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.

S.C. DOCKET NO: 81252
Consolidated with Case No: 81831

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' REPLY BRIEF

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NRAP 26.1 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.

Dated this 6th day of July 2021.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I.

RESPONDENTS' ARGUMENTS REGARDING THE DISTRICT COURT'S DECISION TO GRANT SUMMARY JUDGMENT ARE FLAWED

A. 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 only appropriate when: (1) there are no genuine disputes over material facts; and (2) the moving party is 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 analyzing the above elements, all evidence must be viewed in a light most favorable to the non-moving party and all reasonable inferences must be made in favor of 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.*

B. The Respondents' Arguments Regarding *Nelson v. Heer* are Incorrect and Demonstrably Flawed

The foundation of the Respondents' legal argument is that under the holding of *Nelson v. Heer*, it was not a misrepresentation for Respondent Todd Swanson, on the Seller's Real Property Disclosure form ("SRPD") produced to Appellants, to answer "No" to the question do you have knowledge of any "**[p]revious or current**

moisture conditions and/or water damage" despite undisputed evidence that he possessed such knowledge. *(Emphasis added) See Appendix Vol. IV, at JA000685.* Though the Answering Brief makes wide ranging arguments, the Appellants would emphasize that there are three (3) key points which alone are determinative for this dispute.

First, the Respondents' argument that this matter cannot be distinguished from the holding of *Nelson v. Heer* is flawed because, in that case it was never plead that home seller, Nelson, made any affirmative factual misrepresentations on the SRPD she completed. In contrast, it is asserted here that Respondents did affirmatively misrepresent facts. *See Respondents' Answering Brief at 21-25.* Second, the arguments in the Respondents' Answering Brief completely ignore that the abrogation of the duty to disclose a fact is fundamentally different from having the legal right to make an affirmative misrepresentation/omission regarding a known fact. *Id. at 27-31.*

Finally, third, regardless of the applicability of *Nelson v. Heer* it is still clearly evidenced by the record that the District Court erred in granting the Respondents' summary judgment, because that decision was based on the improper failure to consider the actual claims made in the Appellants' Complaint. The court also ignored clear evidence that the Respondent Todd Swanson had knowledge of unrepaired leaks, which were undisclosed despite acknowledgement, and even

notation of the event, by Respondent Swanson himself. *See Appendix Vol. XIX, JA003710-JA003711; see also Appendix Vol. III, JA000512-JA000525; see also Appendix Vol. XVI, JA002958-JA002997.* As described in turn below, the Respondents' attempts to address the above points in their Answering Brief are all flawed and the fundamental problems with the legal arguments they have asserted further demonstrates that the District Court's decision was in error and should be reversed.

i. The Argument that *Nelson v. Heer* Controls Relies Upon the Mischaracterization of Pertinent Facts and Legal Standards

The Respondents begin their argument by stating that *Nelson v. Heer* is "controlling law." Respondents also argue the Appellants' assertion that the District Court erred in extending the holding beyond "abrogation of the duty to disclose" to "permit objectively false representations on [an] SRPD" ignores the holding of *Nelson v. Heer*, upon which they disproportionately rely. *See Answering Brief at 21-22.*[1] Though the Respondents further state that the Appellants' position is only based on "the Folinos' wild speculations", the subsequent discussion of the factual background and holding of *Nelson v. Heer* reveals that the Respondents' position is fundamentally and fatally flawed. *Id.* One need not speculate as to the contents of

[1] Appellants do not dispute the simple fact that the case presently before the Court is a lawsuit to find that the Plaintiff failed to identify a defect to the Buyer in a timely fashion in the sale of this home.

the third-party inspector's report. This report informed the Respondents that there were several instances of moisture in the home. One of those moisture conditions remained at the time of the completion of the SRPD and was unreported to the Appellants. *See Appendix Vol. XV, JA002870-JA002997; see also Appendix Vol. XVI, JA003006-JA003008.*

Respondents' discussion of the factual background of Nelson v. Heer first states, correctly, that "[i]n *Heer*, a water pipe on the **third floor** of a cabin on Mt. Charleston burst, flooding the cabin . . . [and] a passerby noticed water flowing from the cabin . . . ". *(Internal quotations omitted) (Emphasis added) Id. at 22.* This statement is properly supported by a citation to the Court's decision from Nelson v. Heer. *Id.* However, the Respondents' argument then immediately segues into wild speculations by stating "[t]he extensive water loss and the damages at that cabin were much more severe than any purported leaks or drips in this case." *Id.* The Respondents make this assertion with absolutely no support and without any citation to the record or case law as required by NRAP 28. *Id.* More importantly, the law and the SRPD do not allow for the lack of reporting of drips. As drips are still conditions of moisture that have the potential to cause damage.

Under NRAP 28(a)(10)(A), it is required that all contentions made within the argument section of a brief include "citations to the authorities and parts of the record on which the appellant relies" and, per NRAP 28(b), this requirement is also applied

to a respondent's answering brief. *See NRAP 28(a)(10)(A); see also NRAP 28(b).* Thus, the hypocrisy of Respondents engaging in such wild unsupported speculation on the factual background of *Nelson v. Heer*, almost immediately after accusing the Folinos of the same, is deeply ironic due to the fact that the Respondents purposefully excluded additional background information from *Nelson v. Heer* from consideration through their Motion to Strike, which they seem to want to allude to. *See Respondents' Motion to Strike.*

Respondents proceed by stating "[t]he Court in *Heer* faced the same question the district court faced in this case: whether previous or current moisture conditions, which the owner repaired, had to be disclosed on the seller's SRPD to potential buyers". *(Internal Quotations Omitted) See Answering Brief at 23.* This statement is a blatant mischaracterization. As both the Court and the Respondents are well aware, there was never an affirmative misrepresentation made by the seller in *Nelson v. Heer* as determined by this Court. *See Nelson v. Heer, 123 Nev. 217, 163 P.3d 420 (2007).* More specifically, the phrase, "[w]hich the owner repaired" is not supported by the pleadings or the facts. The intentional misrepresentation claim analyzed therein was "based upon Nelson's **failure to disclose** the prior water damage". *(Emphasis added) See Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007).* Further, in that case when discussing the false representation element of an intentional misrepresentation claim, the Court stated "[w]ith 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." *(Emphasis added) Id.* Here, unequivocal evidence of the occurrence of prior moisture conditions has been presented by Appellants. This omission constitutes the false representation of fact.

Further, the above makes it clear that the holding of *Nelson v. Heer* was absolutely not that the abrogation of the duty to disclose also permits objectively false statements on an SRPD. It is unambiguous that the analysis conducted in *Nelson v. Heer* is of a claim for intentional misrepresentation. Where the false representation element was only met through the omission of a fact that there was a good faith duty to disclose. *Id.* This is completely distinct from the instant dispute where, regardless of any duty to disclose, the Respondents directly made a false representation on the SRPD by stating they had no knowledge of any previous leaks or moisture conditions. *See Appendix Vol. IV, JA000684-JA00688.* The Appellants would also note that the Court's holding on the intentional misrepresentation claim in *Nelson v. Heer* was not even actually based on any abrogation of the duty to disclose, as the Court's decision directly stated, "we reverse the district court's judgment of $24,000 for Heer's claim of intentional misrepresentation, **because Heer failed to establish that the water damage proximately caused the elevated**

amounts of mold within the guest bedroom and master bedroom closet." *(Emphasis added) See Nelson v. Heer, 123 Nev. 217, 226, 163 P.3d 420, 426 (2007).*

Because the lack of any actual affirmative misrepresentation in Nelson v. Heer is ultimately damning to the Respondents' arguments, they proceed to attempt to address this point by engaging in mischaracterization and speculation through contentions for which they, again, fail to provide any citation to case law or the record to support. *See Answering Brief at 24.* For example, the Respondents state "[t]he flooding that occurred at the Nelson cabin was a previous or current moisture conditions" because "unless the laws of gravity did not apply to Mt. Charleston on that day, the water from the third-floor rupture would have created moisture on every level of the cabin" and "[i]t is highly unlikely that the water was gushing only from the third-floor windows of Nelson's cabin." *(Internal Quotations Omitted) Id.* No citation is made to the Nelson v. Heer decision, the record in that appeal, or anything else in support of this argument. *Id.* It is not a finding in the decision that the water flowed from the third floor all the way down to the basement. Id. Thus, it is clear that it is a flimsy and flawed argument to assert that "[n]o material distinction exists between this case and Heer." By suggesting, without any support and which the Court already knows is false, that there actually was an affirmative misrepresentation in that case is inappropriate. *Id. at 23-24.*

