

IN THE SUPREME COURT STATE OF NEVADA

Electronically Filed
Mar 12 2021 03:49 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
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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
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Attorneys for Appellants

1	DISTRICT COURT		
2	CLARK COUNTY, NEVADA		
3		)	
4	JOSEPH FOLINO, an	)	
5	individual, and NICOLE	)	
6	FOLINO, an individual,,	)	
7		)	
8	Plaintiffs,	)	
9		)	
10	vs.	)	CASE NO. A-18-782494-C
11		)	DEPT. NO. XXIV
12	TODD SWANSON, an	)	
13	individual; TODD SWANSON,	)	
14	Trustee of the SHIRAZ	)	
15	TRUST; SHIRAZ TRUST, a	)	
16	trust of unknown origin;	)	
17	LYONS DEVELOPMENT, LLC, a	)	
18	Nevada limited liability	)	
19	company; DOES I through X;	)	
20	and ROES I through X,,	)	
21		)	
22	Defendants.	)	
23		)	

14

15

16

17 VIDEOTAPED DEPOSITION OF KELLY CONTENTA

18 MONDAY, FEBRUARY 3, 2020

19 6:29 P.M.

20 AT 10777 WEST TWAIN AVENUE, THIRD FLOOR,

21 LAS VEGAS, NEVADA

22

23

24 REPORTED BY: MICHELLE R. FERREYRA, CCR No. 876

25 JOB NO. 601855B

1 VIDEOTAPED DEPOSITION OF KELLY CONTENTA,
2 taken at 10777 West Twain Avenue, Third Floor,
3 Las Vegas, Nevada, on MONDAY, FEBRUARY 3, 2020, at
4 6:29 p.m., before Michelle R. Ferreyra, Certified Court
5 Reporter, in and for the State of Nevada.

6 APPEARANCES:

7 For Plaintiffs Joseph Folino and Nicole Folino:

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34 THE VIDEOGRAPHER: Terrell Holloway,
35 Litigation Services

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1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 3, 2020;

2 6:29 p.m.

3 -oOo-

4 VIDEOGRAPHER: This is the beginning of
5 Media No. 1 in the deposition of Kelly Contenta in the
6 matter of Folino, Joseph, versus Swanson, Todd, held at
7 Black & Lobello on February 3, 2020, at 6:29 p.m.

8 The court reporter is Michelle R. Ferreyra.
9 I'm Terrell Holloway, the videographer, an employee of
10 Litigation Services.

11 This deposition is being videotaped at all
12 times unless specified to go off the video record.

13 Would all present please identify themselves,
14 beginning with the witness.

15 THE WITNESS: Kelly Contenta.

16 MR. WELSH: Darren Welsh, attorney on behalf
17 of the deponent.

18 MR. GALLIHER: Jeff Galliher for the
19 defendants.

20 MR. GRAF: And Rusty Graf representing Joseph
21 and Nicole Folino.

22 VIDEOGRAPHER: Will the court reporter please
23 swear in the witness.

24 (Court reporter duly administers oath to
25 witness.)

1 THE WITNESS: I do.

2 MADAM REPORTER: Thank you.

3 Whereupon,

4 KELLY CONTENTA,

5 having been first duly sworn to testify to the truth,
6 the whole truth and nothing but the truth, was examined
7 and testified as follows:

8

9 EXAMINATION

10 BY MR. GRAF:

11 Q. Good evening, Ms. Contenta. Have you ever
12 been deposed before?

13 A. No.

14 Q. Okay.

15 If you would, please state your name and
16 spell your last name for the record.

17 A. Kelly Contenta, C-o-n-t-e-n-t-a.

18 Q. Do you -- have you ever been known by any
19 other names?

20 A. Yeah. Van Fleet. That was my family name.

21 Q. That's your maiden name?

22 A. (Witness nods.)

23 Q. And do you have a middle name?

24 A. Ann.

25 Q. With an E or no E?

1 A. No E.

2 Q. Okay.

3 And any other names or nicknames that you've
4 been known as?

5 A. Huh-uh.

6 Q. Okay.

7 So we're going to -- we're here to take your
8 deposition in a case captioned Joseph and Nicole Folino
9 vs. Todd Swanson and then Shiraz Trust and Lyons
10 Development.

11 Are you aware of that?

12 A. No.

13 Q. Well --

14 A. I know Todd Swanson. I don't know the other
15 stuff.

16 Q. No. Are you aware that you're here to be
17 deposed?

18 A. Oh, yes, of course.

19 Q. Okay.

20 So a deposition is just kind of a formal
21 conversation between you, me, your attorney, counsel
22 for Dr. Swanson, and the court reporter and the
23 videographer. They're here to make sure that we have a
24 clear record of our discussion.

25 A. Okay.

1 Q. So along those lines, if at any point in time
2 I ask a question of you that you don't understand,
3 don't hear, or simply would like me to rephrase, please
4 ask me to do so and I will. Okay?

5 A. Okay.

6 Q. I'm going to assume that if you answer a
7 question, you've answered the question that I've posed.
8 Is that a fair assumption?

9 A. Yes.

10 Q. All right.

11 Uh-huhs, huh-uhs, gestures of the hand, nods
12 of the head, they don't transcribe very well. So if at
13 a point during this deposition you say "uh-huh" or
14 "huh-uh," and I ask you, "Is that a 'yes'?" or "Is that
15 a 'no'?" I'm not trying to be rude or curt. I'm just
16 trying to make sure that, again, we have a clear
17 record. Okay?

18 A. Okay.

19 Q. You're going to have the opportunity,
20 actually, in a day or so, because we're expediting
21 this, to review your deposition transcript.

22 One thing that I'll caution you on is if you
23 do make any changes to your transcript, those changes
24 can be brought to the attention of the trier of fact,
25 whether it's a judge or a jury.

1 Are you aware of that?

2 A. Okay.

3 Q. All right.

4 Is there -- I'm entitled to your best
5 estimate today.

6 Along the lines of understanding the
7 questions that I ask, if you feel like any of the
8 questions that I ask you will cause you to guess, then
9 please tell me, and I'll rephrase the question in a way
10 that you can at least give me an estimate of your
11 response.

12 The difference between a guess and an
13 estimate would be if I asked you how long this table
14 is, you could say, Well, it's 12 to 15 long; whereas,
15 if I asked you how wide my desk is, you wouldn't know
16 because you've never been in my office.

17 Do you understand the difference?

18 A. I do.

19 Q. Okay.

20 Are you under a doctor's care that would
21 inhibit your ability to testify truthfully here today
22 or understand any of my questions?

23 A. No.

24 Q. Have you taken any intoxicating substances or
25 medications within the last 24 hours which would

1 inhibit your ability to testify truthfully here today?

2 A. No.

3 Q. Okay.

4 And it's my understanding that you are
5 represented by counsel?

6 A. Yes.

7 Q. And Mr. Welsh is representing you here today?

8 A. Correct.

9 Q. Okay.

10 Did you review any documents in preparation
11 for your deposition today?

12 A. I -- I printed out the e-mails that I had.

13 Q. Okay.

14 Did you talk to anybody in preparation for
15 your deposition today? And I don't want to know what
16 you talked to about your attorney, but you can tell
17 me --

18 A. No.

19 Q. -- if you met with him.

20 A. Oh, yeah, last week.

21 Q. Okay.

22 And did you talk to Mr. Sher prior to your
23 deposition today?

24 A. No.

25 Q. And did you talk to Dr. Swanson in

1 preparation for your deposition --

2 A. No.

3 Q. -- today?

4 A. No.

5 Q. Okay.

6 One the other things is that if you'll wait
7 for, like, a count of one or two after I finish my
8 question before you respond, it'll help the court
9 reporter because then she doesn't have to splice our
10 statements in together. Okay?

11 A. (Witness nods.)

12 Q. When was the last time you've had a
13 conversation with Dr. Swanson?

14 A. It's been a while. He moved, so that -- like
15 during the time we had his house listed, he had already
16 moved.

17 Q. Okay.

18 Have you spoken with him since the closing on
19 November 17, 2017?

20 A. Just for access to the house during the time
21 we had it listed.

22 Q. Anything else?

23 A. Not really.

24 Q. Okay.

25 Have you spoken with Ashley Oakes regarding

1 this case --

2 A. I haven't.

3 Q. -- or this deposition?

4 A. No.

5 Q. When's the last time you talked to Ashley?

6 A. Just during the times that I was showing the
7 house to them -- to her and her clients.

8 Q. So other than reviewing e-mails regarding
9 this case, what did you do, if anything, in preparation
10 for today?

11 A. Just went through the e-mails.

12 Q. Okay.

13 And those e-mails that you went through,
14 where were they?

15 A. Well, we used to be on a Microsoft program,
16 like Office, and then we switched to Google; so they
17 were all there.

18 Q. Okay. All right.

19 What is your date of birth?

20 A. 8/24/67.

21 Q. How long have you lived in Las Vegas?

22 A. Since 2000.

23 Q. What is your current business address?

24 A. It is -- I don't know it by hand right now,
25 but I --

1 Q. Where are you employed?

2 A. Over at Simply Vegas.

3 Q. What is Simply Vegas?

4 A. A real estate brokerage.

5 Q. Okay.

6 Are you a salesperson --

7 A. Yep.

8 Q. -- or broker?

9 A. Salesperson.

10 Q. Okay.

11 Do you know the cross streets of where
12 Simply Vegas is?

13 A. It's on Durango.

14 Q. Durango and what?

15 A. I take Alta; so Alta to Durango.

16 Q. Okay.

17 Are you married?

18 A. No.

19 Q. Have you ever been married?

20 A. Yes.

21 Q. One time? Two times?

22 A. Yes, one time.

23 Q. Okay.

24 A. Did I do it one time? Yes.

25 Q. And to whom were you married?

1 A. Jeff Contenta.

2 Q. What years were you married to Mr. Contenta?

3 A. It's been a while so -- well, we moved here,
4 to Vegas together; so that -- 2000 until like 2008. I
5 don't know the exact date.

6 Q. Okay.

7 Do you have any children?

8 A. No.

9 Q. Okay.

10 Where did you go to high school?

11 A. Mission Viejo, California.

12 Q. What year did you graduate?

13 A. '86.

14 Q. Did you go to college?

15 A. I went to the Interior Design Institute in
16 Newport Beach.

17 Q. Did you get a degree --

18 A. Uh-huh.

19 Q. -- or diploma?

20 A. I did.

21 Q. And what type of degree do you obtain there?

22 A. It's just an AA, associate's degree.

23 Q. Any other higher education that you went to?

24 A. Nothing specific.

25 Q. Okay.

1 What year did you obtain the associate's
2 degree?

3 A. Honestly, I don't remember the exact year,
4 but I was in my late 20s; so -- I had had time off in
5 between that -- high school.

6 Q. Okay.

7 '90?

8 A. Ish, yeah.

9 Q. '90-ish, okay. All right.

10 And what brought you to Las Vegas in 2000?

11 A. It was Jeff and I -- we met in Arizona, and
12 we moved to Vegas together.

13 Q. Where in Arizona were you living?

14 A. Phoenix.

15 Q. So let's talk about -- you currently work at
16 Simply Vegas?

17 A. Uh-huh.

18 Q. Where did -- is that a "yes"?

19 A. Yes.

20 Q. That's all right. Everybody does it. I'm
21 bad at it.

22 Where did you work prior to Simply Vegas?

23 A. At Berkshire Hathaway.

24 Q. Okay.

25 And did you work in the Sher Group?

1 A. I did.

2 Q. Okay.

3 How long were you in the Sher Group?

4 A. I worked there twice; so more recently it was
5 two years. And then prior to that, I worked for them
6 when Florence was still alive.

7 Q. Okay.

8 So like '18 to '19? 2018 to 2019?

9 A. Right.

10 Q. Okay.

11 And then --

12 A. No, actually '17.

13 Q. '17? Okay.

14 And you were a real estate agent?

15 A. Yes.

16 Q. Okay.

17 How long have you been a licensed real estate
18 agent?

19 A. My first job was at a real estate company; so
20 that was in 2000.

21 Q. Here in town?

22 A. Uh-huh.

23 Q. Were you licensed as a real estate agent in
24 Arizona?

25 A. I was. I had got my license, but I never

1 practiced.

2 Q. When did you obtain your license in Arizona?

3 A. '99.

4 Q. When did you obtain your Nevada license?

5 A. I worked as an assistant for a while, so it
6 had to have been like 2004 or 2005, maybe earlier. I
7 can't recall.

8 Q. Has your Nevada license ever been suspended
9 or revoked.

10 A. Never.

11 Q. Okay.

12 Have you ever been disciplined by the board?

13 A. Never.

14 Q. Okay.

15 And you're a real estate salesperson?

16 A. Correct.

17 Q. And you don't hold a broker's license?

18 A. I do not.

19 Q. Do you hold any other professional licenses?

20 A. No.

21 Q. Okay.

22 Do you have a contractor's license?

23 A. No.

24 Q. Like an interior design --

25 A. No.

1 Q. -- contractor's license?

2 A. No.

3 Q. Okay.

4 What happened to your Arizona license, real
5 estate license?

6 A. Nothing. I took the courses. I got
7 licensed, but I never joined a brokerage.

8 Q. And did you just let it lapse, or did you
9 surrender it --

10 A. Yes. Yeah.

11 Q. -- or what did you do?

12 A. I just let it lapse.

13 Q. So prior to Simply Vegas, who did -- and,
14 actually -- strike that.

15 So you worked for the Sher Group prior to
16 Simply Vegas --

17 A. (Witness nods.)

18 Q. -- in about 2017?

19 A. Uh-huh.

20 Q. So prior to the Sher Group --

21 A. I was with Luxury Homes of Las Vegas with Ken
22 Roman.

23 Q. And how long were you with him?

24 A. Maybe three years. I can't recall exactly.

25 Q. So about 2014 to 2017?

1 A. Yeah.

2 Q. Okay.

3 A. Approximately.

4 Q. Yeah. And it's not like a memory test or
5 anything like that.

6 A. Right. Yeah.

7 Q. I just need your best estimate here.

8 A. Uh-huh.

9 Q. So prior to Luxury Homes, who -- where did
10 you work?

11 A. I was with Florence and Ivan Sher.

12 Q. Okay.

13 And how long were you with them that time?

14 A. Probably two years.

15 Q. Okay.

16 So that gets us to about 2012?

17 A. (Witness nods.)

18 Q. So prior to that, who were you working with?

19 A. I was with Realty One.

20 Q. Who was your broker?

21 A. It was Dee Tina at the time.

22 Q. Can you spell the last name?

23 A. T-i-n-a.

24 Q. Okay.

25 How long were you there?

1 A. Three years.

2 Q. Okay.

3 And same thing: You were a Realtor there?

4 A. Yep.

5 Q. Okay. So 2009, I guess?

6 A. Uh-huh.

7 Q. So prior to Realty One, who were you with?

8 A. I worked with Red Rock Realty, but I think
9 they changed the name.

10 Q. Who was the broker?

11 A. Jill Bernhardt.

12 Q. How long were you with her?

13 A. Almost nine years.

14 Q. Okay.

15 So that was the bulk of the rest of your --

16 A. Correct.

17 Q. -- real estate experience?

18 A. Uh-huh.

19 Q. Okay.

20 What -- what is your primary area of
21 practice?

22 A. Golf course properties.

23 Q. Okay.

24 And those are -- that's residential?

25 A. Yes, exclusively.

1 Q. So how many homes do you think you sold in
2 Las Vegas since 2005 or '06, when you got your license?

3 A. I don't even have a guess as far as the
4 number, because mostly I worked on a team, so I would
5 show the houses. And we would always have escrow
6 coordinators do the transactions, so I really never
7 counted.

8 Q. Okay.

9 A. But we did a lot of transactions, countless.

10 Q. Okay. All right.

11 So do you -- do you have continuing education
12 requirements as a Realtor?

13 A. Yes.

14 Q. And what are they?

15 A. Every other year, 24 hours.

16 Q. Okay.

17 When you were employed this last time with
18 the Sher Group --

19 A. (Witness nods.)

20 Q. -- is there a -- did you have a written
21 contract?

22 A. Yes.

23 Q. Okay.

24 And how were you compensated?

25 A. I was paid a salary. And then I would get

1 myself and another person -- she was another showing
2 agent. She and I would split 10 percent of the sale.

3 Q. So explain that to me real quick.

4 Ten percent of the sale, you're talking about
5 so if there was a 3 percent commission that was going
6 to get paid, you guys would split 5 percent each --

7 A. Correct.

8 Q. -- of the total commission?

9 A. After the -- right, Berkshire Hathaway part.

10 Q. Okay. All right.

11 Did you have a written manual for the
12 policies and procedures?

13 A. Yes.

14 Q. Okay.

15 Did anybody ever tell you how to fill out a
16 seller's real property disclosure form?

17 A. No.

18 Q. Okay.

19 Some other background questions: Have you
20 ever been convicted of a crime?

21 A. No.

22 Q. And did you ever serve in the military?

23 A. No.

24 Q. When's the first time that you met Dr. Todd
25 Swanson?

1 A. 2008 or '09.

2 Q. Did you represent him on the sale or purchase
3 of a home?

4 A. I did.

5 Q. Do you know which home that was?

6 A. It was a -- like an investment home out in
7 the Vistas; so I don't remember the exact address.

8 Q. How many times have you represented
9 Dr. Swanson regarding the sale or purchase of a home?

10 A. Well, that investment house and then when he
11 sold that investment house, and then there was another
12 investment house that he had me sell exclusively, just
13 with me.

