

IN THE SUPREME COURT STATE OF NEVADA

Electronically Filed
Mar 12 2021 03:00 p.m.

JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual, Appellant, v. TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYONS DEVELOPMENT, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X, Respondent.	Case No. 81252	Elizabeth A. Brown Clerk of Supreme Court
JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual, Appellant, v. TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYONS DEVELOPMENT, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X, Respondent.	Case No. 81831	

**APPEAL
FROM THE EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JIM CROCKETT CASE NO. A-18-782494-C**

**JOINT
APPENDIX ON APPEAL
VOLUME XII OF XIX
INDEX TO APPELLANTS' APPENDIX OF RECORD**

VOLUMES

No.	Date of Item	Description	Vol.	Bates Nos.
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VOLUME I

1.	08/05/2006	Appellant's Appendix from Nelson v. Heers Appeal No. 45571 (Part 1)	I	JA000001 JA000200
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VOLUME II

2.	08/05/2006	Appellant's Appendix from Nelson v. Heers Appeal No. 45571 (Part 2)	II	JA000201 JA000248
3.	10/09/2018	Complaint	II	JA000249 JA000325
4.	10/12/2018	Summons – Todd Swanson	II	JA000326 JA000327
5.	10/12/2018	Summons – Lyons Development	II	JA000328 JA000329
6.	10/12/2018	Summons – Shiraz Trust	II	JA000330 JA000331

7.	10/23/2018	Declaration of Service – Summons - Lyons Development	II	JA000332
8.	01/04/2019	Acceptance of Service on Behalf of Defendant Todd Swanson, an individual, Todd Swanson, Trustee of the Shiraz Trust, and Shiraz Trust	II	JA000333 JA000334
9.	02/04/2019	Defendant’s Initial Appearance Fee Disclosure	II	JA000335 JA000336
10.	02/04/2019	Defendant’s Motion to Dismiss and/or Motion for More Definite Statement	II	JA000337 JA000349
11.	02/07/2019	Plaintiff’s Request for Exemption from Arbitration	II	JA000350 JA000355
12.	02/13/2019	Plaintiffs’ Opposition to Defendant’s Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend Complaint	II	JA000356 JA000368
13.	02/13/2019	[Proposed] First Amended Complaint (Part 1)	II	JA000369 JA000407

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14.	02/13/2019	[Proposed] First Amended Complaint (Part 2)	III	JA000408 JA000446
15.	03/26/2019	Notice of Re-Hearing re: Defendant’s Motion to Dismiss and/or Motion for More Definite Statement and Plaintiff’s Countermotion to Amend the Complaint	III	JA000447 JA000449

16.	04/02/2019	Defendant's Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss and/or Motion For More Definite Statement; Countermotion to Amend the Complaint	III	JA000450 JA000458
17.	04/18/2019	Notice of Entry of Order on Defendants' Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend the Complaint	III	JA000459 JA000461
18.	04/18/2019	Order on Defendants' Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend the Complaint	III	JA000462 JA000465
19.	05/20/2019	Defendant's Motion to Dismiss Plaintiff's First Amended Complaint	III	JA000466 JA000486
20.	05/21/2019	Clerk's Notice of Hearing re: Defendant's Motion to Dismiss Plaintiff's First Amended Complaint	III	JA000487 JA000488
21.	06/05/2019	Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint	III	JA000489 JA000501
22.	07/03/2019	Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint	III	JA000502 JA000507

23.	07/18/2019	Minute Order - Defendant's Motion to Dismiss Plaintiff's First Amended Complaint	III	JA000508
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26.	9/03/2019	Plaintiff's Second Amended Complaint	III	JA000526 JA000595
27.	09/24/2019	Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint	III	JA000596 JA000621
28.	09/25/2019	Clerk's Notice of Hearing re: Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint	III	JA000622 JA000623

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96.	06/03/2020	Defendants' Reply in Support of Motion for Attorney's Fees	XI	JA002269 JA002288
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114.	01/24/2019	Swanson Deposition Transcript 1/24/2020 Exhibits 2 – 14	XV	JA002777 JA002977
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124.	01/13/2021	Hearing Transcript of June 20, 2020 of Defendants' Motion for Fees and Costs and Plaintiffs' Motion to Retax Costs	XIX	JA003743 JA003757
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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on March 9th, 2021.

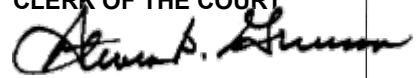
I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 9th day of March 2021.

BLACK & WADHAMS

/s/ Rusty Graf

Rusty Graf, ESQ
Nevada Bar No. 6322
10777 W. Twain Ave., Ste 300.
Las Vegas, Nevada 89135
Attorneys for Appellants



1 **NOE**
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
7 (702) 869-8801
8 (702) 869-2669 (fax)
9 *Attorneys for Plaintiffs*

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

18 **NOTICE OF ENTRY OF ORDER**

19 **PLEASE TAKE NOTICE** that a STIPULATION AND ORDER TO CONTINUE THE
20 HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'
21 MOTION FOR ATTORNEY'S FEES & COSTS was entered on June 4, 2020. A true and
22 correct copy is attached hereto.

23 Dated this 4th day of June 2020.

BLACK & LOBELLO

/s/ Rusty Graf

RUSTY GRAF, ESQ., Bar No. 6322
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 4th day of June 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** 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:

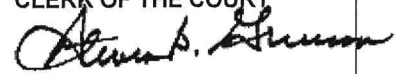
Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128
Attorneys for Defendants

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.

/s/ Joyce L. Martin

An Employee of Black & LoBello



1 **SAO**
2 Rusty Graf, Esq.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 West Twain Avenue, 3rd Floor
6 Las Vegas, Nevada 89135
7 Telephone: (702) 869-8801
8 Facsimile: (702) 869-2669
9 E-mail: rgraf@blacklobello.law
10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 JOSEPH FOLINO, an individual and NICOLE
14 FOLINO, an individual,

15 Plaintiff,

16 v.

17 TODD SWANSON, an individual; TODD
18 SWANSON, Trustee of the SHIRAZ TRUST;
19 SHIRAZ TRUST, a Trust of unknown origin;
20 LYONS DEVELOPMENT, LLC, a Nevada
21 limited liability company; DOES I through X;
22 and ROES I through X,

23 Defendants.

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

**STIPULATION AND ORDER TO
CONTINUE THE HEARING FOR:**

1. **PLAINTIFFS' MOTION TO
RETAX COSTS and**
2. **DEFENDANTS' MOTION FOR
ATTORNEY'S FEES & COSTS**

Current Date: June 11, 2020
Time: 9:00 a.m.
Dept.: 24

24 COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through
25 Rusty Graf, Esq. of Black & LoBello, their attorneys of record, AND Jeff Galliher, Esq. of
26 Galliher Law, and hereby submit this **STIPULATION AND ORDER TO CONTINUE THE**
27 **HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'**
28 **MOTION FOR ATTORNEY'S FEES & COSTS** currently set for hearing on **June 11, 2020**

1 at 9:00 a.m. in Dept. 24 of the above-captioned court to be continued to **June 25, 2020 at 9:00**
2 a.m. in Dept. 24.

3 **IT IS SO STIPULATED BY:**

4 DATED this 3rd day of June 2020.

BLACK & LOBELLO

/s/ Rusty Graf, Esq.

Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blacklobello.law
Attorneys for Plaintiffs

12 DATED this 3rd day of June 2020.

Galliher Legal, P.C.

/s/ Jeffrey L. Galliher, Esq.

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

1 ORDER

2 IT IS SO ORDERED that the STIPULATION AND ORDER TO CONTINUE THE
3 HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'
4 MOTION FOR ATTORNEY'S FEES & COSTS currently set for hearing on June 11, 2020
5 at 9:00 a.m. in Dept. 24 of the above-captioned shall be continued to June 25, 2020 at 9:00 a.m.
6 in Dept. 24.
7

8
9 Dated: June 4, 2020

10 
11 DISTRICT COURT JUDGE
12

13 Prepared by:

14 **BLACK & LOBELLO**

15 /s/ Rusty Graf, Esq.

16 _____
17 Rusty Graf, Esq.
18 Nevada Bar No. 6322
19 10777 W. Twain Ave., Suite 300
20 Las Vegas, NV 89135
21 rgraf@blacklobello.law
22 *Attorneys for Plaintiff*
23
24
25
26
27
28

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO
and that on the 4th day of June 2020, I caused the above and foregoing document

**STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS'
MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S**

FEES & COSTS 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

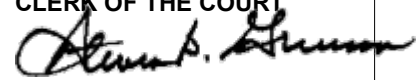
to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

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.

/s/ Joyce L. Martin
An Employee of Black & LoBello



SAO
Rusty Graf, Esq.
Nevada Bar No. 6322
BLACK & LOBELLO
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2669
E-mail: rgraf@blacklobello.law
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

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

**STIPULATION AND ORDER TO
CONTINUE THE HEARING FOR:**

- 1. PLAINTIFFS' MOTION TO
RETAX COSTS and**
- 2. DEFENDANTS' MOTION FOR
ATTORNEY'S FEES & COSTS**

Current Date: June 11, 2020
Time: 9:00 a.m.
Dept.: 24

COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through
Rusty Graf, Esq. of Black & LoBello, their attorneys of record, AND Jeff Galliher, Esq. of
Galliher Law, and hereby submit this **STIPULATION AND ORDER TO CONTINUE THE
HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'
MOTION FOR ATTORNEY'S FEES & COSTS** currently set for hearing on **June 11, 2020**

1 at 9:00 a.m. in Dept. 24 of the above-captioned court to be continued to **June 25, 2020 at 9:00**
2 **a.m.** in Dept. 24.

3 **IT IS SO STIPULATED BY:**

4 DATED this 3rd day of June 2020.

5 **BLACK & LOBELLO**

6
7 /s/ Rusty Graf, Esq.

8

Rusty Graf, Esq.
9 Nevada Bar No. 6322
10 10777 W. Twain Ave., Suite 300
11 Las Vegas, NV 89135
12 rgraf@blacklobello.law
13 *Attorneys for Plaintiffs*

12 DATED this 3rd day of June 2020.

13 **Galliher Legal, P.C.**

14
15 /s/ Jeffrey L. Galliher, Esq.

16

Jeffrey L. Galliher, Esq.
17 Galliher Legal, P.C.
18 Nevada Bar No. 8078
19 1850 E. Sahara Ave., #107
20 Las Vegas, NV 89104
21 *Attorneys for Defendants*

ORDER

IT IS SO ORDERED that the STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S FEES & COSTS currently set for hearing on June 11, 2020 at 9:00 a.m. in Dept. 24 of the above-captioned shall be continued to June 25, 2020 at 9:00 a.m. in Dept. 24.

Dated: June 4, 2020


DISTRICT COURT JUDGE

Prepared by:

BLACK & LOBELLO

/s/ Rusty Graf, Esq.

Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blacklobello.law
\Attorneys for Plaintiff

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO
and that on the 4th day of June 2020, I caused the above and foregoing document

**STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS'
MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S
FEES & COSTS** to be served as follows:

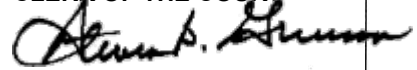
☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's
electronic filing/service system;
☐ pursuant to EDCR 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.

/s/ Joyce L. Martin
An Employee of Black & LoBello



1 **ERR**

2 Rusty Graf, Esq.

3 Nevada Bar No. 6322

4 **BLACK & LOBELLO**

5 10777 West Twain Avenue, 3rd Floor

6 Las Vegas, Nevada 89135

7 Telephone: (702) 869-8801

8 Facsimile: (702) 869-2669

9 E-mail: rgraf@blacklobello.law

10 *Attorneys for Appellants*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JOSEPH FOLINO, an individual and NICOLE
14 FOLINO, an individual,

15 Appellants,

16 v.

