

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Electronically Filed
Mar 09 2021 04:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

S.C. DOCKET NO: 81832

District Court Case No: A-18-782494-C

An Appeal from an Order granting final judgment dated May 11, 2020 and a
special Order entered after final judgment dated August 18, 2020, Eighth Judicial
District Court, Clark County, Nevada; Jim Crockett, Judge.

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellants are individuals, therefore there are no parent corporations or publicly held companies that own 10% or more of the parties' stock.

Rusty Graf, Esq. has appeared for the Appellants in proceedings in the district court and will appear for Appellants before this Court. Rusty Graf, Esq. has appeared for the Appellants in proceedings in the district court.

Dated this 9th day of March 2021.

BLACK & WADHAMS

A handwritten signature in black ink, appearing to read 'Rusty Graf', written over a horizontal line.

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**PRELIMINARY STATEMENT REGARDING REFERENCES TO THE
RECORD ON APPEAL**

References to matters in the record on appeal will be in the form VV PP where “VV” represents the volume number of the Appendix and “PP” represents the page number within that volume of the Joint Appendix.

JURISDICTIONAL STATEMENT

This is a consolidated appeal of a final judgment, pursuant to NRAP 3A(b)(1), and of a special order entered after that final judgment, pursuant to NRAP 3A(b)(8). The Order resulting in the final judgment being appealed is the Order filed May 11, 2020, granting Respondents’ Motion to Dismiss Appellants’ Second Amended Complaint, which was based on the district court’s application of summary judgment standards “because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the summary judgment standards in NRCP 56.” *See Appendix Vol. X, JA002045-JA002064*. The appeal from that Order was timely filed on March 26, 2020. *See Appendix Vol. XI, JA002235-JA002237*. The special order being appealed is the Order filed August 18, 2020, granting Respondents’ Motion for Fees and Costs. *See Appendix Vol. XII, JA002347-JA002368*. The appeal from that Order was timely filed on September 17, 2020. *See Appendix Vol. XII, JA002381-JA002406*.

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ROUTING STATEMENT

Under NRAP 17(a)(11), the Nevada Supreme Court retains “Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law”. *See NRAP 17(a)(11)*. In the present case, Appellants contend that this matter is presumptively retained by the Nevada Supreme Court because the issues on appeal concern whether the negation of the duty to disclose defects on a Seller’s Real Property Disclosure Form due to the repair of those defects means that the seller’s false representations, that such defects never existed on the SRPD, cannot form the basis for a claim of Intentional Misrepresentation.

In the alternative, there can be an Intentional Misrepresentation by omission, given the wording of the current SRPD. The Nevada Supreme Court retains “Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.” *See NRAP 17(a)(12)*. The Respondents are trying to use the cover of the holding of Nelson v. Heer to avoid liability for misrepresentations either by direct statement or by omission. This is at the very least an inconsistency in the application of this published decision to the facts of this underlying case.

STATEMENT OF THE ISSUES

1. The district court erred by misapplying the holding of *Nelson v. Heer* to the affirmative false representations made by Respondents' in their Seller's Real Property Disclosure Form.

2. The district court erred by granting Respondents' Motion to Dismiss/Motion for Summary Judgment, and thereby abused its discretion by granting Respondents' Motion for Attorneys' Fees and Costs based on the clearly erroneous factual determinations: (1) that Appellants' claims were only related to the February 2017 leak; (2) that Appellants' Intentional Misrepresentation claim was only related to allegations of concealment by Respondents', rather than their affirmative false representations and/or omissions; (3) that the affidavit of Aaron Hawley, which allegedly provided support for Respondents' summary judgment motion(s), was disproved by his deposition testimony presented to the district court, thereby negating its application to *Nelson v. Heer*; and (4) that the unrepaired and undisclosed basement ceiling leak was not related to Appellants' claims and clearly erroneously ignored by the district court.

3. The district court erred by failing to analyze whether numerous leaks at the Subject Property provided Respondents with constructive notice of "systemic" defects in the Subject Property's plumbing system and/or of the existence of fungus

and/or mold in the Subject Property, which would have been information requested by the SRPD.

4. The district court erred by granting Respondents' Motion for Attorney's Fees and Costs based on its misapplication of Nelson v. Heer and subsequent flawed analysis of both the Beattie and Brunzell factors and of the applicability of NRS 18.010(2)(b).

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STATEMENT OF THE CASE

The underlying matter was a matter asserting tort claims and violations of NRS 113 as its causes of action. The claims all arising from the purchase and sale of a home and the Appellants' discovery of systemic plumbing issues after the close of the sale. *See Appendix Vol. III, JA000526-JA000595*. The Appeal's underlying action was initiated by Appellants' Complaint asserting claims of (1) Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010 et seq.; (4) Violation of NRS 113; (5) Civil RICO Claim; and (6) Respondeat Superior, which Complaint was filed by on October 9, 2018. *See Appendix Vol. II, JA000249-JA000325*. On February 4, 2019, the Respondents filed a Motion to Dismiss and/or Motion for More Definite Statement. *See Appendix Vol. II, JA000337-JA000349*. Appellants filed their Opposition which also asserted a Countermotion to file an Amended Complaint on February 13, 2021. *See Appendix Vol. II, JA000356-JA000368*. The hearing took place on April 9, 2019, and an Order was entered granting in part and denying in part Respondents' Motion, while granting Appellants' Countermotion to Amend on April 18, 2019. *See Appendix Vol. III, JA000462-JA000465*.

Appellants subsequently filed their First Amended Complaint on April 18, 2019. *See Appendix Vol. II-III, JA000369-JA000446*. Respondents filed a Motion to Dismiss the First Amended Complaint on May 20, 2019, and Appellants filed their

Opposition on June 5, 2019. *See Appendix Vol. III, JA000466-JA000486; see also See Appendix Vol. III, JA000489-JA000501.* A hearing was held by the district court on July 18, 2019, and the district court entered an Order on August 14, 2019, which granted in part and denied in part Respondents' Motion and dismissed all of Appellants' claims except Fraud/Intentional Misrepresentation and Violation of NRS 113. *See Appendix Vol. III, JA000512-JA000525.*

Appellants then filed their Second Amended Complaint with the surviving causes of action on September 3, 2019. *See Appendix Vol. III, JA000526-JA000595.* Respondents filed a Motion to Dismiss the Second Amended Complaint on September 24, 2019, and Appellants filed their Opposition on October 3, 2019. *See Appendix Vol. III, JA000596-JA000621; see also Appendix Vol. IV, JA000624-JA000645.* A hearing was then held on November 7, 2019, wherein the district court stated: (1) that it would analyze the Respondents' Motion to Dismiss the Second Amended Complaint using a Motion for Summary Judgment standard because Respondents' Motion contained matters outside the pleadings; and (2) that the matter would be continued so as to allow for additional discovery and additional briefing by the parties as requested by the Appellants in their Opposition to Respondents' Motion. *See Appendix Vol. VIII, JA001583-JA00158747.*

Appellants filed their Supplemental Brief in Opposition on February 13, 2020. *See Appendix Vol. VIII, JA001611-JA001634.* A hearing was held on April 7, 2020,

and the district court entered an Order granting Respondents' Motion to Dismiss on May 11, 2020. *See Appendix Vol. X, JA002045-JA002064.* Appellants attached and incorporated by reference an extensive list of documents to be considered by the district court in their Supplemental Brief in Opposition to Respondent's Motion to Dismiss. *See Appendix Vol. VIII, JA001625-JA001634.* Appellants timely filed their Notice of Appeal of that Order on May 26, 2020. *See Appendix Vol. XI, JA002235-JA002237.*

On April 22, 2020, Respondents filed a Motion for Fees and Costs and their Memorandum of Costs and Disbursements. *See Appendix Vol. X, JA001869-JA001946; see also Appendix Vol. X, JA001947-JA001950.* Appellants filed their Motion to Retax Costs on April 24, 2020, and their Opposition to Respondents' Motion for Fees and Costs on May 11, 2020. *See Appendix Vol. X, JA001952-JA002042; see also Appendix Vol. XI, JA002065-JA002206.* The hearing on Respondents' Motion for Fees and Costs and Appellants' Motion to Retax Costs was held on June 25, 2020, and the district court entered an Order granting Respondents' Motion and denying Appellants' Motion on August 18, 2020 (the "Fees and Costs Order"). *See Appendix Vol. XII, JA002326-JA002343.*

The Fees and Costs Order stated two separate bases for awarding the Respondents' their attorneys' fees and costs. *Id.* First, Respondents had served an offer of judgment for \$150,000.00 on the Appellants on December 11, 2019 and

Appellants’ “rejection of the \$150,000.00 offer of judgment was grossly unreasonable”, Respondents were entitled to recover their costs and allowed attorney’s fees from the time of the service of the offer as Appellants’ did not accept the offer and then failed to obtain a more favorable outcome pursuant to NRCP 68(f)(1)(B). *Id. at JA002354-JA002366*. Second, because “[t]his 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.” *Id.* The Fees and Costs Order further stated Respondents were also entitled to recover their costs as the prevailing party pursuant to NRS 18.020. *Id. at JA002365-JA002366*. Respondents were ultimately awarded \$39,447.00 in fees and \$5,840.41 in costs. *Id. at JA002366*. Appellants timely filed their Notice of Appeal of the Fees and Costs Order on September 17, 2020. *See Appendix Vol. XII, JA002381-JA002406*.

STATEMENT OF FACTS

On or about October 22, 2017, Appellants Joseph Folino and Nicole Folino (hereinafter collectively the “Folinos” or the “Appellants”) entered into a Residential Purchase Agreement (“RPA”) with Respondents Todd Swanson (hereinafter “Swanson”), the Shiraz Trust and Lyons Development LLC (collectively the “Respondents”) for the Appellants’ purchase of the real property identified as 42 Meadowhawk Lane, Las Vegas, NV 89135 (hereinafter the “Subject Property”). *See Appendix Vol. IV, JA000672-JA00683*. Thereafter, Swanson executed a Sellers Real

Property Disclosure Form for Subject Property (hereinafter the “SRPD”) on behalf of the Respondents on or about October 24, 2017. *See Appendix Vol. IV, JA000684-JA000688*. In pertinent part, the SRPD which the Respondents produced to Appellants asks (1) “[a]re you **aware** of any of the following?: **1. Structure:** (a) Previous or current moisture conditions and/or water damage”; and (2) “[a]re you **aware** of any of the following?:...**7. Fungi / Mold:** Any previous or current fungus or mold?” *Id. at JA000685*. Respondents stated “NO” in response to both of these questions. *Id.*

Appellants acted in reliance on Respondents’ representations in the SRPD by closing on the Subject Property on or about November 17, 2017 and subsequently learned that there had been multiple undisclosed incidents of water loss at the Subject Property in the approximately two years (April 2015 to November 2017) between Respondents’ construction of the Subject Property and its sale to Appellants. *See Appendix Vol. XV, JA002870-JA002937; see also Appendix Vol. XV, JA002938-JA002957; see also Appendix Vol. XVI, JA002980-JA002995; see also Appendix Vol. XVI, JA003006-JA003008*. Discovery revealed the existence of a Criterium Home Inspection Report, whose contents were known to Respondents prior to the signing of the SRPD for the Subject Property from May of 2015 (the “Criterium Report”) and multiple sets of handwritten notes by Swanson documenting the progress of repairs to the Subject Property which were continuously updated by Swanson. *See Appendix Vol. XV, JA002870-JA002937; see also Appendix Vol. XV,*

JA002938-JA002957; see also Appendix Vol. XVI, JA002958-JA002997. These documents clearly evidenced the fact that Respondents were fully aware of the existence of these leaks and the failure to repair at least the basement bathroom leak.

The undisclosed leaks included: (1) two leaks in the Subject Property's recirculation pumps, which were identified in the Criterium Report; (2) a leak in the ceiling of the basement bathroom, which was also identified and photographed in the Criterium Report; and (3) multiple other leaks in the master bathroom over time. *See Appendix Vol. XV, JA002883; see also Appendix Vol. XV, JA002900-JA002902; see also Appendix Vol. XVI, JA003006-JA003008; see also Appendix Vol. XV, JA002938-JA002957.* Further, the two leaks in the Subject Property's recirculation pumps which were allegedly repaired by Rakeman Plumbing in August 2015 were in the same location as the leaks identified in the Criterium Report from May of 2015. *See Appendix Vol. XV, JA002883; see also Appendix Vol. XV, JA002900-JA002901; see also Appendix Vol. XVI, JA002987-JA002995.* This could mean the May 2015 recirculation pump leaks either recurred or those water losses went unaddressed from at least May to August of 2015.

The basement bathroom ceiling leak and the recirculation pump leaks are of particular importance. The basement bathroom ceiling leak is of paramount importance because it is clearly evidenced by Respondent's own notes that it was never repaired. *See Appendix Vol. XV, JA002938-JA002957; see also Appendix Vol.*

XV, JA002958-JA002977. Respondents unambiguously had a duty to disclose its existence on the SRPD, and they failed to do so. See Appendix Vol. IV, JA000685. The recirculation pump leaks because either (1) the leaks went unaddressed for months after being discovered by Respondents, yet no fungus/mold tests were ever conducted; or (2) the recirculation pump leaks were repaired prior to Rakeman plumbing allegedly repairing leaks in the same location in August 2015, meaning the leaks had reoccurred and the Respondents had notice and knowledge of potential systemic issues and failed to indicate as much on the SRPD. See Appendix Vol. XV, JA002883; see also Appendix Vol. XVI, JA002987-JA002995.

The first undisclosed water loss incident, which Appellants became aware of after closing on the Subject Property, was a leak which had occurred on or about February 16, 2017, and which Respondents have asserted they had repaired by Rakeman Plumbing on or about June 7, 2017. *See Appendix Vol. III, JA000596-JA000621.* Appellants learned of the February 2017 leak after contacting the manufacturing company, Uponor, the manufacturer of the plumbing system on the Subject Property and being informed that Rakeman Plumbing had previously submitted an invoice and warranty claim to Uponor for conducting the repair. *See Appendix Vol. XVI, JA002980-JA002986.* After closing, Appellants experienced the effects of the systemic plumbing defects, in the form of water losses and leakage issues within the Subject Property which, after learning of the existence of

previously undisclosed leaks through Uponor, prompted the Appellants to file their initial Complaint against Respondents on April 18, 2019. *See Appendix Vol. II, JA000249-JA000325.*

SUMMARY OF THE ARGUMENTS

The district court erred by interpreting the holding of *Nelson v. Heer*, that the repair of a defect negates the duty to disclose that defect, when it determined that case to hold that a seller who makes affirmative, false representations on an SRPD that such defects never existed (1) complied with the requirements of NRS 113; and (2) that such an affirmative, false representation cannot form the basis for a claim of intentional misrepresentation. The district court also erred when it abused its discretion by basing the decisions on clearly erroneous factual determinations and by disregarding controlling law.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

“This [C]ourt reviews a district court's grant of summary judgment de novo.” *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (Nev. 2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the non-moving party, demonstrates that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* Conclusory statements fail to create issues of fact. *See Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1094-95 (1995). Thus,

there are two basic substantive requirements for a district court to grant summary judgment: (1) there must be no genuine issue as to any material fact; and (2) the moving party must be entitled to judgment as a matter of law. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (Nev. 2009); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 644, 173 P.3d 734, 738 (Nev. 2007).

When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the non-moving party. *See Allstate*, 125 Nev. at 137, 206 P.3d at 575; *Wood*, 121 Nev. at 729, 121 P.3d at 1029. The burden on the nonmoving party to set forth specific facts, by affidavit or otherwise, demonstrating the existence of a genuine issue for trial only applies, if the moving party has properly supported its motion for summary judgment as required by NRCP 56. *See Wood*, 121 Nev. at 731-32, 121 P.3d at 1031.

I.

ARGUMENT

A. The District Court's Decision Relied on a Flawed Interpretation *Nelson v. Heer*

In the May 11, 2020 Order Granting the Respondents' Motion to Dismiss, the district court stated: (1) "[T]he undisputed facts establish that the February 2017 leak was repaired, thus abrogating any requirement that it be disclosed, as fully explained

in Nelson”; (2) “[t]he other purported water losses complained of by the Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property” (Internal Quotations Omitted); and (3) “evidence shows that the Defendants’ purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing...under Nelson v. Heer and NRS §113.130 & 140, the repair and Defendants’ knowledge of the repair negated the Defendants’ duty to disclose the leak [February 2017] in the October 24, 2017 Sellers Real Property Disclosure Form.” See *Appendix Vol. X, JA002054 & JA002063*. As detailed below, the district court’s conclusion that the holding of Nelson v. Heer was applicable to this matter because the purported repairs abrogated the duty to disclose is incorrect, because this holding overlooks the elemental requirements of the Nelson v. Heer, 123 Nev. 217, 163 P.3d 420 (2007), decision.

B. Summary of Pertinent Facts from *Nelson v. Heer*

In Nelson v. Heer, the Court considered the duty of a seller of residential property to disclose any defects to a buyer of that property. *Id.* In that case, an individual Judy Nelson (“Nelson”), purchased a cabin in Mt. Charleston, Nevada, and “[e]ight years later, a water pipe on the third floor burst”. *Id. at 123 Nev. at 220, 163 P.3d at 422*. Nelson subsequently had a contractor repair the damages caused by the water loss and, approximately four years later, listed the cabin for sale and

completed a Seller's Real Property Disclosure Form which did not disclose the water damage. *Id. at 123 Nev. at 220, 163 P.3d at 423.*

The purchaser of the cabin, Scott Heer (“Heer”), did not learn of the water loss incident until after closing on the cabin and subsequently brought a complaint against Nelson which included, in part, claims of intentional misrepresentation and failure to comply with NRS 113.130, identical to those by the Appellants here, because Nelson failed to disclose the prior water damage. *Id. at 123 Nev. at 220-21, 163 P.3d at 423.* The Court ultimately held that Nelson did not have a duty to disclose the water damage that had occurred, because it had been repaired and “[u]nder NRS 113.140(1), a seller of residential property has a duty to disclose only those conditions that materially and adversely affect the value or use of the property, and of which the seller is aware, realized, perceived, or knew.” *Id. at 123 Nev. at 227, 163 P.3d at 427.* More importantly the prior SRPD form did not include any questions which would have required the disclosure of the water loss incident on the third floor of the cabin in order for Nelson to respond honestly and accurately. *See Appendix Vol. I, JA000148-JA000149.*

C. The Changed Language of the SRPD Distinguishes this Matter from *Nelson v. Heer*

Nevada law explicitly requires that a seller of residential real property disclose in writing all defects of which the seller is aware through a disclosure form. *See NRS*

113.130(1)(a). The form of the disclosure document satisfying NRS 113.130 is not left to the discretion of any party to the transaction, but rather a seller of residential property is required to use the most current form for disclosing the condition of residential property provided by the Nevada Real Estate Division. *See NAC 113.150*. Appellants emphasize this point because it is integral to identifying why this case is distinguishable from Nelson v. Heer. Specifically, this matter is factually different from Nelson v. Heer, because the then in force SRPD Form which Nelson completed was substantially different from the Nevada Real Estate Division's later version completed by Respondents. *See Appendix Vol. 1, JA000148-JA000149; see also Appendix Vol. IV, JA000684-JA00688*.

D. *Nelson v. Heer* Does Not Permit False Representation On The SRPD As Nelson Did Not Make Any False Representations

The SRPD completed by Nelson states: "Are you **aware** of any of the following: **1. Basement / Crawl space:** Previous or current moisture conditions?" and Nelson responded to this question by indicating "No". *See Appendix Vol. 1, JA000149*. This was not a false statement or misrepresentation by Nelson, as the water loss incident had occurred when "a water pipe on the third floor burst", not in the basement / crawl space. *See Nelson v. Heer, 123 Nev. 217, 220, 163 P.3d 420, 422 (2007)*. The SRPD Nelson completed did not inquire about the existence of

“previous or current moisture conditions” in any area of the property other than the basement / crawl space. *See Appendix Vol. 1, JA000148-JA000151.*

By contrast, the version of the SRPD which was completed by the Respondents’ states: “Are you **aware** of any of the following?: **1. Structure:** (a) Previous or current moisture conditions and/or water damage?” *See Appendix Vol. IV, JA000685.* Respondents indicated “No” in response to this question but, unlike Nelson, this was a misrepresentation (both directly and by omission) because, as stated above, the Respondents were aware of the numerous, previous moisture conditions and water damage that had occurred in the “Structure”. *Id.*

Therefore, the Nelson v. Heer decision should not be deemed to permit false representations as to the existence of past conditions because, unlike the Respondents, Nelson did not make any actual misrepresentations or false statements in her SRPD. Again, the SRPD Nelson completed only asked if there were any previous or current moisture conditions in the basement/crawl space of her cabin. Nelson’s response of “No” was not a false representation, because the “previous or current moisture condition” had taken place on the third floor of the property, not in the basement / crawl space. *See Nelson v. Heer, 123 Nev. at 220, 163 P.3d at 422; see also Appendix Vol. 1, JA000148-JA000151.* This is entirely different from the affirmative false representation of Respondents’ “NO”, they were aware of previous

and current moisture conditions within the structure. *See Appendix Vol. IV, JA000685.*

In Nelson v. Heer the Court further held that “[t]he term “aware” means “marked by realization, perception, or knowledge.” *See Nelson v. Heer, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007).* Thus, it is unambiguous that Respondents’ made a false representation, when they stated on the SRPD that they were not aware of any previous moisture conditions within the structure on the Subject Property. *See Appendix Vol. IV, JA000685.* There is a distinct difference between the holding of Nelson v. Heer, that repairs negate a duty to disclose, and the interpretation of the district court in the instant litigation that the abrogation of the duty to disclose due to repair also permits objectively false representations to be made on the SRPD. *See Appendix Vol. X, JA002050-JA002051.*

Evidence was presented to the district court in the form of the May 2015 Criterium Report, containing Respondent’s notes on repairs to the Subject Property as well as the deposition testimony of Respondent Swanson all clearly demonstrate that there were previous moisture conditions at the Subject Property of which Respondents were fully aware. *See Appendix Vol. XV, JA002870-JA002937; see also Appendix Vol. XV, JA002938-JA002957; see also Appendix Vol. XV, JA002958-JA002977; See also Appendix Vol. XIII, JA002571, ln. 19 – JA002573, ln. 23; see also Appendix Vol. XIII, JA002576, ln. 2-23; see also Appendix Vol. XIV, JA002591,*

ln. 24 – JA002593, ln. 16; see also Appendix Vol. XIV, JA002653, ln. 21 – JA002656, ln. 2. As the negation of a duty to disclose is not the equivalent of permission to make false representations and/or omissions, the district court erred when it acknowledged in its Order that previous leaks had occurred yet determined that the negation of the duty to disclose under Nelson v. Heer permitted false representations and omissions to be made by Respondents. *See Appendix Vol. X, JA002045-JA002064.*

E. The District Court Erred by Disregarding an Unrepaired and Undisclosed Leak

Further, Appellants would emphasize that even if the district court's interpretation and application of Nelson v. Heer were correct, the district court still erred by: (1) ignoring the clear and convincing evidence of an unrepaired and undisclosed leak at the Subject Property in the basement's bathroom; and (2) improperly analyzing Appellants' Fraud Claim, including as to the systemic nature of the plumbing defects and the existence of mold and/or fungus. *See Appendix Vol. XV, JA002870-JA002937; see also Appendix Vol. X, JA002045-JA002064.* Both issues stem from the decision of the district court to analyze Appellants' claims only in relation to the February 2017, despite the Second Amended Complaint actually having a much broader focus. *See Appendix Vol. X, JA002053-JA002054.* Repaired

or not, the Respondent failed to provide notice of the prior existence of mold that was remediated.

First, the existence of unrepaired and undisclosed leak in the basement bathroom is both unambiguous and undisputed, as the District Court's May 11, 2020 Order acknowledges the existence of this leak and states "inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a drip." (*Internal Quotations Omitted*) See *Appendix Vol. X, JA002052*. Appellants' counsel specifically argued that this alone provides a basis for the claims in the Second Amended Complaint. See *Appendix Vol. IX, JA003710*. The report referenced by the district court is the Criterium Report, discussed above, which directly states, "[t]here is a plumbing leak at the ceiling of the basement bathroom" and it further includes a photo of the water that had leaked from the ceiling and onto the floor. See *Appendix Vol. XV, JA002883*; see also *Appendix Vol. XV, JA002902*.

In the deposition of Respondent Swanson, he provided testimony that he received notice of the basement bathroom leak in the form of the Criterium Report, yet he had not produced any documents or other evidence demonstrating it had been repaired. See *Appendix Vol. XIV, JA002653, ln. 21 – JA002656, ln. 2*; see also *Appendix Vol. XIV, JA002630, ln4 – JA002631, ln.25*; see also *Appendix Vol. XIV, JA002634, ln. 14 – JA002641, ln. 7*. The district court disregarded the evidence of this leak, stating in the May 11, 2020 Order that, "[t]he leak/drip occurred in a

different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint". *See Appendix Vol. X, JA002052*. However, as described in detail below, this was an inaccurate statement by the district court of the factual allegations within the pleadings and does not reflect the actual allegations contained in the Second Amended Complaint. *See Appendix Vol. III, JA000526-JA000595*.

F. The Intentional Misrepresentation Claim Was Improperly Analyzed

Intentional Misrepresentation "is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance." *See Nelson v. Heer, 123 Nev. 217, 225–26, 163 P.3d 420, 426 (2007)*. In *Nelson v. Heer*, this Court further noted that, with respect to the false representation element, "the suppression or **omission of a material fact** which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist." (*Internal quotations omitted*) (*Emphasis added*) *Id.*

Nevada "is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party." *See Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984)*. This means "[a] complaint need only set forth sufficient facts to demonstrate the necessary elements

of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *See W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). When "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See NRCP 9(b)*. However, conditions of a person's mind, such as malice, intent and knowledge, may be alleged generally. *Id.*

The district court erred in dismissing Appellants' claim of Intentional Misrepresentation for the same reason it erred in disregarding the unrepaired and undisclosed leak, by failing to consider the actual allegations contained in the Second Amended Complaint and subsequently making the arbitrary decision to only analyze Appellants' claims in relation to the February 2017 leak. *See Appendix Vol. X, JA002053-JA002054 & JA002063*. The May 11, 2020 Order directly states as a Conclusion of Law that "Plaintiffs' fraud claim fails as a matter of law" because the "Second Amended Complaint alleges one wrong: Defendants' failure to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect". *See Appendix Vol. X, JA002063*. This resulted in the incorrect conclusion by the district court that the "fraud claim is derivative of their NRS Chapter 113 concealment claim" and "[b]ecause this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law." *Id.*

G. Comparison Of The Allegations In Appellants' Second Amended Complaint To The Findings Of Fact And Conclusions Of Law In The May 11, 2020 Order Substantiate The Argument That The District Court Clearly Erred

In the May 11, 2020 Order granting Respondents' Motion to Dismiss, the district court stated, as part of the procedural history, that "[t]he gist of the Plaintiffs' lawsuit is that the Defendants **concealed a water leak** in the plumbing system" and "Plaintiffs filed their initial Complaint seeking damages for Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a systemic defect in the plumbing system." (*Internal quotations omitted*) (*Emphasis added*) See *Appendix Vol. X, JA002046*. The May 11, 2020 Order proceeded to state, in pertinent part, the following as Findings of Fact:

1. "There was a leak in the Uponor plumbing system on February 16, 2017". See *Appendix Vol. X, JA002051*.
2. "Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak". *Id.*
3. "In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint" See *Appendix Vol. X, JA002052*.
4. "The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint". *Id.*

5. “After closing, the mold was fully remediated and a subsequent mold test conducted on December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017 Infinity Report”. See *Appendix Vol. X, JA002053*¹.

