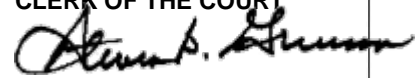


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9 *Attorney for Appellants*

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CLERK OF THE COURT



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Jun 01 2020 09:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and NICOLE
10 FOLINO, an individual,

11 Plaintiff,

12 v.

13 TODD SWANSON, an individual; TODD
14 SWANSON, Trustee of the SHIRAZ TRUST;
15 SHIRAZ TRUST, a Trust of unknown origin;
16 LYONS DEVELOPMENT, LLC, a Nevada
17 limited liability company; DOES I through X;
18 and ROES I through X,

19 Defendants.

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

NOTICE OF APPEAL

20 **NOTICE IS HEREBY GIVEN** that Plaintiffs Joseph Folino and Nicole Folino, by and
21 through their attorney of record, Rusty Graf, Esq. of the law firm Black & LoBello, appeals to
22 the Supreme Court of the State of Nevada from the Decision and Order granting Defendants'

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Motion to Dismiss entered in the above-captioned matter on May 13, 2020.

2 Dated this 26th day of May 2020.

3
4 **BLACK & LOBELLO**

5 
6 RUSTY GRAF, ESQ.
7 Nevada Bar No. 6322
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 26th day of May 2020, I caused the above and foregoing document entitled **NOTICE OF APPEAL** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.

Nevada Bar No. 7961

Jay T. Hopkins, Esq.

Nevada Bar No. 3223

Christopher M. Young, PC

2640 Professional Court, #200

Las Vegas, Nevada 89128

Attorneys for Defendants

Jeffrey L. Galliher, Esq.

Galliher Legal, P.C.

Nevada Bar No. 8078

1850 E. Sahara Ave., #107

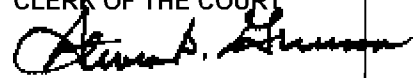
Las Vegas, NV 89104

Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.



An Employee of Black & LoBello



1 **ASTA**

2 J. RUSTY GRAF, ESQ.

3 Nevada Bar No. 6322

4 **BLACK & LOBELLO**

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(702) 869-2669 (fax)

Attorney for Appellants

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and
10 NICOLE FOLINO, an individual,

11 Plaintiffs,

12 v.

13 TODD SWANSON, an individual; TODD
14 SWANSON, Trustee of the SHIRAZ
15 TRUST; SHIRAZ TRUST, a Trust of
16 unknown origin; LYONS DEVELOPMENT,
17 LLC, a Nevada limited liability company;
18 DOES I through X; and ROES I through X,

19 Defendants.

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

CASE APPEAL STATEMENT

20 Plaintiffs Joseph Folino and Kelly Folino ("Plaintiffs"), by and through their attorney of
21 record, Rusty Graf, Esq. of the law firm Black & LoBello, hereby submits their Case Appeal
22 Statement pursuant to Nevada Rule of Appellate Procedure 3(f) as follows:

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

CASE APPEAL STATEMENT

(A) The district court case number and caption showing the names of all parties to the proceedings below:

The district court case number is A-18-782494-C and caption is correctly stated above. The parties to the proceedings below are Plaintiffs and Defendants Todd Swanson, an individual, Todd Swanson, as Trustee of the Shiraz Trust, and Lyons Development LLC. ("Defendants").

(B) The name of the judge who entered the order or judgment being appealed:

The Honorable Jim Crockett, Department XXIV of the Eighth Judicial District Court of the State of Nevada issued all Orders referenced above.

(C) The name of each appellant and the name and address of counsel for each appellant:

Plaintiff/Appellant:

Nicole Folino

Counsel for the Plaintiff:

Rusty Graf, Esq.
BLACK & LOBELLO
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

Plaintiff/Appellant:

Joseph Folino

Counsel for the Plaintiff:

Rusty Graf, Esq.
BLACK & LOBELLO
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

(D) The name of each respondent and the name and address of appellate counsel, if known, for each respondent, but if the name of a respondent's appellate counsel is not known, then the name and address of that respondent's trial counsel:

Defendant/Respondent:

Todd Swanson

1 Counsel for the Respondent:

2 Christopher M. Young, Esq.

3 Nevada Bar No. 7961

4 Jay T. Hopkins, Esq.

5 Nevada Bar No. 3223

6 **Christopher M. Young, PC**

7 2640 Professional Court, #200

8 Las Vegas, Nevada 89128

9 Jeffrey L. Galliher, Esq.

10 **Galliher Legal, P.C.**

11 Nevada Bar No. 8078

12 1850 E. Sahara Ave., #107

13 Las Vegas, NV 89104

14 Attorneys for Respondent

15 Defendant/Respondent:

16 Todd Swanson as Trustee of the Shiraz Trust

17 Counsel for the Respondent:

18 Christopher M. Young, Esq.

19 Nevada Bar No. 7961

20 Jay T. Hopkins, Esq.

21 Nevada Bar No. 3223

22 **Christopher M. Young, PC**

23 2640 Professional Court, #200

24 Las Vegas, Nevada 89128

25 Jeffrey L. Galliher, Esq.

26 **Galliher Legal, P.C.**

27 Nevada Bar No. 8078

28 1850 E. Sahara Ave., #107

Las Vegas, NV 89104

Attorneys for Respondent

29 Defendant/Respondent:

30 Lyons Development, LLC.

31 Counsel for the Respondent:

32 Christopher M. Young, Esq.

33 Nevada Bar No. 7961

34 Jay T. Hopkins, Esq.

35 Nevada Bar No. 3223

36 **Christopher M. Young, PC**

37 2640 Professional Court, #200

38 Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.

Gallihier Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondent

(E) Whether an attorney identified in response to subparagraph (D) is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42, including a copy of any district court order granting that permission:

N/A

(F) Whether the appellant was represented by appointed counsel in the district court, and whether the appellant is represented by appointed counsel on appeal:

N/A

(G) Whether the district court granted the appellant leave to proceed in forma pauperis, and if so, the date of the district court's order granting that leave:

N/A

(H) The date that the proceedings commenced in the district court:

Plaintiffs initiated the proceedings when they filed their Complaint on October 19, 2018.

(I) A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is a tort action related to the purchase and sale of a home located at 42 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from the discovery of systemic plumbing issues after the close of the sale, and the failure of the Defendants to disclose their knowledge of water loss occurrences on the Residential Purchase Agreement. The Plaintiffs' Second Amended Complaint had two causes of action, Violation of NRS 113.100 et seq. and Fraud/Intentional Misrepresentation. This appeal concerns errors by the trial court in the May 11, 2020 Order granting Defendants' Motion to Dismiss and the Findings of Fact and Conclusions of Law contained therein.

1 The issues on appeal, in short, include (1) the trial court's application of the holding of
2 *Nelson v. Heer* to this dispute;¹ (2) the Finding of Fact that Plaintiffs' action was premised on the
3 Defendants' failure to disclose a specific leak which occurred on February 16, 2017; (3) the
4 Conclusion of Law that "Plaintiffs lawsuit is predicated on their allegations that the Defendants
5 failed to disclose a February 16, 2017 water leak in the Uponor plumbing system";² (4) the
6 Finding of Fact that only the February water loss was relevant, and all other water losses
7 complained of by the Plaintiffs "are unrelated to their claims and, further, do not materially affect
8 the value of the property"; and (5) the Conclusion of Law that Plaintiffs' Fraud claim fails as a
9 matter of law because the "Second Amended Complaint alleges one wrong: Defendants' failure
10 to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect.
11 The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim."

12 The application of *Nelson v. Heer* to this case was improper for two reasons. First, because
13 the holding of *Nelson v. Heer* regards whether conducting a repair removes the general duty to
14 disclose the existence of a material issue, while here, Plaintiffs' argued that even if the duty to
15 disclose is removed by repair it is still fraud and/or concealment to respond incorrectly to a direct
16 inquiry (stating "no" in response to a question asking if any previous incidents of water loss **had**
17 **ever occurred**). These are not the same issue. Second, because even if the holding of *Nelson v.*
18 *Heer* did allow Defendants to state that no previous water losses had ever occurred (due to repair),
19 Plaintiffs provided evidence of other unrepaired and undisclosed water losses which were not
20 considered by the trial court.

21 The other issues on appeal all involve Findings of Fact and Conclusions of Law relating
22 to the incorrect statement, and subsequent analysis, of the scope and content of Plaintiffs' claims.
23 The May 13, 2020 Notice of Entry of Order and Order make it clear that granting the Motion to
24

25 ¹ In the May 11, 2020 Order granting the Motion to Dismiss, the trial court directly stated that it was relying upon
26 the holding of *Nelson v. Heer*, and asserted that "repairing damage negates a seller's duty to disclose damage
because repaired damage "no longer constitute[s] a condition that materially lessen[s] the value of the property.""

27 ² Additional Findings of Fact in the May 11, 2020 Order state that (1) previous leaks in other areas of the house
28 were not related to Plaintiffs' Claims; and (2) that another separate water loss in a basement bathroom was not
related to Plaintiffs' Claims, making it clear that the trial court exclusively considered the February and November
leaks in granting the Motion to Dismiss.