14 Q. What do you mean by that?

15 A. Well --

16 Q. Were there other homes that you've worked
17 on that --

18 A. Right, that weren't my listing.

19 Q. So how many other homes did you work on as to
20 purchase or sale by Dr. Todd Swanson?

21 A. Two others.

22 Q. Are you including 42 Meadowhawk as --

23 A. (Witness nods.)

24 Q. -- the latter category or the former
25 category?

1 A. I did not represent him exclusively on that
2 one.

3 Q. On 42 Meadowhawk?

4 A. I did not.

5 Q. Okay. All right.

6 So you've worked on at least five different
7 home purchase or sales with Dr. Swanson?

8 A. Uh-huh. Approximately, yeah.

9 Q. Okay.

10 Did you ever have a personal relationship
11 with Dr. Swanson?

12 A. I did.

13 Q. When was that?

14 A. 2009, on and off.

15 Q. For how long?

16 A. Probably eight years.

17 Q. Okay.

18 So until -- and that -- were you still
19 involved in a personal relationship with Dr. Swanson in
20 2017 --

21 A. No.

22 Q. -- during the relevant time period --

23 A. No.

24 Q. -- of this sale?

25 A. We were friendly.

1 Q. Okay.

2 So when -- when did you end -- when was the
3 relationship ended?

4 A. Well, we ended a couple of times; so it
5 wasn't consistent.

6 Q. Okay.

7 When's the last time that you ended the
8 relationship prior to -- so the relevant time period
9 for this transaction appears to be like August of 2017
10 until -- the closing is November 17, 2017.

11 So in relation to that time period --

12 A. (Witness nods.)

13 Q. -- how --

14 A. We were friendly.

15 Q. And how many months prior or years prior had
16 you ended?

17 A. It was a year or two.

18 Q. Did you ever reside at the 42 Meadowhawk
19 address?

20 A. I did, but it wasn't long.

21 Q. Was it during the pendency of the escrow?

22 A. No. Well, before that.

23 Q. So --

24 A. And I never really resided there. I had
25 things there, but --

1 Q. You would stay there?

2 A. Yes.

3 Q. Overnight?

4 A. Uh-huh.

5 Q. In -- during the pendency of this escrow,
6 from -- I think it's like 10/22 to 11/17 of 2017, did
7 you ever stay --

8 A. Never.

9 Q. -- there during that time period?

10 A. No.

11 Q. What about after the closing?

12 A. No.

13 Q. Okay.

14 Did you -- you didn't have a direct agent
15 relationship with Dr. Swanson during -- or for this
16 transaction, the 42 Meadowhawk; fair statement?

17 A. Yes.

18 Q. So what time frame did you live at
19 42 Meadowhawk?

20 A. I can't recall the exact time. It wasn't
21 that long.

22 Q. So it's my understanding he purchased -- or,
23 actually, the home was built and completed --

24 A. Right.

25 Q. -- in January of 2015.

1 A. Okay.

2 Q. And then this transaction begins
3 approximately August of 2017.

4 So when during that time period did you
5 reside there?

6 A. I would say maybe in early to the middle, but
7 not in the latter years.

8 Q. Okay.

9 Were you aware of any other water leaks that
10 occurred at the residence during the time that you
11 lived there?

12 A. There was one in the master bath. I want to
13 say that the sink below -- the -- one of the main sinks
14 in the master bath.

15 Q. So August 2nd or August 3rd of 2015 is when
16 that event occurred, according to the documentation
17 that's presented in this case.

18 A. Okay.

19 Q. Does that help to refresh your recollection
20 as --

21 A. That sounds right.

22 Q. Okay.

23 So during that leak, you lived at the
24 residence?

25 A. I don't think I lived there, but I was seeing

1 him.

2 Q. Okay.

3 So where did you live during August of 2015?

4 A. Well, I've lived at Peachy Canyon, which are
5 condos, twice, so I'm not sure of the exact years.

6 Q. Did you say PT Canyon?

7 A. Peachy Canyon --

8 Q. Peachy?

9 A. -- in Summerlin, yeah.

10 Q. Okay.

11 So other than the leak that was underneath
12 the sink in the master bathroom, any other leaks that
13 you observed?

14 A. No.

15 Q. Did you ever observe the leak in the master
16 bathroom in November of 2017?

17 A. I did not.

18 Q. Do you know who found that?

19 A. No.

20 Q. Do you know -- when did you learn of the leak
21 in the master bathroom in 2017?

22 A. Later on, but nothing specific. Like nobody
23 kept me posted on the transactions because we just show
24 the houses, and then we move on to the next one.

25 Q. So you weren't involved in the transaction

1 after the house was put in escrow --

2 A. No.

3 Q. -- for the Folinos?

4 A. No. I mean, I met an appraiser or -- like
5 whoever needed to go back to the house, I would try to
6 arrange it.

7 Q. Did you ever assist -- excuse me, assist the
8 Folinos in going through house during the pendency of
9 the escrow?

10 A. If they actually requested a time for them to
11 come back, I would try to accommodate.

12 Q. Did that happen in this escrow?

13 A. During the escrow? Yes.

14 Q. Did that happen more than once?

15 A. Probably. Usually, buyers -- once they go
16 into contract, they want to be there during the
17 inspections, they want to be there during other, you
18 know, times, just to see the house again.

19 Q. And so what do you recall as to the number of
20 times that the Folinos went to the house?

21 A. Twice.

22 Q. Did Dr. Swanson ever ask you how to fill out
23 the seller's real property disclosure form?

24 A. No.

25 Q. So we are here for your deposition pursuant

1 to a subpoena.

2 MR. GRAF: And let's mark this as -- what are
3 we at? Let's continue them.

4 MADAM REPORTER: Twenty --

5 MR. GRAF: 25.

6 (Exhibit 25 marked.)

7 BY MR. GRAF:

8 Q. We already went through 1 through 24 with
9 Ivan --

10 A. Okay.

11 Q. -- so we're going to mark this as 25 for
12 purposes of these depositions.

13 So then that is the subpoena for your
14 deposition. You were served with that document?

15 A. Someone did come to my house.

16 Q. Okay.

17 A. And then when -- I asked them, like, who is
18 it. Because it was kind of in the morning and I
19 wasn't, like, expecting anybody. He left it at the
20 door.

21 Q. Okay.

22 So then in addition to that --

23 (Exhibit 26 marked.)

24 BY MR. GRAF:

25 Q. You've been handed what we've marked as

1 Exhibit 26 for purposes of this deposition, subpoena
2 duces tecum asking you for records and materials.

3 A. Okay.

4 Q. And beginning at the bottom the Page 3
5 through the middle of Page 4, there's six line items as
6 to categories of documents that were requested.

7 And you were served with this subpoena. Is
8 that an accurate statement, Ms. Contenta?

9 A. Yeah. It was left at my door.

10 Q. Okay.

11 Did you make a diligent effort to search for
12 those documents that are described in those categories?

13 A. I did. My phone died in October of '19; so
14 when I got my new phone, they just shipped me another
15 one. And I couldn't get any of my -- when I did the
16 cloud thing, it just didn't -- it erased my music
17 library and any and all text messages.

18 Q. Okay.

19 But in terms of, like, e-mails, that sort of
20 thing, did you make a diligent search?

21 A. I did.

22 Q. Okay.

23 And on what server or provider did you make
24 that search for?

25 A. Everything was on the Berkshire Hathaway.

1 Q. Okay.

2 When did you leave the employ of the Sher
3 Group?

4 A. A week ago, maybe.

5 Q. Okay.

6 So you were still in the employ of the Sher
7 Group --

8 A. Yes.

9 Q. -- when you made this search?

10 A. Uh-huh.

11 Q. Is that a "yes"?

12 A. Yes.

13 Q. All right.

14 So all of the documents that you found, you
15 turned over to your counsel?

16 A. Yes.

17 Q. Okay.

18 And then is it your understanding that
19 they've been produced in this case?

20 A. Yes.

21 Q. Okay.

22 The leak that occurred in November of 2017 in
23 the master bath at 42 Meadowhawk, did you ever -- or
24 were you ever present during any of the repairs for
25 that leak?

1 A. I was not.

2 Q. Did you ever look to see what the source of
3 that leak was?

4 A. No.

5 Q. Did you ever ask anybody as to what the
6 source of that leak was?

7 A. Maybe in passing, but I never specifically
8 asked.

9 Q. So who would you have asked in passing?

10 A. Honestly, I don't think I did.

11 Q. Okay.

12 Did you ever talk to anybody at Rakeman
13 Plumbing about that leak?

14 A. No.

15 Q. Did you talk to anybody at Rakeman Plumbing
16 about the leak in the master bathroom in August of --

17 A. No.

18 Q. -- 2015. No?

19 A. No.

20 Q. Were you present when they did any of the
21 repairs?

22 A. No.

23 Q. Were you aware that Rakeman Plumbing did the
24 repairs in August of 2015?

25 A. No.

1 Q. Did you ever have any discussions with
2 Dr. Swanson about any leaks in the house prior to
3 August of 2015?

4 A. No.

5 Q. Were you aware of a leak that had occurred in
6 the single car garage of 42 Meadowhawk?

7 A. Not specifically.

8 Q. What do you mean by that?

9 A. It wasn't anything directly towards me, but I
10 thought I had heard someone say that -- no. I -- I
11 didn't.

12 Q. Okay.

13 Did Dr. Swanson ever tell you about a leak
14 that occurred in the single car garage in 2015?

15 A. He may have, but I wasn't really -- I didn't
16 go into any detail.

17 Q. Okay.

18 Were you aware of a leak that occurred in the
19 house in February of 2017?

20 A. No.

21 Q. Do you ever recall having any conversation
22 with Dr. Swanson about any repairs of water leaks at
23 that 42 Meadowhawk residence?

24 A. No.

25 Q. Did you discuss any remodeling or remediation

1 that occurred at the La Madre residence that

2 Dr. Swanson was moving into after 42 Meadowhawk?

3 A. No.

4 Q. Did you ever work for Dr. Swanson as an
5 interior designer?

6 A. Yeah. I mean, when he built the house with
7 Blue Heron, I went with him to all the meetings, the
8 design meetings.

9 Q. The 42 Meadowhawk?

10 A. During preconstruction.

11 Q. Did you ever have any conversations with
12 Ashley Oakes regarding any -- any of the leaks at
13 the --

14 A. None.

15 Q. -- 42 Meadowhawk?

16 A. None.

17 Q. Okay.

18 Did you ever have a conversation with Ashley
19 Oakes about the leak in November of 2017?

20 A. No. I mean, she may have mentioned it, but
21 by then I was already out of it.

22 Q. Did you know Ashley Oakes prior to this
23 transaction?

24 A. Just as an agent. I have never worked with
25 her before.

1 Q. Okay.

2 Was she a personal friend --

3 A. No.

4 Q. -- or anybody that you would socialize with?

5 A. No.

6 Q. Okay.

7 What about her husband?

8 A. No.

9 Q. Do you know who her husband is?

10 A. Vaguely.

11 Q. John Oakes, I believe.

12 A. I think he was there one time, but I don't
13 know him.

14 Q. Okay.

15 Did you ever assist Dr. Swanson in finding
16 any plumbers or subcontractors --

17 A. No.

18 Q. -- to do any of the repairs?

19 A. No.

20 Q. Okay.

21 Do you know how long the repairs took in
22 two thousand and -- August of 2015?

23 A. No.

24 Q. You don't know if they took a period of weeks
25 or days or --

1 A. I have no idea.

2 Q. Okay.

3 And, again, you didn't talk to anybody at
4 Rakeman Plumbing regarding the repairs in 2015?

5 A. No.

6 Q. Did you ever ask anybody as to what the cause
7 of the leak was in 2015?

8 A. No.

9 Q. So you were employed by the Sher Group in
10 2017?

11 A. Correct.

12 Q. It wasn't called the Sher Group back then,
13 though, or was it?

14 A. I think it was, right after -- yeah. Right
15 around that time is when he did the name change.

16 Q. Okay.

17 Ms. -- Ms. Shapiro had previously passed?

18 A. Correct.

19 Q. Okay.

20 What did you specifically do in regards to
21 the 42 Meadowhawk transaction?

22 A. I fielded any inquiries from any agent who
23 wanted to see the house, and I worked with his
24 assistants, because I don't think he was living there
25 at the time full time, about getting access to the

1 house.

2 Q. And who was his assistant?

3 A. Nicky.

4 Q. Okay.

5 Nicole Whitfield?

6 A. I don't remember her last name but probably.

7 Q. Did you ever talk to Nicky about any of the
8 water leaks at the residence?

9 A. No.

10 Q. Okay.

11 Did you ever talk to the Folinis during the
12 escrow?

13 A. Not directly. They weren't our clients. I
14 mean, I was polite.

15 Q. So when they -- were you present when the
16 Folinis first toured the house?

17 A. Yes.

18 Q. Okay.

19 Did they ever ask you any questions about the
20 house?

21 A. Not specifically.

22 Q. What do you mean by that?

23 A. I told them when it was built, who built it.

24 Q. Okay.

25 Did Ivan Sher ever ask you about anything

1 with the house?

2 MR. GALLIHER: Objection to form.

3 BY MR. GRAF:

4 Q. Did Ivan Sher ever ask you about the house?

5 A. Nothing specific.

6 Q. Did Mr. Sher know that you had lived in the
7 house at some point in time?

8 MR. GALLIHER: Speculation.

9 THE WITNESS: No, probably not.

10 BY MR. GRAF:

11 Q. So did you ever tell him that you lived in
12 the house?

13 A. No.

14 Q. So we'll look at in the -- in the pile in
15 front of you, I think it's Exhibit 7. Yeah.

16 In the pile in front of you, on the little
17 stickers there's going to be an Exhibit 7, and it's the
18 SRPD.

19 MR. WELSH: Try to keep them in order --

20 THE WITNESS: Okay.

21 MR. WELSH: -- so they don't --

22 BY MR. GRAF:

23 Q. Have you ever seen that document before?

24 A. I think I was cc'd on the e-mail, but I never
25 opened it.

1 Q. Okay.

2 Did Dr. Swanson ever ask you to assist in
3 preparing this document?

4 A. No.

5 Q. Were you present when Dr. Swanson prepared
6 this document?

7 A. No.

8 Q. Did Dr. Swanson ever tell you anything about
9 this document or his responses on the document?

10 A. No. I just remember seeing a chain of
11 e-mails about the paperwork.

12 Q. Did Dr. Swanson ever seek your advice as to
13 how to fill the document out?

14 A. No.

15 Q. Did you ever have any conversations with
16 Dr. Swanson about the Seller's Real Property --

17 A. No.

18 Q. -- Disclosure form? Is that a "no"?

19 A. No.

20 Q. Are you aware of any other litigation that
21 Dr. Swanson was involved in?

22 A. No.

23 Q. Were you aware that Dr. Swanson had
24 previously been involved in mold litigation --

25 A. No.

1 Q. -- regarding another house?

2 A. Huh-uh.

3 Q. Is that a "no"?

4 A. No.

5 Q. And in particular, a house that was located
6 on Planting Fields --

7 A. No.

8 Q. -- somewhere in -- okay.

9 Did Dr. Swanson ever tell you that any of his
10 children had experienced health issues as a result of
11 exposure to mold?

12 A. No.

13 Q. Did Dr. Swanson ever ask you to prepare
14 or -- or sign an affidavit?

15 A. No.

16 Q. Have you ever talked to Dr. Swanson about
17 this litigation?

18 A. No.

19 Q. Have you ever talked to Dr. Swanson about the
20 situation created by the repairs for the leak in
21 November of 2017?

22 MR. GALLIHER: Object to the form.

23 THE WITNESS: Nothing specific.

24 BY MR. GRAF:

25 Q. What, in general, did you discuss with him?

1 A. I think just in general that -- honestly, I
2 don't recall anything specific.

3 Q. Do you know when, approximately, you had this
4 conversation that you don't recall?

5 A. It had to have been during the transaction --

6 Q. Okay.

7 A. -- if at all.

8 Q. And are you still on friendly terms with
9 Dr. Swanson?

10 A. Yeah.

11 Q. Okay.

12 A. I mean, it's been a while, but yeah.

13 MR. GRAF: I don't have anything else.

14 MR. GALLIHER: I don't have any questions for
15 her.

16 MR. GRAF: Thank you.

17 THE WITNESS: Okay.

18 VIDEOGRAPHER: Off the video record at 7:15.

19 (Thereupon, the videotaped deposition
20 concluded at 7:15 p.m.)

21

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25

1	CERTIFICATE OF DEPONENT			
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I, KELLY CONTENTA, deponent herein, do hereby certify and declare under the penalty of perjury the within and foregoing transcription to be my deposition in said action; that I have read, corrected and do hereby affix my signature to said deposition.

KELLY CONTENTA, Deponent

1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)
COUNTY OF CLARK)

3 I, Michelle R. Ferreyra, a Certified Court

4 Reporter licensed by the State of Nevada, do hereby
5 certify: That I reported the videotaped deposition of
6 KELLY CONTENTA, commencing on Monday, February 3, 2020,
7 at 6:29 p.m.; that prior to being deposed, the witness
8 was duly sworn by me to testify to the truth; that I
9 thereafter transcribed my said stenographic notes into
10 written form; that the typewritten transcript is a
11 complete, true, and accurate transcription of my said
12 stenographic notes; and that a request has not been
13 made to review the transcript.

14 I further certify that I am not a relative,
15 employee, or independent contractor of counsel or of
16 any of the parties involved in the proceeding, nor a
17 person financially interested in the proceeding, nor do
18 I have any other relationship that may reasonably cause
19 my impartiality to be questioned.

20 IN WITNESS WHEREOF, I have set my hand in my
21 office in the County of Clark, State of Nevada, this
22 5th day of February, 2020.

23 

24 MICHELLE R. FERREYRA, CCR No. 876

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In the Matter Of:

Folino, Joseph et al. vs Swanson, Todd et al.

TODD SWANSON, M.D., VOLUME II

February 06, 2020

Job Number: 604719

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

Plaintiffs,

vs. Case No. A-18-782494-C
Dept. No. XXIV

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.

VIDEO TELECONFERENCE DEPOSITION OF

TODD SWANSON, M.D.

VOLUME II

Taken on February 6, 2020

at 9:34 a.m.

By a Certified Court Reporter

Las Vegas, Nevada

Stenographically reported by:

Heidi K. Konsten, RPR, CCR
Nevada CCR No. 845 - NCRA RPR No. 816435
JOB NO. 604719

1 Video teleconference deposition of TODD
2 SWANSON, M.D., Volume 2, stenographically taken at
3 10777 West Twain, Las Vegas, Nevada, on Thursday,
4 February 6, 2020, at 9:34 a.m., before Heidi K.
5 Konsten, Certified Court Reporter in and for the
6 State of Nevada.

7

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3 TODD SWANSON, M.D.

4 Examination by Mr. Graf 266

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6 Examination by Mr. Graf 342

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10 EXHIBITS

11 No. Description Page

12 Exhibit 29 May 21, 2015, e-mail string 269

13 Exhibit 30 May 26, 2015, e-mail string 277

14 Exhibit 31 September 3, 2015, e-mail
15 string 28216 Exhibit 32 October 13, 2015, e-mail
17 string 29118 Exhibit 33 October 13, 2015, e-mail
19 string 295

20 Exhibit 34 May 31, 2017, e-mail string 297

21 Exhibit 35 November 24, 2017, Infinity
22 Environmental Services
23 Report 30224 Exhibit 36 December 7, 2017, Infinity
25 Environmental Services
report 30226 Exhibit 37 Affidavit of Todd V.
27 Swanson, M.D. 311

28 * * * * *

1 LAS VEGAS, NEVADA

2 Thursday, February 6, 2020

3 9:34 a.m.

4 DEPOSITION OF TODD SWANSON, M.D.

5 * * * * *

6 (The court reporter was relieved of her
7 duties under NRCP 30(b)4.)

8

9 TODD SWANSON, M.D.,

10 having been first duly sworn, was examined and
11 testified as follows:

12

13 EXAMINATION

14 BY MR. GRAF:

15 Q Doctor, thank you for appearing
16 electronically this morning for your deposition.

17 You're aware that you were just sworn in
18 and that's the same oath you took last week when
19 we deposed you here in my office?

20 A Yes.

21 Q Okay. We're taking your deposition via
22 Zoom, electronic means, so the normal admonitions
23 where I say wait until I finish my question, that
24 sort of thing, are probably even more important
25 today so that you hear the end of my question and

1 so that you have the ability to complete your
2 answers. We'll both have to be a little more
3 diligent.

4 I don't have a lot of exhibits to go
5 through with you this morning, so hopefully it
6 won't take too much time.

7 A Okay.

8 Q Okay. Do you want me to go through the
9 admonitions again, or are you comfortable?

10 A No, I think I'm comfortable with them.

11 MR. GRAF: All right. The only other
12 thing that I want to put on the record with Jeff
13 is the fact that -- I'm not positive what the
14 statute says, but we've come to an agreement that
15 the court reporter will be here in my office. And
16 you are in Toronto, Canada, but she has seen you
17 before and she knows that you are who you are.

18 Is that the same stipulation that you
19 have, Mr. Galliher?

20 MR. GALLIHER: Yes, I'll stipulate that
21 he is who he is and that he remain under oath
22 during today's session.

23 MR. GRAF: And that it's okay that the
24 court reporter is here in my office as opposed to
25 with him in Toronto, Canada?

1 correct?

2 Q Correct, Doctor.

3 A Would it have been sent to me in
4 sequence? Just trying to find out.

5 Q I don't know.

6 A Okay. Well, I'll find it. Oh, here we
7 go. It was the last one sent.

8 Q And it is -- we've marked it as 31, and
9 it is Bates-stamped 321 through 328. And I think
10 it's actually two different e-mail strings, but
11 we'll talk about them jointly.

12 A Okay.

13 Q Okay. So if we start on 325, the bottom
14 of 325 and 326 -- top of 326, there's an e-mail
15 from Henry Regnault -- he's the Blue Heron
16 supervisor -- to you.

17 A Yes.

18 Q So was there a problem with the drywall
19 in the master closet subsequent to the August 2nd
20 or 3rd water leak?

21 A I don't know that it was the master
22 closet, because I don't recall there actually
23 being any work done in the master closet. But I
24 think there were some drywall issues that I
25 pointed out that they were going to come in and

1 fix just as a general -- you know, as a part of
2 the final list of things to be completed. I don't
3 know which -- which area that specifically refers
4 to.

5 Q Okay. So that's August 14.

6 Then if you look above on 325, there's
7 an e-mail from you.

8 A On three -- page 325?

9 Q Yes.

10 A From myself. Going up into 324? Is
11 that the one? Oh, I -- I don't know if that's all
12 one e-mail chain or not, but I -- I see the e-mail
13 on 325.

14 Q So it says, "Thanks, Henry. They will
15 also need to cut a new access door to paint for
16 the garage."

17 Do you see that?

18 A Yes.

19 Q What is that referencing, Doctor?

20 A I think the recirculating pump in the
21 garage was right next to the access door. And so
22 they were going to just cut a new piece of --
23 basically a piece of drywall. They were going to
24 cut a new piece of drywall to -- to put in
25 place --

1 Q Okay.

2 A -- rather than to try and, you know -- I
3 don't know what they would have to do, repaint it
4 or whatever, the piece that was there.

5 Q So this next paragraph said "My
6 assistant told me that Robert with Rakeman
7 Plumbing was there a couple of days ago putting
8 the carpet back in my closet. I hope that the
9 original carpet is okay to put back. At one time,
10 you told me that Cloud Carpet would replace the
11 carpet."

12 So in your previous deposition, you had
13 said that the original carpet was put back in. Is
14 that -- does that statement in that e-mail help to
15 refresh your recollection as to whether or not
16 that carpet was put back in?

17 A The original carpet was replaced -- was
18 put back in, meaning replaced, as in it was not
19 replenished with new carpet; it was replaced back
20 in the position where it originally was.

21 Q Okay. So the next paragraph says --

22 A In other words, I never had any new
23 carpet put into that bath -- closet, that I'm
24 aware of, that I can recall.

25 Q Okay. The next paragraph says "I have

1 contacted Absolute Closets to come out and take a
2 look at the closet cabinets, but have not heard
3 back yet."

4 What is that referencing, Doctor?

5 A They were going to come back and replace
6 the kick -- toe plates or kick plates, whatever
7 they're called -- at the bottom that they had to
8 remove to -- to completely dry out the water in
9 the area.

10 Q Okay. So then if we go to 324, there
11 appears to be a response from Henry Regnault on
12 August 14. And it says in the second paragraph,
13 "Yes, the carpet. I am in the process of getting
14 a price and see when the availability is for
15 delivery."

16 So does that refresh your recollection
17 as to whether or not there was new carpet that was
18 to be installed?

19 A He -- I don't recall him sending this,
20 but I don't recall that that carpet was ever
21 replaced with new carpet.

22 Q Okay. And then if you look at the
23 next --

24 A I think the carpet company -- I think
25 that initially they thought they would replace --

1 or they told me they would replace the carpet with
2 new carpet. And then when they actually came to
3 do the work, they just laid it back down, because
4 they said the carpet was in good shape and they
5 didn't need to replace it, as in replace it with
6 new carpet.

7 Q So then if we look at the e-mail above
8 on August 23rd that starts on 323 and finishes on
9 324, it's about -- you say in the e-mail "It's
10 about ten days after my last e-mail. Items I am
11 still waiting for are the following: No. 1,
12 finish replacing the carpet in the master closet."

13 Do you see that, Doctor?

14 A Yes.

15 Q Does that help to refresh your
16 recollection as to whether or not the carpet got
17 replaced?

18 A Like I have told you several times, I do
19 not recall any new carpet being put in that closet
20 ever.

21 Q Okay. So if you look at Defendant 323
22 and your e-mail dated August 31st and look at line
23 Item No. 5 in that e-mail --

24 A Yes.

25 Q -- that says "The carpet in the master

1 closet has been replaced."

2 Do you see that?

3 A Yes.

4 Q Does that help to refresh your
5 recollection as to whether or not the carpet got
6 replaced?

7 MR. GALLIHER: Object to the form.

8 THE WITNESS: I think some of the --
9 what -- it's the meaning of the word "replaced."
10 Does it mean replace it with new carpet, or does
11 it mean replace it as in putting it back down?
12 Because half of the closet where the water was,
13 the carpet had been pulled up so they could blow
14 fans underneath it and dry it out.

15 So when I talk about replacing the
16 carpet, I want it put back into place. And to my
17 recollection, that's what was done.

18 BY MR. GRAF:

19 Q All right. Then turn to 322 and your
20 e-mail dated September 2nd, 2015. And you address
21 it to Chris and Henry, and it says "Can I get your
22 help in getting the final items repaired/replaced
23 in my house after the water leaks? I feel I've
24 been pretty patient, given three major water leaks
25 in my home within a 24-hour period that occurred

1 over a month ago and only four months after I
2 moved in."

3 Do you see that, Doctor?

4 A Yes.

5 Q So we've talked about those three major
6 water leaks were the one in the single car garage
7 at the circulating -- or recirculating pump?

8 A Yes.

9 Q And then at the recirculating pump in
10 the master closet?

11 A Yes.

12 Q And then the -- the third, is that the
13 water leak underneath the sink in the master
14 closet?

15 A Yes.

16 Q So why did you say that there were three
17 major water leaks?

18 MR. GALLIHER: Object to the form.

19 THE WITNESS: What was the question?

20 BY MR. GRAF:

21 Q Why did you use that -- that language,
22 "three major water leaks"?

23 A I think because I was getting a little
24 bit tired of waiting, and so I wanted to emphasize
25 that I was a bit unhappy and I wanted the things

1 put back the way they were.

2 Q Okay. And do you see No. 1 there below
3 that paragraph where you say "I'm still waiting on
4 the following"?

5 Number one, what does that say, Doctor?

6 A "I need my master closet fixed after the
7 water leak there. Absolute Closets won't return
8 my calls."

9 Q So what is that referencing?

10 A Again, to my knowledge, it's those --
11 the toe kicks or whatever that had to be taken off
12 to get to the -- the water sufficiently or
13 adequately, completely dry the area.

14 Q Okay. So at least as of --

15 A In other words -- I'm sorry.

16 Q Go ahead.

17 A In other words, no cabinets were taken
18 out. No cabinets were damaged by the water. They
19 had to take out certain pieces to get to the
20 water.

21 Q And at least as of September 2nd, those
22 repairs to the cabinets had not been fixed;
23 correct?

24 A That is correct.

25 MR. GALLIHER: Can we take a real quick

1 break?

2 MR. GRAF: Yeah.

3 MR. GALLIHER: Doctor, we're going to
4 take a quick break. I'll be right back.

5 THE WITNESS: Okay.

6 (Whereupon, a recess was taken.)

7 BY MR. GRAF:

8 Q So, Doctor, the next one we're going to
9 go over -- and you're aware you're still under
10 oath, Doctor?

11 A Excuse me? I didn't quite catch that,
12 Rusty.

13 Q You're aware you're still under oath,
14 Doctor? We're going to go back on the record?

15 A Yes.

16 Q Okay. The next exhibit is going to be
17 32, and it is 346.

18 (Exhibit No. 32 was marked for
19 identification.)

20 THE WITNESS: Okay. I've got it.

21 MR. GRAF: So go ahead and take a second
22 and take a look at that e-mail.

23 Sorry, Doctor, I realized I needed a
24 break too.

25 MR. GALLIHER: So we're off the record.

1 (Whereupon, a recess was taken.)

2 BY MR. GRAF:

3 Q All right. Back on the record.

4 Did you have a chance to take a look at
5 that e-mail string, Doctor?

6 A Yes, I'm just finishing. Yes.

7 Q So if we look at the e-mail that begins
8 on 347 and goes to the top of 348, that's an
9 e-mail dated September 10, 2015, from you to
10 Alexxa Warren.

11 So it appears she started at least
12 sometime after the last set of e-mails we had --

13 A Yes.

14 Q -- with Ms. --

15 A You're talking about the e-mail from her
16 to me? Or from me to her?

17 Q I'm talking about the one from you to
18 her.

19 A Okay. Starting on the bottom of 347?

20 Q Yep.

21 A Yes.

22 Q In particular, Item No. 7 at the top of
23 348 where it says -- I put a staple over it --
24 "Fixed master closet cabinets, sitting bench, and
25 shelf under stove."

1 A Yes.

2 Q So first off, where is the sitting bench
3 that's being referring to there?

4 A The sitting bench was on the -- the
5 opposite side of the master closet --

6 Q Why did --

7 A -- I presume.

8 Q And why did that need to be repaired?

9 A Master closet cabinets, sitting bench,
10 and shelf under stove. That's the only sitting
11 bench I can think of in the house as we sit here.

12 Q Why did the sitting bench need to be
13 repaired, Doctor?

14 A That, I can't recall at this time.

15 Q Okay.

16 A There were lots of little items. Like,
17 I don't recall what the shelf under the stove was
18 either. I just don't recall. But as with any new
19 house, there's always little things that need to
20 be fixed in the first year or two.

21 Q Okay. So this is a September 10th
22 e-mail.

23 So at least as of September 10th, the
24 closet cabinets had not been repaired?

25 A Yes. To my knowledge -- what's the date

1 on this e-mail? I don't have an independent
2 recollection when they were fixed.

3 Q So there was a response by Ms. Warren
4 later that day. And if you look at line Item
5 No. 6, what does that tell you?

6 A "The cabinets and sitting bench in your
7 closet can all be easily fixed. Henry called the
8 cabinet company while he was here and ended up
9 leaving a voicemail. He said if he didn't hear
10 anything soon, that he would call his boss and get
11 it taken care of.

12 "The shelf that is supposed to be under
13 the stove is also something you can talk to the
14 cabinet guy about. I'm not really sure if there's
15 supposed to be a shelf there. There is some
16 electrical in there, and it would block a shelf
17 from being able to sit properly. Yes, I've
18 already talked to them about all of the items.
19 They just need to come out to fix it." So
20 that's -- that's what the e-mail says.

21 Do you have a question?

22 Q So this is confirming, though, that the
23 cabinets in the master closet had not been fixed,
24 at least as of this September 10th e-mail;
25 correct?

1 A Yes.

2 Q So as of September 10th, 2015, Doctor,
3 where were you living?

4 A I was living in the subject property.

5 Q Okay. So you were still living in
6 Las Vegas?

7 A Yes.

8 Q When did you leave Las Vegas?

9 MR. GALLIHER: You mean to go to Denver?

10 THE WITNESS: As far as moving to Denver
11 to go to school? I left in September -- I'm not
12 remembering. It would be September of 2017.

13 BY MR. GRAF:

14 Q And that's when you moved to Denver?

15 A Yes.

16 (Exhibit No. 33 was marked for
17 identification.)

18 BY MR. GRAF:

19 Q So the next one I'm going to have you
20 look at, Doctor, is 351. And that's going to be
21 Exhibit 33.

22 A Okay.

23 Q And same --

24 A 351. Okay. Here it is. I've got it.

25 Q And same thing, Doctor. Take a second

1 and take a look at it, and then I'll ask you a
2 couple of questions about it.

3 A Okay.

4 Q So this is Exhibit 33. It's
5 Bates-stamped 351 -- DEF351, 352. And if you look
6 on 350 -- well, it's basically an e-mail exchange
7 between yourself and Ms. Warren again.

8 Is that an accurate statement?

9 A Yes. I'm sorry. Yes.

10 Q So on October 13, the e-mail that begins
11 on the bottom of 351 and moves over to 362, that's
12 Ms. Warren's e-mail to you on October 13.

13 A Yes.

14 Q And did you receive this e-mail?

15 A To my knowledge, yes.

16 Q So then it says "The cabinet people are
17 here now fixing most of the items on your office
18 list. They said there were two things that they
19 didn't have equipment for, but that they would
20 come back another time to take care of."

21 Does this have anything to do with the
22 cabinets in the -- in the closet or the bathroom?

23 MR. GALLIHER: Speculation. Foundation.

24 THE WITNESS: No. I think this refers
25 to the office desk cabinets and whatnot that were

1 put in.

2 (Exhibit No. 34 was marked for
3 identification.)

4 BY MR. GRAF:

5 Q So the next one that I need you to look
6 at, Doctor, is the one that has 381. And it's
7 marked as Exhibit 34 for this deposition. It's
8 longer, so it says DEF381 through 393.

9 A Yes, I have it in front of me. I'm just
10 going over it. Okay. That's a long e-mail, so
11 I've kind of, sort of, skimmed it.

12 Q So, if you would, turn to 393.

13 A Okay. I'm there.

14 Q And that e-mail from you to Nicky on
15 November 15th, 2017, do you see that?

16 A Yes.

17 Q Did you prepare and send that e-mail?

18 A Yes, I believe so.

19 Q And it says "The buyers are going to
20 want a statement by a mold remediation expert that
21 there is no mold in the master closet after the
22 water leak."

23 Do you see that, Doctor?

24 A Yes.

25 Q Had you spoken with someone, an agent on

1 **behalf of the Folinos or the Folinos?**

2 MR. GALLIHER: Object to form.

3 THE WITNESS: Yes. Someone would have
4 given me that information, that they wanted the
5 mold test. As I recall, they wanted a mold test,
6 a visual inspection, and a pressure test.

7 BY MR. GRAF:

8 Q Okay.

9 A I don't recall if Nicky gave that to me
10 or somebody else did. Since I'm telling Nicky
11 about this, it may have been my agent, perhaps.

12 Q Okay. So as of this point,
13 November 15th, 2017, you were living in Denver?

14 A Yes.

15 Q Okay. As you sit here today, do you
16 recall whether or not you spoke with Ashley Oakes
17 about the request for the mold testing?

18 A No, I never spoke directly to her or the
19 Folinos during the contract period.

20 Q Okay. So I'm just trying to eliminate
21 people. And I appreciate that, because that
22 eliminates a couple of people right off the bat.

23 So what about -- was this a statement
24 that was made to you by Ivan Sher?

25 A I don't think he would have -- I don't

1 think he personally would have sent it to me, but
2 possibly someone in his office.

3 Q So --

4 A A guy by the name of Austin that did --
5 that I communicated with regarding this
6 transaction.

7 Q Okay. So one of the things that we
8 didn't talk about at your last deposition, Doctor,
9 was the leaseback of the property.

10 So it's your understanding that you
11 leased back the property from the time of closing,
12 which officially occurred on November 17.

13 Are you aware of that, Doctor?

14 A Yeah. 17, yes, through the 28th, I
15 believe.

16 Q And that's what I was going to ask you.

17 So from November 17 to November 28, you
18 leased back the property from the Folinos;
19 correct?

20 A Yes.

21 Q What was the purpose of that leaseback
22 if you weren't living there and you were living in
23 Denver at the time?

24 A Because all of my furniture and
25 belongings were in the subject property. I was

1 planning on moving to my current residence in Red
2 Rock Country Club, but they were -- it had been
3 used as a rental for ten years, so I was in the
4 process of remodeling it.

5 And they weren't going to have it
6 finished to the point where I could move my things
7 in until the 27th. It really wasn't even finished
8 then, but enough that I could move my things over.

9 Q Okay. So then in the next couple of
10 reply e-mails on 392, Ms. Whitfield says that she
11 contacted Rakeman about getting the mold test on
12 November 16, 2017.

13 Do you see that, Doctor?

14 A Which page are you on?

15 Q 392, that middle e-mail, the
16 November 16, 2017, 9:20 a.m. e-mail from Nicky
17 Whitfield.

18 A Okay. I see it, yes.

19 Q Then it says "Closet. Before I read
20 this updated e-mail, I already requested Rakeman
21 to send someone out. I will look up the woman
22 you've suggested and see if she's still available.
23 I've requested a schedule for the repairs as
24 well."

25 Do you see that, Doctor?

1 A Yes.

2 Q So at least as of November 16, the
3 repairs had not occurred; correct?

4 A No, they had not.

5 Q And that's the repairs as to the leak
6 that occurred in the master closet?

7 A Yes. On -- on or about November 7 or
8 8th, I believe.

9 Q Okay. So then we went over this in your
10 previous deposition. There was an inspection by
11 Infinity Environmental on November 17, 2017.

12 Do you remember that, Doctor?

13 A Yes.

14 Q And then they were prepared to report as
15 a result of that inspection, and that was positive
16 for mold. That report was dated November 24,
17 2017; correct?

18 A Say -- say that again.

19 MR. GRAF: Can you read that back?

20 (Whereupon, the record was read.)

21 MR. GALLIHER: Foundation.

22 THE WITNESS: I thought the report that
23 we reviewed showed that there was no mold in the
24 house --

25

1 BY MR. GRAF:

2 Q Okay. So there --

3 A -- by Infinity Environmental Services.

4 Q So there was a prior report, and I guess
5 that's what I need to go over with you. There
6 were two reports from Infinity Environmental
7 Services.

8 Were you aware of that, Doctor?

9 A Well, no. I only have one that I could
10 find, which is the one that I produced.

11 Q Okay. So there was a second report
12 of -- a first report that was prepared dated
13 November 24, 2017.

14 So let's -- let's go off the record, and
15 I'll have that e-mailed to you, Doctor.

16 A Okay.

17 (Whereupon, a recess was taken.)

18 (Exhibit Nos. 35 and 36 were
19 marked for identification.)

20 BY MR. GRAF:

21 Q Okay. Doctor, that e-mail actually has
22 the next two exhibits. So Exhibit 35 is going to
23 be Bates-stamped PLTF1813, and it's tough, because
24 it's over some other writing.

25 A Yeah, I see it though.

1 Q And it goes through 1831. And then in
2 that same e-mail is 1832 through 1837, which will
3 be Exhibit 36, which is the report you've already
4 seen, the December 7th report.

5 A Okay.

6 Q So Exhibit 35 is the November 24, 2017,
7 Infinity Environmental Services report. And it
8 says "To whom it may concern. Rakeman Plumbing,"
9 and it's "Fungal Indoor Air Quality Assessment
10 Report: Visual, Airborne and Surface Fungal
11 Assessment. Water-damaged master bedroom closet
12 set, 42 Meadowhawk Lane, Las Vegas, Nevada 89135."

13 And that's the address of this home;
14 correct, Doctor?

15 A Yes.

16 Q Have you ever seen this report before,
17 Doctor?

18 A I have not.

19 Q Were you ever told by Rakeman Plumbing
20 that the home had tested positive for mold?

21 A Not that I recall.

22 Q Okay. Would you have done anything
23 differently with the seller's real property
24 disclosure form if you were made aware of this
25 report?

1 MR. GALLIHER: Speculation. Foundation.
2 Incomplete hypothetical.

3 THE WITNESS: Would I have done anything
4 different when I filled it out prior to the water
5 leak? This report came out after we closed.

6 BY MR. GRAF:

7 Q Correct.

8 Here is my question to you, though,
9 Doctor. The Addendum 4-A which references the
10 water leak that you produced and submitted to the
11 Folinos, that was an addendum to show that there
12 had been a water leak; correct?

13 A Yes.

14 Q Would you have prepared another addendum
15 to show that there had been the presence of mold
16 as a result of that water leak if you were made
17 aware of this report?

18 MR. GALLIHER: Lacks foundation. Calls
19 for speculation. It's an incomplete hypothetical.

20 BY MR. GRAF:

21 Q You can answer, Doctor.

22 A I don't understand the question, because
23 the report came out after the property closed.

24 Q Okay. So if you became aware of this
25 mold report, you wouldn't have done anything

1 differently?

2 MR. GALLIHER: Same objections. Vague
3 as to time.

4 BY MR. GRAF:

5 Q During the closing of this property, you
6 would not have done anything differently?

7 MR. GALLIHER: Same objection.

8 THE WITNESS: How could I be aware of
9 this before -- this report is dated November 24,
10 2017. We closed on November 17th, 2017. How
11 could I have done anything different? I don't
12 understand what you're asking.

13 BY MR. GRAF:

14 Q So, Doctor, if you look at the first
15 sentence of the report, it says "To whom it may
16 concern: In accordance with your request and
17 authorization for services, Infinity Environmental
18 Services, (Infinity) of Las Vegas, Nevada,
19 provided the subject services on November 17,
20 2017."

21 Do you see that, Doctor?

22 A Yes.

23 Q Okay. So on November 17, 2017, the date
24 that this property closed, did Rakeman Plumbing
25 inform you that they were having a mold test

1 performed?

2 A I knew that there was a mold test being
3 done, because the seller had requested -- or, I'm
4 sorry, the buyer had requested it.

5 Q Okay. And I guess that's the -- the
6 follow-up question to that is -- again, we went
7 over the e-mail.

8 You don't recall who told you that
9 somebody had requested a mold report?

10 A I don't.

11 Q But let's -- I mean, let's look at that
12 real quick.

13 And if you look at Exhibit 34 and the
14 e-mail that we looked at, November 15, 2017, at
15 least as of that date -- on Bates stamp DEF393, it
16 least on that date, you were aware that somebody
17 had requested a mold report; correct?

18 A You're looking at Bates stamp 393?

19 Q Yes.

20 A I need to find that again.

21 Q And it's in Exhibit 34, Doctor, the last
22 page.

23 A Yeah. Okay. I found it.

24 Yes, as of the 15th, I knew that they
25 wanted a mold -- or a mold test done.

1 Q And at least according to this document,
2 Exhibit 35, that mold test -- at least the samples
3 were taken on November 17, 2017?

4 A According to the report that you just
5 gave me, yes.

6 Q Okay. And are you aware as to whether
7 or not anybody -- whether it be Rakeman -- well,
8 let me ask it to you in this order, actually.

9 Were you aware as to whether Rakeman had
10 said visual evidence of mold prior to November 15,
11 2017?

12 A No, I'm not aware of any visual evidence
13 of mold or otherwise.

14 Q So did you ever have any conversations
15 with Nicole Whitfield as to whether or not she had
16 been informed by Rakeman Plumbing that there were
17 visual signs of mold?

18 A Not that I recall, no.

19 Q Okay. Have you had a chance to read
20 through this report yet, Doctor?

21 A I've read just the first couple of
22 pages, kind of the summary of conclusions part.

23 Q Did you read the results and discussion
24 on page two?

25 A Yes.

1 Q Okay. Did those results in that
2 discussion state that there was a positive
3 sample -- air sample for mold?

4 MR. GALLIHER: Objection. The document
5 speaks for itself. He's not an expert.

6 THE WITNESS: Well, it says "The results
7 of the Air-O-Cell cassette sample indicated the
8 total fungal genera detected in the indoor samples
9 were higher than the concurrent outdoor genera
10 levels with elevated levels of Alternaria (13
11 spores per cub meter)," so I'm assuming this
12 refers to the air samples.

13 BY MR. GRAF:

14 Q Okay. And that the sample was positive
15 for Penicillium/Aspergillus?

16 A Yes.

17 Q Okay. And then on page three, is it
18 your understanding after reading this report that
19 the surface swabs from the -- well, it doesn't
20 say. Oh, yeah, it does -- collected from the
21 master bedroom closet on the lower damaged wall
22 under the closet cabinet that is adjacent to the
23 master bathroom was positive for Alternaria,
24 Ascospores, Hyphae, and Ulocladium?

25 MR. GALLIHER: Form. Foundation.

1 Speculation.

2 THE WITNESS: Yes, that's what it says
3 on the "Results and Discussion."

4 BY MR. GRAF:

5 Q So underneath "Results and Conclusions,"
6 No. 1, it says "During our visual" -- on that same
7 page. "During our visual inspection of the master
8 bedroom closet, we found suspect visible fungi on
9 lower wall under the closet cabinet that is
10 adjacent to the master bathroom and water heater."

11 Do you see that, Doctor?

12 A Yes.

13 Q Okay. Had you ever observed the area
14 underneath those cabinets in the closet?

15 A You were sort of cutting out there. I
16 didn't catch the question.

17 Q After the November 7th leak in 2017, did
18 you ever look underneath the cabinets in that
19 master closet?

20 A I don't recall looking, other than
21 glancing to see what was down there. But I didn't
22 look -- I wasn't -- I didn't look with the
23 intention of looking for mold, if that's what
24 you're asking.

25 Q First off, I just wanted to know if you

1 looked.

2 So if you did look, you only looked for
3 the presence of what?

4 A Water, probably.

5 Q Okay. Did you ever instruct
6 Ms. Whitfield to look underneath those cabinets?

7 A Not that I recall.

8 Q And, Doctor, on November 24 and until
9 November 28, you were still occupying or leasing
10 back the residence; correct?

11 A November 21st through the 27th I was,
12 yes.

13 Q Okay. Now, you said you had already
14 moved to Denver at that point in time.

15 Did you have anybody staying at the
16 house on a daily basis during the leaseback
17 period?

18 A During the leaseback period?

19 Q Yes, sir.

20 A I stayed there.

21 Q Okay. So I'm confused, so let me just
22 ask a question.

23 I thought that you had moved to Denver
24 in September of 2017. Is that not the case?

25 A Yes, but I came back. We finished our

1 final exams on the 21st of November, so I came
2 back to the property, lived in the property until
3 my home that I was moving into had been renovated
4 to the point where I could move my things over on
5 November 28th from the subject property.

6 Q Okay. So as of the date of this report,
7 you were living in the residence?

8 A Yes.

9 Q So you were not living in the residence
10 on November 17th when the inspection was conducted
11 by Infinity Environmental?

12 A No.

13 (Exhibit No. 37 was marked for
14 identification.)

15 BY MR. GRAF:

16 Q Doctor, I handed to the court reporter
17 your affidavit that is -- should have 195 on the
18 attachment.

19 Do you have it?

20 A I'm looking for it.

21 Q Okay.

22 A Yes, I found it.

23 Q Okay. Have you seen that document
24 before, Doctor?

25 A Yes.

1 Q And it's Bates-stamped Swanson 195
2 through Swanson 197.

3 A Yes.

4 Q On 197, is that your signature?

5 A Yes.

6 Q Do you recall signing it in front of the
7 notary Cesar Omar Melendez?

8 A Well, I don't recall that, as we sit
9 here, but I have no doubt that I did.

10 Q Do you know why this affidavit was
11 prepared, Doctor?

12 A I believe this was prepared for the
13 mediation.

14 Q Did you prepare this, or was it prepared
15 for you?

16 A I think it was prepared with the
17 assistance of my attorney.

18 Q Okay. And, again, if at any point in
19 time while we're talking about this document I ask
20 you a question that would require you to testify
21 as to something that your attorney told you, I'm
22 not trying to obtain that type of information. So
23 if you feel like you have to, just tell me that,
24 and I'll try and rephrase the question so that you
25 don't have to relay that type of information.

1 Okay, Doctor?

2 A Okay.

3 Q All right. So do you believe that the
4 information that's contained on this affidavit is
5 true and accurate?

6 A I -- yes.

7 Q When is the last time you read it,
8 Doctor?

9 A Well, probably -- not for a while.

10 Q Why don't you take a second and read
11 through it, because I'm going to ask you some
12 questions about the contents.

13 A Okay. Okay. I've read it.

14 Q Okay. So just briefly, Doctor, you
15 did -- and I'm going to go through some of these
16 paragraphs to make sure the information I have is
17 the same as what's on here.

18 So the owner and seller of the property,
19 42 Meadowhawk, was Lyons Development, LLC?

20 A Yes.

21 Q And that the sole member of Lyons
22 Development is Tiger's Tail Management Trust, an
23 irrevocable Nevada spendthrift trust?

24 A Yes.

25 Q And then you are cotrustee with Sharon

1 **Evans?**

2 A Yes.

3 Q You moved into the 42 Meadowhawk
4 property in April of 2015?

5 A Yes.

6 Q Okay. Do you recall there being a leak
7 in the property prior to August of 2015?

8 A Ask the question again.

9 Q Do you recall the leak at the property
10 prior to August 2nd, 2015?

11 A No.

12 Q Okay.

13 A Not at the time I signed this affidavit.
14 Of course, we saw the three leaks on the punch
15 list.

16 Q And that's what I'm asking, Doctor.

17 This affidavit does not contain the
18 information that was on the Criterium property as
19 to those leaks that were indicated in May of 2015;
20 correct?

21 A No.

22 Q Okay. And I guess my question is this,
23 had the recirculating pumps been replaced prior to
24 August 2nd, 2015?

25 MR. GALLIHER: Speculation. Foundation.

1 THE WITNESS: What's your question?

2 MR. GRAF: Can you restate it?

3 (Whereupon, the record was read.)

4 THE WITNESS: Not to my knowledge. I
5 mean, I don't know what they did to fix them, but
6 I don't recall them telling me that they replaced
7 them.

8 BY MR. GRAF:

9 Q Okay. So my question to you is this,
10 Doctor: You agree that the May 2015 Criterium
11 report identified that the recirculating pumps
12 were leaking; correct?

13 A Yes.

14 Q Okay. And then they --

15 A Yes, the report did. Yes.

16 Q And those same recirculating pumps then
17 failed on August 2nd, 2015; correct?

18 MR. GALLIHER: Foundation.

19 THE WITNESS: To my knowledge, yes.

20 BY MR. GRAF:

21 Q Okay. Can you say with any degree of
22 certainty that those recirculating pumps were not
23 leaking between May of 2015 and August of 2015?

24 MR. GALLIHER: Foundation. Speculation.
25 Incomplete hypothetical.

1 THE WITNESS: I would have no way of
2 knowing, not being a plumber, other than Rakeman
3 told me that the -- the leaks were fixed and I saw
4 no evidence of water intrusion in the house.

5 BY MR. GRAF:

6 Q Okay.

7 A That's the only way I would -- I would
8 know if they were leaking or not.

9 Q Okay. But you didn't go and personally
10 examine the recirculating pumps after the repairs
11 pursuant to the May 2015 report; correct?

12 A That would not be something I would do,
13 because that's why I hired licensed professionals
14 to take care of my plumbing.

15 Q But you -- my statement would be
16 correct? You didn't go up there and take a look
17 at the recirculating pumps and see if they were
18 still leaking between the repairs that were
19 purportedly made after the May 2015 report and the
20 August 2nd leaks; correct?

21 MR. GALLIHER: Objection. Form.

22 THE WITNESS: Did I personally try to
23 find the recirculating pumps to see if they were
24 leaking? No, I did not.

25

1 BY MR. GRAF:

2 Q So you also can't testify that those
3 recirculating pumps weren't leaking between that
4 time period; correct?

5 MR. GALLIHER: Form. Foundation.

6 THE WITNESS: I can't testify that they
7 were or were not.

8 BY MR. GRAF:

9 Q Okay. So it says all leaks were
10 repaired by Rakeman Plumbing.

11 You're talking about after the
12 August 2nd, 2015, leaks; correct?

13 A In this affidavit, I am, because I was
14 unaware of the first two leaks. But I would have
15 no reason to believe that they hadn't been
16 repaired with the first leaks as well.

17 Q And in terms of the statement here,
18 during the repair, Rakeman Plumbing replaced both
19 circulating pumps with, in their terms, better
20 ones. Do you see that?

21 A Yes.

22 Q That same recirculating pump failed or
23 leaked again within two years; correct?

24 A Not to my knowledge. These -- this
25 statement refers to the August 2015 recirculating

1 pump leaks. They were -- the recirculating pumps
2 were replaced with, quote, better ones. To my
3 knowledge, the recirculating pumps have not leaked
4 since.

5 Q The November 2017 leak, is it your
6 testimony that that wasn't related to the
7 recirculating pumps?

8 A That's not what I was told, no.

9 Q And this affidavit does not address the
10 leak that was observed in photographs five and six
11 of the Criterium report in the basement bathroom;
12 correct?

13 A No. If there was, indeed, a leak.

14 Q So where it states in the affidavit "All
15 leaks were repaired by Rakeman Plumbing," that
16 leak was never repaired by Rakeman Plumbing;
17 correct?

18 MR. GALLIHER: Foundation. Speculation.

19 THE WITNESS: Well, I don't know that we
20 established there was a leak. Because when I
21 asked them to investigate it, they couldn't find a
22 leak there.

23 BY MR. GRAF:

24 Q So the --

25 A And I never observed any water in that

1 bathroom over the two years I lived there.

2 Q Except those two photographs in the
3 Criterium report; correct?

4 A Well, I think those -- when I look at
5 those reports, I can't tell what it is. I see a
6 drop of water next to a vent, and then I see some
7 moisture around the base of the toilet. And I
8 don't know how -- even if water dripped from the
9 ceiling, how it would just sort of collect in that
10 pattern around the base of the toilet.

11 But I think more importantly, I was down
12 there, as I said, you know, three, four, five
13 times a week, and I never saw any moisture in that
14 bathroom. So I don't know that we -- I don't know
15 that there actually was a leak there.

16 Q That report informed you that there was
17 a leak; correct, Doctor?

18 MR. GALLIHER: Document speaks for
19 itself.

20 THE WITNESS: Well, that report informed
21 a lot of things that weren't -- didn't happen to
22 be the case. But, yes, it did suggest that there
23 was a leak that needed to be evaluated.

24 BY MR. GRAF:

25 Q And your affidavit here where it says

1 "All leaks were repaired by Rakeman Plumbing,"
2 that statement does not include that leak in the
3 basement bathroom; correct?

4 MR. GALLIHER: Form. Foundation.
5 Speculation.

6 THE WITNESS: At the time I wrote --
7 signed this affidavit, I did not even recall that
8 I had gotten that inspection, so it would not have
9 included those.

10 BY MR. GRAF:

11 Q I get what you're saying, Doctor, but
12 I'm going to keep asking the question until you
13 answer it. It's a yes-or-no question.

14 That statement "All leaks were repaired
15 by Rakeman Plumbing" is not an accurate statement,
16 is it, because that leak in the basement bathroom
17 ceiling was never addressed --

18 MR. GALLIHER: Form. Foundation.

19 BY MR. GRAF:

20 Q -- by Rakeman Plumbing; correct?

21 MR. GALLIHER: Form. Foundation.
22 Misstates his testimony.

23 THE WITNESS: So all I can say is if
24 there was a leak in the bathroom in the basement,
25 it was not repaired because they could not find

1 the leak. They investigated, and they
2 communicated to me that they could not find it.

3 BY MR. GRAF:

4 Q Okay. So is it your testimony here
5 today that Rakeman Plumbing sent out a water
6 remediation company to dry out the master closet,
7 bathroom, bedroom, and garage?

8 MR. GALLIHER: Vague as to time.

9 THE WITNESS: Yes.

10 BY MR. GRAF:

11 Q And this is in regards to the
12 August 2nd, 2015, water losses; correct?

13 A Yes.

14 Q So where it says "On January 17, I
15 discovered a small pinhole leak in one of the
16 plastic water pipes in the wall. Rakeman Plumbing
17 fixed the leak," do you see that, Doctor?

18 A Yes.

19 Q When did Rakeman Plumbing fix that leak,
20 Doctor?

21 A They fixed it immediately, being when I
22 called them when I discovered the leak.

23 Q Doctor, why don't -- why don't we have
24 any documentation prior to May of 2017 regarding
25 those repairs?

1 MR. GALLIHER: Speculation. Foundation.
2 Incomplete hypothetical.

3 THE WITNESS: I'm sorry. I'm getting a
4 little bit of cutout on my feeds, so would you
5 repeat that again?

6 MR. GRAF: Mr. Galliher is making
7 objections and causing problems.

8 MR. GALLIHER: That's what I do.

9 THE WITNESS: I can't hear everything
10 that is going on. I don't know if that was a joke
11 or --

12 MR. GALLIHER: It was.

13 THE WITNESS: I'm sorry.

14 MR. GRAF: Judge Gonzales says that my
15 sarcasm does not transcribe very well either.

16 MR. GALLIHER: She's told me the same
17 thing, as a matter of fact.

18 THE WITNESS: I'm sorry. Sometimes if I
19 disconnect and reconnect, we can get a better --
20 because I think we're going to be struggling with
21 this. I've been having a little issue for a while
22 now.

23 MR. GRAF: Oh, so do you -- well, I
24 don't know how to reconnect. So if you want to
25 dis --

1 THE WITNESS: No, I can -- I'm sorry.

2 MR. GRAF: Go ahead.

3 THE WITNESS: I'll -- I'll disconnect
4 and then reconnect.

5 MR. GRAF: Let's go off the record.

6 (Whereupon, a recess was taken.)

7 (Whereupon, the record was read.)

8 MR. GALLIHER: Same objection.

9 THE WITNESS: Why don't I have any
10 documentation prior to May of 2017 regarding which
11 repairs?

12 BY MR. GRAF:

13 Q On the top of page 196, we were asking
14 questions about the statement in January of 2017,
15 "I discovered a small pinhole leak in one of the
16 plastic water pipes in the wall." And it says
17 "Rakeman Plumbing fixed the leak."

18 The documentation that we have seen from
19 Rakeman Plumbing is a May 23rd, 2017, invoice, and
20 Mr. Gerber testified that that is when he went out
21 to make those repairs.

22 So is this -- does this mean that those
23 repairs were not conducted between January of 2017
24 and May of 2017?

25 MR. GALLIHER: Form. Speculation.

1 Foundation.

2 THE WITNESS: The -- the repair was
3 conducted on the date that the -- the water was
4 discovered in the closet. And to the best of my
5 knowledge, I found this somewhere, that was
6 February 16, 2017, and I was searching for
7 documents again today to see where that date came
8 from. And I could only find an e-mail that
9 stated -- and I think I sent it to you --
10 something about Don said they would be out to
11 finish the repairs from the water leak, something
12 like that.

13 But the date of that e-mail was March 7,
14 2017. And I believe that was from Nicky, and I
15 believe that was -- that was one of the additional
16 documents I supplemented you with recently.

17 BY MR. GRAF:

18 Q Okay. So then, Doctor, at a bare
19 minimum, according to your documentation and your
20 testimony here today, between February 16, 2017,
21 and March of 2017, that hole or small pinhole leak
22 was not repaired; correct?

23 MR. GALLIHER: Objection. Misstates his
24 testimony.

25 THE WITNESS: Yes, the e-mail wasn't

1 regarding repair of the leak. It was regarding
2 putting the carpet back down and those repairs,
3 because they obviously had to take some time to
4 dry the thing out. The repair was done on the
5 date that the leak was discovered, which to my
6 knowledge was February 17 or 18 of 2017.

7 BY MR. GRAF:

8 Q So that's my question, Doctor. So is
9 this affidavit inaccurate? The affidavit says
10 that you observed the pinhole leak in January of
11 2017. That's why I'm asking these questions.

12 A Yes, that part is, I believe,
13 inaccurate. I think at the time we drafted this
14 affidavit, we were not entirely sure of the exact
15 date of that leak. But I believe, to the best of
16 my knowledge, it was February 2017.

17 Q So going down a couple of paragraphs,
18 you completed the seller's real property
19 disclosures on August 24, 2017; correct?

20 MR. GALLIHER: You said August. Do you
21 mean October?

22 BY MR. GRAF:

23 Q I mean October 24. My apologies.

24 A Yes.

25 Q And according to this affidavit, you

1 **knew that when you prepared the disclosures, that**
2 **there had been two previous water leaks; correct?**

3 A Yes. Well, technically -- technically
4 three. Let's see. So I think it would probably
5 be more accurate to read that there were water
6 leaks on two different dates, both the -- well, it
7 was actually August 2nd and 3rd of 2015 and
8 February 7 or 8th of 2017.

9 Q But those actually reference four
10 different leaks in the house; correct, Doctor?

11 A There were four -- yes, there were four
12 leaks.

13 Q Okay. So this -- where it says there
14 had been two previous leaks, that means this
15 affidavit is inaccurate; correct?

16 A Yes, that should read four previous
17 water leaks.

18 Q And then the next statement, "However,
19 the leaks and all associated damages were repaired
20 by a licensed plumbing company, Rakeman Plumbing,"
21 is that an accurate statement?

22 A That is accurate, yes.

23 Q That statement doesn't say how long it
24 took to make those repairs, does it?

25 MR. GALLIHER: Form. Foundation.

1 THE WITNESS: That statement does not,
2 no.

3 BY MR. GRAF:

4 Q And in some instances it took a period
5 of months to make the repairs; correct?

6 MR. GALLIHER: Misstates his testimony.
7 Assumes facts not in evidence. Form and
8 foundation.

9 THE WITNESS: Not to make the repair of
10 the actual water leakage. Those were done
11 immediately. But, of course, it takes a while to
12 dry out anything that needs to be dried out, so
13 the -- replacing the carpet, replacing the toe
14 kicks and whatnot took a few weeks with each one,
15 yes.

16 BY MR. GRAF:

17 Q And in some instances, it took a period
18 of months; right?

19 A Now, which one are you referring to?

20 Q The leak in August of 2015. We went
21 over some e-mails today -- that there were e-mails
22 back and forth between your two different
23 assistants going into October of 2015 about the
24 repairs still not being completed; correct?

25 A Yes.

1 MR. GALLIHER: Foundation.

2 THE WITNESS: Some of the -- yeah,
3 cabinets and -- and carpet work, I believe.

4 BY MR. GRAF:

5 Q So it says "At that time, to my
6 knowledge, the work done by Rakeman Plumbing fixed
7 all of the problems with the plumbing system."

8 Do you see that, Doctor?

9 A Yes.

10 Q Again, this statement does not include
11 the leak that occurred in the bathroom basement;
12 correct?

13 MR. GALLIHER: Foundation.

14 THE WITNESS: Well, one, I had forgotten
15 that I had gotten that inspection at the time I
16 wrote this. But, number two, we don't know that
17 there was a leak, because I had it inspected and
18 they couldn't find the leak.

19 BY MR. GRAF:

20 Q Did you have an obligation under the
21 purchase and sale agreement to provide the buyers
22 with all copies of reports or inspections that you
23 had conducted as to the house?

24 MR. GALLIHER: Form. Speculation.
25 Calls for a legal conclusion.

1 THE WITNESS: Can you repeat that,
2 please?

3 (Whereupon, the record was read.)

4 THE WITNESS: Not to my recollection. I
5 would have to go back and review it.

6 BY MR. GRAF:

7 Q Okay. So just going back, you signed
8 this affidavit on August 13, 2018, Doctor?

9 A August 13 of 2018, yes.

10 Q Okay. So on the next two paragraphs
11 down, it says "On November 7, 2017, my assistant,
12 Nicky Whitfield, discovered a water leak in the
13 master closet."

14 Is that an accurate statement, Doctor?

15 A Yes, I believe so.

16 Q Doctor, did your assistant actually
17 discover that leak on November 6, 2017?

18 A I would have to look at my dates, but
19 she notified me when she discovered the leak.

20 Q Okay.

21 A And I thought that date was November 7.

22 Q Okay. And "On November 8, 2017, my
23 agent was informed that a leak had occurred."

24 Who is your agent there?

25 A The Ivan Sher group, Shapiro & Sher.

1 Q So my question is, did you inform
2 Mr. Sher or did you inform Kelly Contenta? Austin
3 Sherwood? Who did you inform?

4 A I believe that I e-mailed Austin
5 Sherwood first. But later, prior to closing, I
6 believe I discussed it with Ivan Sher.

7 Q Okay. I'm just talking about this
8 e-mail here.

9 So you -- the agent that you're
10 referring to there is Austin Sherwood?

11 MR. GALLIHER: Objection. Asked and
12 answered.

13 MR. GRAF: I'm just trying to -- he said
14 a couple of things there.

15 THE WITNESS: "On November 8th, my agent
16 was informed that a leak had occurred." If I
17 remember correctly, I e-mailed Austin Sherwood,
18 but I may have copied other people. I don't
19 recall, but I think I've provided that e-mail.

20 BY MR. GRAF:

21 Q So the next paragraph, it says "Between
22 November 7, 2017, and November 17th, it is my
23 understanding that the Folinos came to the
24 property on several occasions to plan for their
25 move-in."

1 Do you see that, Doctor?

2 A Yes.

3 Q Who provided you with that information?

4 A My assistant, Nicole Whitfield.

5 Q Doctor, you didn't personally see the
6 Folinos at the property between November 7 and
7 November 17 of 2017; correct?

8 A No. I was living in Denver at the time
9 going to school.

10 Q So this was -- this isn't your personal
11 knowledge. This is something that somebody told
12 you; correct?

13 A Well, I think we have the records from
14 the -- yeah, the Ridges guard gate that shows when
15 the Folinos entered the Ridges.

16 Q I understand your response, Doctor.
17 But my question is, you don't have
18 personal knowledge regarding whether or not the
19 Folinos visited the house between November 7th and
20 November 17 of 2017; correct?

21 MR. GALLIHER: Foundation.

22 MR. GRAF: I agree. He lacks it.

23 THE WITNESS: I would -- I would have to
24 look, but I think there were -- I think you
25 supplied some text messages between Nicole Folino

1 and Mrs. Ladowski that may have suggested that she
2 was in the house during that period. I would have
3 to go back and look.

4 BY MR. GRAF:

5 Q I understand your qualifications.
6 Doctor, I'm just asking a very specific question.
7 You did not see personally, with your
8 own eyes, the Folinos at the property between
9 November 7 and November 17, 2017; right?

10 A No, I did not.

11 Q Okay. So that statement is not based
12 upon your own personal knowledge. That statement
13 is based upon information you received from a
14 third party; correct?

15 MR. GALLIHER: Foundation. Calls for a
16 legal conclusion.

17 THE WITNESS: Yes, that was not based on
18 my own visual knowledge of her visiting the
19 property.

20 BY MR. GRAF:

21 Q So then you then state, "It is also my
22 understanding that the Folinos had full access to
23 the property, including the master bedroom and
24 master closet where the November 7, 2017, water
25 problem was visible."

1 Do you see that?

2 A Yes.

3 Q Again, you don't have personal knowledge
4 that they went into the master bedroom at any of
5 the times that they went to the property, do you?

6 MR. GALLIHER: Objection. That
7 misstates -- hold on. Hold on, Doc. Hold on.
8 Foundation, and that misstates the
9 document.

10 Now you can answer.

11 THE WITNESS: So you're asking me if I
12 visually observed that? No, I was in Denver.

13 BY MR. GRAF:

14 Q Okay. And so it says it is your
15 understanding that the Folinos had full access to
16 the property.

17 What do you base that statement upon?
18 Who told you that?

19 A Nicole Whitfield, I presume.

20 Q So then the next paragraph says "On
21 November 15th, 2017, I informed the Folinos of the
22 leak via amended disclosures." And then it says
23 in parens, "Addendum No. 4-A to the Residential
24 Purchase Agreement."

25 Do you see that, Doctor?

1 A Yes.

2 Q Okay. Did you create Addendum 4-A?

3 A I notified my broker or broker's office,
4 and they prepared it.

5 Q Okay. You don't have any personal
6 knowledge as to when Addendum 4-A was transmitted
7 to anybody on behalf of the Folinos, do you,
8 Doctor?

9 MR. GALLIHER: Form. Foundation.
10 Assumes facts not in evidence.

11 THE WITNESS: I don't recall if I was
12 copied on an e-mail to them or not. I presume it
13 would have gone to their Realtor, but I don't
14 know.

15 BY MR. GRAF:

16 Q Okay. The Addendum 4-A, that is
17 referencing the leak that occurred on or about
18 November 6 or 7 of 2017; correct?

19 A Yes.

20 Q It's not referencing any of the prior
21 leaks; correct?

22 A Correct.

23 Q You never amended the SRPD to include
24 any reference to the prior leaks in 2015 or in
25 January or February, March of 2017; correct?

1 A Did you say January and February and
2 March? Or January or February or March?

3 Q I'm leaving that open.

4 So the leak -- the pinhole leak that we
5 have already gone over in your affidavit that
6 arose either in January, February, or March, you
7 never submitted an addendum saying that that leak
8 occurred; correct?

9 A Correct.

10 Q Doctor, have you had any conversations
11 with Nicole Whitfield since your prior deposition?

12 A Just briefly.

13 Q And what did you talk about?

14 A I just asked her how the deposition
15 went, and she said that it was not fun.

16 Q Thank you. Just kidding. That's
17 sarcasm.

18 MR. GALLIHER: Your sarcasm doesn't
19 transcribe.

20 MR. GRAF: I know. It doesn't. It's
21 obvious.

22 BY MR. GRAF:

23 Q So anything other than that that you
24 talked about with her?

25 A No. I just -- Nicole wanted to vent a

1 little because she was a little frustrated. She
2 felt like she was asked the same questions over
3 and over. But that -- that was the gist of it. I
4 didn't have a lot of time to talk to her, so I had
5 to cut the conversation short.

6 Q Did she give you any information that
7 you didn't have about this transaction or the
8 water losses or any of the facts and circumstances
9 of this case that you didn't have prior to your
10 deposition the other day?

11 A No.

12 Q What did you do in preparation for your
13 deposition here today?

14 MR. GALLIHER: You mean between the last
15 one and this?

16 MR. GRAF: Yes.

17 THE WITNESS: Well, basically reviewed
18 the additional documents that I supplied to you
19 and sort of went through the chronology of dates,
20 just to refresh my memory.

21 BY MR. GRAF:

22 Q Did you have any conversations with
23 either Aaron Hawley or William Rocky Gerber from
24 Rakeman Plumbing?

25 A No.

1 Q Did you contact anybody else that was
2 involved in this transaction, other than your
3 attorneys?

4 A No.

5 MR. GRAF: Okay. That's it, Doctor. I
6 appreciate your time. Thank you.

7 MR. GALLIHER: I have, like, two
8 follow-up questions.

9

10 EXAMINATION

11 BY MR. GALLIHER:

12 Q So we're talking about -- you remember
13 Rusty asked you some questions about the water in
14 the bathroom basement that was reported in the
15 Criterium report?

16 A Yes.

17 Q All right. So you got that list -- you
18 reported that, correct, to Blue Heron or Rakeman
19 or somebody?

20 A To Blue Heron.

21 Q To Blue Heron.

22 And somebody came out and looked at it
23 and told you there was no leak; is that correct?

24 A Yes. I -- Rakeman Plumbing did all of
25 the plumbing in the house, so this was sort of

1 my -- this was my punch list that you go through.
2 When you build a house, you go through all of the
3 items that need to be finished up. So they
4 contacted Rakeman, who came out and addressed the
5 recirculating pump problem and then that leak --

6 Q Okay.

7 A -- or supposedly.

8 Q And from that time on, until the time
9 that you moved out of the home, did you ever --
10 did you ever observe any evidence of a water leak
11 in that bathroom?

12 A In the two years that I lived in the
13 home?

14 Q Right.

15 A No, I never -- like I said, I was down
16 there frequently, because that was my gym, and
17 used that bathroom several times a week, and I
18 don't recall there ever being any water on the
19 floor. There was no water stain on the ceiling,
20 there was just nothing. I don't know what those
21 pictures are depicting.

22 Q All right. Are you aware that when --
23 during the sale transaction to the Folinos, the
24 Folinos hired a home inspector to inspect 42
25 Meadowhawk?

1 A In the normal course of the sale, yeah,
2 they hired an inspector.

3 Q Well, do you recall -- you were informed
4 about some -- some issues that they requested be
5 repaired prior to the sale, weren't you?

6 A Yes.

7 Q Were there any problems or concerns with
8 the basement bathroom, specifically with any leaks
9 in the basement bathroom, that were included in
10 those things that the Folinos requested to be
11 repaired?

12 A No.

13 MR. GRAF: Object as to form.

14 MR. GALLIHER: I think that was the
15 perfect question.

16 BY MR. GALLIHER:

17 Q Rusty asked if you could testify that
18 the recirculating pumps had been repaired after
19 the May 2015 leak.

20 Do you recall that testimony about 20
21 minutes ago?

22 A If they had been repaired after -- after
23 which date?

24 Q I think his question was after the --
25 after the May of 2015 leak.

1 MR. GRAF: No.

2 MR. GALLIHER: No?

3 MR. GRAF: The May of 2015 Criterium
4 report and the August leak.

5 MR. GALLIHER: But there was a leak in
6 May.

7 MR. GRAF: Yep.

8 BY MR. GALLIHER:

9 Q All right. So let's go back. So
10 after -- let's talk about the May 2015 Criterium
11 report.

12 So same thing. Right? You got that
13 report. You provided it to Blue Heron, and then
14 you were informed that Rakeman came out and
15 repaired the recirculating pumps; isn't that
16 correct?

17 A Yes.

18 Q And then there was a leak in the
19 recirculating pumps or close -- thereabouts in May
20 of 2015; right? Later in May; is that right?

21 A Well, the leaks were in August of 2015.

22 Q Yeah, in August. Thank you. I'm sorry.

23 And then do you have an understanding of
24 what measures were taken after those -- after that
25 leak to repair those recirculating pumps?

1 A What -- what measures were taken?

2 Q Yeah. What happened? So, again, you
3 reported that and Rakeman came out.

4 Do you know what Rakeman did to fix it?

5 A They told me that they -- they replaced
6 those pumps with a better quality pump.

7 Q Okay. Now, between --

8 A With better pumps.

9 Q So between the Criterium report in May
10 and your reporting that to Blue Heron and you
11 being told that it was fixed and the problem in
12 August, did you ever observe any water visible in
13 the areas of the recirculating pumps?

14 A None.

15 Q Did the recirculating pumps function
16 properly? Meaning did you have hot water
17 throughout the house?

18 A Yes.

19 Q He asked you about the statement in your
20 affidavit regarding providing -- that the Folinos
21 had full access to the property during escrow.

22 Do you recall that? That was just a
23 couple of minutes ago. Do you recall that?

24 A I recall that, yes.

25 Q Did you ever instruct Nicole -- you

1 know, Nicky Whitfield to restrict access to any
2 area of the house -- restrict access to the
3 Folinos during the escrow period?

4 A No, I never instructed her. The only
5 thing I would say is that the -- apparently Nicole
6 had talked to either Rakeman or the -- the mold
7 testing company, who were very specific that no
8 work of any kind should be done until the results
9 were back from the mold testing. And I remember
10 Nicole was a bit -- maybe I'll say confused rather
11 than upset -- that they had their contractors in
12 there working prior to getting the mold report
13 back --

14 Q When you say "Nicole" --

15 A -- in spite of that warning.

16 Q When you say "Nicole," are you talking
17 about Nicole Folino or Nicole Whitfield?

18 MR. GRAF: Object as to form.

19 THE WITNESS: Nicole Whitfield.

20 MR. GALLIHER: All right. I don't have
21 any more questions, Doctor.

22 MR. GRAF: I have a couple of
23 follow-ups, Doctor.

24

25 EXAMINATION

1 BY MR. GRAF:

2 Q So the recirculating pump, the one
3 that's in the master closet or adjacent to the
4 master closet, it's inside the wall cavity; is
5 correct?

6 A Did you say -- I think you said is it
7 inside the wall cavity; is that --

8 Q Yes, sir.

9 A Yeah, it is.

10 Q So as you're walking around in the
11 closet or you're walking around in the master
12 bathroom or the other side of that wall, which I
13 think is the hallway, you wouldn't see the
14 recirculating pumps, would you?

15 A No.

16 Q Okay. And the same thing with the one
17 that's in the -- I think it's like the ceiling
18 joist of the single car garage, that's in that --
19 it's in a confined, closed-in area that's not
20 visible to somebody that's walking around in the
21 garage; correct?

22 A Correct.

23 Q So Mr. Gallagher asked you some
24 questions about the Folinos and the inspections
25 that they did of the house; right?

1 A Yes.

2 Q You don't have any document or anything
3 like that transmitting the Criterium report to
4 Caveat Emptor, the company that did the inspection
5 on behalf of the Folinos, do you?

6 A No.

7 Q You did not give the Criterium report to
8 the Folinos, did you, prior to the close of
9 escrow?

10 A I had forgotten I even had the report
11 until I was searching for documents.

12 Q So the answer to that is you did not
13 send that property to the Folinos prior to the
14 close of escrow; correct?

15 A No, I did not.

16 Q The ceiling above the basement bathroom,
17 what's -- what's just above that in the house?

18 A I'm not sure. It would be over on the
19 master bedroom/bathroom side of the house. I'm
20 not sure exactly what's above it, though.

21 Q Isn't the master bathroom just above it,
22 Doctor?

23 A I don't -- I don't know for sure, but
24 it's that side of the house.

25 Q It's in that general vicinity, too,

1 **though, isn't it, Doctor?**

2 A Well, I just answered it, what I know.

3 Q **Okay. There was a problem with the**
4 **toilet in the master bathroom; correct?**

5 A There was a leak at one point, and I
6 can't recall the date. I think it was maybe 2015,
7 although I would have to go back and look, that
8 was caught and repaired.

9 Q **Okay. Do you recall there being any**
10 **repairs to the ceiling in the master bathroom?**

11 A No.

12 Q **So if there's drywall repairs that are**
13 **evident in pictures of that ceiling in the master**
14 **bathroom, you're unaware as to anything in there?**

15 MR. GALLIHER: Form. Foundation.
16 Speculation. Vague as to time.

17 THE WITNESS: Wait a minute. I
18 remember, and I'm -- I need to change my answer.

19 When they -- the mini split to the media
20 equipment closet was put in after the bathroom had
21 been drywalled. So to run the line set outside,
22 they had to put -- they had to make a hole in that
23 drywall to run the line set, if I remember.

24 BY MR. GRAF:

25 Q **For that HVAC unit?**

1 A I'm sorry?

2 Q Was that the HVAC unit?

3 A Yes. A mini split is an HVAC unit.

4 Q Okay. Are you aware of any water
5 staining that has occurred on that bath -- master
6 bathroom ceiling prior to you selling the home in
7 2017?

8 A No.

9 MR. GRAF: I don't have anything
10 further. Thank you, Doctor.

11 MR. GALLIHER: Nothing further.

12 (Whereupon, the deposition
13 concluded at 12:17 p.m.)

14 * * * * *

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1 CERTIFICATE OF COURT REPORTER

2 STATE OF NEVADA)
3) ss:
4 COUNTY OF CLARK)

5 I, Heidi K. Konsten, Certified Court Reporter
6 licensed by the State of Nevada, do hereby certify
7 that I reported the deposition of TODD SWANSON,
8 M.D., commencing on February 6, 2020, at 9:34 a.m.

9 Prior to being deposed, the witness was duly
10 sworn by me to testify to the truth. I thereafter
11 transcribed my said stenographic notes via
12 computer-aided transcription into written form,
13 and that the transcript is a complete, true and
14 accurate transcription and that a request was not
15 made for a review of the transcript.

16 I further certify that I am not a relative,
17 employee or independent contractor of counsel or
18 any party involved in the proceeding, nor a person
19 financially interested in the proceeding, nor do I
20 have any other relationship that may reasonably
21 cause my impartiality to be questioned.

22 IN WITNESS WHEREOF, I have set my hand in my
23 office in the County of Clark, State of Nevada,
24 this February 10, 2020.

25 Heidi K. Konsten
Heidi K. Konsten, RPR, CCR No. 845

1 DECLARATION OF DEPONENT

2 I, TODD SWANSON, M.D., deponent
3 herein, do hereby declare under penalty of perjury
4 that I have read the within and foregoing
5 transcription of my testimony taken on February 6,
6 2020, at Las Vegas, Nevada, and that the same is a
7 true record of the testimony given by me at the
8 time and place hereinabove set forth, with the
9 following exceptions:

10
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24

25

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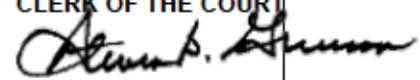
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RTRAN

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
TUESDAY, MARCH 3, 2020

**RECORDER'S TRANSCRIPT OF HEARING
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

APPEARANCES (continued on page 2):

For the Plaintiffs:

J. RUSTY GRAF, ESQ.

1
2 APPEARANCES (continued):

3 For the Defendants:

JEFFREY L. GALLIHER, ESQ.
CHRISTOPHER M. YOUNG,
ESQ.
JAY T. HOPKINS, ESQ.

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24 RECORDED BY: GAIL REIGER, COURT RECORDER
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1 Las Vegas, Nevada, Tuesday, March 3, 2020

2
3 [Case called at 9:14 a.m.]

4 MR. GALLIHER: Good morning, Your Honor, Jeff Galliher,
5 along with Jay Hopkins, Christopher Young for the Defendants.

6 THE COURT: Good morning.

7 MR. GRAF: Good morning, Your Honor, Rusty Graf on behalf
8 of the Folinos.

9 THE COURT: Good morning.

10 Have a seat. All right, so this is Defendant's Motion to
11 Dismiss Plaintiff's Second Amended Complaint.

12 This is a case in which the Plaintiffs purchased a home from
13 the Defendant. It was a high-end home, very modern and sophisticated
14 in its appearance and in its cost of construction. The suit claims that the
15 Defendant failed to disclose a plumbing leak and also claims fraud.

16 So historically what had happened in this case was there had
17 been a Motion for Summary Judgment earlier or Motion to Dismiss. And
18 that was heard, I don't know, sometime ago, November 7th.

19 And at that time, the Court stated its inclination as to the
20 Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint,
21 noting that an affidavit was required seeking 56(d), now (e) relief.

22 Further, there were two questions of fact. Moreover, the Court
23 was inclined to grant the Motion for Summary Judgment and to deny the
24 inappropriately filed Countermotion for Sanctions. There were
25 arguments by counsel.

1 So what the Court did was I granted 90 days to demonstrate
2 the existence of a genuine issue of material fact by February 6th,
3 Defendants reply due February 20th.

4 So counsel did in fact file supplemental materials. But from
5 what I've read on February 13th, Plaintiff filed a supplemental brief and a
6 supplemental list of witnesses and documents, referencing unattached
7 and unauthenticated materials with Bates numbering in the 4- to 5,000
8 range.

9 And I don't know, was I supposed to treat that as an
10 argument, because it isn't. And of course, I didn't have access to any of
11 the 4- to 5,000 pages of documents.

12 So -- and we have no courtesy copy of it either, not that I was
13 looking forward to a courtesy copy of 4- to 5,000 pages. But there's
14 also --

15 MR. GRAF: Your Honor -- oh.

16 THE COURT: -- most importantly, there's no affidavit to
17 contradict the affidavit of Aaron Holley [phonetic]. And the whole
18 purpose of the month delay was to permit Plaintiff to demonstrate a
19 genuine dispute as to a material issue of fact.

20 Recall that Mr. Holley was the superintendent or foreman or
21 some kind of a key employee --

22 MR. GRAF: He was.

23 THE COURT: -- of the plumbing company. And he's --

24 MR. GRAF: He's the owner.

25 THE COURT: Pardon?

1 MR. GRAF: He's the owner, Your Honor.

2 THE COURT: Owner.

3 MR. GRAF: Yes.

4 THE COURT: He provided a detailed affidavit telling us what
5 the plumbing leak issues were that he was hired to investigate and
6 correct.

7 And he explained that his company, his personnel did in fact
8 investigate, identify, ongoing plumbing leaks and repair them to the point
9 where he was able to report to the person who hired him, the Defendant,
10 we've fixed those plumbing leaks.

11 And at that point, under the law, once somebody has repaired
12 a problem and they have no reason to think it wasn't repaired, they're
13 absolved of any obligation to report it by law, cited extensively in the
14 Defendant's brief.

15 So what I was giving you the chance to do was to come back
16 with an affidavit from somebody saying actually leaks continued in those
17 very same areas that were allegedly repaired.

18 There were complaints from the owner to the plumbing
19 company saying you didn't fix anything. We're not going to pay you,
20 something to show that the representations of Mr. Holley in his affidavit,
21 which is very comprehensive, could be disputed or questioned.

22 But there is -- there was no affidavit offered by anybody on
23 behalf of the Plaintiff to dispute Holley's contentions, which I think takes
24 us right back to where we were to begin with, after the filing of Holley's
25 affidavit, because you can't just do an information dump and say it's in

1 there somewhere, Judge.

2 You'll find that there's -- you could genuinely dispute Holley's
3 affidavit somewhere in these documents. I just -- it doesn't do it. So --

4 MR. GRAF: A couple of things, Your Honor, if I could. We did
5 drop off a copy of a thumb drive that had all of the documents attached.

6 The documents that were attached are also referenced in our
7 supplemental brief, beginning on page 15 and incorporated by
8 reference.

9 Included in those documents is the deposition transcript of Mr.
10 Holley and the deposition transcript of Mr. Gerber, who are both
11 referenced in there. Both sworn --

12 THE COURT: You understand, though, that when you're
13 pitching your case to the Court, you don't just hand them a banker's box
14 and say our file is in there. If you read it, you will see that we have a
15 case.

16 MR. GRAF: And we didn't do that, Your Honor. We argued
17 that in our brief.

18 THE COURT: You didn't reference any sworn testimony. You
19 didn't attach any excerpts.

20 MR. GRAF: Your Honor --

21 THE COURT: There's nothing that refutes Holley's affidavit at
22 all.

23 MR. GRAF: Your Honor, we did. There's -- they're replete
24 with footnotes citing the exact page and line of the testimony that we're
25 referencing.

1 We gave you all of that information. We produced it. And we
2 dropped a copy off for your Court, Your Honor.

3 So I -- there's several things that are included in those
4 documents, Your Honor, and they're all footnoted in our brief. And they
5 include Dr. Swanson's two volumes of depositions, which we referenced
6 extensively.

7 And in that deposition, we also reference, you know, I thought
8 His Honor put me on a task to go and find some sort of incidence of
9 moisture or water that had not been repaired.

10 We found that. There was a water leak that Dr. Swanson
11 testified to at length in his deposition. And it's cited to multiple times in
12 our supplemental brief that he is aware that there was a leak in the
13 basement bathroom, that it was not repaired.

14 I got Mr. Holley and Mr. Gerber, both employees of the
15 plumbing company, to admit that they did not make that repair. They
16 were not aware of the leak, period.

17 So all of that is cited in our brief, Your Honor. I -- you had put
18 me down the track of saying, okay, if there was an incidence of moisture
19 or something along those lines, go and find it.

20 We did. That's why we produced all this stuff. We took, in
21 addition to Dr. Swanson's two volumes of depositions, we did written
22 discovery on all Defendants.

23 THE COURT: Okay, but don't tell me about two volumes of
24 depositions because I'm not going to read -- nobody's going to read two
25 volumes of depositions.

1 MR. GRAF: Your Honor, there's --

2 THE COURT: Your job as counsel is to tease out the
3 information and provide me with the specific information.

4 MR. GRAF: There's --

5 THE COURT: Now if there was a leak that Swanson wasn't
6 aware of or the plumbing company wasn't aware of and didn't attempt to
7 repair, that's something else.

8 My question is do you refute the affidavit of Holley? And if so,
9 you just say Holley says this. We have this information that's in direct
10 contravention to that.

11 MR. GRAF: And that is in here, Your Honor.

12 THE COURT: Well --

13 MR. GRAF: That is in our brief. It's in the footnotes. And
14 more importantly, Your Honor --

15 THE COURT: Why would you put it in the footnotes? I love
16 footnotes and I read them, but if you're --

17 MR. GRAF: Well, because Your Honor, I apologize. The
18 formatting of our brief is we make the statement above. Then we say
19 footnote, and then you go to the footnote, and it says Volume 2, page
20 138 of Dr. Swanson's depo.

21 THE COURT: That part's fine. That part's fine. Do you take
22 Holley's affidavit side by side and compare it to say so when Holley says
23 this, we can dispute that?

24 Because the moment there's a dispute, it's all over with in
25 terms of a motion for summary judgment that has to be tried by a jury.

1 MR. GRAF: And I agree, Your Honor. And there is a disputed
2 fact here. The disputed fact is that incidence of water that occurred in a
3 May 2015 report that Dr. Swanson testified to at length, and then, Your
4 Honor, he kind of then -- and the way I argue it in the brief is in kind of
5 an OCD manner, he keeps a series of versions of that report, which is
6 Exhibit 49 to that production. And it says in multiple areas that Dr.
7 Swanson didn't fix it, the plumbers couldn't find it, so they didn't fix it.

8 And we've got photographs. You know, Dr. Swanson in his
9 deposition, we talk about that too in our brief, Your Honor, tries to
10 dispute the actual instance of the occurrence.

11 So I brought with me and what was produced on the drive,
12 Your Honor, I apologize, were color copies. And here's the color copies.

13 And if I can approach, Your Honor, I mean, this is on the disk.
14 It shows actual water dripping from the ceiling. This is the water
15 condition that he never repaired.

16 THE COURT: Counsel, if you want your reader to see
17 documents, give your reader the documents, not a thumb drive or a DVD
18 or some --

19 MR. GRAF: Your Honor, on page 13, we incorporated by
20 reference all of those documents that we attached and that we
21 produced.

22 THE COURT: You can incorporate anything by reference, but
23 just in terms of trying to persuade somebody to your point of view, just
24 give them the information. Don't make them have to go look for it.

25 All right, let me hear from Defense counsel?

1 MR. GALLIHER: Well, Your Honor, I think that's exactly what
2 happened is the Court said go and find some information that what Mr.
3 Holley has presented in this affidavit is inaccurate, i.e. that either these
4 repairs were not made.

5 But not only that the repairs are not made, but that Dr.
6 Swanson knew the repairs were not made because both of those
7 problems are required under Nelson.

8 And he didn't do that. What he did was he came up with what
9 he just talked to you about, which we addressed in our brief, which is the
10 reddest of herrings really is five years ago, a home inspector hired by Dr.
11 Swanson saw a couple drips on a vent and a couple drips on the
12 ground.

13 Dr. Swanson was made aware of that. He informed
14 Rakeman. They came out. They couldn't find anything. For the next
15 two years, Dr. Swanson lived in the house, never saw water there again.

16 For the last two years, the Folinos have lived in that house.
17 No evidence from the Folinos that they've ever seen water there. No
18 evidence that any -- from any plumber or anybody else that there's ever
19 been a leak there.

20 It's a exhaust vent over the toilet in the bathroom. That water
21 could have come from -- could have gone inside the flapper and ran out.
22 Nobody knows where it came from, but we know that Rakeman went
23 and looked and could not identify a plumbing leak up there.

24 So that's not what was pled in his complaint, which was that
25 Dr. Swanson was aware of a systemic problem --

1 THE COURT: Ongoing problem.

2 MR. GALLIHER: -- in the Uponor system. And there's been
3 no evidence of that over the last 90 days. We've produced almost a
4 thousand documents.

5 We didn't try at all to ratchet back the discovery. All three
6 Defendants responded to requests for production, requests for
7 admission, interrogatories.

8 We've produced Dr. Swanson twice, his assistant, Dr. -- both
9 of Dr. Swanson's realtors, and both the plumbers for deposition.

10 We've spent thousands and thousands of dollars allowing him
11 to do what the Court asked him to do, which was to go and find some
12 information, some evidence that would create a triable issue of fact here
13 that Dr. -- that to meet the Nelson standard, Dr. Swanson --

14 THE COURT: Yeah, you realize that the Holley affidavit
15 embraces the time period and the subject leaks that would be a subject
16 for your clients to complain about had they not -- no, you can't talk about
17 something that happened in 2015 and didn't occur. It doesn't matter,
18 okay?

19 MR. GRAF: No, Your Honor, the -- yes, I can talk about that
20 because that's what the SRPD is exactly for. The sellers real property
21 disclosure form.

22 And we argued it, Your Honor, in particular on page 15 of our
23 brief. More importantly, Dr. Swanson informed the Plaintiffs of the water
24 moisture condition in 2017. And he did an Addendum 4A, that we talk
25 about in our brief.

1 And it talks about the water loss. And, Your Honor, there's a
2 report that we produced in these documents from a mold testing
3 company that on November 17th, the day he did the Addendum 4A, that
4 he was informed that the house tested positive for mold.

5 Dr. Swanson testified in his deposition absolutely that's the
6 date of the report, November 17th, 2017. And it's exhibit -- I can give
7 you the exhibit that we produced it, Your Honor.

8 And that report says that there's is mold, aspergillus and
9 stachybotrys in this house that has to be remediated. On that date,
10 that's the date that Dr. Swanson then produced the addendum report
11 that just identifies the water leak.

12 Mysteiously enough, Your Honor, also in the production that
13 came from the Plaintiffs, we didn't get the November 17th report
14 identifying the mold.

15 What we got from the Plaintiff was a December clearance
16 report. We got that mold report from November from the actual Infinity
17 Environmental Company.

18 THE COURT: What's the December clearance report?

19 MR. GRAF: December clearance report says the mold has
20 been cleaned up.

21 THE COURT: Right, so the problem has been remedied.

22 MR. GRAF: But Your Honor, it doesn't vitiate --

23 THE COURT: So the Nelson case --

24 MR. GRAF: -- the fact that on November 17th, there's a
25 question of fact as to whether or not Dr. Swanson was aware that there

1 was mold and ongoing -- what he testified to in his deposition is he had
2 an obligation to identify ongoing problems in the house.

3 THE COURT: Ongoing. And so, the problem is once you
4 have a clearance report where you have a plumbing company repair it
5 by virtue of state law and the Nelson Supreme Court case, it allows,
6 rightly or wrongly, it allows the home seller to close the door on the
7 obligation to report those issues. They become no longer relevant and
8 required to be reported.

9 MR. GRAF: So here's my point, Your Honor, I want to make
10 sure we're very clear on this. The date of the addendum where Dr.
11 Swanson puts my clients on notice of the water leak from November 7,
12 2017, he does not identify the fact that there's a mold condition in the
13 house. He --

14 THE COURT: Hadn't there been a clearance report issued in
15 December?

16 MR. GRAF: Your Honor, that's after the fact. I'm talking about
17 the addendum. Telling them that there wasn't a -- was a condition of
18 mold, he did not do that. That is a question of fact, but --

19 THE COURT: But of what consequence is it if it's been
20 cleared?

21 MR. GRAF: Your Honor, you're talking about two different
22 dates.

23 THE COURT: I know.

24 MR. GRAF: The clearance was a month later, a month and a
25 half later.

1 THE COURT: Right, but it's a clearance report.

2 MR. GRAF: Okay. And I get that, Your Honor, so --

3 THE COURT: So if your client is not suing, claiming that
4 there's aspergillus or stachybotrys that they've had to remediate,
5 correct?

6 MR. GRAF: Correct, Your Honor.

7 THE COURT: Okay, so --

8 MR. GRAF: What we're suing --

9 THE COURT: -- talking about things that were wrong but had
10 been remediated, there's no cause of action based upon that.

11 MR. GRAF: So --

12 THE COURT: Even if the Plaintiff or the Defendant seller
13 didn't disclose them because it's of no consequence. There's no harm,
14 no foul.

15 MR. GRAF: So, Your Honor, that's why we took the
16 depositions of Mr. Gerber [phonetic], who is referenced in the affidavit
17 and Mr. Holley. And we also took Mr. Holley's deposition.

18 Both of those individuals testified that they were not aware of
19 any of the repairs that were ever performed in 2015. That directly
20 contradicts the testimony presented by the Defense. They say they are
21 not aware of Rakeman Plumbing going out and making the repairs of the
22 over four different water losses in that year.

23 In 2015, Dr. Swanson was made aware in May 21st report
24 that --

25 THE COURT: Okay, are you arguing that repairs were made,

1 that the Defendant seller didn't disclose?

2 MR. GRAF: I'm arguing that there is no testimony by
3 Rakeman Plumbing that the repairs that Dr. Swanson testified were
4 repaired in 2015 were actually made. They don't have any record of it
5 and they don't recall ever going out there. Both individuals testified the
6 same.

7 As a matter of fact, on pages 34 and 20 for Mr. Gerber's
8 report -- excuse me, deposition, and then also on page 63 of Mr.
9 Holley's deposition, he testifies he's not aware of any repairs that were
10 made at that house in 2015.

11 THE COURT: Okay, but of what consequence is that?

12 MR. GRAF: Because there were several -- His Honor's
13 previous ruling as far as I understood, so that Your Honor --

14 THE COURT: No, here's what I'm saying --

15 MR. GRAF: -- on Nelson v. Heer was that if there's --

16 THE COURT: Here's what I'm saying, here's what I'm saying.
17 If Holley says I'm not aware of any repairs being made in 2015 --

18 MR. GRAF: Correct.

19 THE COURT: -- the fact that he's not aware of any repairs
20 being made doesn't mean that the Plaintiff made any misrepresentations
21 to -- that the Defendant made any misrepresentations to the
22 Defendant -- to Plaintiff.

23 MR. GRAF: No, Your Honor, it's the omission. And if we
24 just -- just talking about the one leak in the bathroom basement, Your
25 Honor, he was aware of it. It's in this report, Your Honor. Exactly on the

1 executive summary, it says -- I apologize, Your Honor.

2 THE COURT: Now imagine trying to find it on a thumb drive
3 on my computer.

4 MR. GRAF: I understand, Your Honor. I thought we did a
5 good job of saying exactly where these -- where this information was in
6 the footnotes. And if His Honor wants some sort of supplement to go
7 through all this stuff, I'm more than willing to do that.

8 THE COURT: The problem is the courtesy copy that we
9 received was actually a listing of the witnesses and documents. That's
10 what I got. And I thought what am I supposed to do with this?

11 MR. GRAF: No, there was a separate thumb drive that came
12 over with all 5,500 pages of documents.

13 THE COURT: No, no, I'm not talking about the thumb drive.

14 MR. GRAF: Okay.

15 THE COURT: I'm talking about your supplemental brief.
16 What I received under the guise of a supplemental brief was not a
17 supplemental brief really. It was a listing of witness' names and exhibits.
18 That's what I got.

19 MR. GRAF: Your Honor, if I could approach?

20 THE COURT: Okay.

21 MR. GRAF: We -- if my office didn't drop our supplemental
22 brief off, then I apologize, Your Honor, but there was a brief that was
23 done.

24 MR. GALLIHER: And, Your Honor, Defendant -- this was our
25 motion, so we provided the courtesy copy. And what we provide to the

1 Court was everything that was filed by the Plaintiffs, which was the brief
2 and the list.

3 So we didn't provide to the Court anything that wasn't filed by
4 the Plaintiff because it's my -- why would we?

5 THE COURT: Well, I'm just telling you that whoever provided
6 the courtesy copy, it's on the Movant to do so, but I did not get that brief.
7 I got something called supplemental brief.

8 MR. GRAF: So --

9 THE COURT: And what it actually was was just a listing of all
10 the witnesses and the exhibits.

11 MR. GRAF: Okay, so you see that I did argument and we
12 cited to the record and we cited to the documents saying exactly where
13 this information was.

14 THE COURT: No, I don't see that because I haven't seen
15 that.

16 MR. GRAF: Oh, well, then I would -- Your Honor, if they didn't
17 give you this brief then, yeah.

18 But my office actually -- I actually spoke with my associate
19 yesterday, Your Honor. He told me that he sent this over with the thumb
20 drive of the 5,500 pages too last week --

21 THE COURT: You don't have a thumb drive, do you?

22 MR. GRAF: -- because we got an email saying, hey, this had
23 to be here seven days prior to the hearing and I made sure get it to them
24 seven days prior to the hearing.

25 THE COURT: We didn't see this?

1 UNIDENTIFIED SPEAKER: For some reason, we only got the
2 list of the documents.

3 THE COURT: That's all we got, that's all we got.

4 UNIDENTIFIED SPEAKER: It came in a red envelope.

5 MR. GRAF: I did the thumb drive myself, Your Honor, so --

6 THE COURT: No, no, no, I'm not saying --

7 MR. GRAF: -- if you want us to do another one.

8 THE COURT: -- what you generated in your office. I'm saying
9 what made it here to the Phoenix building on the 11th floor.

10 MR. GALLIHER: Your Honor, the binder that I hand-delivered
11 last Thursday and you -- of course, I ran into Your Honor out there, it
12 had Plaintiff's brief in it. It was I think 24 pages. And it had that list
13 because that's what Plaintiff filed and served on us.

14 MR. GRAF: I apologize, Your Honor, because I know what
15 you're referring to. We did do a, you know, an NRCP supplemental
16 production --

17 THE COURT: Right.

18 MR. GRAF: -- with list of witnesses and everything. We did
19 that also, but no, we did a full-blown brief.

20 MR. GALLIHER: And --

21 MR. GRAF: If you haven't seen it, then I'd ask that we --

22 THE COURT: I will. I'll take a --

23 MR. GRAF: -- have the opportunity to take a look at it.

24 THE COURT: I will take a look at it, but let me tell you
25 something. And this applies to everybody. Don't ever send a thumb

1 drive or a DVD to the Court expecting that the Court is going to reach
2 down under the desk, find a receptacle for the thumb drive, plug it in,
3 and use it, okay?

4 If you have documents you want to see, let's say you have a
5 200-page deposition. Am I going to be impressed if you attach a
6 200-page deposition?

7 No, I'll be very impressed if you attach the six-pages that you
8 refer to and highlight the language you want me to look at.

9 MR. GRAF: And that's what we do in the brief, Your Honor.

10 THE COURT: Well, but not if you said a thumb drive, counsel.

11 The other thing is I've had attorneys send over what they call
12 a courtesy copy and it's a photocopy of a DVD or it's a photocopy of a
13 thumb drive.

14 And I think really if you were going to feed your dog, would
15 you send it a picture of some Purina dog chow? So --

16 MR. GRAF: Your Honor, I was a law clerk.

17 THE COURT: -- think about what you're doing in terms of
18 presentation of information to the Court, so that it can see it.

19 I will most definitely go back and look at whatever is in the
20 package. We'll confirm that there's a supplemental brief in there and not
21 just a listing of witnesses and exhibits.

22 But thumb drives, DVDs, and so forth, those are useless in
23 terms of our study of the paperwork. If you saw the volume of materials
24 we have to go through, you would understand that there's no way we
25 can also look at a thumb drive and DVD and try to find things on it. Just

1 can't be done.

2 MR. GRAF: Your Honor, I was a law clerk for a lady that now
3 works down the hall, Justice Becker. And I would never have done that
4 if I hadn't had my office call and say, how do you want these
5 documents? I would never have done that. So I -- my apologies to the
6 Court and to your staff --

7 THE COURT: No.

8 MR. GRAF: -- if I misunderstood --

9 THE COURT: I'm not making myself clear.

10 MR. GRAF: No, no, no, you are making yourself clear.

11 THE COURT: 4,500 pages would fill a banker's box, okay?
12 There's no way that you refer to 4,500 pages. You're going to be
13 referring to isolated pages from that --

14 MR. GRAF: We are, Your Honor.

15 THE COURT: -- the ones that are operative like when you
16 pulled out the pictures of the leak. You aren't going to pull out pictures
17 of 40 pages of photographs. You're going to pull out the ones that
18 matter.

19 So I will take a look at this again, but I can tell you that I think
20 you're barking up the wrong tree. You're referencing things that
21 happened, were rectified, and were of no consequence at the time of
22 sale.

23 And your clients are upset that there were misrepresentations
24 made, even if it turned out that they were of no consequence to the
25 buyers. That's my impression of what's going on.

1 And I understand that they're upset because it was a very
2 expensive home. And one would not expect there to be any issues with
3 a very expensive home. I understand that.

4 MR. GRAF: And --

5 THE COURT: So we'll set this down for 30 days from today.
6 I'll take a look at the binder that Mr. Galliher sent over. We'll confirm that
7 there is in fact a brief in there separate and apart from the listing of
8 witnesses and exhibits. I'll review it and we'll have you come back for
9 continued hearing on --

10 THE CLERK: Let's do it -- that will be March -- no, April 7th.

11 THE COURT: April 7th.

12 THE CLERK: 9 a.m.

13 THE COURT: That date work for everybody?

14 MR. GRAF: It'll have to, yes.

15 MR. GALLIHER: It will, Judge, but I want to make sure
16 because now we created a little bit of a record here and I want to make
17 sure that there are -- that we're clear so that when Your Honor goes
18 back and looks at this.

19 The Addendum 4A, which was where Dr. Swanson disclosed
20 a leak, was made on the 16th of November. The mold testing was done
21 on the 17th of November, which is the day of the closing.

22 The mold testing result report that he said was dated
23 November 17th is actually dated November 24th. It's addressed to
24 Rakeman Plumbing.

25 Dr. Swanson testified under oath he'd never seen it until his

1 deposition a month ago. So, which by the way, the problem with that for
2 Mr. Graf and his clients is that November 24th is after the -- after closing.

3 Also, there is ample evidence of emails from the Folino's
4 agent where she discusses the leak. She discusses potential remedies.
5 It's cited in our brief. It's appended to our brief. She discusses potential
6 remedies, including on the night before closing that my clients can just
7 walk away.

8 So they elected not to do that with full knowledge of this leak.
9 And so, I mean, they -- I think they clearly waive that.

10 But I want to make sure that the Court is crystal clear that the
11 only evidence of mold came on the 24th, which was a week after the
12 closing. So it's impossible for Dr. Swanson to have knowledge of the
13 mold before the closing.

14 THE COURT: Okay, and there was a remediation or?

15 MR. GALLIHER: And there was a remediation. And two
16 weeks later, there's the report. And that report was provided to Dr.
17 Swanson. By whom and for what reason we don't know, but there was a
18 remediation in the meantime on --

19 THE COURT: Okay.

20 MR. GALLIHER: And then on December 5th --

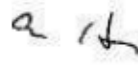
21 THE COURT: We'll see you April 7th.

22 MR. GALLIHER: Thank you, Your Honor.

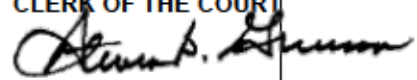
23 [Proceedings concluded at 9:41 a.m.]

24 * * * * *

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

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5 Chris Hwang
6 Transcriber
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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

TUESDAY, APRIL 7, 2020

**RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE VIA
BLUEJEANS HEARING
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

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.
JAY T. HOPKINS, ESQ.

RECORDED BY: NANCY MALDONADO, COURT RECORDER

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1 Las Vegas, Nevada, Tuesday, April 7, 2020

2
3 [Case called at 10:42 a.m.]

4 THE CLERK: A782494, Joseph Folino versus Todd Swanson.
5 We should have Mr. Graf and Mr. Galliher.

6 MR. GRAF: Good morning, Your Honor, Rusty Graf.

7 THE COURT: Good morning.

8 MR. GALLIHER: And good morning, Your Honor, Jeff Galliher
9 and Jay Hopkins for the Defendants.

10 THE COURT: Good morning. All right, first of all, I owe
11 counsel an apology. I was castigating you for not giving me the
12 documents that you were referring to. That was completely my error.

13 I had several different three-ring binders that came in on this
14 case. And the one that contained the pleadings that I needed to be
15 referring to and that I was giving you guys a hard time about was on a
16 different part of the filing cabinet. And I simply did not see it and look at
17 it. So I apologize for accusing you guys of screwing up. That was my
18 error.

19 So this is Defendant's Motion to Dismiss Plaintiff's Second
20 Amended Complaint. In the Plaintiff's supplemental brief, it appears the
21 Plaintiff is attempting to expand their claim that Defendant
22 misrepresented water loss issues by bringing up items that surfaced
23 after the initial sellers executed the real property disclosure form on
24 October 24th, 2017. For example, a water leak that manifested on
25 November 7th, 2017.