6. “[T]here is no evidence showing that the Defendants knew of the results of the mold test on or before the closing date.” *Id.*

The May 11, 2020 Order also stated, in pertinent part, the following as Conclusions of Law:

1. “Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs’ Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were “at least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants] owned the home.” **However, the evidence shows that the only relevant “water losses” relate to two failures in the Uponor plumbing system**, one which occurred in February 2017, which the Defendants’ repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the Plaintiffs’ closing on the property.” (*Emphasis added*) See *Appendix Vol. X, JA002054*.

2. “The Plaintiffs have failed to present evidence to establish the **one fact that could possibly make their claims viable: that the February 2017 leak was not repaired**. To the contrary, the undisputed facts establish that the February 2017 leak was repaired, thus abrogating any requirement that it be disclosed, as fully explained in Nelson. The **other purported “water losses”** complained of by the Plaintiffs **are unrelated to their claims** and, further, do not materially affect the value of the property.” (*Emphasis added*) *Id.*

3. “The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are

¹ As an aside, but also an affirmatively obvious statement, this Finding of Fact, is proof positive of the misrepresentations by Respondents. It Finds there was mold.

outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.” *See Appendix Vol. X, JA002055.*

4. “Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which it the basis of their Second Amended Complaint.” *See Appendix Vol. X, JA002062.*

5. “This Court finds that the Plaintiffs’ failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a “systemic defect” in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.” *Id.*

6. “This Court also finds that the Plaintiffs’ fraud claim fails as a matter of law. The Plaintiffs’ Second Amended Complaint alleges one wrong: Defendants’ failure to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect. The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim. Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs’ fraud claim fails as a matter of law.” *See Appendix Vol. X, JA002063.*

7. As a footnote to the above stated Conclusion of Law, the district court stated “NRS Chapter 113 provides plaintiffs with a statutory remedy to redress a seller’s failure to disclose a defect or condition in a real estate transaction. The statute preempts the Plaintiffs’ fraud claim.” *Id.*

Appellants have included the above Findings of Fact and Conclusions of Law, on which the district court based its holding on Appellants’ Intentional Misrepresentation claim, because these facts reveal the clear failure of the district court to conduct a proper analysis when compared to the allegations in Appellants’ Complaints. Specifically, the following were stated as factual allegations were

asserted in Appellants' Second Amended Complaint and, thus, were the subject of the district court's analysis and the above cited May 11, 2020 Order granting dismissal:

1. "This pre-closing inspection occurred on or before November 17, 2017." *See Appendix Vol. III, JA000529, ¶ 25.*
2. "During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants." *See Appendix Vol. III, JA000529, ¶ 26.*
3. "The **Defendants stated** that there was an **isolated water loss**, drywall damage and other repairs that were being completed". (*Emphasis added*) *See Appendix Vol. III, JA000529, ¶ 29.*
4. "The plumbing defects in the house were systemic and known to the Defendants prior to the closing of the transaction." *See Appendix Vol. III, JA000530, ¶ 38.*

The Fourth provision of the Second Amended Complaint above is the very definition of Notice Pleading. Moreover, it alleges the systemic nature of the plumbing defects in the home that were uncovered in discovery and presented to the district court, and subsequently ignored. *Id.*

Further, Appellants' Second Amended Complaint stated, in pertinent part, the following allegations as part of the Fraud/Intentional Misrepresentation cause of action:

1. "Defendants, and each of them, communicated, by and through themselves and their employees and/or agents, on or about October 24, 2017, to the Plaintiffs that there were no defects in the house, the systems or the structure." *See Appendix Vol. I, JA000531, ¶ 43.*

2. “The Defendants purposefully, and with the intent to deceive the Plaintiffs, failed to identify the known defects, **prior water losses**, prior warranty repairs and other **material misrepresentations or omissions contained on the SRPD**.” (*Emphasis added*) *See Appendix Vol. III, JA000531, ¶ 43.*

3. “The Defendants made these intentional misrepresentations on the SRPD form in an effort to induce the Plaintiffs to purchase the Subject Property.” *See Appendix Vol. III, JA000531, ¶ 46.*

4. “Defendants, and each of them, intended by their false representations to induce the Plaintiffs into entering into said transaction.” *See Appendix Vol. III, JA000531, ¶ 47.*

5. “Plaintiffs would not have completed the transaction had they known of the facts alleged herein and withheld from the Plaintiffs by the Defendants.” *See Appendix Vol. III, JA000531, ¶ 48.*

6. “Plaintiffs relied to their detriment upon the false representations, when they were required to complete the transaction in favor of the Defendants.” *See Appendix Vol. III, JA000531, ¶ 49.*

7. “Plaintiffs’ reliance on the above representations was justified and reasonable in light of the facts and circumstances alleged herein.” *See Appendix Vol. III, JA000532, ¶ 52.*

8. “As a direct and proximate result of defendant’s fraudulent representations, Plaintiffs have been damaged in the sum in excess of \$15,000.00, an exact amount to be proven at the time of trial.” *See Appendix Vol. III, JA000532, ¶ 53.*

“Prior water losses,” “[P]rior warranty repairs” and the “material misrepresentations or omissions contained on the SRPD” place the district court and the Respondents on notice of the very factual allegations elicited in numerous depositions and evidence presented to the district court in opposition to each of the motions to dismiss and motion for summary judgment. *See Appendix Vol. III, JA000531, ¶ 43.*

H. Even if *Nelson v. Heer* Does Permit False Representations as to Repaired Issues, the District Court Still Erred by Disregarding an Unrepaired Leak & by Improperly Analyzing the Intentional Misrepresentation Claim

Consideration of the actual allegations in the Appellants' Second Amended Complaint and the existence of an unrepaired and undisclosed leak (the basis of which is undisputed by the Respondents), in conjunction with the above stated Findings of Fact and Conclusions of Law on which the district court based its May 11, 2020 Order, reveals that the district court erred by arbitrarily narrowing the focus of its analysis specifically to the February 2017 leak. The actual content of the Second Amended Complaint does not reflect such a narrow focus, and there was no valid reason for the district court to do so. *See Appendix Vol. III, JA000526-JA000595.*

Regarding Appellants' NRS 113 claim, it is self-evident why the district court's improper narrowing of its focus led to that claim erroneously being dismissed despite being an undisputedly unrepaired and undisclosed leak. The Respondents' clear and unequivocally acknowledgment of the existence of the basement bathroom ceiling leak. *See Appendix Vol. XIV, JA002653, ln. 21 – JA002656, ln. 2; see also Appendix Vol. XV, JA002870-JA002937; see also Appendix Vol. XV, JA002938-JA002957; see also Appendix Vol. XV, JA002958-JA002977.*

Regarding Appellants' Intentional Misrepresentation claim, the allegations quoted above were directly stated in the Appellants' Second Amended Complaint. *See Appendix Vol. III, JA000526-JA000595*. There was never any decision by the district court limiting the scope of the Second Amended Complaint² and, as the plain language of the allegations, it is clear the focus of either Complaint was never only the February 2017 leak. *Id.* To briefly reiterate and reemphasize, Appellants' Second Amended Complaint did not actually allege that Respondents' sole wrong was their failure to disclose the February 2017 leak, but rather directly alleged that affirmative false representations were made to Appellants in the form of Respondents communicating to Appellants that "there were no defects in the house, the systems or the structure." *See Appendix Vol. III, JA000531, ¶ 43.*

