IN THE SUPREME COURT OF THE STATE OF NEVADA

BOUR ENTERPRISES, LLC., A NEVADA LIMITED LIABILITY COMPANY; MULUGETA BOUR, AN INDIVIDUAL; HILENA MENGESHA, AN INDIVIDUAL,

Appellants,

vs.

4520 ARVILLE, A CALIFORNIA GENERAL PARTNERSHIP; MCKINLEY MANOR, AN IDAHO GENERAL PARTNERSHIP,

Respondents.

Supreme Court Case No.: 82699

District Court Case No.: Case No.: A-19-794864-C

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APPELLANTES OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellants are individuals and a Nevada limited liability company. The individuals own 100% of the membership of the Nevada limited liability company, therefore there are no parent corporations or publicly held companies that own 10% or more of the parties' stock.

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

Dated this 5th day of October 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURDICTIONAL STATEMENT

This is a consolidated appeal of a final judgment, pursuant to NRAP 3A(b)(1), and of a special order entered after that final judgment, pursuant to NRAP 3A(b)(8). The Order resulting in the final judgment being appealed is the Order filed March 9, 2021, granting Respondents' Motion to Dismiss Appellants' Second Amended Complaint, which was based on the district court's application of summary judgment standards. *See Appendix Vol. IX, AI00641-AI000648*. The appeal from that Order was timely filed on March 24, 2021. *See Appendix Vol. IX, AI000792-AI000794*. The special orders being appealed is the Order filed May 27, 2021, granting Respondents' Motion for Fees and Costs. *See Appendix Vol. X, AI000942-AI000950*. The First Supplemental Judgment was also entered May 24, 2021. *See Appendix Vol. X, AI000932-AI000934*. The amended notice of appeal from that Special Order and the Notice of Entry of the First Supplement Judgment was timely filed on May 27, 2021. *See Appendix Vol. X, AI000951-AI000955*.

ROUTING STATEMENT

Under NRAP 17(a)(11), the Nevada Supreme Court retains "Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law". *See NRAP 17(a)(11).* In the present case, Appellants contend that this matter is presumptively retained by the Nevada Supreme Court because the issues on appeal concern whether the district court erred in granting the motion or summary while not adjudicating the affirmative defenses prior to so ruling, whether the district court erred in ruling that the implied warranty of habitability does not apply to commercial leases, whether the implied warranty of habitability is waived by an "as-is" clause, whether no set of facts was presented to support a claim of constructive eviction, and whether an award of attorneys' fees was appropriate given the issues on appeal as presented.

STATEMENT OF THE ISSUES

1. The district court erred in holding that the Appellants had failed to raise an issue in their affirmative defenses.

2. The district court erred in adjudicating the Respondent's motion for entry of judgment without allowing the Appellants to present its testimony and evidence of the affirmative defenses.

3. The district court erred in finding that the warranty of habitability does not apply in the setting of a commercial lease.

4. The district court erred by ruling that even if Nevada did recognize a warranty of habitability, the warranty would have been waived in the application of the "as-is" clause within the lease.

5. The district erred in holding that the constructive eviction did not occur.

6. The district court erred in awarding attorneys' fees and costs based upon the procedurally improper entry of the order granting summary judgment without allow Appellant to present its facts and evidence of the constructive eviction and/or in opposition to the constructive eviction claim.

STATEMENT OF THE CASE

The underlying matter was a matter asserting breach of a commercial lease.[1] The matter further included an answer and counterclaim asserting constructive eviction and a violation of the warranty of habitability.[2] The Appeal's underlying action was initiated by Appellants' Complaint asserting claims of (1) Breach of Lease; (2) Breach of Guaranties against Guarantors; (3) Breach of Implied Covenant of Good Faith and Fair Dealing; (4) Unjust Enrichment; and (5) Declaratory Relief; which was filed on May 15, 2019.[3] On July 16, 2019, the Appellants filed an Answer and Counterclaim.[4] The Answer asserted affirmative defenses for, among other

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[1] *See Appendix Vol. I, AI000001-AI000006.*
[2] *Id.*
[3] *Id.*
[4] *See Appendix Vol. I, AI00007-AI000021.*

stated defenses: Failure to State a Claim; Constructive Eviction; Unclean Hands; Actions Caused by the Respondents; Respondents Were in Breach of the Contract; Failure to Mitigate Damages; Failure of the Respondents to Perform Under the Contract; Lies and Deceit in Misrepresenting Facts to Induce the Appellants to Contract; Equitable Doctrines of Waiver, Release, Laches, Unclean Hands and Equitable Estoppel; Doctrines of Novation, Accord and Satisfaction and Recoupment.[5] The Counterclaim asserted claims for (1) Constructive Eviction; (2) Breach of Contract; (3) Breach of the Covenant of Good Faith and Fair Dealing; and (4) Declaratory Relief; which was filed on July 16, 2019.[6] Respondent filed its motion to dismiss the Counterclaim on August 1, 2019, which asserted arguments to dismiss all of the Appellants' Counterclaims.[7] The hearing took place on September 3, 2019, and an Order was entered denying Respondents' Motion on September 13, 2019.[8] Respondents subsequently filed their Answer to the Counterclaims on October 14, 2019.[9]

Respondents filed a Motion for Summary Judgment on the counterclaim damages on November 10, 2020, and Appellants filed their Opposition on December

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[5]Id.
[6] Id.
[7] *See Appendix Vol. I, AI000022-JA000038.*
[8] *See Appendix Vol. II, AI000166-AI000170.*
[9] *See Appendix Vol. II, AI000171-AI000178.*

17, 2020.[10] Respondents filed a Motion for Summary Judgment on Respondent's breach of contract claims on December 1, 2020, and Appellants filed their Opposition on December 17, 2020.[11] A hearing was held by the district court on January 12, 2021, and the district court entered an Order on January 28, 2021, which granted Respondents' Motion.[12]

Respondents then filed their Motion for Entry of Judgment as to the surviving causes of action or affirmative defenses on February 10, 2021.[13] Appellants filed the Opposition to the Motion for Entry of Judgment on February 24, 2021.[14] A hearing was then held on March 2, 2021, and an Order was entered on March 9, 2021, wherein the district court stated: (1) Per the Court's Order entered January 28, 2021, wherein the district court granted the motion for summary judgment on the breach of contract claims, the district court concluded that "the undisputed material facts established that [Appellants] breached the leases and personal guaranties"; (2) the district court "rejected" Appellants' argument as to constructive eviction "as the implied warranty of habitability was deemed inapplicable to commercial leases and that even if such warranty is applicable, it was specifically waived by the

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[10] *See Appendix Vol. VI, AI000244-AI000357*; *see also Appendix Vol. VI, AI000358-AI000370.*
[11] *See Appendix Vol. VI, AI000371-AI000426 and Appendix Vol. VII, AI000427-AI000482; see also Appendix Vol. VII, AI000483-AI000509.*
[12] *See Appendix Vol. VIII, AI000535-JA000547.*
[13] *See Appendix Vol. VIII, AI000548-AI000569.*
[14] *See Appendix Vol. VIII, AI000570-AI000616.*

[Appellants] in the subject lease."; (3) the district court then determined that the only "remaining issue" is whether a trial was necessary to prove Respondents damages; (4) Appellants failed to raise arguments in opposition to the Motion for summary Judgment on breach of contract claims as to the appropriateness and reasonableness of the damages claimed; and (5) the arguments against the damages cannot be subsequently raised, and are therefore "waived and cannot be subsequently considered."[15]

Appellants filed its Notice of Appeal on March 24, 2021, appealing the Order entered March 9, 2021, as well as the Judgment entered March 9, 2021.[16]

On March 29, 2021, Respondents filed a Motion for Fees and Costs and their Memorandum of Costs and Disbursements.[17] Appellants filed their Opposition to the Motion for fees and costs on April 12, 2021, and their Motion to Retax Respondents' Costs on March 18, 2020.[18] The hearing on Respondents' Motion for Fees and Costs and Appellants' Motion to Retax Costs was held on May 6, 2021, and the district court entered an Order granting in part Respondents' Motion and entered the order on May 27, 2021 (the "Fees and Costs Order").[19]

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[15] *See Appendix Vol. IX, AI000635-AI000640.*
[16] *See Appendix Vol. IX, AI000641-AI000648; see also Appendix Vol. IX, AI000635-AI000640 and Appendix Vol. IX, AI000641-AI000648*
[17] *See Appendix Vol. X, AI000802-AI000916;*
[18] *See Appendix Vol. VII, AI000700-AI000791.*
[19] *See Appendix Vol. XI, AI000942-AI000950.*

The Fees and Costs Order stated the contract provided for the basis for awarding the Respondents' attorneys' fees and costs. *Id.* First, because the Respondents had prevailed on the Summary Judgment and the Appellants were found to have breached the Lease and the Guarantees.[20] The Fees and Costs Order further stated Respondents were also entitled to recover their costs as the prevailing party pursuant to NRS 18.020.[21] Respondents were ultimately awarded $60,000.00 in fees and $6,307.71.41 in costs.[22]

Respondents then entered the First Supplemental Judgment on May 27, 2021.[23] Appellants timely filed their Notice of Appeal of the Fees and Costs Order on June 22, 2021.[24] The Appellants' Amended Notice of Appeal added the Orders and Supplemental Judgments entered May 27, 2021, and Notice of entry of the Order granting in part the Motion for fees entered May 27, 2021.[25]

STATEMENT OF FACTS

On or about April 20, 2017, Appellants, BOUR ENTERPRISES, LLC., a Nevada limited liability company; MULUGETA BOUR, an individual (hereinafter

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[20] *Id. at AI000946.*
[21] *Id. at AI000947.*
[22] *Id. at AI000948.*
[23] *See Appendix Vol. XI, AI000932-AI000934.*
[24] *See Appendix Vol. XI, AI000992-JA000995.*
[25] *Id. at AI000993.*

"Bour"); HILENA MENGESHA, an individual (hereinafter "Mengesha") (hereinafter collectively the "Appellants") entered into a commercial lease agreement ("CLA") with Respondents, 4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership (collectively the "Respondents") for the Appellants' lease of the real property identified as 4560 South Arville St., Units C-10, 23, 24 and 29, Las Vegas, NV 89103 (hereinafter the "Subject Property").[26] Thereafter, Bour and Mengesha executed guarantees for the CLA (hereinafter the "Guarantees").[27]

Appellants subsequently learned that there was a condition in Subject Property that created an inhabitable environment.[28] Discovery revealed the existence of the presence of materials that could be harmful to individuals if inhaled by the occupants of the Subject Property (the "Expert Report").[29] These documents and the magnitude of the substance evidenced the fact that Respondents had to be fully aware of the existence of these substances. Appellants communicated the existence of the harmful substances to the Respondents.

The parties further communicated about issues with the parking that was available at the Subject Property.[30] Appellants were assured that they would be

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[26] See *Appendix Vol. I, AI000001-AI000006.*
[27] *Id.*
[28] See *Appendix Vol. I, AI000007-AI000021.*
[29] See *Appendix Vol. VIII, AI000570-AI000616.*
[30] *See Appendix Vol. I, AI00007-AI000021.*

afforded the number of stalls necessary for them to operate their business.[31] They were not and the Appellants complaint on a number of occasions.[32]

The CLA entered into by the Appellants contained a provision captioned as an "as-is" clause,[33] which states as follows:

> "Condition of Premises. Lessee hereby accepts the Premises in "as-is" condition with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease."[34]

The clause does not address whether the condition complained of was in existence at the time Appellants took possession of the Subject Property, and further only addresses if there are "alterations or improvements" necessary.[35] This clause does not address any hazardous condition that would be required to be abated.

The Appellants asserted that they were constructively evicted from the Subject Property by the Respondents' failures to abate the hazardous condition or nuisance.[36] Further, the Appellants asserted that the failure to abate the nuisance or hazardous condition would act as a breach of the warranty of habitability.[37]

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[31] Id.
[32] Id.
[33] *See Appendix Vol. I, AI000022-AI000038* at *AI00032*.
[34] Id.
[35] Id.
[36] *See Appendix Vol. I, AI000007-AI000021*.
[37] Id.

The district court further ordered that the affirmative defenses of the Appellants some of which operate as offsets or reduction of the damages were "waived" when a party brings a motion for summary judgment asking for breach of contract adjudication and then attaches a spreadsheet of the purported damages. Appellants asserted that the calculation of the damages were correct given the CLA and the time left on those leases. However, Appellants argued that there were affirmative defenses including and not limited to failure to mitigate.

Proof of the Affirmative defenses is also present in the lack of responses to the interrogatories by the Plaintiffs.[38] Particularly, Plaintiffs responded as follows:

> INTERROGATORY NO. 30: Please give step by step description of any actions taken to mitigate damages after Defendants informed you they would no longer be leasing the Subject Property.
>
> RESPONSE TO INTERROGATORY NO. 30: This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no response is necessary. *Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684, 686 (D. Nev. 1997).*[39]

Further, the documents produced by the Plaintiffs and the Declaration of Bour attached to the Opposition to the Motion for Summary Judgment, substantiate the failure to mitigate.[40]

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[38] *See Appendix Vol. VIII, AI000570-AI000616.*
[39] Id.
[40] *See Appendix Vol. VIII, AI000570-AI000616.*

SUMMARY OF THE ARGUMENT

The district court erred in: (1.) holding that the Appellants had failed to raise an issue in their affirmative defenses; (2.) adjudicating the Respondent's motion for entry of judgment without allowing the Appellants to present its testimony and evidence of the affirmative defenses; (3.) finding that the warranty of habitability does not apply in the setting of a commercial lease; (4.) ruling that even if Nevada did recognize a warranty of habitability, the warranty would have been waived in the application of the "as-is" clause within the lease; (5.) holding that the constructive eviction did not occur; (6.) awarding attorneys' fees and costs based upon the procedurally improper entry of the order granting summary judgment without allowing Appellants to present facts and evidence of the constructive eviction and/or in opposition to the constructive eviction claim. The district court also erred and when it abused its discretion by basing the decisions on clearly erroneous factual determinations and by disregarding controlling law.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

"This [C]ourt reviews a district court's grant of summary judgment de novo."[41] Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the non-moving party, demonstrates that no genuine issue

[41] *See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (Nev. 2005).*

of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* Conclusory statements fail to create issues of fact.[42] Thus, there are two basic substantive requirements for a district court to grant summary judgment are: (1) there must be no genuine issue as to any material fact; and (2) the moving party must be entitled to judgment as a matter of law.[43]

When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the non-moving party.[44] The burden on the nonmoving party to set forth specific facts, by affidavit or otherwise, demonstrating the existence of a genuine issue for trial only applies if the moving party has properly supported its motion for summary judgment as required by NRCP 56.[45]

I.

ARGUMENT

A. The District Court Erred in Holding That The Appellants Had Failed To Raise An Issue In Their Affirmative Defenses.

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[42] *See Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094-95 (1995).*

[43] *See Allstate Ins. Co. v. Fackett, 125 Nev. 132, 137, 206 P.3d 572, 575 (Nev. 2009); see also ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 644, 173 P.3d 734, 738 (Nev. 2007).*

[44] *See Allstate, 125 Nev. at 137, 206 P.3d at 575; Wood, 121 Nev. at 729, 121 P.3d at 1029.*

[45] *See Wood, 121 Nev. at 731-32, 121 P.3d at 1031.*

It is unclear as to what the district court was adjudicating in its ruling upon the motions for summary judgment and then the motion for entry of judgment, if not its agreement that the orders on the motions for summary judgment did not include a final adjudication. Thus, when the district court granted the motion for entry of judgment, and Appellants in their opposition to the Motion for Entry asserted their right to present evidence and testimony on the Respondents failure to mitigate their damages.

Following a bench trial, this Court will not overturn the district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence.[46] *Yount* is a case where this court discussed implied consent adjudication of counterclaims pursuant to NRCP 15(b). This Court then went a step further and found the following:

> "NRCP 8(c) addresses affirmative defenses and allows the court to treat an affirmative defense as a counterclaim if the party "mistakenly designated" the counterclaim as an affirmative defense. In addressing FRCP 8(c), the United States Court of Appeals for the District of Columbia Circuit explained that:
>
> > 'affirmative defenses made in response to a pleading are not themselves claims for relief. True, [FRCP] 8(c)(2) provides a potential mechanism for extending jurisdiction to an improperly pled claim .... But several of our sister circuits have held that a request for relief that amounts to no more than denial of the plaintiffs demand is properly considered an

[46] *Yount* at 171.

answer, not a separate claim for affirmative relief that expands the court's jurisdiction.'"[47]

Appellants are not trying to argue that there is some sort of trial by consent as this was an adjudication at summary judgment. However, the argument is analogous to the rationale asserted in *Yount*, what it clearly does state is that affirmative defenses are viable to present a defense to damages. *Yount* is case where the district court, sua sponte, awarded damages, and this Court reversed the district court's finding of damages for the "untried counterclaim."[48] Appellants argue here that the inverse must certainly be true. Appellants asked for the opportunity to assert their affirmative defenses at the bench trial and were denied that right. The Affirmative Defenses had not been adjudicated by the Court, or at the very least the request to prove the basis of its affirmative defense at an evidentiary hearing should have been afforded the Appellants.

B. The District Court Erred in Adjudicating The Respondent's Motion For Entry Of Judgment Without Allowing The Appellants To Present Its Testimony And Evidence Of The Affirmative Defenses

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[47] *Yount* at 174-175; citing to *Akiachak Native Cmty. v. U.S. Dep't of Interior,* 827 F.3d 100, 107 (D.C. Cir. 2016) (internal quotation marks and alterations omitted).
[48] Yount at 421.

The Appellants disputed the basis for the damages as awarded by the Court in its Opposition to the Motion for Entry of Judgment. The proceeding Motion for Summary Judgment on Breach of Contract did not request a dollar figure judgment.[49] Appellants had asserted the failure to mitigate in its Answer and Counterclaim as well as the Opposition to the Motion for Entry of Judgment. More importantly, the bench trial that was then still set would have allowed the Appellants to present the evidence, testimony and conduct cross examination of those witnesses identified to call into question the purported lost rents. Specifically, the bench trial would allow the Respondents to attack the failure to re-lease the Subject Property.

In support of these arguments that there was a significant question as to the adjudication of the affirmative defense is the procedural fact that the Respondent filed two consecutive Motions for Summary Judgment, and then filed a Motion for Entry of Judgment. The assertion by the Appellants that there should have been evidence and testimony to controvert the lost rents should have been allowed at the time of the then set bench trial. The Respondents have the burden to prove their damages and the reasonableness of their damages.[50] The affirmative defense of

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[49] *See Appendix Vol. VI, AI000371-AI000426.*

[50] "As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts. *See First Nat. Bank v. Milford,* 239 Kan. 151, 718 P.2d 1291, 1297 (1986).
The rule of mitigation of damages begins when the breach is discovered. *See Holland v. Green Mountain Swim Club Inc.,* 470 P.2d 61, 63 (Colo.App.1970)." *Conner v. Southern Nevada Paving*, 103 Nev. 353, 355 (1987).

mitigation places the burden on the breaching party to prove it.[51] Mitigation of damages can be proven by simple cross examination.[52] Moreover, the previous Orders on the Motions for Summary Judgment for Breach of Contract and Counterclaims did not address or adjudicate the affirmative defenses.

In the instant case before this Court, there were expressly stated and asserted counterclaims and affirmative defenses. This is not an instance of implied consent or other claims pursuant to NRCP 15(b). Those were not limited to the constructive eviction or warranty of habitability. They included equitable affirmative defenses and the failure to mitigate the damages.[53] There is no order before this Court or having been issued by the district court adjudicating the affirmative defenses asserted in Appellants answer.[54]

Strikingly, following a bench trial, this Court "will not overturn the district court's findings of fact 'unless they are clearly erroneous or not supported by

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[51] "However, the burden of proving failure to mitigate is on the breaching party. *Cobb v. Osman,* 83 Nev. 415, 422, 433 P.2d 259, 263 (1967)." *Conner* at 355-6.

[52] "A cross-examination is about the only test, certainly the most efficacious one, which the law has yet devised to discover the truth. To deprive a party of this right is such irregularity and error as to prevent the party from having a fair and impartial trial, and is sufficient to reverse the case. 1 Green l.Ev., §446; 10 Mich. 460; 14 Cal. 23; 29 Ind. 456; 37 New York, 143; 47 Maine, 470; 8 Black, 556; 29 Ind. 293; 33 Cal. 647; 8 Gray, 172." *Ferguson v. Rutherford*, 7 Nev. 385, 386 (1872).

[53] *See Appendix Vol. I, AI000007-AI000021.*

[54] Id.

substantial evidence.'"[55] Here, the district court denied the Appellants the right to contest the damages by evidence, testimony, and cross examination.

This Court has recently ruled upon a district court's failure to properly adjudicate a defendant's properly asserted affirmative defense of mitigation of damages, where the district court failed at a bench trial to adjudicate those claims.[56] In *Beckstead*, the district court awarded back pay, and failed to make any findings of fact or supporting analysis for the efforts taken to mitigate those damages.[57] This Court went further to find as follows:

> "Accordingly, while the back pay awards would ordinarily be subject to a deferential abuse of discretion standard, *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980), this manifestly deficient order amounts to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (reversing an award of custody based on a lack of supporting reasoning by the district court and noting that "[d]eference is not owed to legal error or to findings so conclusory they mask legal error") (citations omitted). We therefore vacate the district court's back pay awards and remand for further proceedings to address mitigation and recalculate damages as appropriate."

The failure to even allow the bench trial to contest the damages is manifest error, and mandates a reversal and remand for further proceedings.

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[55] *Yount v. Criswell Radovan, LLC*, 136 Nev. 167, 172 (2020); *citing to Wells Fargo Bank, N.A. v. Radecki,* 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

[56] See *Complete Care Medical Center v. Beckstead*, 484 P.3d 950, 2021 WL 1345693 (2021).

[57] Id at *1.

C. The District Court erred in Finding That The Warranty Of Habitability Does Not Apply In The Setting Of A Commercial Lease

This Court has not expressly ruled upon the issue of whether a warranty of habitability applies to a commercial lease. This this is a matter of first impression and Appellants ask the Court to find that there is a warranty of habitability that applies in the commercial lease setting as here.

The parties acknowledge that NRS 118C, Landlord and Tenant Chapter, does not include any mention to a warranty of habitability.[58] Moreover, the there is no direct decision by this Court on the application of the warranty in a commercial setting. Respondents cited to foreign jurisdictions for the proposition that the warranty should not be applied to commercial leases.[59]

Event he caselaw cited by the Respondents requires at least a second by this Court, as there are other jurisdictions that have found implied warranties of habitability in commercial leases.[60] By finding that four out of six states have not found the implied warranty to apply in a commercial leasing setting, means that two

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[58] See NRS 118C.010 et seq.

[59] "Our review of the authorities reveals that the majority view, which we adopt, does not extend an implied warranty of habitability or fitness to commercial leases." *B.W.S. Investments v. Mid-Am Restaurants, Inc.*, 1990 WL 108794 (N.D. 1990), other citations omitted.

[60] "While most states recognize the implied warranty of habitability, four of the six state high courts to consider the implied warranty of suitability in commercial leases have declined to adopt it." *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 913, 50 Tex. Sup. Ct. J. 634 (2007).

other jurisdictions did find that the warranty of habitability did apply in the commercial leasing setting.[61]

What is all the more telling is the rationale expressed for the ruling on the Warranty of Habitability by the Texas court, which held, "We recognize that our holding today stands in contrast to the implied warranty of habitability, which 'can be waived only to the extent that defects are adequately disclosed.'"[62] And the Texas court further reasoned, "The implied warranty of habitability 'applies in almost all jurisdictions only to residential tenancies' while commercial tenancies are 'excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions.'"[63]

There was no express waiver of the warranty of habitability, and if the bench trial had been allowed to proceed, the testimony that no additional information was provided as to offensive condition was ever provided. Thus, the Appellants did not have the opportunity to waive the purported condition, as they were never given notice of the same.

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[61] Id.
[62] Id. at 913; citing to *Centex Homes v. Buecher,* 95 S.W.3d 266, 274 (Tex.2002).
[63] Id.; citing to 2 *RICHARD R. POWELL, POWELL ON REAL PROPERTY § 233[2][b] (Patrick J. Rohan, ed.,1991*).

D. The District Court Erred in Ruling That Even If Nevada Did Recognize A Warranty Of Habitability, The Warranty Would Have Been Waived In The Application Of The "As-Is" Clause Within The Lease

The arguments above as to the *Gym-N-I Playgrounds, Inc.* case relied upon for the proposition that the majority of courts do not recognize the warranty of habitability in a commercial setting is debunked as the Texas court's decision clearly holds that the implied warranty can only be waived to the extent that the defects are adequately disclosed.[64] The "as-is" condition of the Subject Property was concealed as the complained of substances were found on the ceiling of an interior space.[65]

So whether the purported waiver as ruled upon by the district court was a bar to the warranty of habitability is not as clear as just waiving that claim. The district court was required to make findings and have evidence presented of whether there was notice to the waiving party, and no such evidence is in the record.

E. The District Court Erred in Holding That The Constructive Eviction Did Not Occur

This Court has determined that constructive eviction requires the party asserting it as a claim to prove that the landlord had notice and the opportunity to

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[64] *Gym-N-I Playgrounds, Inc.* at 913; citing to *Centex Homes v. Buecher,* 95 S.W.3d 266, 274 (Tex.2002).

[65] *See Appendix Vol. VII, AI000483-AI000509.*

cure.[66] Whether constructive eviction has occurred is a factual determination made by the trier of fact.[67] This Court will not disturb a finding if it is supported by substantial evidence.[68]

Constructive eviction requires three elements of proof: First, the landlord must either act or fail to act;[69] Second, "the landlord's action or inaction must render "the whole or a substantial part of the premises ... unfit for occupancy for the purpose for which it was leased;"[70] Third, the tenant must vacate the premises within a reasonable time.[71]

All of this evidence was provided to the district court in opposition to the motion for summary judgment on the counterclaim damages and the opposition to the motion for summary judgment on contract claims.[72] Specifically attached as the only exhibit is the affidavit Anthony Bour in opposition.[73] The declaration details the arguments about the parking claims, assurances by the Respondents and then the

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[66] *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development, LLC*, 130 Nev. 834, 213-14, 335 P.3d 211 (2014).
[67] Id. at 213.
[68] Id.; citing to *Weddell v. H2O, Inc.*, 128 Nev. ____, ____, 271 P.3d 743, 748 (2021)
[69] Id. at 214; citing to *Yee v. Weiss,* 110 Nev. 657, 660, 877 P.2d 510, 512 (1994).
[70] Id.
[71] Id. at 214; citing to *Schultz v. Provenzano,* 69 Nev. 324, 328, 251 P.2d 294, 296 (1952).
[72] *See Appendix Vol. VII, AI000483-AI000509; see also Appendix Vol. VI, AI000358-AI000370.*
[73] Id.

failures to fulfill those promises.[74] The declaration further details infestation by rodents and mounds of particulate.[75] All of which created an unfit and unsanitary condition within the Subject Property.[76] The Declaration then detailed the termination and vacating of the premises by stating that a correspondence was sent to the landlords citing all of these conditions.[77] The Declaration then cites to rejection of any remediation in the response by the Respondents' counsel.[78] And finally, the Declaration detailed the Appellants' dates to vacate the Subject Property.[79]

The opposition to the motion for summary judgment for contract claims provided the proof necessary to support a finding of constructive eviction. It stated and averred in a sworn Declaration that the landlord failed to act. How the landlord failed to act. Appellants provided notice and an opportunity to cure and then they vacated the premises. All of the damages that the Respondents were awarded flowed from after the Appellants vacating the Subject Property.

At a bare minimum, there were several material questions of fact that should have allowed the parties to present them at a trial. Clearly, there was substantial

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[74] Id.
[75] Id.
[76] Id.
[77] Id.
[78] Id.
[79] Id.

evidence in the form of a detailed and specific affidavit in support of the counterclaim for constructive eviction.

F. The District Court Erred In Awarding Attorneys' Fees And Costs Based Upon The Procedurally Improper Entry Of The Order Granting Summary Judgment

1. Standard Of Review For An Award Of Attorneys' Fees And Costs

The Court reviews a district court's decision regarding an award of attorney fees or costs for an abuse of discretion.[80] An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law.[81] Factual findings that "are clearly erroneous or not supported by substantial evidence" can be an abuse of discretion.[82] It is also an abuse of discretion for the district court to make a decision "in clear disregard of the guiding legal principles".[83]

G. The District Court Abused Its Discretion By Awarding Fees And Costs

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[80] *See Albios v. Horizon Communities, Inc., 122 Nev. 409, 417, 132 P.3d 1022, 1027–28 (2006); see also Vill. Builders 96, L.P. v. U.S. Labs., Inc., 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).*

[81] *See NOLM, LLC v. Cnty. of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004).*

[82] *Id.*

[83] *See Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).*

After granting Respondents' motions for summary judgment, the Respondents' subsequent Motion for Attorney's Fees and Costs was also granted through an Order issued by the district court on May 27, 2021 (the "Fees and Costs Order").[84] The district court held: (1) The fees sought were reasonable and justified under the Beattie and Brunzell factors; and, (2) Respondents were entitled to an award of their costs under NRS 18.020 as the prevailing party.[85]

Appellants respectfully assert that the district court abused its discretion by basing its decision on the award of fees and costs on clearly erroneous factual determinations and by disregarding controlling law. The district court's award of attorneys' fees and costs was also an abuse of discretion, because it was based upon the clearly erroneous factual determinations that a constructive eviction did not occur.

Further, this case involves a novel legal issue and/or a request for clarification or modification of existing law. That question of whether a warranty of habitability applies in the commercial lease situation even if there is an "as-is" clause within said lease. Therefore, due to both the produced evidence, the legal basis/arguments for Appellants' claims, the district court abused its discretion in awarding fees based upon in part the denial of the constructive eviction claim.

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[84] *See Appendix Vol. XI, AI000942-AI000950.*
[85] Id.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 5th day of October 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type and style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because the brief is proportionally spaced, has a typeface of 14, and excluding the parts of the brief exempted by NRAP 32(1)(7)(C), it does not exceed 30 pages.

I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable NEVADA RULES OF APPELLATE PROCEDURE, in particular NRAP Rule 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NEVADA RULES OF APPELLATE PROCEDURE.

DATED this 5th day of October 2021.

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CERTIFICATE OF SERVICE

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

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF e-flex electronic filing/service system; on October 5th, 2021.

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

DATED this 5th[th] day of October 2021.

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