17 TODD SWANSON, an individual; TODD
18 SWANSON, Trustee of the SHIRAZ TRUST;
19 SHIRAZ TRUST, a Trust of unknown origin;
20 LYONS DEVELOPMENT, LLC, a Nevada
21 limited liability company; DOES I through X;
22 and ROES I through X,

23 Respondents.

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

**ERRATA TO CASE APPEAL
STATEMENT**

24 COMES NOW, Appellants JOSEPH FOLINO and NICOLE FOLINO, by and through
25 their attorney of record Rusty Graf, Esq., of Black & LoBello, hereby submit their Errata to
26 their Case Appeal Statement, wherein Appellant Nicole Folino was inadvertently listed as Kelly
27 Folino.

28 ///

///

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///

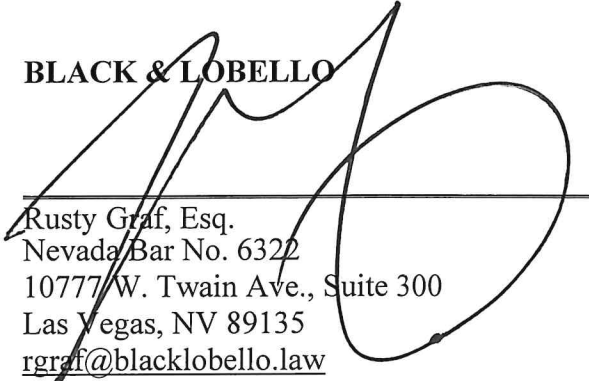
///

///

1 Appellants submit the instant Errata, therefore, for the purpose of providing the Court
2 and opposing counsel with a correct version of the Case Appeal Statement. The corrected
3 version of the Case Appeal Statement is attached hereto as Exhibit 1.

4 DATED this ____ day of June 2020.

BLACK & LOBELLO


Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blacklobello.law
Attorney for Appellants

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 18th day of June 2020, I caused the above and foregoing document **ERRATA TO CASE APPEAL STATEMENT** 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;

☒ 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

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

James A. Kohl
Howard & Howard Attorneys PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
Settlement Judge

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


An Employee of Black & LoBello

EXHIBIT 1

1 **ASTA**
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
(702) 869-8801
(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,
LLC, a Nevada limited liability company;
DOES I through X; and ROES I through X,

17 Defendants.
18

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

CASE APPEAL STATEMENT

19
20 Plaintiffs Joseph Folino and Nicole 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 ///

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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

Defendant/Respondent:

Lyons Development, LLC.

Counsel for the Respondent:

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

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 11, 2020 Order makes it clear that granting the Motion to Dismiss was based entirely
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 upon the incorrect assessment that “Plaintiffs have failed to present evidence to establish the one
2 fact that could possibly make their claims viable: that the February 2017 leak was not repaired.”
3 The problem with this assessment is that it has no basis in the substance and allegations actually
4 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 11, 2020 Order
17 is also improper, as it was not based upon the pleading that was actually the subject of the Motion
18 to Dismiss (the Second Amended Complaint) and instead analyzed the Motion to Dismiss in
19 relation to the content of the initial Complaint and First Amended Complaint. These disparities,
20 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

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

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

Dated this ____ day of June, 2020.

BLACK & LOBELLO

RUSTY GRAF, ESQ.
Nevada Bar No. 6322
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (fax)
rgraf@blacklobello.law
Attorney for Appellants

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CERTIFICATE OF SERVICE

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

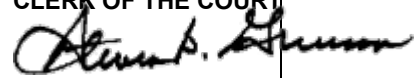
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;
- ☐ pursuant to 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.
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1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

An Employee of Black & LoBello



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

CASE#: A-18-782494-C

DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE
THURSDAY, JUNE 25, 2020

**RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE VIA
BLUEJEANS HEARING
DEFENDANTS' MOTION FOR FEES AND COSTS AND PLAINTIFFS'
MOTION TO RETAX COSTS**

APPEARANCES (continued on page 2):

For the Plaintiffs:

J. RUSTY GRAF, ESQ.

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APPEARANCES (continued):

For the Defendants:

JEFFREY L. GALLIHER, ESQ.

RECORDED BY: NANCY MALDONADO, COURT RECORDER

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1 Las Vegas, Nevada, Thursday, June 25, 2020

2
3 [Case called at 9:20 a.m.]

4 THE CLERK: Case A-18-782494-C, Joseph Folino versus
5 Todd Swanson.

6 THE COURT: All right, who do we have for the Plaintiff?

7 MR. GRAF: Good morning, Your Honor, Rusty Graf
8 appearing for the Plaintiffs.

9 THE COURT: Okay.

10 MR. GALLIHER: Good morning, Your Honor, Jeff Galliher for
11 the Defendants.

12 THE COURT: All right, now I had actually reviewed all of this
13 and was issuing an order without the need for oral argument, because
14 you guys provided very comprehensive briefs. You passionately
15 presented your points of view. And I couldn't imagine you adding
16 anything at oral argument.

17 And my experience has been, not just with you guys, but with
18 most counsel, that rarely at oral argument do counsel add anything new.
19 They're usually reiterating things that they already said in their motion,
20 opposition, or reply briefs.

21 And I guess the fear is that I didn't read it and comprehend it
22 the first time, but I did. So I'm going to tell you what my thinking is on
23 these two motions.

24 And then, I'll grant each of you a very brief opportunity, if you
25 choose to exercise it, to provide two or three minutes of oral argument if

1 you think it is necessary.

2 So with regard to Defendants' Motion for Fees and Costs, the
3 Court has carefully and meticulously reviewed the Motion for Fees that
4 was filed April 22nd, 2020.

5 Also reviewed Plaintiff's Opposition to the Motion for Fees that
6 was filed May 11th, as well as the errata filed May 13th, 2020, and
7 Defendants' Reply filed June 3rd of 2020.

8 Throughout the various hearings and briefings in this case, up
9 to and including the present matter under consideration, the recurring
10 theme has been that Plaintiff insists upon refusing to consider that he
11 may be pursuing an unjustified claim against the Defendant.

12 Finally, when the Motion for Summary Judgment was heard
13 and considered, it became abundantly clear to the Court that no matter
14 whether the facts or law supported Plaintiff's idea of what the case was
15 about, Plaintiff was going to insist upon pursuing claims against
16 Defendant, whether or not there was any evidence to support the claim.

17 When one of Plaintiff's claims would reveal itself to be
18 completely without merit or unsupportable under the law or facts, Plaintiff
19 resorted to a whack-a-mole approach in an effort to offer up a different
20 leak or alleged nondisclosure.

21 It demonstrated to the Court that the Plaintiff was motivated to
22 pursue this case and these claims against Defendant with the goal of
23 extorting a pound of flesh because of Plaintiff's dissatisfaction with his
24 purchase of this luxury home.

25 Very importantly, at the time of escrow closing, even though

1 new issues were arising as the escrow was still open, the Plaintiff
2 insisted upon going forward and closing escrow in spite of his actual
3 knowledge of issues he later tried to elevate into claims.

4 Having very carefully reviewed all the pleadings, the Court is
5 satisfied with the Beatty and Brunzell analysis set forth in Defendants'
6 motion and adopts the same because it is exceptionally well supported
7 in the record and compellingly persuasive.

8 Accordingly, in the preparation of the order granting this
9 Motion for Fees, Defense counsel is directed to utilize an abridged
10 version of its brief to formulate findings and conclusions for the Court's
11 adoption.

12 The fees incurred since the offer of judgment are entirely
13 reasonable and they were necessarily incurred. And the Brunzell factors
14 are thoroughly fleshed out and supported in the motion.

15 Accordingly, the Court finds that \$39,447 in fees should be
16 awarded to Defendant.

17 The Court would add that this was a very close case for the
18 Court to consider the possibility of awarding all fees, since the inception
19 of the suit, which would have amounted to the fair and reasonable sum
20 of \$82,021 in fees, but the Court declines to do so, instead, awarding
21 fees of \$39,447 reasonably and necessarily incurred since the offer of
22 judgment.

23 I'm going to address costs in discussing the Plaintiff's Motion
24 for Retax. And then, I will give counsel the opportunity to speak.

25 So with regard to Plaintiff's Motion to Retax, although

1 technically, an opposition was not filed in response to this Motion to
2 Retax, before the Motion to Retax costs was filed, Defendant filed its
3 Motion for Fees and Costs preemptively, making its arguments in
4 support of costs in its Motion for Fees and Costs.

5 There were two items that were challenged by the Plaintiff.
6 The Plaintiff says mediation costs are not enumerated. That's true.

7 Plaintiff continued that they're not reasonable or necessary,
8 but the Court thinks that's a self-defeating argument. Mediation is by
9 definition a process both the Plaintiff and the Defendant entered into
10 voluntarily in an attempt to resolve their differences.

11 Thus, it was a voluntary, consensual agreement to expend
12 funds on both sides to attempt to prevent further expense and bring the
13 matter to a close.

14 And there is no doubt that at the time that voluntary
15 consensual agreement was entered into by the parties, each of them
16 necessarily thought that it was reasonable and necessary.

17 So the Court finds a mediation expense to be both reasonable
18 and necessary, and therefore, approves the mediation costs totaling
19 \$2084.50.

20 The other item criticized by the Plaintiff is runner costs. In this
21 modern day and age, it was become more cost effective to employ the
22 services of a runner on an ad hoc basis, rather than to employ a runner,
23 which would necessitate increasing firm income, which is to say hourly
24 fees, to cover the increased overhead cost.

25 Accordingly, the Court finds that the utilization of runner

1 services was reasonable and necessary and disallows Plaintiff's
2 objection to the costs for runner totaling \$135.60.

3 So, Mr. Graf, I have explained my thinking and inclination as
4 to both of these motions. And since they disfavor the Plaintiff's side, I
5 want to give you the first opportunity to make any remarks you wish to
6 that are in addition to what you competently and comprehensively stated
7 in your briefs?

8 MR. GRAF: Thank you, Your Honor. I -- one point of
9 clarification before I speak. You're awarding the fees under NRCP 68
10 and not under 18.010(2)(b)?

11 THE COURT: Well, had I opted to award them from the very
12 beginning, I would have relied upon 18.010.

13 But since I'm only awarding them from the date of offer of
14 judgment, it's -- this decision is being made pursuant to the case law
15 under NRCP 68, offers of judgment.

16 MR. GRAF: And it just -- it shortens things, so that's why I
17 want to clarify that.

18 THE COURT: Okay.

19 MR. GRAF: So, really, the only -- the main argument that we
20 presented in the brief as to NRCP 68 --

21 THE COURT: Could you get closer to your microphone?

22 MR. GRAF: I apologize, Your Honor. Can you hear me
23 better?

24 THE COURT: Yeah, it's just a little wavery [sic]. I'm not quite
25 sure what's going on, but go ahead.

1 MR. GRAF: Okay. Your Honor, our only argument as to if
2 you seek the award to be at the timing of the offer that [indiscernible].
3 The timing of the offer of judgment, Your Honor, was made at a time
4 when it was not answer even filed by the Defendants in the case.

5 That's one of the things that may or may not have been as
6 clear in our brief. And the fact that the Defendants have never filed an
7 answer. They filed three successive motions to dismiss and then a
8 motion for summary judgment.

9 His Honor at one point in time in the hearing had required
10 them to file an answer and they didn't. So if the issue is whether or not
11 NRCP 68 is only available to a party, we would at least argue at this time
12 for purposes of the record that we don't think that they were a party per
13 se in the sense that they didn't file an answer.

14 They'd only filed a motion to dismiss. And if they weren't -- be
15 accorded the -- not protection, but the governing principals of attorneys'
16 fees pursuant to NRCP 68.

17 Then further, Your Honor, the only other argument as to timing
18 would be the offer of judgment was made at a time when there was no
19 discovery that was completed.

20 And I think that there is case law that we've cited, as well as
21 other cases in the state of Nevada, that say prior to the time of filing an
22 answer, regardless of the arguments that are made in court and
23 everything else, is not appropriate.

24 That you're a party or you're a nonparty, who presents an offer
25 of judgment prior to even filing an answer and prior to discovery, that

1 offer of judgment in and of itself is per se unreasonable and file a
2 [indiscernible] provision of those cases [indiscernible].

