacent" high school would be named the "Adelson School"; everything else would remain the "Milton I. Schwartz Hebrew Academy." (28 App. 6889–90, 6912–13, 6944–45; *see also* 15 App. 3750–16 App. 3751, 14 App. 3421–22.)

Mr. Schwartz Dies

Three months later, Mr. Schwartz died. (27 App. 6648; 14 App. 3424–25.) Jonathan Schwartz as executor petitioned for probate of Mr. Schwartz's will and listed the Milton I. Schwartz Hebrew Academy as a beneficiary. (27 App. 6650, 6652.) He "had absolutely no reason to believe that . . . the estate w[ould] not be giving a gift of $500,000 to the Milton I. Schwartz Hebrew Academy." (14 App. 3427.)

D. The School's Breaches

The School Actively Conceals Its Removal of Mr. Schwartz's Name from the Executor

Far from alerting the executor to the corporation's renaming,[14] in 2008 the school thanked the executor for his generous contributions to the school, referring to both the Milton I. Schwartz Hebrew Academy and the Dr. Miriam and Sheldon G. Adelson School. (28 App. 6999; 28 App. 7000.) The letterhead reflected the importance of both names:

(28 App. 6999; 14 App. 3440.)

During the executor's tour of the campus that same year, school head Paul Schiffman pointed out Mr. Schwartz's painting in the hallway, a statue of Mr. Schwartz in the building, and Mr. Schwartz's name above the entry doors to the school. (14 App. 3434.) In fact, according

[14] While that change ultimately came out during discovery (14 App. 3438), the executor never tried to look up the school's articles of incorporation online because he "trusted conversations [he] had with people from the school." (14 App. 3428–29.)

to Mr. Schiffman, the Milton I. Schwartz Hebrew Academy and the Adelson School were operating as "two separate institutions," with the Milton I. Schwartz Hebrew Academy still constituting preschool to eighth grade. (16 App. 3774.) So a sign at the entrance for the "Adelson Educational Campus" referred only to the high school. (17 App. 4009–10, 4028.)[15] And when the entrance sign with Mr. Schwartz's name was removed, the executor was misled that the removal was just temporary, for construction. (17 App. 4010.)

On August 28, 2008, the executor wrote Mr. Schiffman to congratulate him, the Adelsons, and the board for the growth of the Milton I. Schwartz Hebrew Academy (MISHA) and the Adelson School. (27 App. 6685.) The executor also asked for the MISHA board[16] to send him written confirmation that the anticipated gift from Mr. Schwartz's estate would be used to fund annual scholarships "in perpetuity at the MISHA for the purpose of educating Jewish children only." (27 App.

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[15] The executor does not recall seeing this sign until March 2010, but regardless of when he first saw it, Mr. Schiffman said that it referred only to the high school. (17 App. 4055-56.)

[16] The executor did not know that there was no MISHA board. (14 App. 3438.) By now, there was only a board of trustees for the Dr. Miriam and Sheldon G. Adelson Educational Institute.

6685.)

After this letter, the executor heard nothing until 2010. (14 App. 3442.)

The School Changes Its Corporate Name

In December 2007, four months after Mr. Schwartz's death, the board entered a naming rights agreement with the Adelsons and changed the school's corporate name to "The Dr. Miriam and Sheldon G. Adelson Educational Institute.'" (27 App. 6676–77, 6683; 16 App. 3876.) But "the Corporation's elementary school shall be named in honor of Milton I. Schwartz in perpetuity." (27 App. 6676; 16 App. 3752–53.)[17]

The name change prompted the board members to agree to indemnify and hold themselves harmless for "all liabilities related to their functions as trustee of the school, including all legal costs incurred." (27 App. 6647; 17 App. 4120–21.) As then-board member Sam Ventura ex-

[17] That same day, the school purportedly agreed "that the Corporation, the campus, the high school, the middle school and the classroom buildings themselves will be named in perpetuity in honor of Dr. Miriam Adelson and Sheldon G. Adelson." (27 App. 6680, ¶ 3.) There is no mention of the elementary school, presumably because it was supposed to be named after Mr. Schwartz in perpetuity.

plained, the board did not want "to worry about the legality what happened 10, 15 years earlier." (17 App. 4120–21.)

Mr. Adelson Threatens the Naming Rights, but the School Assuages the Executor

Around February 2010, Sheldon Adelson called the executor to complain that Mr. Schwartz gave "a paltry sum of money compared to what [Mr. Adelson] gave, and that if I [the executor] didn't give him more money, he was going to take my dad's name off the school. He threatened me." (14 App. 3444.) Following that alarming call, the executor met with the board and was assured that "what Sheldon [Adelson] threatened wasn't going to happen." (14 App. 3444–45.)

The School Continues to Actively Conceal Changes in the School's Name

The Milton I. Schwartz Hebrew Academy logo had been removed from the school's letterhead on May 30, 2008. (16 App. 3772.) When the school corresponded with the executor later in 2008 and all the way through 2011, however, the school used the discontinued letterhead referring to the Milton L. Schwartz Hebrew Academy. (28 App. 6999; 28 App. 7000; 29 App. 7001, 29 App. 7002.) When Mr. Schiffman saw these letters at trial, he testified "this letterhead should not have been

used" and he was "embarrassed" that it was apparently used only with the executor. (16 App. 3777–80.)

The Executor Learned of the School's Breach No Earlier than March 2010

In March 2010, the executor met with Paul Schiffman, Victor Chaltiel, and Sam Ventura at the school campus and saw a sign for "Adelson Middle School." (14 App. 3445, 3452.) As the executor understood that only the high school was named for the Adelsons (28 App. 6889–90), he complained to Mr. Chaltiel:

> What's this? Pointing to the sign that said Adelson Middle School. And he said, Well, the middle school is now named after the Adelsons. And I turned to him and I said, That's a violation of my dad's agreement with the school. I said, What are you doing? And he turned to me, and he said, Sheldon [Adelson] gave $65 million[;] he can do whatever he wants.

(14 App. 3452.)

The School Refuses to Recognize Mr. Schwartz's Naming Rights

In May 2010, the executor proposed a settlement to the board to preserve Mr. Schwartz's naming rights and prevent further erosion of his legacy. (27 App. 6710; 14 App. 3448; 27 App. 6687.) At this point, the board had still not revealed its corporate name change or the naming rights agreement with the Adelsons. (16 App. 3876.)

Instead of resolving matters with the executor, three years later the school filed a petition demanding that the $500,000 bequest for the Milton I. Schwartz Hebrew Academy be paid to the school. (14 App. 3458–59; 27 App. 6714.) On May 31, 2013, the Estate filed its petition for declaratory relief. (28 App. 6900.)

The School Again Breaches After the Executor's Petition

After litigation commenced, the school removed Mr. Schwartz's name from the building that had been the elementary school through eighth grade (now through fourth grade)—contrary to the naming-rights agreement and the board's own resolution that "the Corporation's elementary school shall be named in honor of Milton I. Schwartz in perpetuity." (27 App. 6676; 14 App. 3462–63; 16 App. 3774, 3787.

Citing his contributions "228 times" those of Mr. Schwartz, Mr. Adelson (now board chairman) testified that "it's always the person putting up the maximum amount of money that gets the naming rights[]" (15 App. 3624), so it would be "ridiculous" for Mr. Schwartz to have them. (15 App. 3623; 15 App. 3625.)