1 Dismiss was based entirely upon the incorrect assessment that “Plaintiffs have failed to present
2 evidence to establish the one fact that could possibly make their claims viable: that the February
3 2017 leak was not repaired.” The problem with this assessment is that it has no basis in the
4 substance and allegations actually contained in Plaintiffs’ Second Amended Complaint.

5 Plaintiffs’ initial Complaint and First Amended Complaint were focused on the February
6 2017 leak, but these Complaints were not the subject of the Motion to Dismiss. Plaintiffs’ Second
7 Amended Complaint asserts in pertinent part that (1) the Seller’s Real Property Disclosure did
8 not notify Plaintiffs’ of “any water event”; (2) that other water losses occurred which either
9 required disclosure themselves or made Defendants aware of “systemic defects” in the plumbing
10 system; and (3) that Defendants acted with intent to deceive when they failed to notify Plaintiffs
11 of the prior water losses (which include at least one water loss that Defendants did not even claim
12 was repaired and, therefore, cannot logically be covered by the *Nelson v. Heer* removal of duty
13 to disclose).

14 It was improper of the trial court to determine that it would only analyze Plaintiffs’ claims
15 in relation to the February 2017 leak, when this clearly did not align with the actual contents of
16 Plaintiffs’ Second Amended Complaint. Thus, the trial court’s subsequent May 13, 2020 Notice
17 of Entry of Order and Order is also improper, as it was not based upon the pleading that was
18 actually the subject of the Motion to Dismiss (the Second Amended Complaint) and instead
19 analyzed the Motion to Dismiss in relation to the content of the initial Complaint and First
20 Amended Complaint. These disparities, among others, necessitate appellate relief.

21 **(J) Whether the case has previously been the subject of an appeal to or original writ**
22 **proceeding in the Supreme Court or Court of Appeals and, if so, the caption and**
23 **docket number of the prior proceeding:**

24 N/A

25 **(K) Whether the appeal involves child custody or visitation:**

26 N/A

27 ///

28 ///

1 **(L) Whether the appeal involves the possibility of settlement:**

2 Plaintiffs do not believe that there is a possibility of settlement with Defendants.

3 Dated this 26 day of May, 2020.

BLACK & LOBELLO

4
5
6 RUSTY GRAF, ESQ.
7 Nevada Bar No. 6322
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13 *Attorney for Appellants*
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Black & LoBello and that on
3 the 26 day of May 2020, I caused the above and foregoing document entitled **CASE**
4 **APPEAL STATEMENT** to be served as follows:

- 5 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
7 ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's
8 electronic filing/service system;
9 ☐ pursuant to EDCR 7.26, to be sent via facsimile;
10 ☐ hand delivered.

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated
12 below:

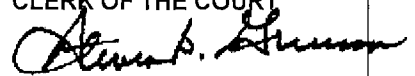
13 Christopher M. Young, Esq.
14 Nevada Bar No. 7961
15 Jay T. Hopkins, Esq.
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17 Christopher M. Young, PC
18 2640 Professional Court, #200
19 Las Vegas, Nevada 89128
20 Attorneys for Defendants

21 Jeffrey L. Galliher, Esq.
22 Galliher Legal, P.C.
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24 1850 E. Sahara Ave., #107
25 Las Vegas, NV 89104
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jgalliher@galliherlawfirm.com

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSEPH FOLINO, an individual and NICOLE
FOLINO, an individual,

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST, a Trust of unknown origin;
LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 11th
day of May, 2020.

1 A copy of said Order is attached hereto.

2
3 Dated this 13th day of May 2020.

4
5
6 GALLIHER LEGAL P.C.

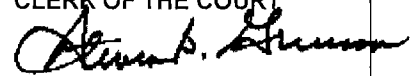
7 /s/ Jeffrey L. Galliher
8 Jeffrey Galliher, Esq.
9 Nevada Bar No. 8078
10 1850 E. Sahara Ave., Suite 107
11 Las Vegas, NV 89104

CERTIFICATE OF E-SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 13th of May I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

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rgraf@blacklobello.law
swilson@blacklobello.law

/s/Kimalee Goldstein
An Employee of GALLIHER LEGAL, PC



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Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH FOLINO, an individual and NICOLE
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST, a Trust of unknown origin;
LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

I.

PREAMBLE

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment ¹
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.¹ Rusty J.
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.
3 appeared on behalf of the Defendants.²

4 This Court considered the parties' motions and supplements, together with the exhibits and
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact
8 and Conclusions of Law under the standards set forth below.

10 II.

11 PROCEDURAL HISTORY

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak
16 in the plumbing system.

18 *Plaintiffs' Complaint*

19 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for
20 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a
21 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)
22 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010
23

25 ¹ While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that
26 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the
summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

27 ² The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the
28 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;
and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").

1 et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known
2 Defects); (5) Civil RICO; and (6) Respondeat Superior.³

3 ***Defendants' February 4, 2019 Motion to Dismiss***

4 On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to
5 NRCPP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the
6 Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading
7 deficiencies.
8

9 ***Plaintiffs' First Amended Complaint***

10 On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same
11 claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing
12 the Corporate Veil/Alter Ego.
13

14 ***Defendants' May 20, 2019 Motion to Dismiss***

15 On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint,
16 seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing
17 on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs' Negligent
18 Misrepresentation, Deceptive Trade Practices, Civil RICO; Respondeat Superior and Piercing the
19 Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims
20 survived and ordered the Plaintiffs to file a Second Amended Complaint.
21

22 ***Plaintiffs' Second Amended Complaint***

23 On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging
24 concealment in violation of NRS 113 *et seq.* and fraud/intentional misrepresentation. The Plaintiffs
25

26
27 ³ The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint
28 which, under NRCPP 12(b)(5)'s standards, are incorporated into the pleadings. *Brelant v. Preferred Equities Corp.*, 109
Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1 also sought punitive damages.

2 ***Defendants' September 24, 2019 Motion to Dismiss***

3 Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants
4 provided evidence in the form of an affidavit from the licensed plumbing company that the February
5 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113
6 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).
7

8 In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence
9 that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the
10 motion.

11 At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the
12 Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to
13 permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery
14 and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact.
15 Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.
16

17 ***The Plaintiffs' Discovery***

18 Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive
19 discovery, which included serving numerous subpoenas for documents, serving interrogatories,
20 requests for production of documents and requests for admissions. Plaintiffs took the depositions of
21 six witnesses.⁴ The Defendants produced nearly 1000 pages of documents as supplemental disclosures
22 and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also
23 produced over 5000 pages of documents.
24

25
26
27 ⁴ The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two
28 separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and
Kelly Contenda.

1 On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the
2 Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party
3 attached voluminous exhibits.

4 On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the
5 following findings of fact and conclusions of law.
6

7 **III.**

8 **LEGAL STANDARDS**

9 The following legal standards are applicable to this case:

10 **A. Summary Judgment Standards**

11 Because the parties presented matters outside the pleadings, this Court treats the Defendants'
12 motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and
13 *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).
14

15 Since *Wood v. Safeway*,⁵ the Nevada Supreme Court has followed a gradual trend toward
16 favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a
17 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019
18 Nev. LEXIS 39, *4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which
19 factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the
20 attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at
21 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a
22 whole, which are designed to secure the just, speedy and inexpensive determination of every action.")
23

24 "Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the
25 light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact
26

27 ⁵ *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).
28

1 remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am.,*
2 *N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A
3 genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return
4 a verdict for the nonmoving party.” *Id.*

5
6 **B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions**

7 Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16,
8 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The
9 Plaintiffs’ claims are based on violation of NRS Chapter 113.

10
11 NRS §113.140 provides:

12 Disclosure of unknown defect not required; form does not constitute warranty; duty of
13 buyer and prospective buyer to exercise reasonable care.

14 1. NRS §113.130 does not require a seller to disclose a defect in residential property
15 of which the seller is not aware.

16 2. A completed disclosure form does not constitute an express or implied warranty
17 regarding any condition of residential property.

18 3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer
19 of the duty to exercise reasonable care to protect himself or herself.

20 In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under
21 NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a
22 seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that
23 materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.*
24 According to the Court, “the seller of residential real property does not have a duty to disclose a defect
25 or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if
26 the seller does not realize, perceive, or have knowledge of that defect or condition.”⁶

27
28 ⁶ Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form
that was caused by the seller’s reliance upon information provided to the seller by:… (b) A contractor, engineer, land

1 NRS §113.150(2) provides:

2 Remedies for seller's delayed disclosure or nondisclosure of defects in property;
3 waiver.

4 2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent
5 informs the purchaser or the purchaser's agent, through the disclosure form or another written
6 notice, of a defect in the property of which the cost of repair or replacement was not limited
7 by provisions in the agreement to purchase the property, the purchaser may:

8 (a) Rescind the agreement to purchase the property at any time before the conveyance
9 of the property to the purchaser; or

10 (b) Close escrow and accept the property with the defect as revealed by the seller or
11 the seller's agent without further recourse.

12 **IV.**

13 **SUMMARY OF FINDINGS OF FACT**

14 The Court finds the following facts are undisputed and supported by the evidence presented
15 by the parties:

- 16 • In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at
17 property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- 18 • The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- 19 • There was a leak in the Uponor plumbing system on February 16, 2017;
- 20 • Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- 21 • A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16,
22 2017 leak;⁷
- 23 • Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the
24

25 _____
26 surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that
27 profession in this State at the time the information was provided." NRS 113.150(5).

28 ⁷ The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the
undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to
Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and
documents that Rakeman completely repaired that leak.

October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint;
- The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted

1 mold tests at the property;

- 2 • Infinity tested for possible fungal levels in the master bathroom and master closet, which is the
- 3 area where the February 2017 and November 7, 2017 leaks occurred;
- 4 • Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the
- 5 Plaintiffs closed on the property;
- 6 • Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- 7 • Plaintiffs closed on the property on November 17, 2017 before the Infinity results were
- 8 reported;
- 9 • After closing, the mold was fully remediated and a subsequent mold test conducted on
- 10 December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017
- 11 Infinity Report;
- 12 • The results of the mold test were not provided by Infinity to Defendants because the
- 13 Defendants no longer owned the property and there is no evidence showing that the Defendants
- 14 knew of the results of the mold test on or before the closing date.
- 15
- 16

17 V.

18 **CONCLUSIONS OF LAW**

19 This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017
20 water leak. Throughout these proceedings, the Defendants have asserted, together with providing
21 undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing
22 contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS
23 Chapter 113, the repair negated Defendants' duty to disclose.

24 In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the
25 Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than
26 dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts
27
28

1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been
2 repaired, two facts required by *Nelson*.

3 The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the
4 discovery revealed additional facts, none of those additional facts are material to the claims made in
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case
8 still fails as a matter of law.
9

10 Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the
16 Plaintiffs' closing on the property.
17

18 The Plaintiffs have failed to present evidence to establish the one fact that could possibly make
19 their claims viable: that the February 2017 leak was not repaired. To the contrary, the undisputed facts
20 establish that the February 2017 leak was repaired, thus abrogating any requirement that it be
21 disclosed, as fully explained in *Nelson*. The other purported "water losses" complained of by the
22 Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property.
23

24 **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**
25 **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**
26 **the Leak**

27 Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a
28

February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.⁸ The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

Dr. Swanson’s Testimony

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

⁸ The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.

1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,
4 but the date was February 17th or 18th or something like that, I think. Or 7th or 8th.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.
6

7 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on
8 the Rakeman invoice, cleared up the confusion regarding the date of the leak:

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.
14

15 Dr. Swanson also testified as follows:

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive
24 that the date was in February, whatever the date was, February 8th or whatever.

25 ***

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,
27 so I tried to find the correct date. . . . And that's what I came up with.
28

///

///

Rakeman Plumbing Testimony

The Rakeman Plumbing documents and testimony showed that the leak in question occurred in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the date “confusion,” Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman warranty work. According to Mr. Hawley,

if there’s warranty work done behind our new construction, there may not be any papers behind it. It’s not like it’s an invoiceable call to where somebody calls up. . . . If this was done under warranty, which I don’t know if it was or wasn’t, there may not be any papers involved.

Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and testified that the other leak occurred in either February or May, but not both.

Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to work covered under Rakeman’s own warranty, a summary is always prepared “after the fact.” According to Mr. Gerber, a summary to the manufacturer “has to be done after the fact.”⁹

Uponor Documents

The Uponor documents are perhaps the most revealing. Uponor records show the “initial claim [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which

⁹ Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact. Indeed, the attached Rakeman document references April 5, 2017 as “Wanted” and “Promised” which predates the May 23, 2017 invoice date. So, it is impossible that the leak occurred in May.

1 corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

2 These documents clearly establish a nexus between the February 16, 2017 “failure date”
3 documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the
4 fact that there was only one leak in the first half of 2017, on February 16th.

5
6 *Nicky Whitfield’s Testimony*

7 At the time Dr. Swanson’s assistant, Nicky Whitfield, began working for Dr. Swanson in
8 March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak.
9 According to Ms. Whitfield’s sworn testimony, “when I started [working for Dr. Swanson] they were
10 just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway
11 in March if the leak did not occur until May.

12 Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably
13 disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that
14 more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak
15 occurring in the first half of 2017, regardless of whether it happened in February or May, was fully
16 repaired, thus abrogating its disclosure under *Nelson*.

17
18 This Court finds that the undisputed evidence establishes that the leak which is the subject of
19 the Plaintiffs’ action occurred on February 16, 2017, not May 23, 2017, which is the date on the
20 Rakeman invoice.

21
22 Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide
23 uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the
24 Defendants’ duty of disclosure. This Court finds that the Plaintiffs’ allegation the Defendants failed
25 to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and
26 fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCPL
27 56(a), NRS Chapter 113 and *Nelson v. Heer*.
28

B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.¹⁰

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

¹⁰ The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.

1
2 28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with
3 the Defendants and the subcontractor hired to make the repairs.

4 These allegations directly contradict the unsupported argument that they did not know about the
5 November 7, 2017 leak.

6 Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants
7 specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31
8 a.m., on November 16, 2017.¹¹ Addendum 4-A, stated:

9
10 Seller is disclosing that there was a water leak in the master closet from a water pipe
11 that broke. The Seller is fully remediating the issue to include new baseboards, carpet,
etc. and all repair items regarding this leak will be handled prior to closing.

12 The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back
13 because the buyers "don't want to rely on the plumber and their warranty." This shows that on
14 November 16, the day prior to closing, the parties' agents were discussing potential remedies for
15 dealing with the disclosed leak.

16
17 Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the
18 Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she
19 acknowledges that "at this point due to the change in circumstances with the last minute issue with
20 the leak, the buyer's recourse is to walk at this point if they are not comfortable with the
21 repairs/credits."

22 Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the
23

24 ¹¹ An agent's knowledge is imputed to the principal. *ARCPE I, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub.
25 LEXIS 1017, *2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d
26 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak.
27 See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).
28

1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own
4 allegations and the other evidence.
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**

7
8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.

13 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’
14 options were to either “rescind the agreement to purchase the property at any time before the
15 conveyance of the property to the purchaser; or close escrow and accept the property with the defect
16 as revealed by the seller or the seller’s agent without further recourse.”
17

18 The evidence is undisputed that prior to closing, the Defendants provided notice to the
19 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the
20 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse
21 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,
22 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.
23

24 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter
25 of law.

26 ///

27 ///

D. The 2015 “Water Losses” are Unrelated to the Plaintiffs’ Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose “water losses” that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which it the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,¹² rather than to conceal a defect. Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

This Court finds that the Plaintiffs’ failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a “systemic defect” in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.

///

¹² The notes are admissible as “present sense impressions” and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a “present sense impression” is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.”

Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

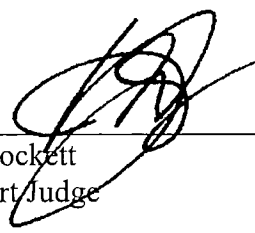
ORDER

The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

19

1 Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second
2 Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby
3 DISMISSED, with prejudice.


4 DATED this 11th day of May 2020.

6
7 
8 Hon. Jim Crockett
District Court Judge

9
10 Respectfully submitted by:

11 /s/ Jeffrey L. Galliher
12 Jeffrey L. Galliher, Esq.
13 GALLIHER LEGAL P.C.
14 1850 East Sahara Avenue, Suite 107
15 Las Vegas, Nevada 89104
16 Attorney for Defendants

17 Approved as to form and content:

18 
19 Risty Graf, Esq.
20 BLACK & LOBELLO
21 10777 West Twain Avenue, 3rd Floor
22 Las Vegas, Nevada 89135
23 Attorney for Plaintiffs
24
25
26
27
28

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY**CASE NO. A-18-782494-C**

Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

§
 §
 §
 §
 §

Location: **Department 24**
 Judicial Officer: **Crockett, Jim**
 Filed on: **10/09/2018**
 Cross-Reference Case Number: **A782494**

CASE INFORMATION**Statistical Closures**

05/11/2020 Motion to Dismiss by the Defendant(s)

Case Type: **Other Tort**

Case Status: **05/11/2020 Dismissed**


DATE**CASE ASSIGNMENT****Current Case Assignment**


Case Number A-18-782494-C
 Court Department 24
 Date Assigned 10/09/2018
 Judicial Officer Crockett, Jim

PARTY INFORMATION

		<i>Lead Attorneys</i>
Plaintiff	Folino, Joseph	Graf, J. Rusty <i>Retained</i> 702-869-8801(W)
	Folino, Nicole	Graf, J. Rusty <i>Retained</i> 702-869-8801(W)
Defendant	Lyons Development, LLC Removed: 05/11/2020 Dismissed	Young, Christopher M. <i>Retained</i> 702-240-2499(W)
	Shiraz Trust Removed: 05/11/2020 Dismissed	Young, Christopher M. <i>Retained</i> 702-240-2499(W)
	Swanson, Todd	Young, Christopher M. <i>Retained</i> 702-240-2499(W)
	Todd Swanson Trustee of the Shiraz Trust Removed: 02/13/2019 Data Entry Error	

DATE**EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**


10/09/2018  Complaint
 Filed By: Plaintiff Folino, Joseph
Complaint

10/09/2018  Initial Appearance Fee Disclosure
 Filed By: Plaintiff Folino, Nicole
Initial Appearance Fee Disclosure

