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Elizabeth A. Brown
Clerk of Supreme Court

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Attorney for Plaintiffs/Appellants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Plaintiff,

v.

NOTICE OF APPEAL

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

Defendants.

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

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

5 Dated this 17th day of September 2020.

BLACK & WADHAMS

RUSTY GRAF, ESQ.

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Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 17th day of September 2020, I caused the above and foregoing document entitled **NOTICE OF APPEAL** to be served as follows:

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

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

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

☐ hand delivered

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

Christopher M. Young, Esq.

Nevada Bar No. 7961

Jay T. Hopkins, Esq.

Nevada Bar No. 3223

Christopher M. Young, PC

2640 Professional Court, #200

Las Vegas, Nevada 89128

Attorneys for Defendants

Jeffrey L. Galliher, Esq.

Galliher Legal, P.C.

Nevada Bar No. 8078

1850 E. Sahara Ave., #107

Las Vegas, NV 89104

Attorneys for Defendants

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


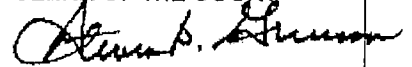

An Employee of Black & Wadams

EXHIBIT 1



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Attorneys for Defendants

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff(s),

v.

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

Defendant(s).

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 18th
day of August, 2020.

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

2
3 Dated this 24th day of August 2020.

4
5
6 GALLIHER LEGAL P.C.

7 /s/ Jeffrey L. Galliher
8 Jeffrey Galliher, Esq.
9 Nevada Bar No. 8078
10 1850 E. Sahara Ave., Suite 107
11 Las Vegas, NV 89104
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THE GALLIHER LAW FIRM
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CERTIFICATE OF E-SERVICE

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

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

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EXHIBIT 1

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Heather J. Smith
CLERK OF THE COURT

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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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FOLINO, an individual,

Plaintiff(s),

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LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Further, the Court finds that the Defendants offer was made in a genuine effort to settle the
21 case. To that time, and even now, Plaintiffs have never asserted that they had suffered any measurable
22 special damages. All available information suggests that just as had been the case when Defendants
23 owned the Property, all repairs to the plumbing system were handled under warranty by either
24 Rakeman Plumbing or the piping manufacturer, Uponor. At the time of the offer of judgment,
25 Plaintiffs had already been advised in open court of the Court's inclination to grant Defendants'
26 motion to summarily dispose of the case because the Plaintiffs could not present any evidence to rebut
27
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1 the Defendants' facts supporting summary judgment. Nevertheless, in a genuine attempt to resolve
2 the case in the very spirit of NRCP 68, Defendant's offered the substantial amount of \$150,000.00 at
3 a time when Plaintiffs had yet to expend significant amounts of time and money on what ultimately
4 turned out to be futile discovery efforts.

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

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

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

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

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

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

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

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

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

Nev. Rev. Stat. § 113.150(2).

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

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

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

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):
13

- 14 ▪ The qualities of the advocate: his ability, training, education, experience, professional
15 standing and skill;
- 16 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
17 skill required, the responsibility imposed and the prominence and character of the
18 parties where they affect the importance of the litigation;
- 19 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
20 work; and
- 21 ▪ The result: whether the attorney was successful and what benefits were derived.
22

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

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

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

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

20
21 None of that discovery changed the facts which had already been established: the February
22 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
23 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
24 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
25 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
26 which proved to be fruitless.
27
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1 Conversely, Defendants' conduct since the offer of judgment has been almost completely
2 reactive in nature, meaning that the work done by defense counsel was directly necessitated by the
3 actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what
4 Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the
5 significant sum of \$150,000.

6
7 Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the
8 nature of the work (real estate litigation) and the experience of counsel involved.

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

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

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

19
20 NRS 18.010(2)(b) provides as follows:

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

23 ...

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

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

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

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

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

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

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

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

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

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

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.
26

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

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

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

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

13 IV.

14 ORDER

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

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

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

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

18 BLACK AND LOBELLO

19 refused to sign

20 Rusty J. Graf, Esq.
Nevada Bar No. 6322
21 Attorney for Plaintiffs

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 8/18/2020

15 Jerri Hunsaker

jhunsaker@blacklobello.law

16 Mariella Dumbrique

mdumbrique@blacklobello.law

17 Christopher Young

mhyde@cotomlaw.com

18 Diane Meeter

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19 J. Graf

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20 Christopher Young

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21 Jeffrey Galliher

jgalliher@galliherlawfirm.com

22 Jeffrey Galliher

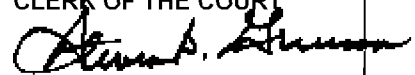
jgalliher@galliherlawfirm.com

23 Jay Hopkins

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24 Kimalee Goldstein

kgoldstein@galliherlawfirm.com
25
26
27
28



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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

12 Appellants,

13 v.