1 Plaintiff seems to take issue with the fact that when the seller
2 completes the real property disclosure form on October 24th, 2017, he's
3 under no obligation to and can't report a leak that hasn't happened yet.

4 So the Defendant cannot be charged with concealing or failing
5 to report or misrepresenting something on October 24th, 2017 that
6 doesn't happen until November 7th, 2017.

7 In Defendant's supplemental brief of 2/27/20, as the
8 Defendants points out, Plaintiff's lawsuit was premised on there being a
9 leak in the -- I don't know how you pronounce this, U-P-O-N-O-R, that's
10 a brand name system, for my purposes, I'll just call it the Uponor, on
11 February 16th, 2017, which of course, pre-dates October 24th, 2017.

12 The -- which Plaintiff says the Defendant failed to disclose
13 that. But it has been established clearly under oath that actually that
14 leak was repaired by Rakeman Plumbing, R-A-K-E-M-A-N, long before
15 the 10/24/17 real property disclosure form was executed by the
16 Defendant.

17 This is evidenced by the uncontroverted affidavit of Mr. Holley
18 [phonetic] of Rakeman Plumbing. There was another leak November
19 7th, 2017 after the 10/24/17 real property disclosure form was executed
20 by the Defendant.

21 On November 15th, 2017, eight days later, Defendant notified
22 its agent, emailed disclosure of that leak, and Defendant's agent in turn
23 on November 16th, 2017. And there are text messages acknowledging
24 Plaintiff's actual knowledge of the reporting of the leaks.

25 With knowledge of the leaks, Plaintiff elected to close escrow

1 on November 17th, 2017. On November 17th, 2017, mold testing was
2 done and mold was identified, but the matter was remediated and
3 resolved by December 5th, 2017.

4 To the Court, it appears that the undisputed evidence is that
5 Defendant did not fail to disclose the February 16th, 2017 leak because
6 the affidavit of Rakeman employee Holley, which is not disputed or
7 contested by a countervailing affidavit on the facts or any expert opinion
8 to the contrary.

9 And so, the Defendant was not under an obligation to report
10 the repaired condition in the absence of evidence or information that
11 would leave the Defendant to know or have reason to know that the leak
12 had not in fact been repaired.

13 The evidence shows that the Plaintiff knew of the November
14 7th, 2017 leak, but elected to close escrow anyway after threatening to
15 walk if there were not sufficient credits made.

16 But escrow did close, so Plaintiff waived or is estopped to
17 disavow the waiver effect of closure of escrow with this knowledge.

18 The alleged "water losses" regarding the two recirculating
19 pumps, water pumps, in 2015 were also matters that became moot
20 when the two recirculating pumps were replaced under warranty in that
21 same year, 2015. Apparently, the home was completed in April of 2015.

22 The third "leak in the ceiling" apparently did not continue or did
23 not recur, and in any event, is not the subject of the alleged failure to
24 disclose.

25 The subject of the alleged failure to disclose was the 2/16/17

1 leak repaired by Rakeman.

2 For me, Defendant's Supplemental Reply brief of 2/27/20
3 adequately synthesizes my thinking at page 2, line 3 through page 3,
4 line 10; at page 3, line 14 through page 6, line 4; at page 7, line 7
5 through page 11, line 5; at page 11, line 17 through page 13, lines 1
6 through 22, and at page 14, line 1 and page 14, lines 13 through page
7 15, line 4. I offer you the page and line citations rather than to read that
8 information into the record.

9 So my conclusion is that the Motion for Summary Judgment
10 should be granted. And Defendants should prepare findings of fact and
11 conclusions of law consistent with this Court's analysis.

12 So those are my thoughts. I'm happy to hear anything that the
13 Plaintiff's counsel wishes to add that supplements the very
14 comprehensive brief and exhibits that were already submitted and
15 reviewed.

16 And, again, my apologies to you for having not made myself
17 aware of it at the earlier hearing.

18 MR. GRAF: Your Honor, not a problem. I understand that
19 these things happen when you got caseloads like you have.

20 Your Honor, and this is Rusty Graf appearing on behalf of the
21 Plaintiffs and I would like to make some statements regarding those
22 findings, Your Honor.

23 First and foremost, Your Honor, it's my understanding you're
24 making this finding pursuant to NRS 113.140, as well as Nelson v. Heer.

25 My understanding, Your Honor, is the following that you're

1 also making this determination that you announced on your -- the last
2 hearing on a basis of summary judgment.

3 I would like to talk about the fact that the standard of summary
4 judgment is it's reviewed in the light most favorable to the nonmoving
5 party, that is the Plaintiff, Your Honor.

6 In addition, Your Honor, that I wanted to make a procedural
7 statement regarding Nelson v. Heer. Nelson v. Heer was the case that
8 decided on NRCP 50 after the presentation of evidence at trial and after
9 the trial had actually concluded.

10 That's important because Nelson v. Heer makes the following
11 determination. It says the determination of whether a seller is aware of a
12 defect, however, is a question of fact to be decided by the trier of fact.

13 What we attempted to do, Your Honor, by presenting the
14 evidence and information that we presented to His Honor, His Honor had
15 made a statement at the last hearing like you did a document dump.
16 And I apologize, Your Honor, if you thought that.

17 That wasn't the intent. The intent was, you know, in just sitting
18 here through some of the other hearings that you had this morning, I
19 heard where you instructed Plaintiff's counsel that they needed to do
20 some discovery and what not.

21 I think it's important for the Court to understand the amount of
22 discovery that was conducted on this case, that we took Dr. Swanson's
23 deposition, that we took Mr. Holley's deposition. We provided the
24 affidavit from Rakeman Plumbing. And we took the deposition of Mr.
25 Gerber [phonetic], who was the basis of what we would call the hearsay

1 statements contained within the affidavit.

2 In addition, Your Honor, we took the depositions of a couple of
3 realtors and that sort of thing. And from all of that testimony, Your
4 Honor, and from all of the information that we subpoenaed also and that
5 we presented to His Honor was more information that I think negates
6 this Court's granting of a Motion for Summary Judgment.

7 There are several questions of fact that exist as to whether or
8 not particularly Dr. Swanson had knowledge of the defects and the leaks
9 and the conditions of moisture that occurred in 2015 --

10 THE COURT: Let me --

11 MR. GRAF: -- as well as thereafter.

12 THE COURT: Excuse me, one second. Let me interject one
13 thing.

14 MR. GRAF: Yes, yes, sir.

15 THE COURT: There is a common misconception that
16 happens when people are seeking to defend against a motion for
17 summary judgment.

18 And it is conflating a genuine dispute as to a material issue of
19 fact with a question of fact. Oftentimes, there are questions of fact, but a
20 motion for summary judgment presses the issue and says, well, here is
21 what we say the facts are and here is our sworn statement as to those
22 facts.

23 And if the person against whom summary judgment is sought
24 is unable to dispute that, the fact that they may have questions
25 subjectively as to whether or not they agree or disagree or whether or

1 not there might be evidence out there to contradict that statement, that
2 does not defeat a motion for summary judgment.

3 Instead, the party against whom summary judgment is sought,
4 they have to come up with evidence to contradict that sworn statement
5 or that evidence offered by the moving party to show that, well, that may
6 be that party's view of what the facts are, but in actuality, there's also
7 this factual contention under oath or by sworn exhibits that shows that
8 that is not in fact.

9 So then, you have a genuine dispute as to a material issue of
10 fact, which means that it has to be decided by the trier of fact whether
11 that's the judge in a nonjury trial or by the jury.

12 But merely having questions is not sufficient. If you have
13 questions, that you think you could provide answers to if you were given
14 sufficient time, that's when you seek NRCP 56(d) relief under the new
15 numbering system.

16 And that's the rule I read earlier. You have an affidavit where
17 you say, look, we know that Swanson has testified in his deposition that
18 his only knowledge of the February 6th, 2017 leak was back at the time
19 it occurred.

20 And we know that he has testified that Rakeman repaired it.
21 So, for him, it was no longer an issue when he signed the disclosure
22 form on October 24, 2017.

23 But we have a -- an email from him to Rakeman Plumbing
24 refusing to pay Rakeman Plumbing's invoice dated March 15th of 2017
25 because he said you didn't fix the leak. It's still an ongoing problem.

1 We don't have authentication that this is an email sent by Dr.
2 Swanson, so we're asking for some more time to conduct some
3 discovery to pin that down.

4 That is an affidavit for 56(d) relief. And that's how you seek
5 the opportunity to conduct more discovery.

6 You have to remember that the whole focus of your lawsuit
7 was the February 6th, 2017 leak. All of these other things that you talk
8 about, it may have been frustrating and irritating for the Plaintiffs to find
9 out that there was a leak that happened in November of 2017, but with
10 full knowledge of that, and even though the Plaintiff was threatening to
11 walk, the Plaintiff said, oh, you know, let's close escrow, let's be done
12 with it.

13 And so, we can't lose sight of the fact that the real issue has
14 always been in terms of the assertions made in the lawsuit, the February
15 6th, 2017 leak.

16 And if you are unable to create a genuine dispute as to a
17 material issue of fact, i.e., that Rakeman Plumbing repaired the February
18 6th, 2017 leak, then you're out of luck in terms of the lawsuit that you
19 have filed in this case.

20 And the fact that you have become aware of other things,
21 they're just -- they're not relevant to this inquiry regarding this Motion for
22 Summary Judgment. It's that simple.

23 MR. GRAF: Your Honor --

24 THE COURT: Or maybe I didn't make it sound real simple,
25 but I think it's simple.

1 MR. GRAF: And I understand what His Honor is saying as to
2 the November 2017 leak. My question is this, Your Honor.

3 Whether or not Dr. Swanson had knowledge of leaks in 2015,
4 whether or not he has proof and support to say that those leaks had
5 been repaired is a question of fact in this case. We've uncovered that
6 through the evidence and testimony that's been presented in our
7 supplemental brief.

8 Your Honor, our allegations as to the violation of NRS 113 and
9 the material misrepresentation or the fraudulent misrepresentation,
10 excuse me, allegation is as to anything that they did not indicate on the
11 SRPD.

12 The SRPD is a simple document, Your Honor. It is a yes or
13 no response. And he responded, no, there were no prior incidences of
14 moisture condition at this house.

15 That is categorically not true. It is false. We have proven that
16 through the deposition testimony of Dr. Swanson and we have proven
17 that also, Your Honor, through the deposition testimony of Mr. Holley
18 and Mr. Gerber.

19 One thing that I want to draw to the attention of the Court is,
20 Your Honor, we have submitted the deposition transcripts of Mr. Holley
21 and Mr. Gerber.

22 Those deposition transcripts controvert the testimony and
23 statements in the affidavit. Those -- that sworn testimony specifically
24 says that they were not there when any repairs were made.

25 One of the things that His Honor made very clear at the prior

1 hearing is that the decision the Court was going to make as to the
2 November 17, 2017 leak was based upon the affidavit of Mr. Holley.

3 That affidavit was controverted during their depositions. They
4 both testified they were not present during any repairs. They
5 were -- both testified that they could not provide you with any evidence
6 as to the repairs themselves.

7 That is in direct contravention of that. Your Honor, they both
8 testified they did not perform the repairs. That controverts that affidavit.
9 Both of those individuals, Your Honor, testified as such.

10 They -- Mr. Holley testified at page 17 of his deposition that he
11 obtained any knowledge that he had from others, not from personal
12 knowledge that he had.

13 He then -- he testified at page 24 of his deposition that he did
14 not observe any of the repairs and emphatically stated in that deposition
15 not at all.

16 He then said, Your Honor, that on page 34 of his deposition, I
17 do not know what actually occurred.

18 Your Honor, if these types of statements are in direct
19 contravention of his affidavit, I don't know what are.

20 He specifically then went forward to say, Your Honor, that in
21 terms of the mold testing in 2017, and I don't want to really talk too much
22 about that, but that is an indication of -- and here's the question of fact
23 that I would like to draw to the attention of the Court on that issue, Your
24 Honor.

25 And that is this. The testing was conducted on November

1 17th. That's the day that the house supposedly closed. That test by
2 Infinity Environmental, which that test is before His Honor, and the
3 results of that test are before His Honor, is a positive test for mold.

4 At some point in time, Dr. Swanson was aware of that defect.
5 Your Honor --

6 THE COURT: Hold on, let me ask you a question about that.
7 Are you saying that the October 24th, 2017 disclosure form was a
8 misrepresentation regarding the November 2017 mold?

9 MR. GRAF: I am, Your Honor, for the following reasons.

10 THE COURT: No, wait, wait, wait. Wait, it's clear that it was
11 brought to the attention of your client, and your client was not happy
12 about it, said he was going to walk if suitable credits were not done.

13 And I don't know if credits were done or not, but he closed
14 escrow with that information as opposed to refusing to close escrow.
15 Had he refused to close escrow, we wouldn't be here. There wouldn't
16 have been a purchase and sale.

17 But in spite of all of this information, your client went ahead
18 and closed escrow.

19 MR. GRAF: Your Honor, and I apologize, Your Honor, I didn't
20 -- I kind of stopped and started there a couple of times. This is kind of a
21 difficult format to use, especially when I don't have video, so I apologize.

22 In response to that statement, I think that that's an accurate
23 statement, Your Honor, as to the leak. It's not an accurate statement as
24 to the mold.

25 This is the issue here. And we asserted this in our brief, Your

1 Honor. Counsel, or excuse me, not counsel, but Dr. Swanson submitted
2 an addendum, Addendum 4A, that was meant to supplement the SRPD.
3 That was the document where he told the Folinos that there had been a
4 leak in November of 2017.

5 What that document does not contain, Your Honor, and has
6 never been produced, nor was it ever disclosed anywhere is the actual
7 positive test for mold that came back from Infinity Environmental.

8 THE COURT: No, but --

9 MR. GRAF: And Your Honor --

10 THE COURT: No, but counsel, the problem is it put your
11 client on notice of the fact that there was a leak.

12 And given the --

13 MR. GRAF: No --

14 THE COURT: And given the fact that your client had
15 concerns and this was a not insubstantial purchase at all, and given the
16 fact that he threatened to walk, and instead, he went ahead and closed
17 escrow without any further specification or demands regarding that leak.

18 So I do think, and I got to cut you off because we have other
19 things we have to get to, but I do think that your client is confounding
20 some of the other information that they've learned since that just has
21 thrown gasoline on their fire over issues with this house.

22 And they've even gotten upset about things which are not
23 problems going on today, but the mere fact that they weren't told about
24 them or that they existed is a source of irritation to them.

25 I understand that it's irritating and upsetting, but it's not legally

1 actionable. And that's where the distinction has to be drawn. So I think
2 that the Motion for Summary Judgment --

3 MR. GRAF: Your Honor --

4 THE COURT: -- should be granted.

5 MR. GRAF: Your Honor --

6 THE COURT: It's a Motion to Dismiss the Second Amended
7 Complaint. But I think given all of extensive consideration of matters
8 outside the pleadings that have been utilized, that it should be treated as
9 a summary judgment motion and I'm inclined to grant it.

10 Now, Mr. Galliher, is there anything that you wish to add?

11 MR. GRAF: Your Honor, I don't mean to interrupt His Honor,
12 but I had some statements that I'd like to make as to the 2015 leaks --

13 THE COURT: No, I'm sorry, counsel, I have to cut you off.
14 You have to realize you submitted at least a couple thousand pages of
15 material for my review.

16 I reviewed it. I was tardy in my review of it, but I reviewed it.
17 And so, there is nothing you have said or could say that would be
18 supplemental to the written materials you provided.

19 If there was something that you didn't include, that's what I
20 was inviting you to mention, but everything you have said is contained in
21 the brief.

22 And I have to manage the time here and move on to the next
23 case. So I do want to give Mr. Galliher a chance, if he wishes to, to
24 supplement his written filings if he wants to for the record.

25 MR. GALLIHER: Thank you, Your Honor. Very briefly, I just

1 want to make sure it's clear for this record that the very first report of
2 mold at 33 Meadowhawk is dated November 24th, 2017, which is a
3 week after the date of closing.

4 The test was conducted on November 17th, 2017, but no
5 results were had until November 24th. And even then, that report was
6 never provided to Dr. Swanson because of course, he was no longer the
7 owner of the property. And I believe that report was actually directed to
8 Rakeman Plumbing.

9 So there could be no question, disputed or otherwise, about
10 whether Dr. Swanson ever had any knowledge either express or implied
11 of or notice of mold prior to the date of the closing. I just want to make
12 sure that we're clear on that that there's been confusion about dates, but
13 there's no --

14 THE COURT: No, it was clear to me that the material was
15 submitted for testing on November 17th, 2017. Escrow closed. And
16 then, some days later, the report came back positive findings of mold.
17 All right. So the motion --

18 MR. GALLIHER: Thank you, Your Honor.

19 THE COURT: The Motion to Dismiss is being treated as a
20 Motion for Summary Judgment. It's granted and I tried to call out the
21 specific information in the briefs that I felt was important to be included in
22 the findings of fact and conclusions of law.

23 I do need the order within 14 days per EDCR 7.21. All right?

24 MR. GALLIHER: Thank you, Your Honor.

25 THE COURT: And we will set a calendar date for 30 days

1 from today. And what I'm looking for is the filing of the order granting
2 summary judgment.

3 THE CLERK: May 5th at 9 a.m.

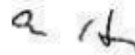
4 THE COURT: No need to return on May 5th if the order has
5 been filed. If it has been, I will need to see you on May 5th. Okay, thank
6 you.

7 MR. GALLIHER: Thank you, Your Honor.

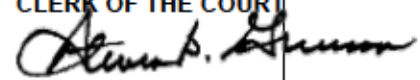
8 [Proceedings concluded at 11:09 a.m.]

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

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16 Chris Hwang
17 Transcriber
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1 **RTRAN**

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5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

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

11 **Plaintiffs,**

12 **vs.**

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

22 **Defendants.**

CASE#: A-18-782494-C

DEPT. XXIV

23 **BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE**

24 **THURSDAY, JUNE 25, 2020**

25 **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.

1 APPEARANCES (continued):

2 For the Defendants:

JEFFREY L. GALLIHER, ESQ.

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24 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.

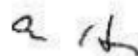
MR. GALLIHER: Thank you, Your Honor.

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.



Chris Hwang
Transcriber