10/12/2018

CASE SUMMARY

CASE NO. A-18-782494-C

	 Summons Electronically Issued - Service Pending Party: Plaintiff Folino, Joseph <i>Summons</i>
10/12/2018	 Summons Electronically Issued - Service Pending Party: Plaintiff Folino, Joseph <i>Summons</i>
10/12/2018	 Summons Electronically Issued - Service Pending Party: Plaintiff Folino, Joseph <i>Summons</i>
10/23/2018	 Affidavit of Service Filed By: Plaintiff Folino, Joseph <i>Declaration of Service</i>
01/03/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Due Diligence</i>
01/14/2019	 Acceptance of Service Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Acceptance of Service on Behalf of Defendant Todd Swanson, an individual, Todd Swanson, Trustee of the Shiraz Trust, and Shiraz Trust</i>
02/04/2019	 Motion to Dismiss <i>Defendant's Motion to Dismiss and/or Motion for More Definite Statement</i>
02/04/2019	 Initial Appearance Fee Disclosure <i>Initial Appearance Fee Disclosure</i>
02/07/2019	 Request for Exemption From Arbitration Filed by: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Request for Exemption from Arbitration</i>
02/13/2019	 Opposition and Countermotion Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Opposition to Defendant's Motion to Dismiss and/or Motion for More Definite Statement; Counter Motion to Amend the Complaint</i>
02/13/2019	 Amended Complaint Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>[Proposed] First Amended Complaint</i>
03/26/2019	 Notice of Rescheduling of Hearing <i>Notice of Rehearing</i>
04/02/2019	 Reply <i>Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend the Complaint</i>
04/18/2019	 Order Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Order on Defendants' Motion to Dismiss and/or Motion for More Definite Statement;</i>

CASE SUMMARY

CASE NO. A-18-782494-C

Countermotion to Amend the Complaint

04/18/2019



Notice of Order

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Notice of Entry of Order on Defendants Motion to Dismiss and/or Motion For More Definite Statement; Countermotion To Amend Complaint

04/18/2019



First Amended Complaint

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
First Amended Complaint

05/20/2019



Motion to Dismiss

Defendant's Motion to Dismiss Plaintiff's First Amended Complaint

05/21/2019



Clerk's Notice of Hearing

Notice of Hearing

06/05/2019



Opposition

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint

07/03/2019



Reply to Opposition

Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint

08/14/2019



Order

Order

08/14/2019



Notice of Entry of Order

Notice of Entry of Order

09/03/2019



Second Amended Complaint

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiffs' Second Amended Complaint

09/24/2019



Motion to Dismiss

Filed By: Trustee Swanson, Todd
Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint

09/25/2019



Clerk's Notice of Hearing

Notice of Hearing

10/03/2019



Opposition to Motion to Dismiss

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint

10/31/2019



Reply to Opposition

Filed by: Trustee Swanson, Todd
Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint

11/20/2019



Early Case Conference List of Witnesses & Production of Docs

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiff's Initial List of Witnesses and Production of Documents 16.1

CASE SUMMARY

CASE NO. A-18-782494-C

11/20/2019	 Notice of Early Case Conference Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Notice of Early Case Conference</i>
11/26/2019	 Notice of Association of Counsel <i>Notice of Association of Counsel</i>
12/06/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - SDT COR Rakeman Plumbing, Inc.</i>
12/09/2019	 Affidavit of Service Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Affidavit of Service - Frontsteps</i>
12/10/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - The Summerlin Association COR</i>
12/10/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - The Ivan Sher Group SDT COR</i>
12/10/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Lyons Development LLV</i>
12/19/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Americana LLC</i>
12/19/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Repipe Specialist</i>
12/19/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Las Vegas Homes</i>
12/23/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - The Ridges Community Association</i>
12/26/2019	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Uponor, Inc.</i>
12/30/2019	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' First Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1</i>
12/30/2019	

CASE SUMMARY

CASE NO. A-18-782494-C

	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Production of Documents PLT000054 - PLT000064</i>
01/02/2020	 Deposition Subpoena Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>VideoTaped Deposition Subpoena - Ivan Sher</i>
01/02/2020	 Deposition Subpoena Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>VideoTaped Deposition Subpoena - Nicole Whitfield</i>
01/02/2020	 Deposition Subpoena Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>VideoTaped Deposition Subpoena - Kelly Contenta</i>
01/02/2020	 Subpoena Duces Tecum Filed by: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiff's Notice of Subpoenas Pursuant to NRCP 45(A)(4)(A)</i>
01/13/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Young re Resheduled Depo of Swanson, PMK Shiraz and PMK Lyons</i>
01/13/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Galliher re Resheduled Depo of Swanson, PMK Shiraz and PMK Lyons</i>
01/14/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Young re Resheduled Video Depo on Gerber and Hawley</i>
01/14/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - Galliher re Resheduled Video Depo on Gerber and Hawley</i>
01/14/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - SDT and Video Depo - Ivan Sher</i>
01/14/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - SDT - Absolute</i>
01/14/2020	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Second Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1</i>
01/14/2020	 Early Case Conference Production Pursuant to NRCP 16.1 Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Production PLT000065 - PLT000156</i>

CASE SUMMARY

CASE NO. A-18-782494-C

01/14/2020	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Third Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1</i>
01/14/2020	 Miscellaneous Filing Filed by: Plaintiff Folino, Joseph; Trustee Swanson, Todd <i>Letter from Kirby C Gruchow Jr. 01-06-20</i>
01/15/2020	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Fourth Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1</i>
01/15/2020	 Amended Certificate of Service Party: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Amended Certificate of Service Plaintiffs' Production of the Plaintiffs' Fourth Supplemental List of Witnesses and Production of Documents NRCP 16.1</i>
01/15/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service re SDT and Video Depo - Kelly Contenta</i>
01/15/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service re SDT - EH Designs</i>
01/15/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service re SDT - Infinity Environmental Services</i>
01/23/2020	 Declaration Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Declaration of Service - SDT and Videotaped Deposition - Nicole Whitfield</i>
01/24/2020	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Fifth Supplemental List of Witnesses and Production of Documents NRCP 16.1</i>
02/04/2020	 Notice Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Notice of Continuance (Via Zoom Conferencing) Deposition of Swanson, et al.</i>
02/05/2020	 Early Case Conference List of Witnesses & Production of Docs Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Plaintiffs' Sixth Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1</i>
02/07/2020	 Stipulation and Order Filed by: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole <i>Stipulation and Order for Sixty (60) Day Continuing Production, Plaintiffs' Brief and Hearing Date</i>
02/11/2020	 Notice of Entry of Order

CASE SUMMARY

CASE NO. A-18-782494-C

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Notice of Entry of Order

02/13/2020



Supplemental Brief

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiffs' Supplemental Brief

02/13/2020



Supplemental List of Witnesses and Production of Documents

Filed by: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiffs' Supplemental Lit of Witnesses and Production of Documents

02/27/2020



Reply in Support

Filed By: Trustee Swanson, Todd; Defendant Lyons Development, LLC; Defendant Shiraz Trust
Defendants' Supplemental Reply in Support of Motion For Summary Judgment

03/10/2020



Acceptance of Service

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Acceptance of Service

04/22/2020



Memorandum of Costs and Disbursements

Filed By: Trustee Swanson, Todd; Defendant Lyons Development, LLC; Defendant Shiraz Trust
Defendants' Verified Memorandum of Costs and Disbursements

04/22/2020



Motion for Fees

Filed By: Trustee Swanson, Todd; Defendant Lyons Development, LLC; Defendant Shiraz Trust
Defendants' Motion for Fees and Costs

04/23/2020



Clerk's Notice of Hearing

Party: Trustee Swanson, Todd
Notice of Hearing

04/24/2020



Motion to Retax

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Plaintiff's Motion to Retax Costs

04/27/2020



Clerk's Notice of Hearing

Notice of Hearing

05/11/2020



Order

ORDER GRANTING DISMISSAL

05/11/2020



Opposition to Motion

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Opposition to Defendants' Motion for Attorney's Fees and Costs

05/13/2020



Errata

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole
Errata to Opposition to Defendants' Motion for Attorney's Fees and Costs

05/13/2020



Notice of Entry of Order

Filed By: Plaintiff Folino, Joseph; Trustee Swanson, Todd; Plaintiff Folino, Nicole

CASE SUMMARY

CASE NO. A-18-782494-C

Notice of Entry of Order

05/26/2020



Notice of Appeal

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole

Notice of Appeal

05/26/2020



Case Appeal Statement

Filed By: Plaintiff Folino, Joseph; Plaintiff Folino, Nicole

Case Appeal Statement

DISPOSITIONS

08/14/2019

Order of Dismissal (Judicial Officer: Crockett, Jim)

Debtors: Joseph Folino (Plaintiff), Nicole Folino (Plaintiff)

Creditors: Todd Swanson (Defendant), Lyons Development, LLC (Defendant), Shiraz Trust (Defendant)

Judgment: 08/14/2019, Docketed: 08/14/2019

Comment: Certain Causes

05/11/2020

Order of Dismissal With Prejudice (Judicial Officer: Crockett, Jim)

Debtors: Joseph Folino (Plaintiff), Nicole Folino (Plaintiff)

Creditors: Todd Swanson (Defendant), Lyons Development, LLC (Defendant), Shiraz Trust (Defendant)

Judgment: 05/11/2020, Docketed: 05/12/2020

HEARINGS

04/09/2019

Motion to Dismiss (9:00 AM) (Judicial Officer: Crockett, Jim)