The Respondents conclude their argument as to *Nelson v. Heer* by (1) describing the leaks they assert were repaired, (2) acknowledging the presence an unrepaired leak, which they simply dismissed as "[t]he phantom basement bathroom leak", and (3) asserting "[t]hus, the Folinos failed to establish that Swanson was bound in good faith to disclose the repaired water damage, or that he intended for the Folinos to rely on the claimed omission." *Id. at 24-25.* In light of the above discussion, it is clear this conclusion is deeply flawed because: (1) regardless of whether Swanson had the good faith duty to disclose the previous leaks or that duty was abrogated, the intentional misrepresentation claim does not rely upon that duty due to the affirmative misrepresentation by Respondent Swanson on the SRPD; (2) whether Swanson intended for the Appellants to rely on his omissions is also irrelevant to the intentional misrepresentation claim due to the affirmative misrepresentation on the SRPD; and (3) the Respondents acknowledge that there was an unrepaired basement bathroom leak and offer no argument as to why the failure to disclose this leak (and affirmative misrepresentation that it did not exist) does not provide a basis for the intentional misrepresentation claim. Merely stating it was a "phantom" and "only seen once" is not repair as required by *Nelson v. Heer*. *See Answering Brief at 24-25.* Appellants have not found any exclusion to the SRPD, despite the Respondents numerous assertions otherwise.

More importantly, this is not a situation where the Appellants found out about a person spilling a glass of wine or other beverage in the home during a social event, and then Appellant subsequently sought to use that incident as the basis for the violation of the disclosure requirements of the SRPD or the intentional misrepresentation claim. No, what has been alleged, and proven at the District Court level, is a condition of moisture which was directly identified by an INSPECTION COMPANY in a report given to the Respondents, and upon which the Respondent notated. Thereafter, evidence has been shown through the testimony and evidence from the Respondent himself that the condition of moisture was admittedly never repaired. Thus, the Respondents' own arguments reveal that there is no factual or legal support for the arguments it has asserted and, therefore, it must be concluded that the District Court erred in granting summary judgment. *Id.*

ii. The Argument that Respondent Swanson did not Violate NRS 113 is Without Any Basis

After making the arguments concerning the decision in *Nelson v. Heer*, the Respondents next engage in an extensive discussion of the disclosure requirements of NRS 113 and proceed to assert that those requirements were not violated. *See Answering Brief at 25-29.* Though there are a number of issues with the Respondents' arguments in this vein, the key point is that Respondents have affirmatively admitted in their Answering Brief, and before the district court, that,

at the bare minimum, there was one (1) unrepaired basement leak that was never disclosed, and which Respondent Swanson directly indicated did not exist on the SRPD. *Id. at 24-25*. They call the leak little and unresolved and unlocated, but they nonetheless acknowledge its existence by such nomenclature. *Id.* Thus, there is no question the claim that Respondent Swanson complied with NRS 113.140(1) and NRS 113.150(5)(b) is patently false. *Id. at 28*. Respondents attempt to obfuscate this point by extensively discussing the repaired leaks but, again, they offer absolutely no reasonable legal argument as to why the admittedly unrepaired basement bathroom leak does not constitute a violation of the requirements of those statutes. *Id. at 25-29*.

iii. The Respondents are Attempting to Obscure the Factual Background of *Nelson v. Heer*

Respondents next slightly shift the focus of their arguments, and assert "[t]he Folinos contend the text of the SRPD in *Heer* varies from the SRDP now in use and approved by the Nevada Real Estate Division. But that assertion is unsupported by the record. Building on this speculation, the Folinos conclude that Heer is not controlling." *Id. at 29*. Respondents further state that "[t]he Folinos are mistaken" because "they failed to raise this argument in the court below, and it cannot be considered here" and "[f]urther, they cannot show how any purported changes in the text of the SRPD affect the outcome of this case." *Id. at 28-29*.

As the Court is already aware, the Respondents filed a Motion to Strike which resulted in an Order, filed April 16, 2021, that directed the clerk to strike the portions of the joint appendix which contained records and documents filed in Nelson v. Heer, but also stated that "[t]o the extent appellants argue in the brief that the facts of *Heer* were different from those at issue in the instant appeal, such argument may stand." *See April 16, 2021, Order at 2.*

Thus, per this Court's Order, the following arguments by Appellants' as to the facts proven and established in this matter being distinctly and fundamentally different from the facts established in Nelson v. Heer are permitted to stand and demonstrate the flaw in Respondents' position: (1) the SRPD completed by Nelson asked "[a]re you **aware** of any of the following: **1. Basement / Crawl space:** Previous or current moisture conditions?"; (2) the SRPD completed by Nelson did not inquire as to the existence of any previous or current moisture conditions in any area of the property other than the basement/crawl space; (3) the leak on Nelson's property occurred on the third floor of the property, not in the basement / crawl space;[2] (4) that, therefore, it was not a false representation for Nelson to respond "No" in response to the SRPD's question, when the leak did not happen in the basement / crawl space; and (5) this distinguishes Nelson v. Heer from the instant

[2] *See Nelson v. Heer, 123 Nev. at 220, 163 P.3d at 422.*

matter because the version of the SRPD completed by Respondents inquired as to knowledge of the existence of any previous or current moisture conditions anywhere within the "Structure" rather than just the basement/crawl space. Thus, Respondent Swanson's broad response of "No" was an affirmative misrepresentation. *See Appellants' Opening Brief at 12-14.*

C. The Respondents Mischaracterize the Evidence Presented to the District Court

The Respondents proceed to argue that "[d]espite conducting extensive discovery, the Folinos were unable to establish that all prior leaks were not repaired – and they chose to close on the home despite their knowledge of the November 2017 leak." *See Answering Brief at 32.* This is demonstrably false as, to reiterate, the Respondents have directly admitted that there was a basement leak that was never repaired. *See Answering Brief at 25-29.* The Respondents' assertion assumes a premise that there was only the November 2017 leak. *Id.* Assuming, arguendo, that was a fact, then that argument may prevail. However, as there are numerous water losses other than the November 2017 leak which are documented and proven, it must be concluded that this argument lacks any valid basis.

The falsity of this statement is evidenced by the Criterium Home Inspection Report, the contents of which were known to Respondents prior to their completion and signing of the SRPD for the Subject Property. Further, the multiple sets of

handwritten notes by Respondent Swanson documenting the progress of repairs, and lack thereof, to the Subject Property 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.* Further, this false assertion by the Respondents that there was only the November 2017 leak also ignores two (2) leaks in the Subject Property's recirculation pumps, which were also identified in the Criterium Home Inspection Report, as well as 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.*

Taken together, the evidence of leaks other than the November 2017 leak demonstrates an issue of material fact, which made the District Court's decision to grant summary judgment an error. As Respondents seemingly realize that their arguments cannot overcome or otherwise address the existence of these leaks, they instead seek to mischaracterize the content of the Appellants' Complaint by arguing that the February 2017 leak was the sole focus of the Appellants' suit and "the Folinos did not present any evidence showing the repaired February 2017 leak caused any damages or materially affected the value of the home." *See Answering Brief at 32.* However, as described below, the Appellants' complaint clearly and

plainly contained claims which encompassed all of these undisclosed leaks on the Subject Property, not simply the February 2017 leak or the November 2017 leak.

D. The Appellants' Complaint was not Solely Focused on the February 2017 Leak and the District Court Erred in Analyzing the Claims Only in Regard to that Leak

First, as quoted by the Respondents themselves in their Answering Brief, the District Court directly stated that "[y]ou [the Folinos] have to remember that the whole focus of your lawsuit was the February 6th (sic) 2017 leak." *See Answering Brief at 36; see also Appendix Vol. VII, JA001861.* Even after clear documentation of the unrepaired basement leak was produced, the District Court simply disregarded the evidence before it, stating in its 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.* Further, Appellants' counsel specifically argued to the District Court that the basement leak alone provided a solid basis for the claims in their Second Amended Complaint. *See Appendix Vol. IX, JA003710.*

Though Appellants' Second Amended Complaint contained numerous allegations that encompassed the undisclosed leaks, the following sentence alone from that Complaint reveals that the District Court and Respondents' are incorrect

in asserting that the focus was only the February 2017 leak: "[t]he 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 at ¶ 43.* As has been argued in the prior Brief, Nevada is a notice pleading state, and this clearly puts the parties on notice of the claims. *See Appellants' Opening Brief.* More succinctly, through discovery the Appellants uncovered at least six (6) different leaks, some of which the Respondents claim were repaired. *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.* However, the basement leak was unequivocally not repaired, was known to the Respondents and these facts are not disputed. *Id.*