E. The Trial

The District Court Prohibits the Estate from Presenting Its Oral Contract Theory to the Jury

In August 2018, the district court granted summary judgment on the Estate's breach-of-contract claim to the extent the contract was oral. (10 App. 2466–67.) The court admitted that there were "questions of fact" and that the school "may have lured [the executor] into a false sense of relief by saying look, your dad's name is still on the wall in 2009." (10 App. 2458, 2464.) Nevertheless, applying a four-year statute of limitations from the Estate's May 2013 petition, the court concluded that the Estate "had notice long before 2010. . . . I just can't see this any other way." (10 App. at 2464.) The court held that the executor "stands in different shoes because he's the Executor, and he needs to get these claims resolved to the benefit of the creditors and to the beneficiaries," so he should have "figure[d] this out sooner." (10 App. 2460.)

The Jury Finds that Mr. Schwartz Believed He Had a Valid Naming Rights Agreement, but that it was Unenforceable

After seven days of trial, the jury found that Mr. Schwartz intended that the bequest in his will "be made only to a school known as the 'Milton I. Schwartz Hebrew Academy'" and not to the "school presently known as the Adelson Educational Institute." (19 App. 4515,

Question 8.) The jury also found that "the reason Milton I. Schwartz made the Bequest was based on his belief that he had a naming rights agreement with the School which was in perpetuity." (*Id.*, Question 9.)

But the jury did not think that Milton I. Schwarz had an enforceable written naming-rights contract. (19 App. 4513, Question 1.)

SUMMARY OF THE ARGUMENT

The district court erroneously granted summary judgment on the Estate's oral-contract claim. The executor timely filed upon learning of the school's breaches of contract. The court relied on disputed facts to conclude otherwise, despite the school's efforts to conceal them. The district court misconstrued the concept of "inquiry notice," treating it as constructive notice even where the executor's actual inquiry led not to knowledge of a breach but to false assurances from the school.

A new trial should also be granted because the district court erroneously refused to instruct the jury on contract modification and breach of the implied covenant of good faith. This was prejudicial because the evidence supported that the Sabbath letter modified the parties' original agreement, and that the school reduced Mr. Schwartz's naming rights in bad faith before eliminating them altogether.

Alternatively, this Court should at least order the school to repay Mr. Schwartz's lifetime donations because those donations were conditioned on—and would not have been made but for—the school's being named after Mr. Schwartz forever.

ARGUMENT

I.

NAMING RIGHTS AGREEMENTS MUST BE ENFORCED IF THEY ARE TO MEAN ANYTHING

Offering naming rights as a charitable fundraising technique "has exploded since the mid-1990s." William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts?*, 2016 MICH. ST. L. REV. 1267, 1271 (2016). "Donors emblazon their names on all sorts of real and personal property from the otter playground at the Louisville Zoo to the restrooms at Harvard Law School[.]" *Id.* at 1273 (footnotes omitted).

To keep generating funds for charitable organizations, donors need to know that their naming rights will be enforced. While the state generally "limits dead hand control through the rule against perpetuities, . . . the state strikes a more generous bargain" with charitable donors. Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111,

1114 (1993). They "get to extend their control indefinitely" because "[i]n exchange for perpetual donor control, society gets wealth devoted to recognizably 'public' purposes." *Id.* *See generally* NEV. CONST. art. 15, § 4 (allowing perpetuities "for eleemosynary purposes").

Without enforcement, some organizations will seek "to escape the donor's terms and perhaps even to remarket the naming privilege." John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 388 (2005).

That's what happened here when subsequent donors came along with more money decades after the school had already given perpetual naming rights to Mr. Schwartz. Legally, the amount of donations in 2008-09 is irrelevant to the enforceability of the school's agreement with Mr. Schwartz in 1989. Yet, in closing argument to the jury, the school consistently referred to the size of the later donations to suggest that

should deny enforceability. (*See, e.g.*, 18 App. 4417;[18] 18 App. 4427.[19])

Refusing to enforce Mr. Schwartz's naming-rights agreement because of a larger donor is wrong. In a similar case where Augsburg College solicited "money in exchange for [the college's] promise to name the wing after" the donor, the court noted:

> Nonprofit corporations, for-profit corporations, and individuals, are expected to honor their commitments. Courts of law and equity enforce legal contracts. . . . The keeping of one's promise honors us all.
>
> We suggest it would be startling news to Augsburg's alumni that their college's "charitable and educational mission" includes specifically soliciting contributions for a particular purpose, formalizing that solicitation by a specific vote of the board of regents, and then claiming the power to say, "Oops, we changed our mind. We are not going to give your money back, instead we are going to keep it."

---

[18] "The Adelson's put $3.8 million into that building as part of the refurbishment. They put three times, five times . . . the amount of money that Milton Schwartz put into that building and yet—Jonathan Schwartz says my father's name goes on everything. And it is infinitesimally small."

[19] "They want you to say that the agreement with the Adelson's is a breach of Milton Schwartz' agreement, which means . . . the Adelson agreement would be null and void. Do they—I guess they want the School to pay back the Adelson's a hundred million dollars. That's what that would mean. That's what he is asking you without being obvious about it. Oh, well, forget their deal, because my dad had a deal 30 years ago."

Stock v. Augsburg Coll., No. C1-01-1673, 2002 WL 555944, at *6 (Minn. Ct. App. Apr. 16, 2002) (footnote omitted); *see also Tenn. Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 118 (Tenn. Ct. App. 2005) (requiring university to return money donor paid in 1933 for naming rights, as courts "are not at liberty to relieve parties from contractual obligations simply because these obligations later prove to be burdensome or unwise").

Mr. Schwartz's naming rights agreement must be enforced, not only because it is the right—and legal—thing to do, but also because it will assure donors everywhere that their naming rights will be respected.

II.

NRS 11.190(1) AND DISPUTED ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT ON THE ESTATE'S ORAL CONTRACT CLAIM

The district court "just [couldn't] see how" the Estate "can get around the four-year statute of limitations on oral contract" (10 App. 2466) and so improperly granted summary judgment. First, no matter which statute of limitations applies, whether the Estate learned of the school's breach before March 2010 is a fact question. Second, the school

actively concealed its breach; the district court was wrong to reject equitable tolling as a matter of law. Third, the district court confused "inquiry notice" for "constructive notice"; any duty to inquire was discharged when the school reassured the executor that Mr. Schwartz's name was still associated with the elementary school. Fourth, the school did not commit its ultimate breach of removing Mr. Schwartz's name from the lower school until after this litigation commenced. Fifth, the Estate's petition is timely under the six-year statute in NRS 11.190(1)(b): although elements of the contract were oral, it was nonetheless "founded upon an instrument in writing."

A. Even If the Four-Year Statute of Limitation Applied, Disputed Issues of Fact Precluded Summary Judgment

As discussed in part PART One:II.E, the six-year statute of limitations applies to the Estate's claim. But even if the four-year statute of limitations applied, the district court erred in granting summary judgment. "Dismissal on statute of limitations grounds is only appropriate when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the facts giving rise to the cause of action." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998).

There is no "uncontroverted evidence" that "irrefutably demonstrates" the Estate should have discovered the school's breach before May 28, 2009 (four years before the Estate's petition).

The school relied on disputed evidence:

First, the school argued that because it officially changed its name on March 21, 2008 and the amended articles of incorporation were of public record, the executor had constructive notice. (7 App. 1529.) Not even the district court accepted that argument. (10 App. 2459 ("I'm not so hung up on the fact that . . . they changed the corporate records or the corporate name . . . . Nobody looks at that. Who looks at that?").) The district court was right: public records do not perforce create constructive notice. *Bemis*, 114 Nev. at 1026, 967 P.2d at 441 (reversing dismissal on statute-of-limitations grounds, as "it cannot be said as a matter of law that Kevin and Scott should have known of their parents' divorce agreement simply because it was public record"). The executor did not learn about the school's corporate name change until after this case was filed. (14 App. 3428.)

