Case No. 81252
Consolidated with Case No. 81831

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

TODD SWANSON, an individual, TODD SWANSON, Trustee of the SHIRAZ TRUST; the SHIRAZ TRUST, a Trust of unknow origin, and LYON DEVELOPMENT, LLC, a Nevada Limited Liability Company,

Respondents.

RESPONDENTS' ANSWERING BRIEF

APPEAL
From the Eighth Judicial District Court, Department XXIV
The Honorable Jim Crockett, District Judge - Case No. A-18-782494-C

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NRAP RULE 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Todd Swanson is an individual, none of the Respondents are governmental entities, and no publicly traded corporations own 10% or more of the stock of any Respondent.

The law firms and attorneys appearing for the Respondents in this Appeal and the underlying litigation are Jay T. Hopkins, Esq. and Christopher M. Young, Esq., of the Christopher M. Young, PC, law firm, and Jeffrey L. Galliher, Esq., of the Galliher Law Firm.

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STATEMENT OF THE ISSUES & STANDARDS OF REVIEW

I. The Appellants Confuse and Mischaracterize the Issues on Appeal.

As they have throughout this case, the Folino Appellants[1] attempt to confuse the issues. They continue to mischaracterize their claims and relief sought.

They repeatedly state that Swanson[2] made "affirmative false representations . . . in their Seller's Real Property Disclosure Form" ("SRPD"). AOB:ix.[3] No facts support this distorted allegation. Even though the facts clearly demonstrate the February 2017 leak was repaired, the Folinos claim seminal, on-point Nevada precedent – *Nelson v. Heer*, 123 Nev. 26, 163 P.3d 420, 425 (2007) ("*Heer*") – does not apply here. AOB:ix.

The Folinos also argue Swanson concealed other problem with the home – not just the February of 2017 Uponor water system leak. *Id.* They erroneously conclude that "numerous leaks at the Subject Property

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1 Plaintiffs/Appellants, Nicole and Joseph Folino, are collectively referred to in this brief as "the Folinos."

2 Defendants/Respondents are collectively referred to as "Swanson."

3 Respondent makes reference to Appellants' Opening Brief as AOB:--.

provided Respondents with constructive notice of 'systemic' defects in the Subject Property's plumbing system and/or the existence of fungus and/or mold in the Subject Property . . . ." AOB:ix-x. They claim that a phantom drip in the basement ceiling constituted part of their claims. AOB:ix.

The facts do not support these distorted allegations, nor do they preclude summary judgment for Swanson. They also focus on an inconsequential conflict between the affidavit of Aaron Hawley and his deposition testimony, and they argue that his affidavit is not admissible evidence. AOB:ix, 30-34.

Additionally, the Appellants claim the district court abused its discretion in awarding fees and costs to Swanson. AOB:ix. None of the Appellants' claims have any merit. The district court considered and applied Nevada law to the facts presented.

Swanson recharacterizes the issues as:

- On summary judgment, the district court carefully reviewed the evidence presented, and correctly applied NRS Chapter 113 and the holding in *Heer* – ruling the Folinos offered nothing to refute the fact that all leaks were repaired or were non-existent.

- The district court properly rejected the Folinos' argument

that other leaks/drips supported the claim that Swanson had knowledge of "'systemic' defects" in the plumbing system and the existence of fungus/mold.

- The district court correctly relied on the holding in the *Heer* case and the clear language in NRS Chapter 113 to rule that Swanson did not have to disclose[4] prior leaks, because the purported leaks: (i) had been repaired, and (ii) did not negatively affect the value of the real property.

- The district court considered the NRCP 68 and NRS 18.010 standards, and it applied the *Beattie* and *Brunzell* factors in its award of attorney's fees and costs to Swanson.

II. Under the Applicable Standards of Review, This Court Should Affirm the District Court's Rulings.

A. This Court Reviews a District Court's Grant of Summary Judgment *De Novo*.[5]

The standard of review for rulings on summary judgment is *de novo*. *Wood v. Safeway,* 121 Nev. 724, 121 P.3d 1026 (2005). The *de novo*

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[4] The applicable law does not distinguish between "concealment," "affirmative false representations," or "omissions" in a seller's disclosure.

[5] Swanson acknowledged that his motion to dismiss the Folinos' Second Amended Complaint should be treated as one for summary judgment. RSA000081, n.2. The District court made its final ruling using the summary judgment standard. JA002046.

standard of review requires this Court to consider whether the facts presented to the district court support its ruling. NRCP 56(c); *Wood,* 121 Nev. at 731, 121 P.3d at 1031. "Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law." *Bank of America, N.A. v. SFR Investment Pool 1, LLC,* 427 P.3d 113, 117 (Nev. 2018).

This Court has recognized summary judgment serves as a valuable tool in litigation – one that weeds out meritless cases. *Boesiger v. Desert Appraisals, LLC,* 444 P.3d 436, 438-439 (Nev. 2019). Being "an integral part of the [rules of civil procedure] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action . . . [summary judgment] is no longer a disfavored procedural shortcut." *Wood,* 121 Nev. at 730, 121 P.3d at 1030.

Nevada's summary judgment rules require the district court to undertake a burden-shifting analysis.[6] In this case, the Folinos would

[6] In *Wood*, this Court adopted the burden-shifting approach outlined in the 1986 United States Supreme Court summary judgment trilogy. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v.*

have had the burden to prove their case at trial. In his motion for summary judgment, Swanson identified evidentiary deficiencies in the Folinos' case by presenting undisputed evidence that all identified leaks had been repaired. Swanson's showing shifted the summary judgment burden to the Folinos to present specific facts showing that a genuine issue of material fact remained for trial.[7] *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

The Folinos had to "'do more than simply show that there is some metaphysical doubt' as to the operative facts." *Boesiger*, 444 P.3d at 439 (citing W*ood,* 121 Nev. at 732, 121 P.3d at 1031). They were required "by affidavit or otherwise [to] set forth specific facts demonstrating the existence of a genuine issue for trial or have judgment entered against [them]." *Wood,* 121 Nev. at 732, 121 P.3d at 1031 (emphasis added).

After assessing the parties' evidence and arguments, the district court correctly concluded the Folinos failed to present genuine issues of material fact – and Swanson was entitled to judgment as a matter of law.

Liberty Lobby, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)).

[7] "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Cuzze*, 123 Nev. at 602, 172 P.3d at 134.

B. This Court Reviews the District Court's Interpretation of Nevada Statute *De Novo*.

This case involves interpretation of NRS Chapter 113. "Issues of statutory construction are reviewed *de novo." Heer,* 123 Nev. at 224, 163 P.3d at 425. Nevertheless, "when the language of a statute is plain and unambiguous, and its meaning is clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Id.*

This Court found the language in NRS 113.130 to be clear and unambiguous in the *Heer* case.

C. The District Court Did Not Abuse Its Discretion in Awarding of Attorney's Fees and Costs to Swanson.

The Folinos also appeal the district court's order awarding attorney's fees and costs to Swanson pursuant to NRCP 68 and NRS 18.010. The district court may, in its discretion, award attorney's fees "when allowed by agreement or when authorized by a statute or rule." *Miller v. Wilfong,* 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). Here, NRCP 68 and NRS 18.010(2)(b) gave the district court broad discretion to award attorney's fees.

This Court "generally review[s] a district court's 'decisions

awarding or denying attorney's fees for a manifest abuse of discretion.'" *Thomas v. City of North Las Vegas,* 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (addressing whether to permit expert to testify under the *Hallmark* standard). This Court affirms district court decisions granting attorney's fees if they are supported by evidence in the record. *Semenza & Caughlin Crafted Homes*, 111 Nev. 1089 1095, 901 P.2d 684, 687 (1995).

Here, the district court in this case did not manifestly abuse its discretion. It carefully considered the facts and the law, and found Swanson was entitled to an award of fees and costs under NRCP 68 and NRS 18.010(2)(b), and costs under NRS 18.020.

STATEMENT OF THE CASE

This case is about buyers' remorse. The Folinos are dissatisfied with their purchase of a luxury home.

The Folinos sued Swanson for the alleged failure to disclose a water leak in his SRPD. JA000249-325.[8] The gravamen of the Folinos' case was the alleged concealment of a February 16, 2017, leak in the Uponor plumbing system.[9] Their Complaint asserted the leak indicated "systemic" plumbing defects. JA000253, JA000531-532.

The Folinos maintained their focus on the February 2017 leak for most of the litigation – in their original complaint, in their First Amended Complaint, and in their Second Amended Complaint – then their claims morphed.[10]

At the initial stages of the litigation – from October of 2019 through

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[8] Many citations in the Joint Appendix do not line up with the Volume references in the index the Appellants filed. Therefore, Respondents' citations to the record will be: JA-----. In addition, the Joint Appendix is missing some documents, which are offered as Respondents' Supplemental Appendix, referenced as RSA----.

[9] Uponor plumbing components for residential and commercial applications "consists of cross-linked polyethelene (PEX) . . . and is suitable for hot and cold water applications." *See* JA001752-1753.

[10] In their Opening Brief, the Folinos say they "experienced the effects of the systemic plumbing defects, in the form of water losses and leakage issues within the Subject Property which, after learning of the existence of previously undisclosed leaks through Uponor" and they admit this "prompted [them] to file their initial Complaint . . . ." AOB:7-8.

April of 2020 – the district court considered three dispositive motions filed by Swanson. The district court, however, refused to dismiss the Folinos' claims and allowed the case to proceed – allowing the parties to conduct discovery. RSA000102.

