

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.

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Elizabeth A. Brown
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Consolidated with Case No: 81831

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

OPPOSITION TO RESPONDENTS' MOTION TO FILE SURREPLY

I.

THE MOTION TO FILE SURREPLY LACKS ANY VALID BASIS

The Respondents' Motion begins by correctly identifying the fact that after the Appellants' Reply Brief was filed, NRAP 28(c) prohibits the filing of further briefs without permission of the Court. *See Respondents' Motion to File Surreply at 1; see also NRAP 28(c)*. The Respondents proceed to state that their instant Motion is brought pursuant to NRAP 27 for the purpose of correcting an "impermissible argument made by Appellants". *Id. at 1-2*. The proposed Surreply subsequently begins by outlining the procedural history of this matter and, specifically, the

Respondents' Motion to Strike pages 1 through 248 in Volumes I and II of Appellants' Appendix which was granted by the Court. *Id. at 3.*

However, as the Respondents directly state, the Court's holding on that Motion to Strike included ruling 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." *Id. at 3-4.* Respondents now assert, despite the ruling that those arguments were allowed to stand, that "Appellants arguments at pages 16-17 of their Reply Brief have no factual support" and are therefore improper. *Id. at 4.* As detailed below, Respondents are incorrect in their characterization of the Appellants' arguments and, therefore, have raised an invalid argument through their instant Motion. Therefore, the Appellants respectfully request that Respondents' Motion to File Surreply be denied.

A. Appellants did not Violate NRAP 28(a)(10)(A)

The Respondents' argument is ironic, as immediately after they cite to this Court's Order for the quotation "[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", they proceed to seemingly argue that citation to such an Order is outside the record and thus improper. *Id. at 3-4.* Respondents state that "NRAP 28(a)(10)(A) specifically requires that every factual assertion supporting an argument contain a citation to the record" but ignore the fact that the pages of the Appellants' Reply

Brief which they seek to have stricken are discussing, and contain citations to, both Nelson v. Heer and the April 16, 2021, Order of this Court which explicitly permitted arguments that the facts of Heer were different from those at issue in the instant appeal to stand. *Id.* at 5; *see also Appellants' Reply Brief at 16-17.*

This Motion by the Respondents is simply an attempt to twist and mischaracterize the requirements of NRAP 28(a)(10)(A), which is the rule that states a brief's argument must contain the "appellant's contentions and the reasons for them, with **citations to the authorities and parts of the record on which the appellant relies**". (*Emphasis added*) *See NRAP 28(a)(10)(A)*. Clearly NRAP 28(a)(10)(A) is not meant to exclude a party from making any mention in its briefs of the procedural developments of a case at the Appellate level, and that is all that occurred in this situation. *Id.* The Appellants' Reply Brief does directly cite to the part of the record upon which it relies, the April 16, 2021, Order, before proceeding to state "[t]hus, **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:...". *See Appellants' Reply Brief at 16.*

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More specifically, the Respondents' primary contention appears to be that the following arguments from pages 16 through 17 of the Appellants' Reply Brief are improper:

(1) "[T]he SRPD completed by Nelson asked "[a]re you aware of any of the following: 1. Basement / Crawl space: Previous or current moisture conditions?" *Id. at 16*. This is not improper under NRAP 28(a)(10)(A) because it is supported by the case law of Nelson v. Heer and, even more importantly, it is an argument that the Court explicitly stated was permitted to stand in the April 16, 2021. To briefly reiterate, that Order stated "[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." (*Emphasis added*) *See April 16, 2021, Order Granting Motion to Strike*. This is clearly an argument that the facts of Heer were different from those at issue in the instant appeal and, thus, the Respondents have no valid basis to argue it is improper.

(2) "[T]he 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". *See Appellants' Reply Brief at 16*. Just as above, this is clearly an argument that the facts of Heer were different from those at issue in the instant appeal. As such, there is again no valid basis for the Respondents' argument it is improper.

(3) “[T]he leak on Nelson’s property occurred on the third floor of the property, not in the basement / crawl space”. *See Appellants’ Reply Brief at 16*. Though, again, the Order of this Court permitting arguments as to the factual differences between this appeal and Heer to stand is sufficient to establish that this is acceptable, this statement also included a footnote citing to Heer, further establishing that this was drawn from pertinent case law and is not unsupported. *Id.*

(4) “[T]hat, 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”. *See Appellants’ Reply Brief at 16*. Once again, this is a direct argument as to the existence of factual differences between this appeal and Heer, which has been permitted by the Court.

(5) “[T]his distinguishes Nelson v. Heer from the instant 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.” *Id. at 16-17*. Finally, this too is an argument that there are factual differences between this appeal and Heer, which is simply used to conclude that the holding of that case is, therefore, not applicable.

Id.

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II.

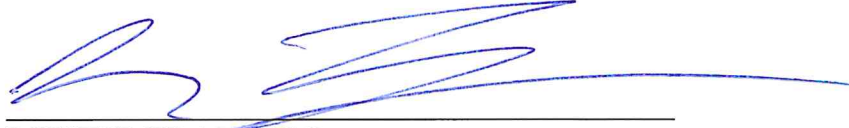
CONCLUSION

Based on the above, the Appellants respectfully assert that the Respondents' entire Motion to File Surreply is premised on the demonstrably incorrect argument that Appellants did not properly support the assertions made in their Reply Brief and, therefore, should be denied.

RESPECTFULLY SUBMITTED this 22 day of July 2021.

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CERTIFICATE OF SERVICE

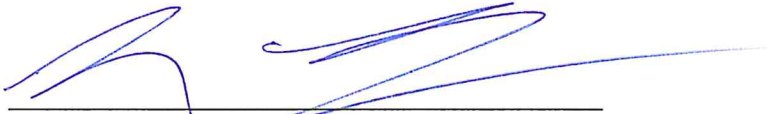
I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF e-flex electronic filing/service system on July 22, 2021.

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

DATED this 22 day of July 2021.

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