Second, the school pointed to the executor's May 2010 proposed settlement letter to the school, suggesting this showed the executor

knew of the school's breaches two-and-a-half years before the date of the letter. (9 App. 2179.) But the letter indicated only that the executor had been trying to carry out his father's will since his father *died* two-and-a-half years ago, not that he *learned* about the school's breach of the naming-rights agreement two-and-a-half years ago. (27 App. 6687 ("I have done everything within my power over the last two and one half years to make certain that my Dad's wishes are carried out precisely as provided for in his Will."); *id.* at 6689 ("The Draft Settlement basically accepts what the school is already doing despite the fact that some of what the school has done in the last 2 and ½ years breaches the Agreements.").)

Third, the school selectively pointed to the executor's deposition testimony in which he discussed how:

> This was sort of, you know, death by a thousand cuts.
>
> I would hear, you know, statements from board members, statements from, you know, people who sent their kids there, you know, "They're—they're not respecting your dad's legacy," all of this kind of stuff. And this was, you know, a series of events. And little by little, they diminished my father's naming rights and supplanted it completely with Adelson, which was not the agreement.

* * *

> Again, as these events were occurring in 2007, '8, '9, '10, '11, '12, '13, '14, I would hear things from members of the community . I would hear things from parents who sent their kids there, from board members.

(7 App. 1540–41.) The school never established what particular statements the executor "heard" or when he heard them. It was the school's "burden of showing the absence of a genuine issue of material fact as to when appellant discovered or should have discovered" the facts constituting the elements of his cause of action. *Oak Grove Inv'rs v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

In fact, one time the executor "heard things" was a lunch in 2010:

> . . . I had lunch with Sam Ventura one day at a Mediterranean restaurant on the east side of town, where he proceeded to tell me, "Look, what Sheldon is doing isn't right, and I disagree with it. And I told them that if they tried to do this, you would sue the school."
>
> Q. Okay. And when . . . was this?
>
> A. Sometime in '8 or '9 -- 2008, 2009. This was a long time ago, so I may be off on the exact year.

(7 App. 1541.) The executor *was* off; it was later established that the lunch occurred in February 2010—after the threatening phone call from Sheldon Adelson and well within the statute of limitations. (14 App.

3442–45.)

Yet the district court did not allow these disputed facts to be explored. Rather, the court relied on the executor's status and declared "it just seems like there's some sort of an obligation there to make this thing move faster and to figure this out sooner." (10 App. 2460 ("not just because he's an attorney, but he stands in different shoes because he's the Executor"); 10 App. 2464 ("They may have done something to reassure him or to cause him to delay in taking action, but that's not—he's on inquiry notice, and he needed to figure out sooner what was going on.").)

There is no authority for the proposition that a statute of limitations applies differently to executors of an estate than it does to other people. Moreover, the district court's opinion that the executor "needed to figure out sooner what was going on" is a quintessential question of fact. "'When the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact.'" *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990) (quoting *Oak Grove*, 99 Nev. at 623, 668 P.2d at 1079); *see also In re*

Amerco Deriv. Litig., 127 Nev. 196, 2289, 252 P.3d 681, 703 (2011) (same); *Siragusa v. Brown*, 114 Nev. 1384, 1400, 971 P.2d 801, 812 (1998) ("[T]he question of when a claimant discovered or should have discovered the facts constituting a cause of action is one of fact.").

The school did not meet its burden to establish what particular statement the executor heard before May 2009 that put him on notice of the school's breach. But even if it had, this dispute ought to have gone to the jury.

B. Estoppel and Equitable Tolling Kept the Statute from Running

The district court erroneously concluded that because the executor was on "inquiry notice," equitable tolling could not apply. The court admitted that there were "questions of fact"[20] and that the school "may have lured [the executor] into a false sense of relief by saying look, your dad's name is still on the wall in 2009." (10 App. 2458, 2464.) Yet, the court inexplicably concluded that that would not toll the statute of limitations: "as soon as somebody starts telling him whatever they're telling him" (without specifying when that occurred or who might have said

[20] "Those, to me, are all questions of fact . . . [T]hey did continue to use letterhead." (10 App. 2458.)

that), "he knows," regardless of the school's inducement. (10 App. 2464.)

That is incorrect. Statutes of limitation are "'subject to waiver, estoppel, and equitable tolling.'" *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 836, 673 P.2d 490, 492 (1983) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). Where one party conceals the true state of facts or induces the other party to not bring suit, the limitations period is equitably tolled. *See Winn v, Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 254, 277 P.3d 458, 463 (2012); *Jamison*, 106 Nev. at 799, 801 P.2d at 1382. This doctrine applies especially when there is inquiry notice: the reasonableness of plaintiffs' inquiry depends on whether the defendant falsely assured them there was no reason to sue:

> A defendant will be estopped to assert the statute of limitations if the defendant's conduct, relied on by the plaintiff, has induced the plaintiff to postpone filing the action until after the statute has run. One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.
>
> It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It is sufficient

> that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings.

Mills v. Forestex Co., 134 Cal. Rptr. 2d 273, 295–96 (Cal. Ct. App. 2003) (quotation marks and citations omitted). Equitable tolling is a crucial escape valve "'to prevent the unjust technical forfeiture of causes of action.'" *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d 666, 671 (2011) (quoting *Lantzy v. Centex Homes*, 73 P.3d 517, 523 (Cal. 2003)). And its application is generally a question of fact for the jury. *Copeland*, 99 Nev. at 826–27, 673 P.2d at 492 (holding that equitable tolling presented question of fact precluding summary judgment).

Likewise, a defendant who fraudulently conceals the plaintiff's injury cannot invoke the affirmative defense of statute of limitations against an otherwise diligent plaintiff. *Siragusa v. Brown*, 114 Nev. 1384, 1394, 971 P.2d 801, 807 (1998). Evidence of such concealment presents a fact question that defeats summary judgment. *Id.*

Here, the district court acknowledged that the school may have lulled the executor into a false sense of security. (10 App. 2458, 2464.) The evidence at trial confirmed that the school misleadingly corresponded with the executor on "Milton I. Schwartz Hebrew Academy"

letterhead long after the school ceased using that letterhead for other purposes. (28 App. 6999; 28 App. 7000; 29 App. 7001; 29 App. 7002; 16 App. 3772, 3777–80.) And when the executor visited the school, he was directed to the remaining symbols of his father's legacy—the painting, the statute, and Mr. Schwartz's name above the entry doors (14 App. 3434)—and assured that his father's naming rights were not being violated, including the false statement that the "Milton I. Schwartz Hebrew Academy" sign was only temporarily removed for construction and that the "Adelson Educational Campus" sign referred only to the high school. (17 App. 4010, 4028.) School representatives deceived the executor into not suing; that fraudulent concealment equitably tolls the statute and estops the school from invoking it.

C. If the Executor Had Inquiry Notice, He Inquired

The district court suggested that even if the executor heard mere rumors, he was on inquiry notice and needed to investigate what the school was doing. (10 App. 2465–66.) There was nothing sufficient to put the executor on inquiry notice of a potential breach, but even if there was, the executor *did* investigate.

1. Inquiry Notice Is Only a Duty to Inquire, Not Constructive Knowledge of a Breach

The district court conflated inquiry notice with constructive notice. Courts have long recognized that "inquiry notice" is "that notice which a plaintiff would have possessed after due investigation." *Gassmann v. Eli Lilly & Co.*, 407 F. Supp. 2d 203, 208–09 (D.D.C. 2005) (quoting *Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996)). It just triggers a duty to inquire:

> There must also be evidence that, had a plaintiff inquired, he or she would have learned facts sufficient to support the pertinent elements of his or her claim.

Keller v. Armstrong World Indus., Inc., 107 P.3d 29, 39–40 (Or. Ct. App. 2005) (en banc) (*Keller I*), *opinion adhered to as modified on reconsideration*, 115 P.3d 247 (2005), *aff'd*, 147 P.3d 1154 (Or. 2006) (*Keller II*); *accord* AM. L. PROD. LIAB. 3D § 47:45. That is, a reasonable investigation, "if conducted, would have led to actual notice." *Diamond*, 680 A.2d at 772. It is the defendant's burden to provide "evidence of what plaintiff would have learned if he had inquired." *Keller II*, 147 P.3d at 1162–63 & n.12. If "a reasonable juror could find that plaintiff had engaged in a reasonable inquiry" and still did not learn of an actionable breach, the statute does not begin to run. *Id.* at 1162.

This Court has likewise held in the medical-malpractice context that a plaintiff who inquires and is "reassured" that there is "no permanent damage" is not on notice of an injury for the statute of limitations. *See Massey v. Litton*, 99 Nev. 723, 726, 669 P.2d 248, 251 (1983); *see also, e.g.*, *Momenian v. Davidson*, 878 F.3d 381, 390 (D.C. Cir. 2017) (plaintiffs' "allegations plausibly demonstrate reasonable diligence," as "a reasonable person would rely on an attorney's regular assurances that he was working on a case and feel no need to investigate further"). When a plaintiff confronts the defendant about a potential breach of contract and the defendant denies it, that can suffice for a reasonable inquiry; the plaintiff "cannot be faulted for believing that [the defendant] had made truthful statements." *Fred Ezra Co. v. Psychiatric Inst. of Washington, D.C.*, 687 A.2d 587, 592–93 (D.C. 1996); *accord Doe v. Medlantic Health Grp.*, 814 A.2d 939, 947–49 (D.C. 2003).

2. Upon Inquiry, the School Reassured the Executor It Was Not in Breach

Here, the executor's reasonable inquiry did not uncover a breach. In attempting to fulfill his father's will bequest, the executor visited the school, asked questions, and exercised reasonable diligence to ascertain whether the school was complying with the naming rights contract and

whether the school would carry out his father's specific bequest instructions. The school assured the executor that it was not breaching the naming rights contract (17 App. 4028; 17 App. 4010; 14 App. 3434), even sending the executor correspondence on discontinued letterhead reflecting his father's name. (28 App. 6999; 28 App. 7000; 29 App. 7001; 29 App. 7002; 16 App. 3772, 3777–80.) The school fraudulently concealed its contractual breaches.

The executor was not required to engage in heroic efforts, disbelieve school officials, or dig through corporate records to uncover the school's contractual breaches. Rather, he was required to exercise only "reasonable diligence," and whether he did so was a question of fact for the jury to determine. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440 ("Whether plaintiffs exercised reasonable diligence in discovering their causes of action 'is a question of fact to be determined by the jury or trial court after a full hearing.'" (quoting *Millspaugh v. Millspaugh*, 96 Nev. 446, 448, 611 P.2d 201, 203 (1980))); *see also Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 555 (4th Cir. 2019) ("Put simply, the fraudulent concealment doctrine requires *reasonable* diligence; it does not necessarily hold individual borrowers to the diligence standard of combing

court filings in potentially related cases").

Nor was the executor required to compare letterhead with other recipients of school correspondence to uncover the school's concealment of its contractual breaches. *See Metro. Water Dist. of S. California v. State*, 99 Nev. 506, 508–10, 665 P.2d 262, 264–65 (1983) (reversing dismissal on statute of limitations grounds where water district "had absolutely no reason to suspect that it was being singled out for the discriminatory tax assessment" and it would be "unfair" to "put the burden of investigation upon the Water District . . . to make gratuitous inquiries"). The fact question of what a reasonable inquiry revealed should have gone to the jury. *See Siragusa v. Brown*, 114 Nev. 1384, 1401, 971 P.2d 801, 812 (1998).

Summary judgment was particularly inappropriate given the school's false assurances to the executor that the school was honoring Mr. Schwartz's legacy and name when the school had, in fact, already changed its corporate name and letterhead. The school cannot assure the executor it was *not* breaching the naming rights agreement and then turn around and argue that the executor should have disbelieved its lies. *See NGA #2 Liab. Co. v. Rains*, 113 Nev. 1151, 1160, 946 P.2d

163, 169 (1997) (equitable estoppel). The school's conduct was so egregious that it was akin to fraudulent concealment, prohibiting the school from seeking refuge under the statute. *See Siragusa*, 114 Nev. at 1394 & n.7, 971 P.2d at 808 & n.7.

D. At a Minimum, the Estate Timely Sued for the Separate Breach of Removing Mr. Schwartz's Name Altogether

"[I]t would be illogical to begin the statute of limitations before the [claimant] even has a justiciable claim for breach of contract." *Grayson v. State Farm Mut. Auto. Ins.*, 114 Nev. 1379, 1381, 971 P.2d 798, 799 (1998); *see also Mullins v. Rockwell Internat. Corp.*, 936 P.2d 1246, 1251 (Cal. 1997). And where "independent acts cause independent injuries, each act is separately actionable, and the statute of limitations begins to run separately with each alleged breach." *Pritchard v. Regence Bluecross Blueshield of Oregon*, 201 P.3d 290, 292 (Or. App. 2009). So a later, material breach is separately actionable from an earlier one:

> [A]lthough, by delay for the statutory period, the injured party may lose its right to recover damages for the slight breach that has already occurred as a separate injury, if later the breach becomes material, or another and a material breach is committed, the statutory period in an action for the entire breach of the contract should be calculated from the time when the plaintiff was first able to sue for an entire breach of the

contract.

31 WILLISTON ON CONTRACTS § 79:16 (4th ed. updated July 2019). *See also Merrill v. DeMott*, 113 Nev. 1390, 1400, 951 P.2d 1040, 1046 (1997) (waiver of right to collect rent in some months "does not relinquish his right to collection of rent for any [other] period"); *see also Seaboard Sur. Co. v. United States ex rel. C. D. G., Inc.*, 355 F.2d 139, 144–45 (9th Cir. 1966) (waiver of breach from delayed delivery did not preclude action for later breach based on different behavior); *Fred Ezra*, 687 A.2d at 589 n.3 (rejecting argument "that if one claim arising out of a contract is barred by the statute of limitations, all must be barred"); *Nix v. Heald*, 203 P.2d 847, 850 (Cal. Ct. App. 1949) (similar).

Here, the removal of Mr. Schwartz's name from the middle school, from signage, from the school's letterhead, and ultimately from the elementary school were all separate breaches, separately actionable. As it is undisputed that the school removed Mr. Schwartz's name from the elementary school *after* this litigation was commenced (16 App. 3787), the statute of limitations cannot have run for *that* breach.