Defendant's Motion to Dismiss and/or Motion for More Definite Statement

04/09/2019

Opposition and Countermotion (9:00 AM) (Judicial Officer: Crockett, Jim)

Plaintiffs' Opposition to Defendant's Motion to Dismiss and/or Motion for More Definite Statement; Counter Motion to Amend the Complaint

Granted in Part;

04/09/2019



All Pending Motions (9:00 AM) (Judicial Officer: Crockett, Jim)

Matter Heard;

Journal Entry Details:

COURT stated FINDINGS and ORDERED, Plaintiff's Counter Motion to Amend the Complaint GRANTED and Defendant thirty (30) days to file an answer or responsive pleading from the date they are served with the Amended Complaint. Upon Mr. Graf's inquiry, Court advised he could e-serve the opposition.;

07/18/2019



Motion to Dismiss (9:00 AM) (Judicial Officer: Crockett, Jim)

Defendant's Motion to Dismiss Plaintiff's First Amended Complaint

Granted in Part;

Journal Entry Details:

Argument for dismissal by Mr. Young. Opposition by Mr. Graf. Argument regarding plumbing issues. COURT ORDERED, claims 2,3,5,6,7 DISMISSED; claims 1 and 4 remain. COURT INSTRUCTED counsel to file an Second Amended Complaint with the surviving claims.;

11/07/2019



Motion to Dismiss (9:00 AM) (Judicial Officer: Crockett, Jim)

11/07/2019, 03/03/2020, 04/07/2020

Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint

Matter Continued;

Matter Continued;

Granted;

Journal Entry Details:


Mr. Graf argued mold and leaks and that Dr. Swanson had knowledge of the defects.

Opposition by Mr. Galiher. Argument that the Defendant was no longer the owner at the time

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-18-782494-C

	<p>of the results. Court finds that Plaintiff was aware of the leaks and elected to close escrow. COURT ORDERED, motion GRANTED as a Summary Judgment. Matter SET for status check for filing of the order 5/5/20 9:00am.;</p> <p>Matter Continued;</p> <p>Matter Continued;</p> <p>Granted;</p> <p>Journal Entry Details:</p> <p>COURT NOTED, there was a Motion to Dismiss heard back in November; at that time the Court stated its inclination to the Defendants Motion to Dismiss Plaintiffs second amended Complaint noting that an affidavit was required seeking 56(d) relief, further there were two questions of fact, the Court was inclined to GRANT the Motion for Summary Judgment and to DENY the inappropriate filed counter motion for sanctions. Court further stated there is no affidavit to contradict the affidavit of Mr. Holly, Plaintiff was to demonstrate a genuine dispute as a material issue of fact. Mr. Graf stated he did have a thumb drive dropped off with all of the documents attached. The documents that are attached are also referenced in the Supplemental Brief. Mr. Graf further stated included in those documents is the deposition transcript of Mr. Holly and deposition transcript of Mr. Gerber. Following further arguments of counsel. COURT ORDERED, MATTER CONTINUED 4-07-20 9:00 AM DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT;</p> <p>Matter Continued;</p> <p>Matter Continued;</p> <p>Granted;</p> <p>Journal Entry Details:</p> <p>Court stated its inclination as to the Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint noting an affidavit was required seeking 56 (d) relief. Further, there were two questions of fact. Moreover, the Court was inclined to grant the motion for summary judgment and to deny to inappropriately filed counter motion for sanctions. Arguments by counsel. Colloquy regarding affidavits, discovery, and conducting depositions. Court GRANTED counsel ninety (90) days to demonstrate a genuine issue of material fact by February 6th; Defendant's Reply February 20th. COURT ORDERED, matter CONTINUED. Counsel to adhere to compliance with the rules. Additionally, the parties could conduct their 16.1 even in advance of their answers or bring the answers to the 16.1. Moreover, Defendants need to file supplemental affidavits as to the two technicians. CONTINUED TO: 02/27/20 9:00 AM ;</p>
04/29/2020	<p> Status Check (3:00 AM) (Judicial Officer: Crockett, Jim)</p> <p>04/29/2020, 06/11/2020</p> <p>Matter Continued;</p> <p>Journal Entry Details:</p> <p>COURT NOTES as of 4/28/2020 the Order Granting Summary Judgement has not been filed and ORDERED, matter CONTINUED. COURT FURTHER ORDERED, matters SET 6/9/2020 CONTINUED to 6/11/2020. CONTINUED TO: 6/11/2020 9:00 AM... MOTION TO RETAX... MOTION FOR FEES CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 4/29/2020;</p>
06/11/2020	<p>Motion for Fees (9:00 AM) (Judicial Officer: Crockett, Jim)</p> <p>Events: 04/22/2020 Motion for Fees</p> <p>Defendants' Motion for Fees and Costs</p>
06/11/2020	<p>Motion to Retax (9:00 AM) (Judicial Officer: Crockett, Jim)</p> <p>Plaintiff's Motion to Retax Costs</p>

DATE

FINANCIAL INFORMATION

Plaintiff Folino, Joseph	
Total Charges	324.00
Total Payments and Credits	324.00
Balance Due as of 5/28/2020	0.00
 Trustee Swanson, Todd	
Total Charges	283.00
Total Payments and Credits	283.00
Balance Due as of 5/28/2020	0.00

CASE SUMMARY

CASE NO. A-18-782494-C

DISTRICT COURT CIVIL COVER SHEET

A-18-782494-C

County, Nevada

Case No. _____

Department 24

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual,	Defendant(s) (name/address/phone): TODD SWANSON, an individual; Lyons Development, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X,
Attorney (name/address/phone): Rusty Graf, Esq. Black & Lobello 10777 W. Twain Ave., 3rd Floor Las Vegas, NV 89135	Attorney (name/address/phone): Christopher Young, Esq. Cobeaga Law Firm 550 E. Charleston Blvd., #D. Las Vegas, NV 89104

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input checked="" type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrantum <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

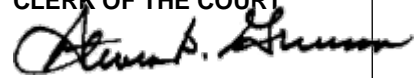
Business Court filings should be filed using the Business Court civil coversheet.

October 9, 2018

Date

Signature of initiating party or representative

See other side for family-related case filings.



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Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH FOLINO, an individual and NICOLE
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST, a Trust of unknown origin;
LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

I.

PREAMBLE

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment ¹
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.¹ Rusty J.
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.
3 appeared on behalf of the Defendants.²

4 This Court considered the parties' motions and supplements, together with the exhibits and
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact
8 and Conclusions of Law under the standards set forth below.

10 II.

11 PROCEDURAL HISTORY

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak
16 in the plumbing system.

18 *Plaintiffs' Complaint*

19 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for
20 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a
21 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)
22 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010
23

25 ¹ While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that
26 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the
summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

27 ² The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the
28 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;
and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").

et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known Defects); (5) Civil RICO; and (6) Respondeat Superior.³

Defendants' February 4, 2019 Motion to Dismiss

On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to NRCP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading deficiencies.

Plaintiffs' First Amended Complaint

On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing the Corporate Veil/Alter Ego.

Defendants' May 20, 2019 Motion to Dismiss

On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint, seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs Negligent Misrepresentation, Deceptive Trade Practices, Civil RICO; Respondeat Superior and Piercing the Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims survived and ordered the Plaintiffs to file a Second Amended Complaint.

Plaintiffs' Second Amended Complaint

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging concealment in violation of NRS 113 *et seq.* and fraud/intentional misrepresentation. The Plaintiffs

³ The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint which, under NRCP 12(b)(5)'s standards, are incorporated into the pleadings. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1 also sought punitive damages.

2 ***Defendants' September 24, 2019 Motion to Dismiss***

3 Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants
4 provided evidence in the form of an affidavit from the licensed plumbing company that the February
5 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113
6 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).
7

8 In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence
9 that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the
10 motion.

11 At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the
12 Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to
13 permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery
14 and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact.
15 Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.
16

17 ***The Plaintiffs' Discovery***

18 Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive
19 discovery, which included serving numerous subpoenas for documents, serving interrogatories,
20 requests for production of documents and requests for admissions. Plaintiffs took the depositions of
21 six witnesses.⁴ The Defendants produced nearly 1000 pages of documents as supplemental disclosures
22 and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also
23 produced over 5000 pages of documents.
24

25
26
27 ⁴ The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two
28 separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and
Kelly Contenda.

On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party attached voluminous exhibits.

On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the following findings of fact and conclusions of law.

III.

LEGAL STANDARDS

The following legal standards are applicable to this case:

A. Summary Judgment Standards

Because the parties presented matters outside the pleadings, this Court treats the Defendants' motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).

Since *Wood v. Safeway*,⁵ the Nevada Supreme Court has followed a gradual trend toward favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019 Nev. LEXIS 39, *4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.")

"Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact

⁵ *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).

remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party.” *Id.*

B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions

Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16, 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The Plaintiffs’ claims are based on violation of NRS Chapter 113.