The Folinos acknowledge that discovery was extensive and not limited. As their attorney stated: "I think it's important for the court to understand the [extensive] amount of discovery that was conducted on this case." JA001858-1859. After completion of discovery, the parties filed supplemental briefs with the district court. RSA000103-126, JA001635-1826. These briefs were to address the issues in Swanson's motion to dismiss the Second Amended Complaint.

In their supplemental briefing, the Folinos persisted with the claim that Swanson concealed the February 2017 leak. But the evidence presented to the district court established that the February 2017 leak was repaired by a licensed plumber. Thus, the Folinos failed to identify any "affirmative, false representations" made by Swanson. They also failed to identify other "water losses and leakage issues" which were not repaired.

Therefore, the Folinos concocted other reasons to blame Swanson

for perceived deficiencies with the home. They changed their arguments and focused on issues that were never alleged in the three complaints filed by them. Judge Crockett subsequently described the Folinos' approach in grasping for any legal theory as playing "whack-a-mole." JA003747.

After discovery, and despite changing their legal theories, the Folinos still could not present specific facts to defeat summary judgment. The Folinos offered no evidence that the leaks in question, and specifically the February 2017 leak, were not repaired. Nor did they show that any leaks or drips negatively affected the property's value.

Thus, the district court ruled Swanson had no duty to disclose: (i) the repaired February 2017 Uponor leak, (ii) the repaired 2015 recirculation pump leaks and phantom drip, or (iii) the possibility of mold – of which Swanson had no knowledge. JA002045-2064. The district court granted Swanson's motion for summary judgment, and subsequently granted Swanson's motion for attorney's fees and costs. JA002045-2064, JA002326-2343. Judge Crockett had advised the Folinos of their burden, stating: "if you are unable to create a genuine issue of material fact, *i.e.* that Rakeman repaired the February 6th (sic) 2017 leak, then you're out

of luck in terms of the lawsuit you have filed in this case." JA001861.

The attorney's fee award highlights the frivolous and vexations nature of the Folinos' claims. As the district court noted, this case "was a close case" for "determining whether or not to award fees from the very beginning of the institution of the suit . . . on the basis that it was a vexatious, spurious and unsupportable claim against the Defendant." JA003753, JA003748. However, the court "decline[d] to do so, instead, awarding fees . . . since the date of the offer of judgment." JA003748.

The Folinos seem to have abandoned their claims relating to the February 2017 leak. The principal focus in this appeal now concerns claims that Swanson concealed: (1) recirculation pump leaks that occurred in 2015 – which the undisputed evidence shows were repaired and then replaced; (2) an isolated leak/drip in the basement bathroom – that was seen only once by a post-construction inspector; and (3) the discovery of mold/fungi after the Folino's closed on the sale.

STATEMENT OF FACTS

I. Swanson Bought and Owned the Meadowhawk Home for Over Two Years.

The property at issue is located at the Ridges, 42 Meadowhawk Lane, Las Vegas, Nevada 89135 (the "Property"). JA000263-272. Lyons

Development bought the lot in 2008 and contracted with Blue Heron to build the house. JA002594.

Dr. Swanson moved into the house in April 2015. JA002533. He lived there until September 2017, when he moved to Denver, Colorado. *Id.* After Dr. Swanson moved in, and near completion of construction, some post-construction warranty issues arose, which Swanson and Blue Heron worked to resolve. Criterium-McWilliams Engineering identified the issues in a May 11, 2017 report (the "Criterium Report"). JA001746-1757. Criterium inspected the Property to create a post-construction punch list for items that needed to be fixed or completed. *Id.*

A licensed plumbing contractor, Rakeman Plumbing ("Rakeman"), [11] repaired leaks related to two recirculation pumps. JA001692, JA001764. The same recirculation pumps ultimately failed – and Rakeman replaced them in August of 2015. JA001772. The Criterium Report also noted a drip from the ceiling of the basement bathroom. JA001769-1770. Rakeman could not find the source of the drip. *Id.* The source was never identified, and there is no evidence it was ever

[11] Rakeman Plumbing holds a C-1 license issued by the Nevada State Contractors' Board. JA003203. Rakeman installed the Uponor PEX pipe and fittings and was familiar with the system and the Property. JA003312.

seen again – not by the Folinos, not by their home inspector retained during escrow, and not by Swanson.

A leak in the Uponor plumbing system occurred on February 16, 2017. JA001664.[12] The Rakeman invoice for the February repair states: "[c]alled out for leak in the master bedroom closet at 42 Meadowhawk. Found 3/4 Uponor tear leaking on the hot side of the plumbing system. Cut out leaking fitting and replace with new fitting and restored water." JA000303, JA001669. The Rakeman records establish that Rakeman repaired the February 2017 leak – the invoice states: "[n]o further leaks." JA000303, JA001669. According to Rakeman employee, William "Rocky" Gerber, "[a]ll the work got done." JA003365.[13]

The Folinos' attached the Uponor and Rakeman documents as exhibits to their initial Complaint. JA000303-314, JA001669. Under

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[12] The Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. JA000303, JA001669. Mr. Gerber, however, confirmed the leak occurred on February 16, 2017. JA003379. But the invoice was created after-the-fact when Rakeman submitted its warranty claim to Uponor. JA003381.Uponor documents list the "failure date" as February 16, 2017. JA000310. The check from Uponor to Rakeman for reimbursement under the warranty matches the Rakeman invoice. JA000303-000304, JA000306-307. This issue was discussed in depth in Swanson's Supplemental Brief. JA001641-1645.

[13] Invoices for warranty work are routinely prepared after-the-fact. JA003381. Mr. Gerber, the technician in charge, hand-wrote the invoice, which was then typed. JA000303-304, JA001669, JA003338-3339, JA003381.

NRCP 12(b)(5)'s standards, those documents are incorporated into their pleadings. *Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). The allegations constitute admissions.[14]

The exhibits confirmed Rakeman's repair of the February 16, 2017, leak and Uponor's payment to Rakeman for the warranty claim. *Id.* The Folinos attached the same documents to their First Amended Complaint and Second Amended Complaint. RSA000001-75, JA000577-588.[15] The Folinos also attached the Uponor warranty that covered repairs for the Uponor system. JA0000323-325.

II. In Late-2017, the Folinos Contracted to Purchase Swanson's House.

When Dr. Swanson offered his Property for sale, the Folinos immediately fell in love with it. On October 19, 2017, the parties were

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[14] The Folinos admit in their pleadings that the February 2017 Uponor leak was repaired, and that Swanson "previously employed Rakeman Plumbing to make repairs." JA000254 (Complaint ¶39), JA000374 (1st Amended Complaint ¶39), JA000531 (Second Amended Complaint ¶39). *Whittlesea Blue Cab Co. v. McIntosh*, 86 Nev. 609, 611, 472 P.2d 356, 357 (1970); *see also Sterling Builders, Inc. v. Fuhrman,* 80 Nev. 543, 549, 396 P.2d 850, 854 (1964) (discussing when a party makes an allegation/admission in his pleadings, the doctrine of judicial estoppel may apply).

[15] In the invoice, Mr. Gerber described additional work to complete the repair, including "remove toe kicks on built in cabs in closet. Cut out wet drywall, carpet pad, and place equipment to dry out closet. After everything is dry Rakeman repaired all drywall to match existing texture and color and repaired all damaged built-in closets then reset all carpet." JA003341.

under contract. JA000672-683.

A. The Folinos Undertook and Conducted Their Due Diligence Investigations Prior to Closing.

As required by NRS 113.130(3), Swanson provided the Folinos with an SRPD. JA000684-688. During escrow, the Folinos also had unrestricted access to the Property and the ability to conduct any inspections they deemed necessary. The Folinos acknowledge they "requested and were given the opportunity to perform their own site inspection of the Subject Property" prior to closing. JA000252. "Dr. Swanson wanted to give the Folinos liberal access to the Property so that Ms. Folino could make remodeling plans and to plan for their move," and she visited the Property on many occasions to plan renovations. JA001791.

The Folinos also hired an inspector, Caveat Emptor, to inspect the Property. JA000289-293. Caveat Emptor conducted its inspection on October 27, 2017. The Caveat Emptor report did not identify any water-related problems or water-related damage. JA000252, JA000372.

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B. The Uponor Plumbing System Sprang a Leak During Escrow.

On November 7, 2017, shortly before the November 17, 2017 closing, Swanson discovered a leak in the Uponor system in the master bedroom. JA003084-3085. As required by NRS 113.130(b), Swanson disclosed it in Addendum 4-A. JA001735. Swanson's agent sent Addendum 4-A to the Folinos' real estate agent, Ashley Lazosky, at 8:31 a.m. on November 16, 2017. JA001737.[16] The Folinos were upset and Ms. Lazosky "had to talk them off the ledge." JA001741.

The Folinos had first-hand knowledge about the leak prior to closing.[17] Ms. Folino "came to the property on several occasions" After the they learned about the leak. JA001791. Nicole Whitfield, Dr. Swanson's assistant, testified that:

> On November 16, Mr. & Ms. Folino conducted a walk-through of the entire house . . . [I] personally walked

[16] An agent's knowledge is imputed to the principal. *ARCPE 1, LLC v. Paradise Harbor Place Trust,* 448 P.3d 553 (Nev. 2019) (unpublished disposition); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas,* 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934); *see also Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011) (discussing constructive knowledge).

[17] The Folinos alleged that after learning about the November 7, 2017 Uponor leak they "requested and were given the opportunity to perform their own site inspection . . . on or before November 17, 2017," the closing date. JA000252. According to the Folinos' own pleadings, "during this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by [Swanson]." JA000529.