3 Your Honor, the only other argument that we have as to the
4 cost and our Motion to Retax costs on the mediation is I want to make
5 sure that the record is clear here today.

6 And that is that the complaint in this matter was not filed until
7 October 9th, 2018. It is our argument in the Motion to Retax that
8 because there was a mediation that was conducted in July of 2018, that
9 is not a recoverable cost under NRS 18.020.

10 That it's only the costs that are incurred pursuant to litigation.
11 That is clearly three months prior to litigation. And that was the basis of
12 our opposition and I want to make everybody clear on that. And that
13 was it, Your Honor. We submitted.

14 THE COURT: Well, the one thing that your arguments result
15 in is the necessity for the Court to give greater consideration to NRS
16 18.010, because as I mentioned in my initial remarks, the Court's view
17 was that the Plaintiff from the get-go obstinately refused to consider that
18 he may be pursuing an unjustified claim.

19 And as I mentioned, at the time the escrow happened, that
20 was a time where the Plaintiff had the full opportunity to deal with all of
21 his concerns that he had about purchasing this home.

22 And instead of -- and he even threatened that he was not
23 going to allow this escrow to close until these issues were dealt with.

24 But, apparently, he was not in earnest about that or changed
25 his mind because with knowledge of all the issues that came up at and

1 around and shortly after the opening of escrow, he still went ahead
2 without making any financial adjustments in the purchase price and
3 moved ahead with the purchase of this property.

4 Now that all happened before the suit was instituted. And as I
5 mentioned, this was a close case in me determining whether or not to
6 award fees from the very beginning of the institution of the suit by the
7 Plaintiff on the basis that it was a vexatious, spurious, and
8 unsupportable claim against the Defendant.

9 However, in the interests of allowing the Plaintiff the latitude to
10 go forward with the case and find out what was going on, if there were
11 any other issues, I decided against that.

12 And the offer of judgment that was made was an additional
13 opportunity for the Plaintiff to retreat from pursuing this case. And so, I
14 would add that the considerations that apply to NRS 18.010 and
15 initiating, pursuing, and maintaining a vexatious and spurious litigation
16 also factor into my decision in awarding fees.

17 It's just that I am restricting the award to those incurred after
18 the offer of judgment was made, so I would amend my initial statement
19 to you by saying that 18.010 and NRCP 68 both form the basis for this
20 decision.

21 I don't know if that provides you with any further reasons to
22 make any further argument, but I'll give you the opportunity to do so if
23 you wish.

24 MR. GRAF: I appreciate that, Your Honor and it does.
25 18.010 --

1 THE COURT: I can't -- I'm sorry, I can't hear you.

2 MR. GRAF: Sorry, Your Honor. Can you hear me better
3 now?

4 THE COURT: Yes.

5 MR. GRAF: Okay, yes, it does, Your Honor. We would just
6 reiterate as we did in our brief that 18.010 simply requires that the
7 defendants be a prevailing party. The case law that we cited to means
8 that they have to be awarded a money -- monetary judgment.

9 They have not been awarded a monetary judgment.
10 18.010(2)(b) is not applicable. And that's --

11 THE COURT: That's not correct. Successfully prevailing on a
12 claim is enough to justify an award of attorneys' fees under 18.010.

13 MR. GRAF: Your Honor, we've cited to the Perotti [phonetic]
14 case and the Perotti case says that it have to an evaluation of the net
15 judgment. There is no net judgment, zero on both sides. Submitted.

16 THE COURT: Well, the problem is that would mean that
17 anybody who has a spurious and vexatious and nonmeritorious suit
18 leveled against it would never have the opportunity to have justice
19 afforded by an award of attorneys' fees.

20 Anything else?

21 MR. GRAF: Not other than we thought that it was a very
22 meritorious case, Your Honor.

23 THE COURT: Mr. Galliher?

24 MR. GALLIHER: Thank you, Your Honor. Well, first, I would
25 note that this time limits argument that Mr. Graf just made, this is the first

1 time we're hearing it. It wasn't in any of the briefing.

2 But it's very clear the only time limit requirement contained in
3 NRCP 68 is the 21 days before trial time limit.

4 So the idea that the Defendants weren't parties to this case is
5 kind of nonsensical since, clearly, the Plaintiffs served multiple sets of
6 discovery on the Defendants. The Defendants participated in
7 depositions.

8 I don't think there's much really support for this notion that if
9 you haven't filed an answer, you've only filed some other responsive
10 pleading, that you can't file an offer of judgment.

11 And then, with respect to the argument you just made, we
12 cited in our brief to the Poker Equipment case, the Copper Sands case,
13 the 145 East Harmon 2 case, which all stand for the proposition that you
14 don't have to get a money judgment that you -- because again, then how
15 often does a Defendant actually get a money judgment? So it would
16 basically make that a plaintiffs-only rule, which of course, that's not the
17 case.

18 I would just echo the Court's comments regarding the
19 comment of the Plaintiffs from the beginning of this case, the attitude
20 that they brought to the case, the way they conducted the case.

21 And I think that it does justify an award under 18.010. And I
22 understand the Court's reasoning. And I appreciate it and the comments
23 that it was a close call, but I just want to make sure the record is clear
24 that the Defendants feel that this is a case that under 18.010(2) would
25 warrant the award of \$82,000 in fees since the inception. And -- but with

1 that I would submit it and appreciate the Court's time.

2 THE COURT: All right, well, I am awarding these fees under
3 NRCP 68 and NRS 18.010. I am just restricting them in terms of those
4 reasonably and necessarily incurred to the ones that were incurred after
5 the offer of judgment as a beginning point time-wise.

6 All right, so Mr. Galliher, I need you to prepare. I think you
7 can do this with a single order addressing your Motion for Fees and
8 Costs and integrating within the order the ruling regarding the Plaintiff's
9 Motion to Retax costs.

10 But I think a single order should suffice. I'd like it approved as
11 to form and content, but it doesn't have to be.

12 I don't want to see competing orders. That's, you know, from
13 the Court's standpoint reviewing these lengthy competing orders is no
14 different than having a motion for reconsideration put in front of you.

15 So I need the order submitted to the Court for signature within
16 14 days per EDCR 7.21.

17 Gentlemen, is there anything else we can address while we
18 have everybody on the line?

19 MR. GRAF: Yes, Your Honor, just one quick question?

20 THE COURT: Yes.

21 MR. GRAF: If we don't agree on the language of the order,
22 and we're not to submit competing orders, how do I present any of the
23 issues? You just want a letter stating what my issues are with his order,
24 if I have a problem --

25 THE COURT: No, if you think the order is in error, appeal.

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MR. GRAF: Understood, Your Honor. Thank you.

THE COURT: Okay. All right, thank you.

MR. GALLIHER: Thank you, Your Honor.

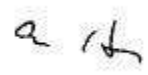
THE CLERK: Status check for the filing of that order set for
July 23rd in Chambers.

THE COURT: Okay, thank you.

[Proceedings concluded at 9:42 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my ability.



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Transcriber

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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

**ORDER REGARDING DEFENDANTS' MOTION FOR ATTORNEY'S FEES, VERIFIED
MEMORANDUM OF COSTS AND DISBURSEMENTS AND PLAINTIFFS' MOTION TO
RETAX**

I.

PREAMBLE

On June 25, 2020, this Court held a hearing to address the Defendants' Motion For Attorneys Fees. Rusty J. Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. appeared on behalf of the Defendants.¹ The Defendants had previously filed a Verified Memorandum of Costs and Disbursements on April 22, 2020 and Plaintiffs filed a Motion to Retax on April 24, 2020. At the hearing, this Court addressed both the motion for fees and the parties' arguments regarding the propriety of certain costs. Accordingly, the following Order addresses the Defendants' Motion for Attorneys Fees, Defendants' Verified Memorandum of Costs and Disbursements and the Plaintiffs' Motion to Retax.

After considering the parties' briefs, together with exhibits submitted to the court and arguments of counsel at the June 25, 2020 hearing, this Court finds that Defendants are entitled to an award of fees and costs, as more fully detailed and supported by the following findings and analysis.

II.

BACKGROUND

This case arises from the sale of a private residence located at 42 Meadowhawk ("The Property") in Las Vegas. The home was constructed by Blue Heron Homes pursuant to a contract with Defendant Lyons Development and construction was completed in the spring of 2015. Years later the Property was sold by Defendant Lyons Development to Plaintiffs and escrow closed on November 17, 2017.

On October 9, 2018 Plaintiffs filed their Complaint alleging seven separate causes of action against Defendants. On February 4, 2019 Defendants filed their motion to dismiss Plaintiffs'

¹ The parties are the following: Plaintiffs, Nicole and Joseph Folino and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust; and Lyons Development, LLC.

1 complaint. In response, Plaintiffs filed a countermotion to amend their complaint which was granted
2 at a hearing on April 9, 2019.

3 On April 18, 2019 Plaintiffs filed their First Amended Complaint (“FAC”) and Defendants’
4 filed a motion to dismiss the same on May 20, 2019. On July 18, 2019, this Court held a hearing
5 wherein Plaintiffs’ 2nd, 3rd, 5th, 6th, and 7th causes of action were dismissed. The Court ordered
6 Plaintiffs to file a second amended complaint limited to the two surviving causes of action.
7

8 On September 3, 2019 Plaintiffs filed their Second Amended Complaint (“SAC”) wherein
9 Plaintiffs alleged two causes of action. The first alleged Fraud/Intentional Misrepresentation and the
10 second alleged violation of NRS 113.100 et seq. The gravamen of the SAC was that Defendants failed
11 to disclose systemic defects in The Property’s plumbing system related to the Uponor piping installed
12 in The Property at the time it was constructed based upon a water leak occurring in February 2017. In
13 response the Defendants filed a motion to dismiss/motion for summary judgment, supported by
14 indisputable evidence that Rakeman Plumbing completely repaired the February 2017 water leak, thus
15 negating the Defendants’ purported “knowing concealment.”
16

17 On November 7, 2019, this Court held a hearing on Defendants’ motion to dismiss. At that
18 time, the Court stated its inclination to grant Defendants’ motion, but afforded the Plaintiffs 90 days
19 to conduct discovery to develop, if possible, specific facts to rebut the facts presented by the
20 Defendants in seeking dismissal’ facts in a supplemental pleading. On November 26, 2019, due to
21 the extent of discovery indicated by numerous written discovery requests and notices of deposition
22 served by Plaintiffs, Defendants associated Mr. Galliher as counsel.
23

24 On December 11, 2019 Defendants served an offer of judgment upon the Plaintiffs in the
25 amount of \$150,000.00 (one-hundred, fifty thousand dollars) inclusive of fees, costs and interest. The
26 offer of judgment was not accepted and ultimately expired by operation of time.
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1 After the offer of judgment expired, Plaintiffs conducted substantial discovery in a futile effort
2 to uncover a material issue of fact to rebut the Defendants' facts supporting summary judgment. That
3 discovery included service of Interrogatories, Requests for Admissions and Requests for Production
4 of Documents on all Defendants. Additionally, Plaintiff noticed and took the depositions of Dr.
5 Swanson (twice), his assistant (Nikki Whitfield), two employees of Rakeman Plumbing (Aaron
6 Hawley and William Gerber) and two of the selling agent's team (Ivan Sher and Kelly Contenta).

8 After a brief stipulated extension Plaintiff's filed their supplemental brief on February 13,
9 2020. Along with the brief Plaintiffs served more than 5,400 pages of documents upon the Defendants.

10 On February 27, 2020 Defendants filed their response to Plaintiffs' supplement.

11 On March 3, 2020 the Court held a hearing on all pending motions. Due to some logistical
12 confusion the matter was eventually continued to April 7, 2020.

13 On April 7, 2020, this Court granted summary judgment in favor of the Defendants. On May
14 11, 2020, this court issued detailed findings of fact and conclusions of law in support of its order
15 granting summary judgment in favor of the Defendants. Notice of Entry of the Order was filed on
16 May 13, 2020.

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

20 This Court finds that Defendants are entitled to an award of attorney's fees from the date of
21 the Defendants' offer of judgment, December 11, 2019 in the amount of \$39,447.00. Further, this
22 court finds that an award of costs is warranted in the amount of \$5,840.41.

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE *BEATTIE* AND *BRUNZELL* FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- The work actually performed by the lawyer; the skill, time and attention given to the work; and
- The result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and costs.

1) Whether the Plaintiffs' claims were brought in good faith

There is a substantial question of whether Plaintiffs' claims in this case were brought in good faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163 P.3d 420, 425 (2007).

On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended complaint including the surviving claims.

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence

1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
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1 When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith"
2 was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but
3 had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to
4 defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS
5 Chapter 113 and *Nelson*, their claims failed.
6

7 Approximately two weeks later, prior to the extensive discovery which ultimately did not yield
8 a disputed issue of material fact that could defeat the Defendants' motion for summary judgment, the
9 Defendants presented the Plaintiffs with their offer of judgment. This Court finds that, under the first
10 *Beattie* factor, the Plaintiffs' claims were not brought in good faith.

11 ***2) Whether the defendant's offer of judgment was reasonable and in good faith in both its***
12 ***timing and amount***

13 This Court finds that the Defendants' December 11, 2019 offer of judgment was reasonable in
14 time. First, the offer of judgment was made after the Court expressed its inclination to dismiss the
15 case. Second, although the Plaintiffs own pleadings presented evidence that negated their claims
16 under NRS Chapter 113 and *Nelson*, this Court exercised caution and granted Plaintiffs leave to
17 proceed with discovery to uncover disputed issues of material fact. Third, the Defendants' offer was
18 made before the parties had expended substantial time, effort and money in discovery.
19

20 Further, the Court finds that the Defendants offer was made in a genuine effort to settle the
21 case. To that time, and even now, Plaintiffs have never asserted that they had suffered any measurable
22 special damages. All available information suggests that just as had been the case when Defendants
23 owned the Property, all repairs to the plumbing system were handled under warranty by either
24 Rakeman Plumbing or the piping manufacturer, Uponor. At the time of the offer of judgment,
25 Plaintiffs had already been advised in open court of the Court's inclination to grant Defendants'
26 motion to summarily dispose of the case because the Plaintiffs could not present any evidence to rebut
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1 the Defendants' facts supporting summary judgment. Nevertheless, in a genuine attempt to resolve
2 the case in the very spirit of NRCP 68, Defendant's offered the substantial amount of \$150,000.00 at
3 a time when Plaintiffs had yet to expend significant amounts of time and money on what ultimately
4 turned out to be futile discovery efforts.

5
6 Defendants' offer was reasonable with respect to amount because it was for an objectively
7 substantial amount when compared to Plaintiffs' potential, yet unsupported, damages. Plaintiffs never
8 disclosed any special damages which they allege to have suffered. Instead, Plaintiffs' computation of
9 damages merely claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith
10 Damages" of "\$100,000.00." Based upon the dearth of damage information, and with the knowledge
11 that the court had declared its inclination to dismiss the case, Defendants appear to have calculated
12 their offer with the expectation that it would do what it was intended to do: settle the case. While
13 Defendants maintained that they did nothing wrong, given the unpredictable nature of litigation and
14 the potential to accrue substantial costs and fees in a relatively short period of time they authorized
15 their counsel to offer an exceedingly generous amount of money to resolve the case once and for all.

16
17 When no response was forthcoming from Plaintiffs, Defendants and their counsel were left
18 with no alternative but to go forward and participate fully in the discovery propounded by Plaintiffs,
19 attend the six depositions noticed by Plaintiffs and continue defending the case.

20
21 ***3) Whether the plaintiff's decision to reject the offer and proceed in the litigation was
grossly unreasonable or in bad faith***

22
23 When Defendants served their offer of judgment, the court had already indicated its inclination
24 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
25 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
26 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
27 expense to the parties.

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.

6
7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.

11 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
12 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
13 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
14 pesticide applicator, who was authorized to practice that profession in this State at the time the
15 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
16 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
17 plumbing contractor for investigation and repair and that all information relied upon by Defendants
18 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson.*

19
20 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
21 NRS 113.150 provides, in pertinent part:
22

23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may: **(a)**
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or **(b)** Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse.** (emphasis added)

Nev. Rev. Stat. § 113.150(2).

1 In this case, there can be no dispute that the leak occurring in November 2017 was disclosed to
2 Plaintiffs via Addendum 4A to the purchase agreement prior to the close of escrow. Plaintiffs' decision
3 to nevertheless close escrow was their election of remedy and bars "further recourse" as a matter of
4 law. *Id.*

5 Under the circumstances as they existed in mid-December 2019, in the face of formidable
6 factual, legal and statutory barriers to any substantial recovery, Plaintiffs' rejection of the \$150,000.00
7 offer of judgment was grossly unreasonable.
8

9 ***4) Whether the fees sought be the offeror are reasonable and justified in amount***

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):

- 13 ▪ The qualities of the advocate: his ability, training, education, experience, professional
14 standing and skill;
- 15 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
16 skill required, the responsibility imposed and the prominence and character of the
17 parties where they affect the importance of the litigation;
- 18 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
19 work; and
- 20 ▪ The result: whether the attorney was successful and what benefits were derived.
21

22 The Defendants provided declarations showing the attorneys handling the defense of this
23 matter have excellent credentials. All attorneys involved in the defense have been partnered with and
24 trained by some of the finest trial lawyers in the state, including the late J. Mitchell "Mitch" Cobeaga
25 and Rex Jemison, among others. They have substantial litigation and trial experience over many
26 decades of combined admission as Nevada lawyers in handling lawsuits for both plaintiffs and
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1 defendants. They serve as judges pro-tem and arbitrators in both criminal and civil courts. They are
2 skilled litigators with at least one of them rated AV/Preeminent in litigation by Martindale-Hubbell,
3 the nation's foremost rating service for attorneys. All are in good standing with the State Bar of Nevada
4 with no history of discipline.

5 The character of the work to be done was difficult. The range of claims initially brought by
6 the Plaintiffs, together with voluminous documents and the statute-heavy nature of these types of
7 cases, required close attention to detail and mastery of a litany of important facts. The work performed
8 in a relatively short period of time was extensive, including six lengthy depositions being taken over
9 just a two week period, expansive research and writing, including review of over 5,400 documents
10 and multiple oral arguments. Defense counsel delivered a just result for their client: dismissal of the
11 case. Plaintiffs nonetheless pushed the case and conducted substantial discovery which had to be dealt
12 with and made myriad arguments which had to be countered.

13 After rejecting the offer of judgment of \$150,000.00, Plaintiffs conducted substantial and
14 wide-ranging discovery. Plaintiffs' counsel noticed and conducted six depositions. In addition,
15 Plaintiffs served each of the Defendants with substantive Interrogatories, Requests for Admissions
16 and Requests for Production of Documents and issued many third-party subpoenas resulting in the
17 production of more than 5,400 pages of documents.

18 None of that discovery changed the facts which had already been established: the February
19 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
20 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
21 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
22 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
23 which proved to be fruitless.
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Conversely, Defendants' conduct since the offer of judgment has been almost completely reactive in nature, meaning that the work done by defense counsel was directly necessitated by the actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the significant sum of \$150,000.

Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the nature of the work (real estate litigation) and the experience of counsel involved.

Based on NRCp 68, this court hereby awards Defendants attorneys fees from the date of the offer of judgment, December 11, 2019, in the amount of \$39,447.00.

C. ATTORNEYS FEES ARE ALSO WARRANTED UNDER THE STANDARDS SET FORTH IN NRS 18.010(2)(b)

This court also finds that NRS 18.010(2)(b) supports an award of attorneys' fees because the case, from its inception had little, if any, legal or factual support. Indeed, the same exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately supported this Court's granting of summary judgment in favor of the Defendants. However, rather than award attorney's fees to Defendants for defending this case from its inception, this Court limits its attorneys' fees award to fees incurred from the date of the offer of judgment, December 11, 2019.

NRS 18.010(2)(b) provides as follows:

In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

...

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party **was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because

1 such claims and defenses overburden limited judicial resources, hinder the timely
2 resolution of meritorious claims and increase the costs of engaging in business and
3 providing professional services to the public. (Emphasis added)

4 Plaintiffs sued the Defendants without factual or legal support. The February 2017 leak was
5 fully repaired, as indicated by documentation the Plaintiff attached to their initial complaint and
6 subsequent pleadings. With respect to the November 2017 leak, Plaintiffs' pleadings, from the
7 inception of this case, clearly show that Plaintiffs requested and performed an inspection prior to close
8 of escrow and that during that inspection they observed the November 2017 leak, but nevertheless
9 proceeded to closing on November 17, 2017.
10

11 These facts, alleged in and supported by the Plaintiffs' own pleadings, establish that
12 Defendants had no liability under Nevada law because they established that 1) the February leak had
13 been repaired, and 2) Plaintiffs were aware of the November leak prior to closing. These facts, alleged
14 by Plaintiffs themselves, defeat their claims when applied to clearly established precedent in the
15 *Nelson* decision.
16

17 Further, even if the Plaintiffs could establish a *prima facie* case, the Plaintiffs failed to present
18 any evidence that they had suffered any recoverable damages. The repair to the piping was done under
19 warranty at no expense to the Plaintiffs and concurrent with other work being done at The Property.
20 It appears that Plaintiffs suffered no monetary damages nor even any significant inconvenience.
21 Plaintiffs' claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith Damages" of
22 "\$100,000.00" have no factual support since they did not have to pay for the re-piping of the property
23 or for the remediation of the November 2017 leak.
24

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
28

1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

7 This Court has acknowledged the controlling nature of *Nelson v. Heer* with respect to the issues
8 in this case. Any reasonable reading of *Nelson* must lead to the conclusion that the conduct of the
9 Defendants alleged in this case are not actionable. Likewise, Plaintiffs made no real effort to
10 distinguish this case from *Nelson* nor did they argue that *Nelson* should not otherwise apply. Instead,
11 in pursuing this case Plaintiffs essentially ignored *Nelson* and the clear example it set for actionable
12 conduct. “A claim is groundless if “the allegations in the complaint . . . are not supported by any
13 credible evidence at trial.” [citation omitted] *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev.
14 1993).
15

16 **D. PURSUANT TO NRS 18.020, DEFENDANTS ARE ENTITLED TO COSTS**

17 Pursuant to NRS 18.020, “(c)osts must be allowed of course to the prevailing party against
18 any adverse party against whom judgment is rendered, in the following cases...(3) In an action for
19 the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” An
20 award of costs under NRS 18.020 is “mandatory and not subject to the court’s discretion.” *Day v.*
21 *West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985).
22

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.

26 This Court finds that law firms employing runners is an impractical overhead expense in
27 today’s economy. As such, law firms routinely utilize outside runners for various tasks, and such
28

1 services are recoverable under NRS 18.020. This Court therefore awards the Defendants' costs for
2 runners in the amount of \$135.50.

3 Regarding prelitigation mediation fees, this Court finds that such fees were a reasonable and
4 necessary cost related to this case. The parties, by mutual agreement, determined that litigation of
5 this case, and the related litigation costs, could possibly be avoided by submitting the case to
6 mediation. As such, mediation costs in the amount of \$2,084.50 are recoverable pursuant to NRS
7 18.020.
8

9 No other costs requested by Defendants were challenged by the Plaintiffs and the Court finds
10 that those costs were reasonable and necessarily incurred in the defense of this case. This Court
11 hereby awards to the Defendants costs, as requested by Defendants, in the amount of \$5,840.41.
12

13 **IV.**

14 **ORDER**

15 Defendants Motion for Attorney's Fees and Costs is hereby GRANTED and Defendants are
16 hereby awarded their attorney's fees in the amount of \$39,447.00 and costs in the amount of \$5,840.41
17 for a total award of \$45,287.41. Plaintiff's Motion to Retax Costs is hereby DENIED.

18 ///

19 ///

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26 ///

GALLIHER LEGAL P.C.
1850 E. Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
702-735-0049 Fax: 702-735-0204

1 It is further ORDERED that this award shall be reduced to a JUDGMENT against Plaintiffs
2 in the total amount of \$45,287.41.

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

12
13 Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
14 Jay T. Hopkins, Esq.
Nevada Bar No. 3223
15 Attorneys for Defendants

57B B94 9A28 D97E
16 Jim Crockett
Reviewed for form and content:
District Court Judge

17 BLACK AND LOBELLO

18 refused to sign
19 Rusty J. Graf, Esq.
Nevada Bar No. 6322
20 Attorney for Plaintiffs

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/18/2020

15 Jerri Hunsaker

jhunsaker@blacklobello.law

16 Mariella Dumbrique

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17 Christopher Young

mhyde@cotomlaw.com

18 Diane Meeter

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19 J. Graf

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20 Christopher Young

cyoung@cotomlaw.com

21 Jeffrey Galliher

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22 Jeffrey Galliher

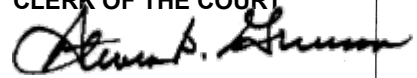
jgalliher@galliherlawfirm.com

23 Jay Hopkins

jaythopkins@gmail.com

24 Kimalee Goldstein

kgoldstein@galliherlawfirm.com



1 NCOA
2 **BLACK & WADHAMS**
3 J. RUSTY GRAF, ESQ.
4 Nevada Bar No. 6322
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (fax)
Attorneys for Plaintiffs

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

20 **NOTICE OF NAME CHANGE OF LAW FIRM**

21 Plaintiffs, JOSEPH FOLINO, an individual and NICOLE FOLINO ("Plaintiffs") by and
22 through their attorney of record, Rusty Graf, Esq., hereby gives notice that the effective August
23 1, 2020, the name of law firm of Black & LoBello has been change to **Black & Wadhams**.
24 Contact information for Mr. Graf is set forth below:

25 Rusty Graf, Esq.
26 10777 W. Twain Ave., Suite 300
27 Las Vegas, NV 89135
28 Telephone: (702) 869-8801
Fascimile: (702) 869-2669
Email: rgraf@blackwadhams.law

BLACK & WADHAMS
10777 W. Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

Dated this 21st day of August 2020.

BLACK & WADHAMS

Rusty Graf, Esq. (NSB 6322)
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Attorneys for Plaintiffs

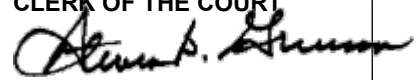
CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing NOTICE OF CHANGE OF NAME OF LAW FIRM, to be served electronically using the Odyssey File & Serve system, to all parties with an email address on record.

/s/ Diane Meeter
An Employee of Black & Wadhamis

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

Electronically Filed
8/24/2020 9:52 AM
Steven D. Grierson
CLERK OF THE COURT



Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
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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 18th
day of August, 2020.

1 A copy of said Order is attached hereto as Exhibit 1.

2
3 Dated this 24th day of August 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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CERTIFICATE OF E-SERVICE

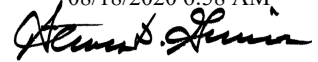
Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 24th of August I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

Rusty Graf, Esq.
Shannon M. Wilson, Esq.
10777 West Twain Avenue, 3rd Floor
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rgraf@blacklobello.law
swilson@blacklobello.law

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

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EXHIBIT 1



CLERK OF THE COURT

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
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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

**ORDER REGARDING DEFENDANTS' MOTION FOR ATTORNEY'S FEES, VERIFIED
MEMORANDUM OF COSTS AND DISBURSEMENTS AND PLAINTIFFS' MOTION TO
RETAX**

I.

PREAMBLE

On June 25, 2020, this Court held a hearing to address the Defendants' Motion For Attorneys Fees. Rusty J. Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. appeared on behalf of the Defendants.¹ The Defendants had previously filed a Verified Memorandum of Costs and Disbursements on April 22, 2020 and Plaintiffs filed a Motion to Retax on April 24, 2020. At the hearing, this Court addressed both the motion for fees and the parties' arguments regarding the propriety of certain costs. Accordingly, the following Order addresses the Defendants' Motion for Attorneys Fees, Defendants' Verified Memorandum of Costs and Disbursements and the Plaintiffs' Motion to Retax.

After considering the parties' briefs, together with exhibits submitted to the court and arguments of counsel at the June 25, 2020 hearing, this Court finds that Defendants are entitled to an award of fees and costs, as more fully detailed and supported by the following findings and analysis.

II.

BACKGROUND

This case arises from the sale of a private residence located at 42 Meadowhawk ("The Property") in Las Vegas. The home was constructed by Blue Heron Homes pursuant to a contract with Defendant Lyons Development and construction was completed in the spring of 2015. Years later the Property was sold by Defendant Lyons Development to Plaintiffs and escrow closed on November 17, 2017.

On October 9, 2018 Plaintiffs filed their Complaint alleging seven separate causes of action against Defendants. On February 4, 2019 Defendants filed their motion to dismiss Plaintiffs'

¹ The parties are the following: Plaintiffs, Nicole and Joseph Folino and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust; and Lyons Development, LLC.

1 complaint. In response, Plaintiffs filed a countermotion to amend their complaint which was granted
2 at a hearing on April 9, 2019.

3 On April 18, 2019 Plaintiffs filed their First Amended Complaint (“FAC”) and Defendants’
4 filed a motion to dismiss the same on May 20, 2019. On July 18, 2019, this Court held a hearing
5 wherein Plaintiffs’ 2nd, 3rd, 5th, 6th, and 7th causes of action were dismissed. The Court ordered
6 Plaintiffs to file a second amended complaint limited to the two surviving causes of action.
7

8 On September 3, 2019 Plaintiffs filed their Second Amended Complaint (“SAC”) wherein
9 Plaintiffs alleged two causes of action. The first alleged Fraud/Intentional Misrepresentation and the
10 second alleged violation of NRS 113.100 et seq. The gravamen of the SAC was that Defendants failed
11 to disclose systemic defects in The Property’s plumbing system related to the Uponor piping installed
12 in The Property at the time it was constructed based upon a water leak occurring in February 2017. In
13 response the Defendants filed a motion to dismiss/motion for summary judgment, supported by
14 indisputable evidence that Rakeman Plumbing completely repaired the February 2017 water leak, thus
15 negating the Defendants’ purported “knowing concealment.”
16

17 On November 7, 2019, this Court held a hearing on Defendants’ motion to dismiss. At that
18 time, the Court stated its inclination to grant Defendants’ motion, but afforded the Plaintiffs 90 days
19 to conduct discovery to develop, if possible, specific facts to rebut the facts presented by the
20 Defendants in seeking dismissal’ facts in a supplemental pleading. On November 26, 2019, due to
21 the extent of discovery indicated by numerous written discovery requests and notices of deposition
22 served by Plaintiffs, Defendants associated Mr. Galliher as counsel.
23

24 On December 11, 2019 Defendants served an offer of judgment upon the Plaintiffs in the
25 amount of \$150,000.00 (one-hundred, fifty thousand dollars) inclusive of fees, costs and interest. The
26 offer of judgment was not accepted and ultimately expired by operation of time.
27
28

1 After the offer of judgment expired, Plaintiffs conducted substantial discovery in a futile effort
2 to uncover a material issue of fact to rebut the Defendants' facts supporting summary judgment. That
3 discovery included service of Interrogatories, Requests for Admissions and Requests for Production
4 of Documents on all Defendants. Additionally, Plaintiff noticed and took the depositions of Dr.
5 Swanson (twice), his assistant (Nikki Whitfield), two employees of Rakeman Plumbing (Aaron
6 Hawley and William Gerber) and two of the selling agent's team (Ivan Sher and Kelly Contenta).

8 After a brief stipulated extension Plaintiff's filed their supplemental brief on February 13,
9 2020. Along with the brief Plaintiffs served more than 5,400 pages of documents upon the Defendants.

10 On February 27, 2020 Defendants filed their response to Plaintiffs' supplement.

11 On March 3, 2020 the Court held a hearing on all pending motions. Due to some logistical
12 confusion the matter was eventually continued to April 7, 2020.

13 On April 7, 2020, this Court granted summary judgment in favor of the Defendants. On May
14 11, 2020, this court issued detailed findings of fact and conclusions of law in support of its order
15 granting summary judgment in favor of the Defendants. Notice of Entry of the Order was filed on
16 May 13, 2020.

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

20 This Court finds that Defendants are entitled to an award of attorney's fees from the date of
21 the Defendants' offer of judgment, December 11, 2019 in the amount of \$39,447.00. Further, this
22 court finds that an award of costs is warranted in the amount of \$5,840.41.

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE *BEATTIE* AND *BRUNZELL* FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- The work actually performed by the lawyer; the skill, time and attention given to the work; and
- The result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and costs.

1) Whether the Plaintiffs' claims were brought in good faith

There is a substantial question of whether Plaintiffs' claims in this case were brought in good faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163 P.3d 420, 425 (2007).

On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended complaint including the surviving claims.

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence

1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
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1 When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith"
2 was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but
3 had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to
4 defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS
5 Chapter 113 and *Nelson*, their claims failed.
6

7 Approximately two weeks later, prior to the extensive discovery which ultimately did not yield
8 a disputed issue of material fact that could defeat the Defendants' motion for summary judgment, the
9 Defendants presented the Plaintiffs with their offer of judgment. This Court finds that, under the first
10 *Beattie* factor, the Plaintiffs' claims were not brought in good faith.

11 ***2) Whether the defendant's offer of judgment was reasonable and in good faith in both its***
12 ***timing and amount***

13 This Court finds that the Defendants' December 11, 2019 offer of judgment was reasonable in
14 time. First, the offer of judgment was made after the Court expressed its inclination to dismiss the
15 case. Second, although the Plaintiffs own pleadings presented evidence that negated their claims
16 under NRS Chapter 113 and *Nelson*, this Court exercised caution and granted Plaintiffs leave to
17 proceed with discovery to uncover disputed issues of material fact. Third, the Defendants' offer was
18 made before the parties had expended substantial time, effort and money in discovery.
19

20 Further, the Court finds that the Defendants offer was made in a genuine effort to settle the
21 case. To that time, and even now, Plaintiffs have never asserted that they had suffered any measurable
22 special damages. All available information suggests that just as had been the case when Defendants
23 owned the Property, all repairs to the plumbing system were handled under warranty by either
24 Rakeman Plumbing or the piping manufacturer, Uponor. At the time of the offer of judgment,
25 Plaintiffs had already been advised in open court of the Court's inclination to grant Defendants'
26 motion to summarily dispose of the case because the Plaintiffs could not present any evidence to rebut
27
28

1 the Defendants' facts supporting summary judgment. Nevertheless, in a genuine attempt to resolve
2 the case in the very spirit of NRCP 68, Defendant's offered the substantial amount of \$150,000.00 at
3 a time when Plaintiffs had yet to expend significant amounts of time and money on what ultimately
4 turned out to be futile discovery efforts.

5
6 Defendants' offer was reasonable with respect to amount because it was for an objectively
7 substantial amount when compared to Plaintiffs' potential, yet unsupported, damages. Plaintiffs never
8 disclosed any special damages which they allege to have suffered. Instead, Plaintiffs' computation of
9 damages merely claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith
10 Damages" of "\$100,000.00." Based upon the dearth of damage information, and with the knowledge
11 that the court had declared its inclination to dismiss the case, Defendants appear to have calculated
12 their offer with the expectation that it would do what it was intended to do: settle the case. While
13 Defendants maintained that they did nothing wrong, given the unpredictable nature of litigation and
14 the potential to accrue substantial costs and fees in a relatively short period of time they authorized
15 their counsel to offer an exceedingly generous amount of money to resolve the case once and for all.

16
17 When no response was forthcoming from Plaintiffs, Defendants and their counsel were left
18 with no alternative but to go forward and participate fully in the discovery propounded by Plaintiffs,
19 attend the six depositions noticed by Plaintiffs and continue defending the case.

20
21 ***3) Whether the plaintiff's decision to reject the offer and proceed in the litigation was
grossly unreasonable or in bad faith***

22
23 When Defendants served their offer of judgment, the court had already indicated its inclination
24 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
25 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
26 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
27 expense to the parties.

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.

6
7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.

11 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
12 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
13 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
14 pesticide applicator, who was authorized to practice that profession in this State at the time the
15 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
16 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
17 plumbing contractor for investigation and repair and that all information relied upon by Defendants
18 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson.*

19
20 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
21 NRS 113.150 provides, in pertinent part:
22

23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may: **(a)**
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or **(b)** Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse.** (emphasis added)

Nev. Rev. Stat. § 113.150(2).

1 In this case, there can be no dispute that the leak occurring in November 2017 was disclosed to
2 Plaintiffs via Addendum 4A to the purchase agreement prior to the close of escrow. Plaintiffs' decision
3 to nevertheless close escrow was their election of remedy and bars "further recourse" as a matter of
4 law. *Id.*

5 Under the circumstances as they existed in mid-December 2019, in the face of formidable
6 factual, legal and statutory barriers to any substantial recovery, Plaintiffs' rejection of the \$150,000.00
7 offer of judgment was grossly unreasonable.
8

9 **4) *Whether the fees sought be the offeror are reasonable and justified in amount***

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):

- 13 ▪ The qualities of the advocate: his ability, training, education, experience, professional
14 standing and skill;
- 15 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
16 skill required, the responsibility imposed and the prominence and character of the
17 parties where they affect the importance of the litigation;
- 18 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
19 work; and
- 20 ▪ The result: whether the attorney was successful and what benefits were derived.
21

22 The Defendants provided declarations showing the attorneys handling the defense of this
23 matter have excellent credentials. All attorneys involved in the defense have been partnered with and
24 trained by some of the finest trial lawyers in the state, including the late J. Mitchell "Mitch" Cobeaga
25 and Rex Jemison, among others. They have substantial litigation and trial experience over many
26 decades of combined admission as Nevada lawyers in handling lawsuits for both plaintiffs and
27
28

1 defendants. They serve as judges pro-tem and arbitrators in both criminal and civil courts. They are
2 skilled litigators with at least one of them rated AV/Preeminent in litigation by Martindale-Hubbell,
3 the nation's foremost rating service for attorneys. All are in good standing with the State Bar of Nevada
4 with no history of discipline.

5 The character of the work to be done was difficult. The range of claims initially brought by
6 the Plaintiffs, together with voluminous documents and the statute-heavy nature of these types of
7 cases, required close attention to detail and mastery of a litany of important facts. The work performed
8 in a relatively short period of time was extensive, including six lengthy depositions being taken over
9 just a two week period, expansive research and writing, including review of over 5,400 documents
10 and multiple oral arguments. Defense counsel delivered a just result for their client: dismissal of the
11 case. Plaintiffs nonetheless pushed the case and conducted substantial discovery which had to be dealt
12 with and made myriad arguments which had to be countered.

13 After rejecting the offer of judgment of \$150,000.00, Plaintiffs conducted substantial and
14 wide-ranging discovery. Plaintiffs' counsel noticed and conducted six depositions. In addition,
15 Plaintiffs served each of the Defendants with substantive Interrogatories, Requests for Admissions
16 and Requests for Production of Documents and issued many third-party subpoenas resulting in the
17 production of more than 5,400 pages of documents.

18 None of that discovery changed the facts which had already been established: the February
19 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
20 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
21 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
22 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
23 which proved to be fruitless.
24
25
26
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28

Conversely, Defendants' conduct since the offer of judgment has been almost completely reactive in nature, meaning that the work done by defense counsel was directly necessitated by the actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the significant sum of \$150,000.

Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the nature of the work (real estate litigation) and the experience of counsel involved.

Based on NRCp 68, this court hereby awards Defendants attorneys fees from the date of the offer of judgment, December 11, 2019, in the amount of \$39,447.00.

C. ATTORNEYS FEES ARE ALSO WARRANTED UNDER THE STANDARDS SET FORTH IN NRS 18.010(2)(b)

This court also finds that NRS 18.010(2)(b) supports an award of attorneys' fees because the case, from its inception had little, if any, legal or factual support. Indeed, the same exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately supported this Court's granting of summary judgment in favor of the Defendants. However, rather than award attorney's fees to Defendants for defending this case from its inception, this Court limits its attorneys' fees award to fees incurred from the date of the offer of judgment, December 11, 2019.

NRS 18.010(2)(b) provides as follows:

In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

...

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party **was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because

1 such claims and defenses overburden limited judicial resources, hinder the timely
2 resolution of meritorious claims and increase the costs of engaging in business and
3 providing professional services to the public. (Emphasis added)

4 Plaintiffs sued the Defendants without factual or legal support. The February 2017 leak was
5 fully repaired, as indicated by documentation the Plaintiff attached to their initial complaint and
6 subsequent pleadings. With respect to the November 2017 leak, Plaintiffs' pleadings, from the
7 inception of this case, clearly show that Plaintiffs requested and performed an inspection prior to close
8 of escrow and that during that inspection they observed the November 2017 leak, but nevertheless
9 proceeded to closing on November 17, 2017.
10

11 These facts, alleged in and supported by the Plaintiffs' own pleadings, establish that
12 Defendants had no liability under Nevada law because they established that 1) the February leak had
13 been repaired, and 2) Plaintiffs were aware of the November leak prior to closing. These facts, alleged
14 by Plaintiffs themselves, defeat their claims when applied to clearly established precedent in the
15 *Nelson* decision.
16

17 Further, even if the Plaintiffs could establish a *prima facie* case, the Plaintiffs failed to present
18 any evidence that they had suffered any recoverable damages. The repair to the piping was done under
19 warranty at no expense to the Plaintiffs and concurrent with other work being done at The Property.
20 It appears that Plaintiffs suffered no monetary damages nor even any significant inconvenience.
21 Plaintiffs' claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith Damages" of
22 "\$100,000.00" have no factual support since they did not have to pay for the re-piping of the property
23 or for the remediation of the November 2017 leak.
24

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
28

1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

7 This Court has acknowledged the controlling nature of *Nelson v. Heer* with respect to the issues
8 in this case. Any reasonable reading of *Nelson* must lead to the conclusion that the conduct of the
9 Defendants alleged in this case are not actionable. Likewise, Plaintiffs made no real effort to
10 distinguish this case from *Nelson* nor did they argue that *Nelson* should not otherwise apply. Instead,
11 in pursuing this case Plaintiffs essentially ignored *Nelson* and the clear example it set for actionable
12 conduct. “A claim is groundless if “the allegations in the complaint . . . are not supported by any
13 credible evidence at trial.” [citation omitted] *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev.
14 1993).
15

16 **D. PURSUANT TO NRS 18.020, DEFENDANTS ARE ENTITLED TO COSTS**

17 Pursuant to NRS 18.020, “(c)osts must be allowed of course to the prevailing party against
18 any adverse party against whom judgment is rendered, in the following cases...(3) In an action for
19 the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” An
20 award of costs under NRS 18.020 is “mandatory and not subject to the court’s discretion.” *Day v.*
21 *West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985).
22

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.

26 This Court finds that law firms employing runners is an impractical overhead expense in
27 today’s economy. As such, law firms routinely utilize outside runners for various tasks, and such
28

1 services are recoverable under NRS 18.020. This Court therefore awards the Defendants' costs for
2 runners in the amount of \$135.50.

3 Regarding prelitigation mediation fees, this Court finds that such fees were a reasonable and
4 necessary cost related to this case. The parties, by mutual agreement, determined that litigation of
5 this case, and the related litigation costs, could possibly be avoided by submitting the case to
6 mediation. As such, mediation costs in the amount of \$2,084.50 are recoverable pursuant to NRS
7 18.020.
8

9 No other costs requested by Defendants were challenged by the Plaintiffs and the Court finds
10 that those costs were reasonable and necessarily incurred in the defense of this case. This Court
11 hereby awards to the Defendants costs, as requested by Defendants, in the amount of \$5,840.41.
12

13 **IV.**

14 **ORDER**

15 Defendants Motion for Attorney's Fees and Costs is hereby GRANTED and Defendants are
16 hereby awarded their attorney's fees in the amount of \$39,447.00 and costs in the amount of \$5,840.41
17 for a total award of \$45,287.41. Plaintiff's Motion to Retax Costs is hereby DENIED.

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GALLIHER LEGAL P.C.
1850 E. Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
702-735-0049 Fax: 702-735-0204

1 It is further ORDERED that this award shall be reduced to a JUDGMENT against Plaintiffs
2 in the total amount of \$45,287.41.

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

12
13 Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
14 Jay T. Hopkins, Esq.
Nevada Bar No. 3223
15 Attorneys for Defendants

57B B94 9A28 D97E
16 Jim Crockett
Reviewed for form and content:
District Court Judge

17 BLACK AND LOBELLO

18 refused to sign
19 Rusty J. Graf, Esq.
Nevada Bar No. 6322
20 Attorney for Plaintiffs

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/18/2020

15 Jerri Hunsaker

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16 Mariella Dumbrique

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17 Christopher Young

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18 Diane Meeter

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22 Jeffrey Galliher

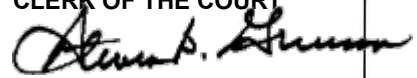
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23 Jay Hopkins

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1 ACAS
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & WADHAMS**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
7 (702) 869-8801
8 (702) 869-2669 (fax)
9 *Attorney for Appellants*

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 JOSEPH FOLINO, an individual and
13 NICOLE FOLINO, an individual,

14 Appellants,

15 v.

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

22 Respondents.

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

23 **APPELLANTS' CASE APPEAL**
24 **STATEMENT**

25 Appellants Joseph Folino and Nicole Folino (hereinafter "Appellants"), by and through
26 their attorney of record, Rusty Graf, Esq. of the law firm Black & Wadhams, hereby submits their
27 Case Appeal Statement pursuant to Nevada Rule of Appellate Procedure 3(f) as follows:

28 ///

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1 **CASE APPEAL STATEMENT**

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

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

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

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

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

12 Plaintiff/Appellant:

13 Nicole Folino

14 Counsel for the Appellant:

15 Rusty Graf, Esq.
16 BLACK & WADHAMS
17 10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

18 Plaintiff/Appellant:

19 Joseph Folino

20 Counsel for the Appellant:

21 Rusty Graf, Esq.
22 BLACK & WADHAMS
23 10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

24
25 **(D) The name of each respondent and the name and address of appellate counsel, if**
26 **known, for each respondent, but if the name of a respondent's appellate counsel is**
27 **not known, then the name and address of that respondent's trial counsel:**

28 Defendant/Respondent:

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Todd Swanson

Counsel for the Respondent:

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

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

Defendant/Respondent:

Todd Swanson as Trustee of the Shiraz Trust

Counsel for the Respondent:

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Attorneys for Respondent

Defendant/Respondent:

Lyons Development, LLC.

Counsel for the Respondent:

Christopher M. Young, Esq.
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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:

Appellants 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:

The underlying matter was a tort action arising from the purchase and sale of a home located at 42 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanated from Appellants' discovery of systemic plumbing issues after the close of the sale, and the failure of the

1 Respondents to disclose their knowledge of water loss occurrences on the Seller's Real Property
2 Disclosure Form.

3 Appellants initial Complaint was filed on October 19, 2018. Appellants subsequently filed
4 a First Amended Complaint on April 18, 2019, and a Second Amended Complaint on May 20,
5 2019. Appellants initial Complaint and First Amended Complaint were both focused on claims
6 arising from a water loss incident that occurred on or about February 16, 2017. However, at the
7 time of the filing of Appellants' Second Amended Complaint a significant amount of discovery
8 had taken place, and it was revealed that numerous water loss incidents other than the February
9 16, 2017 incident had occurred on the property. The Second Amended Complaint reflected these
10 newly discovered water loss incidents and instead of focusing on the February 16, 2017 incident,
11 contained the factual allegations that (1) numerous water losses had occurred on the property; (2)
12 none of these water loss incidents were disclosed; (3) the existence of fungi/mold on the property
13 was also not disclosed in the Seller's Real Property Disclosure Form; (4) Respondents' had
14 knowledge of systemic plumbing issues on the property; and (5) that Respondents' acted with
15 intent to deceive when they failed to disclose the prior water losses (which include at least one
16 water loss that Respondents' did not even claim was repaired and, therefore, cannot logically be
17 covered by the Nelson v. Heer holding relating to the removal of a duty to disclose).

18 On September 24, 2019, Respondents filed a Motion to Dismiss the Appellants' Second
19 Amended Complaint. The district court held a hearing on Respondents' Motion to Dismiss the
20 Second Amended Complaint on November 7, 2019, and the matter was ordered continued to
21 permit the parties time to file a supplemental brief and production of documents. Appellants'
22 Supplemental Brief was filed on February 13, 2020, and emphasized that Appellants' Second
23 Amended Complaint was not focused on the February 16, 2017 water loss incident, but rather (1)
24 that numerous incidents that occurred; (2) the fact that there was no documentation demonstrating
25 that some of these leaks had been repaired; and (3) that there was evidence of the existence of
26 fungi/mold on the property which also required disclosure on the Seller's Real Property
27 Disclosure Form and yet was omitted. Despite Appellants' Second Amended Complaint
28 containing direct allegations that there were unrepaired leaks and mold/fungi that went

1 undisclosed on the Seller's Real Property Disclosure Form, the district court relied on the holding
2 of Nelson v. Heer and entered an order granting Respondents' Motion to Dismiss Appellants'
3 Second Amended Complaint on May 11, 2020.

4 The Order granting Respondents' Motion to Dismiss had incorrect/false Findings of Fact
5 which included: (1) that Appellants' action was premised on the Respondents' failure to disclose
6 a specific leak which occurred on February 16, 2017; (2) that previous leaks in other areas of the
7 house were not related to Appellants' Claims; (3) that another separate water loss in a basement
8 bathroom was not related to Appellants' Claims; and (4) that only the February 16, 2017 water
9 loss was relevant, and all other water losses complained of by the Appellants "are unrelated to
10 their claims and, further, do not materially affect the value of the property". The Order also had
11 incorrect Conclusions of Law which included: (1) that "Plaintiffs lawsuit is predicated on their
12 allegations that the Defendants failed to disclose a February 16, 2017 water leak in the Uponor
13 plumbing system"; and (2) that Appellants' Fraud/Intentional Misrepresentation claim failed as a
14 matter of law because the "Second Amended Complaint alleges one wrong: Defendants' failure
15 to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect.
16 The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim."

17 These Findings of Fact and Conclusions of Law contained in the May 11, 2020 Order
18 make it clear that the district court did not consider the allegations in Appellants' Second
19 Amended Complaint and instead conducted an analysis of the allegations from Appellants' initial
20 Complaint and First Amended Complaint. As a result, the district court improperly applied Nelson
21 v. Heer, as the holding from that case states that conducting a repair removes the general duty to
22 disclose the existence of a material issue. While the leak which caused the February 16, 2017
23 water loss may have been repaired, Appellants' Second Amended Complaint and Supplemental
24 Brief both directly stated (and produced documents evidencing) that there were other undisclosed
25 leaks and mold/fungi that were not repaired or disclosed. Further, regarding the February 16, 2017
26 water loss incident, Appellants also assert that, under Nelson v. Heer, even if the duty to disclose
27 is removed by repair it is still fraud and/or concealment to respond incorrectly to a direct inquiry
28 about water losses having ever occurred on the property.

1 The above issues are the subject of a pending appeal, Case No. 81252. However, the May
2 11, 2020 Order dismissing Appellants' case did not address an earlier Motion for Attorney's Fees
3 and Costs filed by the Respondents on April 22, 2020 and a Motion to Retax filed by Appellants
4 on April 24, 2020. The district court held a hearing on these matters on June 25, 2020, and
5 subsequently filed an Order on August 18, 2020, which granted Respondents' Motion for
6 Attorney's Fees and Costs and denied Appellants' Motion to Retax.

7 The district court's August 18, 2020 Order had Findings of Fact and Conclusions of Law
8 which included: (1) "Pursuant to NRCF 68(f)(1)(B), Defendants are entitled to recover their costs
9 and allowed attorney's fees from the time of the service of the offer", which occurred on
10 December 11, 2019. The Court awarded "\$39,447.00 in attorney's fees in defending this case
11 from December 11, 2019 forward"; (2) That the attorney's fees and costs sought by Respondents
12 were reasonable and justified under a Beattie and Brunzell factors analysis; (3) that the
13 Respondents were also entitled to an award of their attorney's fees pursuant to NRS 18.010(2)(b)
14 because "the case, from its inception had little, if any, legal or factual support. Indeed, the same
15 exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately
16 supported this Court's granting of summary judgment in favor of the Defendants."; and (4) that
17 Respondents were entitled to an award of their costs, pursuant to NRS 18.020, "in the amount of
18 \$5,840.41." It was pursuant to these Findings of Fact and Conclusions of Law, that the Court
19 Ordered that Respondents' Motion for Attorney's Fees and Costs was granted and Appellants'
20 Motion to Retax was denied. Respondents were awarded "their attorney's fees in the amount of
21 \$39,447.00 and costs in the amount of \$5,840.41 for a total award of \$45,287.41."

22 It was improper of the district court to make such Findings of Facts and Conclusions of
23 Law, and to subsequently award Respondents attorney's fees in the amount of Thirty-Nine
24 Thousand Four Hundred and Forty-Seven Dollars (\$39,447.00) and costs in the amount of Five
25 Thousand Eight Hundred and Forty Dollars and 41/100 Cents (\$5,840.41) for a total award of
26 Forty-Five Thousand Two Hundred and Eighty Seven Dollars and 41/100 Cents (\$45,287.41)
27 based upon those Findings of Facts and Conclusions of Law. This was improper and flawed
28 because, like the Order dismissing Appellants' Second Amended Complaint, it also relied upon:

1 (1) the district court's incorrect application of the holding of Nelson v. Heer to this dispute; (2)
2 the incorrect Finding of Fact that Appellants' action was premised on the Respondents' failure to
3 disclose a specific leak which occurred on February 16, 2017; (3) the incorrect Conclusion of
4 Law that "Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose
5 a February 16, 2017 water leak in the Uponor plumbing system"; and (4) the false Finding of Fact
6 that only the February water loss was relevant, and all other water losses complained of by the
7 Appellants "are unrelated to their claims and, further, do not materially affect the value of the
8 property". Additionally, these issues resulted in the district court making a further error in
9 improperly analyzing the award of attorney's fees and costs to Respondents using the Beattie and
10 Brunzell factors.

11 As discussed above, Appellants has asserted in a pending appeal, Case No. 81252, that
12 the Findings of Facts and Conclusions of Law of the district court as they relate to the application
13 of the holding of Nelson v. Heer to this dispute were incorrect. Further, Appellants also assert that
14 the district court acted improperly in failing to consider the actual content of Appellants' Second
15 Amended Complaint, instead choosing to analyze Appellants' claims only in relation to the
16 February 2017 leak. Both of these improper actions formed the basis for the district court's
17 subsequent Order granting Respondents' their attorney's fees and costs. The Order granting those
18 fees and costs to Respondents directly states as much, identifying that the award of attorney's
19 fees pursuant to NRS 18.010(2)(b) was because the case had "little, if any, legal or factual
20 support" and costs were awarded pursuant to NRS 18.020 because Respondents were the
21 prevailing party. The basis for both of these awards is completely undermined by the
22 inapplicability of Nelson v. Heer to this situation, and the fact that the content of Appellants'
23 Second Amended Complaint did have substantial legal and factual support, but this content was
24 ignored and the claims of Appellants were only analyzed in relation to the February 2017 leak.

25 Finally, the Order granting fees and costs to Respondents is also improper due to the
26 insufficiency of the district court's analysis of the Beattie and Brunzell factors and resulting
27 improper conclusion that they favored awarding fees and costs to Respondents. The district court
28 held that the Beattie and Brunzell factors supported the award of costs and fees to Respondents

1 and relied upon the following Findings of Fact and Conclusions of Law in reaching that decision:
2 (1) that “Plaintiffs’ claims were not brought in good faith” as evidenced by the complaint having
3 a “dubious factual basis” and the filing of “inappropriate motion for sanctions”; (2) that
4 defendant’s offer of judgment was “reasonable and in good faith in both its timing and amount”
5 because at the time of the offer the damages suffered by Appellants was “unsupported” and “at
6 the time of the offer of judgment, Plaintiffs had already been advised in open court of the Court’s
7 inclination to grant Defendants’ motion to summarily dispose of the case”; and (3) that it was
8 grossly unreasonable for Appellants to reject Respondents’ December 11, 2020 settlement offer
9 because “the court had already indicated its inclination to dismiss the case, Plaintiffs had provided
10 no evidence of any damages, and established case law seemingly eviscerated Plaintiff’s claims.”

11 This analysis of the Beattie and Brunzell factors by the district court was incorrect and
12 improper because it, again, relied upon (1) the district court’s incorrect application of the holding
13 of Nelson v. Heer to this dispute; (2) the incorrect Finding of Fact that Appellants’ action was
14 premised on the Respondents’ failure to disclose a specific leak which occurred on February 16,
15 2017; (3) the incorrect Conclusion of Law that “Plaintiffs lawsuit is predicated on their allegations
16 that the Defendants failed to disclose a February 16, 2017 water leak in the Uponor plumbing
17 system”; and (4) the false Finding of Fact that only the February water loss was relevant, and all
18 other water losses complained of by the Appellants “are unrelated to their claims and, further, do
19 not materially affect the value of the property”. This incorrect basis for the analysis led to the
20 completely unsupported and factually incorrect conclusions by the district court that Appellants
21 lacked good faith in bringing their claims (which was based primarily on the application of Nelson
22 v. Heer and the analysis of Appellants’ claims in relation to only the February 16, 2017 leak), that
23 the Offer by Respondents was reasonable and in good faith in timing and amount (which was
24 based primarily on the district court expressing its “inclination to dismiss the case”, but such an
25 inclination was based on the same issues discussed herein), and that Appellants’ decision to reject
26 the offer was grossly unreasonable (which was again based primarily on the district court
27 expressing its “inclination to dismiss the case” and the supposed fact that “established case law
28 seemingly eviscerated Plaintiff’s claims” despite the fact that the inclination had no basis and the

1 holding of the established case law did not apply). All of these issues directly resulted in the
2 district court improperly granting Respondents' Motion for Attorney's Fees and Costs while
3 denying Appellants' Motion to Retax. These issues, among others, necessitate appellate relief.

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

7
8 **Pending Appeal:**

9 **1. Case No. 81252**

10 JOSEPH FOLINO, AN INDIVIDUAL; AND NICOLE FOLINO,
11 AN INDIVIDUAL,

12 Appellants,

13 v.

14 TODD SWANSON, AN INDIVIDUAL; TODD SWANSON,
15 TRUSTEE OF THE SHIRAZ TRUST; SHIRAZ TRUST, A
16 TRUST OF UNKNOWN ORIGIN; AND LYONS
17 DEVELOPMENT, LLC, NEVADA LIMITED LIABILITY
18 COMPANY,

18 Respondents.

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

20 N/A

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

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

2 Appellants do not believe that there is a possibility of settlement with Respondents.

3
4 Dated this 17th day of September, 2020.

5
6 **BLACK & WADHAMS**

7
8 RUSTY GRAF, ESQ.
9 Nevada Bar No. 6322
10 10777 W. Twain Ave., 3rd Fl.
11 Las Vegas, Nevada 89135
12 (702) 869-8801
13 (702) 869-2669 (fax)
14 rgraf@blackwadhams.law
15 *Attorney for Appellants*
16
17
18
19
20
21
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23
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Black & Wadhams and that on the 12th day of September 2020, I caused the above and foregoing document entitled **APPELLANTS' CASE APPEAL STATEMENT** 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 Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;

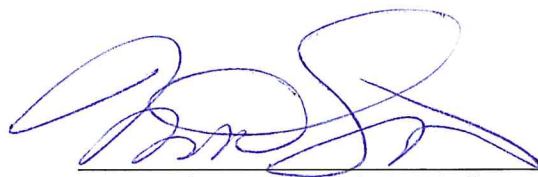
☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered.

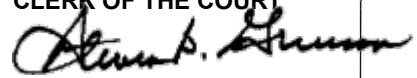
to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

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 Respondents

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondents



An Employee of Black & Wadhams



1 **NOAS**
2 J. RUSTY GRAF, ESQ.
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4 **BLACK & WADHAMS**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (fax)
Attorney for Plaintiffs/Appellants

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 & Wadhams, 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 for Attorney's Fees and Costs and Denying Plaintiffs' Motion to Retax filed in the
2 above-captioned matter on August 18, 2020 with notice of entry filed on August 24, 2020. (See
3 Exhibit 1, copy of Filed Notice of Entry of Order granting Defendants' Motion for Attorney's
4 Fees and Costs and Denying Plaintiffs' Motion to Retax.)

5 Dated this 17th day of September 2020.

BLACK & WADHAMS

RUSTY GRAF, ESQ.

Nevada Bar No. 6322

10777 W. Twain Ave., 3rd Fl.

Las Vegas, Nevada 89135

(702) 869-8801

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rgraf@blackwadhamslaw.com

Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 17th day of September 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.

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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.

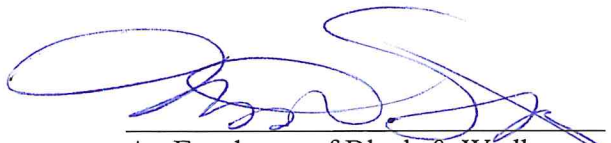
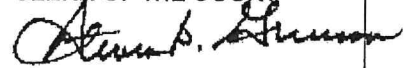

An Employee of Black & Wadams

EXHIBIT 1



Christopher M. Young, Esq.
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jgalliher@galliherlawfirm.com

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 18th
day of August, 2020.

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A copy of said Order is attached hereto as Exhibit 1.

Dated this 24th day of August 2020.

GALLIHER LEGAL P.C.

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

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 24th of August I caused the foregoing NOTICE OF ENTRY OF ORDER to be electronically e-served on counsel as follows:

Rusty Graf, Esq.
Shannon M. Wilson, Esq.
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rgraf@blacklobello.law
swilson@blacklobello.law

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

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EXHIBIT 1

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Heather S. Gemin
CLERK OF THE COURT

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jgalliher@galliherlawfirm.com

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

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

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).

**ORDER REGARDING DEFENDANTS' MOTION FOR ATTORNEY'S FEES, VERIFIED
MEMORANDUM OF COSTS AND DISBURSEMENTS AND PLAINTIFFS' MOTION TO
RETAX**

I.

PREAMBLE

On June 25, 2020, this Court held a hearing to address the Defendants' Motion For Attorneys Fees. Rusty J. Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. appeared on behalf of the Defendants.¹ The Defendants had previously filed a Verified Memorandum of Costs and Disbursements on April 22, 2020 and Plaintiffs filed a Motion to Retax on April 24, 2020. At the hearing, this Court addressed both the motion for fees and the parties' arguments regarding the propriety of certain costs. Accordingly, the following Order addresses the Defendants' Motion for Attorneys Fees, Defendants' Verified Memorandum of Costs and Disbursements and the Plaintiffs' Motion to Retax.

After considering the parties' briefs, together with exhibits submitted to the court and arguments of counsel at the June 25, 2020 hearing, this Court finds that Defendants are entitled to an award of fees and costs, as more fully detailed and supported by the following findings and analysis.

II.

BACKGROUND

This case arises from the sale of a private residence located at 42 Meadowhawk ("The Property") in Las Vegas. The home was constructed by Blue Heron Homes pursuant to a contract with Defendant Lyons Development and construction was completed in the spring of 2015. Years later the Property was sold by Defendant Lyons Development to Plaintiffs and escrow closed on November 17, 2017.

On October 9, 2018 Plaintiffs filed their Complaint alleging seven separate causes of action against Defendants. On February 4, 2019 Defendants filed their motion to dismiss Plaintiffs'

¹ The parties are the following: Plaintiffs, Nicole and Joseph Folino and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust; and Lyons Development, LLC.

1 complaint. In response, Plaintiffs filed a counter motion to amend their complaint which was granted
2 at a hearing on April 9, 2019.

3 On April 18, 2019 Plaintiffs filed their First Amended Complaint ("FAC") and Defendants'
4 filed a motion to dismiss the same on May 20, 2019. On July 18, 2019, this Court held a hearing
5 wherein Plaintiffs' 2nd, 3rd, 5th, 6th, and 7th causes of action were dismissed. The Court ordered
6 Plaintiffs to file a second amended complaint limited to the two surviving causes of action.
7

8 On September 3, 2019 Plaintiffs filed their Second Amended Complaint ("SAC") wherein
9 Plaintiffs alleged two causes of action. The first alleged Fraud/Intentional Misrepresentation and the
10 second alleged violation of NRS 113.100 et seq. The gravamen of the SAC was that Defendants failed
11 to disclose systemic defects in The Property's plumbing system related to the Uponor piping installed
12 in The Property at the time it was constructed based upon a water leak occurring in February 2017. In
13 response the Defendants filed a motion to dismiss/motion for summary judgment, supported by
14 indisputable evidence that Rakeman Plumbing completely repaired the February 2017 water leak, thus
15 negating the Defendants' purported "knowing concealment."
16

17 On November 7, 2019, this Court held a hearing on Defendants' motion to dismiss. At that
18 time, the Court stated its inclination to grant Defendants' motion, but afforded the Plaintiffs 90 days
19 to conduct discovery to develop, if possible, specific facts to rebut the facts presented by the
20 Defendants in seeking dismissal' facts in a supplemental pleading. On November 26, 2019, due to
21 the extent of discovery indicated by numerous written discovery requests and notices of deposition
22 served by Plaintiffs, Defendants associated Mr. Galliher as counsel.
23

24 On December 11, 2019 Defendants served an offer of judgment upon the Plaintiffs in the
25 amount of \$150,000.00 (one-hundred, fifty thousand dollars) inclusive of fees, costs and interest. The
26 offer of judgment was not accepted and ultimately expired by operation of time.
27
28

1 After the offer of judgment expired, Plaintiffs conducted substantial discovery in a futile effort
2 to uncover a material issue of fact to rebut the Defendants' facts supporting summary judgment. That
3 discovery included service of Interrogatories, Requests for Admissions and Requests for Production
4 of Documents on all Defendants. Additionally, Plaintiff noticed and took the depositions of Dr.
5 Swanson (twice), his assistant (Nikki Whitfield), two employees of Rakeman Plumbing (Aaron
6 Hawley and William Gerber) and two of the selling agent's team (Ivan Sher and Kelly Contenta).

8 After a brief stipulated extension Plaintiff's filed their supplemental brief on February 13,
9 2020. Along with the brief Plaintiffs served more than 5,400 pages of documents upon the Defendants.

10 On February 27, 2020 Defendants filed their response to Plaintiffs' supplement.

11 On March 3, 2020 the Court held a hearing on all pending motions. Due to some logistical
12 confusion the matter was eventually continued to April 7, 2020.

13 On April 7, 2020, this Court granted summary judgment in favor of the Defendants. On May
14 11, 2020, this court issued detailed findings of fact and conclusions of law in support of its order
15 granting summary judgment in favor of the Defendants. Notice of Entry of the Order was filed on
16 May 13, 2020.

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

20 This Court finds that Defendants are entitled to an award of attorney's fees from the date of
21 the Defendants' offer of judgment, December 11, 2019 in the amount of \$39,447.00. Further, this
22 court finds that an award of costs is warranted in the amount of \$5,840.41.

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE BEATTIE AND BRUNZELL FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- 1 ▪ The work actually performed by the lawyer; the skill, time and attention given to the work;
- 2 and
- 3 ▪ The result: whether the attorney was successful and what benefits were derived.

4 *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

5 In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and
6 costs.

7
8 ***1) Whether the Plaintiffs' claims were brought in good faith***

9 There is a substantial question of whether Plaintiffs' claims in this case were brought in good
10 faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in
11 subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in
12 February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted
13 on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first
14 pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak
15 had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

16 After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought
17 dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related
18 documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had
19 been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163
20 P.3d 420, 425 (2007).

21 On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed
22 Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended
23 complaint including the surviving claims.

24 On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the
25 Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence
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1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
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1 When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith"
2 was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but
3 had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to
4 defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS
5 Chapter 113 and *Nelson*, their claims failed.
6

7 Approximately two weeks later, prior to the extensive discovery which ultimately did not yield
8 a disputed issue of material fact that could defeat the Defendants' motion for summary judgment, the
9 Defendants presented the Plaintiffs with their offer of judgment. This Court finds that, under the first
10 *Beattie* factor, the Plaintiffs' claims were not brought in good faith.

11 ***2) Whether the defendant's offer of judgment was reasonable and in good faith in both its***
12 ***timing and amount***

13 This Court finds that the Defendants' December 11, 2019 offer of judgment was reasonable in
14 time. First, the offer of judgment was made after the Court expressed its inclination to dismiss the
15 case. Second, although the Plaintiffs own pleadings presented evidence that negated their claims
16 under NRS Chapter 113 and *Nelson*, this Court exercised caution and granted Plaintiffs leave to
17 proceed with discovery to uncover disputed issues of material fact. Third, the Defendants' offer was
18 made before the parties had expended substantial time, effort and money in discovery.
19

20 Further, the Court finds that the Defendants offer was made in a genuine effort to settle the
21 case. To that time, and even now, Plaintiffs have never asserted that they had suffered any measurable
22 special damages. All available information suggests that just as had been the case when Defendants
23 owned the Property, all repairs to the plumbing system were handled under warranty by either
24 Rakeman Plumbing or the piping manufacturer, Uponor. At the time of the offer of judgment,
25 Plaintiffs had already been advised in open court of the Court's inclination to grant Defendants'
26 motion to summarily dispose of the case because the Plaintiffs could not present any evidence to rebut
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1 the Defendants' facts supporting summary judgment. Nevertheless, in a genuine attempt to resolve
2 the case in the very spirit of NRCP 68, Defendant's offered the substantial amount of \$150,000.00 at
3 a time when Plaintiffs had yet to expend significant amounts of time and money on what ultimately
4 turned out to be futile discovery efforts.

5
6 Defendants' offer was reasonable with respect to amount because it was for an objectively
7 substantial amount when compared to Plaintiffs' potential, yet unsupported, damages. Plaintiffs never
8 disclosed any special damages which they allege to have suffered. Instead, Plaintiffs' computation of
9 damages merely claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith
10 Damages" of "\$100,000.00." Based upon the dearth of damage information, and with the knowledge
11 that the court had declared its inclination to dismiss the case, Defendants appear to have calculated
12 their offer with the expectation that it would do what it was intended to do: settle the case. While
13 Defendants maintained that they did nothing wrong, given the unpredictable nature of litigation and
14 the potential to accrue substantial costs and fees in a relatively short period of time they authorized
15 their counsel to offer an exceedingly generous amount of money to resolve the case once and for all.

16
17 When no response was forthcoming from Plaintiffs, Defendants and their counsel were left
18 with no alternative but to go forward and participate fully in the discovery propounded by Plaintiffs,
19 attend the six depositions noticed by Plaintiffs and continue defending the case.

20
21 ***3) Whether the plaintiff's decision to reject the offer and proceed in the litigation was
grossly unreasonable or in bad faith***

22
23 When Defendants served their offer of judgment, the court had already indicated its inclination
24 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
25 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
26 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
27 expense to the parties.

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.

6
7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.

11 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
12 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
13 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
14 pesticide applicator, who was authorized to practice that profession in this State at the time the
15 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
16 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
17 plumbing contractor for investigation and repair and that all information relied upon by Defendants
18 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson.*

19
20 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
21 NRS 113.150 provides, in pertinent part:
22

23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may: (a)
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or (b) Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse.** (emphasis added)

Nev. Rev. Stat. § 113.150(2).