E. The Six-Year Statute of Limitation Applied because, Even if the Contract Was Oral, the Claim Was to Enforce an Obligation Founded Upon a Writing

1. A Contract "Founded Upon an Instrument in Writing" Does Not Have to Mean a Written Contract

The six-year statute of limitations in NRS 11.190(1)(b) "is not limited to actions upon 'contracts in writing,' but relates to any obligation or liability founded upon an instrument of writing." *El Ranco, Inc. v. New York Meat & Provision Co.*, 88 Nev. 111, 113, 493 P.2d 1318, 1320 (1972), *overruled on other grounds by State v. Am. Bankers Ins. Co.*, 105 Nev. 692, 696, 782 P.2d 1316, 1318 n.2 (1989). The provision is liberally construed: all that is required is a writing that "fairly imports" an obligation. *Id.* at 116, 493 P.2d at 1321-22. Thus, this Court found that where the buyer signed sale receipts showing an obligation to pay, "[s]uch obligation is founded upon written instruments within our statute." *Id.*, 88 Nev. at 115, 493 P.2d at 1321; *see also Webster v. Beazer Homes Holdings Corp.*, No. 02:11-CV-00784-LRH, 2013 WL 271448, at *4–5 (D. Nev. Jan. 23, 2013) (finding invoices constituted "instruments in writing" and action accordingly was not time-barred).

"This is a fair construction of the statute, consistent with its language and with the legislative purpose to allow a longer time to commence an action for which there is solid written proof." *El Ranco*, 88 Nev. at 116, 493 P.2d at 1322; *see also* 54 C.J.S. *Limitations of Actions* § 82 (updated Dec. 2019) ("If there is doubt as to which of two or more statutes of limitation applies to a particular action or proceeding, and it is necessary to resolve the doubt, it will generally be resolved in favor of the application of the statute containing the longest limitation.").[21]

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[21] Whether an obligation is founded upon an instrument in writing is distinct from whether a writing satisfies the statute of frauds. NRS 11.190(1)(b) can still apply even if material terms are orally agreed on. Regardless, the checks from Mr. Schwartz, the pledge list, and the bylaws satisfy the statute of frauds by showing (1) the parties to the contract (the bylaws use Mr. Schwartz's name), (2) that Mr. Schwartz promised to pay $500,000 to the school, and (3) that the board agreed to name the school after Mr. Schwartz in perpetuity. "Of course a 'note or memorandum' may satisfy the statute even though it consists of separate writings. Indeed we have heretofore permitted separate writings to be considered together, even though one of them was not signed by the party to be charged, and neither was a sufficient memorandum in itself." *Motor Lodge, Inc. v. Shatz*, 80 Nev. 114, 118–19, 390 P.2d 42, 44 (1964) (citation omitted) (holding two letters considered together satisfied the statute of frauds); *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1300, 904 P.2d 1024, 1027 (1995) (statute of frauds was satisfied where "credit application and guarantee, construed together, clearly refer to the same transaction, and the customer name on the credit application is the same customer referenced in the guarantee"); *Haspray v. Pasarelli*, 79 Nev. 203, 207–08, 380 P.2d 919, 921–22 (1963) (summary judgment reversed as unsigned handwritten memo combined with

2. The Naming-Rights Agreement Was "Founded Upon" the Bylaws

Even if certain terms were agreed upon orally, the naming rights agreement between Mr. Schwartz and the school was well documented, with numerous writings reflecting the obligation to name the school after Mr. Schwartz in perpetuity, including two sets of bylaws: "The name of the Corporation is the Milton I. Schwartz Hebrew Academy and will remain so in perpetuity." (27 App. 6629; 27 App. 6612 (similar); 28 App. 6883–84.)

The bylaws are the type of written instruments[22] to which the longer statute of limitations applies. *See Grismer v. Merger Mines Corp.*, 43 F. Supp. 990, 993 (E.D. Wash. 1942) (six-year statute of limitations applied where agreement was reflected in "the corporate minutes and entries made under [president's] direction and control"); *Elec. Contractors' Ass'n of City of Chicago v. A. S. Schulman Elec. Co.*,

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agreement missing certain terms could together be sufficient to satisfy the statute of frauds, even though they did not expressly reference one another).

[22] *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (an instrument embraces "bye-laws . . . any written or printed document that may have to be interpreted by the Courts'" (quoting Edward Beal, *Cardinal Rules of Legal Interpretation* 55 (A.E. Randall ed., 3d ed. 1924))).

63 N.E.2d 392, 397 (Ill. 1945); *Texas W. Ry. Co. v. Gentry*, 8 S.W. 98, 101 (Tex. 1888).[23] The Estate sought to enforce the naming obligation founded upon these written instruments.

Because the school acknowledged that claims falling within the six-year limitations period would not be barred by the statute of limitations (10 App. 2448–49), the district court erred in applying the four-year limitations period in NRS 11.190(2)(c).

In this case, there were written instruments showing both Mr. Schwartz's payment to the school (28 App. 6871) and the school's promise to perpetually name the school after Mr. Schwartz in return (27 App. 6607–20). This is more than is required to make the agreement fall within the longer statute of limitations. Usually there is a writing on only one side of the equation. *See El Ranco*, 88 Nev. at 115, 493 P.2d at 1321; *Hahn v. Strasser*, 484 F. App'x 155, 157 (9th Cir. 2012) ("Because consideration/performance by Hahn can be fairly implied from the

[23] *See also, e.g.*, *Gray v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local No. 51*, 447 F.2d 1118, 1121 (6th Cir. 1971) ("Gray's application for union membership and its acceptance, together with the union constitution and bylaws, constitute a written contract."); *Bankers' Tr. Co. v. Rood*, 211 Iowa 289, 233 N.W. 794, 801 (Iowa 1930) (applying longer statute to contractual claims recognized in the articles of incorporation and bylaws).

writing, the written letter agreement sufficiently describes the essential elements and should be subject to the six-year statute of limitations for written contracts.").

Given the written instruments reflecting the obligation to name the school after Mr. Schwartz in perpetuity, the district court erred in determining that the four-year statute of limitations applied rather than the six-year statute of limitations in NRS 11.190(1)(b).

F. The Estate Was Prejudiced by the Erroneous Grant of Summary Judgment

Summary judgment barred the Estate from arguing to the jury that Mr. Schwartz's original naming rights contract with the school was oral.

1. The Jury Should Have Been Instructed that Contracts Can Be Oral

In Nevada, a "contract may be oral, written, or partly oral and partly written. An oral, or partly oral and partly written contract is as valid and enforceable as a written contract." *Ringle v. Bruton*, 120 Nev. 82, 90, 86 P.3d 1032, 1037 n.10 (2004).

Yet with the dismissal of the oral-contract claim, the Estate could not seek a jury instruction on oral contracts or argue that Mr. Schwartz

had a valid oral contract. The school hammered the absence of a written contract. (*See, e.g.*, 18 App. 4421 ("They don't have a written agreement."); 18 App. 4422 ("If there was a written contract, we wouldn't be here."); 18 App. 4423 ("it was an oral contract . . . The person who brought this lawsuit alleging a contract told you under oath there is no written contract. It was oral.").)

Without such an instruction, the jury adopted the school's simplistic—and false—line that an enforceable contract requires a neat writing signed by both parties. *Contra Mountain Shadows of Incline v. Kopsho*, 92 Nev. 599, 600, 555 P.2d 841, 842 (1976) ("We reject appellant's contention that it cannot be bound by its employment contract because the contract was not reduced to a written agreement and signed by the parties."); *Micheletti v. Fugitt*, 61 Nev. 478, 134 P.2d 99, 104 (1943) (expectation of memorialization does not prevent oral contract from taking effect). This caused prejudicial error.