NRS §113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS §113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.
2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.
3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.* According to the Court, “the seller of residential real property does not have a duty to disclose a defect or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if the seller does not realize, perceive, or have knowledge of that defect or condition.”⁶

⁶ Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form that was caused by the seller's reliance upon information provided to the seller by:… (b) A contractor, engineer, land

1 NRS §113.150(2) provides:

2 Remedies for seller's delayed disclosure or nondisclosure of defects in property;
3 waiver.

4 2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent
5 informs the purchaser or the purchaser's agent, through the disclosure form or another written
6 notice, of a defect in the property of which the cost of repair or replacement was not limited
7 by provisions in the agreement to purchase the property, the purchaser may:

8 (a) Rescind the agreement to purchase the property at any time before the conveyance
9 of the property to the purchaser; or

10 (b) Close escrow and accept the property with the defect as revealed by the seller or
11 the seller's agent without further recourse.

12 **IV.**

13 **SUMMARY OF FINDINGS OF FACT**

14 The Court finds the following facts are undisputed and supported by the evidence presented
15 by the parties:

- 16 • In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at
17 property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- 18 • The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- 19 • There was a leak in the Uponor plumbing system on February 16, 2017;
- 20 • Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- 21 • A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16,
22 2017 leak;⁷
- 23 • Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the
24

25 _____
26 surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that
27 profession in this State at the time the information was provided." NRS 113.150(5).

28 ⁷ The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the
undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to
Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and
documents that Rakeman completely repaired that leak.

October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint;
- The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted

1 mold tests at the property;

- 2 • Infinity tested for possible fungal levels in the master bathroom and master closet, which is the
- 3 area where the February 2017 and November 7, 2017 leaks occurred;
- 4 • Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the
- 5 Plaintiffs closed on the property;
- 6 • Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- 7 • Plaintiffs closed on the property on November 17, 2017 before the Infinity results were
- 8 reported;
- 9 • After closing, the mold was fully remediated and a subsequent mold test conducted on
- 10 December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017
- 11 Infinity Report;
- 12 • The results of the mold test were not provided by Infinity to Defendants because the
- 13 Defendants no longer owned the property and there is no evidence showing that the Defendants
- 14 knew of the results of the mold test on or before the closing date.
- 15
- 16
- 17

18 **V.**

19 **CONCLUSIONS OF LAW**

20 This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017
21 water leak. Throughout these proceedings, the Defendants have asserted, together with providing
22 undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing
23 contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS
24 Chapter 113, the repair negated Defendants' duty to disclose.

25 In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the
26 Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than
27 dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts
28

1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been
2 repaired, two facts required by *Nelson*.

3 The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the
4 discovery revealed additional facts, none of those additional facts are material to the claims made in
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case
8 still fails as a matter of law.
9

10 Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the
16 Plaintiffs' closing on the property.
17

18 The Plaintiffs have failed to present evidence to establish the one fact that could possibly make
19 their claims viable: that the February 2017 leak was not repaired. To the contrary, the undisputed facts
20 establish that the February 2017 leak was repaired, thus abrogating any requirement that it be
21 disclosed, as fully explained in *Nelson*. The other purported "water losses" complained of by the
22 Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property.
23

24 **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**
25 **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**
26 **the Leak**

27 Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a
28

February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.⁸ The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

Dr. Swanson’s Testimony

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

⁸ The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.

1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,
4 but the date was February 17th or 18th or something like that, I think. Or 7th or 8th.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.

6 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on
7 the Rakeman invoice, cleared up the confusion regarding the date of the leak:
8

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.

14 Dr. Swanson also testified as follows:
15

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive
24 that the date was in February, whatever the date was, February 8th or whatever.

25 ***

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,
27 so I tried to find the correct date. . . . And that's what I came up with.
28

///

///

Rakeman Plumbing Testimony

The Rakeman Plumbing documents and testimony showed that the leak in question occurred in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the date “confusion,” Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman warranty work. According to Mr. Hawley,

if there’s warranty work done behind our new construction, there may not be any papers behind it. It’s not like it’s an invoicable call to where somebody calls up. . . . If this was done under warranty, which I don’t know if it was or wasn’t, there may not be any papers involved.

Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and testified that the other leak occurred in either February or May, but not both.

Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to work covered under Rakeman’s own warranty, a summary is always prepared “after the fact.” According to Mr. Gerber, a summary to the manufacturer “has to be done after the fact.”⁹

Uponor Documents

The Uponor documents are perhaps the most revealing. Uponor records show the “initial claim [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which

⁹ Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact. Indeed, the attached Rakeman document references April 5, 2017 as “Wanted” and “Promised” which predates the May 23, 2017 invoice date. So, it is impossible that the leak occurred in May.

1 corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

2 These documents clearly establish a nexus between the February 16, 2017 “failure date”
3 documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the
4 fact that there was only one leak in the first half of 2017, on February 16th.

5 ***Nicky Whitfield’s Testimony***

6 At the time Dr. Swanson’s assistant, Nicky Whitfield, began working for Dr. Swanson in
7 March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak.
8 According to Ms. Whitfield’s sworn testimony, “when I started [working for Dr. Swanson] they were
9 just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway
10 in March if the leak did not occur until May.

11 Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably
12 disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that
13 more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak
14 occurring in the first half of 2017, regardless of whether it happened in February or May, was fully
15 repaired, thus abrogating its disclosure under *Nelson*.

16 This Court finds that the undisputed evidence establishes that the leak which is the subject of
17 the Plaintiffs’ action occurred on February 16, 2017, not May 23, 2017, which is the date on the
18 Rakeman invoice.

19 Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide
20 uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the
21 Defendants’ duty of disclosure. This Court finds that the Plaintiffs’ allegation the Defendants failed
22 to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and
23 fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCP
24 56(a), NRS Chapter 113 and *Nelson v. Heer*.

B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.¹⁰

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

¹⁰ The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.

1
2 28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with
3 the Defendants and the subcontractor hired to make the repairs.

4 These allegations directly contradict the unsupported argument that they did not know about the
5 November 7, 2017 leak.

6 Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants
7 specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31
8 a.m., on November 16, 2017.¹¹ Addendum 4-A, stated:

9
10 Seller is disclosing that there was a water leak in the master closet from a water pipe
11 that broke. The Seller is fully remediating the issue to include new baseboards, carpet,
etc. and all repair items regarding this leak will be handled prior to closing.

12 The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back
13 because the buyers "don't want to rely on the plumber and their warranty." This shows that on
14 November 16, the day prior to closing, the parties' agents were discussing potential remedies for
15 dealing with the disclosed leak.

16 Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the
17 Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she
18 acknowledges that "at this point due to the change in circumstances with the last minute issue with
19 the leak, the buyer's recourse is to walk at this point if they are not comfortable with the
20 repairs/credits."

21
22 Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the
23

24 ¹¹ An agent's knowledge is imputed to the principal. *ARCPE I, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub.
25 LEXIS 1017, *2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d
26 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak.
27 See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).
28

1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own
4 allegations and the other evidence.
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**

7
8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.

13 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’
14 options were to either “rescind the agreement to purchase the property at any time before the
15 conveyance of the property to the purchaser; or close escrow and accept the property with the defect
16 as revealed by the seller or the seller’s agent without further recourse.”
17

18 The evidence is undisputed that prior to closing, the Defendants provided notice to the
19 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the
20 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse
21 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,
22 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.
23

24 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter
25 of law.

26 ///

27 ///

D. The 2015 “Water Losses” are Unrelated to the Plaintiffs’ Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose “water losses” that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which is the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,¹² rather than to conceal a defect.

Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

This Court finds that the Plaintiffs’ failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a “systemic defect” in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.

///

¹² The notes are admissible as “present sense impressions” and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a “present sense impression” is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.”

E. The Plaintiffs' Fraud Claim is Derivative of Plaintiffs' Concealment Claim and Fails by Operation of Law

This Court also finds that the Plaintiffs' fraud claim fails as a matter of law. The Plaintiffs' Second Amended Complaint alleges one wrong: Defendants' failure to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect. The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim.¹³

Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

VI.

ORDER

Pursuant to the findings of fact and conclusions of law detailed herein, this Court finds that summary judgment is warranted regarding the Plaintiffs' Second Amended Complaint because the Plaintiffs failed to present facts showing disputed issues of material fact which preclude summary judgment under NRCP 56.

The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

¹³ NRS Chapter 113 provides plaintiffs with a statutory remedy to redress a seller's failure to disclose a defect or condition in a real estate transaction. The statute preempts the Plaintiffs' fraud claim. *See Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000), citing *Casa Clara v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla 1993) (noting that home buyers are protected by "statutory remedies, the general warranty of habitability and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.")

1 Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second
2 Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby
3 DISMISSED, with prejudice.

4 DATED this 11th day of May 2020.

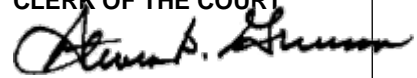
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8 Hon. Jim Crockett
District Court Judge

9
10 Respectfully submitted by:

11 /s/ **Jeffrey L. Galliher**
12 Jeffrey L. Galliher, Esq.
13 GALLIHER LEGAL P.C.
14 1850 East Sahara Avenue, Suite 107
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15 Approved as to form and content:

16
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSEPH FOLINO, an individual and NICOLE
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST, a Trust of unknown origin;
LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 11th
day of May, 2020.

1 A copy of said Order is attached hereto.

2
3 Dated this 13th day of May 2020.

4
5
6 GALLIHER LEGAL P.C.

