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Elizabeth A. Brown
Clerk of Supreme Court

1 **NOE**
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
7 (702) 869-8801
8 (702) 869-2669 (fax)
9 *Attorneys for Plaintiffs*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and NICOLE
10 FOLINO, an individual,

11 Plaintiff,

12 v.

13 TODD SWANSON, an individual; TODD
14 SWANSON, Trustee of the SHIRAZ TRUST;
15 SHIRAZ TRUST, a Trust of unknown origin;
16 LYONS DEVELOPMENT, LLC, a Nevada
17 limited liability company; DOES I through X;
18 and ROES I through X,

19 Defendants.

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

18 **NOTICE OF ENTRY OF ORDER**

19 **PLEASE TAKE NOTICE** that a STIPULATION AND ORDER TO CONTINUE THE
20 HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'
21 MOTION FOR ATTORNEY'S FEES & COSTS was entered on June 4, 2020. A true and
22 correct copy is attached hereto.

23 Dated this 4th day of June 2020.

BLACK & LOBELLO

24 /s/ Rusty Graf

25 RUSTY GRAF, ESQ., Bar No. 6322
26 10777 West Twain Avenue, Suite 300
27 Las Vegas, Nevada 89135
28 *Attorneys for Plaintiffs*

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 4th day of June 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

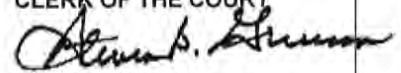
Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128
Attorneys for Defendants

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Joyce L. Martin

An Employee of Black & LoBello



1 **SAO**
2 Rusty Graf, Esq.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 West Twain Avenue, 3rd Floor
6 Las Vegas, Nevada 89135
7 Telephone: (702) 869-8801
8 Facsimile: (702) 869-2669
9 E-mail: rgraf@blacklobello.law
10 *Attorneys for Plaintiffs*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and NICOLE
10 FOLINO, an individual,

11 Plaintiff,

12 v.

13 TODD SWANSON, an individual; TODD
14 SWANSON, Trustee of the SHIRAZ TRUST;
15 SHIRAZ TRUST, a Trust of unknown origin;
16 LYONS DEVELOPMENT, LLC, a Nevada
17 limited liability company; DOES I through X;
18 and ROES I through X,

19 Defendants.

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

**STIPULATION AND ORDER TO
CONTINUE THE HEARING FOR:**

1. **PLAINTIFFS' MOTION TO
RETAX COSTS and**
2. **DEFENDANTS' MOTION FOR
ATTORNEY'S FEES & COSTS**

Current Date: June 11, 2020
Time: 9:00 a.m.
Dept.: 24

21 COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through
22 Rusty Graf, Esq. of Black & LoBello, their attorneys of record, AND Jeff Galliher, Esq. of
23 Galliher Law, and hereby submit this **STIPULATION AND ORDER TO CONTINUE THE**
24 **HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'**
25 **MOTION FOR ATTORNEY'S FEES & COSTS** currently set for hearing on **June 11, 2020**
26
27
28

1 at 9:00 a.m. in Dept. 24 of the above-captioned court to be continued to **June 25, 2020 at 9:00**
2 a.m. in Dept. 24.

3 **IT IS SO STIPULATED BY:**

4 DATED this 3rd day of June 2020.

5 **BLACK & LOBELLO**

6
7 /s/ Rusty Graf, Esq.

8 Rusty Graf, Esq.
9 Nevada Bar No. 6322
10 10777 W. Twain Ave., Suite 300
11 Las Vegas, NV 89135
12 rgraf@blacklobello.law
13 *Attorneys for Plaintiffs*

14 DATED this 3rd day of June 2020.

15 **Galliher Legal, P.C.**

16 /s/ Jeffrey L. Galliher, Esq.

17 Jeffrey L. Galliher, Esq.
18 Galliher Legal, P.C.
19 Nevada Bar No. 8078
20 1850 E. Sahara Ave., #107
21 Las Vegas, NV 89104
22 *Attorneys for Defendants*
23
24
25
26
27
28

ORDER

IT IS SO ORDERED that the STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S FEES & COSTS currently set for hearing on June 11, 2020 at 9:00 a.m. in Dept. 24 of the above-captioned shall be continued to June 25, 2020 at 9:00 a.m. in Dept. 24.

Dated: June 4, 2020


DISTRICT COURT JUDGE

Prepared by:

BLACK & LOBELLO

/s/ Rusty Graf, Esq.

Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blacklobello.law
Attorneys for Plaintiff

BLACK & LOBELLO
10777 W. Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO
and that on the 4th day of June 2020, I caused the above and foregoing document

**STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS'
MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S**

FEES & COSTS to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;
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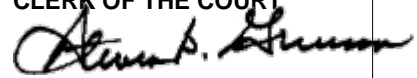
to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128
Attorneys for Defendants

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Joyce L. Martin
An Employee of Black & LoBello



SAO
Rusty Graf, Esq.
Nevada Bar No. 6322
BLACK & LOBELLO
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2669
E-mail: rgraf@blacklobello.law
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

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

**STIPULATION AND ORDER TO
CONTINUE THE HEARING FOR:**

- 1. PLAINTIFFS' MOTION TO
RETAX COSTS and**
- 2. DEFENDANTS' MOTION FOR
ATTORNEY'S FEES & COSTS**

Current Date: June 11, 2020
Time: 9:00 a.m.
Dept.: 24

COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through
Rusty Graf, Esq. of Black & LoBello, their attorneys of record, AND Jeff Galliher, Esq. of
Galliher Law, and hereby submit this **STIPULATION AND ORDER TO CONTINUE THE
HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS'
MOTION FOR ATTORNEY'S FEES & COSTS** currently set for hearing on **June 11, 2020**

1 at 9:00 a.m. in Dept. 24 of the above-captioned court to be continued to **June 25, 2020 at 9:00**
2 **a.m.** in Dept. 24.

3 **IT IS SO STIPULATED BY:**

4 DATED this 3rd day of June 2020.

5 **BLACK & LOBELLO**

6
7 /s/ Rusty Graf, Esq.

8

Rusty Graf, Esq.
9 Nevada Bar No. 6322
10 10777 W. Twain Ave., Suite 300
11 Las Vegas, NV 89135
12 rgraf@blacklobello.law
13 *Attorneys for Plaintiffs*

12 DATED this 3rd day of June 2020.

14 **Galliher Legal, P.C.**

15 /s/ Jeffrey L. Galliher, Esq.

16

Jeffrey L. Galliher, Esq.
17 Galliher Legal, P.C.
18 Nevada Bar No. 8078
19 1850 E. Sahara Ave., #107
20 Las Vegas, NV 89104
21 *Attorneys for Defendants*

ORDER

IT IS SO ORDERED that the **STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS' MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S FEES & COSTS** currently set for hearing on **June 11, 2020 at 9:00 a.m.** in Dept. 24 of the above-captioned shall be continued to **June 25, 2020 at 9:00 a.m.** in Dept. 24.

Dated: June 4, 2020



DISTRICT COURT JUDGE

Prepared by:

BLACK & LOBELLO

/s/ Rusty Graf, Esq.

Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blacklobello.law
\Attorneys for Plaintiff

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO
and that on the 4th day of June 2020, I caused the above and foregoing document

**STIPULATION AND ORDER TO CONTINUE THE HEARING FOR: 1. PLAINTIFFS'
MOTION TO RETAX COSTS and 2. DEFENDANTS' MOTION FOR ATTORNEY'S
FEES & COSTS** to be served as follows:

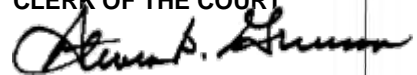
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☐ hand delivered
to the party or their attorney(s) listed below at the address and/or facsimile number indicated
below:

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128
Attorneys for Defendants

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so
addressed.

/s/ Joyce L. Martin
An Employee of Black & LoBello



1 **ERR**

2 Rusty Graf, Esq.

3 Nevada Bar No. 6322

4 **BLACK & LOBELLO**

5 10777 West Twain Avenue, 3rd Floor

6 Las Vegas, Nevada 89135

7 Telephone: (702) 869-8801

8 Facsimile: (702) 869-2669

9 E-mail: rgraf@blacklobello.law

10 *Attorneys for Appellants*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JOSEPH FOLINO, an individual and NICOLE
14 FOLINO, an individual,

15 Appellants,

16 v.

17 TODD SWANSON, an individual; TODD
18 SWANSON, Trustee of the SHIRAZ TRUST;
19 SHIRAZ TRUST, a Trust of unknown origin;
20 LYONS DEVELOPMENT, LLC, a Nevada
21 limited liability company; DOES I through X;
22 and ROES I through X,

23 Respondents.

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

**ERRATA TO CASE APPEAL
STATEMENT**

24 COMES NOW, Appellants JOSEPH FOLINO and NICOLE FOLINO, by and through
25 their attorney of record Rusty Graf, Esq., of Black & LoBello, hereby submit their Errata to
26 their Case Appeal Statement, wherein Appellant Nicole Folino was inadvertently listed as Kelly
27 Folino.

28 ///

///

///

///

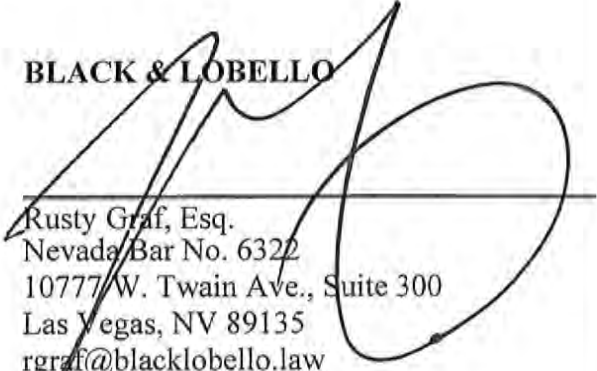
///

///

1 Appellants submit the instant Errata, therefore, for the purpose of providing the Court
2 and opposing counsel with a correct version of the Case Appeal Statement. The corrected
3 version of the Case Appeal Statement is attached hereto as Exhibit 1.

4 DATED this ____ day of June 2020.

BLACK & LOBELLO


Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blacklobello.law
Attorney for Appellants

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 18th day of June 2020, I caused the above and foregoing document **ERRATA TO CASE APPEAL STATEMENT** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

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to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

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Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

James A. Kohl
Howard & Howard Attorneys PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
Settlement Judge

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.


An Employee of Black & LoBello

EXHIBIT 1

1 **ASTA**
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (fax)
Attorney for Appellants

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9
10 JOSEPH FOLINO, an individual and
11 NICOLE FOLINO, an individual,

12 Plaintiffs,

13 v.

14 TODD SWANSON, an individual; TODD
15 SWANSON, Trustee of the SHIRAZ
16 TRUST; SHIRAZ TRUST, a Trust of
17 unknown origin; LYONS DEVELOPMENT,
18 LLC, a Nevada limited liability company;
19 DOES I through X; and ROES I through X,

20 Defendants.

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

CASE APPEAL STATEMENT

21 Plaintiffs Joseph Folino and Nicole Folino ("Plaintiffs"), by and through their attorney of
22 record, Rusty Graf, Esq. of the law firm Black & LoBello, hereby submits their Case Appeal
23 Statement pursuant to Nevada Rule of Appellate Procedure 3(f) as follows:

24 ///

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CASE APPEAL STATEMENT

(A) The district court case number and caption showing the names of all parties to the proceedings below:

The district court case number is A-18-782494-C and caption is correctly stated above. The parties to the proceedings below are Plaintiffs and Defendants Todd Swanson, an individual, Todd Swanson, as Trustee of the Shiraz Trust, and Lyons Development LLC. ("Defendants").

(B) The name of the judge who entered the order or judgment being appealed:

The Honorable Jim Crockett, Department XXIV of the Eighth Judicial District Court of the State of Nevada issued all Orders referenced above.

(C) The name of each appellant and the name and address of counsel for each appellant:

Plaintiff/Appellant:

Nicole Folino

Counsel for the Plaintiff:

Rusty Graf, Esq.
BLACK & LOBELLO
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

Plaintiff/Appellant:

Joseph Folino

Counsel for the Plaintiff:

Rusty Graf, Esq.
BLACK & LOBELLO
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

(D) The name of each respondent and the name and address of appellate counsel, if known, for each respondent, but if the name of a respondent's appellate counsel is not known, then the name and address of that respondent's trial counsel:

Defendant/Respondent:

Todd Swanson

1 Counsel for the Respondent:

2 Christopher M. Young, Esq.

3 Nevada Bar No. 7961

4 Jay T. Hopkins, Esq.

5 Nevada Bar No. 3223

6 **Christopher M. Young, PC**

7 2640 Professional Court, #200

8 Las Vegas, Nevada 89128

9 Jeffrey L. Galliher, Esq.

10 **Galliher Legal, P.C.**

11 Nevada Bar No. 8078

12 1850 E. Sahara Ave., #107

13 Las Vegas, NV 89104

14 Attorneys for Respondent

15 Defendant/Respondent:

16 Todd Swanson as Trustee of the Shiraz Trust

17 Counsel for the Respondent:

18 Christopher M. Young, Esq.

19 Nevada Bar No. 7961

20 Jay T. Hopkins, Esq.

21 Nevada Bar No. 3223

22 **Christopher M. Young, PC**

23 2640 Professional Court, #200

24 Las Vegas, Nevada 89128

25 Jeffrey L. Galliher, Esq.

26 **Galliher Legal, P.C.**

27 Nevada Bar No. 8078

28 1850 E. Sahara Ave., #107

Las Vegas, NV 89104

Attorneys for Respondent

Defendant/Respondent:

Lyons Development, LLC.

Counsel for the Respondent:

Christopher M. Young, Esq.

Nevada Bar No. 7961

Jay T. Hopkins, Esq.

Nevada Bar No. 3223

Christopher M. Young, PC

2640 Professional Court, #200

Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.

Gallihier Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondent

(E) Whether an attorney identified in response to subparagraph (D) is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42, including a copy of any district court order granting that permission:

N/A

(F) Whether the appellant was represented by appointed counsel in the district court, and whether the appellant is represented by appointed counsel on appeal:

N/A

(G) Whether the district court granted the appellant leave to proceed in forma pauperis, and if so, the date of the district court's order granting that leave:

N/A

(H) The date that the proceedings commenced in the district court:

Plaintiffs initiated the proceedings when they filed their Complaint on October 19, 2018.

(I) A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is a tort action related to the purchase and sale of a home located at 42 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from the discovery of systemic plumbing issues after the close of the sale, and the failure of the Defendants to disclose their knowledge of water loss occurrences on the Residential Purchase Agreement. The Plaintiffs' Second Amended Complaint had two causes of action, Violation of NRS 113.100 et seq. and Fraud/Intentional Misrepresentation. This appeal concerns errors by the trial court in the May 11, 2020 Order granting Defendants' Motion to Dismiss and the Findings of Fact and Conclusions of Law contained therein.

1 The issues on appeal, in short, include (1) the trial court's application of the holding of
2 *Nelson v. Heer* to this dispute;¹ (2) the Finding of Fact that Plaintiffs' action was premised on the
3 Defendants' failure to disclose a specific leak which occurred on February 16, 2017; (3) the
4 Conclusion of Law that "Plaintiffs lawsuit is predicated on their allegations that the Defendants
5 failed to disclose a February 16, 2017 water leak in the Uponor plumbing system";² (4) the
6 Finding of Fact that only the February water loss was relevant, and all other water losses
7 complained of by the Plaintiffs "are unrelated to their claims and, further, do not materially affect
8 the value of the property"; and (5) the Conclusion of Law that Plaintiffs' Fraud claim fails as a
9 matter of law because the "Second Amended Complaint alleges one wrong: Defendants' failure
10 to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect.
11 The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim."

12 The application of *Nelson v. Heer* to this case was improper for two reasons. First, because
13 the holding of *Nelson v. Heer* regards whether conducting a repair removes the general duty to
14 disclose the existence of a material issue, while here, Plaintiffs' argued that even if the duty to
15 disclose is removed by repair it is still fraud and/or concealment to respond incorrectly to a direct
16 inquiry (stating "no" in response to a question asking if any previous incidents of water loss **had**
17 **ever occurred**). These are not the same issue. Second, because even if the holding of *Nelson v.*
18 *Heer* did allow Defendants to state that no previous water losses had ever occurred (due to repair),
19 Plaintiffs provided evidence of other unrepaired and undisclosed water losses which were not
20 considered by the trial court.

21 The other issues on appeal all involve Findings of Fact and Conclusions of Law relating
22 to the incorrect statement, and subsequent analysis, of the scope and content of Plaintiffs' claims.
23 The May 11, 2020 Order makes it clear that granting the Motion to Dismiss was based entirely
24

25 ¹ In the May 11, 2020 Order granting the Motion to Dismiss, the trial court directly stated that it was relying upon
26 the holding of *Nelson v. Heer*, and asserted that "repairing damage negates a seller's duty to disclose damage
because repaired damage "no longer constitute[s] a condition that materially lessen[s] the value of the property.""

27 ² Additional Findings of Fact in the May 11, 2020 Order state that (1) previous leaks in other areas of the house
28 were not related to Plaintiffs' Claims; and (2) that another separate water loss in a basement bathroom was not
related to Plaintiffs' Claims, making it clear that the trial court exclusively considered the February and November
leaks in granting the Motion to Dismiss.

1 upon the incorrect assessment that “Plaintiffs have failed to present evidence to establish the one
2 fact that could possibly make their claims viable: that the February 2017 leak was not repaired.”
3 The problem with this assessment is that it has no basis in the substance and allegations actually
4 contained in Plaintiffs’ Second Amended Complaint.

5 Plaintiffs’ initial Complaint and First Amended Complaint were focused on the February
6 2017 leak, but these Complaints were not the subject of the Motion to Dismiss. Plaintiffs’ Second
7 Amended Complaint asserts in pertinent part that (1) the Seller’s Real Property Disclosure did
8 not notify Plaintiffs’ of “any water event”; (2) that other water losses occurred which either
9 required disclosure themselves or made Defendants aware of “systemic defects” in the plumbing
10 system; and (3) that Defendants acted with intent to deceive when they failed to notify Plaintiffs
11 of the prior water losses (which include at least one water loss that Defendants did not even claim
12 was repaired and, therefore, cannot logically be covered by the *Nelson v. Heer* removal of duty
13 to disclose).

14 It was improper of the trial court to determine that it would only analyze Plaintiffs’ claims
15 in relation to the February 2017 leak, when this clearly did not align with the actual contents of
16 Plaintiffs’ Second Amended Complaint. Thus, the trial court’s subsequent May 11, 2020 Order
17 is also improper, as it was not based upon the pleading that was actually the subject of the Motion
18 to Dismiss (the Second Amended Complaint) and instead analyzed the Motion to Dismiss in
19 relation to the content of the initial Complaint and First Amended Complaint. These disparities,
20 among others, necessitate appellate relief.

21 **(J) Whether the case has previously been the subject of an appeal to or original writ**
22 **proceeding in the Supreme Court or Court of Appeals and, if so, the caption and**
23 **docket number of the prior proceeding:**

24 N/A

25 **(K) Whether the appeal involves child custody or visitation:**

26 N/A

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(L) Whether the appeal involves the possibility of settlement:

Plaintiffs do not believe that there is a possibility of settlement with Defendants.

