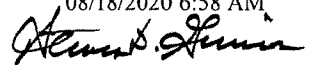


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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

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

v.

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

Defendant(s).

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The Court finds that the Defendants attorney's fees and costs in defending this case, including costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees 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 counter-motion 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's undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
24
25
26
27
28

1 When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith"
2 was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but
3 had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to
4 defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS
5 Chapter 113 and *Nelson*, their claims failed.
6

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

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

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

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

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

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

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

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

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.

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

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

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

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

13 IV.

14 ORDER

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

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

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 Reviewed for form and content:
Jim Crockett
District Court Judge

17 BLACK AND LOBELLO

18 refused to sign

19 Rusty J. Graf, Esq.
Nevada Bar No. 6322
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

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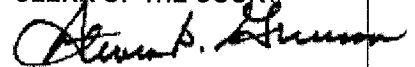
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Attorneys for Defendants

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.

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

Dated this 24th day of August 2020.

GALLIHER LEGAL P.C.

/s/ Jeffrey L. Galliher
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CERTIFICATE OF E-SERVICE

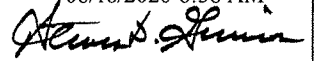
Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 24th of August I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

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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),

CASE NO.: A-18-782494-C
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v.

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

Defendant(s).

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

23 The Court finds that the Defendants attorney's fees and costs in defending this case, including
24 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
25 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
26 satisfies the *Brunzell* and *Beattie* factors.
27
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's undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
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1 When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith"
2 was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but
3 had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to
4 defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS
5 Chapter 113 and *Nelson*, their claims failed.
6

7 Approximately two weeks later, prior to the extensive discovery which ultimately did not yield
8 a disputed issue of material fact that could defeat the Defendants' motion for summary judgment, the
9 Defendants presented the Plaintiffs with their offer of judgment. This Court finds that, under the first
10 *Beattie* factor, the Plaintiffs' claims were not brought in good faith.
11

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

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

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

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

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

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

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

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.
28

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.

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 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

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

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

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

IV.

ORDER

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

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

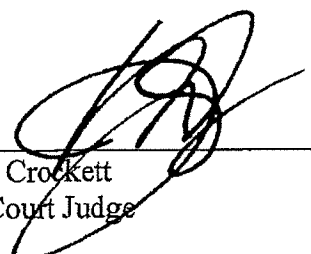
1 It is further ORDERED that this award shall be reduced to a JUDGMENT against Plaintiffs
2 in the total amount of \$45,287.41.

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

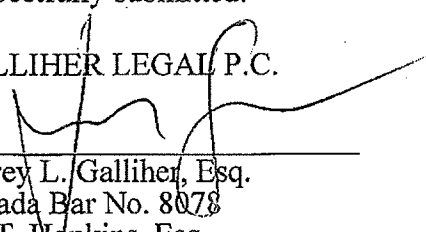
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6
7 Hon. Jim Crockett
District Court Judge



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
Reviewed for form and content:
Jim Crockett
District Court Judge

BLACK AND LOBELLO

16 refused to sign

17 Rusty J. Graf, Esq.
Nevada Bar No. 6322
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

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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

OFFER OF JUDGMENT

TO: JOSEPH FOLINO and NICOLE FOLINO, Plaintiffs

TO: RUSTY J. GRAF, ESQ., Attorney for Plaintiffs

PLEASE TAKE NOTICE that pursuant to the provisions of NRCP 68 and Chapter 17
of the Nevada Revised Statutes, Defendants, TODD SWANSON, individually, TODD

1 SWANSON as Trustee of the SHIRAZ TRUST, the SHIRAZ TRUST, and LYON
2 DEVELOPMENT, LLC, by and through their attorneys of record, CHRISTOPHER M.
3 YOUNG, ESQ., JAY T. HOPKINS, ESQ. and JEFFREY L. GALLIHER, ESQ., hereby offers
4 to have judgment taken against them in the total sum of ONE HUNDRED FIFTY
5 THOUSAND DOLLARS AND ZERO CENTS (\$150,000.00). This offer is inclusive of costs,
6 fees and interest.
7

8 DATED this 11th day of December, 2019.
9

10
11 */s/ Jeffrey L. Galliher*

12 CHRISTOPHER M. YOUNG, ESQ.
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26 *Attorneys for Defendants*
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