7 /s/ Jeffrey L. Galliher
8 Jeffrey Galliher, Esq.
9 Nevada Bar No. 8078
10 1850 E. Sahara Ave., Suite 107
11 Las Vegas, NV 89104

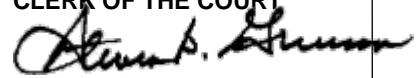
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THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
702-735-0049 Fax: 702-735-0204

CERTIFICATE OF E-SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 13th of May I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

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Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH FOLINO, an individual and NICOLE
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST, a Trust of unknown origin;
LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

I.

PREAMBLE

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment ¹
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.¹ Rusty J.
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.
3 appeared on behalf of the Defendants.²

4 This Court considered the parties' motions and supplements, together with the exhibits and
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact
8 and Conclusions of Law under the standards set forth below.

10 II.

11 PROCEDURAL HISTORY

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak
16 in the plumbing system.

18 *Plaintiffs' Complaint*

19 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for
20 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a
21 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)
22 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010
23

25 ¹ While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that
26 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the
summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

27 ² The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the
28 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;
and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").

et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known Defects); (5) Civil RICO; and (6) Respondeat Superior.³

Defendants' February 4, 2019 Motion to Dismiss

On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to NRCP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading deficiencies.

Plaintiffs' First Amended Complaint

On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing the Corporate Veil/Alter Ego.

Defendants' May 20, 2019 Motion to Dismiss

On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint, seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs Negligent Misrepresentation, Deceptive Trade Practices, Civil RICO; Respondeat Superior and Piercing the Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims survived and ordered the Plaintiffs to file a Second Amended Complaint.

Plaintiffs' Second Amended Complaint

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging concealment in violation of NRS 113 *et seq.* and fraud/intentional misrepresentation. The Plaintiffs

³ The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint which, under NRCP 12(b)(5)'s standards, are incorporated into the pleadings. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1 also sought punitive damages.

2 ***Defendants' September 24, 2019 Motion to Dismiss***

3 Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants
4 provided evidence in the form of an affidavit from the licensed plumbing company that the February
5 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113
6 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).
7

8 In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence
9 that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the
10 motion.

11 At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the
12 Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to
13 permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery
14 and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact.
15 Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.
16

17 ***The Plaintiffs' Discovery***

18 Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive
19 discovery, which included serving numerous subpoenas for documents, serving interrogatories,
20 requests for production of documents and requests for admissions. Plaintiffs took the depositions of
21 six witnesses.⁴ The Defendants produced nearly 1000 pages of documents as supplemental disclosures
22 and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also
23 produced over 5000 pages of documents.
24

25
26
27 ⁴ The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two
28 separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and
Kelly Contenda.

On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party attached voluminous exhibits.

On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the following findings of fact and conclusions of law.

III.

LEGAL STANDARDS

The following legal standards are applicable to this case:

A. Summary Judgment Standards

Because the parties presented matters outside the pleadings, this Court treats the Defendants' motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).

Since *Wood v. Safeway*,⁵ the Nevada Supreme Court has followed a gradual trend toward favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019 Nev. LEXIS 39, *4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.")

"Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact

⁵ *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).

remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party.” *Id.*

B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions

Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16, 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The Plaintiffs’ claims are based on violation of NRS Chapter 113.

NRS §113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS §113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.
2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.
3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.* According to the Court, “the seller of residential real property does not have a duty to disclose a defect or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if the seller does not realize, perceive, or have knowledge of that defect or condition.”⁶

⁶ Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form that was caused by the seller's reliance upon information provided to the seller by:… (b) A contractor, engineer, land

1 NRS §113.150(2) provides:

2 Remedies for seller's delayed disclosure or nondisclosure of defects in property;
3 waiver.

4 2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent
5 informs the purchaser or the purchaser's agent, through the disclosure form or another written
6 notice, of a defect in the property of which the cost of repair or replacement was not limited
7 by provisions in the agreement to purchase the property, the purchaser may:

8 (a) Rescind the agreement to purchase the property at any time before the conveyance
9 of the property to the purchaser; or

10 (b) Close escrow and accept the property with the defect as revealed by the seller or
11 the seller's agent without further recourse.

12 **IV.**

13 **SUMMARY OF FINDINGS OF FACT**

14 The Court finds the following facts are undisputed and supported by the evidence presented
15 by the parties:

- 16 • In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at
17 property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- 18 • The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- 19 • There was a leak in the Uponor plumbing system on February 16, 2017;
- 20 • Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- 21 • A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16,
22 2017 leak;⁷
- 23 • Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the
24

25 _____
26 surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that
27 profession in this State at the time the information was provided." NRS 113.150(5).

28 ⁷ The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the
undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to
Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and
documents that Rakeman completely repaired that leak.

October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint;
- The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted

1 mold tests at the property;

- 2 • Infinity tested for possible fungal levels in the master bathroom and master closet, which is the
- 3 area where the February 2017 and November 7, 2017 leaks occurred;
- 4 • Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the
- 5 Plaintiffs closed on the property;
- 6 • Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- 7 • Plaintiffs closed on the property on November 17, 2017 before the Infinity results were
- 8 reported;
- 9 • After closing, the mold was fully remediated and a subsequent mold test conducted on
- 10 December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017
- 11 Infinity Report;
- 12 • The results of the mold test were not provided by Infinity to Defendants because the
- 13 Defendants no longer owned the property and there is no evidence showing that the Defendants
- 14 knew of the results of the mold test on or before the closing date.
- 15
- 16
- 17

18 **V.**

19 **CONCLUSIONS OF LAW**

20 This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017
21 water leak. Throughout these proceedings, the Defendants have asserted, together with providing
22 undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing
23 contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS
24 Chapter 113, the repair negated Defendants' duty to disclose.

25 In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the
26 Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than
27 dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts
28

1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been
2 repaired, two facts required by *Nelson*.

3 The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the
4 discovery revealed additional facts, none of those additional facts are material to the claims made in
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case
8 still fails as a matter of law.
9

10 Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the
16 Plaintiffs' closing on the property.
17

18 The Plaintiffs have failed to present evidence to establish the one fact that could possibly make
19 their claims viable: that the February 2017 leak was not repaired. To the contrary, the undisputed facts
20 establish that the February 2017 leak was repaired, thus abrogating any requirement that it be
21 disclosed, as fully explained in *Nelson*. The other purported "water losses" complained of by the
22 Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property.
23

24 **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**
25 **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**
26 **the Leak**

27 Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a
28

February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.⁸ The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

Dr. Swanson’s Testimony

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

⁸ The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.

1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,
4 but the date was February 17th or 18th or something like that, I think. Or 7th or 8th.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.

6 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on
7 the Rakeman invoice, cleared up the confusion regarding the date of the leak:
8

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.

14 Dr. Swanson also testified as follows:
15

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive
24 that the date was in February, whatever the date was, February 8th or whatever.

25 ***

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,
27 so I tried to find the correct date. . . . And that's what I came up with.
28

///

///

Rakeman Plumbing Testimony

The Rakeman Plumbing documents and testimony showed that the leak in question occurred in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the date “confusion,” Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman warranty work. According to Mr. Hawley,

if there’s warranty work done behind our new construction, there may not be any papers behind it. It’s not like it’s an invoicable call to where somebody calls up. . . . If this was done under warranty, which I don’t know if it was or wasn’t, there may not be any papers involved.

Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and testified that the other leak occurred in either February or May, but not both.

Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to work covered under Rakeman’s own warranty, a summary is always prepared “after the fact.” According to Mr. Gerber, a summary to the manufacturer “has to be done after the fact.”⁹

Uponor Documents

The Uponor documents are perhaps the most revealing. Uponor records show the “initial claim [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which

⁹ Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact. Indeed, the attached Rakeman document references April 5, 2017 as “Wanted” and “Promised” which predates the May 23, 2017 invoice date. So, it is impossible that the leak occurred in May.

1 corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

2 These documents clearly establish a nexus between the February 16, 2017 “failure date”
3 documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the
4 fact that there was only one leak in the first half of 2017, on February 16th.
5

6 ***Nicky Whitfield’s Testimony***

7 At the time Dr. Swanson’s assistant, Nicky Whitfield, began working for Dr. Swanson in
8 March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak.
9 According to Ms. Whitfield’s sworn testimony, “when I started [working for Dr. Swanson] they were
10 just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway
11 in March if the leak did not occur until May.

12 Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably
13 disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that
14 more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak
15 occurring in the first half of 2017, regardless of whether it happened in February or May, was fully
16 repaired, thus abrogating its disclosure under *Nelson*.
17

18 This Court finds that the undisputed evidence establishes that the leak which is the subject of
19 the Plaintiffs’ action occurred on February 16, 2017, not May 23, 2017, which is the date on the
20 Rakeman invoice.
21

22 Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide
23 uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the
24 Defendants’ duty of disclosure. This Court finds that the Plaintiffs’ allegation the Defendants failed
25 to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and
26 fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCP
27 56(a), NRS Chapter 113 and *Nelson v. Heer*.
28

B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.¹⁰

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

¹⁰ The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.

1
2 28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with
3 the Defendants and the subcontractor hired to make the repairs.

4 These allegations directly contradict the unsupported argument that they did not know about the
5 November 7, 2017 leak.

6 Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants
7 specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31
8 a.m., on November 16, 2017.¹¹ Addendum 4-A, stated:

9
10 Seller is disclosing that there was a water leak in the master closet from a water pipe
11 that broke. The Seller is fully remediating the issue to include new baseboards, carpet,
etc. and all repair items regarding this leak will be handled prior to closing.

12 The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back
13 because the buyers "don't want to rely on the plumber and their warranty." This shows that on
14 November 16, the day prior to closing, the parties' agents were discussing potential remedies for
15 dealing with the disclosed leak.

16 Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the
17 Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she
18 acknowledges that "at this point due to the change in circumstances with the last minute issue with
19 the leak, the buyer's recourse is to walk at this point if they are not comfortable with the
20 repairs/credits."

21
22 Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the
23

24 ¹¹ An agent's knowledge is imputed to the principal. *ARCPE I, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub.
25 LEXIS 1017, *2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d
26 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak.
27 See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).
28

1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own
4 allegations and the other evidence.
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**

7
8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.

13 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’
14 options were to either “rescind the agreement to purchase the property at any time before the
15 conveyance of the property to the purchaser; or close escrow and accept the property with the defect
16 as revealed by the seller or the seller’s agent without further recourse.”
17

18 The evidence is undisputed that prior to closing, the Defendants provided notice to the
19 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the
20 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse
21 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,
22 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.
23

24 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter
25 of law.

26 ///

27 ///

D. The 2015 “Water Losses” are Unrelated to the Plaintiffs’ Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose “water losses” that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which is the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,¹² rather than to conceal a defect.

Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

This Court finds that the Plaintiffs’ failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a “systemic defect” in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.

///

¹² The notes are admissible as “present sense impressions” and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a “present sense impression” is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.”

E. The Plaintiffs' Fraud Claim is Derivative of Plaintiffs' Concealment Claim and Fails by Operation of Law

This Court also finds that the Plaintiffs' fraud claim fails as a matter of law. The Plaintiffs' Second Amended Complaint alleges one wrong: Defendants' failure to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect. The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim.¹³

Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

VI.

ORDER

Pursuant to the findings of fact and conclusions of law detailed herein, this Court finds that summary judgment is warranted regarding the Plaintiffs' Second Amended Complaint because the Plaintiffs failed to present facts showing disputed issues of material fact which preclude summary judgment under NRCP 56.

The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

¹³ NRS Chapter 113 provides plaintiffs with a statutory remedy to redress a seller's failure to disclose a defect or condition in a real estate transaction. The statute preempts the Plaintiffs' fraud claim. *See Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000), *citing Casa Clara v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla 1993) (noting that home buyers are protected by "statutory remedies, the general warranty of habitability and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.")

1 Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second
2 Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby
3 DISMISSED, with prejudice.

4 DATED this 11th day of May 2020.

5
6
7 
8 Hon. Jim Crockett
District Court Judge

9
10 Respectfully submitted by:

11 */s/ Jeffrey L. Galliher*
12 Jeffrey L. Galliher, Esq.
13 GALLIHER LEGAL P.C.
14 1850 East Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
Attorney for Defendants

15 Approved as to form and content:

16
17 Risty Graf, Esq.
BLACK & LOBELLO
18 10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
19 Attorney for Plaintiffs
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 09, 2019

A-18-782494-C Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

April 09, 2019

9:00 AM

All Pending Motions

HEARD BY: Crockett, Jim

COURTROOM: Phoenix Building 11th Floor
116

COURT CLERK: Natalie Ortega

RECORDER:

REPORTER: Bill Nelson

PARTIES

PRESENT: Graf, J. Rusty Attorney
 Hopkins, Jay T. Attorney
 Swanson, Todd Defendant
 Trustee
 Young, Christopher M. Attorney

JOURNAL ENTRIES

- COURT stated FINDINGS and ORDERED, Plaintiff's Counter Motion to Amend the Complaint GRANTED and Defendant thirty (30) days to file an answer or responsive pleading from the date they are served with the Amended Complaint. Upon Mr. Graf's inquiry, Court advised he could e-serve the opposition.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

July 18, 2019

A-18-782494-C Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

July 18, 2019 9:00 AM Motion to Dismiss

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor
116

COURT CLERK:
Alice Jacobson

RECORDER:

REPORTER:

PARTIES

PRESENT: Graf, J. Rusty Attorney
Hopkins, Jay T. Attorney
Young, Christopher M. Attorney

JOURNAL ENTRIES

- Argument for dismissal by Mr. Young. Opposition by Mr. Graf. Argument regarding plumbing issues. COURT ORDERED, claims 2,3,5,6,7 DISMISSED; claims 1 and 4 remain. COURT INSTRUCTED counsel to file an Second Amended Complaint with the surviving claims.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

November 07, 2019

A-18-782494-C Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

November 07, 2019 9:00 AM Motion to Dismiss

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor
116

COURT CLERK: Nylasia Packer
Natalie Ortega

RECORDER:

REPORTER:

PARTIES

PRESENT: Graf, J. Rusty Attorney
Hopkins, Jay T. Attorney

JOURNAL ENTRIES

- Court stated its inclination as to the Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint noting an affidavit was required seeking 56 (d) relief. Further, there were two questions of fact. Moreover, the Court was inclined to grant the motion for summary judgment and to deny to inappropriately filed counter motion for sanctions. Arguments by counsel. Colloquy regarding affidavits, discovery, and conducting depositions. Court GRANTED counsel ninety (90) days to demonstrate a genuine issue of material fact by February 6th; Defendant's Reply February 20th. COURT ORDERED, matter CONTINUED. Counsel to adhere to compliance with the rules. Additionally, the parties could conduct their 16.1 even in advance of their answers or bring the answers to the 16.1. Moreover, Defendants need to file supplemental affidavits as to the two technicians.

CONTINUED TO: 02/27/20 9:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

March 03, 2020

A-18-782494-C	Joseph Folino, Plaintiff(s) vs. Todd Swanson, Defendant(s)
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March 03, 2020	9:00 AM	Motion to Dismiss
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HEARD BY: Crockett, Jim	COURTROOM: Phoenix Building 11th Floor 116
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COURT CLERK: Phyllis Irby

RECORDER: Gail Reiger

REPORTER:

PARTIES

PRESENT:	Galliher, Jeffrey L.	Attorney
	Graf, J. Rusty	Attorney
	Hopkins, Jay T.	Attorney
	Young, Christopher M.	Attorney

JOURNAL ENTRIES

- COURT NOTED, there was a Motion to Dismiss heard back in November; at that time the Court stated its inclination to the Defendants Motion to Dismiss Plaintiffs second amended Complaint noting that an affidavit was required seeking 56(d) relief, further there were two questions of fact, the Court was inclined to GRANT the Motion for Summary Judgment and to DENY the inappropriate filed countermotion for sanctions.

Court further stated there is no affidavit to contradict the affidavit of Mr. Holly, Plaintiff was to demonstrate a genuine dispute as a material issue of fact.

Mr. Graf stated he did have a thumb drive dropped off with all of the documents attached. The documents that are attached are also referenced in the Supplemental Brief. Mr. Graf further stated included in those documents is the deposition transcript of Mr. Holly and deposition transcript of Mr. Gerber. Following further arguments of counsel.

COURT ORDERED, MATTER CONTINUED

4-07-20 9:00 AM DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 07, 2020

A-18-782494-C Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

April 07, 2020 9:00 AM Motion to Dismiss

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor
116

COURT CLERK: Alice Jacobson

RECORDER: Nancy Maldonado

REPORTER:

PARTIES

PRESENT: Galliher, Jeffrey L. Attorney
Graf, J. Rusty Attorney
Hopkins, Jay T. Attorney

JOURNAL ENTRIES

- Mr. Graf argued mold and leaks and that Dr. Swanson had knowledge of the defects. Opposition by Mr. Galliher. Argument that the Defendant was no longer the owner at the time of the results. Court finds that Plaintiff was aware of the leaks and elected to close escrow. COURT ORDERED, motion GRANTED as a Summary Judgment. Matter SET for status check for filing of the order 5/5/20 9:00am.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 29, 2020

A-18-782494-C Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

April 29, 2020 3:00 AM Status Check

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor
116

COURT CLERK: Rem Lord

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- COURT NOTES as of 4/28/2020 the Order Granting Summary Judgement has not been filed and ORDERED, matter CONTINUED. COURT FURTHER ORDERED, matters SET 6/9/2020 CONTINUED to 6/11/2020.

CONTINUED TO: 6/11/2020 9:00 AM... MOTION TO RETAX... MOTION FOR FEES

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 4/29/2020



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

J. RUSTY GRAF, ESQ.
10777 W. TWAIN AVE., 3RD FL.
LAS VEGAS, NV 89135

DATE: May 28, 2020
CASE: A-18-782494-C

RE CASE: JOSEPH FOLINO; NICOLE FOLINO vs. TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST; LYONS DEVELOPMENT, LLC

NOTICE OF APPEAL FILED: May 26, 2020

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; ORDER; NOTICE OF ENTRY OF ORDER; DISTRICT
COURT MINUTES; NOTICE OF DEFICIENCY

JOSEPH FOLINO; NICOLE FOLINO,

Plaintiff(s),

vs.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST; LYONS DEVELOPMENT,
LLC,

Defendant(s),

Case No: A-18-782494-C

Dept No: XXIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 28 day of May 2020.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk