

**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 25 2021 04:20 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
**S.C. DOCKET NO: 81831**  
District Court Case No: A-18-782494-C

**Response to Motion to Strike Volumes I and II of Appellants' Joint Appendix  
and to Strike Portions of Appellants' Opening Brief**

This Response is brought pursuant to NRAP 27 and is supported by the following Memorandum of Points and Authorities and attached exhibits.

**MEMORANDUM OF POINTS & AUTHORITIES**

**I.**

**INTRODUCTION**

The Respondents' instant Motion requests that Volumes I and II of the Appellants' Joint Appendix and sections of Appellants' Opening Brief must be stricken because: (1) Volume I and II of the Appellants' Joint Appendix contains documents presented for the first time on appeal; and (2) three sections of

Appellants' Opening Brief rely on those documents. *See Respondents' Motion to Strike at 2-4*. The documents in question are an Appendix to Nelson v. Heer, a case which was heard by this Court and which was the basis for the district court decision being appealed herein. *See Appellants' Appendix, Volume I & II, JA000001-JA000248*.

The Respondents' interpretation of Nelson v. Heer as permitting the seller of a residential property to make demonstrably false representations (as to the existence of past conditions/defects) on a seller's real property disclosure form ("SRPD") has been a key issue raised repeatedly in this case and was also the basis of the district court decisions which are the subject of this Appeal. *See Appellants' Appendix, Volume IV, JA000624-JA000658; see also Volume X, JA002045-JA002064*. Throughout the underlying case, the Appellants repeatedly asserted that the Respondents' interpretation was flawed because it failed to account for the fact that the Respondents directly made false representations on the SRPD, while no false representations looking at the specific facts of the case were actually made in Nelson v. Heer. Id.

In that case, Judy Nelson ("Nelson") had a "water pipe on the third-floor burst" and, after having the leak repaired, she later completed an SRPD on which she indicated "No" in response to the question "Are you **aware** of any of the following: **1. Basement / Crawl space:** Previous or current moisture conditions?"

*See Nelson v. Heer. at 123 Nev. at 220, 163 P.3d at 422; see also Appellants' Appendix Vol. 1, JA000149. This was not a false representation. Id.*

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?" and Respondents indicated "NO". (*Emphasis added*) *See Appellants' Appendix Vol. IV, JA000685.* The new version has no location qualifier such as: Basement/Crawl space. The Respondents' omissions are demonstrably false representations, regardless of whether any repairs had removed a duty to disclose. *See Appellants' Appendix Volume XV, JA002870-JA002937; see also Volume XV, JA002938-JA002957; see also Volume XV, JA002958-JA002977.* The distinct difference between the removal of a duty to disclose and permission to make false representations was a fundamental part of the Appellants' arguments to the district court and, to illustrate this point, the following example is drawn directly from arguments made by Appellants made in pleadings to the district court:

- **"Defendants are correct that in Nelson the Court found it was not concealment for a seller not to disclose past water damage they believed repaired. Nelson v. Heer, 123 Nev. 217, 163 P.3d 420 (2007). However, Defendants ignore a key difference between the holding in Nelson and the current situation. Namely that, unlike in Nelson, Defendants explicitly lied on the SRPD".** (*Emphasis added*) *See Appellants' Appendix, Volume IV, JA000629.*

///

As a further example, the pleadings of the Respondents to the district court also demonstrate that the correct interpretation of the holding of Nelson v. Heer was the fundamental issue:

- “It is important to stress the Nelson holding. Under Nelson, if a defect or condition is repaired, the seller cannot be aware that it is condition which materially affects the value of the property. Instead of refuting the evidence presented by the Defendants, however, the **Plaintiffs question the rules in Nelson** and argue the Rakeman evidence that the leak was repaired is **irrelevant because the Defendants “lied” on the disclosure form.**” (Emphasis added) See Appellants’ Appendix, Volume IV, JA000651.

The above discussion leads to the elephant in the room, which is the fact that the Respondents’ Motion to Strike is making the ridiculous argument that it is impermissible for this Court to have access to the full factual background of one of its previous decisions, while it is reviewing the district court’s interpretation of the legal standard set-in place by that decision. See generally Respondents’ Motion to Strike. This is contrary to both common sense and public policy (particularly when the interpretation championed by the Respondents would permit such blatant false representations by home sellers).

## II.

### **LEGAL ARGUMENT**

NRAP 10(a) provides that “[t]he trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.” See NRAP

10(a). The Respondents premise their entire legal argument on their assertions that “[m]atters outside the record on appeal may not be considered” and that under NRAP 10(a) the documents included in Volume I and II of the Appellants’ Appendix, which were taken from the Appendix to the case *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007), are thus outside the record and may not be considered by the Court. *See Respondents’ Motion to Strike at 4-5*. As discussed above, the documents Respondents seek to strike do not fall under the NRAP 10(a) definition of matters outside the record, because they are not ancillary documents outside the record. These documents should be considered by this Court when interpreting the legal standard squarely at issue in the instant Appeal. *See Appellants’ Appendix, Volumes I and II, JA000001-JA000248*.

**A. The Respondents’ Motion is Flawed Because the Court May Simply Take Judicial Notice of the Documents in Question**

Per NRS 47.130, the Court may take judicial notice of certain matters of fact. *See NRS 47.130*. NRS 47.130(2) provides that a judicially noticed fact must be “[g]enerally known within the territorial jurisdiction of the trial court” or “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.” *See NRS 47.130(2)*. NRS 47.150 further states that the Court “may take judicial notice, whether requested or not” and “shall take judicial notice if requested by a party and supplied with the necessary information.” *See NRS 47.150*.

Recently, in the unpublished disposition Bank of New York Mellon as Tr. to JPMorgan Chase Bank, N.A. v. CKVC Invs., LLC, this Court took judicial notice of a quitclaim deed that was not part of the trial court record and cited to NRS 47.170 as providing support for such an action. *See Bank of New York Mellon as Tr. to JPMorgan Chase Bank, N.A. v. CKVC Invs., LLC*, 461 P.3d 158 (Nev. 2020).<sup>1</sup> In that case, this Court stated, in pertinent part, that the decision to take such judicial notice of the deed was supported by the fact that “appellants have not questioned the deed’s authenticity or the facts stated therein”. *Id.*

Here, the authenticity of the Documents produced in Volume I and II of the Appellants’ Appendix “cannot reasonably be questioned, so that the fact is not subject to reasonable dispute”, because they are the very same documents considered by this Court when it heard the case Nelson v. Heer. *See Appellants’ Appendix, Volume I and II, JA000001-JA000248*. Therefore, the documents meet the requirements of NRS 47.130(2), and the Court may take judicial notice of the same. *See NRS 47.130(2)*. Further, like in Bank of New York Mellon as Tr. to JPMorgan Chase Bank, N.A. v. CKVC Invs., LLC, the Respondents have not questioned the authenticity of the documents in Volume I and II of the Appellants’ Appendix or the facts stated therein, merely whether those documents are permitted by NRAP 10(a).

---

<sup>1</sup> NRAP 36(c)(3) provides that “[a] party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016.” *See* NRAP 36(c)(3).

*See generally Respondents' Motion to Strike.* Thus, as both statute and persuasive authority demonstrate that the Court may take judicial notice of the Appendix from Nelson v. Heer, and the Appellants respectfully request that it do so. However, the Respondents make a motion to strike documents considered by the Court in another matter and use that motion to strike entire arguments of the Appellants. This is not only heavy handed, but also factually and procedurally improper.

**B. Respondents' Motion Should Also be Denied Pursuant to NRAP 28(f)**

NRAP 28(f) provides “[i]f the court’s **determination of the issues presented requires the study of** statutes, rules, regulations, **etc.**, the relevant parts shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.” *See NRAP 28(f)*. Though the statute only specifically mentions statutes, rules and regulations, the inclusion of “etc.” clearly suggests that this is intended to allow a party to present relevant documents, if they are related to Nevada law, part of the public record, and their review is prudent given the Court’s determination of the issues presented. *Id.*

Here, the Appeal has presented to the Court the applicability of the holding of Nelson v. Heer to otherwise false representations. *See Appellants' Opening Brief, Statement of the Issues at ix.* As discussed in further detail above and in Appellants' Opening Brief, there is an undeniable distinction between the appealed from decision and the decision in Nelson v. Heer, because the previous language of the SRPD

during the applicable time of Nelson v. Heer was such that no false representations were actually made by Nelson. The SRPD language had changed by the time Respondents completed the SRPD, resulting in a false representation. The difference in the language creates a hole in the analysis which is in fact an omission by the Respondent as to either systemic defects in the plumbing system and/or the simple failure to provide notice of the leak in the basement bathroom that was never repaired by the Respondents. *See Appellants' Opening Brief at 6-7.*

Thus, it is evident that the Court's determination of this issue will require the study of the language of the SRPD in Nelson v. Heer. For this reason, the Appellants produced the Appendix from that case (which includes the SRPD completed by Nelson) as Volumes I and II of the Appellants' Appendix.

As the production of such documents is provided for by NRAP 28(f), the Court should deny the Respondents' Motion to Strike. *See NRAP 28(f)*. In the alternative, should the Court determine that the inclusion of the Appendix from Nelson v. Heer in the Appellants' Appendix was improper under NRAP 10(a), and that it will not take judicial notice of the documents, the Appellants request to be permitted to produce the most pertinent parts of the Nelson Appendix, such as the SRPD, to this Court as a pamphlet.

///

///



IV.

**CONCLUSION**

As described above, the Motion to Strike must be denied as it does not provide any valid or logical basis for the Court to grant the Respondents' request and strike Volumes I and II of the Appellants' Appendix and additional section of their opening brief. This is simply an attempt by the Respondents to skirt a fundamental flaw in their arguments by arbitrarily preventing the Court from fully reviewing the factual background of its previous decision in Nelson v. Heer. Thus, the Appellants respectfully request the Court deny the Respondents' Motion to Strike. Or in the alternative, Appellants request the opportunity to produce the same information in pamphlet form and amend the Appendix appropriately.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of March 2021.

**BLACK & WADHAMS**

RUSTY GRAF, ESQ.  
Nevada Bar No. 006322  
MARK LOUNSBURY, ESQ.  
Nevada Bar No. 015271  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
702-869-8801  
*Attorney for Appellants*  
*Joseph Folino and Nicole Folino*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of March 2021, that I served a copy of the foregoing document upon all counsel of record electronically via the Court's eflex-efile and e-serve system.

/s/ Diane Meeter  
An Employee of Black & Wadhams