The NRS Chapter 113 concealment claim is based upon: (1) the Respondents' failure to make statutorily required disclosures and/or failure to complete the SRPD accurately by untruthfully answering questions related to past occurrences and omitting the fact of at least one prior unrepaired water loss: the basement bathroom leak. *See Appendix Vol. III, JA000526-JA000595; see also Appendix Vol. XV, JA002883; see also Appendix Vol. XV, JA002900-JA002901; see also Appendix Vol.*

² The Second Amended Complaint was filed as a result of the district court's August 13, 2019 Order which granted in part and denied in Part the Respondents' Motion to Dismiss the Appellants' First Amended Complaint and instructed Appellants' to file their Second Amended Complaint with the surviving causes of action (fraud and violation of NRS 113) within 20 days of that Order. *See Appendix Vol. III, JA000512-JA000525.*

XV, JA002938-JA002957; see also Appendix Vol. XV, JA002958-JA002977. The Appellants' Intentional Misrepresentation claim is based upon the fact that Respondents made affirmative false representations and/or false representations by omission to the Appellants when Respondents stated that they were not aware of any previous moisture conditions at the Subject Property. See Appendix Vol. IV, JA000685. Regardless of whether any repair negates the duty to disclose under NRS 113, the clear evidence of the existence of this unrepaired water loss, means that the Respondents were unquestionably making an affirmative false representation and/or a false representation by omission when they stated on the SRPD that they were not aware of any past moisture conditions at the Subject property. Id.

Therefore, the district court erred by: (1) determining that it would only conduct an analysis of the Appellants' claims as they related to the February 2017 leak, despite the Notice Pleading doctrine adhered to by Nevada courts; and (2) concluding that Appellants' false misrepresentation claim was "derivative of their NRS Chapter 113 concealment claim", when the asserted claims were actually different, each with an independent basis. *See Appendix Vol. X, JA002053-JA002054 & JA002063.* The district court's decision to dismiss Appellants' Intentional Misrepresentation claim and NRS 113 claim was in error.

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I. The District Court Erred by Failing to Consider Deposition Transcripts that Controverted Aaron Hawley’s Affidavit and any Assertion that Hawley Meets the Personal Knowledge Requirement Imposed by NRCP 56(c)

i. Personal Knowledge Requirement Imposed By NRCP 56(c)

Under NRCP 56(c)(1), a party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” *See NRCP 56(c)(1)*. NRCP 56(c)(2) provides that a “party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” *See NRCP 56(c)(2)*. “An **affidavit** or declaration used to support or oppose a motion **must be made on personal knowledge**, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” (*Emphasis added*) *See NRCP 56(c)(4)*. If a review of business records is the basis of the personal knowledge stated in an affidavit, the documents reviewed must be exhibited. *See Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 38, 482 P.2d 814, 818 (1971).

The admissibility of evidence on a motion for summary judgment is subject to NRCP 43(a) and evidence that would be inadmissible at the trial of the case is

inadmissible on a motion for summary judgment. *See Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969). Further, the court “is not limited to a consideration of the affidavit and depositions relied on by the moving party but is **required** by NRCP 56(c)2 to consider all pleadings, depositions, answers to interrogatories and admissions on file together with affidavits when ruling on a motion for summary judgment.” (*Emphasis added*) *Id.*

ii. Aaron Hawley’s Affidavit Cannot Provide A Basis For Summary Judgment

Though Appellants’ maintain that it was improper for the district court to arbitrarily narrow the focus of the Second Amended Complaint to the February 2017 leak, even under such a narrow analysis the district court still erred by failing to consider that the deposition testimony of Aaron Hawley (the owner of Rakeman Plumbing), which controverted his own Affidavit. *See Appendix Vol. XIV, JA003210, ln. 19 - JA003211, ln. 16.* Respondents based their assertion that the Rakeman repairs had abrogated their duty to disclose the February 2017 and November 2017 leaks under Nelson v. Heer based upon Hawley’s Affidavit. *See Appendix Vol. III, JA000596-JA000621; see also Appendix Vol. IV, JA000646-JA000658; see also Appendix Vol. IX, JA001635-JA001826.* The May 11, 2020 Order’s Conclusions of Law section repeatedly emphasized that the decision was based upon Aaron Hawley’s Affidavit regarding the repair of the February 2017

leak, stating “[u]ncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the Defendants’ duty of disclosure.” *See Appendix Vol. X, JA002058.*

In his deposition, Mr. Hawley was asked “since 2015, have you personally done any of the plumbing at 42 Meadowhawk?”; and “[d]id you ever supervise any of the work at 42 Meadowhawk?” *See Appendix Vol. XIV, JA003210, ln. 19 - JA003211, ln. 7.* To both of inquiries Mr. Hawley responded “No”, and further stated that “I’ve never seen the house.” *See Appendix Vol. XIV, JA003210, ln. 21; see also Appendix Vol. XIV, JA003211, ln. 7.* Then, when directly asked “[s]o any testimony or knowledge that you have **regarding 42 Meadowhawk or the repairs** at 42 Meadowhawk **would be from documents that you reviewed** as the owner of Rakeman Plumbing?” Mr. Hawley responded “Secondary information. **It would be word of mouth or documents.**” (*Emphasis added*) *See Appendix Vol. XIV, JA003211, ln. 11-16.* Both of which are clearly hearsay, not personal knowledge upon which a valid affidavit may be based, particularly for the purposes of Summary Judgment. *See NRCP 56(e).*

As stated above, the party asserting that there is no genuine dispute of material fact for the purposes of summary judgment must support that assertion with admissible evidence. *See NRCP 56(c)(1).* Here, the Respondents sought to support their assertion that there was no genuine issue of material fact by arguing all leaks

had been repaired and producing in support the Affidavit of Aaron Hawley, the owner of the company asserted to have conducted those repairs. *See Appendix Vol. III, JA000596-JA000621; see also Appendix Vol. IV, JA000646-JA000658; see also Appendix Vol. IX, JA001635-JA001826.* However, per NRCP 56(c)(2) “[a]n **affidavit** or declaration used to support or oppose a motion **must be made on personal knowledge**” and if business records are reviewed as the basis of that personal knowledge the documents reviewed must be exhibited. (*Emphasis added*) *See NRCP 56(c)(2).* It is this requirement which Aaron Hawley’s Affidavit demonstrably fails to meet, as in his deposition testimony Hawley unambiguously stated that he actually had no personal knowledge of the alleged repairs. *See Appendix Vol. XIV, JA003210, ln. 19 - JA003211, ln. 16.*

The business record exception to hearsay for purposes of an affidavit does not apply when the Affiant is averring to the occurrence of a material issue of fact: the repairs and, here, the Affiant has admitted he has never been to the house, nor does he have any actual personal knowledge of the repairs. *Id.* Further, the author of the Rakeman Plumbing documents related to the alleged repairs, William Gerber, admitted in deposition testimony that he never observed the repairs and, thus, authored said documents without personal knowledge. *See Appendix Vol. XVI, JA003312, ln. 11-23; see also Appendix Vol. XVI, JA003316, ln. 10 - JA003317, ln. 4; see also Appendix Vol. XVI, JA003329, ln. 15 - JA003330, ln. 12.* Thus, the basis

of the documents which are the subject of the business records exception are also negated as triple hearsay.

As no business records have been produced as exhibits which would support either William Gerber or Aaron Hawley having personal knowledge of the alleged repairs, the Aaron Hawley Affidavit unambiguously fails to meet the explicit requirements of NRCP 56(c)(2). *See NRCP 56(c)(2)*. Further, the district court directly stated that the decision to grant Respondents' Motion for Summary Judgment was largely based upon that Affidavit. *See Appendix Vol. X, JA002058*. This makes it clear that the district court erred in granting the Respondents' Motion for Summary Judgment based upon an improper and inadmissible Affidavit which was directly disavowed in the Affiant's own deposition. *See Appendix Vol. XVI, JA003025-JA003032; see also Appendix Vol. XVI, JA003312, ln. 11-23; see also Appendix Vol. XVI, JA003316, ln. 10 - JA003317, ln. 4; see also Appendix Vol. XVI, JA003329, ln. 15 - JA003330, ln. 12*. An Affiant cannot aver to facts upon which he has no personal knowledge, nor can he aver as to facts stated based upon business records that have also been controverted. If Mr. Gerber cannot provided the foundational testimony for an affidavit, then it is inadmissible. Mr. Hawley's affidavit cannot then prop itself up by inadmissible evidence.

Further, the transcript from the hearing on Respondents Motion to Dismiss reveals that the district court was aware of Aaron Hawley's deposition testimony

stating his Affidavit was inaccurate, yet still relied upon that Affidavit in reaching its decision. In that hearing, the district court began by discussing the standard for Summary Judgment and stated:

There is a common misconception that happens when people are seeking to defend against a motion for summary judgment. And it is conflating a genuine dispute as to a material issue of fact with a question of fact. Oftentimes, there are questions of fact, but **a motion for summary judgment presses the issue and says, well, here is what we say the facts are and here is our sworn statement as to those facts.** And if the person against whom summary judgment is sought is unable to dispute that, the fact that they may have questions subjectively as to whether or not they agree or disagree or whether or not there might be evidence out there to contradict that statement, that does not defeat a motion for summary judgment. Instead, **the party against whom summary judgment is sought, they have to come up with evidence to contradict that sworn statement**". (*Emphasis added*) See Appendix Vol. IX, JA002222-JA002223.

After making this statement, the district court proceeded "if you are unable to create a genuine dispute as to a material issue of fact, i.e., that Rakeman Plumbing repaired the February 6th, 2017 leak, then you're out of luck in terms of the lawsuit". See Appendix Vol. XIX, JA003710-JA003711. As is evident from these quotes, the district court was essentially stating that it believed the only way Appellants' could overcome Respondents' motion was to create a genuine dispute as to a material issue of fact by producing evidence that contradicted Aaron Hawley's sworn statement. *Id.* Instead, Appellants presented to the district court sworn testimony by the Affiant controverting, and agreeing that it is controverting, his own affidavit, yet the district court ignored those facts.

Attorney for Appellants responded to the district court's statement that the sworn statement of Hawley was controverted to overcome Respondents' motion by stating "[y]our Honor, we have submitted the deposition transcripts of Mr. Hawley and Mr. Gerber. Those **deposition transcripts controvert the testimony and statements in the affidavit**. Those -- that sworn testimony specifically says that they were not there when any repairs were made." (*Emphasis added*) See Appendix Vol. XIX, JA003713. Counsel for the Appellants continued by stating "Mr. Holley³ testified at page 17 of his deposition that he obtained any knowledge that he had from others, not from personal knowledge that he had... he testified at page 24 of his deposition that he did not observe any of the repairs... He then said, Your Honor, that on page 34 of his deposition, I do not know what actually occurred" before concluding "Your Honor, if these types of statements are [not] in direct contravention of his affidavit, I don't know what are." See Appendix Vol. XIX, JA003714.

However, the district court did not address the above argument before proceeding to disregard its own assertion that the sworn statement of Mr. Hawley must be contradicted to overcome the Respondents' Motion to Dismiss/Motion for Summary Judgment and stating "everything you have said is contained in the brief.

³ Aaron Hawley's name was transcribed phonetically as "Holley" within the transcript.

And I have to manage the time here and move on to the next case.” *See Appendix Vol. XIX, JA003717*. Moreover, the district court failed to understand, or otherwise take into consideration, that the transcripts of Mr. Hawley and Mr. Gerber were part of the record. Appellants had filed with the clerk, and had incorporated by reference in its Opposition, both of those transcripts. *See Appendix Vol. VIII, JA001622-JA001623 & JA001631*. The district court demonstrated that it erred in failing to conduct a complete analysis of the evidence in deciding Respondents’ Motion as, even under its flawed analysis of the Appellants’ allegations being narrowly focused on only the February 2017 leak, the exact evidence the district court stated was necessary to overcome the Respondents’ motion was in fact produced, argued at the time of the hearing of the motion, and then expressly and demonstrably ignored by the district court.

II.

THE DISTRICT COURT ERRED IN AWARDING FEES AND COSTS

A. Standard of Review for an Award of Attorneys’ Fees and Costs

The Court reviews a district court's decision regarding an award of attorney fees or costs for an abuse of discretion. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027–28 (2006); *see also Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). An abuse of discretion can occur when the district court bases its decision on a clearly erroneous

factual determination or disregards controlling law. *See NOLM, LLC v. Cnty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004). Factual findings that “are clearly erroneous or not supported by substantial evidence” can be an abuse of discretion. *Id.* It is also an abuse of discretion for the district court to make a decision “in clear disregard of the guiding legal principles”. *See Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

B. Standard for Awarding Fees and Costs Under NRCP 68(f)(1)(B)

Pursuant to NRCP 68(f)(1)(B), a party may recover their costs and allowed attorney’s fees from the time of the service of an offer of judgment if the adverse party rejects that offer of judgment and fails to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *see also Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993). In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the four following Beattie factors: 1) whether the plaintiff’s claim was brought in good faith; 2) whether the offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the 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. *See Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *see also Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). If the district court determines

that the Beattie factors favor an award of fees and costs, it then must analyze whether the amount requested is reasonable using the following Brunzell factors which weigh: (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) 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; (3) The work actually performed by the lawyer; the skill, time and attention given to the work; and (4) the result, meaning whether the attorney was successful and what benefits were derived. *See Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

C. Standard for Awarding Fees and Costs Under NRS 18.010(2)(b)

Under NRS 18.010(2)(b), in addition to the cases where an allowance is authorized by specific statute, the district court may make an allowance of attorney's fees to a prevailing party 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. *See NRS 18.010(2)(b)*. For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *See Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995). A party is not deemed to have filed a suit for an improper purpose, and thus an award of fees and costs

pursuant to NRS 18.010(2)(b) is not permitted, if: (1) the case presents novel legal issues; or (2) the case involved the party arguing for clarification or modification of existing law. *See Stubbs v. Strickland*, 129 Nev. 146, 153-54, 297 P.3d 326, 330-31 (2013); *see also Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 801 (2009).

D. The District Court Abused its Discretion by Awarding Fees and Costs

After granting Respondents' Motion to Dismiss Appellants' Second Amended Complaint, the Respondents' subsequent Motion for Attorney's Fees and Costs was also granted through an Order issued by the district court on August 18, 2020 (the "Fees and Costs Order"). *See Appendix Vol. XII, JA002326-JA002343*. The Order granting fees stated, in pertinent part, that: (1) "[p]ursuant 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"; (2) that the fees sought were reasonable and justified under the Beattie and Brunzell factors; (3) that "[t]his 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"; and that Respondents were entitled to an award of their costs under NRS 18.020 as the prevailing party. *See Appendix Vol. XII, JA002330-JA002340*.

Appellants respectfully assert that the district court did abuse its discretion by basing its decision on the award of fees and costs on clearly erroneous factual determinations and by disregarding controlling law. As detailed above, Nelson v. Heer should not be deemed to permit false representations simply because it removes the duty to disclose repaired defects. *See Appendix Vol. XII, JA002326-JA002343.* The district court repeatedly emphasized that its decision was based on the negation of duty holding in Nelson v. Heer, yet applied this negation of duty to the instant matter in a way that disregarded controlling law by expanding the holding of Nelson v. Heer to also permit affirmative false representations on an SRPD. *Id.*

The district court's award of attorneys' fees and costs was also an abuse of discretion because it was based upon the clearly erroneous factual determinations that: (1) the claims in the Second Amended Complaint were only related to the February 2017 leak; (2) the unrepaired and undisclosed leak in the Subject Property's basement bathroom was unrelated to Appellants' claims and the failure to disclose that leak was not in violation of NRS 113; and (3) the Affidavit of Aaron Hawley provided a sufficient basis for dismissing Appellants' claims despite being directly contradicted by his deposition testimony. *Id.* The award of fees and costs made pursuant to NRCP 68(f)(1)(B) and the award of costs made pursuant to NRS 18.010(2)(b), should both be reversed and remanded because such an award under

NRCP 68(f)(1)(B) requires a party to have obtained a less favorable outcome after declining an offer of judgment. *Id.*; *see also NRCP 68(f)(1)(B)*.

Even more importantly, the district court also abused its discretion in awarding fees and costs to Respondents pursuant to NRCP 68(f)(1)(B) because the offer of judgment by Respondents' was not reasonable in timing. As stated above, the second Beattie factor requires that the district court analyze and determine that an offer of judgment was reasonable and in good faith, both in the amount offered and in the timing of the offer, before awarding fees and costs under NRCP 68(f)(1)(B). *See Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *see also Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). An offer of judgment is not reasonable in its timing if it is made so early in litigation that the party receiving the offer has "not yet had a fair opportunity to assess its claim through discovery." *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012).

Here, the district court erred and abused its discretion because the Respondents' offer of judgment unambiguously failed to meet this standard for being determined reasonable and in good faith because it was made while Appellants still had not yet had a fair opportunity to assess their claims. *See Appendix Vol. XII, JA002328-JA002329 & JA002333-JA002334*. Though some discovery had been conducted at the time the offer of judgment was made, the Appellants still lacked a

sufficient opportunity to assess their claims at the time they received the offer because the Respondents never filed an Answer in the underlying matter. *See Appendix Vol. III, JA000599-JA000600*. This means that when they received the offer of judgment on December 11, 2019, the Appellants were still unable to assess their claims in consideration of the potential defenses of Respondents and, thus, the offer of judgment was unreasonable. *See Appendix Vol. XII, JA002328-JA002329 & JA002333-JA002334; see also Appendix Vol. III, JA000599-JA000600*.

In addition to the above stated issues improperly making Respondents' the prevailing party, and thus eligible for an award of fees and costs, the award of the same under NRS 18.010(2)(b) was also improper because it directly contradicts established case law on this issue wherein this Court has held that: (1) a claim is only frivolous or groundless, and thus subject to NRS 18.010(2)(b), if there is no credible evidence to support it; and (2) that a case is not frivolous and an award of fees and costs pursuant to NRS 18.010(2)(b) is improper if the case presents novel legal issues or involves a party arguing for clarification or modification of existing law. *See Stubbs v. Strickland*, 129 Nev. 146, 153-54, 297 P.3d 326, 330-31 (2013); *see also Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 801 (2009).

Here, there is credible evidence to support Appellants' assertion that their claim was not frivolous in the form of: (1) the Criterium Report's evidence of an unrepaired leak; (2) Respondent Swanson's own notes and deposition transcripts;

and (3) the deposition transcripts of Aaron Hawley and William Gerber wherein they directly state that the content of Hawley's Affidavit in support of Respondents' Motion was improper because it was not based on personal knowledge. *See Appendix Vol. XV, JA002870-JA002937; see also Appendix Vol. XV, JA002938-JA002957; see also Appendix Vol. XV, JA002958-JA002977; see also Appendix Vol. XIII, JA002571, ln. 19 – JA002573, ln. 23; see also Appendix Vol. XIV, JA002591, ln. 24 – JA002593, ln. 16; see also Appendix Vol. XIV, JA002630, ln. 4 – JA002631, ln. 25; see also Appendix Vol. XIV, JA002634, ln. 14 – JA002641, ln. 7; see also Appendix Vol. XIV, JA002653, ln. 21 – JA002656, ln. 2; see also Appendix Vol. XIV, JA003210, ln. 19 - JA003211, ln. 16; see also Appendix Vol. XVI, JA003312, ln. 11-23; see also Appendix Vol. XVI, JA003316, ln. 10 - JA003317, ln. 4; see also Appendix Vol. XVI, JA003329, ln. 15 - JA003330, ln. 12.*

Further, this case involves a novel legal issue and/or a request for clarification or modification of existing law. As discussed in detail above, it is Appellants' assertion that the district court misapplied the holding of Nelson v. Heer due to changes in the language of Seller's Real Property Disclosure Forms and that, as a result, the holding of that case does not actually permit affirmative false representations but only removes the duty to disclose. Therefore, due to both the produced evidence and the legal basis/arguments for Appellants' claims, the case

was not maintained frivolously and the award of fees and costs under NRS 18.010(2)(b) was an abuse of discretion.

CONCLUSION

Appellants respectfully requests that this Court reverse the district court's Orders and remand this matter to the district court for further litigation.

RESPECTFULLY SUBMITTED this 9th day of March 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, and complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). I further certify that this brief contains less than 14,000 words and complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii). I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

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I further certify that this brief complies with all applicable NEVADA RULES OF APPELLATE PROCEDURE, in particular NRAP Rule 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NEVADA RULES OF APPELLATE PROCEDURE.

DATED this 9th day of March 2021.

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