Dated this ____ day of June, 2020.

BLACK & LOBELLO

RUSTY GRAF, ESQ.
Nevada Bar No. 6322
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (fax)
rgraf@blacklobello.law
Attorney for Appellants

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Black & LoBello and that on
3 the ____ day of June 2020, I caused the above and foregoing document entitled **CASE**
4 **APPEAL STATEMENT** to be served as follows:

- 5 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
7 ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's
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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

CASE#: A-18-782494-C

DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE

THURSDAY, JUNE 25, 2020

**RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE VIA
BLUEJEANS HEARING
DEFENDANTS' MOTION FOR FEES AND COSTS AND PLAINTIFFS'
MOTION TO RETAX COSTS**

APPEARANCES (continued on page 2):

For the Plaintiffs:

J. RUSTY GRAF, ESQ.

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APPEARANCES (continued):

For the Defendants:

JEFFREY L. GALLIHER, ESQ.

RECORDED BY: NANCY MALDONADO, COURT RECORDER

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1 Las Vegas, Nevada, Thursday, June 25, 2020

2
3 [Case called at 9:20 a.m.]

4 THE CLERK: Case A-18-782494-C, Joseph Folino versus
5 Todd Swanson.

6 THE COURT: All right, who do we have for the Plaintiff?

7 MR. GRAF: Good morning, Your Honor, Rusty Graf
8 appearing for the Plaintiffs.

9 THE COURT: Okay.

10 MR. GALLIHER: Good morning, Your Honor, Jeff Galliher for
11 the Defendants.

12 THE COURT: All right, now I had actually reviewed all of this
13 and was issuing an order without the need for oral argument, because
14 you guys provided very comprehensive briefs. You passionately
15 presented your points of view. And I couldn't imagine you adding
16 anything at oral argument.

17 And my experience has been, not just with you guys, but with
18 most counsel, that rarely at oral argument do counsel add anything new.
19 They're usually reiterating things that they already said in their motion,
20 opposition, or reply briefs.

21 And I guess the fear is that I didn't read it and comprehend it
22 the first time, but I did. So I'm going to tell you what my thinking is on
23 these two motions.

24 And then, I'll grant each of you a very brief opportunity, if you
25 choose to exercise it, to provide two or three minutes of oral argument if

1 you think it is necessary.

2 So with regard to Defendants' Motion for Fees and Costs, the
3 Court has carefully and meticulously reviewed the Motion for Fees that
4 was filed April 22nd, 2020.

5 Also reviewed Plaintiff's Opposition to the Motion for Fees that
6 was filed May 11th, as well as the errata filed May 13th, 2020, and
7 Defendants' Reply filed June 3rd of 2020.

8 Throughout the various hearings and briefings in this case, up
9 to and including the present matter under consideration, the recurring
10 theme has been that Plaintiff insists upon refusing to consider that he
11 may be pursuing an unjustified claim against the Defendant.

12 Finally, when the Motion for Summary Judgment was heard
13 and considered, it became abundantly clear to the Court that no matter
14 whether the facts or law supported Plaintiff's idea of what the case was
15 about, Plaintiff was going to insist upon pursuing claims against
16 Defendant, whether or not there was any evidence to support the claim.

17 When one of Plaintiff's claims would reveal itself to be
18 completely without merit or unsupportable under the law or facts, Plaintiff
19 resorted to a whack-a-mole approach in an effort to offer up a different
20 leak or alleged nondisclosure.

21 It demonstrated to the Court that the Plaintiff was motivated to
22 pursue this case and these claims against Defendant with the goal of
23 extorting a pound of flesh because of Plaintiff's dissatisfaction with his
24 purchase of this luxury home.

25 Very importantly, at the time of escrow closing, even though

1 new issues were arising as the escrow was still open, the Plaintiff
2 insisted upon going forward and closing escrow in spite of his actual
3 knowledge of issues he later tried to elevate into claims.

4 Having very carefully reviewed all the pleadings, the Court is
5 satisfied with the Beatty and Brunzell analysis set forth in Defendants'
6 motion and adopts the same because it is exceptionally well supported
7 in the record and compellingly persuasive.

8 Accordingly, in the preparation of the order granting this
9 Motion for Fees, Defense counsel is directed to utilize an abridged
10 version of its brief to formulate findings and conclusions for the Court's
11 adoption.

12 The fees incurred since the offer of judgment are entirely
13 reasonable and they were necessarily incurred. And the Brunzell factors
14 are thoroughly fleshed out and supported in the motion.

15 Accordingly, the Court finds that \$39,447 in fees should be
16 awarded to Defendant.

17 The Court would add that this was a very close case for the
18 Court to consider the possibility of awarding all fees, since the inception
19 of the suit, which would have amounted to the fair and reasonable sum
20 of \$82,021 in fees, but the Court declines to do so, instead, awarding
21 fees of \$39,447 reasonably and necessarily incurred since the offer of
22 judgment.

23 I'm going to address costs in discussing the Plaintiff's Motion
24 for Retax. And then, I will give counsel the opportunity to speak.

25 So with regard to Plaintiff's Motion to Retax, although

1 technically, an opposition was not filed in response to this Motion to
2 Retax, before the Motion to Retax costs was filed, Defendant filed its
3 Motion for Fees and Costs preemptively, making its arguments in
4 support of costs in its Motion for Fees and Costs.

5 There were two items that were challenged by the Plaintiff.
6 The Plaintiff says mediation costs are not enumerated. That's true.

7 Plaintiff continued that they're not reasonable or necessary,
8 but the Court thinks that's a self-defeating argument. Mediation is by
9 definition a process both the Plaintiff and the Defendant entered into
10 voluntarily in an attempt to resolve their differences.

11 Thus, it was a voluntary, consensual agreement to expend
12 funds on both sides to attempt to prevent further expense and bring the
13 matter to a close.

14 And there is no doubt that at the time that voluntary
15 consensual agreement was entered into by the parties, each of them
16 necessarily thought that it was reasonable and necessary.

17 So the Court finds a mediation expense to be both reasonable
18 and necessary, and therefore, approves the mediation costs totaling
19 \$2084.50.

20 The other item criticized by the Plaintiff is runner costs. In this
21 modern day and age, it was become more cost effective to employ the
22 services of a runner on an ad hoc basis, rather than to employ a runner,
23 which would necessitate increasing firm income, which is to say hourly
24 fees, to cover the increased overhead cost.

25 Accordingly, the Court finds that the utilization of runner

1 services was reasonable and necessary and disallows Plaintiff's
2 objection to the costs for runner totaling \$135.60.

3 So, Mr. Graf, I have explained my thinking and inclination as
4 to both of these motions. And since they disfavor the Plaintiff's side, I
5 want to give you the first opportunity to make any remarks you wish to
6 that are in addition to what you competently and comprehensively stated
7 in your briefs?

8 MR. GRAF: Thank you, Your Honor. I -- one point of
9 clarification before I speak. You're awarding the fees under NRCP 68
10 and not under 18.010(2)(b)?

11 THE COURT: Well, had I opted to award them from the very
12 beginning, I would have relied upon 18.010.

13 But since I'm only awarding them from the date of offer of
14 judgment, it's -- this decision is being made pursuant to the case law
15 under NRCP 68, offers of judgment.

16 MR. GRAF: And it just -- it shortens things, so that's why I
17 want to clarify that.

18 THE COURT: Okay.

19 MR. GRAF: So, really, the only -- the main argument that we
20 presented in the brief as to NRCP 68 --

21 THE COURT: Could you get closer to your microphone?

22 MR. GRAF: I apologize, Your Honor. Can you hear me
23 better?

24 THE COURT: Yeah, it's just a little wavery [sic]. I'm not quite
25 sure what's going on, but go ahead.

1 MR. GRAF: Okay. Your Honor, our only argument as to if
2 you seek the award to be at the timing of the offer that [indiscernible].
3 The timing of the offer of judgment, Your Honor, was made at a time
4 when it was not answer even filed by the Defendants in the case.

5 That's one of the things that may or may not have been as
6 clear in our brief. And the fact that the Defendants have never filed an
7 answer. They filed three successive motions to dismiss and then a
8 motion for summary judgment.

9 His Honor at one point in time in the hearing had required
10 them to file an answer and they didn't. So if the issue is whether or not
11 NRCP 68 is only available to a party, we would at least argue at this time
12 for purposes of the record that we don't think that they were a party per
13 se in the sense that they didn't file an answer.

14 They'd only filed a motion to dismiss. And if they weren't -- be
15 accorded the -- not protection, but the governing principals of attorneys'
16 fees pursuant to NRCP 68.

17 Then further, Your Honor, the only other argument as to timing
18 would be the offer of judgment was made at a time when there was no
19 discovery that was completed.

20 And I think that there is case law that we've cited, as well as
21 other cases in the state of Nevada, that say prior to the time of filing an
22 answer, regardless of the arguments that are made in court and
23 everything else, is not appropriate.

24 That you're a party or you're a nonparty, who presents an offer
25 of judgment prior to even filing an answer and prior to discovery, that

1 offer of judgment in and of itself is per se unreasonable and file a
2 [indiscernible] provision of those cases [indiscernible].

3 Your Honor, the only other argument that we have as to the
4 cost and our Motion to Retax costs on the mediation is I want to make
5 sure that the record is clear here today.

6 And that is that the complaint in this matter was not filed until
7 October 9th, 2018. It is our argument in the Motion to Retax that
8 because there was a mediation that was conducted in July of 2018, that
9 is not a recoverable cost under NRS 18.020.

10 That it's only the costs that are incurred pursuant to litigation.
11 That is clearly three months prior to litigation. And that was the basis of
12 our opposition and I want to make everybody clear on that. And that
13 was it, Your Honor. We submitted.

14 THE COURT: Well, the one thing that your arguments result
15 in is the necessity for the Court to give greater consideration to NRS
16 18.010, because as I mentioned in my initial remarks, the Court's view
17 was that the Plaintiff from the get-go obstinately refused to consider that
18 he may be pursuing an unjustified claim.

19 And as I mentioned, at the time the escrow happened, that
20 was a time where the Plaintiff had the full opportunity to deal with all of
21 his concerns that he had about purchasing this home.

22 And instead of -- and he even threatened that he was not
23 going to allow this escrow to close until these issues were dealt with.

24 But, apparently, he was not in earnest about that or changed
25 his mind because with knowledge of all the issues that came up at and

1 around and shortly after the opening of escrow, he still went ahead
2 without making any financial adjustments in the purchase price and
3 moved ahead with the purchase of this property.

4 Now that all happened before the suit was instituted. And as I
5 mentioned, this was a close case in me determining whether or not to
6 award fees from the very beginning of the institution of the suit by the
7 Plaintiff on the basis that it was a vexatious, spurious, and
8 unsupportable claim against the Defendant.

9 However, in the interests of allowing the Plaintiff the latitude to
10 go forward with the case and find out what was going on, if there were
11 any other issues, I decided against that.

12 And the offer of judgment that was made was an additional
13 opportunity for the Plaintiff to retreat from pursuing this case. And so, I
14 would add that the considerations that apply to NRS 18.010 and
15 initiating, pursuing, and maintaining a vexatious and spurious litigation
16 also factor into my decision in awarding fees.

17 It's just that I am restricting the award to those incurred after
18 the offer of judgment was made, so I would amend my initial statement
19 to you by saying that 18.010 and NRCP 68 both form the basis for this
20 decision.

21 I don't know if that provides you with any further reasons to
22 make any further argument, but I'll give you the opportunity to do so if
23 you wish.

24 MR. GRAF: I appreciate that, Your Honor and it does.
25 18.010 --

1 THE COURT: I can't -- I'm sorry, I can't hear you.

2 MR. GRAF: Sorry, Your Honor. Can you hear me better
3 now?

4 THE COURT: Yes.

5 MR. GRAF: Okay, yes, it does, Your Honor. We would just
6 reiterate as we did in our brief that 18.010 simply requires that the
7 defendants be a prevailing party. The case law that we cited to means
8 that they have to be awarded a money -- monetary judgment.

9 They have not been awarded a monetary judgment.
10 18.010(2)(b) is not applicable. And that's --

11 THE COURT: That's not correct. Successfully prevailing on a
12 claim is enough to justify an award of attorneys' fees under 18.010.

13 MR. GRAF: Your Honor, we've cited to the Perotti [phonetic]
14 case and the Perotti case says that it have to an evaluation of the net
15 judgment. There is no net judgment, zero on both sides. Submitted.

16 THE COURT: Well, the problem is that would mean that
17 anybody who has a spurious and vexatious and nonmeritorious suit
18 leveled against it would never have the opportunity to have justice
19 afforded by an award of attorneys' fees.

20 Anything else?

21 MR. GRAF: Not other than we thought that it was a very
22 meritorious case, Your Honor.

23 THE COURT: Mr. Galliher?

24 MR. GALLIHER: Thank you, Your Honor. Well, first, I would
25 note that this time limits argument that Mr. Graf just made, this is the first

1 time we're hearing it. It wasn't in any of the briefing.

2 But it's very clear the only time limit requirement contained in
3 NRCP 68 is the 21 days before trial time limit.

4 So the idea that the Defendants weren't parties to this case is
5 kind of nonsensical since, clearly, the Plaintiffs served multiple sets of
6 discovery on the Defendants. The Defendants participated in
7 depositions.

8 I don't think there's much really support for this notion that if
9 you haven't filed an answer, you've only filed some other responsive
10 pleading, that you can't file an offer of judgment.

11 And then, with respect to the argument you just made, we
12 cited in our brief to the Poker Equipment case, the Copper Sands case,
13 the 145 East Harmon 2 case, which all stand for the proposition that you
14 don't have to get a money judgment that you -- because again, then how
15 often does a Defendant actually get a money judgment? So it would
16 basically make that a plaintiffs-only rule, which of course, that's not the
17 case.

18 I would just echo the Court's comments regarding the
19 comment of the Plaintiffs from the beginning of this case, the attitude
20 that they brought to the case, the way they conducted the case.

21 And I think that it does justify an award under 18.010. And I
22 understand the Court's reasoning. And I appreciate it and the comments
23 that it was a close call, but I just want to make sure the record is clear
24 that the Defendants feel that this is a case that under 18.010(2) would
25 warrant the award of \$82,000 in fees since the inception. And -- but with

1 that I would submit it and appreciate the Court's time.

2 THE COURT: All right, well, I am awarding these fees under
3 NRCP 68 and NRS 18.010. I am just restricting them in terms of those
4 reasonably and necessarily incurred to the ones that were incurred after
5 the offer of judgment as a beginning point time-wise.

6 All right, so Mr. Galliher, I need you to prepare. I think you
7 can do this with a single order addressing your Motion for Fees and
8 Costs and integrating within the order the ruling regarding the Plaintiff's
9 Motion to Retax costs.

10 But I think a single order should suffice. I'd like it approved as
11 to form and content, but it doesn't have to be.

12 I don't want to see competing orders. That's, you know, from
13 the Court's standpoint reviewing these lengthy competing orders is no
14 different than having a motion for reconsideration put in front of you.

15 So I need the order submitted to the Court for signature within
16 14 days per EDCR 7.21.

17 Gentlemen, is there anything else we can address while we
18 have everybody on the line?

19 MR. GRAF: Yes, Your Honor, just one quick question?

20 THE COURT: Yes.

21 MR. GRAF: If we don't agree on the language of the order,
22 and we're not to submit competing orders, how do I present any of the
23 issues? You just want a letter stating what my issues are with his order,
24 if I have a problem --

25 THE COURT: No, if you think the order is in error, appeal.

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MR. GRAF: Understood, Your Honor. Thank you.

THE COURT: Okay. All right, thank you.

MR. GALLIHER: Thank you, Your Honor.

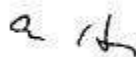
THE CLERK: Status check for the filing of that order set for
July 23rd in Chambers.

THE COURT: Okay, thank you.

[Proceedings concluded at 9:42 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my ability.



Chris Hwang
Transcriber

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

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

1 After the offer of judgment expired, Plaintiffs conducted substantial discovery in a futile effort
2 to uncover a material issue of fact to rebut the Defendants' facts supporting summary judgment. That
3 discovery included service of Interrogatories, Requests for Admissions and Requests for Production
4 of Documents on all Defendants. Additionally, Plaintiff noticed and took the depositions of Dr.
5 Swanson (twice), his assistant (Nikki Whitfield), two employees of Rakeman Plumbing (Aaron
6 Hawley and William Gerber) and two of the selling agent's team (Ivan Sher and Kelly Contenta).
7

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

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

11 On March 3, 2020 the Court held a hearing on all pending motions. Due to some logistical
12 confusion the matter was eventually continued to April 7, 2020.
13

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

18 **III.**

19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
20

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

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.
28

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE BEATTIE AND BRUNZELL FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- The work actually performed by the lawyer; the skill, time and attention given to the work; and
- The result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and costs.

1) Whether the Plaintiffs' claims were brought in good faith

There is a substantial question of whether Plaintiffs' claims in this case were brought in good faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163 P.3d 420, 425 (2007).

On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended complaint including the surviving claims.

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence

1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
24
25
26
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28

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

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

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

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

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

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

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

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

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

22
23 When Defendants served their offer of judgment, the court had already indicated its inclination
24 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
25 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
26 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
27 expense to the parties.

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.

6
7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.

11 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
12 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
13 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
14 pesticide applicator, who was authorized to practice that profession in this State at the time the
15 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
16 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
17 plumbing contractor for investigation and repair and that all information relied upon by Defendants
18 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson.*

19
20 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
21 NRS 113.150 provides, in pertinent part:
22

23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may:(a)
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or (b) Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse.** (emphasis added)

Nev. Rev. Stat. § 113.150(2).

1 In this case, there can be no dispute that the leak occurring in November 2017 was disclosed to
2 Plaintiffs via Addendum 4A to the purchase agreement prior to the close of escrow. Plaintiffs' decision
3 to nevertheless close escrow was their election of remedy and bars "further recourse" as a matter of
4 law. *Id.*

5 Under the circumstances as they existed in mid-December 2019, in the face of formidable
6 factual, legal and statutory barriers to any substantial recovery, Plaintiffs' rejection of the \$150,000.00
7 offer of judgment was grossly unreasonable.
8

9 **4) *Whether the fees sought be the offeror are reasonable and justified in amount***

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):

- 13 ▪ The qualities of the advocate: his ability, training, education, experience, professional
14 standing and skill;
- 15 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
16 skill required, the responsibility imposed and the prominence and character of the
17 parties where they affect the importance of the litigation;
- 18 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
19 work; and
- 20 ▪ The result: whether the attorney was successful and what benefits were derived.
21

22 The Defendants provided declarations showing the attorneys handling the defense of this
23 matter have excellent credentials. All attorneys involved in the defense have been partnered with and
24 trained by some of the finest trial lawyers in the state, including the late J. Mitchell "Mitch" Cobeaga
25 and Rex Jemison, among others. They have substantial litigation and trial experience over many
26 decades of combined admission as Nevada lawyers in handling lawsuits for both plaintiffs and
27
28

1 defendants. They serve as judges pro-tem and arbitrators in both criminal and civil courts. They are
2 skilled litigators with at least one of them rated AV/Preeminent in litigation by Martindale-Hubbell,
3 the nation's foremost rating service for attorneys. All are in good standing with the State Bar of Nevada
4 with no history of discipline.

5 The character of the work to be done was difficult. The range of claims initially brought by
6 the Plaintiffs, together with voluminous documents and the statute-heavy nature of these types of
7 cases, required close attention to detail and mastery of a litany of important facts. The work performed
8 in a relatively short period of time was extensive, including six lengthy depositions being taken over
9 just a two week period, expansive research and writing, including review of over 5,400 documents
10 and multiple oral arguments. Defense counsel delivered a just result for their client: dismissal of the
11 case. Plaintiffs nonetheless pushed the case and conducted substantial discovery which had to be dealt
12 with and made myriad arguments which had to be countered.

13 After rejecting the offer of judgment of \$150,000.00, Plaintiffs conducted substantial and
14 wide-ranging discovery. Plaintiffs' counsel noticed and conducted six depositions. In addition,
15 Plaintiffs served each of the Defendants with substantive Interrogatories, Requests for Admissions
16 and Requests for Production of Documents and issued many third-party subpoenas resulting in the
17 production of more than 5,400 pages of documents.

18 None of that discovery changed the facts which had already been established: the February
19 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
20 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
21 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
22 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
23 which proved to be fruitless.
24
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Conversely, Defendants' conduct since the offer of judgment has been almost completely reactive in nature, meaning that the work done by defense counsel was directly necessitated by the actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the significant sum of \$150,000.

Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the nature of the work (real estate litigation) and the experience of counsel involved.

Based on NRCp 68, this court hereby awards Defendants attorneys fees from the date of the offer of judgment, December 11, 2019, in the amount of \$39,447.00.

C. ATTORNEYS FEES ARE ALSO WARRANTED UNDER THE STANDARDS SET FORTH IN NRS 18.010(2)(b)

This 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. Indeed, the same exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately supported this Court's granting of summary judgment in favor of the Defendants. However, rather than award attorney's fees to Defendants for defending this case from its inception, this Court limits its attorneys' fees award to fees incurred from the date of the offer of judgment, December 11, 2019.

NRS 18.010(2)(b) provides as follows:

In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

...

(b) Without regard to the recovery sought, 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. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because

1 such claims and defenses overburden limited judicial resources, hinder the timely
2 resolution of meritorious claims and increase the costs of engaging in business and
3 providing professional services to the public. (Emphasis added)

4 Plaintiffs sued the Defendants without factual or legal support. The February 2017 leak was
5 fully repaired, as indicated by documentation the Plaintiff attached to their initial complaint and
6 subsequent pleadings. With respect to the November 2017 leak, Plaintiffs' pleadings, from the
7 inception of this case, clearly show that Plaintiffs requested and performed an inspection prior to close
8 of escrow and that during that inspection they observed the November 2017 leak, but nevertheless
9 proceeded to closing on November 17, 2017.
10

11 These facts, alleged in and supported by the Plaintiffs' own pleadings, establish that
12 Defendants had no liability under Nevada law because they established that 1) the February leak had
13 been repaired, and 2) Plaintiffs were aware of the November leak prior to closing. These facts, alleged
14 by Plaintiffs themselves, defeat their claims when applied to clearly established precedent in the
15 *Nelson* decision.
16

17 Further, even if the Plaintiffs could establish a *prima facie* case, the Plaintiffs failed to present
18 any evidence that they had suffered any recoverable damages. The repair to the piping was done under
19 warranty at no expense to the Plaintiffs and concurrent with other work being done at The Property.
20 It appears that Plaintiffs suffered no monetary damages nor even any significant inconvenience.
21 Plaintiffs' claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith Damages" of
22 "\$100,000.00" have no factual support since they did not have to pay for the re-piping of the property
23 or for the remediation of the November 2017 leak.
24

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
28

1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

7 This Court has acknowledged the controlling nature of *Nelson v. Heer* with respect to the issues
8 in this case. Any reasonable reading of *Nelson* must lead to the conclusion that the conduct of the
9 Defendants alleged in this case are not actionable. Likewise, Plaintiffs made no real effort to
10 distinguish this case from *Nelson* nor did they argue that *Nelson* should not otherwise apply. Instead,
11 in pursuing this case Plaintiffs essentially ignored *Nelson* and the clear example it set for actionable
12 conduct. “A claim is groundless if “the allegations in the complaint . . . are not supported by any
13 credible evidence at trial.” [citation omitted] *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev.
14 1993).
15

16 **D. PURSUANT TO NRS 18.020, DEFENDANTS ARE ENTITLED TO COSTS**

17 Pursuant to NRS 18.020, “(c)osts must be allowed of course to the prevailing party against
18 any adverse party against whom judgment is rendered, in the following cases...(3) In an action for
19 the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” An
20 award of costs under NRS 18.020 is “mandatory and not subject to the court’s discretion.” *Day v.*
21 *West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985).
22

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.

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

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

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

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

13 **IV.**

14 **ORDER**

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

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

12
13 Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
14 Jay T. Hopkins, Esq.
Nevada Bar No. 3223
15 Attorneys for Defendants

57B B94 9A28 D97E
16
17 Jim Crockett
Reviewed for form and content:
District Court Judge

18 BLACK AND LOBELLO

19 refused to sign
20
21 Rusty J. Graf, Esq.
Nevada Bar No. 6322
22 Attorney for Plaintiffs

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/18/2020

15 Jerri Hunsaker

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16 Mariella Dumbrique

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17 Christopher Young

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18 Diane Meeter

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19 J. Graf

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20 Christopher Young

cyoung@cotomlaw.com

21 Jeffrey Galliher

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22 Jeffrey Galliher

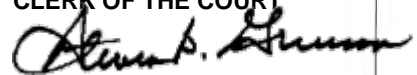
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23 Jay Hopkins

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24 Kimalee Goldstein

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1 NCOA
2 **BLACK & WADHAMS**
3 J. RUSTY GRAF, ESQ.
4 Nevada Bar No. 6322
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (fax)
Attorneys for Plaintiffs

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and NICOLE
10 FOLINO, an individual,

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

11 Plaintiff,

12 v.

13 TODD SWANSON, an individual; TODD
14 SWANSON, Trustee of the SHIRAZ TRUST;
15 SHIRAZ TRUST, a Trust of unknown origin;
16 LYONS DEVELOPMENT, LLC, a Nevada
17 limited liability company; DOES I through X;
18 and ROES I through X,

19 Defendants.

20 **NOTICE OF NAME CHANGE OF LAW FIRM**

21 Plaintiffs, JOSEPH FOLINO, an individual and NICOLE FOLINO ("Plaintiffs") by and
22 through their attorney of record, Rusty Graf, Esq., hereby gives notice that the effective August
23 1, 2020, the name of law firm of Black & LoBello has been change to **Black & Wadhams**.
24 Contact information for Mr. Graf is set forth below:

25 Rusty Graf, Esq.
26 10777 W. Twain Ave., Suite 300
27 Las Vegas, NV 89135
28 Telephone: (702) 869-8801
Fascimile: (702) 869-2669
Email: rgraf@blackwadhamslaw.com

Dated this 21st day of August 2020.

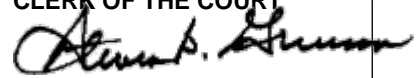
BLACK & WADHAMS

Rusty Graf, Esq. (NSB 6322)
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing NOTICE OF CHANGE OF NAME OF LAW FIRM, to be served electronically using the Odyssey File & Serve system, to all parties with an email address on record.

/s/ Diane Meeter
An Employee of Black & Wadham



Christopher M. Young, Esq.
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Jay T. Hopkins, Esq.
Nevada Bar No. 3223
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Jeffrey L. Galliher, Esq.
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jgalliher@galliherlawfirm.com

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 18th
day of August, 2020.

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

2
3 Dated this 24th day of August 2020.

4
5
6 GALLIHER LEGAL P.C.

7 /s/ Jeffrey L. Galliher
8 Jeffrey Galliher, Esq.
9 Nevada Bar No. 8078
10 1850 E. Sahara Ave., Suite 107
11 Las Vegas, NV 89104

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THE GALLIHER LAW FIRM
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CERTIFICATE OF E-SERVICE

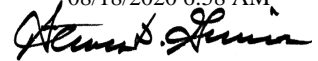
Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 24th of August I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

Rusty Graf, Esq.
Shannon M. Wilson, Esq.
10777 West Twain Avenue, 3rd Floor
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rgraf@blacklobello.law
swilson@blacklobello.law

/s/Kimalee Goldstein
An Employee of GALLIHER LEGAL, PC

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EXHIBIT 1



CLERK OF THE COURT

Christopher M. Young, Esq.
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

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

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

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

1 After the offer of judgment expired, Plaintiffs conducted substantial discovery in a futile effort
2 to uncover a material issue of fact to rebut the Defendants' facts supporting summary judgment. That
3 discovery included service of Interrogatories, Requests for Admissions and Requests for Production
4 of Documents on all Defendants. Additionally, Plaintiff noticed and took the depositions of Dr.
5 Swanson (twice), his assistant (Nikki Whitfield), two employees of Rakeman Plumbing (Aaron
6 Hawley and William Gerber) and two of the selling agent's team (Ivan Sher and Kelly Contenta).
7

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

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

11 On March 3, 2020 the Court held a hearing on all pending motions. Due to some logistical
12 confusion the matter was eventually continued to April 7, 2020.
13

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

18 **III.**

19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
20

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

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.
28

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE BEATTIE AND BRUNZELL FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- 1 ▪ The work actually performed by the lawyer; the skill, time and attention given to the work;
- 2 and
- 3 ▪ The result: whether the attorney was successful and what benefits were derived.

4 *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

5 In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and
6 costs.
7

8 ***1) Whether the Plaintiffs' claims were brought in good faith***

9 There is a substantial question of whether Plaintiffs' claims in this case were brought in good
10 faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in
11 subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in
12 February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted
13 on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first
14 pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak
15 had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

16 After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought
17 dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related
18 documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had
19 been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163
20 P.3d 420, 425 (2007).
21

22 On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed
23 Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended
24 complaint including the surviving claims.
25

26 On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the
27 Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence
28

1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
24
25
26
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28

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

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

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

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

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

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

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

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

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

22
23 When Defendants served their offer of judgment, the court had already indicated its inclination
24 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
25 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
26 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
27 expense to the parties.

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.

6
7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.

11 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
12 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
13 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
14 pesticide applicator, who was authorized to practice that profession in this State at the time the
15 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
16 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
17 plumbing contractor for investigation and repair and that all information relied upon by Defendants
18 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson.*

19
20 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
21
22 NRS 113.150 provides, in pertinent part:

23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may:(a)
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or (b) Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse.** (emphasis added)

Nev. Rev. Stat. § 113.150(2).

1 In this case, there can be no dispute that the leak occurring in November 2017 was disclosed to
2 Plaintiffs via Addendum 4A to the purchase agreement prior to the close of escrow. Plaintiffs' decision
3 to nevertheless close escrow was their election of remedy and bars "further recourse" as a matter of
4 law. *Id.*

5 Under the circumstances as they existed in mid-December 2019, in the face of formidable
6 factual, legal and statutory barriers to any substantial recovery, Plaintiffs' rejection of the \$150,000.00
7 offer of judgment was grossly unreasonable.
8

9 **4) *Whether the fees sought be the offeror are reasonable and justified in amount***

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):

- 13 ▪ The qualities of the advocate: his ability, training, education, experience, professional
14 standing and skill;
- 15 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
16 skill required, the responsibility imposed and the prominence and character of the
17 parties where they affect the importance of the litigation;
- 18 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
19 work; and
- 20 ▪ The result: whether the attorney was successful and what benefits were derived.
21

22 The Defendants provided declarations showing the attorneys handling the defense of this
23 matter have excellent credentials. All attorneys involved in the defense have been partnered with and
24 trained by some of the finest trial lawyers in the state, including the late J. Mitchell "Mitch" Cobeaga
25 and Rex Jemison, among others. They have substantial litigation and trial experience over many
26 decades of combined admission as Nevada lawyers in handling lawsuits for both plaintiffs and
27
28

1 defendants. They serve as judges pro-tem and arbitrators in both criminal and civil courts. They are
2 skilled litigators with at least one of them rated AV/Preeminent in litigation by Martindale-Hubbell,
3 the nation's foremost rating service for attorneys. All are in good standing with the State Bar of Nevada
4 with no history of discipline.

5 The character of the work to be done was difficult. The range of claims initially brought by
6 the Plaintiffs, together with voluminous documents and the statute-heavy nature of these types of
7 cases, required close attention to detail and mastery of a litany of important facts. The work performed
8 in a relatively short period of time was extensive, including six lengthy depositions being taken over
9 just a two week period, expansive research and writing, including review of over 5,400 documents
10 and multiple oral arguments. Defense counsel delivered a just result for their client: dismissal of the
11 case. Plaintiffs nonetheless pushed the case and conducted substantial discovery which had to be dealt
12 with and made myriad arguments which had to be countered.

13 After rejecting the offer of judgment of \$150,000.00, Plaintiffs conducted substantial and
14 wide-ranging discovery. Plaintiffs' counsel noticed and conducted six depositions. In addition,
15 Plaintiffs served each of the Defendants with substantive Interrogatories, Requests for Admissions
16 and Requests for Production of Documents and issued many third-party subpoenas resulting in the
17 production of more than 5,400 pages of documents.

18 None of that discovery changed the facts which had already been established: the February
19 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
20 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
21 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
22 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
23 which proved to be fruitless.
24
25
26
27
28

Conversely, Defendants' conduct since the offer of judgment has been almost completely reactive in nature, meaning that the work done by defense counsel was directly necessitated by the actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the significant sum of \$150,000.

Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the nature of the work (real estate litigation) and the experience of counsel involved.

Based on NRCP 68, this court hereby awards Defendants attorneys fees from the date of the offer of judgment, December 11, 2019, in the amount of \$39,447.00.

C. ATTORNEYS FEES ARE ALSO WARRANTED UNDER THE STANDARDS SET FORTH IN NRS 18.010(2)(b)

This 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. Indeed, the same exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately supported this Court's granting of summary judgment in favor of the Defendants. However, rather than award attorney's fees to Defendants for defending this case from its inception, this Court limits its attorneys' fees award to fees incurred from the date of the offer of judgment, December 11, 2019.

NRS 18.010(2)(b) provides as follows:

In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

...

(b) Without regard to the recovery sought, 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. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because

1 such claims and defenses overburden limited judicial resources, hinder the timely
2 resolution of meritorious claims and increase the costs of engaging in business and
3 providing professional services to the public. (Emphasis added)

4 Plaintiffs sued the Defendants without factual or legal support. The February 2017 leak was
5 fully repaired, as indicated by documentation the Plaintiff attached to their initial complaint and
6 subsequent pleadings. With respect to the November 2017 leak, Plaintiffs' pleadings, from the
7 inception of this case, clearly show that Plaintiffs requested and performed an inspection prior to close
8 of escrow and that during that inspection they observed the November 2017 leak, but nevertheless
9 proceeded to closing on November 17, 2017.
10

11 These facts, alleged in and supported by the Plaintiffs' own pleadings, establish that
12 Defendants had no liability under Nevada law because they established that 1) the February leak had
13 been repaired, and 2) Plaintiffs were aware of the November leak prior to closing. These facts, alleged
14 by Plaintiffs themselves, defeat their claims when applied to clearly established precedent in the
15 *Nelson* decision.
16

17 Further, even if the Plaintiffs could establish a *prima facie* case, the Plaintiffs failed to present
18 any evidence that they had suffered any recoverable damages. The repair to the piping was done under
19 warranty at no expense to the Plaintiffs and concurrent with other work being done at The Property.
20 It appears that Plaintiffs suffered no monetary damages nor even any significant inconvenience.
21 Plaintiffs' claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith Damages" of
22 "\$100,000.00" have no factual support since they did not have to pay for the re-piping of the property
23 or for the remediation of the November 2017 leak.
24

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
28

1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

7 This Court has acknowledged the controlling nature of *Nelson v. Heer* with respect to the issues
8 in this case. Any reasonable reading of *Nelson* must lead to the conclusion that the conduct of the
9 Defendants alleged in this case are not actionable. Likewise, Plaintiffs made no real effort to
10 distinguish this case from *Nelson* nor did they argue that *Nelson* should not otherwise apply. Instead,
11 in pursuing this case Plaintiffs essentially ignored *Nelson* and the clear example it set for actionable
12 conduct. “A claim is groundless if “the allegations in the complaint . . . are not supported by any
13 credible evidence at trial.” [citation omitted] *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev.
14 1993).
15

16 **D. PURSUANT TO NRS 18.020, DEFENDANTS ARE ENTITLED TO COSTS**

17 Pursuant to NRS 18.020, “(c)osts must be allowed of course to the prevailing party against
18 any adverse party against whom judgment is rendered, in the following cases...(3) In an action for
19 the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” An
20 award of costs under NRS 18.020 is “mandatory and not subject to the court’s discretion.” *Day v.*
21 *West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985).
22

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.

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

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

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

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

13 **IV.**

14 **ORDER**

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

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

12
13 Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
14 Jay T. Hopkins, Esq.
Nevada Bar No. 3223
15 Attorneys for Defendants

57B B94 9A28 D97E
16
17 Jim Crockett
Reviewed for form and content:
District Court Judge

18 BLACK AND LOBELLO

19 refused to sign

20 Rusty J. Graf, Esq.
Nevada Bar No. 6322
21 Attorney for Plaintiffs

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/18/2020

15 Jerri Hunsaker

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16 Mariella Dumbrique

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17 Christopher Young

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18 Diane Meeter

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22 Jeffrey Galliher

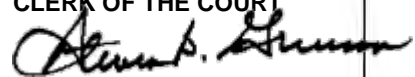
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1 ACAS
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & WADHAMS**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
7 (702) 869-8801
8 (702) 869-2669 (fax)
9 *Attorney for Appellants*

DISTRICT COURT
CLARK COUNTY, NEVADA

10 JOSEPH FOLINO, an individual and
11 NICOLE FOLINO, an individual,

12 Appellants,

13 v.

14 TODD SWANSON, an individual; TODD
15 SWANSON, Trustee of the SHIRAZ
16 TRUST; SHIRAZ TRUST, a Trust of
17 unknown origin; LYONS DEVELOPMENT,
18 LLC, a Nevada limited liability company;
19 DOES I through X; and ROES I through X,

20 Respondents.

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

APPELLANTS' CASE APPEAL
STATEMENT

21 Appellants Joseph Folino and Nicole Folino (hereinafter "Appellants"), by and through
22 their attorney of record, Rusty Graf, Esq. of the law firm Black & Wadhams, hereby submits their
23 Case Appeal Statement pursuant to Nevada Rule of Appellate Procedure 3(f) as follows:

24 ///

25 ///

26 ///

27 ///

28 ///

CASE APPEAL STATEMENT

(A) The district court case number and caption showing the names of all parties to the proceedings below:

The district court case number is A-18-782494-C and caption is correctly stated above. The parties to the proceedings below are Appellants and Defendants Todd Swanson, an individual, Todd Swanson, as Trustee of the Shiraz Trust, and Lyons Development LLC. (hereinafter "Respondents").

(B) The name of the judge who entered the order or judgment being appealed:

The Honorable Jim Crockett, Department XXIV of the Eighth Judicial District Court of the State of Nevada issued all Orders referenced above.

(C) The name of each appellant and the name and address of counsel for each appellant:

Plaintiff/Appellant:

Nicole Folino

Counsel for the Appellant:

Rusty Graf, Esq.
BLACK & WADHAMS
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

Plaintiff/Appellant:

Joseph Folino

Counsel for the Appellant:

Rusty Graf, Esq.
BLACK & WADHAMS
10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

(D) The name of each respondent and the name and address of appellate counsel, if known, for each respondent, but if the name of a respondent's appellate counsel is not known, then the name and address of that respondent's trial counsel:

Defendant/Respondent:

1 Todd Swanson

2 Counsel for the Respondent:

3 Christopher M. Young, Esq.
4 Nevada Bar No. 7961
5 Jay T. Hopkins, Esq.
6 Nevada Bar No. 3223
7 **Christopher M. Young, PC**
8 2640 Professional Court, #200
9 Las Vegas, Nevada 89128

10 Jeffrey L. Galliher, Esq.
11 **Galliher Legal, P.C.**
12 Nevada Bar No. 8078
13 1850 E. Sahara Ave., #107
14 Las Vegas, NV 89104
15 Attorneys for Respondent

16 Defendant/Respondent:

17 Todd Swanson as Trustee of the Shiraz Trust

18 Counsel for the Respondent:

19 Christopher M. Young, Esq.
20 Nevada Bar No. 7961
21 Jay T. Hopkins, Esq.
22 Nevada Bar No. 3223
23 **Christopher M. Young, PC**
24 2640 Professional Court, #200
25 Las Vegas, Nevada 89128

26 Jeffrey L. Galliher, Esq.
27 **Galliher Legal, P.C.**
28 Nevada Bar No. 8078
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Attorneys for Respondent

Defendant/Respondent:

Lyons Development, LLC.

Counsel for the Respondent:

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Las Vegas, NV 89104
Attorneys for Respondent

(E) Whether an attorney identified in response to subparagraph (D) is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42, including a copy of any district court order granting that permission:

N/A

(F) Whether the appellant was represented by appointed counsel in the district court, and whether the appellant is represented by appointed counsel on appeal:

N/A

(G) Whether the district court granted the appellant leave to proceed in forma pauperis, and if so, the date of the district court's order granting that leave:

N/A

(H) The date that the proceedings commenced in the district court:

Appellants initiated the proceedings when they filed their Complaint on October 19, 2018.

(I) A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

The underlying matter was a tort action arising from the purchase and sale of a home located at 42 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanated from Appellants' discovery of systemic plumbing issues after the close of the sale, and the failure of the

1 Respondents to disclose their knowledge of water loss occurrences on the Seller's Real Property
2 Disclosure Form.

3 Appellants initial Complaint was filed on October 19, 2018. Appellants subsequently filed
4 a First Amended Complaint on April 18, 2019, and a Second Amended Complaint on May 20,
5 2019. Appellants initial Complaint and First Amended Complaint were both focused on claims
6 arising from a water loss incident that occurred on or about February 16, 2017. However, at the
7 time of the filing of Appellants' Second Amended Complaint a significant amount of discovery
8 had taken place, and it was revealed that numerous water loss incidents other than the February
9 16, 2017 incident had occurred on the property. The Second Amended Complaint reflected these
10 newly discovered water loss incidents and instead of focusing on the February 16, 2017 incident,
11 contained the factual allegations that (1) numerous water losses had occurred on the property; (2)
12 none of these water loss incidents were disclosed; (3) the existence of fungi/mold on the property
13 was also not disclosed in the Seller's Real Property Disclosure Form; (4) Respondents' had
14 knowledge of systemic plumbing issues on the property; and (5) that Respondents' acted with
15 intent to deceive when they failed to disclose the prior water losses (which include at least one
16 water loss that Respondents' did not even claim was repaired and, therefore, cannot logically be
17 covered by the *Nelson v. Heer* holding relating to the removal of a duty to disclose).

18 On September 24, 2019, Respondents filed a Motion to Dismiss the Appellants' Second
19 Amended Complaint. The district court held a hearing on Respondents' Motion to Dismiss the
20 Second Amended Complaint on November 7, 2019, and the matter was ordered continued to
21 permit the parties time to file a supplemental brief and production of documents. Appellants'
22 Supplemental Brief was filed on February 13, 2020, and emphasized that Appellants' Second
23 Amended Complaint was not focused on the February 16, 2017 water loss incident, but rather (1)
24 that numerous incidents that occurred; (2) the fact that there was no documentation demonstrating
25 that some of these leaks had been repaired; and (3) that there was evidence of the existence of
26 fungi/mold on the property which also required disclosure on the Seller's Real Property
27 Disclosure Form and yet was omitted. Despite Appellants' Second Amended Complaint
28 containing direct allegations that there were unrepaired leaks and mold/fungi that went

1 undisclosed on the Seller's Real Property Disclosure Form, the district court relied on the holding
2 of Nelson v. Heer and entered an order granting Respondents' Motion to Dismiss Appellants'
3 Second Amended Complaint on May 11, 2020.

4 The Order granting Respondents' Motion to Dismiss had incorrect/false Findings of Fact
5 which included: (1) that Appellants' action was premised on the Respondents' failure to disclose
6 a specific leak which occurred on February 16, 2017; (2) that previous leaks in other areas of the
7 house were not related to Appellants' Claims; (3) that another separate water loss in a basement
8 bathroom was not related to Appellants' Claims; and (4) that only the February 16, 2017 water
9 loss was relevant, and all other water losses complained of by the Appellants "are unrelated to
10 their claims and, further, do not materially affect the value of the property". The Order also had
11 incorrect Conclusions of Law which included: (1) that "Plaintiffs lawsuit is predicated on their
12 allegations that the Defendants failed to disclose a February 16, 2017 water leak in the Uponor
13 plumbing system"; and (2) that Appellants' Fraud/Intentional Misrepresentation claim failed as a
14 matter of law because the "Second Amended Complaint alleges one wrong: Defendants' failure
15 to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect.
16 The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim."

17 These Findings of Fact and Conclusions of Law contained in the May 11, 2020 Order
18 make it clear that the district court did not consider the allegations in Appellants' Second
19 Amended Complaint and instead conducted an analysis of the allegations from Appellants' initial
20 Complaint and First Amended Complaint. As a result, the district court improperly applied Nelson
21 v. Heer, as the holding from that case states that conducting a repair removes the general duty to
22 disclose the existence of a material issue. While the leak which caused the February 16, 2017
23 water loss may have been repaired, Appellants' Second Amended Complaint and Supplemental
24 Brief both directly stated (and produced documents evidencing) that there were other undisclosed
25 leaks and mold/fungi that were not repaired or disclosed. Further, regarding the February 16, 2017
26 water loss incident, Appellants also assert that, under Nelson v. Heer, even if the duty to disclose
27 is removed by repair it is still fraud and/or concealment to respond incorrectly to a direct inquiry
28 about water losses having ever occurred on the property.

1 The above issues are the subject of a pending appeal, Case No. 81252. However, the May
2 11, 2020 Order dismissing Appellants' case did not address an earlier Motion for Attorney's Fees
3 and Costs filed by the Respondents on April 22, 2020 and a Motion to Retax filed by Appellants
4 on April 24, 2020. The district court held a hearing on these matters on June 25, 2020, and
5 subsequently filed an Order on August 18, 2020, which granted Respondents' Motion for
6 Attorney's Fees and Costs and denied Appellants' Motion to Retax.

7 The district court's August 18, 2020 Order had Findings of Fact and Conclusions of Law
8 which included: (1) "Pursuant to NRCF 68(f)(1)(B), Defendants are entitled to recover their costs
9 and allowed attorney's fees from the time of the service of the offer", which occurred on
10 December 11, 2019. The Court awarded "\$39,447.00 in attorney's fees in defending this case
11 from December 11, 2019 forward"; (2) That the attorney's fees and costs sought by Respondents
12 were reasonable and justified under a Beattie and Brunzell factors analysis; (3) that the
13 Respondents were also entitled to an award of their attorney's fees pursuant to NRS 18.010(2)(b)
14 because "the case, from its inception had little, if any, legal or factual support. Indeed, the same
15 exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately
16 supported this Court's granting of summary judgment in favor of the Defendants."; and (4) that
17 Respondents were entitled to an award of their costs, pursuant to NRS 18.020, "in the amount of
18 \$5,840.41." It was pursuant to these Findings of Fact and Conclusions of Law, that the Court
19 Ordered that Respondents' Motion for Attorney's Fees and Costs was granted and Appellants'
20 Motion to Retax was denied. Respondents were awarded "their attorney's fees in the amount of
21 \$39,447.00 and costs in the amount of \$5,840.41 for a total award of \$45,287.41."

22 It was improper of the district court to make such Findings of Facts and Conclusions of
23 Law, and to subsequently award Respondents attorney's fees in the amount of Thirty-Nine
24 Thousand Four Hundred and Forty-Seven Dollars (\$39,447.00) and costs in the amount of Five
25 Thousand Eight Hundred and Forty Dollars and 41/100 Cents (\$5,840.41) for a total award of
26 Forty-Five Thousand Two Hundred and Eighty Seven Dollars and 41/100 Cents (\$45,287.41)
27 based upon those Findings of Facts and Conclusions of Law. This was improper and flawed
28 because, like the Order dismissing Appellants' Second Amended Complaint, it also relied upon:

1 (1) the district court's incorrect application of the holding of Nelson v. Heer to this dispute; (2)
2 the incorrect Finding of Fact that Appellants' action was premised on the Respondents' failure to
3 disclose a specific leak which occurred on February 16, 2017; (3) the incorrect Conclusion of
4 Law that "Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose
5 a February 16, 2017 water leak in the Uponor plumbing system"; and (4) the false Finding of Fact
6 that only the February water loss was relevant, and all other water losses complained of by the
7 Appellants "are unrelated to their claims and, further, do not materially affect the value of the
8 property". Additionally, these issues resulted in the district court making a further error in
9 improperly analyzing the award of attorney's fees and costs to Respondents using the Beattie and
10 Brunzell factors.

11 As discussed above, Appellants has asserted in a pending appeal, Case No. 81252, that
12 the Findings of Facts and Conclusions of Law of the district court as they relate to the application
13 of the holding of Nelson v. Heer to this dispute were incorrect. Further, Appellants also assert that
14 the district court acted improperly in failing to consider the actual content of Appellants' Second
15 Amended Complaint, instead choosing to analyze Appellants' claims only in relation to the
16 February 2017 leak. Both of these improper actions formed the basis for the district court's
17 subsequent Order granting Respondents' their attorney's fees and costs. The Order granting those
18 fees and costs to Respondents directly states as much, identifying that the award of attorney's
19 fees pursuant to NRS 18.010(2)(b) was because the case had "little, if any, legal or factual
20 support" and costs were awarded pursuant to NRS 18.020 because Respondents were the
21 prevailing party. The basis for both of these awards is completely undermined by the
22 inapplicability of Nelson v. Heer to this situation, and the fact that the content of Appellants'
23 Second Amended Complaint did have substantial legal and factual support, but this content was
24 ignored and the claims of Appellants were only analyzed in relation to the February 2017 leak.

25 Finally, the Order granting fees and costs to Respondents is also improper due to the
26 insufficiency of the district court's analysis of the Beattie and Brunzell factors and resulting
27 improper conclusion that they favored awarding fees and costs to Respondents. The district court
28 held that the Beattie and Brunzell factors supported the award of costs and fees to Respondents

1 and relied upon the following Findings of Fact and Conclusions of Law in reaching that decision:
2 (1) that "Plaintiffs' claims were not brought in good faith" as evidenced by the complaint having
3 a "dubious factual basis" and the filing of "inappropriate motion for sanctions"; (2) that
4 defendant's offer of judgment was "reasonable and in good faith in both its timing and amount"
5 because at the time of the offer the damages suffered by Appellants was "unsupported" and "at
6 the time of the offer of judgment, Plaintiffs had already been advised in open court of the Court's
7 inclination to grant Defendants' motion to summarily dispose of the case"; and (3) that it was
8 grossly unreasonable for Appellants to reject Respondents' December 11, 2020 settlement offer
9 because "the court had already indicated its inclination to dismiss the case, Plaintiffs had provided
10 no evidence of any damages, and established case law seemingly eviscerated Plaintiff's claims."

11 This analysis of the Beattie and Brunzell factors by the district court was incorrect and
12 improper because it, again, relied upon (1) the district court's incorrect application of the holding
13 of Nelson v. Heer to this dispute; (2) the incorrect Finding of Fact that Appellants' action was
14 premised on the Respondents' failure to disclose a specific leak which occurred on February 16,
15 2017; (3) the incorrect Conclusion of Law that "Plaintiffs lawsuit is predicated on their allegations
16 that the Defendants failed to disclose a February 16, 2017 water leak in the Uponor plumbing
17 system"; and (4) the false Finding of Fact that only the February water loss was relevant, and all
18 other water losses complained of by the Appellants "are unrelated to their claims and, further, do
19 not materially affect the value of the property". This incorrect basis for the analysis led to the
20 completely unsupported and factually incorrect conclusions by the district court that Appellants
21 lacked good faith in bringing their claims (which was based primarily on the application of Nelson
22 v. Heer and the analysis of Appellants' claims in relation to only the February 16, 2017 leak), that
23 the Offer by Respondents was reasonable and in good faith in timing and amount (which was
24 based primarily on the district court expressing its "inclination to dismiss the case", but such an
25 inclination was based on the same issues discussed herein), and that Appellants' decision to reject
26 the offer was grossly unreasonable (which was again based primarily on the district court
27 expressing its "inclination to dismiss the case" and the supposed fact that "established case law
28 seemingly eviscerated Plaintiff's claims" despite the fact that the inclination had no basis and the

1 holding of the established case law did not apply). All of these issues directly resulted in the
2 district court improperly granting Respondents' Motion for Attorney's Fees and Costs while
3 denying Appellants' Motion to Retax. These issues, among others, necessitate appellate relief.

4 **(J) Whether the case has previously been the subject of an appeal to or original writ**
5 **proceeding in the Supreme Court or Court of Appeals and, if so, the caption and**
6 **docket number of the prior proceeding:**

7
8 **Pending Appeal:**

9 **1. Case No. 81252**

10 JOSEPH FOLINO, AN INDIVIDUAL; AND NICOLE FOLINO,
11 AN INDIVIDUAL,

12 Appellants,

13 v.

14 TODD SWANSON, AN INDIVIDUAL; TODD SWANSON,
15 TRUSTEE OF THE SHIRAZ TRUST; SHIRAZ TRUST, A
16 TRUST OF UNKNOWN ORIGIN; AND LYONS
17 DEVELOPMENT, LLC, NEVADA LIMITED LIABILITY
18 COMPANY,

18 Respondents.

19 **(K) Whether the appeal involves child custody or visitation:**

20 N/A

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1 (L) **Whether the appeal involves the possibility of settlement:**

2 Appellants do not believe that there is a possibility of settlement with Respondents.

3
4 Dated this 17th day of September, 2020.

5
6 **BLACK & WADHAMS**

7
8 RUSTY GRAE, ESQ.
9 Nevada Bar No. 6322
10 10777 W. Twain Ave., 3rd Fl.
11 Las Vegas, Nevada 89135
12 (702) 869-8801
13 (702) 869-2669 (fax)
14 rgraf@blackwadhams.law
15 *Attorney for Appellants*
16
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Black & Wadhams and that on the 12th day of September 2020, I caused the above and foregoing document entitled **APPELLANTS' CASE APPEAL STATEMENT** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;
- ☐ pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ hand delivered.

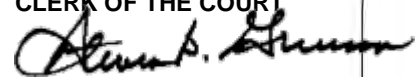
to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128
Attorneys for Respondents

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondents



An Employee of Black & Wadhams



1 **NOAS**
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & WADHAMS**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
7 (702) 869-8801
8 (702) 869-2669 (fax)
9 *Attorney for Plaintiffs/Appellants*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 JOSEPH FOLINO, an individual and NICOLE
13 FOLINO, an individual,

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

14 Plaintiff,

15 v.

NOTICE OF APPEAL

16 TODD SWANSON, an individual; TODD
17 SWANSON, Trustee of the SHIRAZ TRUST;
18 SHIRAZ TRUST, a Trust of unknown origin;
19 LYONS DEVELOPMENT, LLC, a Nevada
20 limited liability company; DOES I through X;
21 and ROES I through X,

22 Defendants.

23 **NOTICE IS HEREBY GIVEN** that Plaintiffs Joseph Folino and Nicole Folino, by and
24 through their attorney of record, Rusty Graf, Esq. of the law firm Black & Wadhams, appeals to
25 the Supreme Court of the State of Nevada from the Decision and Order granting Defendants'

26 ///

27 ///

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///

///

1 Motion for Attorney's Fees and Costs and Denying Plaintiffs' Motion to Retax filed in the
2 above-captioned matter on August 18, 2020 with notice of entry filed on August 24, 2020. (See
3 Exhibit 1, copy of Filed Notice of Entry of Order granting Defendants' Motion for Attorney's
4 Fees and Costs and Denying Plaintiffs' Motion to Retax.)

5 Dated this 17th day of September 2020.

BLACK & WADHAMS

RUSTY GRAF, ESQ.

Nevada Bar No. 6322

10777 W. Twain Ave., 3rd Fl.

Las Vegas, Nevada 89135

(702) 869-8801

(702) 869-2669 (fax)

rgraf@blackWadhams.law

Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 17th day of September 2020, I caused the above and foregoing document entitled **NOTICE OF APPEAL** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.

Nevada Bar No. 7961

Jay T. Hopkins, Esq.

Nevada Bar No. 3223

Christopher M. Young, PC

2640 Professional Court, #200

Las Vegas, Nevada 89128

Attorneys for Defendants

Jeffrey L. Galliher, Esq.

Galliher Legal, P.C.

Nevada Bar No. 8078

1850 E. Sahara Ave., #107

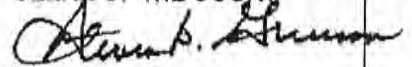
Las Vegas, NV 89104

Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.


An Employee of Black & Wadams

EXHIBIT 1



Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
CHRISTOPHER M. YOUNG, PC
2460 Professional Court, #200
Las Vegas, Nevada 89128
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Jeffrey L. Galliher, Esq.
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GALLIHER LEGAL P.C.
1850 East Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
Telephone: (702) 735-0049
Facsimile: (702) 735-0204
jgalliher@galliherlawfirm.com

Attorneys for Defendants

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff(s),

v.

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

Defendant(s).

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 18th
day of August, 2020.

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

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

Dated this 24th day of August 2020.

GALLIHER LEGAL P.C.

/s/ Jeffrey L. Galliher
Jeffrey Galliher, Esq.
Nevada Bar No. 8078
1850 E. Sahara Ave., Suite 107
Las Vegas, NV 89104

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

CERTIFICATE OF E-SERVICE

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

Rusty Graf, Esq.
Shannon M. Wilson, Esq.
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
rgraf@blacklobello.law
swilson@blacklobello.law

/s/Kimalee Goldstein
An Employee of GALLIHER LEGAL, PC

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

EXHIBIT 1

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Alvin S. Lewis
CLERK OF THE COURT

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
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Facsimile: (702) 735-0204
jgalliher@galliherlawfirm.com

Attorneys for Defendants

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff(s),

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

v.

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

Defendant(s).

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

7
8 On September 3, 2019 Plaintiffs filed their Second Amended Complaint ("SAC") wherein
9 Plaintiffs alleged two causes of action. The first alleged Fraud/Intentional Misrepresentation and the
10 second alleged violation of NRS 113.100 et seq. The gravamen of the SAC was that Defendants failed
11 to disclose systemic defects in The Property's plumbing system related to the Uponor piping installed
12 in The Property at the time it was constructed based upon a water leak occurring in February 2017. In
13 response the Defendants filed a motion to dismiss/motion for summary judgment, supported by
14 indisputable evidence that Rakeman Plumbing completely repaired the February 2017 water leak, thus
15 negating the Defendants' purported "knowing concealment."

16
17 On November 7, 2019, this Court held a hearing on Defendants' motion to dismiss. At that
18 time, the Court stated its inclination to grant Defendants' motion, but afforded the Plaintiffs 90 days
19 to conduct discovery to develop, if possible, specific facts to rebut the facts presented by the
20 Defendants in seeking dismissal' facts in a supplemental pleading. On November 26, 2019, due to
21 the extent of discovery indicated by numerous written discovery requests and notices of deposition
22 served by Plaintiffs, Defendants associated Mr. Galliher as counsel.

23
24 On December 11, 2019 Defendants served an offer of judgment upon the Plaintiffs in the
25 amount of \$150,000.00 (one-hundred, fifty thousand dollars) inclusive of fees, costs and interest. The
26 offer of judgment was not accepted and ultimately expired by operation of time.
27
28

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

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

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

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

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

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

23 The Court finds that the Defendants attorney's fees and costs in defending this case, including
24 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
25 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
26 satisfies the *Brunzell* and *Beattie* factors.
27
28

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE BEATTIE AND BRUNZELL FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- The work actually performed by the lawyer; the skill, time and attention given to the work; and
- The result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and costs.

1) Whether the Plaintiffs' claims were brought in good faith

There is a substantial question of whether Plaintiffs' claims in this case were brought in good faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163 P.3d 420, 425 (2007).

On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended complaint including the surviving claims.

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence

1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
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1 When this Court granted the Plaintiffs leave to conduct discovery, the Plaintiffs' "good faith"
2 was clearly in doubt. Not only had Plaintiffs filed multiple complaints with dubious factual bases, but
3 had also filed a completely inappropriate motion for sanctions ascribing multiple nefarious acts to
4 defense counsel without basis. Plaintiffs' own pleadings included evidence indicating that under NRS
5 Chapter 113 and *Nelson*, their claims failed.

6
7 Approximately two weeks later, prior to the extensive discovery which ultimately did not yield
8 a disputed issue of material fact that could defeat the Defendants' motion for summary judgment, the
9 Defendants presented the Plaintiffs with their offer of judgment. This Court finds that, under the first
10 *Beattie* factor, the Plaintiffs' claims were not brought in good faith.

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

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

19
20 Further, the Court finds that the Defendants offer was made in a genuine effort to settle the
21 case. To that time, and even now, Plaintiffs have never asserted that they had suffered any measurable
22 special damages. All available information suggests that just as had been the case when Defendants
23 owned the Property, all repairs to the plumbing system were handled under warranty by either
24 Rakeman Plumbing or the piping manufacturer, Uponor. At the time of the offer of judgment,
25 Plaintiffs had already been advised in open court of the Court's inclination to grant Defendants'
26 motion to summarily dispose of the case because the Plaintiffs could not present any evidence to rebut
27
28

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

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

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

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

22
23 When Defendants served their offer of judgment, the court had already indicated its inclination
24 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
25 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
26 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
27 expense to the parties.
28

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.
6

7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.
11

12 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
13 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
14 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
15 pesticide applicator, who was authorized to practice that profession in this State at the time the
16 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
17 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
18 plumbing contractor for investigation and repair and that all information relied upon by Defendants
19 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson*.
20

21 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
22 NRS 113.150 provides, in pertinent part:

23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may: (a)
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or (b) Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse**. (emphasis added)

Nev. Rev. Stat. § 113.150(2).

1 In this case, there can be no dispute that the leak occurring in November 2017 was disclosed to
2 Plaintiffs via Addendum 4A to the purchase agreement prior to the close of escrow. Plaintiffs' decision
3 to nevertheless close escrow was their election of remedy and bars "further recourse" as a matter of
4 law. *Id.*

5 Under the circumstances as they existed in mid-December 2019, in the face of formidable
6 factual, legal and statutory barriers to any substantial recovery, Plaintiffs' rejection of the \$150,000.00
7 offer of judgment was grossly unreasonable.
8

9 *4) Whether the fees sought be the offeror are reasonable and justified in amount*

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):
13

- 14 ▪ The qualities of the advocate: his ability, training, education, experience, professional
15 standing and skill;
- 16 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
17 skill required, the responsibility imposed and the prominence and character of the
18 parties where they affect the importance of the litigation;
- 19 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
20 work; and
- 21 ▪ The result: whether the attorney was successful and what benefits were derived.
22

23 The Defendants provided declarations showing the attorneys handling the defense of this
24 matter have excellent credentials. All attorneys involved in the defense have been partnered with and
25 trained by some of the finest trial lawyers in the state, including the late J. Mitchell "Mitch" Cobeaga
26 and Rex Jemison, among others. They have substantial litigation and trial experience over many
27 decades of combined admission as Nevada lawyers in handling lawsuits for both plaintiffs and
28

1 defendants. They serve as judges pro-tem and arbitrators in both criminal and civil courts. They are
2 skilled litigators with at least one of them rated AV/Preeminent in litigation by Martindale-Hubbell,
3 the nation's foremost rating service for attorneys. All are in good standing with the State Bar of Nevada
4 with no history of discipline.

5
6 The character of the work to be done was difficult. The range of claims initially brought by
7 the Plaintiffs, together with voluminous documents and the statute-heavy nature of these types of
8 cases, required close attention to detail and mastery of a litany of important facts. The work performed
9 in a relatively short period of time was extensive, including six lengthy depositions being taken over
10 just a two week period, expansive research and writing, including review of over 5,400 documents
11 and multiple oral arguments. Defense counsel delivered a just result for their client: dismissal of the
12 case. Plaintiffs nonetheless pushed the case and conducted substantial discovery which had to be dealt
13 with and made myriad arguments which had to be countered.

14
15 After rejecting the offer of judgment of \$150,000.00, Plaintiffs conducted substantial and
16 wide-ranging discovery. Plaintiffs' counsel noticed and conducted six depositions. In addition,
17 Plaintiffs served each of the Defendants with substantive Interrogatories, Requests for Admissions
18 and Requests for Production of Documents and issued many third-party subpoenas resulting in the
19 production of more than 5,400 pages of documents.

20
21 None of that discovery changed the facts which had already been established: the February
22 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
23 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
24 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
25 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
26 which proved to be fruitless.

1 Conversely, Defendants' conduct since the offer of judgment has been almost completely
2 reactive in nature, meaning that the work done by defense counsel was directly necessitated by the
3 actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what
4 Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the
5 significant sum of \$150,000.
6

7 Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the
8 nature of the work (real estate litigation) and the experience of counsel involved.

9 Based on NRCP 68, this court hereby awards Defendants attorneys fees from the date of the
10 offer of judgment, December 11, 2019, in the amount of \$39,447.00.

11 **C. ATTORNEYS FEES ARE ALSO WARRANTED UNDER THE STANDARDS SET**
12 **FORTH IN NRS 18.010(2)(b)**

13 This court also finds that NRS 18.010(2)(b) supports an award of attorneys' fees because the
14 case, from its inception had little, if any, legal or factual support. Indeed, the same exhibits attached
15 to the Plaintiffs' initial complaint are the very same exhibits which ultimately supported this Court's
16 granting of summary judgment in favor of the Defendants. However, rather than award attorney's fees
17 to Defendants for defending this case from its inception, this Court limits its attorneys' fees award to
18 fees incurred from the date of the offer of judgment, December 11, 2019.
19

20 NRS 18.010(2)(b) provides as follows:

21 In addition to the cases where an allowance is authorized by specific statute, the court
22 may make an allowance of attorney's fees to a prevailing party:

23 ...

24 (b) Without regard to the recovery sought, when the court finds that the claim,
25 counterclaim, cross-claim or third-party complaint or defense of the opposing party
26 **was brought or maintained without reasonable ground or to harass the prevailing**
27 **party. The court shall liberally construe the provisions of this paragraph in favor**
28 **of awarding attorney's fees in all appropriate situations.** It is the intent of the
Legislature that the court award attorney's fees pursuant to this paragraph and impose
sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate
situations to punish for and deter frivolous or vexatious claims and defenses because

1 such claims and defenses overburden limited judicial resources, hinder the timely
2 resolution of meritorious claims and increase the costs of engaging in business and
3 providing professional services to the public. (Emphasis added)

4 Plaintiffs sued the Defendants without factual or legal support. The February 2017 leak was
5 fully repaired, as indicated by documentation the Plaintiff attached to their initial complaint and
6 subsequent pleadings. With respect to the November 2017 leak, Plaintiffs' pleadings, from the
7 inception of this case, clearly show that Plaintiffs requested and performed an inspection prior to close
8 of escrow and that during that inspection they observed the November 2017 leak, but nevertheless
9 proceeded to closing on November 17, 2017.
10

11 These facts, alleged in and supported by the Plaintiffs' own pleadings, establish that
12 Defendants had no liability under Nevada law because they established that 1) the February leak had
13 been repaired, and 2) Plaintiffs were aware of the November leak prior to closing. These facts, alleged
14 by Plaintiffs themselves, defeat their claims when applied to clearly established precedent in the
15 *Nelson* decision.
16

17 Further, even if the Plaintiffs could establish a *prima facie* case, the Plaintiffs failed to present
18 any evidence that they had suffered any recoverable damages. The repair to the piping was done under
19 warranty at no expense to the Plaintiffs and concurrent with other work being done at The Property.
20 It appears that Plaintiffs suffered no monetary damages nor even any significant inconvenience.
21 Plaintiffs' claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith Damages" of
22 "\$100,000.00" have no factual support since they did not have to pay for the re-piping of the property
23 or for the remediation of the November 2017 leak.
24

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
28

1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

7 This Court has acknowledged the controlling nature of *Nelson v. Heer* with respect to the issues
8 in this case. Any reasonable reading of *Nelson* must lead to the conclusion that the conduct of the
9 Defendants alleged in this case are not actionable. Likewise, Plaintiffs made no real effort to
10 distinguish this case from *Nelson* nor did they argue that *Nelson* should not otherwise apply. Instead,
11 in pursuing this case Plaintiffs essentially ignored *Nelson* and the clear example it set for actionable
12 conduct. “A claim is groundless if “the allegations in the complaint . . . are not supported by any
13 credible evidence at trial.” [citation omitted] *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev.
14 1993).
15

16 **D. PURSUANT TO NRS 18.020, DEFENDANTS ARE ENTITLED TO COSTS**

17 Pursuant to NRS 18.020, “(c)osts must be allowed of course to the prevailing party against
18 any adverse party against whom judgment is rendered, in the following cases...(3) In an action for
19 the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” An
20 award of costs under NRS 18.020 is “mandatory and not subject to the court’s discretion.” *Day v.*
21 *West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985).
22

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.
26

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

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

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

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

13 IV.

14 ORDER

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

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

5
6
7 Hon. Jim Crockett
District Court Judge

8
9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

12
13 Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
14 Jay T. Hopkins, Esq.
Nevada Bar No. 3223
15 Attorneys for Defendants

57B B94 9A28 D97E
16
17 ~~Jim Crockett~~
Reviewed for form and content:
District Court Judge

BLACK AND LOBELLO

18 refused to sign
19 Rusty J. Graf, Esq.
Nevada Bar No. 6322
20 Attorney for Plaintiffs

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/18/2020

15 Jerri Hunsaker

jhunsaker@blacklobello.law

16 Mariella Dumbrique

mdumbrique@blacklobello.law

17 Christopher Young

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18 Diane Meeter

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19 J. Graf

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20 Christopher Young

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21 Jeffrey Galliher

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23 Jay Hopkins

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24 Kimalee Goldstein

kgoldstein@galliherlawfirm.com
25
26
27
28

Heather S. Lumin

CLERK OF THE COURT

MSTY
Rusty Graf, Esq.
Nevada Bar No. 6322
BLACK & WADHAMS
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2669
E-mail: rgraf@blackwadhams.law
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

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

**MOTION FOR STAY OF EXECUTION
OF JUDGMENT ON AN ORDER
SHORTENING TIME**

DATE OF HEARING:

TIME OF HEARING:

COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through
their attorney of record Rusty Graf, Esq. of the firm Black & Wadhams, hereby moves this Court
for a stay of execution of this Court's Entry of the Judgment filed on or about August 18, 2020.

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1 This Motion is made and based upon the following Memorandum of Points and
2 Authorities, the Declaration of Counsel, the papers and pleadings on file herein and any oral
3 argument allowed by the Court at the time of the hearing of this matter.

4 DATED this 17th day of September 2020.

BLACK & WADHAMS

Rusty Graf, Esq.
Nevada Bar No. 6322
10777 W. Twain Ave., Suite 300
Las Vegas, NV 89135
rgraf@blackwadhamslaw.com
Attorneys for Plaintiff

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ORDER SHORTENING TIME

Upon good cause shown, please take notice that the hearing before the above-entitled court on the **MOTION FOR STAY OF EXECUTION OF JUDGMENT ON ORDER SHORTENING TIME** is shortened to the 1st day of ~~September~~ ^{October} 2020 at 9:00 a.m./p.m. or as soon hereafter as counsel can be heard. This Order Shortening Time shall be served on all parties by e-service, hand delivery, facsimile, or email not later than the _____ day of September 2020.

Dated this 17th day of September, 2020

DATED this _____ day of September 2020.

OPPOSITION DUE: 9/24/20
REPLY DUE: 9/29/20

DISTRICT JUDGE

Submitted by:

Rusty Graf, Esq.
Nevada Bar No. 6322
BLACK & WADHAMS
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2669
E-mail: rgraf@blackwadhams.law
Attorneys for Plaintiffs

2E9 FF0 136D 46B1
Jim Crockett
District Court Judge

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DECLARATION OF RUSTY GRAF, ESQ. IN SUPPORT OF PLAINTIFFS'
MOTION FOR STAY OF EXECUTION OF JUDGMENT

I, RUSTY GRAF, declare under penalty of perjury as follows:

1. I am over 18 years of age and licensed to practice law in the State of Nevada.

2. That affiant has been retained to represent Plaintiffs Joseph Folino and Nicole Folino.

3. This Declaration is made of my own personal knowledge, and if called to testify as a witness, I can competently testify thereto.

4. That affiant is aware that on or about May 13, 2020, counsel for the Defendants filed a Notice of Entry of Judgment dismissing Plaintiffs' Second Amended Complaint.

5. That affiant is aware that on or about August 24, 2020, counsel for the Defendants filed a Notice of Entry of Judgment awarding Defendants attorney's fees in the amount of Thousand Four Hundred and Forty-Seven Dollars (\$39,447.00) and costs in the amount of Five Thousand Eight Hundred and Forty Dollars and 41/100 Cents (\$5,840.41).

6. That on or about May 26, 2020, Plaintiffs' filed Notice of their appeal to the Supreme Court of the State of Nevada of the Order granting Defendants' Motion to Dismiss.

7. That on or about September 17, 2020, Plaintiffs' filed Notice of their appeal to the Supreme Court of the State of Nevada of the Order granting Defendants' Motion for Attorney's Fees and Costs and denying Plaintiffs' Motion to Retax.

8. That the award of attorney's fees and costs to Defendants and the denial of Plaintiffs' Motion to Retax were based upon issues which are central to Plaintiffs' appeals.

9. That Plaintiffs have the means and ability to pay the Judgment awarding Defendants attorney's fees and costs and that there would be no difficulty or complexity in the collection process should Plaintiffs' appeal be unsuccessful.

10. That the time for the execution by the Defendants upon the order awarding fees

1 cannot occur until thirty (30) days have elapsed since the notice of entry of the order awarding
2 the fees and costs, and as a result of that timeline, this motion is requested on an order shortened
3 time basis.

4 11. I declare under penalty of perjury under the laws of the State of Nevada that the
5 foregoing is true and correct.

6 Executed this 17th day of September 2020.

7
8
9
10 Rusty Graf, Esq.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I.**

13 **FACTUAL AND PROCEDURAL BACKGROUND**

14 As this Court is aware of the procedural history of this case, counsel will not belabor the
15 points with the Court with a reiteration of those points here.

16 Briefly, on or about May 13, 2020, counsel for Defendants Todd Swanson, as an
17 individual, Todd Swanson, as Trustee of the Shiraz Trust, the Shiraz Trust, and Lyons
18 Development, LLC. (collectively the "Defendants") filed a Notice of Entry of Order for a
19 Judgment dismissing Plaintiffs' Second Amended Complaint. *See attached Exhibit 1, Notice of*
20 *Entry of Order for Judgment Dismissing Plaintiffs' Second Amended Complaint.* Subsequently,
21 on or about August 24, 2020, counsel for the Defendants filed a Notice of Entry of Order for
22 Judgment which granted Defendants' Motion for Attorney's Fees and Costs, awarding
23 Defendants attorney's fees in the amount Thousand Four Hundred and Forty-Seven Dollars
24 (\$39,447.00) and costs in the amount of Five Thousand Eight Hundred and Forty Dollars and
25 41/100 Cents (\$5,840.41), and denying Plaintiffs' Motion to Retax. *See attached Exhibit 2,*
26
27
28

1 *Notice of Entry of Order for Judgment for Attorney's Fees and Costs.*

2 On May 26, 2020, Plaintiffs' filed Notice of their appeal to the Supreme Court of the
3 State of Nevada of the Order granting Defendants' Motion to Dismiss. *See attached Exhibit 3,*
4 *Plaintiffs' Notice of Appeal of Order Granting Motion to Dismiss.* Subsequently, on September
5 17, 2020, Plaintiffs' filed Notice of their appeal to the Supreme Court of the State of Nevada of
6 the Order granting Defendants' Motion for Attorney's Fees and Costs and denying Plaintiffs'
7 Motion to Retax. *See attached Exhibit 4, Plaintiffs' Notice of Appeal of Order Granting*
8 *Defendants' Motion for Attorney's Fees and Costs and Denying Defendants' Motion to Retax.*
9 Therefore, in light of these appeals, it is within the purview of the Supreme Court to decide the
10 propriety of the judgment and/or the awards of attorney's fees and costs. The Plaintiffs
11 respectfully request this Court to stay any execution proceedings in satisfaction of the August 24,
12 2020 Order's award of attorney's fees and costs to Defendants until the completion of the appeal
13 proceedings.
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II.