2. The Evidence of an Oral or Partially Oral Contract Was Overwhelming

Had the Estate been permitted to present its oral-contract claim, the jury would almost certainly have found a contract existed. (*See, e.g.*, 13 App. 3082 (Lenard Schwartzer testifying "it's a verbal understanding

that the board had with Milton Schwartz"); 13 App. 3086 ("There is no contract signed by both sides in this case, is my understanding, because otherwise we wouldn't be here."); 13 App. 3130–31 ("What it was, was an orally stated, mutual understanding between the members of the board and Milton Schwartz, that in exchange for his donation and raising additional funds and making sure the school got built, that the school would be named after him in perpetuity."); 15 App. 3507 (Jonathan Schwartz testifying, "it was an oral contract"); 17 App. 4127–28 (former board member Sam Ventura agreeing that "this agreement that we talked about, if it wasn't in writing, then it must have been some kind of a verbal agreement; would that be your understanding? A. Yes."); 14 App. 3254, 3363–64 (Dr. Sabbath testifying that the board accepted the money Mr. Schwartz gave in exchange for promising that the school would be named after Mr. Schwartz in perpetuity and that "may be it was in conversation that this promise was made").)[24]

The contract here was partly oral, partly written: Mr. Schwartz

[24] *See also* 16 App. 3949 (Rabbi Lorne Wyne explaining that naming rights arrangements in the Jewish community are often "done on good faith . . . a lot of it is a handshake").)

and the school initially agreed on the terms of the naming rights agreement orally. (14 App. 3254 ("That was the gentleman's agreement.").) But then important terms were documented in writing. (27 App. 6612; 28 App. 6883; 27 App. 6629.)

Mr. Schwartz offered to pay the school $500,000 (28 App. 6871) in exchange for the school's promise to name the school the Milton I. Schwartz Hebrew Academy in perpetuity. (13 App. 3156–57, 3161; 8 App. 1857; 28 App. 6880; 12 App. 2990–91; 13 App. 3071–72.) The school accepted. (14 App. 3353; 27 App. 6607–20; 28 App. 7004; 28 App. 6876; 13 App. 3012.) *See Chautauqua Cty. Bank of Jamestown,* 159 N.E. 173, 176 (N.Y. 1927) ("The moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty" to maintain the memorial fund named after the donor). The naming-rights condition of Mr. Schwartz's donation (14 App. 3353) constituted consideration. *See Dunaway v. First Presbyterian Church of Wickenburg*, 351, 442 P.2d 93, 95 (Ariz. 1968) ("[W]here the gift has passed into the hands of the donee, there is an implied promise agreeing to the purposes for which it is offered from the acceptance of the donation and

there arises a bilateral contract supported by a valuable consideration."); *see also Allegheny Coll.,* 159 N.E. at 176 (concluding there was consideration for charitable subscription where college impliedly promised to perpetuate the name of the donor in exchange for the donation). And the school *was* named after Mr. Schwartz for many years, evidencing a meeting of the minds. (27 App. 6612; 13 App. 3005; 28 App. 6883; 14 App. 3421.) *See Moore v. Prindle,* 80 Nev. 369, 372, 394 P.2d 352, 354 (1964) (looking to the parties' conduct).[25]

3. The Bylaws Evidenced a Partially Written Contract

The bylaws reflecting the agreement were signed by both Mr. Schwartz and the other board members. (27 App. 6612, 6629.)

The school indoctrinated the jury with the false notion that "[b]ylaws are not a contract." (*E.g.*, 18 App. 4422, 4442 ("Bylaws are not

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[25] *See also Flyge v. Flynn*, 63 Nev. 201, 240, 166 P.2d 539, 556 (1946) (quotation marks omitted):

> Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled them to resort to law and one of them seeks an interpretation at variance with their practical interpretation of its provisions.

a contract.").) In both for-profit and non-profit corporations, "the articles of incorporation and bylaws create a contractual relationship between the parties." *Oberbillig v. W. Grand Towers Condo. Ass'n*, 807 N.W.2d 143, 149 (Iowa 2011) (quotation marks omitted). "[B]ylaws are contracts[.]" *Airgas, Inc. v. Air Prod. & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).[26] With the right to elect directors, Mr. Schwartz was a member of the school corporation when the 1990 bylaws were effectuated.[27] They created a binding agreement. NRS 82.216(3). The bylaws

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[26] *See also Hill Int'l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 38 (Del. 2015) ("The bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers and stockholders . . . bylaws are contracts[.]"); *Casady v. Modern Metal Spinning & Mfg. Co.*, 10 Cal. Rptr. 790, 793 (Cal. App. 1961) ("The by-laws of a corporation constitute a contract between the shareholders and the corporation; the by-laws are also a contract among the shareholders[.]") (citation omitted).

[27] Mr. Schwartz was both a member and a director of the Milton I. Schwartz Hebrew Academy. *See* NRS 82.026; NRS 82.031. But even if he were considered a third party:

> When a bylaw is intended to operate as to certain third persons and is communicated to them for the purpose of inducing action by them in reliance on it, the corporation cannot defeat a claim . . . by asserting that bylaws are rules for the internal government of the corporation and its shareholders only and that third persons cannot claim rights under it.

8 FLETCHER CYC. CORP. § 4197 (updated Sept. 2019). The bylaws were communicated to Mr. Schwartz with the express intention of reassuring

were both a contract and a conveyance of naming rights; they were signed by the board members and were binding on the corporation.

The school tried to convince the jury bylaws are not a contract because "[t]hey say right on them they can be amended." (18 App. 4442.) But "[t]he general rule established long ago is that a corporation is prohibited from amending its by-laws so as to impair a member's contractual rights." *Surf Club v. Long*, 325 So. 2d 66, 69 (Fla. Dist. Ct. App. 1975) (holding that attempted amendment "was invalid and void"). Thus, where an amendment to bylaws violates the original bylaws and deprives a member of an existing right, the amendment is void. *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley*, 857 P.2d 611, 615 (Idaho 1993); *First Fla. Bank, N.A. v. Fin. Transaction Sys., Inc.*, 522 So. 2d 891, 892 (Fla. Dist. Ct. App. 1988) ("It is firmly established that a corporation is prohibited from amending its bylaws so as to impair a member's contractual right.").[28] Naming the school after the Adelsons violated the

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him that the school would be named after forever – so he would continue to make donations.

[28] *See also Kemmer v. Newman*, 387 P.3d 131, 134 (Id. 2016) ("[a]ctions taken in violation of a corporation's bylaws are void"); 8 Fletcher Cyc. Corp. § 4197 (updated Sept. 2019) ("actions taken in violation of a corporation's bylaws are void. The corporation, and its directors and officers,

bylaws and was a void action.

The school also tried to convince the jury that the bylaws were not *the* contract because the bylaws did not contain all the material terms of the naming-rights agreement. It is true that the bylaws specify only that the name of the corporation must remain the Milton I. Schwartz Hebrew Academy in perpetuity.[29] But that is precisely why the Estate was prejudiced by not being able to argue a partially oral and partially written contract to the jury. Even if not all material terms were included in the bylaws (such as that appropriate signage identifying the school must bear Mr. Schwartz's name), the contract between Mr. Schwartz and the school was at least partially written.

The district court's erroneous grant of summary judgment prejudicially precluded the Estate from arguing that the contract was partly oral and partly written.

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are bound by and must comply with them.") (footnote omitted).

[29] In some ways, the school's argument proves too much. Even if the only contractual requirement was to name the corporation after Mr. Schwartz in perpetuity, (a) the school breached that provision, and (b) the executor did not find out about the corporation's name change until after this litigation was filed. (14 App. 3428.) Thus, the breach of contract claim – whether oral or written – was timely.

III.

THE DISTRICT COURT ERRED IN REFUSING A JURY INSTRUCTION ON CONTRACT MODIFICATION

"It is well established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence." *Johnson v. Egtedar*, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996). "[A]nd it is error to refuse such an instruction when the law applies to the facts of the case." *Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d 765, 778 (2010) (quotation marks and citation omitted).

The district court refused to give the Estate's proposed jury instruction on contract modification "on the grounds that it's not relevant." (18 App. 4346.) Not so.

The school emphasized that the bylaws were "the only document that has any reference to in perpetuity" (18 App. 4422)[30] and that the bylaws did not did not spell out all the terms of the agreement because they specify that only the corporation has to be named after Mr. Schwartz. This made the proposed instruction on modification essential

[30] That is incorrect: the 1990 board minutes discuss naming the corporation after Mr. Schwartz "in perpetuity" (29 App. 7004), and Dr. Sabbath's letter used "always" to "reflect[] the 'in perpetuity' piece." (14 App. 3306.)

because both the Sabbath letter and the parties' course of performance modified the original agreement and confirmed the additional terms absent from the bylaws, that the school's signage and letterhead had to reflect Mr. Schwartz's name, as well.

Oral agreements often commence informally but are clarified by subsequent writings or the parties' performance. "Parties may mutually consent to enter into a valid agreement to modify a former contract," and "consent to a modification may be implied from conduct consistent with an asserted modification." *Clark Cty. Sports Enterprises, Inc. v. City of Las Vegas*, 96 Nev. 167, 172, 606 P.2d 171, 175 (1980). The school acknowledged in writing its intention to refer to the school as the "Milton I. Schwartz Hebrew Academy" and to have signage and letterhead reflecting this name (28 App. 6883), and the school in fact performed those obligations for over ten years. (14 App. 3421.) A jury could find that the parties' contract, even if it did not originally contain those terms, was thus modified.

The school wrongly argued that "you can't find a modification or alteration of an oral contract." (24 App. 5990.) The district court evi-

dently believed this and compounded the prejudicial effect of erroneously granting summary judgment on the Estate's oral contract claim, using this as the reason to deny the Estate's motion for post-trial relief based on the refused jury instruction. (*Id.* at 5991 ("starting from the oral contract, the statute has run on that, and so from that point on then I just—the rest of this sequentially falls into place").)

But oral contracts *can* be modified. Nevada law does not restrict modification to written contracts, but rather provides that "[p]arties to an existing contract may subsequently enter into a valid agreement to extinguish, rescind, or modify the former contract." *Holland v. Crummer Corp.*, 78 Nev. 1, 7, 368 P.2d 63, 66 (1962); *see also Carlton v. Manuel*, 64 Nev. 570, 573, 588–89, 187 P.2d 558, 560, 567 (1947) (holding parties' course of conduct after certain date modified higher discount rate alleged to have been "established by oral agreement").

Nevada law is in accord with other jurisdictions that oral contracts can be modified. *See, e.g.*, CAL. CIV. CODE § 1697 ("A contract not in writing may be modified in any respect by consent of the parties, in writing, without a new consideration"); *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381–82 (Fla. 2004) (oral contract can be modified, including

through "the parties' subsequent conduct"); *Farmers Elevator Co. of Reserve v. Anderson*, 552 P.2d 63, 66 (Mont. 1976) (parties' "course of performance" modified "the original oral contract"); *In re Empire Pac. Indus., Inc.*, 71 B.R. 500, 504 (Bankr. D. Or. 1987) ("The Court finds that an oral contract was made . . . , but that contract was modified by a subsequent agreement").

The district court's refusal to instruct the jury on contract modification was prejudicial. The jury did not understand that even if certain details of the deal between Mr. Schwartz and the school were not initially reduced to writing, the contract could be modified through subsequent writings such as the Sabbath letter and through the parties' course of conduct.

IV.

THE DISTRICT COURT ERRED IN REFUSING A JURY INSTRUCTION ON THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The district court also refused to give the Estate's proposed instruction on the implied covenant of good faith and fair dealing, reasoning that there could be no such claim here because

> [i]t's a very specific business tort that doesn't really ap-

> ply to the facts that we have here, . . . where it's agreement and/or the intent of Mr. Schwartz under that when he wrote his will.

(18 App. 4346.) This was error. The implied covenant of good faith and fair dealing is not a unique "business" claim. "It is well settled in Nevada that *every* contract imposes upon the contracting parties the duty of good faith and fair dealing." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 989, 103 P.3d 8, 19 (2004) (quotation marks and citation omitted) (emphasis added).

A. The Estate Adequately Pleaded Breach of the Implied Covenant by Pleading Breach of Contract

Where the "pleadings identify [(1)] the contract which is the basis for [plaintiff's] implied covenant claim," (2) the defendant's conduct claimed to constitute the breach of the covenant, and (3) resulting damages, this is sufficient to "present a claim for breach of the implied covenant of good faith and fair dealing." *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1278–79, 886 P.2d 454, 457 (1994).

Here, the Estate did not need to raise breach of the implied covenant of good faith as an independent tort claim. Rather, the Estate pleaded a that the school "has breached its agreements and promises"

and failed to comply with the promises memorialized in the Sabbath letter (28 App. 6808), which suffices to raise a theory of *contractual* liability under the implied covenant. *See Hilton Hotels Corp. v. Butch Lewis Prods., Inc.,* 107 Nev. 226, 233–34, 808 P.2d 919, 923 & n.5 (1991) (*Hilton I*) (allegation that defendant "breached their obligations to [plaintiff] under the . . . agreement" sufficient to raise implied-covenant theory). It is not a separate cause of action. *Id.*[31] Indeed, the Estate's damages for breach of the implied covenant would be the same as its contract damages. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1047, 862 P.2d 1207, 1209 (1993) (*Hilton II*) ("A determination by the jury that the implied covenant was breached will give rise to an award of contract damages."). Thus, the Estate's breach of contract claim sufficiently raised and included breach of the implied covenant.

[31] *See also Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 1325 (S.D. Fla. 2015) ("good faith is part of a contract claim and does not stand alone") (quoting *Lakota Loc. Sch. Dist. Bd. of Edn. v. Brickner,* 671 N.E.2d 578, 584 (Ohio Ct. App. 1996)).

B. The District Court's Refusal to Instruct the Jury on Breach of the Implied Covenant Was Prejudicial

"Where one party to a contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." *Morris*, 110 Nev. at 1278, 886 P.2d at 457 (quotation marks omitted); *see also State Dep't of Transportation v. Eighth Judicial Dist. Court*, 133 Nev. 549, 555, 402 P.3d 677, 683 (2017) ("Even if a defendant does not breach the express terms of a contract, a plaintiff may still be able to recover damages for breach of the implied covenant of good faith and fair dealing.") (quotation marks omitted).

Here, had it been instructed, the jury would have found a breach of the implied covenant of good faith. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1007, 194 P.3d 1214, 1220 (2008). The implied covenant "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007). So even if the 1990 bylaws specified only that the corporation had to bear Mr. Schwartz's name, the school violated the spirit and intent of the agreement by taking Mr. Schwartz's name off the school's letterhead and signage. Mr. Schwartz's perpetual naming

rights were not solely for the technical name of the corporation or for his name to appear on a single building (18 App. 4453), while the school publicly referred to itself as the Adelson Campus. *Cf. Allegheny Coll.*, 159 N.E. at 175 (where donor gave money with the condition that the gift "should 'be known as the Mary Yates Johnston Memorial Fund,'" the "purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial").