> Mrs. Folino through the master closet and showed her exactly where the leak had occurred and . . . showed her the damages. . . . I witnessed that Mrs. Folino was in the master bedroom and that she saw the water damage from the November 7, 2017 leak . . . [and confirmed they] were aware of the leak prior to the close of escrow.

JA001791-1792.

The parties' agents exchanged emails on November 16, 2017. JA001739-1741. At 1:48 p.m., Ms. Lazosky relayed the Folinos' position to Swanson's agent. She stated that "the buyer is only agreeable to a 20k hold back since they don't want to rely on the plumber and their warranty." JA001739.

Through his agent, Swanson rejected the Folinos' offer stating: "Hi Ashley. Unfortunately, that number is excessive. As the seller is always taking the high road and is diligently working on the solution, we need to be reasonable with regard to the escrow holdback amount." JA0001739. The Folinos responded that they wanted to see "a warranty or report from plumber." JA001741.

Later that evening, Ms. Lazosky sent a detailed email to Swanson's agent with the Folinos' latest terms. JA001743, JA003150-3151. The Folinos demanded that Swanson "have plumbing in the home checked"

and "requested a pressure test to make sure there are no other weak spots in the water lines that may result in another leak." *Id.* Ms. Lazosky threatened "at this point due to the change in circumstances with the last-minute issue with the leak, the buyer's recourse is to walk at this point if they are not comfortable with the repairs/credits." JA001743. The Folinos also demanded a "mold remediation hold-back." *Id.*

C. Despite Knowing About the Leak in the Uponor System, the Folinos Closed Escrow and Bought the Meadowhawk Home.

The parties failed to agree to terms regarding the November 7, 2017 Uponor leak or potential mold remediation. Rather than delay the closing until these issues could be resolved, the Folinos abandoned their threat to "walk" and elected to close on the property on November 17, 2017. JA000298-301.

Swanson honored the Folinos' request for a mold test, which Infinity Environmental Services ("Infinity") conducted on November 17, 2017. JA001814-1818. On November 24, 2017, one week after closing, Infinity submitted its report. The report disclosed a positive mold test. JA001814-1818. Two weeks later, on December 7, 2017, Infinity reported that the mold issue had been completely remediated. JA001820-1825.

In mid-December of 2017, after they moved into the house, the Folinos contacted Uponor to make a warranty claim. JA000253, AOB:7. Shortly thereafter, the entire Uponor system was replaced at no cost to the Folinos. JA000315-325. At that time, they learned Rakeman had previously submitted an invoice and warranty claim to Uponor for the February 2017 leak. JA002987.

III. The Folinos Brought the Underlying Lawsuit Against Swanson.

A. The Folinos Alleged That Problems with the Uponor System Were Maliciously Concealed by Swanson.

On October 19, 2018, the Folinos sued Swanson. JA000249-325. The Folinos alleged damages based on Swanson's purported concealment of "systemic" defects in the Uponor plumbing system. JA000253. The focus of their lawsuit was the February 2017 leak in the Uponor system. According to the Folinos, that leak indicated "plumbing defects in the house [which] were systemic and known to the Defendants prior to the closing of the transaction." JA000253.

The Folinos alleged Swanson "maliciously" "coerced" and "induce[d]" them to purchase the Property. JA000531-532.[18] They claimed they

[18] The facts – and the district court's judgment – show this assertion is

closed on the sale because Swanson concealed, hid, and affirmatively omitted known facts "that the house was built with defects known to the Defendants, whether repaired or not." JA000254.

In this litigation, Swanson has acknowledged, and the parties do not dispute, that a leak occurred in the Uponor system in February of 2017. *See* AOB:*passim.* The undisputed evidence, however, confirms the February 2017 leak was repaired by Rakeman. JA000303-313, JA001669.

B. The District Court Gave the Folinos Multiple Opportunities to Assert and Prove Their Claims.

The Folinos failed to establish their entitlement to recovery on any legal theory. The district court never rushed to judgment. Instead, the district court gave the Folinos repeated opportunities to present evidence that would support their claims. The district court refused to dismiss the underlying case, even when Swanson filed three dispositive motions. JA000337-349, JA000466-486, RSA000076-101.

1. *The District Court Allowed the Folinos to Amend Their Original Complaint, Then Dismissed Five of the Folinos' Seven Claims.*

The Folinos' filed their original Complaint on October 9, 2018 – with

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categorically false.

several deficiently pled causes of action. JA000249-261. On February 4, 2019.Swanson moved to dismiss or for a more definite statement pursuant to NRCP 12(b)(5), JA000337-349. The Court did not rule on the substance of Swanson's motion. Instead, it granted the Folinos' request for leave to amend to cure the pleading deficiencies. JA000462-465.

The Folinos filed their First Amended Complaint on April 18, 2019. JA000369-446. They asserted the same claims as in the initial Complaint: intentional and negligent misrepresentation, concealment – as well as Civil RICO and Deceptive Trade Practices Act claims. *Id.* The Folinos also added a seventh claim for Piercing the Corporate Veil/Alter Ego. JA000381.

Swanson moved to dismiss the Folinos' First Amended Complaint on May 20, 2019. JA000466-486. The district court granted the motion in part, dismissing five of the seven claims.[19] The district court determined that the Folinos' intentional misrepresentation[20] and NRS Chapter 113 concealment claims could proceed. JA000512-525. The Folinos filed their

[19] The court dismissed the Folinos' claims for Negligent Misrepresentation, Deceptive Trade Practices, Civil RICO, Respondeat Superior and Piercing the Corporate Veil. JA000509-525.

[20] The district court reasoned that the intentional misrepresentation claim was a question of fact. JA000517.

Second Amended Complaint on September 4, 2019. JA000526-595.

2. *In Response to Swanson's Third Motion to Dismiss, the District Court Allowed the Folinos to Conduct Discovery.*

On September 24, 2019, Swanson moved to dismiss the Folinos' Second Amended Complaint. RSA000076-101. Swanson attached an affidavit from Aaron Hawley,[21] the principal of Rakeman Plumbing. JA003203. That Affidavit affirmed that the February 2017 leak had been repaired. RSA000088-89. Attached to the affidavit were Rakeman invoices documenting the scope of Rakeman's work in repairing the leak. RSA000091-95.

The Folinos' opposition to Swanson's motion failed to present <u>any</u> facts or evidence to rebut Swanson's proof that the February 2017 leak had been repaired. Instead, their attorney berated Swanson's counsel and sought sanctions for the filing of the motion to dismiss. JA000624-645.

The district court stated – but resisted – its "inclination" to grant summary judgment in favor of Swanson. RSA000102, JA002048. Giving

[21] Aaron Hawley has been Rakeman's "Qualified Employee" since 2005. JA003203.

the Folinos another chance to provide evidence supporting their claims, the district court continued the case for 90 days, and granted the Folinos request for leave to conduct discovery. *Id.*

3. *Swanson Made an Offer of Judgment, Which the Folinos Rejected, and Discovery Proceeded.*

Between November 7, 2019, and February 13, 2020, the Folinos conducted extensive, comprehensive discovery. The discovery included subpoenas for documents, interrogatories, requests for production and requests for admissions. JA00662-1610. The Folinos took the depositions of six witnesses.

In particular, the Folinos deposed Mr. Hawley and one of Rakeman's technicians, Rocky Gerber. JA003195-3296, JA003297-3386. The Folinos also deposed Dr. Swanson (on two separate occasions), Dr. Swanson's assistant Nicole Whitfield, and Swanson's real estate agents Ivan Sher and Kelly Contenta. JA002510-3038, JA003039-3194, JA003387-3539, JA003540-3583.

The Folinos never claimed their discovery efforts were limited in any way – stressing to the district court the amount of discovery that was conducted. JA001858. Swanson produced hundreds of pages of

documents in his supplemental NRCP 16.1 disclosures, his responses to the Folinos' interrogatories, and his responses to the Folinos' requests for production. *See, e.g.*, JA001660-1826. "All three defendants responded to requests for production, requests for admissions, [and] interrogatories. . . [and] didn't try at all to ratchet back the discovery." JA003712. The Folinos claim to have produced over 5500 pages of documents. JA003718.

On December 11, 2019, Swanson served the Folinos an offer of judgment, pursuant to NRCP 68. JA001933-1934. The Folinos did not accept the offer.

4. *The District Court Granted Summary Judgment in Favor of Swanson and Awarded Attorney's Fees and Costs.*

After completing discovery, the parties filed supplemental briefs. Both parties expanded on the arguments relating to Swanson's third dispositive motion. JA001611-1634, JA001635-1826. Swanson attached voluminous exhibits supporting summary judgment in his favor. JA001660-1826. The Folinos' supplement referenced numerous exhibits – but these were not attached to the brief. Instead, they submitted a zip drive to the court.

Judge Crockett considered all the evidence presented by the Folinos.

JA001886. After evaluating the evidence produced by the parties in their supplemental briefs, and considering the arguments presented, the court orally granted summary judgment in Swanson's favor, on April 7, 2020. JA001851-1868.

On May 11, 2020, the district court issued its written order, which contained detailed findings of fact and conclusions of law. JA002045-2064. The written order explained the factual and legal grounds supporting the district court's ruling. Notice of entry of the district court's summary judgment order was filed on May 13, 2020. JA002212-2234. The Folinos timely appealed the summary judgment order on May 26, 2020. JA002235-002237.

After prevailing on summary judgment, Swanson moved for attorney's fees and costs, on April 22, 2020. JA001869-1946, JA001947-1950. Pursuant to NRCP 68 and NRS 18.010(2)(b), the court awarded fees from the date of Swanson's offer of judgment forward. JA002326-2343, JA003743-3757. The court also awarded Swanson cost pursuant to NRS 18.020.

As with the order granting summary judgment, the district court made specific findings and explained its decision in a detailed order

issued on August 18, 2020. JA002326-2343. Notice of entry of the attorney's fee order was filed on August 24, 2020. JA002347-2368. The Folinos timely appealed the attorney's fees and costs order on September 17, 2020. JA002369-2380.

SUMMARY OF THE ARGUMENT

Throughout this case, the Folinos relentlessly pursued unfounded theories of recovery. They asserted concealment and misrepresentation claims that were unsupported by either the facts or the law.

The district court did not immediately dismiss the Folinos' case. Instead, it allowed the Folinos to conduct extensive discovery. In the end, however, the district court found that the Folinos failed to present any evidence to support their claims. JA002063. It granted summary judgment to the Swanson Defendants. JA002045-2064.

"[I]t became abundantly clear" to the district court that the Folinos would not let go of this case – "no matter whether the facts or law supported Plaintiffs' idea of what the case was about." JA003747. Thus, they "resorted to a whack-a-mole approach . . . ." *Id.* The Folinos "insist[ed] upon pursuing claims against Defendant, whether or not there was any evidence to support the claim[s]." *Id.* The Folinos' goal was to extract "a

pound of flesh" from Swanson because they were dissatisfied in their purchase of the Property. *Id.*

Based on the Folinos insistence to pursue unjustified claims, and by refusing to consider that those claims were unfounded, the district court found an award of attorney's fees and costs warranted. JA002326-2341. It carefully considered and weighed the *Beattie* and *Brunzell* factors in making the award of fees. *Id.*

In pursing this appeal, the Folinos perpetuate their lost cause. They unsuccessfully try to distinguish the seminal *Heer* case – claiming the facts are materially different. They continue to grasp at any, and all, conceivable arguments. They raise immaterial facts, such as repairs made in 2015, a phantom drip in 2015, and the prospect that mold should have been anticipated.

None of these arguments swayed the district court – and none of these arguments should change the outcome. This Court must affirm the district court's decisions and findings.

ARGUMENT

I. Swanson Did Not Conceal Problems with the Plumbing System or Misrepresent the Condition of the Home.

A. Nevada Law Abrogated Any Requirement to Disclose Leaks That Had Been Repaired.

1. *The* Nelson v. Heer *Case Dictated the Outcome of This Litigation.*

The Folinos argue the district court misapplied the seminal case of *Nelson v. Heer,* 123 Nev. 217, 163 P.3d 420 (2007). The Folinos say the court "overlook[ed] the elemental requirements" of the *Heer* case. AOB:10. The Folinos fail, however, to describe the errors made by the district court or identify the "elemental requirements" that the court overlooked. Contrary to the Folinos' wild speculations, the *Heer* case is "on all fours" with this case.

As they must, the Folinos concede that under the holding in *Heer*, a repair negates the duty to disclose the existence of a previous condition, problem, or defect. Nevertheless, they assert Swanson is "trying to use the cover of the holding in *Heer* to avoid liability for misrepresentations either by direct statement or omission." AOB:viii. The arguments made by Swanson do not constitute a "cover" – *Heer* is controlling law.

The Folinos assert the district court extended the *Heer* ruling

beyond "abrogation of the duty to disclose" to "permit objectively false representations on [an] SRPD." AOB:14. They contend "the negation of a duty to disclose is not the equivalent of permission to make false representations and/or omissions . . . " AOB:15. They argue that "repaired or not," Swanson had the obligation to disclose the February 2017 leak, and the replaced recirculation pumps. AOB:15-16, *See also* JA000254. Their argument ignores the holding in *Heer*.

In *Heer,* a water pipe on the third floor of a cabin on Mt. Charlseton "burst, flooding the cabin . . . [and] a passerby noticed water flowing from the cabin . . . " *Heer,* 123 Nev. at 220, 163 P.3d at 422-423. The extensive water loss and the damages at that cabin were much more severe than any purported leaks or drips in this case.

As in this case, the owner (Nelson) hired a general contractor to repair the broken water pipe and mitigate the damages. *Id.* The damage to the cabin was extensive – with remediation that "included replacing the flooring, ceiling tiles, several sections of wallboard, insulation, kitchen cabinets, bathroom vanities, kitchen appliances, and certain furniture." *Id.*, 123 Nev. at 220 163 P.3d at 423.[22] Nelson eventually sold

[22] As in this case, Ms. Nelson lived in the cabin after the flood, and she never

the cabin to Heer.

The Court in *Heer* faced the same question the district court faced in this case: whether "previous or current moisture conditions," which the owner repaired, had to be disclosed on the seller's SRPD to potential buyers. *Id.* (emphasis added). This Court analyzed the language of NRS Chapter 113 and the SRPD – and held Nelson did not violate the disclosure rules, because the earlier flood and damages were repaired.

The repair negated Nelson's "awareness" that a problem existed; and due to the repair, the prior flood did not materially affect the value of the property. Simply put, the teaching in *Heer* shows that from a seller's perspective, after something is repaired, it no longer materially detracts from the value of a property.

The Folinos suggest that since the water damage in the Nelson cabin occurred on the third floor, and not in the basement/crawl space, it was outside the requirements for disclosure on Nelson's SRPD. AOB:11-12.[23] This is an absurd claim to avoid the holding in *Heer*. No material

tested for mold.

[23] To support this argument, they cite to the prior version of the SRPD – which has been stricken from the Appendix. Thus, a direct comparison of the two SPRDs is not possible. Nevertheless, despite any changes in the language contained in the prior version of the SRPD, the holding in *Heer* is undeniable – a repaired problem need not be disclosed.

distinction exists between this case and *Heer*.

The flooding that occurred at the Nelson cabin was a "previous or current moisture conditions." And, unless the laws of gravity did not apply to Mt. Charleston on that day, the water from the third-floor rupture would have created "moisture" on every level of the cabin. It is highly unlikely that the water was gushing only from the third-floor windows of Nelson's cabin.

The question in *Heer* was not where the burst water pipe and leak originated, but whether water damage or moisture conditions existed in the cabin at the time of Nelson's disclosure. Under the analysis proposed by the Folinos, Nelson would have had knowledge and awareness of "previous or current moisture conditions" in the cabin.

The outcome the Folinos seek makes no sense from either a practical or policy standpoint. Disclosure of every conceivable problem a homeowner has ever had, whether repaired or not, would be virtually impossible and onerous at best.

Similarly, the Folinos other claims fail under the analysis and holding in *Heer* – *i.e.*, claims relating to the recirculation pump replacements in 2015, a phantom bathroom leak in 2015, and the

possibility of mold. All the known and identified leaks were repaired by Rakeman.[24] The phantom basement bathroom leak was only seen once, and never seen again. JA001769-1770. The district court also properly ruled the Folinos' speculative claim that prior water damage may have caused mold was insufficient to defeat summary judgment. *Heer,* 123 Nev. at 219, 163 P.3d at 422.

The undisputed evidence shows Swanson did not have any "realization, perception or knowledge" of any defective conditions requiring disclosure. The Folinos have not offered any evidence to establish that Swanson] knew, or should have known, that prior water damage – which was repaired by a licensed contractor – was a material factor the Folinos might have considered when purchasing the Property. *Id.* Thus, the Folinos failed to establish that Swanson "was bound in good faith to disclose the repaired water damage," or that he intended for the Folinos to rely on the claimed omission.

2. *Swanson Did Not Contravene the Requirements of NRS Chapter 113.*

The Folinos' concealment claims are based in part on Swanson's

[24] Dr. Swanson testified that Rakeman repaired the 2015 leak(s). JA002648.

purported violation of NRS Chapter 113. No violation of the statute took place. Swanson disclosed everything required of him.

The relevant parts of NRS Chapter 113 provide:

NRS 113.130 Completion and service of disclosure form before conveyance of property; discovery or worsening of defect after service of form; exceptions; waiver.

1. Except as otherwise provided in subsection

(a) At least 10 days before residential property is conveyed to a purchaser:

(1) The seller shall complete a disclosure form regarding the residential property; and

(2) The seller or the seller's agent shall serve the purchaser or the purchaser's agent with the completed disclosure form.

(b) If, after service of the completed disclosure form but before conveyance of the property to the purchaser, a seller or the seller's agent discovers a new defect in the residential property that was not identified on the completed disclosure form or discovers that a defect identified on the completed disclosure form has become worse than was indicated on the form, the seller or the seller's agent shall inform the purchaser or the purchaser's agent of that fact, in writing, as soon as practicable after the discovery of that fact but in no event later than the conveyance of the property to the purchaser.

If the seller does not agree to repair or replace the defect, the purchaser may:

(1) Rescind the agreement to purchase the property; or

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

NRS 113.140 Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

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

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

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

NRS 113.150 Remedies for seller's delayed disclosure or nondisclosure of defects in property; waiver.

* * *

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

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

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

* * *

5. A purchaser may not recover damages from a seller pursuant to subsection 4 on the basis of an error or omission in the disclosure form that was caused by the seller's reliance upon information provided to the seller by:

* * *

(b) A contractor, engineer, land surveyor, certified inspector as defined

> in NRS 645D.040 or pesticide applicator, who was authorized to practice that profession in this State at the time the information was provided.

Swanson complied with:

- NRS 113.130(1)(a)(1) & (2), by completing the SRPD and serving the SRPD form on the Folinos;
- NRS 113.130(1)(b), by informing the Folinos of the November 2017 leak, in writing;
- NRS 113.140(1), because Swanson was not "aware" of any defect, as defined in *Heer*;
- NRS 113.150(5)(b), because he had repairs to the recirculation pumps and Uponor system performed by a licensed, professional plumbing contractor.

The Folinos produced no evidence to refute the facts stated above. As for the question of Swanson being "aware" of potential defects – the *Heer* Court provided the answer. When considering the meaning of NRS 113.140(1), this Court found the statute to be "plain and unambiguous." *Heer*, 123 Nev. at 224, 163 P.3d at 425. The term "'aware' means 'marked by realization, perception, or knowledge.'" *Id.* (*citing* Websters Third New International Dictionary of the English Language, Unabridged 152

(1968)). According to this Court, the plain meaning of "aware," means a "seller of residential real property does not have a duty to disclose a defect or condition that materially affects the value or use of residential property in an adverse manner, if the seller does not realize, perceive, or have knowledge of that defect or condition." *Heer*, 123 Nev. at 224, 163 P.3d at 425. In other words, "it is impossible for a seller to disclose conditions in the property of which he or she has no realization, perception, or knowledge." *Id.*

Swanson also receives the protection of NRS 113.150(2)(b). The Folinos chose to "close escrow and accept the property with the defect as revealed by [Swanson] without further recourse." *Id.* (emphasis added).

3. *Swanson Did Not Violate the Requirements of the Seller's Real Property Disclosure.*

The Folinos contend the text of the SRPD in *Heer* varies from the SRDP now in use and approved by the Nevada Real Estate Division. But that assertion is unsupported by the record. Building on this speculation, the Folinos conclude that *Heer* is not controlling. AOB:*passim*. The Folinos are mistaken. First, they failed to raise this argument in the court below, and it cannot be considered here. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981, 983 (1981). Further, they cannot show

how any purported changes in the text of the SRPD affect the outcome of this case.

The SRPD form directs sellers to "disclose any and all known conditions and aspects of the property which materially affect the value or use of residential property in an adverse manner." JA000278. *Heer*, 123 Nev. at 224, 163 P.3d at 423. This mandate is consistent with NRS 113.130, which does not require a seller to disclose a defect in residential property of which the seller is not aware. JA000687. The SRPD's stated purpose is the:

> disclosure of the condition and information concerning the property known by the Seller which materially affects the value of the property. Unless otherwise advised, the Seller does not possess any expertise in construction, architecture, engineering or any other specific area related to the construction or condition of the improvements on the property or land. . . . This statement is not a warranty of any kind by the Seller or by any Agent representing Seller in this transaction and is not a substitute for any inspections or warranties the Buyer may wish to obtain.

JA000684.

The statute requires sellers to disclose "only what the seller [knows] as a layman." *See* S.B. 212, Minutes of the Assembly Committee on Judiciary, May 29, 1997, Remarks of Shirley Petro, Real Estate Division,

State of Nevada. Sellers are protected from liability because a seller can rely on information provided to them by qualified professionals. NRS 113.150(5)(b).

In accord with the rules governing the SRPD, Swanson checked the "no" box on the SRPD which requested disclosure of "[p]revious or current moisture conditions and/or water damage." JA000685. Swanson "testified that Rakeman repaired" all prior leaks and they were no longer "an issue when he signed the disclosure form." JA001860. According to Dr. Swanson, "there was no problem with the plumbing system at the time I filled" out the SRPD. JA002572.

Further, the statute and case law specify that any prior or previous problems must materially affect [lessen] the value of the property. The record is devoid of <u>any</u> evidence that any leaks negatively affected the value of the property.

The Rakeman repair negated Swanson's duty to disclose prior leaks under the binding precedent in *Heer* and pursuant to NRS Chapter 113.

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B. The Folinos' Evidence Failed to Show Swanson Concealed Defects That Materially Affected the Value of the Home.

Despite conducting extensive discovery, the Folinos were unable to establish that all prior leaks were not repaired – and they chose to close on the home despite their knowledge of the November 2017 leak.

1. *The February 2017 Leak Was Completely Repaired.*

The undisputed evidence confirms that Swanson had the February 2017 leak repaired by Rakeman. JA000303-313, JA001669. In addition, the Folinos did not present any evidence showing the repaired February 2017 leak caused any damages or materially affected the value of the home.

Under the *Heer* standards and the plain language of NRS Chapter 113, Swanson did not conceal anything or make any affirmatively false representations as to the condition of the Property. Because Rakeman repaired the leak, "it was no longer an issue when [Swanson] signed the disclosure form on October 24, 2017." JA001860, JA002045-2064, JA003725-3742.

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2. *Swanson Timely Disclosed the November 2017 Leak – and the Folinos Waived Their Claims for Concealment.*

By closing on the purchase of the home, with knowledge of the November 7, 2017 leak, the Folinos waived their claims of concealment.[25] JA001647, n.10. The district court agreed. JA001856, JA001861, JA001865-1856. Judge Crockett stated:

> [G]iven the fact that your client had concerns, and this was not an insubstantial purchase at all, and given the fact that he threatened to walk, and instead, he went ahead and closed escrow without any further specifications or demands regarding the leak.
>
> * * *
>
> But I do think your client is confounding some other information that they've learned that just has thrown gasoline on the fire over issues with this house. . . . I understand it's irritating and upsetting, but it's not actionable.

JA001865-1866. "At the time of escrow, even though new issues were arising as the escrow was still open, the Plaintiff insisted upon going forward and closing in spite of his actual knowledge of issues he later tried to elevate into claims." JA003748, JA003752-3753. The district

[25] *See Udevco, Inc. v. Wagner,* 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of waiver as: (1) voluntary and intentional relinquishment of a known right; (2) made with knowledge of all material facts).

court correctly ruled that "the Plaintiffs' election to close escrow bars 'further recourse,' as a matter of law." JA002061, JA002063; *see also* NRS 113.130(b)(2) and NRS 113.150(2)(b).

C. The Folinos Provided No Evidence to Support Their Intentional Misrepresentation Claim.

When the district court granted Swanson's motion to dismiss the Folinos' First Amended Complaint, in part, it allowed the Folinos' intentional misrepresentation and concealment claims to survive. JA000509-525. To prevail on a claim for intentional misrepresentation, a plaintiff must establish three factors:

(1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation,
(2) an intent to induce another's reliance, and
(3) damages that result from this reliance.

Heer, 123 Nev. at 225-26, 163 P.3d at 426 (citing *Collins v. Burns,* 103 Nev. 394, 397, 741 P.2d 819, 821 (1987)).

The suppression or omission "of a material fact which a party is bound in good faith to disclose is equivalent to a false representation." *Midwest Supply, Inc. v. Waters,* 89 Nev. 210, 212-13, 510 P.2d 876, 878

(1973). The holding in *Heer* negated the obligation to make disclosure of the repaired leaks in the plumbing – therefore, Swanson did not make a "false representation."

The second and third elements unravel without a false representation. Further, the Folinos provided no evidence of Swanson's intent to induce their reliance. Plus, the damages the Folinos alleged had to be proximately caused by their reliance on the misrepresentation. *Collins,* 103 Nev. at 399, 741 P.2d at 822 (limiting liability to foreseeable consequences connected to the misrepresentation and harm).

As in *Heer*, "the record is devoid of any evidence that the water damage to the [Meadowhawk home] caused the presence of elevated amounts of mold." *Heer,* 123 Nev. at 226, 163 P.3d at 426. No one testified that the recirculation pump leaks, the February 2017 leak, or November 2017 leak caused elevated mold readings. Therefore, even when viewing the evidence in the light most favorable to the Folinos, they "failed to establish that any omitted disclosure caused [them] to suffer damages for mold remediation." *Id.*

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II. The Folinos Played "Whack-a-Mole" and Changed Their Theory of the Case When Their Uponor Claims Failed.

In their Opening Brief, the Folinos assert leaks identified in 2015 are of "particular importance" to their case for concealment. AOB:6. The Criterium Report identified: (i) leaks in two recirculation pumps, and (ii) a "drip" at the basement bathroom ceiling. JA001746-1757, JA001770. The Folinos assert Swanson is liable for nondisclosure of the 2015 leaks. But these specious assertions are nothing more than red herrings.

In their Supplemental Brief, and in this appeal, the Folinos seem to abandon their claims relating to the February 2017 leak. Apparently, the revelation about the 2015 water losses fed the Folinos' litigious appetite – seizing on what they learned happened in 2015, which threw "gasoline on the fire over issues with this house."[26] JA001866. These additional factors form a major part of the Folinos' Opening Brief.

The district court, however, recognized the focus of the Folinos' lawsuit was the February 2017 leak. "You [the Folinos] have to remember that the whole focus of your lawsuit was the February 6th (sic) 2017 leak.

[26] The Folinos, however, never amended their complaint to include allegations related to this new evidence. Instead, they grasped for new theories of concealment and deception in opposing Swanson's motion for summary judgment.

All of these other things that you talk about, it may be frustrating and irritating . . . " JA001861. The district court summarized the Folinos' relentless pursuit of unfounded theories, and it stressed the Folinos had failed to present evidence to support their claims:

> . . . it became abundantly clear to the Court that no matter whether the facts or law supported Plaintiffs' idea of what the case was about, Plaintiff was going to insist upon pursuing claims against Defendant, whether or not there was any evidence to support the claim.
>
> When one of Plaintiffs' claims would reveal itself to be completely without merit or unsupportable under the law or facts, Plaintiff resorted to a whack-a-mole approach in an effort to offer up a different leak or alleged non-disclosure.
>
> Plaintiff was motivated to pursue this case and these claims against Defendant with the goal of extorting a pound of flesh because of Plaintiffs' dissatisfaction with his purchase of this luxury home.

JA003747 (emphasis added).

A. The Recirculation Pump Leaks Were Repaired, and Then Replaced.

The 2015 "water losses" asserted by the Folinos' are not related to their claims regarding concealment of systemic plumbing defects. The recirculation pumps are unrelated to the Uponor system. JA003367-003368. They have nothing to do with the Folinos' claim that Swanson

concealed "systemic" plumbing defects. Specifically, Mr. Gerber stated the leaks in the recirculation pumps would not prompt him to check the pipes. He analogized it in this manner: "if you had a leaking toilet, do you check the kitchen sink? No." JA003368.

Swanson "left it up to professionals like [Criterium] and Blue Heron to make the repairs and make sure everything was done properly." JA002635. Nonetheless, he made notes on the Criterium Report, identifying what needed to be repaired or completed before he closed on the property. JA001760-1767. The Folinos acknowledge that Swanson "continuously updated" the notes "documenting the progress of the repairs." AOB:5. They extrapolate that the notes show Swanson knew the Property had numerous leaks, which he intentionally did not disclose. AOB:5-6.

The Folinos' argument ignores the undisputed facts. Contrary to the Folinos' assertions, rather than showing someone trying to conceal a defect, documenting the progress of the repairs indicates a conscientious effort to fix the problems.

Swanson ordered the Criterium inspection and made notes on the report to "keep track of what had been fixed and what hadn't." JA001694-

1696. Swanson "wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction. . . . [and] would not have closed on the house with leaks in the house." JA001690-1694. He "wouldn't have let them not fix these items." JA001692 (emphasis added).

The undisputed evidence shows the recirculation pumps were repaired, and then replaced three months later. JA001688, JA001759-1767, JA001772. The Folinos take this undisputed evidence and speculate about what might have happened. They surmise that because the recirculation pump leaks were repaired in May, and then the pumps were replaced in August, "[t]his could mean the May 2105 recirculation pumps either recurred or those water losses went unaddressed from at least May to August of 2015." AOB:6 (emphasis added).

The Folinos' argument as to what the evidence "could mean" is pure speculation – speculation that is contradicted by actual evidence of the repair and lack of evidence that any damage occurred. According to the court, the recirculation pump leak issues "became moot when [they] were replaced under warranty in that same year, 2015. JA001856. The district court stressed that even viewing these 2015 "water loss" occurrences in

the light most favorable to the Folinos, summary judgment was proper because the leaks were not material. JA001859-1861.[27]

B. A Phantom Bathroom Drip Does Not Establish Swanson's Liability for Any Claim.

The Folinos also complain about a drip in the basement bathroom ceiling. According to the Folinos, the Criterium Report and the accompanying notes "clearly evidenced the fact that Respondents were fully aware of the existence of these leaks and the failure to repair at least the basement bathroom leak." AOB:6. The Folinos assert "[t]he basement bathroom ceiling leak [also] is of paramount importance because it is clearly evidenced by Respondent's own notes that it was never repaired." AOB:15-16 (emphasis added).

But the basement bathroom drip was only seen once in 2015 . . . and was never seen again. Nevertheless, the Folinos argued: "the plumbers couldn't find it, so they didn't fix it." JA003710. The Folinos claim that since there is no documentation showing a repair to the once-seen

[27] The court recognized the Folinos were "conflating a genuine dispute as to a material issue of fact with a question of fact. . . ." JA001859. The court explained: "we know that Swanson has testified in his deposition that his only knowledge of the February 6th (sic) 2017 leak was back at the time it occurred." JA001860. In line with summary judgment standards, "to create a genuine dispute as to a material issue of fact," the Folinos had "to come up with evidence to contradict" Swanson's testimony and evidence that the leak had been repaired. JA001860-1861.

bathroom drip, this "alone provides a basis for the claims in the Second Amended Complaint." AOB:16 (emphasis added).[28]

They tried to associate the phantom drip to their claims of "systemic" plumbing issues and assert that their Second Amended Complaint "actually ha[d] a much broader focus." AOB:15. The focus of the Second Amended Complaint, however, was identical to the First Amended Complaint – less the five dismissed claims.

The phantom basement drip was only seen once. The Criterium Report and Swanson's notes evidence that the drip existed in that location for a moment – and never again. A Rakeman plumber came to fix the phantom drip, but he could not find it. JA001764. So, Swanson's notes say that he would "monitor it." JA001693. Swanson lived in the house, and he routinely used the basement bathroom. He provided unequivocal testimony: "I know there was no water in that bathroom because I used it all the time." JA001695, JA001698-1699.

No evidence exists that the Folinos or their inspectors ever saw the

[28] Even though Appellants claim they preserved the issue – which they did not – the district court disregarded any passing argument regarding the drip as forming any basis for the claims in the Second Amended Complaint. *See* AOB:16 (citing to JA003710).

drip – not from the date they opened escrow, not through the date they moved into the house in late 2017, nor during the pendency of this litigation. The district court recognized that without evidence pertaining to this phantom drip, this claim did not help the Folinos' case. One must wonder – how can the Folinos now give "paramount importance" to such a flimsy claim?

C. Swanson Was Not Aware of Mold, and Therefore, He Could Not Disclose Its Presence.

Not to be outdone by the unfounded issues concerning the 2015 punch-list items, the Folinos raised an additional fruitless argument. In keeping with their "whack-a-mole" tradition, the Folinos claim the phantom drip should have alerted Swanson as to the possibility of mold. JA001746-1757. Yet, they produced no evidence that Swanson knew about any mold before the closing. In fact, the Infinity mold report was not completed until November 24, 2017, seven days after the closing for the sale of the house. JA001814-1818.

The Folinos made a passing reference to mold/fungi in their pleadings. JA000252, RSA000004 and JA000529. Then, in their Supplemental Brief, the Folinos speculated that "it is likely that" water from the 2015 leaks "sat their (sic) unaddressed for months!" RSA000114.

Without any evidence, the Folinos surmise Swanson was aware of mold, but concealed it. According to the Folinos, Swanson should have checked the "yes" box in response to the question in the SRPD "[a]re you aware of . . . [a]ny previous or current fungus or mold?" AOB:5 (emphasis in original).

The Folinos now argue that "[r]epaired or not, [Swanson] failed to provide notice of the prior existence of mold that was remediated." AOB:15-16 (emphasis added). This assertion contradicts the explicit holding in *Heer* that a repair negates the duty to disclose. *Heer,* 123 Nev. at224-25, 163 P.3d at 425.

Apparently, the Folinos base their mold argument on the unfounded assertion that the recirculation pump leaks "went unaddressed for months after being discovered by Respondents, yet no fungi/mold tests were ever conducted." AOB:7. The Folinos speculate the evidence "could mean" that certain leaks persisted and could have caused fungus or mold problems. AOB:6-7.

Counsel for the Folinos made a specious misrepresentation to the district court – that Swanson knew about mold before the closing of escrow. The court asked: "[a]re you saying that the October 24th, 2017

disclosure form was a misrepresentation regarding the November 2017 mold?" JA001864. Counsel responded, "I am, Your Honor." *Id.*

Because the mold results were not completed until November 24, 2017, Swanson could not have had an awareness or suspicion of mold when he made his property disclosures on October 24, 2017 and November 16, 2017.[29] Swanson testified he never saw any evidence of mold. JA003629. In fact, there is no evidence that anyone saw evidence of any mold. Swanson could not disclose something of which he was unaware – a condition that became known only after closing. *See* JA003626-3629.

The plaintiff in *Heer* made a similar argument – which this Court rejected. Heer claimed the seller failed to comply with NRS Chapter 113 "because she failed to disclose prior water damage that may have caused elevated amounts of mold within the cabin . . . [and] Heer merely asserted that Nelson should have disclosed the prior water damage and its repair." *Heer,* 123 Nev. at 219, 163 P.3d at 422 (emphasis added).

According to this Court, "[b]ecause Nelson had the prior water

[29] Swanson testified he never saw the November 24, 2017, Infinity report until his February 2020 deposition. JA003625.

damage repaired and she was not aware of the presence of any elevated amounts of mold, we conclude that Nelson did not have a duty under NRS Chapter 113 to disclose the prior water damage or the possible presence of mold." *Id.* (emphasis added). A "metaphysical" possibility or fanciful speculation does not preclude summary judgment.[30]

As in *Heer,* Swanson had no duty to speculate, assume, guess or extrapolate that the repaired leaks would ultimately cause mold. The Folinos failed to establish that Swanson was "aware of, *i.e.,* realized, perceived, or even knew of, elevated amounts of mold" in the home and "failed to establish a sufficient issue for the jury to decide with respect to [the] claim under NRS 113.130." *Id.*, 163 P.3d at 425-26.

The Folinos also grasp at another unfounded presumption: that mold testing is done every time there is a water leak. RSA000114, AOB:7. The evidence contradicts this presumption. According to Mr. Hawley,[31] mold tests are not done unless there is visual observation of "extreme water or spores." JA001674-1678.

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[30] *See Wood,* 121 Nev. at 731-32, 121 P.3d at 1030-31 (to avoid summary judgment, a plaintiff must "do more than simply show that there is some 'metaphysical doubt' as to the operative facts" and "may not . . . rely[] on the gossamer threads of whimsy, speculation and conjecture.")

[31] Mr. Hawley testified that Rakeman also owns CPI Restoration which holds a B-2 license, and regularly conducts mold testing and remediation. JA003204.

The district court made it clear that the mold claim was a non-issue. The Folinos were "going to walk if suitable credits were not done. . . . but [they] closed escrow with that information as opposed to refusing to close escrow. Had [they] refused to close escrow, we wouldn't be here. There wouldn't have been a purchase and sale." JA001864.

III. The District Court Properly Found Swanson was Entitled to an Award of Attorney's Fees and Costs.

A. The District Court Limited the Award of Fees to Those Incurred After Swanson's Offer of Judgment.

After the district court granted summary judgment, Swanson moved for attorney's fees and costs. JA001869-1946, JA001947-1950. Swanson requested fees from the inception of the case, in the amount of $82,021.50. JA001869-1946. Swanson also requested costs in the amount of $5,840.41. JA001947-1950.

The court could have awarded all fees under either NRCP 68 or NRS 18.010. *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983). It was a "very close case for the court to consider the possibility of awarding all fees, since the inception of the suit." JA003748. But the court limited the award of fees.

Swanson had served the Folinos with a $150,000 offer of judgment,

on December 11, 2019. JA001933-1934. The Folinos did not accept the offer of judgment. Therefore, the district court only awarded fees incurred from the December 11, 2019 offer of judgment forward, pursuant to NRCP 68. JA002326-2341. In its order of August 18, 2020, the district court awarded $39,447.00 in fees to Swanson. *Id.*

The court "carefully and meticulously" reviewed the parties "very comprehensive briefs." JA003746-3747. The court was "satisfied with" Swanson's *Beattie* and *Brunzell* analysis "and adopt[ed] the same because it was exceptionally well supported in the record and completely persuasive." JA003748.

B. The District Court Found Costs for the Mediation and Runner Charges Were Necessary Expenses.

The Folinos argued that two expenses itemized in Swanson's Memorandum of Costs were improper: (i) "runners' costs," and (ii) "costs related to the pre-litigation mediation." JA001952-2042, JA002340. The district court determined the mediation "was a voluntary, consensual agreement to expend funds . . . to prevent further expense and bring the matter to a close." JA003749. "And there is no doubt that at the time" the parties "thought [mediation] was reasonable and necessary." *Id.* Thus, the court awarded mediation costs totaling $2,084.50. *Id.,* JA0002340-

2341.

The district court also awarded runners costs, noting "in this modern day and age, it [has] become more cost effective to employ the services of a runner on an ad hoc basis" rather than to employ a full-time runner," which would increase firm overhead. JA003749, JA002340-2341. The court awarded Swanson $5,840.41, which included the mediation and runner's costs. JA002341.

C. The Case is Not Novel and the Law Does Not Need Clarification.

The Folinos argue the district court abused its discretion in awarding fees. They repeat their unsuccessful arguments that their claims against Swanson were brought in good faith and that *Heer* does not apply to this case. The Folinos now claim fees are not warranted because "the case presents novel legal issues" and they seek a "clarification or modification of existing law." AOB:37. But the Folinos case is not "novel," and the law applying to their case does not need "clarification or modification." The Folinos simply do not like the law. NRS Chapter 113 and the holding in *Heer* made their case meritless from the start.

The Uponor and Rakeman documents showed the February 16,

2017, Uponor leak was repaired. To bolster their allegations, the Folinos attached those documents to their complaint(s). *See e.g.* JA000303-000313. Under the *Heer* precedent, the repairs negated the Folinos' misrepresentation and concealment claim. The allegations in the Folinos' pleadings were legally and factually unsupported – giving the district court ample basis for the award of fees and costs.

D. The District Court Properly Awarded Attorney's Fees Under NRCP 68 and the *Beattie* Factors.

According to NRCP 68(a), "[a]t any time more than 21 days before the trial begins, any party may serve upon the adverse party an offer. . . ." Swanson served the Folinos with the offer of judgment "to encourage settlement." *Morgan v. Demille,* 106 Nev. 671, 674, 799 P.2d 561, 563 (1990). Swanson made the offer of judgment in good faith and believed it was reasonable.

"If an offeree declines to accept an offer of judgment . . . and the offeree receives a judgment at trial which is not more favorable than the offer, the offeree may be required to pay the offeror's attorney's fees." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720 (Nev. 1993). NRCP 68 "directs the offeree who rejects the offer to pay the offeror such attorney fees as the district court might award." *Trustees v. Developers*

Surety, 120 Nev. 56, 84 P.3d 59 (2004).

Before a court may award fees under NRCP 68, the court must consider the four *Beattie* factors:

> (1) whether the plaintiff's claim was brought in good faith;
>
> (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount;
>
> (3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and
>
> (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274; *see also Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).[32]

The district court weighed each *Beattie* factor and found that those factors were satisfied.

1. *The Folinos' Did Not Bring Their Case in Good Faith.*

After looking at the "actual circumstances of the case," and the

[32] "[E]xplicit findings on every *Beattie* factor" are not "required for the district court to adequately exercise its discretion." *State Drywall v. Rhodes Design & Development*, 122 Nev. 111, 119 n. 18, 127 P.3d 1082, 1088 n. 18 (2006).

Folinos' conduct as they prosecuted this case,[33] the district court concluded that an award of attorney's fees and costs was warranted. The district court noted that "[t]hroughout the various hearings and briefings in this case," a recurring theme appeared: the Folinos insisted on "refusing to consider that [they] may be pursuing an unjustified claim. . . . " JA003747.

The Folinos lawsuit was commenced and maintained even though they did not have any facts, and never developed facts to support their concealment claims. Ironically, the Folinos attached exhibits to their pleadings that show the February 2017 leak had been repaired. *E.g.*, JA000303-313. This gutted their case. Either the Folinos ignored the controlling law stated in *Heer*, or they failed to make a reasonable inquiry regarding the law.

From the outset, Swanson presented evidence to the court that the Folinos' case had no merit. The Folinos were granted leave to amend their pleadings but did not change a word in their allegations or claims.

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[33] "Determining whether attorney fees should be awarded . . . requires the court to inquire into the actual circumstances of the case, 'rather than a hypothetical set of facts favoring plaintiff's averments.'" *Baldonado v. Wynn Las Vegas, LLC,* 124 Nev. 951, 967–968, 194 P.3d 96, 106–107 (2008).

Instead, in their First and Second Amended Complaints they reasserted the same claim, supported by the same exhibits. RSA000001-75, JA000577-588.

The district court recognized that the Folinos knew the February 16, 2017, leak was repaired because documents showing the repair were exhibits to the Folinos' pleadings. Nonetheless, the court permitted the Folinos to conduct discovery to develop facts showing the leak had not been repaired. JA003706. But the discovery only re-confirmed the February 2017 leak had been repaired. *See, e.g.,* Discussion, *supra* at 6, 32.

With their Uponor "systemic" plumbing defect theory in ruins, the Folinos latched onto their new theory that the 2015 recirculation pump leaks and the basement bathroom drip in the Criterium Report justified continuing their case against Swanson. But these facts did not validate the Folinos' claim that Swanson concealed defects.

Since the evidence did not support the recirculation pump leak and the basement bathroom drip theory, the Folinos asked the district court to endorse pure speculation that the recirculation pump leaks "likely" caused mold. RSA000113-115. JA001864-1865. The Folinos even

misrepresented to the court that "Dr. Swanson was aware that there were pictures showing black mold." RSA000117. It is undisputed that the mold was not discovered until November 24, 2017 - seven days after the closing. JA001814-1818.

The mold theory, like the others, had no factual support. The district court saw the fallacy in the Folinos' theories. According to the court, "no matter whether the facts or law supported" the Folinos' lawsuit, the Folinos were "going to insist upon pursuing claims against [Swanson] whether or not there was any evidence to support the claim. . . ." JA003747.

Their specious claims aside, the Folinos also acted vexatiously when Swanson moved to dismiss the Folinos' Second Amended Complaint. Swanson presented additional proof showing the February 2017 leak had been repaired and, therefore, negated Swanson's duty to disclose under *Heer.* JA000596-621. But the Folinos did not defend their case on the merits and did not offer any rebuttal to Swanson's proof. Instead, they moved for sanctions and personally attacked Swanson's counsel. JA000624-645. The district court found that the Folinos' sanctions motion was "inappropriately filed." JA001899.

The Folinos' inappropriate motion for sanctions indicated a deeper motive beyond merely seeking legal redress. The Folinos wanted to punish Swanson. The Folinos were "motivated to pursue this case and these claims . . . with the goal of extorting a pound of flesh because of [their] dissatisfaction with his purchase of this luxury home." JA003747.

When discovery did not uncover factual support for their "systemic" defect claim, the Folinos resorted to another bad-faith tactic to try to save their case. In their Supplemental Brief, the Folinos tried to dupe the court, misrepresenting that Swanson never disclosed the November 7, 2017 Uponor leak. RSA000105, JA001798-1801.[34]

The court saw through the Folino's deception. According to the court, "at the time of escrow closing, even though new issues were arising as the escrow was still open, the [Folinos] insisted upon going forward and closing escrow in spite of issues [they] later tried to elevate into claims." JA003748.

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[34] In their Supplemental Brief, the Folinos referenced affidavits prepared by Mr. & Mrs. Folino to support their misrepresentation. RSA000095. The affidavits were unsigned. *See* JA001798-1801. The Folinos did not file them with the court. Instead, they sent the affidavits to Swanson who attached them to his Supplemental Brief. JA001798-1801.

2. *Swanson's Timing and Amount of the Offer of Judgment Was Reasonable and Made In Good Faith.*

There is no dispute that Swanson's served the offer of judgment "at least 21 days" before the trial." NRCP 68(a). First, the Folinos argue that at the time Swanson served the offer of judgment, no discovery had taken place. AOB:39. But, Swanson's offer of judgment was reasonable at that time – the exhibits attached to the Folinos complaint(s) showed the February 2017 had been repaired. No additional discovery was needed to establish this fact.

The Folinos also raised an unusual argument about the timing of an offer of judgment. The Folinos argued the offer of judgment was not reasonable in its timing because "we don't think [Defendants] were a party per se in the sense that they didn't file an answer . . . " but instead "filed three successive motions to dismiss and then a motion for summary judgment." JA003751.

The Folinos represented to the court that they had caselaw holding that an offer of judgment is not reasonable in time if it is served "prior to the time of filing an answer, regardless of the arguments that are made in court. . . ." *Id.* The Folinos' argument was not supported by any caselaw.

In fact, the district court was shocked the Folinos would raise that argument. In response to this "left-field" argument, the court stated it needed to reconsider whether NRS 18.010(2)(b) sanctions were warranted after all. JA003752.

The $150,000.00 amount Swanson offered was reasonable in amount. The Folinos' NRCP 16.1 disclosures claimed damages for $300,000.00 for "fraud" and $100,000.00 for "bad faith." It appears the Folinos' alleged damages were pulled out of thin air – and have no factual support whatsoever. Nowhere in the record on appeal are any documents showing the Folinos paid anything to have the plumbing in the house replaced. In contrast, the evidence proves that Uponor bore the cost of repairs under warranty. JA000303-313.

Nowhere in the record is any evidence that the Uponor leaks diminished the value of the property, as required by NRS Chapter 113. The evidence shows the opposite. The Folinos deposed Ivan Sher, a real estate professional with significant real estate experience in the Vegas Valley selling high-end homes. JA003406-3413. Mr. Sher presented evidence that even with water damage in the "seven figures," and associated mold, similar homes were sold for premium prices because

they too were located in the Ridges. JA003508-3510. Water damage and mold did not diminish the value of those homes. *Id.*

3. *The Folinos' Decision to Proceed with This Case was Grossly Unreasonable or Made in Bad Faith.*

In opposing Swanson's motion for fees and costs, the Folinos argued that an offer less than the $400,000.00, as alleged in their Rule 16.1 computation of damages cannot be in good faith. JA002076. But an offer of judgment is intended to promote settlement, which often requires a compromise. If good faith required a defendant to give-in and pay the total amount of the plaintiff's claimed damages, there would be no reason for the offer of judgment remedy.

The Folinos' case was weak and the risk of losing the case was significant. The Folinos presented no evidence they had any out-of-pocket costs because the repairs were under warranty. JA002335. The law favored Swanson. Both *Heer* and NRS Chapter 113, limited the Folinos damages. Considering the difficulties of the Folinos' case, rejecting Swanson's "substantial" $150,000.00 offer was grossly unreasonable. JA002334.

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4. *Swanson's Requested Fees Were Reasonable Pursuant to Factors Outlined in* Brunzell.

This Court, like the district court, is required to consider the *Brunzell* factors in determining whether the requested fees are reasonable. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The district court properly applied the *Brunzell* factors and detailed how Swanson's proof satisfied each of the four *Brunzell* factors. JA002336-2338. The court found that Swanson's attorneys have "excellent credentials." JA002336. The character of the work "was difficult," involved "voluminous documents" and "required close attention to detail and a mastery of a litany of important facts." JA002337. The actual work involved "substantial and wide-ranging discovery" which included participating in several depositions and substantive discovery. *Id.* Counsel achieved "a just result for [Swanson]: dismissal of the case." *Id.*

The district court's detailed analysis of the *Beattie* and *Brunzell* factors supports its ruling awarding fees from the date of the offer of judgment forward.

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E. The District Court Properly Found that NRS 18.010(2)(b) Also Justified an Award of Fees

NRS 18.010(2)(b) authorizes a district court to award attorney's fees to a prevailing party "when the court finds that the claim . . . of the opposing party was brought without reasonable ground or to harass the prevailing party." In making this determination, the district court "shall liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations." *Id.* Further, "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to [NRS 18.010(2)(b)] . . . to punish for and deter frivolous or vexatious claims and defenses." *Id.*[35] An award under NRS 18.010(2)(b) is appropriate where evidence exists to support the district court's finding that the claim or defense was unreasonable or brought to harass. *Bower v. Harrah's Laughlin, Inc.,* 125 Nev. 470, 493, 215 P.3d 709, 726 (2009).

As discussed above, the Folinos sued Swanson even though their own pleadings and exhibits undermined their case. JA000303-313. The

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[35] Swanson also claimed NRS 7.085 relief was warranted. JA001884. NRS 7.085(1)(b) allows a district court to require an attorney to personally pay expenses and attorney fees relating to a case when the attorney unreasonably and vexatiously extended the proceedings. NRS 7.085(2) also directs the court to "liberally construe" NRS 7.085 "in favor of awarding costs, expenses and attorney's fees." The court did not make findings under that statute, however.

Folinos persisted and brought the same deficient claims in their First and Second Amended Complaints. From the start of the case, through the filing of their Opening Brief in this case, the Folinos have ignored the binding precedent in *Heer*. Discovery did not uncover any evidence to support their case.

Rather than countering the summary judgment evidence presented by Swanson, the Folinos attacked Swanson and his counsel. JA00624-645. The Folinos even disregarded the *Wood* summary judgment standard, instead arguing that the "slightest doubt" standard applied, citing *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258 (1981). JA000627.

Additionally, the Folinos perpetrated untruths and specious claims. They misrepresented that Swanson knew that there was mold. *See* Discussion, *supra* at 42-46. They misrepresented that Swanson never disclosed the November 7, 2017, leak. RSA000105, JA001798-1801. They based their mold argument on speculation alone. RSA000113-115. JA001864-1865. These unjustified actions unreasonably delayed the proceedings and forced Swanson to incur significant and unnecessary costs.

In contrast, Swanson provided ample proof justifying the court's

attorney's fees award in the amount of $38,447.00 under NRCP 68 and NRS 18.010(2)(b).

F. The District Court Properly Awarded Swanson Costs Pursuant to NRS 18.020

An award of costs under NRS 18.020 is "mandatory and not subject to the court's discretion." *Day v. West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985). NRS 18.020 provides: "(c)osts must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." (Emphasis added).

Here, Swanson itemized and justified his hard-costs. JA001947-001950. The Folinos questioned only two items: costs related to the mediation and runners' costs. JA001952-2042, JA002340. The district court properly determined the parties engaged in mediation to avoid going through an extensive, and expensive, litigation process. JA003749.

The district court also recognized that "law firms employing runners is an impractical overhead expense in today's economy." JA002340. Therefore, the court found Swanson's outside runners' costs to be reasonable. JA002340-2341, JA003749.

Pursuant to NRS 18.020, the court did not abuse its discretion and properly awarded Swanson $5,840.41 in costs. JA002341.

CONCLUSION & RELIEF REQUESTED

The Folinos failed to present any facts showing Swanson concealed defects in violation of NRS Chapter 113. Similarly, the record is devoid of facts showing Swanson made any fraudulent misrepresentations.

Swanson presented undisputed evidence that the February 2017 Uponor leak was repaired. Indeed, the Folinos attached exhibits to their pleadings which documented the repair. The Folinos' claim that Swanson concealed the Uponor leak failed from the start.

When Swanson disclosed a similar Uponor leak which occurred just before closing, the Folinos threatened to exercise their right to rescind. But they forged ahead and closed on the property before the problem was resolved. Under the law, the Folinos closed on the Property "without recourse."

When comprehensive discovery did not reveal any facts showing the February 2017 leak had not been repaired, the Folinos modified their claims, identifying post-construction issues from 2015. The Folinos did not produce any evidence of any damage. But Swanson presented

undisputed evidence that the 2015 leaks had nothing to do with the Uponor system. Swanson also presented undisputed evidence that each issue was resolved.

The district court carefully considered the Folinos original claims. The court also carefully considered the Folinos' modified claims when facts and the law rendered their original claims meritless. The court gave the Folinos every opportunity to present facts to the court which supported their case. But the Folinos failed. The court properly granted summary judgment.

The district court also properly awarded Swanson attorney's fees and costs. The record establishes that Swanson presented the Folinos with a reasonable offer of judgment, and that the Folinos rejection of the offer was grossly unreasonable. In addition, the record shows that the Folinos acted vexatiously in pursing their claims. The court awarded attorney's fees in a detailed order after analyzing the *Beattie* and *Brunzell* factors. Then, the court properly determined that the contested costs were warranted under NRS 18.020.

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The district court did not err in granting summary judgment and awarding fees and costs. Swanson respectfully requests that this Court affirm the district court's rulings. In addition, Swanson requests that this Court rule that attorney's fees relating to the Folinos' appeal are appropriate.

Dated this 20th day of May 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using MSWord in Century type style, 14 point font, for the principal text of the brief, and Times New Roman type style, 14 point font, for footnotes and quoted statutory sections.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more, and contains 13,851 words.

Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the

Dated this 20th day of May 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May 2021, the foregoing RESPONDENTS' ANSWERING BRIEF was electronically submitted for filing and transmitted through the Notice of Electronic Filing to those parties listed on the Court's Master Service List:

Rusty Graf, Esq.

Jeffrey Galliher, Esq.

Dated this 20th day of May 2021.

/s/ CHRISTOPHER M. YOUNG, ESQ.
An employee of Christopher M. Young, PC