LEGAL ARGUMENT

A. This Court Should Stay Enforcement of the Judgment

It is well established that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance.” *See Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) These inherent powers allow courts to stay proceedings pending the resolution of outstanding issues. *See e.g., Penn Mut. Life Ins. Co. v. Berck*, No. CIV.A DKC 09-0578, 2010 WL 3294309, at *3 (D. Md. Aug. 20, 2010) (other citations omitted). Here, this Court should exercise its inherent power to stay the execution of the Judgment with respect to the award of attorney’s fees and costs against the Plaintiffs. The award of fees and costs was entirely based upon issues which are central to Plaintiffs’ appeal to the Nevada Supreme Court of the Order dismissing Plaintiffs’ Second Amended Complaint and are the primary focus of Plaintiffs’ appeal to the Nevada Supreme Court of the Order granting Defendants’ Motion for Attorney’s Fees and Costs and denying Plaintiffs’ Motion to Retax. The Court was reticent to award to any attorney’s fees or costs at the time of the hearing, and the Plaintiffs are respectfully requesting a status quo be maintained as to that issue until the Nevada Supreme Court can render a decision.

Moreover, a party may also seek a stay of enforcement of a judgment pending an appeal pursuant to NRCP 62(d). *See NRCP 62(d)*. An appellant is entitled to a stay of proceedings to enforce a judgment pending appeal as a matter of right upon the posting of a supersedeas bond. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). In considering this matter, it is important to note that the Court’s Order for Judgment Dismissing Plaintiffs’ Second

1 Amended Complaint was heavily based upon the holding of Nelson v. Heer. *Id.* Further, the
2 Court's Order awarding Defendants' their attorney's fees and costs also relied upon the
3 applicability of Nelson v. Heer to this case.

4 The Plaintiffs are willing to post a supersedeas bond for the full amount of the purported
5 Judgment in this case, attorney's fees in the amount of Thirty-Nine Thousand Four Hundred and
6 Forty-Seven Dollars (\$39,447.00) and costs in the amount of Five Thousand Eight Hundred and
7 Forty Dollars and 41/100 Cents (\$5,840.41). Posting such a supersedeas bond is sufficient to
8 permit full satisfaction of the Judgment should Plaintiffs be unsuccessful on appeal.

9 In determining whether the amount of the supersedeas bond is sufficient, the Court must
10 review the factors set forth in *Nelson*, 121 Nev. at 836, 121 P.3d at 1254 as follows:
11

- 12 (1) the complexity of the collection process;
- 13 (2) the amount of time required to obtain a judgment after it is affirmed on appeal;
- 14 (3) the degree of confidence that the district court has in the availability of funds to
15 pay the judgment;
- 16 (4) whether the party's ability to pay the judgment is so plain that the cost of a bond
17 would be a waste of money; and
- 18 (5) whether the party is in such a precarious financial situation that the requirement to
19 post a bond would place other creditors of the defendant in an insecure position.
20
21

22 *Id.*

23 1. Here, the Plaintiffs would assert that there is no complexity of the collection
24 process. They are willing and able to pay the Judgment should their appeal be unsuccessful.

25 2. The amount of time required to obtain a judgment after it is affirmed of appeal is
26 going to be the amount of time for the Court to issue a remittitur on appeal: i.e., not very long.

27 3. The District Court may have a high degree of confidence in the ability of
28

1 Plaintiffs' to pay the Judgment, as the attorney's fees and costs awarded are a significantly
2 smaller amount of monies than was being disputed by Plaintiffs and Defendants during the
3 litigation.

4 4. It is obvious to this Court that the Plaintiffs have the ability to pay the judgment,
5 and that is so plain that the cost of a bond could be a waste of money, however these Plaintiffs
6 are willing to post the bond to give security to this Court.
7

8 5. The Plaintiffs are not in a precarious financial situation. However, the Judgment
9 still represents a significant portion of their income, and Plaintiffs would rather post a bond in
10 lieu of all of these funds being made unavailable.

11 The Plaintiffs are fully capable of paying the Judgment, and any interest that may accrue
12 during the course of their appeals. Indeed, other Courts have issued stays of execution pending
13 appeal requiring no bond, where the judgment debtor was financially solvent and there was no
14 threat to the judgment creditor's ultimate ability to recover. *See e.g., Federal Prescription*
15 *Service v. American Pharmaceutical Assn.*, 635 F.2d 755, 760 (D.C. 1980). Especially when the
16 amount is so small.
17

18 Accordingly, there is no question regarding their ability to pay any interest that may
19 accrue during the course of their appeal, the Plaintiffs respectfully request that the Court issue a
20 stay of execution of judgment with respect to the attorney's fees and cost award against them
21 pursuant to NRCP 62(d).
22

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III.

CONCLUSION

Plaintiffs respectfully request that this Court issue an Order staying these proceedings pending a decision by the Nevada Supreme Court, and allowing these Plaintiffs to post a supersedeas bond in the amount of Thirty-Nine Thousand Four Hundred and Forty-Seven Dollars (\$39,447.00) for the attorney's fees awarded to Defendants and in the amount of Five Thousand Eight Hundred and Forty Dollars and 41/100 Cents (\$5,840.41) for the costs awarded to Defendants.

DATED this 17 day of September 2020.

Rusty Graf, Esq.

Nevada Bar No. 6322

BLACK & WADHAMS

10777 West Twain Avenue, 3rd Floor

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Attorneys for Plaintiffs

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the _____ day of September 2020, I caused the above and foregoing document **MOTION FOR STAY OF EXECUTION OF JUDGMENT**; to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

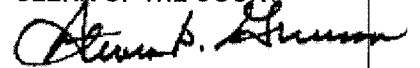
Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
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Attorneys for Defendants

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Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

An Employee of Black & Wadhams

EXHIBIT 1



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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Plaintiff(s),

v.

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

Defendant(s).

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 11th
day of May, 2020.

1 A copy of said Order is attached hereto.

2
3 Dated this 13th day of May 2020.

4
5
6 GALLIHER LEGAL P.C.

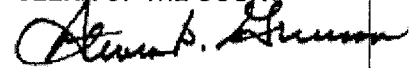
7 /s/ Jeffrey L. Galliher
8 Jeffrey Galliher, Esq.
9 Nevada Bar No. 8078
10 1850 E. Sahara Ave., Suite 107
11 Las Vegas, NV 89104

CERTIFICATE OF E-SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 13th of May I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

I.

PREAMBLE

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment ¹
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

JA002422

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.¹ Rusty J.
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.
3 appeared on behalf of the Defendants.²

4 This Court considered the parties' motions and supplements, together with the exhibits and
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact
8 and Conclusions of Law under the standards set forth below.

10 II.

11 PROCEDURAL HISTORY

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak
16 in the plumbing system.

18 *Plaintiffs' Complaint*

19 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for
20 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a
21 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)
22 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010
23

25 ¹ While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that
26 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the
summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

27 ² The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the
28 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;
and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").

et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known Defects); (5) Civil RICO; and (6) Respondeat Superior.³

Defendants' February 4, 2019 Motion to Dismiss

On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to NRCP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading deficiencies.

Plaintiffs' First Amended Complaint

On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing the Corporate Veil/Alter Ego.

Defendants' May 20, 2019 Motion to Dismiss

On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint, seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs' Negligent Misrepresentation, Deceptive Trade Practices, Civil RICO; Respondeat Superior and Piercing the Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims survived and ordered the Plaintiffs to file a Second Amended Complaint.

Plaintiffs' Second Amended Complaint

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging concealment in violation of NRS 113 *et seq.* and fraud/intentional misrepresentation. The Plaintiffs

³ The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint which, under NRCP 12(b)(5)'s standards, are incorporated into the pleadings. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

also sought punitive damages.

Defendants' September 24, 2019 Motion to Dismiss

Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants provided evidence in the form of an affidavit from the licensed plumbing company that the February 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).

In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the motion.

At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact. Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.

The Plaintiffs' Discovery

Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive discovery, which included serving numerous subpoenas for documents, serving interrogatories, requests for production of documents and requests for admissions. Plaintiffs took the depositions of six witnesses.⁴ The Defendants produced nearly 1000 pages of documents as supplemental disclosures and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also produced over 5000 pages of documents.

⁴ The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and Kelly Contenda.

On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party attached voluminous exhibits.

On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the following findings of fact and conclusions of law.

III.

LEGAL STANDARDS

The following legal standards are applicable to this case:

A. Summary Judgment Standards

Because the parties presented matters outside the pleadings, this Court treats the Defendants' motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).

Since *Wood v. Safeway*,⁵ the Nevada Supreme Court has followed a gradual trend toward favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019 Nev. LEXIS 39, *4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.")

"Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact

⁵ *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).

remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am., N.A. v. SFR Invs. Pool I, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party.” *Id.*

B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions

Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16, 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The Plaintiffs’ claims are based on violation of NRS Chapter 113.

NRS §113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS §113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.
2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.
3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.* According to the Court, “the seller of residential real property does not have a duty to disclose a defect or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if the seller does not realize, perceive, or have knowledge of that defect or condition.”⁶

⁶ Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form that was caused by the seller’s reliance upon information provided to the seller by:… (b) A contractor, engineer, land

1 NRS §113.150(2) provides:

2 Remedies for seller's delayed disclosure or nondisclosure of defects in property;
3 waiver.

4 2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent
5 informs the purchaser or the purchaser's agent, through the disclosure form or another written
6 notice, of a defect in the property of which the cost of repair or replacement was not limited
by provisions in the agreement to purchase the property, the purchaser may:

7 (a) Rescind the agreement to purchase the property at any time before the conveyance
8 of the property to the purchaser; or

9 (b) Close escrow and accept the property with the defect as revealed by the seller or
the seller's agent without further recourse.

10
11 **IV.**

12 **SUMMARY OF FINDINGS OF FACT**

13 The Court finds the following facts are undisputed and supported by the evidence presented
14 by the parties:

- 15 • In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at
16 property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- 17 • The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- 18 • There was a leak in the Uponor plumbing system on February 16, 2017;
- 19 • Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- 20 • A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16,
21 2017 leak;⁷
- 22 • Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the
23
24

25 _____
26 surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that
profession in this State at the time the information was provided." NRS 113.150(5).

27 ⁷ The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the
28 undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to
Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and
documents that Rakeman completely repaired that leak.

October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- 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;
- 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. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted

1 mold tests at the property;

- 2 • Infinity tested for possible fungal levels in the master bathroom and master closet, which is the
- 3 area where the February 2017 and November 7, 2017 leaks occurred;
- 4 • Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the
- 5 Plaintiffs closed on the property;
- 6 • Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- 7 • Plaintiffs closed on the property on November 17, 2017 before the Infinity results were
- 8 reported;
- 9 • After closing, the mold was fully remediated and a subsequent mold test conducted on
- 10 December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017
- 11 Infinity Report;
- 12 • The results of the mold test were not provided by Infinity to Defendants because the
- 13 Defendants no longer owned the property and there is no evidence showing that the Defendants
- 14 knew of the results of the mold test on or before the closing date.
- 15
- 16
- 17

18 V.

19 **CONCLUSIONS OF LAW**

20 This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017
21 water leak. Throughout these proceedings, the Defendants have asserted, together with providing
22 undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing
23 contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS
24 Chapter 113, the repair negated Defendants' duty to disclose.

25 In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the
26 Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than
27 dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts
28

1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been
2 repaired, two facts required by *Nelson*.

3 The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the
4 discovery revealed additional facts, none of those additional facts are material to the claims made in
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case
8 still fails as a matter of law.

10 Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the
16 Plaintiffs' closing on the property.

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

24 **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**
25 **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**
26 **the Leak**

27 Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a
28

February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.⁸ 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 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.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

Dr. Swanson’s Testimony

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

⁸ The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.

1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,
4 but the date was February 17th or 18th or something like that, I think. Or 7th or 8th.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.
6

7 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on
8 the Rakeman invoice, cleared up the confusion regarding the date of the leak:

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.
14

15 Dr. Swanson also testified as follows:

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive
24 that the date was in February, whatever the date was, February 8th or whatever.

25 ***

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,
27 so I tried to find the correct date. . . . And that's what I came up with.
28

///

///

1 ***Rakeman Plumbing Testimony***

2
3 The Rakeman Plumbing documents and testimony showed that the leak in question occurred
4 in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the
5 affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the
6 date “confusion,” Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman
7 warranty work. According to Mr. Hawley,
8

9 if there’s warranty work done behind our new construction, there may not be any papers
10 behind it. It’s not like it’s an invocable call to where somebody calls up. . . . If this was
11 done under warranty, which I don’t know if it was or wasn’t, there may not be any
12 papers involved.

13 Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and
14 that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley
15 recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and
16 testified that the other leak occurred in either February or May, but not both.

17 Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to
18 work covered under Rakeman’s own warranty, a summary is always prepared “after the fact.”
19 According to Mr. Gerber, a summary to the manufacturer “has to be done after the fact.”⁹

20 ***Uponor Documents***

21 The Uponor documents are perhaps the most revealing. Uponor records show the “initial claim
22 [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference
23 a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017
24 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which
25

26
27 ⁹ Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact.
28 Indeed, the attached Rakeman document references April 5, 2017 as “Wanted” and “Promised” which predates the May
23, 2017 invoice date. So, it is impossible that the leak occurred in May.

1 corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

2 These documents clearly establish a nexus between the February 16, 2017 “failure date”
3 documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the
4 fact that there was only one leak in the first half of 2017, on February 16th.

5
6 *Nicky Whitfield’s Testimony*

7 At the time Dr. Swanson’s assistant, Nicky Whitfield, began working for Dr. Swanson in
8 March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak.
9 According to Ms. Whitfield’s sworn testimony, “when I started [working for Dr. Swanson] they were
10 just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway
11 in March if the leak did not occur until May.

12 Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably
13 disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that
14 more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak
15 occurring in the first half of 2017, regardless of whether it happened in February or May, was fully
16 repaired, thus abrogating its disclosure under *Nelson*.

17
18 This Court finds that the undisputed evidence establishes that the leak which is the subject of
19 the Plaintiffs’ action occurred on February 16, 2017, not May 23, 2017, which is the date on the
20 Rakeman invoice.

21
22 Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide
23 uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the
24 Defendants’ duty of disclosure. This Court finds that the Plaintiffs’ allegation the Defendants failed
25 to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and
26 fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCPC
27 56(a), NRS Chapter 113 and *Nelson v. Heer*.
28

B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.¹⁰

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

¹⁰ The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.

28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with the Defendants and the subcontractor hired to make the repairs.

These allegations directly contradict the unsupported argument that they did not know about the November 7, 2017 leak.

Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31 a.m., on November 16, 2017.¹¹ Addendum 4-A, stated:

Seller is disclosing that there was a water leak in the master closet from a water pipe that broke. The Seller is fully remediating the issue to include new baseboards, carpet, etc. and all repair items regarding this leak will be handled prior to closing.

The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back because the buyers "don't want to rely on the plumber and their warranty." This shows that on November 16, the day prior to closing, the parties' agents were discussing potential remedies for dealing with the disclosed leak.

Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she acknowledges that "at this point due to the change in circumstances with the last minute issue with the leak, the buyer's recourse is to walk at this point if they are not comfortable with the repairs/credits."

Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the

¹¹ An agent's knowledge is imputed to the principal. *ARCPE I, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub. LEXIS 1017, *2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak. See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).

1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own
4 allegations and the other evidence.
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**
7

8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.
13

14 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’
15 options were to either “rescind the agreement to purchase the property at any time before the
16 conveyance of the property to the purchaser; or close escrow and accept the property with the defect
17 as revealed by the seller or the seller’s agent without further recourse.”
18

19 The evidence is undisputed that prior to closing, the Defendants provided notice to the
20 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the
21 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse
22 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,
23 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.
24

25 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter
26 of law.
27

28 ///

///

D. The 2015 “Water Losses” are Unrelated to the Plaintiffs’ Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose “water losses” that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which is the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,¹² rather than to conceal a defect. Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

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.

///

¹² The notes are admissible as “present sense impressions” and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a “present sense impression” is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.”

E. The Plaintiffs' Fraud Claim is Derivative of Plaintiffs' Concealment Claim and Fails by Operation of Law

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.¹³

Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

VI.

ORDER

Pursuant to the findings of fact and conclusions of law detailed herein, this Court finds that summary judgment is warranted regarding the Plaintiffs' Second Amended Complaint because the Plaintiffs failed to present facts showing disputed issues of material fact which preclude summary judgment under NRCP 56.

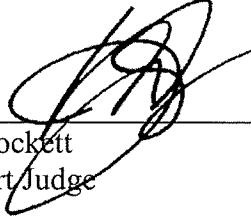
The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

¹³ 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. *See Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000), citing *Casa Clara v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla 1993) (noting that home buyers are protected by "statutory remedies, the general warranty of habitability and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.")

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

Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby DISMISSED, with prejudice.

DATED this 11th day of May 2020.



Hon. Jim Crockett
District Court Judge

Respectfully submitted by:

/s/ **Jeffrey L. Galliher**
Jeffrey L. Galliher, Esq.
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Las Vegas, Nevada 89104
Attorney for Defendants

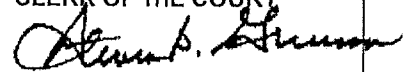
Approved as to form and content:

Risty Graf, Esq.
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Attorney for Plaintiffs

EXHIBIT 2

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8/24/2020 9:52 AM
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Attorneys for Defendants

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff(s),

v.

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

Defendant(s).

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 18th
day of August, 2020.

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

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

2
3 Dated this 24th day of August 2020.

4
5
6 GALLIHER LEGAL P.C.

7 /s/ Jeffrey L. Galliher
8 Jeffrey Galliher, Esq.
9 Nevada Bar No. 8078
10 1850 E. Sahara Ave., Suite 107
11 Las Vegas, NV 89104

CERTIFICATE OF E-SERVICE

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

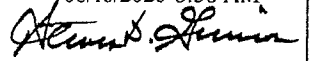
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EXHIBIT 1

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CLERK OF THE COURT

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Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

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

Defendant(s).

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

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

I.

PREAMBLE

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

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

II.

BACKGROUND

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

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

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

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

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

7
8 On September 3, 2019 Plaintiffs filed their Second Amended Complaint ("SAC") wherein
9 Plaintiffs alleged two causes of action. The first alleged Fraud/Intentional Misrepresentation and the
10 second alleged violation of NRS 113.100 et seq. The gravamen of the SAC was that Defendants failed
11 to disclose systemic defects in The Property's plumbing system related to the Uponor piping installed
12 in The Property at the time it was constructed based upon a water leak occurring in February 2017. In
13 response the Defendants filed a motion to dismiss/motion for summary judgment, supported by
14 indisputable evidence that Rakeman Plumbing completely repaired the February 2017 water leak, thus
15 negating the Defendants' purported "knowing concealment."

16
17 On November 7, 2019, this Court held a hearing on Defendants' motion to dismiss. At that
18 time, the Court stated its inclination to grant Defendants' motion, but afforded the Plaintiffs 90 days
19 to conduct discovery to develop, if possible, specific facts to rebut the facts presented by the
20 Defendants in seeking dismissal' facts in a supplemental pleading. On November 26, 2019, due to
21 the extent of discovery indicated by numerous written discovery requests and notices of deposition
22 served by Plaintiffs, Defendants associated Mr. Galliher as counsel.

23
24 On December 11, 2019 Defendants served an offer of judgment upon the Plaintiffs in the
25 amount of \$150,000.00 (one-hundred, fifty thousand dollars) inclusive of fees, costs and interest. The
26 offer of judgment was not accepted and ultimately expired by operation of time.

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

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

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

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

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

18 III.

19 FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

24 The Court finds that the Defendants attorney's fees and costs in defending this case, including
25 costs for a mediation which the parties conducted prior to Plaintiffs filing their complaint, were
26 detailed in exhibits attached to Defendants' motion. Further, this Court finds that the requests for fees
27 satisfies the *Brunzell* and *Beattie* factors.

A. PURSUANT TO NRCP 68, DEFENDANTS ARE ENTITLED TO FEES AND COSTS ACCRUED SINCE DECEMBER 11, 2019

On December 11, 2019 Defendants served upon Plaintiffs an Offer of Judgment in the amount of \$150,000.00. Pursuant to NRCP 68(f)(1)(B), Defendants are entitled to recover their costs and allowed attorney's fees from the time of the service of the offer as Plaintiffs did not accept the offer and then failed to obtain a more favorable outcome. *See Uniroyal Goodrich Tire Co. v. Mercer*, 11 Nev 318, 890 P.2d 785 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720(1993).

The exhibits submitted by the Defendants establish that the Defendants reasonably incurred \$39,447.00 in attorney's fees in defending this case from December 11, 2019 forward.

B. THE ATTORNEYS FEES SOUGHT BY DEFENDANTS ARE REASONABLE AND JUSTIFIED PURSUANT TO THE BEATTIE AND BRUNZELL FACTORS

In determining whether to award fees and costs pursuant to an NRCP 68 offer of judgment the court must evaluate the following factors: 1) whether the plaintiff's claim was brought in good faith; 2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed in the litigation was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983). After weighing these factors the court may award up to the full amount of fees requested. *Id.* at 589.

In considering the amount of fees to award the court must also consider the following:

- The qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;

- The work actually performed by the lawyer; the skill, time and attention given to the work; and
- The result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

In this case, consideration of the *Beattie* and *Bunzell* factors supports an award of fees and costs.

1) Whether the Plaintiffs' claims were brought in good faith

There is a substantial question of whether Plaintiffs' claims in this case were brought in good faith. The gravamen of the Plaintiffs' action, as alleged in Plaintiffs' initial complaint and in subsequent amended complaints, is that Defendants failed to disclose a leak which occurred in February of 2017 on the form Seller's Real Property Disclosure ("SRPD") which Defendants submitted on or about October 24, 2017. However, attached to all of the Plaintiffs' pleadings, from the first pleading forward, was an invoice from Rakeman Plumbing evidencing that the February 2017 leak had, in fact, been repaired by Rakeman Plumbing, a licensed professional plumbing contractor.

After the Plaintiffs were granted leave to amend their initial complaint, the Defendants sought dismissal of each of the Plaintiffs' seven claims. Based on the Rakeman Plumbing invoice and related documents attached to the Plaintiffs' pleading, the Defendants argued the invoice showed the leak had been repaired, thus negating the duty to disclose under *Nelson v. Heer*, 123 Nev. 217, 223-224, 163 P.3d 420, 425 (2007).

On July 18, 2019 at the hearing on Defendants' motion to dismiss the FAC, the court dismissed Plaintiff's 2nd, 3rd, 5th, 6th and 7th causes of action and directed Plaintiffs to file a second amended complaint including the surviving claims.

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint. In response the Defendants filed a Motion to Dismiss, supported by undisputed evidence – indeed the same evidence

1 attached to the Plaintiffs' pleadings - that Rakeman Plumbing completely repaired the water leak,
2 which thus negated the Defendants' purported "knowing concealment."

3 The Defendants obtained an affidavit from Aaron Hawley, the owner of Rakeman Plumbing,
4 regarding the adequacy of Rakeman's repair and what was communicated to the Defendants. Mr.
5 Hawley stated that the water leak was completely repaired and that no further or contradictory
6 information was conveyed to the Defendants.
7

8 With these new facts, the Defendants requested a ruling from this Court that neither of the
9 Plaintiffs' remaining claims could survive summary judgment. The Defendants' presented evidence
10 showing the concealment claim fails under *Nelson* and NRS Chapter 113, because the completed
11 repair negates any duty to disclose. Defendants argued that the Defendants did not have "knowledge"
12 under the *Nelson* standard, because the repair had been completed, and therefore summary judgment
13 on the Plaintiffs' fraud claim was also warranted.
14

15 Plaintiffs' response was to file an opposition and countermotion for sanctions filled with
16 personal attacks against defense counsel. At the hearing on November 7, 2019, the court characterized
17 the motion for sanctions as "inappropriate" and denied it. Further, the court stated its inclination to
18 grant Defendants' motion for summary judgment, thus disposing of the case in its entirety. Plaintiff
19 orally requested NRCP 56(d) relief which was granted in the form of an order allowing Plaintiffs'
20 counsel 90 days to conduct discovery in an attempt to "demonstrate a genuine issue of material fact."
21 In the ensuing period Plaintiff undertook extensive discovery but Plaintiffs were unsuccessful in
22 developing facts to establish a material issue of fact.
23
24
25
26
27
28

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

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

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

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

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

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

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

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

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

22 When Defendants served their offer of judgment, the court had already indicated its inclination
23 to dismiss the case, Plaintiffs had provided no evidence of any damages, and established case law
24 seemingly eviscerated Plaintiff's claims. Thus, rejection of Defendants' offer of judgment was grossly
25 unreasonable. Plaintiffs instead chose to undertake extensive, ultimately futile, discovery at great
26 expense to the parties.
27
28

1 All indications are that all of the expenses required to re-pipe the house and remediate the
2 November 2017 leak were borne by Uponor and Rakeman Plumbing. Indeed, Plaintiffs' disclosed
3 calculation of damages includes zero special damages. Beyond the bare claims in the calculation of
4 damages listed in Plaintiffs' initial disclosures, no other information regarding any alleged damages
5 was ever presented to the Court or the Defendants.

6
7 Even if Plaintiffs could prove that Defendants did fail to make all necessary disclosures under
8 NRS 113.150, Plaintiffs' recoverable damages would be limited to "the amount necessary to repair or
9 replace the defective part of the property." NRS 113.150(4). Plaintiffs have not alleged that they
10 incurred any costs to repair or replace the Uponor system.

11 Further, pursuant to statute, recovery is completely barred "on the basis of an error or omission
12 in the disclosure form that was caused by the seller's reliance upon information provided to the seller
13 by:... (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or
14 pesticide applicator, who was authorized to practice that profession in this State at the time the
15 information was provided." NRS 113.150(5). The undisputed facts show that the leaks in February
16 2017 and November 2017 were immediately reported to Rakeman Plumbing, a licensed Nevada
17 plumbing contractor for investigation and repair and that all information relied upon by Defendants
18 regarding the leaks was provided to the Defendants by Rakeman Plumbing. *See also Nelson*.

19
20 Finally, the damages available to Plaintiffs on their second cause of action are fixed by statute.
21 NRS 113.150 provides, in pertinent part:

22
23 If, before the conveyance of the property to the purchaser, a seller or the seller's agent
24 informs the purchaser or the purchaser's agent, through the disclosure form or another
25 written notice, of a defect in the property of which the cost of repair or replacement was
26 not limited by provisions in the agreement to purchase the property, the purchaser may: (a)
27 Rescind the agreement to purchase the property at any time before the conveyance of the
28 property to the purchaser; or (b) Close escrow and accept the property with the defect as
revealed by the seller or the seller's agent **without further recourse**. (emphasis added)

Nev. Rev. Stat. § 113.150(2).

1 In this case, there can be no dispute that the leak occurring in November 2017 was disclosed to
2 Plaintiffs via Addendum 4A to the purchase agreement prior to the close of escrow. Plaintiffs' decision
3 to nevertheless close escrow was their election of remedy and bars "further recourse" as a matter of
4 law. *Id.*

5
6 Under the circumstances as they existed in mid-December 2019, in the face of formidable
7 factual, legal and statutory barriers to any substantial recovery, Plaintiffs' rejection of the \$150,000.00
8 offer of judgment was grossly unreasonable.

9 **4) *Whether the fees sought be the offeror are reasonable and justified in amount***

10 When determining whether the fees requested are reasonable and justified in amount the court
11 is to consider the four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455
12 P.2d 31, 33 (1969):

- 13 ▪ The qualities of the advocate: his ability, training, education, experience, professional
14 standing and skill;
- 15 ▪ The character of the work to be done: its difficulty, intricacy, importance, the time and
16 skill required, the responsibility imposed and the prominence and character of the
17 parties where they affect the importance of the litigation;
- 18 ▪ The work actually performed by the lawyer; the skill, time and attention given to the
19 work; and
- 20 ▪ The result: whether the attorney was successful and what benefits were derived.

21
22
23 The Defendants provided declarations showing the attorneys handling the defense of this
24 matter have excellent credentials. All attorneys involved in the defense have been partnered with and
25 trained by some of the finest trial lawyers in the state, including the late J. Mitchell "Mitch" Cobeaga
26 and Rex Jemison, among others. They have substantial litigation and trial experience over many
27 decades of combined admission as Nevada lawyers in handling lawsuits for both plaintiffs and
28

1 defendants. They serve as judges pro-tem and arbitrators in both criminal and civil courts. They are
2 skilled litigators with at least one of them rated AV/Preeminent in litigation by Martindale-Hubbell,
3 the nation's foremost rating service for attorneys. All are in good standing with the State Bar of Nevada
4 with no history of discipline.

5
6 The character of the work to be done was difficult. The range of claims initially brought by
7 the Plaintiffs, together with voluminous documents and the statute-heavy nature of these types of
8 cases, required close attention to detail and mastery of a litany of important facts. The work performed
9 in a relatively short period of time was extensive, including six lengthy depositions being taken over
10 just a two week period, expansive research and writing, including review of over 5,400 documents
11 and multiple oral arguments. Defense counsel delivered a just result for their client: dismissal of the
12 case. Plaintiffs nonetheless pushed the case and conducted substantial discovery which had to be dealt
13 with and made myriad arguments which had to be countered.

14
15 After rejecting the offer of judgment of \$150,000.00, Plaintiffs conducted substantial and
16 wide-ranging discovery. Plaintiffs' counsel noticed and conducted six depositions. In addition,
17 Plaintiffs served each of the Defendants with substantive Interrogatories, Requests for Admissions
18 and Requests for Production of Documents and issued many third-party subpoenas resulting in the
19 production of more than 5,400 pages of documents.

20
21 None of that discovery changed the facts which had already been established: the February
22 2017 leak had been repaired by a professional, licensed plumbing contractor and the November 2017
23 leak was disclosed during escrow via Addendum 4A to the Purchase Agreement between the parties.
24 When applied to the well-established case law, the undisputed facts established that Plaintiffs claims
25 failed. Nevertheless, Plaintiffs insisted and persisted in engaging in a scorched earth discovery plan
26 which proved to be fruitless.
27
28

1 Conversely, Defendants' conduct since the offer of judgment has been almost completely
2 reactive in nature, meaning that the work done by defense counsel was directly necessitated by the
3 actions of the Plaintiff in undertaking expansive early discovery. These expenses were exactly what
4 Defendants were seeking to avoid by making an early and substantial offer to settle the dispute for the
5 significant sum of \$150,000.

6
7 Further, the hourly fee of \$270.00 charged to Defendants is exceedingly reasonable given the
8 nature of the work (real estate litigation) and the experience of counsel involved.

9 Based on NRCP 68, this court hereby awards Defendants attorneys fees from the date of the
10 offer of judgment, December 11, 2019, in the amount of \$39,447.00.

11 **C. ATTORNEYS FEES ARE ALSO WARRANTED UNDER THE STANDARDS SET**
12 **FORTH IN NRS 18.010(2)(b)**

13 This court also finds that NRS 18.010(2)(b) supports an award of attorneys' fees because the
14 case, from its inception had little, if any, legal or factual support. Indeed, the same exhibits attached
15 to the Plaintiffs' initial complaint are the very same exhibits which ultimately supported this Court's
16 granting of summary judgment in favor of the Defendants. However, rather than award attorney's fees
17 to Defendants for defending this case from its inception, this Court limits its attorneys' fees award to
18 fees incurred from the date of the offer of judgment, December 11, 2019.

19
20 NRS 18.010(2)(b) provides as follows:

21 In addition to the cases where an allowance is authorized by specific statute, the court
22 may make an allowance of attorney's fees to a prevailing party:

23 ...

24 (b) Without regard to the recovery sought, when the court finds that the claim,
25 counterclaim, cross-claim or third-party complaint or defense of the opposing party
26 **was brought or maintained without reasonable ground or to harass the prevailing**
27 **party. The court shall liberally construe the provisions of this paragraph in favor**
28 **of awarding attorney's fees in all appropriate situations.** It is the intent of the
Legislature that the court award attorney's fees pursuant to this paragraph and impose
sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate
situations to punish for and deter frivolous or vexatious claims and defenses because

1 such claims and defenses overburden limited judicial resources, hinder the timely
2 resolution of meritorious claims and increase the costs of engaging in business and
3 providing professional services to the public. (Emphasis added)

4 Plaintiffs sued the Defendants without factual or legal support. The February 2017 leak was
5 fully repaired, as indicated by documentation the Plaintiff attached to their initial complaint and
6 subsequent pleadings. With respect to the November 2017 leak, Plaintiffs' pleadings, from the
7 inception of this case, clearly show that Plaintiffs requested and performed an inspection prior to close
8 of escrow and that during that inspection they observed the November 2017 leak, but nevertheless
9 proceeded to closing on November 17, 2017.
10

11 These facts, alleged in and supported by the Plaintiffs' own pleadings, establish that
12 Defendants had no liability under Nevada law because they established that 1) the February leak had
13 been repaired, and 2) Plaintiffs were aware of the November leak prior to closing. These facts, alleged
14 by Plaintiffs themselves, defeat their claims when applied to clearly established precedent in the
15 *Nelson* decision.
16

17 Further, even if the Plaintiffs could establish a *prima facie* case, the Plaintiffs failed to present
18 any evidence that they had suffered any recoverable damages. The repair to the piping was done under
19 warranty at no expense to the Plaintiffs and concurrent with other work being done at The Property.
20 It appears that Plaintiffs suffered no monetary damages nor even any significant inconvenience.
21 Plaintiffs' claimed "Fraud Damages" of "[a]pproximately \$300,000.00" and "Bad Faith Damages" of
22 "\$100,000.00" have no factual support since they did not have to pay for the re-piping of the property
23 or for the remediation of the November 2017 leak.
24

25 The plain language of NRS 18.010(2)(b) establishes that attorney's fees awards are appropriate
26 in cases like this one: "It is the intent of the Legislature that the court award attorney's fees pursuant
27 to this paragraph . . . in all appropriate situations to punish for and deter frivolous or vexatious claims
28

1 and defenses because such claims and defenses overburden limited judicial resources, hinder the
2 timely resolution of meritorious claims and increase the costs of engaging in business and providing
3 professional services to the public.” *See also* NRS 7.085. The reasoning set forth in Defendants’
4 motion to dismiss/motion for summary judgment, which was ultimately granted by this Court,
5 establishes the folly of this case.
6

7 This Court has acknowledged the controlling nature of *Nelson v. Heer* with respect to the issues
8 in this case. Any reasonable reading of *Nelson* must lead to the conclusion that the conduct of the
9 Defendants alleged in this case are not actionable. Likewise, Plaintiffs made no real effort to
10 distinguish this case from *Nelson* nor did they argue that *Nelson* should not otherwise apply. Instead,
11 in pursuing this case Plaintiffs essentially ignored *Nelson* and the clear example it set for actionable
12 conduct. “A claim is groundless if “the allegations in the complaint . . . are not supported by any
13 credible evidence at trial.” [citation omitted] *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev.
14 1993).
15

16 **D. PURSUANT TO NRS 18.020, DEFENDANTS ARE ENTITLED TO COSTS**

17 Pursuant to NRS 18.020, “(c)osts must be allowed of course to the prevailing party against
18 any adverse party against whom judgment is rendered, in the following cases...(3) In an action for
19 the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.” An
20 award of costs under NRS 18.020 is “mandatory and not subject to the court’s discretion.” *Day v.*
21 *West Coast Holdings Inc.*, 101 Nev. 260, 264, 699 P.2d 1067, 1070 (1985).
22

23 Defendants’ Verified Memorandum of Costs and Disbursements requested \$5,840.41. The
24 Plaintiffs’ Motion to Retax questioned the propriety of two items of Defendants’ requested costs: (1)
25 runners’ costs; and (2) costs related to the pre-litigation mediation.
26

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

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

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

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

13 IV.

14 ORDER

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

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26 ///

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

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

3 **IT IS SO ORDERED.**

Dated this 18th day of August, 2020

4 DATED this 17th day of August 2020.

6
7 Hon. Jim Crockett
8 District Court Judge

9
10 Respectfully submitted:

11 GALLIHER LEGAL P.C.

12
13 Jeffrey L. Galliher, Esq.
14 Nevada Bar No. 8078
15 Jay T. Hopkins, Esq.
16 Nevada Bar No. 3223
17 Attorneys for Defendants

57B B94 9A28 D97E
18 Jim Crockett
19 Reviewed for form and content:
20 District Court Judge

21 BLACK AND LOBELLO

22 refused to sign

23 Rusty J. Graf, Esq.
24 Nevada Bar No. 6322
25 Attorney for Plaintiffs

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/18/2020

15 Jerri Hunsaker

jhunsaker@blacklobello.law

16 Mariella Dumbrique

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17 Christopher Young

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18 Diane Meeter

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19 J. Graf

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20 Christopher Young

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21 Jeffrey Galliher

jgalliher@galliherlawfirm.com

22 Jeffrey Galliher

jgalliher@galliherlawfirm.com

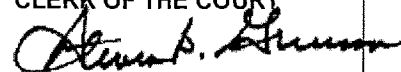
23 Jay Hopkins

jaythopkins@gmail.com

24 Kimalee Goldstein

kgoldstein@galliherlawfirm.com

EXHIBIT 3



Electronically Filed
Jun 01 2020 09:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

1 NOAS
2 J. RUSTY GRAF, ESQ.
3 Nevada Bar No. 6322
4 **BLACK & LOBELLO**
5 10777 W. Twain Ave., 3rd Fl.
6 Las Vegas, Nevada 89135
7 (702) 869-8801
8 (702) 869-2669 (fax)
9 *Attorney for Appellants*

DISTRICT COURT

CLARK COUNTY, NEVADA

10 JOSEPH FOLINO, an individual and NICOLE
11 FOLINO, an individual,

Plaintiff,

v.

12 TODD SWANSON, an individual; TODD
13 SWANSON, Trustee of the SHIRAZ TRUST;
14 SHIRAZ TRUST, a Trust of unknown origin;
15 LYONS DEVELOPMENT, LLC, a Nevada
16 limited liability company; DOES I through X;
17 and ROES I through X,

Defendants.

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

NOTICE OF APPEAL

18 **NOTICE IS HEREBY GIVEN** that Plaintiffs Joseph Folino and Nicole Folino, by and
19 through their attorney of record, Rusty Graf, Esq. of the law firm Black & LoBello, appeals to
20 the Supreme Court of the State of Nevada from the Decision and Order granting Defendants'

21 ///

22 ///

23 ///

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25 ///

26 ///

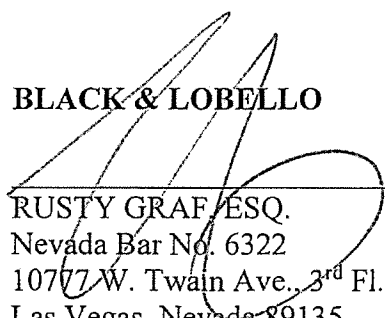
27 ///

28 ///

1 Motion to Dismiss entered in the above-captioned matter on May 13, 2020.

2 Dated this 26th day of May 2020.

3
4 **BLACK & LOBELLO**

5
6 
7 RUSTY GRAF, ESQ.
8 Nevada Bar No. 6322
9 10777 W. Twain Ave., 3rd Fl.
10 Las Vegas, Nevada 89135
11 (702) 869-8801
12 (702) 869-2669 (fax)
13 rgraf@blacklobello.law
14 *Attorney for Appellants*
15
16
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28

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 26th day of May 2020, I caused the above and foregoing document entitled **NOTICE OF APPEAL** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128
Attorneys for Defendants

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.


An Employee of Black & LoBello

EXHIBIT 4

1 **ACAS**
J. RUSTY GRAF, ESQ.
2 Nevada Bar No. 6322
3 **BLACK & WADHAMS**
10777 W. Twain Ave., 3rd Fl.
4 Las Vegas, Nevada 89135
(702) 869-8801
5 (702) 869-2669 (fax)
6 *Attorney for Appellants*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and
10 NICOLE FOLINO, an individual,
11 Appellants,
12 v.

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

13 TODD SWANSON, an individual; TODD
14 SWANSON, Trustee of the SHIRAZ
TRUST; SHIRAZ TRUST, a Trust of
15 unknown origin; LYONS DEVELOPMENT,
16 LLC, a Nevada limited liability company;
DOES I through X; and ROES I through X,
17 Respondents.

**APPELLANTS' CASE APPEAL
STATEMENT**

19
20 Appellants Joseph Folino and Nicole Folino (hereinafter "Appellants"), by and through
21 their attorney of record, Rusty Graf, Esq. of the law firm Black & Wadhams, hereby submits their
22 Case Appeal Statement pursuant to Nevada Rule of Appellate Procedure 3(f) as follows:

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CASE APPEAL STATEMENT**

2 **(A) The district court case number and caption showing the names of all parties to the**
3 **proceedings below:**

4 The district court case number is A-18-782494-C and caption is correctly stated above.
5 The parties to the proceedings below are Appellants and Defendants Todd Swanson, an
6 individual, Todd Swanson, as Trustee of the Shiraz Trust, and Lyons Development LLC.
7 (hereinafter "Respondents").

8 **(B) The name of the judge who entered the order or judgment being appealed:**

9 The Honorable Jim Crockett, Department XXIV of the Eighth Judicial District Court of
10 the State of Nevada issued all Orders referenced above.

11 **(C) The name of each appellant and the name and address of counsel for each appellant:**

12 Plaintiff/Appellant:

13 Nicole Folino

14 Counsel for the Appellant:

15 Rusty Graf, Esq.
16 BLACK & WADHAMS
17 10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

18 Plaintiff/Appellant:

19 Joseph Folino

20 Counsel for the Appellant:

21 Rusty Graf, Esq.
22 BLACK & WADHAMS
23 10777 W. Twain Ave., 3rd Fl.
Las Vegas, Nevada 89135
Attorney for Appellant

24
25 **(D) The name of each respondent and the name and address of appellate counsel, if**
26 **known, for each respondent, but if the name of a respondent's appellate counsel is**
27 **not known, then the name and address of that respondent's trial counsel:**

28 Defendant/Respondent:

Todd Swanson

Counsel for the Respondent:

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondent

Defendant/Respondent:

Todd Swanson as Trustee of the Shiraz Trust

Counsel for the Respondent:

Christopher M. Young, Esq.
Nevada Bar No. 7961
Jay T. Hopkins, Esq.
Nevada Bar No. 3223
Christopher M. Young, PC
2640 Professional Court, #200
Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.
Galliher Legal, P.C.
Nevada Bar No. 8078
1850 E. Sahara Ave., #107
Las Vegas, NV 89104
Attorneys for Respondent

Defendant/Respondent:

Lyons Development, LLC.

Counsel for the Respondent:

Christopher M. Young, Esq.
Nevada Bar No. 7961

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Nevada Bar No. 3223
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Jeffrey L. Galliher, Esq.
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Las Vegas, NV 89104
Attorneys for Respondent

(E) Whether an attorney identified in response to subparagraph (D) is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42, including a copy of any district court order granting that permission:

N/A

(F) Whether the appellant was represented by appointed counsel in the district court, and whether the appellant is represented by appointed counsel on appeal:

N/A

(G) Whether the district court granted the appellant leave to proceed in forma pauperis, and if so, the date of the district court's order granting that leave:

N/A

(H) The date that the proceedings commenced in the district court:

Appellants initiated the proceedings when they filed their Complaint on October 19, 2018.

(I) A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

The underlying matter was a tort action arising from the purchase and sale of a home located at 42 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanated from Appellants' discovery of systemic plumbing issues after the close of the sale, and the failure of the

1 Respondents to disclose their knowledge of water loss occurrences on the Seller's Real Property
2 Disclosure Form.

3 Appellants initial Complaint was filed on October 19, 2018. Appellants subsequently filed
4 a First Amended Complaint on April 18, 2019, and a Second Amended Complaint on May 20,
5 2019. Appellants initial Complaint and First Amended Complaint were both focused on claims
6 arising from a water loss incident that occurred on or about February 16, 2017. However, at the
7 time of the filing of Appellants' Second Amended Complaint a significant amount of discovery
8 had taken place, and it was revealed that numerous water loss incidents other than the February
9 16, 2017 incident had occurred on the property. The Second Amended Complaint reflected these
10 newly discovered water loss incidents and instead of focusing on the February 16, 2017 incident,
11 contained the factual allegations that (1) numerous water losses had occurred on the property; (2)
12 none of these water loss incidents were disclosed; (3) the existence of fungi/mold on the property
13 was also not disclosed in the Seller's Real Property Disclosure Form; (4) Respondents' had
14 knowledge of systemic plumbing issues on the property; and (5) that Respondents' acted with
15 intent to deceive when they failed to disclose the prior water losses (which include at least one
16 water loss that Respondents' did not even claim was repaired and, therefore, cannot logically be
17 covered by the Nelson v. Heer holding relating to the removal of a duty to disclose).

18 On September 24, 2019, Respondents filed a Motion to Dismiss the Appellants' Second
19 Amended Complaint. The district court held a hearing on Respondents' Motion to Dismiss the
20 Second Amended Complaint on November 7, 2019, and the matter was ordered continued to
21 permit the parties time to file a supplemental brief and production of documents. Appellants'
22 Supplemental Brief was filed on February 13, 2020, and emphasized that Appellants' Second
23 Amended Complaint was not focused on the February 16, 2017 water loss incident, but rather (1)
24 that numerous incidents that occurred; (2) the fact that there was no documentation demonstrating
25 that some of these leaks had been repaired; and (3) that there was evidence of the existence of
26 fungi/mold on the property which also required disclosure on the Seller's Real Property
27 Disclosure Form and yet was omitted. Despite Appellants' Second Amended Complaint
28 containing direct allegations that there were unrepaired leaks and mold/fungi that went

1 undisclosed on the Seller's Real Property Disclosure Form, the district court relied on the holding
2 of Nelson v. Heer and entered an order granting Respondents' Motion to Dismiss Appellants'
3 Second Amended Complaint on May 11, 2020.

4 The Order granting Respondents' Motion to Dismiss had incorrect/false Findings of Fact
5 which included: (1) that Appellants' action was premised on the Respondents' failure to disclose
6 a specific leak which occurred on February 16, 2017; (2) that previous leaks in other areas of the
7 house were not related to Appellants' Claims; (3) that another separate water loss in a basement
8 bathroom was not related to Appellants' Claims; and (4) that only the February 16, 2017 water
9 loss was relevant, and all other water losses complained of by the Appellants "are unrelated to
10 their claims and, further, do not materially affect the value of the property". The Order also had
11 incorrect Conclusions of Law which included: (1) that "Plaintiffs lawsuit is predicated on their
12 allegations that the Defendants failed to disclose a February 16, 2017 water leak in the Uponor
13 plumbing system"; and (2) that Appellants' Fraud/Intentional Misrepresentation claim failed as a
14 matter of law because the "Second Amended Complaint alleges one wrong: Defendants' failure
15 to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect.
16 The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim."

17 These Findings of Fact and Conclusions of Law contained in the May 11, 2020 Order
18 make it clear that the district court did not consider the allegations in Appellants' Second
19 Amended Complaint and instead conducted an analysis of the allegations from Appellants' initial
20 Complaint and First Amended Complaint. As a result, the district court improperly applied Nelson
21 v. Heer, as the holding from that case states that conducting a repair removes the general duty to
22 disclose the existence of a material issue. While the leak which caused the February 16, 2017
23 water loss may have been repaired, Appellants' Second Amended Complaint and Supplemental
24 Brief both directly stated (and produced documents evidencing) that there were other undisclosed
25 leaks and mold/fungi that were not repaired or disclosed. Further, regarding the February 16, 2017
26 water loss incident, Appellants also assert that, under Nelson v. Heer, even if the duty to disclose
27 is removed by repair it is still fraud and/or concealment to respond incorrectly to a direct inquiry
28 about water losses having ever occurred on the property.

1 The above issues are the subject of a pending appeal, Case No. 81252. However, the May
2 11, 2020 Order dismissing Appellants' case did not address an earlier Motion for Attorney's Fees
3 and Costs filed by the Respondents on April 22, 2020 and a Motion to Retax filed by Appellants
4 on April 24, 2020. The district court held a hearing on these matters on June 25, 2020, and
5 subsequently filed an Order on August 18, 2020, which granted Respondents' Motion for
6 Attorney's Fees and Costs and denied Appellants' Motion to Retax.

7 The district court's August 18, 2020 Order had Findings of Fact and Conclusions of Law
8 which included: (1) "Pursuant to NRCPP 68(f)(1)(B), Defendants are entitled to recover their costs
9 and allowed attorney's fees from the time of the service of the offer", which occurred on
10 December 11, 2019. The Court awarded "\$39,447.00 in attorney's fees in defending this case
11 from December 11, 2019 forward"; (2) That the attorney's fees and costs sought by Respondents
12 were reasonable and justified under a Beattie and Brunzell factors analysis; (3) that the
13 Respondents were also entitled to an award of their attorney's fees pursuant to NRS 18.010(2)(b)
14 because "the case, from its inception had little, if any, legal or factual support. Indeed, the same
15 exhibits attached to the Plaintiffs' initial complaint are the very same exhibits which ultimately
16 supported this Court's granting of summary judgment in favor of the Defendants."; and (4) that
17 Respondents were entitled to an award of their costs, pursuant to NRS 18.020, "in the amount of
18 \$5,840.41." It was pursuant to these Findings of Fact and Conclusions of Law, that the Court
19 Ordered that Respondents' Motion for Attorney's Fees and Costs was granted and Appellants'
20 Motion to Retax was denied. Respondents were awarded "their attorney's fees in the amount of
21 \$39,447.00 and costs in the amount of \$5,840.41 for a total award of \$45,287.41."

22 It was improper of the district court to make such Findings of Facts and Conclusions of
23 Law, and to subsequently award Respondents attorney's fees in the amount of Thirty-Nine
24 Thousand Four Hundred and Forty-Seven Dollars (\$39,447.00) and costs in the amount of Five
25 Thousand Eight Hundred and Forty Dollars and 41/100 Cents (\$5,840.41) for a total award of
26 Forty-Five Thousand Two Hundred and Eighty Seven Dollars and 41/100 Cents (\$45,287.41)
27 based upon those Findings of Facts and Conclusions of Law. This was improper and flawed
28 because, like the Order dismissing Appellants' Second Amended Complaint, it also relied upon:

1 (1) the district court's incorrect application of the holding of Nelson v. Heer to this dispute; (2)
2 the incorrect Finding of Fact that Appellants' action was premised on the Respondents' failure to
3 disclose a specific leak which occurred on February 16, 2017; (3) the incorrect Conclusion of
4 Law that "Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose
5 a February 16, 2017 water leak in the Uponor plumbing system"; and (4) the false Finding of Fact
6 that only the February water loss was relevant, and all other water losses complained of by the
7 Appellants "are unrelated to their claims and, further, do not materially affect the value of the
8 property". Additionally, these issues resulted in the district court making a further error in
9 improperly analyzing the award of attorney's fees and costs to Respondents using the Beattie and
10 Brunzell factors.

11 As discussed above, Appellants has asserted in a pending appeal, Case No. 81252, that
12 the Findings of Facts and Conclusions of Law of the district court as they relate to the application
13 of the holding of Nelson v. Heer to this dispute were incorrect. Further, Appellants also assert that
14 the district court acted improperly in failing to consider the actual content of Appellants' Second
15 Amended Complaint, instead choosing to analyze Appellants' claims only in relation to the
16 February 2017 leak. Both of these improper actions formed the basis for the district court's
17 subsequent Order granting Respondents' their attorney's fees and costs. The Order granting those
18 fees and costs to Respondents directly states as much, identifying that the award of attorney's
19 fees pursuant to NRS 18.010(2)(b) was because the case had "little, if any, legal or factual
20 support" and costs were awarded pursuant to NRS 18.020 because Respondents were the
21 prevailing party. The basis for both of these awards is completely undermined by the
22 inapplicability of Nelson v. Heer to this situation, and the fact that the content of Appellants'
23 Second Amended Complaint did have substantial legal and factual support, but this content was
24 ignored and the claims of Appellants were only analyzed in relation to the February 2017 leak.

25 Finally, the Order granting fees and costs to Respondents is also improper due to the
26 insufficiency of the district court's analysis of the Beattie and Brunzell factors and resulting
27 improper conclusion that they favored awarding fees and costs to Respondents. The district court
28 held that the Beattie and Brunzell factors supported the award of costs and fees to Respondents

1 and relied upon the following Findings of Fact and Conclusions of Law in reaching that decision:
2 (1) that “Plaintiffs’ claims were not brought in good faith” as evidenced by the complaint having
3 a “dubious factual basis” and the filing of “inappropriate motion for sanctions”; (2) that
4 defendant’s offer of judgment was “reasonable and in good faith in both its timing and amount”
5 because at the time of the offer the damages suffered by Appellants was “unsupported” and “at
6 the time of the offer of judgment, Plaintiffs had already been advised in open court of the Court’s
7 inclination to grant Defendants’ motion to summarily dispose of the case”; and (3) that it was
8 grossly unreasonable for Appellants to reject Respondents’ December 11, 2020 settlement offer
9 because “the court had already indicated its inclination to dismiss the case, Plaintiffs had provided
10 no evidence of any damages, and established case law seemingly eviscerated Plaintiff’s claims.”

11 This analysis of the Beattie and Brunzell factors by the district court was incorrect and
12 improper because it, again, relied upon (1) the district court’s incorrect application of the holding
13 of Nelson v. Heer to this dispute; (2) the incorrect Finding of Fact that Appellants’ action was
14 premised on the Respondents’ failure to disclose a specific leak which occurred on February 16,
15 2017; (3) the incorrect Conclusion of Law that “Plaintiffs lawsuit is predicated on their allegations
16 that the Defendants failed to disclose a February 16, 2017 water leak in the Uponor plumbing
17 system”; and (4) the false Finding of Fact that only the February water loss was relevant, and all
18 other water losses complained of by the Appellants “are unrelated to their claims and, further, do
19 not materially affect the value of the property”. This incorrect basis for the analysis led to the
20 completely unsupported and factually incorrect conclusions by the district court that Appellants
21 lacked good faith in bringing their claims (which was based primarily on the application of Nelson
22 v. Heer and the analysis of Appellants’ claims in relation to only the February 16, 2017 leak), that
23 the Offer by Respondents was reasonable and in good faith in timing and amount (which was
24 based primarily on the district court expressing its “inclination to dismiss the case”, but such an
25 inclination was based on the same issues discussed herein), and that Appellants’ decision to reject
26 the offer was grossly unreasonable (which was again based primarily on the district court
27 expressing its “inclination to dismiss the case” and the supposed fact that “established case law
28 seemingly eviscerated Plaintiff’s claims” despite the fact that the inclination had no basis and the

1 holding of the established case law did not apply). All of these issues directly resulted in the
2 district court improperly granting Respondents' Motion for Attorney's Fees and Costs while
3 denying Appellants' Motion to Retax. These issues, among others, necessitate appellate relief.

4 **(J) Whether the case has previously been the subject of an appeal to or original writ**
5 **proceeding in the Supreme Court or Court of Appeals and, if so, the caption and**
6 **docket number of the prior proceeding:**

7
8 **Pending Appeal:**

9 1. Case No. 81252

10 JOSEPH FOLINO, AN INDIVIDUAL; AND NICOLE FOLINO,
11 AN INDIVIDUAL,

12 Appellants,

13 v.

14 TODD SWANSON, AN INDIVIDUAL; TODD SWANSON,
15 TRUSTEE OF THE SHIRAZ TRUST; SHIRAZ TRUST, A
16 TRUST OF UNKNOWN ORIGIN; AND LYONS
17 DEVELOPMENT, LLC, NEVADA LIMITED LIABILITY
18 COMPANY,

18 Respondents.

19 **(K) Whether the appeal involves child custody or visitation:**

20 N/A

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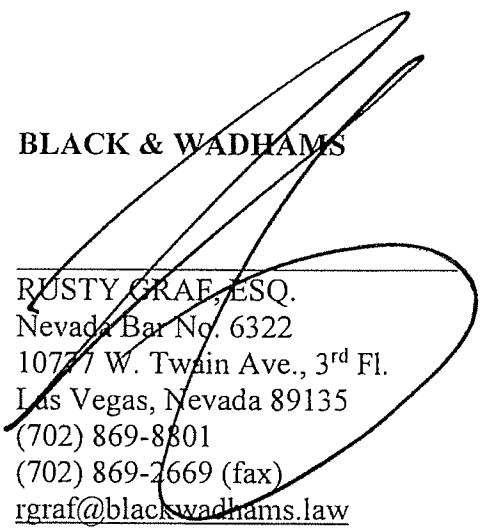
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(L) Whether the appeal involves the possibility of settlement:

Appellants do not believe that there is a possibility of settlement with Respondents.

Dated this 17th day of September, 2020.

BLACK & WADHAMS


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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Black & Wadhams and that on the ____ day of September 2020, I caused the above and foregoing document entitled **APPELLANTS' CASE APPEAL STATEMENT** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;
- ☐ pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ hand delivered.

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

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An Employee of Black & Wadhams

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Folino, Plaintiff(s)

CASE NO: A-18-782494-C

7 vs.

DEPT. NO. Department 24

8 Todd Swanson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Shortening Time was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/17/2020

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