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

20 Respondents.

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

APPELLANTS' CASE APPEAL
STATEMENT

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

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CASE APPEAL STATEMENT**

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

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

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

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

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

12 Plaintiff/Appellant:

13 Nicole Folino

14 Counsel for the Appellant:

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

18 Plaintiff/Appellant:

19 Joseph Folino

20 Counsel for the Appellant:

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

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

Defendant/Respondent:

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28

Todd Swanson

Counsel for the Respondent:

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

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

Defendant/Respondent:

Todd Swanson as Trustee of the Shiraz Trust

Counsel for the Respondent:

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

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

Defendant/Respondent:

Lyons Development, LLC.

Counsel for the Respondent:

Christopher M. Young, Esq.
Nevada Bar No. 7961

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

Jeffrey L. Galliher, Esq.
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1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondent

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

N/A

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

N/A

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

N/A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7
8 **Pending Appeal:**

9 **1. Case No. 81252**

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

12 Appellants,

13 v.

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

18 Respondents.

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

20 N/A

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28

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

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

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

5
6 **BLACK & WADHAMS**

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

Pursuant to NRCP 5(b), I certify that I am an employee of Black & Wadhams and that on the 12th day of September 2020, I caused the above and foregoing document entitled **APPELLANTS' CASE APPEAL STATEMENT** to be served as follows:

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

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

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

☐ hand delivered.

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

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

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



An Employee of Black & Wadhams

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

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

§
§
§
§
§
§

Location: **Department 24**
 Judicial Officer: **Crockett, Jim**
 Filed on: **10/09/2018**
 Cross-Reference Case Number: **A782494**
 Supreme Court No.: **81252**

CASE INFORMATION**Statistical Closures**

08/18/2020 Summary Judgment
 05/11/2020 Motion to Dismiss by the Defendant(s)

Case Type: **Other Tort**

Case Status: **08/18/2020 Closed**


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


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

PARTY INFORMATION

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

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

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

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

CASE SUMMARY

CASE NO. A-18-782494-C

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

CASE SUMMARY

CASE NO. A-18-782494-C

Countermotion to Amend the Complaint

04/18/2019



Notice of Order

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

04/18/2019



First Amended Complaint

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

05/20/2019



Motion to Dismiss

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

05/21/2019



Clerk's Notice of Hearing

Notice of Hearing

06/05/2019



Opposition

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

07/03/2019



Reply to Opposition

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

08/14/2019



Order

Order

08/14/2019



Notice of Entry of Order

Notice of Entry of Order

09/03/2019



Second Amended Complaint

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

09/24/2019



Motion to Dismiss

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

09/25/2019



Clerk's Notice of Hearing

Notice of Hearing

10/03/2019



Opposition to Motion to Dismiss

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

10/31/2019



Reply to Opposition

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

11/20/2019



Early Case Conference List of Witnesses & Production of Docs

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

CASE SUMMARY

CASE NO. A-18-782494-C

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

CASE SUMMARY

CASE NO. A-18-782494-C

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

CASE SUMMARY

CASE NO. A-18-782494-C

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

CASE SUMMARY

CASE NO. A-18-782494-C

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

02/13/2020



Supplemental Brief

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

02/13/2020



Supplemental List of Witnesses and Production of Documents

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

02/27/2020



Reply in Support

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

03/10/2020



Acceptance of Service

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

04/22/2020



Memorandum of Costs and Disbursements

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

04/22/2020



Motion for Fees

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

04/23/2020



Clerk's Notice of Hearing

Party: Trustee Swanson, Todd
Notice of Hearing

04/24/2020



Motion to Retax

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

04/27/2020



Clerk's Notice of Hearing

Notice of Hearing

05/11/2020



Order

ORDER GRANTING DISMISSAL

05/11/2020



Opposition to Motion

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

05/13/2020



Errata

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

05/13/2020



Notice of Entry of Order

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

CASE SUMMARY

CASE NO. A-18-782494-C

Notice of Entry of Order

05/26/2020



Notice of Appeal

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

Notice of Appeal

05/26/2020



Case Appeal Statement

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

Case Appeal Statement

06/03/2020



Reply in Support

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

Defendants' Reply in Support of Motion for Attorney's Fees

06/04/2020



Stipulation and Order

STIPULATION AND ORDER TO CONTINUE THE HEARING FOR 1. PLAINTIFFS MOTION TO RETAX COSTS AND 2. DEFENDANTS MOTION FOR ATTORNEY FEES AND COSTS