The district court prejudicially deprived the Estate of its ability to prove a breach of the implied covenant.

V.

THE DISTRICT COURT ERRED IN DETERMINING THAT IT COULD NOT RESCIND MR. SCHWARTZ'S LIFETIME GIFTS ABSENT AN ENFORCEABLE NAMING RIGHTS AGREEMENT

Following the jury trial, the district court decided the Estate's equitable claims and held that "absent an enforceable naming rights agreement that applies to each of the inter vivos gifts, this Court cannot rescind Milton I. Schwartz's lifetime gifts." (24 App. 5995.) This was legal error. The Estate was entitled to the return of Mr. Schwartz's lifetime gifts based on two separate but interrelated grounds: (1) Mr.

Schwartz's lifetime gifts were conditioned on the school bearing his name in perpetuity; and (2) Mr. Schwartz's belief the school would be named after him forever was an invalidating mistake. Neither theory depends on the existence of an enforceable naming rights agreement.

A. Conditional Gift: Mr. Schwartz's Lifetime Donations Were Conditioned on the School Bearing His Name in Perpetuity

"A conditional gift is one that is conditioned on a donee's performance of an act; and if the condition is not fulfilled then the donor may recover the gift." *Stock*, 2002 WL 555944, at *5. "The condition may be stated in specific words or it may be inferred from the circumstances." RESTATEMENT (FIRST) OF RESTITUTION § 58 cmt. b (1937); *see also Ver Brycke v. Ver Brycke*, 843 A.2d 758, 771 (Md. 2004) (parents' gift of $200,000 to help son and daughter-in-law buy adjacent house was conditioned on their living in that house despite lack of writing); *Campbell v. Robinson*, 726 S.E.2d 221, 225 (S.C. App. 2012) ("As an engagement ring, the gift is impliedly conditioned upon the marriage taking place.").

"[I]rrevocability of a gift does not mean that a gift cannot be subjected to conditions that will result in forfeiture if not complied with." Eason, *supra*, at 463 n.122. In that sense, a conditional gift is not truly

irrevocable. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 603, 331 P.3d 881, 885–86 (2014) ("*Unless conditional*, a gift becomes irrevocable once transferred to and accepted by the donee.") (emphasis added).

Contrary to the district court's ruling, one need not have an enforceable contract to make a conditional gift. *See, e.g.*, *Special Visit Ministry, Inc. v. Murphy*, 2006-Ohio-3571, ¶ 20 (Ohio Ct. App. 2006) ("the promise of transfer was a conditional gift and not a contract"); *In re Wilson*, 210 B.R. 544, 546 (Bankr. N.D. Ohio 1997) ("recovery of conditional gifts is based on an equitable rather than a contractual theory of recovery").[32]

Here, Mr. Schwartz's donations to the school were conditioned on the school's bearing his name. Rescinding those lifetime gifts does not hinge on an enforceable naming rights contract. Rather, as the jury found, the evidence overwhelmingly demonstrated that Mr. Schwartz

[32] By way of further example, many jurisdictions have ruled that engagement rings are conditional gifts despite the lack of any contract that would mandate return of the ring. *E.g.*, *Heiman v. Parrish*, 942 P.2d 631, 634 (Kan. 1997) (collecting cases); *Fierro v. Hoel*, 465 N.W.2d 669, 671 (Iowa Ct. App. 1990) ("there is no need to establish an express condition that marriage will ensue").

believed that he had an enforceable naming rights agreement; his lifetime gifts to the school were conditioned on the school's being named after him in perpetuity.

Mr. Schwartz began donating to the school when it agreed to perpetual naming rights. (14 App. 3254–56; 13 App. 3184–88; 28 App. 6860.) And affirming the condition, Mr. Schwartz stopped making donations when the school temporarily removed his name, notwithstanding the school's substantial debts. (13 App. 3169; 14 App. 3385–86.) Instead, Mr. Schwartz became involved with another Jewish school. (17 App. 4102–03.) He did not resume donations until the 1996 Sabbath letter recommitted the school to use Mr. Schwartz's name. (14 App. 3307, 3394, 13 App. 3184–88; 28 App. 6860.)

The school argued that Mr. Schwartz "never demanded the School return the gifts he made to the School before 1993, even though he was well aware the School changed the name of the corporation back to the Hebrew Academy" and this was "irrefutable proof that Milton Schwartz did not intend his gifts to be conditional." (24 App. 5825.) The school ignores (1) that Mr. Schwartz was still within the statute of limitations

to sue for the return of his donations when the school rectified the problem by restoring his name; and (2) that Mr. Schwartz did sue the school to get back on the board, a position from which he could force compliance with the naming agreement.

Moreover, it is "irrelevant that [Mr. Schwartz] did not undertake to undo the gifts during his lifetime," as nothing "requires that the person take an affirmative action while alive before a gift will be considered conditional." *Estate of Sacchetti v. Sacchetti*, 128 A.3d 273, 288 (Pa. Super. Ct. 2015) (finding gift to purported wife conditional even though donor did not sue for return of the gifts while he was still alive after discovering that his marriage was invalid).

If the recipient disobeys the conditions, the donor can recover the gift. *Tenn. Div. of United Daughters*, 174 S.W.3d at 114 (university had to return, at present value, 1933 donation for naming rights that the school violated); *see also* Eason, *supra*, at 463 n.56 ("Forfeiture is the primary remedy for noncompliance with a naming condition."). Here, because school violated the naming condition, it had to return Mr. Schwartz's lifetime gifts at their present-day value.

B. Invalidating Mistake: Mr. Schwartz Would Not Have Made His Lifetime Donations But for His Belief That the School Bore His Name in Perpetuity

Nevada has "join[ed] the majority of jurisdictions in recognizing that a donor's unilateral mistake in executing a donative transfer may allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence." *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at, 607, 331 P.3d at 888. "An invalidating mistake occurs when 'but for the mistake the transaction in question would not have taken place.'" *Id.* at 605, 331 P.3d at 887 (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 5(2)(a) (2011)).

The Estate proved Mr. Schwartz's intent by clear and convincing evidence. If Mr. Schwartz did not in fact have an enforceable agreement with the school that it would bear his name in perpetuity, at a minimum Mr. Schwartz believed he did. He would not have donated to the school but for his understanding that the school would always bear his name.

The jury correctly found that "the reason Milton I. Schwartz made the Bequest was based on his believe that he had a naming rights

agreement with the School which was in perpetuity." (19 App. 4515, Question 9.) So, too, with lifetime gifts: The only conclusion consistent with this verdict is that Mr. Schwartz made his donations based on the belief that it was his school and would always be named after him. (13 App. 3169; 14 App. 3385–86; 28 App. 6877.)

"Money paid under the impression of the truth of a fact which is untrue may be recovered back[.]" *Estergard, Eberhardt & Ackerman, Inc. v. Carragher*, 434 N.E.2d 1185, 1188 (Ill. Ct. 1982). "Rescission is an appropriate remedy to address an invalidating mistake." *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 606, 331 P.3d at 887.

There was an enforceable naming rights agreement, and the Estate should have been awarded specific performance or contract damages. But absent a contract, the school should return Mr. Schwartz's lifetime donations at present value because he would not have made them but for his belief that the school would always bear his name.

CONCLUSION

This Court should reverse the grant of summary judgment, vacate the judgment on the Estate's contract claims, and remand for a new trial. Alternatively, this Court should order the school to pay the Estate the present-day value of Mr. Schwartz's lifetime donations.

DATED this 29th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

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3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 29th day of January, 2020.

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