This case is not an issue of the scope of the damages or the repairs to be made to the home, this case is whether the scope of the systemic failures in the plumbing system as a whole should have been made known to the Appellants in the SRPD and prior to the close of escrow. NRS 113 et seq. was passed by the Legislature for this specific purpose and *Nelson v. Heer* was decided to further clarify that chapter. *See NRS 113 et seq.*; see also *Nelson v. Heer, 123 Nev. 217, 226, 163 P.3d 420, 426 (2007).*

More importantly, "Knowledge" is created in a number of ways, and one of those is the repetition of events. Like the old adage, "Fool me once, shame on you; fool me twice, shame on me" derived from the proverb, "After being tricked once, one should be wary, so that the person cannot trick you again", here, the Respondents asked the District Court to ignore the leak in the basement, simply because it was not a big leak.[3] The magnitude of the leak is not dispositive of the duty to disclose knowledge of that leak, and the Appellants were never told of the "trick" so as to be wary of the Respondents actions.

E. The Respondents' Arguments & the District Court's Decision Both Rely on a Wholly Controverted Affidavit that Fails the NRCP 56(c) Personal Knowledge Requirement

i. Legal Standard for Affidavit Personal Knowledge Requirement

"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*

[3] See McGraw-Hill Dictionary of American Idioms and Phrasal Verbs (2002).

(1971). If a review of business records is the basis of the personal knowledge stated in an affidavit, the documents reviewed must be exhibited. *Id.*

ii. Aaron Hawley's Affidavit was Controverted & William Gerber's Deposition Testimony does not Support Respondents' Position

Respondents seek to minimize the fact that Aaron Hawley's Affidavit was controverted by stating Appellants "focus on an **inconsequential conflict** between the affidavit of Aaron Hawley and his deposition testimony", but this argument completely ignores the above stated requirement for personal knowledge (which Hawley has admitted he does not possess). *(Emphasis added) See Answering Brief at xi.* There is no inconsequential conflict when considering the lack of personal knowledge of the Affiant/Declarant, as there is either personal knowledge or there is not. Here, there is not.

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.*

Respondents attempt to address this fatal flaw by citing to the deposition testimony of an employee of Hawley, William Gerber, but the cited testimony does nothing to overcome the issues with Aaron Hawley's Affidavit. *See Answering brief at 6 & 37-38*. This is because it is clear that: (1) Aaron Hawley's Affidavit was in violation of NRCP 56(c); and (2) the District Court's decision was largely based on that Affidavit. Thus, the District Court's decision must be remanded.

II.

RESPONDENTS' ARGUMENTS REGARDING THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES AND COSTS ARE ALSO FLAWED

A. Standard of Review for Awards of Attorneys' Fees & 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 decide "in clear disregard of the guiding legal principles". *See Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).*

B. The District Court Erred in Awarding Fees and Costs

Finally, the Respondents' Brief engages in an extensive discussion of the District Court's award of fees and costs and its analysis of the *Beattie* and *Brunzell* factors in making that award. *See Answering Brief at 46-62.* Appellants' have already addressed these issues extensively in their Opening Brief. *See Appellants' Opening Brief at 34-41.* Therefore, the Appellants' would simply briefly reiterate that the award of fees and costs to the Respondents' is entirely premised upon the assumption that it was a valid legal decision to grant the Respondents' summary judgment. As detailed throughout this Response Brief and the Opening Brief, that decision by the District Court was in error and, thus, the award of attorney's fees and costs should be reversed if the Court determines it is proper to remand this matter.

More importantly, the District Court made the determination that the fees were being awarded as "brought without reasonable ground." *See NRS 18.010(2)(b).* This is a factual dispute of whether there was an unreported unidentified additional leak in the basement, which cannot meet the requirements of a sanction by the District Court. More importantly, there were at least six (6) leaks, only two (2) of

which they have acknowledged and argue were repaired. There is no affidavit or proof of the other repairs. *See Joint Appendix*. Therefore, bringing this case and pursuing the damages for the Respondents' misrepresentation is reasonable.

III.

CONCLUSION

Based on the above, the Appellants respectfully requests that this Court reverse the district court's orders granting summary judgment and awarding fees and costs and remand this matter for further litigation.

RESPECTFULLY SUBMITTED this 6 day of July 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 of style requirements of NRAP 32(a)(6). I further certify that this brief contains less than 7,000 words and complies with the type-volume limitations of NRAP 32. 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. 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 6th day of June 2021.

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System:

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF e-flex electronic filing/service system; on July 6th, 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 6th day of July 2021.

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