06/04/2020



Stipulation and Order

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

Stipulation and Order to Continue the Hearing for Plaintiffs' Motion to Retax Costs and Defendants' Motion for Attorney's Fees & Costs

06/04/2020



Notice of Entry of Order

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

Notice of Entry of Order

06/18/2020



Errata

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

Errata to Case Appeal Statement

08/18/2020



Order

08/21/2020



Notice of Change of Address

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

Notice of Name Change of Law Firm

08/24/2020



Notice of Entry

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

Notice of Entry of Order

09/17/2020



Notice of Appeal

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

Notice of Appeal

09/17/2020



Case Appeal Statement

Appellants' Case Appeal Statement

09/17/2020



Motion




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

Motion for Stay of Execution of Judgment on an Order Shortening Time

DISPOSITIONS

CASE SUMMARY

CASE NO. A-18-782494-C

08/14/2019	<p>Order of Dismissal (Judicial Officer: Crockett, Jim) Debtors: Joseph Folino (Plaintiff), Nicole Folino (Plaintiff) Creditors: Todd Swanson (Defendant), Lyons Development, LLC (Defendant), Shiraz Trust (Defendant) Judgment: 08/14/2019, Docketed: 08/14/2019 Comment: Certain Causes</p>
05/11/2020	<p>Order of Dismissal With Prejudice (Judicial Officer: Crockett, Jim) Debtors: Joseph Folino (Plaintiff), Nicole Folino (Plaintiff) Creditors: Todd Swanson (Defendant), Lyons Development, LLC (Defendant), Shiraz Trust (Defendant) Judgment: 05/11/2020, Docketed: 05/12/2020</p>
08/18/2020	<p>Judgment (Judicial Officer: Crockett, Jim) Debtors: Joseph Folino (Plaintiff), Nicole Folino (Plaintiff) Creditors: Todd Swanson (Defendant, Trustee), Lyons Development, LLC (Defendant), Shiraz Trust (Defendant), Todd Swanson Trustee of the Shiraz Trust (Defendant) Judgment: 08/18/2020, Docketed: 08/18/2020 Total Judgment: 45,287.41</p>
	<p>HEARINGS</p>
04/09/2019	<p>Motion to Dismiss (9:00 AM) (Judicial Officer: Crockett, Jim) <i>Defendant's Motion to Dismiss and/or Motion for More Definite Statement</i></p>
04/09/2019	<p>Opposition and Countermotion (9:00 AM) (Judicial Officer: Crockett, Jim) <i>Plaintiffs' Opposition to Defendant's Motion to Dismiss and/or Motion for More Definite Statement; Counter Motion to Amend the Complaint</i> Granted in Part;</p>
04/09/2019	<p> All Pending Motions (9:00 AM) (Judicial Officer: Crockett, Jim) Matter Heard; Journal Entry Details: <i>COURT stated FINDINGS and ORDERED, Plaintiff's Counter Motion to Amend the Complaint GRANTED and Defendant thirty (30) days to file an answer or responsive pleading from the date they are served with the Amended Complaint. Upon Mr. Graf's inquiry, Court advised he could e-serve the opposition.;</i></p>
07/18/2019	<p> Motion to Dismiss (9:00 AM) (Judicial Officer: Crockett, Jim) <i>Defendant's Motion to Dismiss Plaintiff's First Amended Complaint</i> Granted in Part; Journal Entry Details: <i>Argument for dismissal by Mr. Young. Opposition by Mr. Graf. Argument regarding plumbing issues. COURT ORDERED, claims 2,3,5,6,7 DISMISSED; claims 1 and 4 remain. COURT INSTRUCTED counsel to file an Second Amended Complaint with the surviving claims.;</i></p>
11/07/2019	<p> Motion to Dismiss (9:00 AM) (Judicial Officer: Crockett, Jim) 11/07/2019, 03/03/2020, 04/07/2020 <i>Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint</i> Matter Continued; Matter Continued; Granted; Journal Entry Details: <i>Mr. Graf argued mold and leaks and that Dr. Swanson had knowledge of the defects. Opposition by Mr. Galier. Argument that the Defendant was no longer the owner at the time of the results. Court finds that Plaintiff was aware of the leaks and elected to close escrow. COURT ORDERED, motion GRANTED as a Summary Judgment. Matter SET for status check for filing of the order 5/5/20 9:00am.;</i> Matter Continued; Matter Continued; Granted;</p>

CASE SUMMARY

CASE NO. A-18-782494-C

Journal Entry Details:

COURT NOTED, there was a Motion to Dismiss heard back in November; at that time the Court stated its inclination to the Defendants Motion to Dismiss Plaintiffs second amended Complaint noting that an affidavit was required seeking 56(d) relief, further there were two questions of fact, the Court was inclined to GRANT the Motion for Summary Judgment and to DENY the inappropriate filed counter motion for sanctions. Court further stated there is no affidavit to contradict the affidavit of Mr. Holly, Plaintiff was to demonstrate a genuine dispute as a material issue of fact. Mr. Graf stated he did have a thumb drive dropped off with all of the documents attached. The documents that are attached are also referenced in the Supplemental Brief. Mr. Graf further stated included in those documents is the deposition transcript of Mr. Holly and deposition transcript of Mr. Gerber. Following further arguments of counsel. COURT ORDERED, MATTER CONTINUED 4-07-20 9:00 AM DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT;

Matter Continued;

Matter Continued;

Granted;

Journal Entry Details:

Court stated its inclination as to the Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint noting an affidavit was required seeking 56 (d) relief. Further, there were two questions of fact. Moreover, the Court was inclined to grant the motion for summary judgment and to deny to inappropriately filed counter motion for sanctions. Arguments by counsel. Colloquy regarding affidavits, discovery, and conducting depositions. Court GRANTED counsel ninety (90) days to demonstrate a genuine issue of material fact by February 6th; Defendant's Reply February 20th. COURT ORDERED, matter CONTINUED. Counsel to adhere to compliance with the rules. Additionally, the parties could conduct their 16.1 even in advance of their answers or bring the answers to the 16.1. Moreover, Defendants need to file supplemental affidavits as to the two technicians. CONTINUED TO: 02/27/20 9:00 AM ;

04/29/2020



Status Check (3:00 AM) (Judicial Officer: Crockett, Jim)

Matter Continued;

Journal Entry Details:

COURT NOTES as of 4/28/2020 the Order Granting Summary Judgement has not been filed and ORDERED, matter CONTINUED. COURT FURTHER ORDERED, matters SET 6/9/2020 CONTINUED to 6/11/2020. CONTINUED TO: 6/11/2020 9:00 AM... MOTION TO RETAX... MOTION FOR FEES CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 4/29/2020;

06/25/2020

Motion for Fees (9:00 AM) (Judicial Officer: Crockett, Jim)

Events: 04/22/2020 Motion for Fees

Defendants' Motion for Fees and Costs

Granted;

06/25/2020

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

Plaintiff's Motion to Retax Costs

Denied;

06/25/2020



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

Matter Heard;

Journal Entry Details:

DEFENDANTS' MOTION FOR FEES AND COSTS ... PLAINTIFF'S MOTION TO RETAX COSTS COURT stated its findings and ORDERED, Defendants' Motion for Fees and Costs GRANTED; \$39,447.00 in fees to be awarded to Defendant. Defendant to submit an Order which includes the findings of facts and the conclusions of law within fourteen days. COURT FURTHER ORDERED, Plaintiff's Motion to Retax Costs DENIED. Court advised Defendant's counsel to include both Motions in a single Order. COURT ORDERED, status check SET for the filing of the Order. 7/23/2020 STATUS CHECK: FILING OF ORDER (CHAMBERS) ;

07/23/2020



Status Check (3:00 AM) (Judicial Officer: Crockett, Jim)

Status Check: Filing of Order (6/25)

Matter Continued;

Vacated Per 8/18/20 Ds Order

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

Journal Entry Details:

STATUS CHECK: FILING OF ORDER COURT NOTED the Order from the 6/25 Motion had not been filed. COURT ORDERED, matter CONTINUED. COURT FURTHER NOTED if the Order is not filed the Court will consider an Order to Show Cause and imposing sanctions. CONTINUED TO: 8/20/2020 9:00 AM CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 7/30/2020;

10/01/2020

Motion for Stay of Execution (9:00 AM) (Judicial Officer: Crockett, Jim)
Motion for Stay of Execution of Judgement on an Order Shortening Time

DATE**FINANCIAL INFORMATION****Plaintiff** Folino, Joseph

Total Charges

348.00

Total Payments and Credits

348.00

Balance Due as of 9/21/2020**0.00****Trustee** Swanson, Todd

Total Charges

283.00

Total Payments and Credits

283.00

Balance Due as of 9/21/2020**0.00****Plaintiff** Folino, Joseph

Appeal Bond Balance as of 9/21/2020

500.00

DISTRICT COURT CIVIL COVER SHEET

A-18-782494-C

County, Nevada

Case No. _____

Department 24

(Assigned by Clerk's Office)

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

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

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

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

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

October 9, 2018

Date

Signature of initiating party or representative

See other side for family-related case filings.

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Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

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

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

7
8 After a brief stipulated extension Plaintiff's filed their supplemental brief on February 13,
9 2020. Along with the brief Plaintiffs served more than 5,400 pages of documents upon the Defendants.

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

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

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

18 **III.**

19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
24
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When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith" was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS Chapter 113 and *Nelson*, their claims failed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nev. Rev. Stat. § 113.150(2).

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

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

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

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):
13

- 14 ■ The qualities of the advocate: his ability, training, education, experience, professional
15 standing and skill;
- 16 ■ The character of the work to be done: its difficulty, intricacy, importance, the time and
17 skill required, the responsibility imposed and the prominence and character of the
18 parties where they affect the importance of the litigation;
- 19 ■ The work actually performed by the lawyer; the skill, time and attention given to the
20 work; and
- 21 ■ The result: whether the attorney was successful and what benefits were derived.
22

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 **IV.**

14 **ORDER**

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

18 ///

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

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

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

18 BLACK AND LOBELLO

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 8/18/2020

15 Jerri Hunsaker

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16 Mariella Dumbrique

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17 Christopher Young

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18 Diane Meeter

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23 Jay Hopkins

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24 Kimalee Goldstein

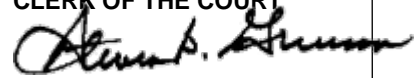
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25

26

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28



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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 18th
day of August, 2020.

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

2
3 Dated this 24th day of August 2020.

4
5
6 GALLIHER LEGAL P.C.

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

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THE GALLIHER LAW FIRM
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CERTIFICATE OF E-SERVICE

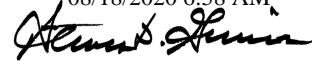
Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 24th of August I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

Rusty Graf, Esq.
Shannon M. Wilson, Esq.
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
rgraf@blacklobello.law
swilson@blacklobello.law

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

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EXHIBIT 1



CLERK OF THE COURT

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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

24 On December 11, 2019 Defendants served an offer of judgment upon the Plaintiffs in the
25 amount of \$150,000.00 (one-hundred, fifty thousand dollars) inclusive of fees, costs and interest. The
26 offer of judgment was not accepted and ultimately expired by operation of time.
27
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1 After the offer of judgment expired, Plaintiffs conducted substantial discovery in a futile effort
2 to uncover a material issue of fact to rebut the Defendants' facts supporting summary judgment. That
3 discovery included service of Interrogatories, Requests for Admissions and Requests for Production
4 of Documents on all Defendants. Additionally, Plaintiff noticed and took the depositions of Dr.
5 Swanson (twice), his assistant (Nikki Whitfield), two employees of Rakeman Plumbing (Aaron
6 Hawley and William Gerber) and two of the selling agent's team (Ivan Sher and Kelly Contenta).
7

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

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

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

13 On April 7, 2020, this Court granted summary judgment in favor of the Defendants. On May
14 11, 2020, this court issued detailed findings of fact and conclusions of law in support of its order
15 granting summary judgment in favor of the Defendants. Notice of Entry of the Order was filed on
16 May 13, 2020.
17

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

20 This Court finds that Defendants are entitled to an award of attorney's fees from the date of
21 the Defendants' offer of judgment, December 11, 2019 in the amount of \$39,447.00. Further, this
22 court finds that an award of costs is warranted in the amount of \$5,840.41.
23

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nev. Rev. Stat. § 113.150(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
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1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

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

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

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

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

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

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

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

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

13 **IV.**

14 **ORDER**

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

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26 ///

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

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

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

17 BLACK AND LOBELLO

18 refused to sign

19 Rusty J. Graf, Esq.
Nevada Bar No. 6322
20 Attorney for Plaintiffs

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 8/18/2020

15 Jerri Hunsaker

jhunsaker@blacklobello.law

16 Mariella Dumbrique

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17 Christopher Young

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18 Diane Meeter

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19 J. Graf

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23 Jay Hopkins

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24 Kimalee Goldstein

kgoldstein@galliherlawfirm.com

25

26

27

28

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 09, 2019

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

April 09, 2019

9:00 AM

All Pending Motions

HEARD BY: Crockett, Jim

COURTROOM: Phoenix Building 11th Floor
116

COURT CLERK: Natalie Ortega

RECORDER:

REPORTER: Bill Nelson

PARTIES

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

JOURNAL ENTRIES

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

July 18, 2019

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

July 18, 2019 9:00 AM Motion to Dismiss

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

COURT CLERK:
Alice Jacobson

RECORDER:

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

November 07, 2019

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

November 07, 2019 9:00 AM Motion to Dismiss

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

COURT CLERK: Nylasia Packer
Natalie Ortega

RECORDER:

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

March 03, 2020

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

March 03, 2020 9:00 AM Motion to Dismiss

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

COURT CLERK: Phyllis Irby

RECORDER: Gail Reiger

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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

COURT ORDERED, MATTER CONTINUED

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 07, 2020

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

April 07, 2020 9:00 AM Motion to Dismiss

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

COURT CLERK: Alice Jacobson

RECORDER: Nancy Maldonado

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 29, 2020

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

April 29, 2020 3:00 AM Status Check

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

COURT CLERK: Rem Lord

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

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

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

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

June 25, 2020

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

June 25, 2020

9:00 AM

All Pending Motions

HEARD BY: Crockett, Jim

COURTROOM: Phoenix Building 11th Floor
116

COURT CLERK: Rem Lord

RECORDER: Nancy Maldonado

REPORTER:

PARTIES

PRESENT: Galliher, Jeffrey L. Attorney
 Graf, J. Rusty Attorney

JOURNAL ENTRIES

- DEFENDANTS' MOTION FOR FEES AND COSTS ... PLAINTIFF'S MOTION TO RETAX COSTS

COURT stated its findings and ORDERED, Defendants' Motion for Fees and Costs GRANTED; \$39,447.00 in fees to be awarded to Defendant. Defendant to submit an Order which includes the findings of facts and the conclusions of law within fourteen days. COURT FURTHER ORDERED, Plaintiff's Motion to Retax Costs DENIED. Court advised Defendant's counsel to include both Motions in a single Order. COURT ORDERED, status check SET for the filing of the Order.

7/23/2020 STATUS CHECK: FILING OF ORDER (CHAMBERS)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

July 23, 2020

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

July 23, 2020 3:00 AM Status Check

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

COURT CLERK: Rem Lord

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- STATUS CHECK: FILING OF ORDER

COURT NOTED the Order from the 6/25 Motion had not been filed. COURT ORDERED, matter CONTINUED. COURT FURTHER NOTED if the Order is not filed the Court will consider an Order to Show Cause and imposing sanctions.

CONTINUED TO: 8/20/2020 9:00 AM

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 7/30/2020



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

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

DATE: September 21, 2020
CASE: A-18-782494-C

RE CASE: JOSEPH FOLINO; NICOLE FOLINO vs. TODD SWANSON; TODD SWANSON, TRUSTEE OF THE SHIRAZ TRUST

NOTICE OF APPEAL FILED: September 17, 2020

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

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

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
 - *Previously paid Bonds are not transferable between appeals without an order of the court.*
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

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

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

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

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

Certification of Copy

State of Nevada }
County of Clark } SS:

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

NOTICE OF APPEAL; APPELLANTS' CASE APPEAL STATEMENT;
DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER REGARDING
DEFENDANTS' MOTION FOR ATTORNEYS' FEES, VERIFIED MEMORANDUM OF COSTS
AND DISBURSEMENTS AND PLAINTIFFS' MOTION TO RETAX; NOTICE OF ENTRY OF
ORDER; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

JOSEPH FOLINO; NICOLE FOLINO,

Plaintiff(s),

vs.

TODD SWANSON; TODD SWANSON,
TRUSTEE OF THE SHIRAZ TRUST,

Defendant(s),

Case No: A-18-782494-C

Dept No: XXIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 21 day of September 2020.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk