IN THE SUPREME COURT OF THE STATE OF NEVADA

BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; and HILENA MENGESHA, an individual, Appellants, vs. 4520 ARVILLE, a California general partnership; MCKINLEY MANOR, an Idaho general partnership, Respondents.	**Case No.: 83099** **(Consolidated with Case No. 82699)** District Court No.: A-19-794864-C

APPEAL
From the Eighth Judicial District Court,
The Honorable Veronica Barisich Presiding
(preceded by the Honorable Trevor Atkin and the Honorable Michael Cherry)

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of the Court may evaluate possible disqualification or recusal.

1. Respondents 4520 Arville and McKinley Manor are not owned by any parent corporation, and no publicly held corporation holds 10% or more of either entity's shares and/or ownership interests.
2. Attorneys from the law firm of Holley Driggs have appeared for Respondent in this appeal, and in the proceedings in the district court.

Dated this 18th day of November, 2021.

HOLLEY DRIGGS

/s/ F. Thomas Edwards
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I. JURISDICTIONAL STATEMENT

This is an appeal from two final judgments from the Eighth Judicial District Court (the "District Court") which are properly under the jurisdiction of the Nevada Supreme Court pursuant to Nevada Rule of Appellate Procedure ("NRAP") 3A(b)(1). On March 9, 2021, Respondents 4520 Arville and McKinley Manor (together, "Landlords") filed a Notice of Entry of Judgment. [IX AI 641–48][1]. On March 24, 2021, Appellants Bour Enterprises, LLC ("Tenant"), Mulugeta Bour ("M. Bour") and Hilena Mengesha ("H. Mengesha") (together, "Defendants") filed their Notice of appeal of that Judgment. [IX AI 792–94].

Thereafter, on May 27, 2021, Landlords filed a Notice of Entry of Order Granting in Part Defendant's Motion for Fees and Costs and Supplemental Judgment. [XI AI 942–55]. On June 22, 2021, Defendants filed their Amended Notice of Appeal of that Order. [XI AI 992–95]. These notices of appeal were timely filed pursuant to NRAP 4(a)(1).

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[1] Citations to Defendants' appendix ("AI") are formatted as [*Volume No.* AI *Page Nos.*]. Citations to Landlords' supplemental appendix ("SUPP") are formatted as [SUPP *Page No.*]. As there is only one volume to Landlords' appendix, citations to the same omit a volume identifier.

Notably, Defendants' Appendix skips from page AI 244 to page AI 426 (duplicating Vol. IX and omitting VI). *See* Appellants' Appendix of Record Volumes I-XI, on file herein. Because of this error, Defendants' Appendix omits the very Motion for Summary Judgment upon which Defendants' appeal is based, in violation of NRAP 30(b) ("Appendix to the briefs").

II. ROUTING STATEMENT

Landlords agree with Defendants that this case must be retained by the Supreme Court pursuant to NRAP 17(a)(11), as this case raises a question of first impression involving the United States or Nevada Constitutions or common law[.]" *See* NRAP 17(a)(11). One of the legal issues raised by Defendants in their Opening Brief is whether the implied warranty of habitability applies to commercial lease agreements. The Nevada Supreme Court has never squarely addressed this issue, and therefore the Supreme Court should retain jurisdiction over this case.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Landlords moved for summary judgment on their breach of lease and breach of guaranty claims against Defendants due to their early abandonment of their leases of Landlords' commercial warehouse space, citing sufficient evidence showing Defendants' breach for failure to pay rent after vacating the premises, including evidence reflecting Landlord's total damages.

In opposition to Landlords' summary judgment motion, Defendants cited no evidence to counter Landlords' prima facie case, and instead relied upon the affirmative defense that Landlords had allegedly breached the implied warranty of habitability, resulting in Tenant's constructive eviction. However, the District Court held that the implied warranty of habitability does not apply to commercial leases in Nevada—and even if it did, Tenant accepted the premises in an "as-is" condition under the leases. Thus, the District Court granted summary judgment in favor of Landlords and thereafter granted them an award of fees and costs based on a prevailing party fee-shifting provision in the leases.

Did the District Court err by granting summary judgment (and an award of fees) in favor of Landlords because Defendants failed to meet their burden at summary judgment?

IV. STATEMENT OF THE CASE

The underlying District Court action from which this appeal is made was a straightforward action for breach of contract (and related equitable claims) based on Defendants' (Appellants) early, unauthorized abandonment of their leases of Landlords' (Respondents) commercial warehouse space and corresponding personal guaranties. Landlords initiated the action against Defendants in May 2019 to recover unpaid rents, plus any applicable fees and interest due thereon. The case was initially assigned to the Honorable Trevor Atkin.

After Landlords filed their motion for summary judgment on their breach of contract claims, but before the hearing on that motion, the case was reassigned to the Honorable Veronica Barisich, who was then the newly assigned Judge to Department 5. In January 2021, the parties appeared before the District Court for the hearing on Landlords' motion for summary judgment. Although the case had recently been assigned to Judge Barisich, the Honorable Justice Michael Cherry presided over the hearing.

After considering the parties' respective arguments, Justice Cherry ruled from the bench, holding that Landlords had established all the elements of their breach of contract claims. Justice Cherry further held that Defendants had failed to create a genuine dispute of material fact for trial, and that the sole affirmative defense upon which Defendants relied in opposition to the motion (constructive

eviction based on Landlords' alleged breach of the implied warranty of habitability) did not apply to commercial leases and thus failed as a matter of law. Accordingly, Justice Cherry granted summary judgment in favor of Landlords and instructed Landlords to prepare the written order.

Landlords prepared the written order granting the motion for summary judgment, which Judge Barisich thereafter reviewed and signed. However, when Landlords separately submitted a proposed judgment (per the order granting summary judgment), Defendants emailed the District Court to object to having judgment entered against them. Apparently attempting to delay entry of judgment and cause confusion for the newly assigned Judge Barisich, Defendants tried to convince the District Court that there were still claims and defenses left to be adjudicated, even though the motion for summary judgment disposed of all claims and defenses.

To clarify matters, Landlords filed a "Motion for Entry of Judgment", explaining that the District Court's prior order granting summary judgment in favor of Landlords had resolved all pertinent claims and defenses, and citing Nevada case law showing that any defenses not raised by Defendants at summary judgment had been waived. Therefore, Landlords explained, entry of judgment in their favor was appropriate. After full briefing and oral argument, the District Court agreed that Defendants had failed to create a genuine dispute of material fact

for trial and had waived any defenses not previously raised. The District Court entered judgment in favor of Landlords accordingly.

Thereafter, the District Court entered an award of fees and costs in favor of Landlords, pursuant to a prevailing party fee-shifting provision contained in the leases. Defendants now appeal both the judgment and the award of fees and costs.

V. STATEMENT OF FACTS

A. TENANT ENTERS LEASES OF LANDLORDS' PREMISES

Landlords own the commercial warehouse space located at 4560 S. Arville St., Units C-10, 23, 24, and 29, Las Vegas, NV 89103 (the "Premises"). [SUPP 41, 72] (Leases Section 1.1 "Parties"). In July of 2015, Defendants started to manage Stardust Limousine, which had been operating out of units C-23/24 at the Premises.[2] [SUPP 3, 22-23]. Later in 2015, Defendants purchased Stardust Limousine and continued to operate the business out of Suite C-23/24 at the Premises under the existing Stardust Limousine lease. [SUPP 3, 22]. When Defendants later complained about the condition of the Premises, Landlords explained that Stardust Limousine had leased the Premises in an "as-is" condition. [SUPP 4, 24]. Defendants also complained that they wanted additional parking,

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[2] As such, Defendants have *always* had actual notice of the exact condition of the Premises, because they had been operating out of the Premises before ever signing their own lease of the same.

even though Defendants understood that each warehouse unit was assigned only a few parking spaces per the terms of the lease. [SUPP 4, 26-27].

In 2017, Landlords requested that Tenant sign a new lease, as opposed to continuing to operate under the Stardust Limousine lease. [SUPP 4, 25, 27]. On or about April 20, 2017, Tenant signed a new lease for units C-23/24 at the Premises and a related personal guaranty signed by M. Bour and H. Mengesha (together, "Guarantors"). [SUPP 4, 41-70]. At or about the same time, to alleviate Defendants' concern about parking, Landlords recommended that Tenant lease an additional warehouse unit, which would provide an additional number of parking spaces and additional room to park vehicles inside the new warehouse unit. [SUPP 4, 27-28].

Defendants agreed and on or about April 20, 2017, Tenant signed an additional lease for unit C-10/29 (together with the lease of units C-23/24, the "Leases"), which also included personal guaranties (together with the guaranty as to units C-23/24, the "Guaranties") signed by Guarantors. [SUPP 4, 72-101].

B. Relevant Terms of the Leases and Guaranties and Defendants' Breaches

The terms of Tenant's Leases are nearly identical. *Compare* [SUPP 41-70] *with* [SUPP 72-101]. *See also* [SUPP 4]. Critically, Section 7.1(a) of the Leases expressly provide that Tenant, at its sole expense, shall keep the premises in "good

order, condition, and repair" and is responsible for *all maintenance* of the Premises. [SUPP 5, 47, 78]. Moreover, consistent with the prior Stardust Limousine lease, Tenant expressly accepted the Premises in an "as-is" condition under the terms of the Leases. [SUPP 5, 66, 97].

On the last page of the Leases, just before the Tenant's and Guarantors' signatures, Landlord expressly advised Tenant to "RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES." [SUPP 60, 91]. Tenant likewise acknowledged in Section 2.4 that:

> [Tenant] has been advised by Lessor and/or Brokers to satisfy itself with respect to the condition of the Premises (including but not limited to . . . environmental aspects . . .), and their suitability for Lessee's intended use, . . . Lessee has made such investigation as it deems necessary . . . [and] neither Lessor, Lessor's agents, nor Brokers have made any oral or written representations or warranties with respect to said matters other than set forth in this Lease.

[SUPP 6, 43, 74].

Paragraph 22 of the Leases also provides that the Leases contain "all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding shall be effective." [SUPP 56, 87]. The Leases "may be modified only in writing, signed by the Parties in interest at the time of modification." [SUPP 6, 59, 90] (Paragraph 46).

Abandoning the Premises and failing to pay rent are breaches of the Leases.

[SUPP 6, 55-56, 86-87] (Sections 13.6 and 23.1). To the extent Tenant believed that *Landlords* breached the Leases, the Leases require Tenant to mail formal notice of the alleged breach to Landlords requesting that Landlords cure the issue. [SUPP 6, 53, 84] (Sections 13.1(a)-(b)). As to Defendants' concerns about parking, the first pages of the Leases expressly state that Tenant is entitled to four (4) unreserved parking spaces, for a total of eight (8) spaces between the Leases. [SUPP 4, 41, 72] (Sections 1.2(b)).

The personal Guaranties signed by M. Bour and H. Mengesha provide that "Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rent and all other sums payable by Lessee under said Lease." [SUPP 7, 69, 100]. Tenant utilized the Premises until on or about May 8, 2018, when it vacated the Premises without Landlords' authorization and failed to pay the rent due under the Leases. [SUPP 7, 104].

C. LANDLORDS FILE THE DISTRICT COURT ACTION FOR BREACH OF THE LEASES AND GUARANTIES

On May 15, 2019, Landlords filed their Complaint in the District Court against Defendants for breach of the Leases and Guaranties (and related equitable claims), to recover Landlords' damages related to Tenant's early, unauthorized abandonment of the Leases and failure to pay rent. [I AI 1-6]. On July 16, 2019, Defendants filed their Answer and Counterclaim. [I AI 7-21]. Defendants

alleged—as an affirmative defense and counterclaim—that some dust and debris present at the Premises breached the implied warranty of habitability, such that Tenant was constructively evicted (thereby excusing Defendants' breach).[3] [I AI 15-16].

Following the close of discovery, on December 1, 2020, Landlords filed a motion for summary judgment on their breach of lease and breach of guaranty claims (the "Motion for Summary Judgment").[4] [SUPP 1-112]. In support of the Motion for Summary Judgment, Landlords attached and cited evidence demonstrating that Tenant abandoned the Leases early and without authorization, which constituted a breach of the Leases. [SUPP 7, 102-112]. Landlords also attached and cited evidence showing that Defendants' breaches caused Landlords' damages, which exhibits set forth the sum of Landlords' damages due to

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[3] Defendants' assertion that they "subsequently learned that there was a condition in [the Premises] that created an uninhabitable environment" after signing the Leases is a clear misrepresentation, as they had been operating Stardust Limousine out of the Premises for two years prior to signing their own Leases. *See* Opening Brief at 8. *See also* [SUPP 3, 22-23].

[4] Landlords also filed a motion for summary judgment on Defendants' counterclaim damages on the grounds that Defendants had failed to provide a computation of their damages and had similarly failed to disclose any documents in support of such alleged damages. The District Court denied this motion on December 15, 2020, on the basis that the motion should have been brought as a motion in limine. This motion did not have any further bearing on the outcome of the District Court action, nor does it have any bearing on this appeal.

Defendants' non-payment of rent. [*Id.*].

Defendants filed their opposition to the Motion for Summary Judgment (the "Opposition") on December 17, 2020. [VII AI 483-509]. Noticeably absent from Defendants' Opposition was any citation to evidence that created a genuine dispute of material fact as to Landlord's contract claims, or any authority demonstrating the existence of a valid affirmative defense that could excuse Defendants' breaches. *See id.* Instead, Defendants relied *solely* upon their constructive eviction affirmative defense related to Landlords' alleged breach of the implied warranty of habitability (which Landlords showed does not apply to commercial leases in Nevada).[5]

On January 4, 2021, the case was reassigned to the Honorable Veronica Barisich upon the Honorable Trevor Atkin's departure from the bench. The following day, January 5, 2021, Landlords filed their reply in support of the Motion for Summary Judgment, setting forth ample authority confirming that Defendants' constructive eviction affirmative defense fails as a matter of law. [VIII AI 510-23].

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[5] A careful review of the Opposition also shows that Defendants did not raise the "mitigation of damages" affirmative defense that they now argue they should have been allowed to present at a bench trial. *See* Opening Brief at 15-17; [VII AI 483-509].

D. JUSTICE CHERRY PRESIDES OVER THE MOTION FOR SUMMARY JUDGMENT HEARING

On January 12, 2021, Landlords and Defendants appeared before the District Court for a hearing on the Motion for Summary Judgment. [XI AI 969-81]. The newly assigned Judge Barisich was unavailable to preside over the hearing, and the Honorable Justice Cherry presided over the hearing instead. [XI AI 969]. Following oral argument by the parties' counsel, Justice Cherry ruled from the bench that

> Defendants do not dispute that they terminated the lease early. Vacated the properties and failed to pay rent. There is no genuine issue of material fact as to this regard. Thus, [Landlords] are entitled to prevail as a matter of law on the breach of contract claim, absent any applicable defenses.

[XI AI 979].

Then, turning to Defendants' affirmative defense and counterclaim that Tenant was constructively evicted from the Premises, Justice Cherry held:

> [A]s [Landlords] point out, ***Nevada law does not recognize implied warranty of habitability in a commercial lease setting unlike a residential lease setting***. ***[Landlords] cite a plethora of persuasive authority from other states recognizing the same. Defendants cite none***. . . . Thus, since implied warranty of habitability in a commercial lease setting is not recognized, and since the claim and defense for a constructive eviction is based solely on implied warranty of habitability, ***as a matter of law Defendants cannot prevail on the breach of contract claim. Also, I'm very impressed that this was an as-is lease***, which makes a big difference in my book.

[XI AI 979-80] (emphasis added).

After giving his ruling from the bench, Justice Cherry instructed Landlords' counsel to prepare the written order, which Landlords' counsel thereafter drafted and submitted to the District Court for review. [XI AI 980].

E. Defendants Create Confusion by Objecting to Entry of Judgment Against Them

Although Justice Cherry presided over the Motion for Summary Judgment hearing, Judge *Barisich* (the newly assigned Judge to Department 5) signed the order prepared by Landlords granting the Motion for Summary Judgment on January 28, 2021 (the "Order Granting Summary Judgment"). *See* [VIII AI 535-47]. The Order Granting Summary Judgment specifically stated that a "separate Judgment shall issue." [VIII AI 532]. Thus, on January 29, 2021, Landlords submitted the separately prepared judgment to Department 5 via email, as required, with opposing counsel copied. [VIII AI 563].

Without filing any motion for relief—and contrary to typical custom and practice—counsel for Defendants responded to Landlords' email containing the proposed judgment, informing the District Court that Defendants "object to the entry of Judgment as they have plead affirmative defenses *not addressed in the Motion for summary Judgment*, including and not limited to [Landlords'] failure to mitigate or take reasonable steps to release the property." [*Id.*] (emphasis added).

A few days later, on February 2, 2021, the District Court emailed Landlords'

counsel's office to inform it that Landlords' proposed judgment could not be accepted because:

> Although the January 29, 2021 order indeed stated that a separate judgment will be issued, there is no explanation as to where the calculation came from. Thus, the court cannot verify where the judgment amount ordered is correct and thus, cannot sign this judgment at this time.

[VIII AI 567].

Notably, the District Court did *not* address Defendants' argument that there were additional affirmative defenses that needed to be adjudicated, but rather declined to sign Landlords' proposed judgment for the sole reason that Landlords did not explain in great enough detail how they calculated the precise damages in the body of the judgment. To remedy this issue, Landlords immediately revised their proposed judgment (consistent with the Motion for Summary Judgment and Order Granting Summary Judgment) to set forth in greater detail the breakdown of Landlords' damages stemming from outstanding rent, late fees, and interest—including citations to the specific evidence cited in the Motion for Summary Judgment and Order Granting Summary Judgment which supported these calculations. *See* [VIII AI 560-61].

Landlords submitted the revised judgment to the District Court the same day, February 2, 2021, again via email, with opposing counsel copied. [VIII AI 564-55]. Again, Defendants responded to Landlords' email submission of the

revised judgment, stating "No competing judgment is expected from the Defense, because We object to the entry of any judgment at this juncture. We will address the issue in a motion to the Court." [VIII AI 564]. Defendants never filed any such motion. *See* [VIII AI 551].

F. Landlords File a "Motion for Entry of Judgment" to Demonstrate to the District Court that Entry of Judgment is Appropriate

The parties appeared before the District Court on February 9, 2021 (Judge Barisich presiding), for a pre-trial conference, during which the District Court instructed that the parties would proceed to a bench trial *unless* the dispute regarding the propriety of trial and/or entry of judgment could be resolved prior to the April 2021 trial date. [*Id.*]. Thus, Landlords drafted and submitted a motion on February 10, 2021, which sought to clarify some of the confusion caused by Defendants' unfounded objections to having judgment entered against them per the District Court's Order Granting Summary Judgment in favor of Landlords.[6] [VIII AI 548-69].

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[6] Contrary to Defendants' assertions, the purpose of the Motion for Entry of Judgment was *not* to resolve any "surviving causes of action or affirmative defenses." *See* Opening Brief at 5. Rather, the Motion for Entry of Judgment sought to clarify for the District Court that the District Court's prior Order Granting Summary Judgment did resolve all claims and defenses, such that the only thing left for the District Court to do was to enter judgment in Landlords' favor, without need of a trial. *See* [VIII AI 548-69].

Landlords titled their motion "Plaintiffs' Motion for Entry of Judgment" (hereinafter, the "Motion for Entry of Judgment"), and explained therein that (1) the District Court's Order Granting Summary Judgment was appropriate and fully supported by undisputed evidence, (2) Defendants had procedurally waived any additional affirmative defenses by failing to raise them at summary judgment, and (3) as a result, entry of judgment in favor of Landlords was appropriate, as stated in the Order Granting Summary Judgment. [VIII AI 548-69]; [VIII AI 532] ("separate judgment shall issue").

On February 24, 2021, Defendants filed their opposition to the Motion for Entry of Judgment, arguing that Defendants were entitled to proceed to trial on their affirmative defenses and counterclaims, despite their failure to raise those issues in opposition to Landlords' Motion for Summary Judgment.[7] [VIII AI 570-616]. For example, Defendants argued—for the very first time—that they should be allowed to proceed to trial on the issue of Landlords' mitigation of damages, even though Defendants made *no* mention of any such affirmative defense in their

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[7] The opposition to Landlords' Motion for Entry of Judgment was the *first time* Defendants discussed their mitigation of damages affirmative defense, arguing that they should be permitted to proceed to a bench trial to litigate this affirmative defense. *See* [VIII 575-78]. However, as will be demonstrated herein, Defendants untimely raised this issue, as the time to set forth evidence of any affirmative defenses was at summary judgment. Because Defendants did not raise this issue at summary judgment, the affirmative defense was waived.

Opposition to the Motion for Summary Judgment. *See* [VIII AI 575-78]; [VII AI 483-509]. Landlords filed their reply in support of the Motion for Entry of Judgment on February 26, 2021, citing various cases holding that a party's failure to raise affirmative defenses in opposition to summary judgment results in that party's waiver of such defenses. [VIII AI 617-22].

G. The District Court Enters Judgment in Favor of Landlords and Grants Them an Award of Fees and Costs Under a Prevailing Party Provision in the Leases

Following a hearing on the Motion for Entry of Judgment on March 2, 2021, the District Court granted the Motion, and confirmed its ruling by minute order issued on March 3, 2021 (the "Minute Order").[8] [XI AI 982-91]; [SUPP 113-14].

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[8] Defendants misrepresent the meaning of the District Court's Minute Order when it claims that the District Court "determined that the only 'remaining issue' is whether a trial was necessary to prove Respondents damages", which seems to imply that there was still an issue left for trial following entry of the Minute Order. *See* Opening Brief at 6 (describing the minute order). However, a faithful reading of the Minute Order shows that the District Court resolved this "remaining issue" in the very next lines of the order:

> Plaintiff's damages sought were set forth in the exhibits 5 and 6 of the motion for summary judgment, wherein Plaintiff sought $62,223.08 for lot C23 and $77,231.42 for lot C10, for total of $139,454.50. Defendants did not challenge the appropriateness of the amounts when the Plaintiff filed its motion for summary judgment and they did not raise the applicable affirmative defenses with regards to the damages sought. Under Shuck v. Signature Flight Support of Nevada, Inc., 126 Nev. 434, 245 P.3d 542 (2010), the argument that was not raised in the original motion must be deemed to have been waived and cannot be subsequently considered. Thus, the motion should be

On March 9, 2021, the District Court signed both the proposed order and the revised judgment submitted by Landlords on February 2, 2021 (the "Judgment"). [IX AI 641-48]; [SUPP 115-21].

On May 27, 2021, the District Court granted Landlords an award of fees and costs pursuant to a prevailing party fee-shifting provision contained in the Leases (the "Prevailing Party Provision"), which states:

> **Attorneys' Fees.** If any Party or Broker brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term, "Prevailing Party" shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred. . .

See [SUPP 58, 89] (Paragraph 31).

The District Court's Order held that Landlords' memorandum of costs and motion for fees had been timely filed, that the Prevailing Party Provision supported Landlords' request for fees and costs, and that Landlords had satisfied the required *Brunzell* factors. [XI AI 936-39]. On the same day, the District Court entered a

(continued)

granted. [SUPP 113].

supplemental judgment reflecting the award of fees and costs (the "Fee Award"). [XI AI 951-55].

VI. SUMMARY OF THE ARGUMENT

The District Court did not err when it granted summary judgment in favor of Landlords and entered Judgment in accordance therewith. Landlords filed a Motion for Summary Judgment on their breach of contract claims related to Defendants' failure to pay rent and unauthorized abandonment of Tenant's commercial Leases of Landlords' warehouse space. Landlords' Motion for Summary Judgment set forth sufficient evidence and authority to support each and every element of their claims, including the element of damages. Thus, the burden shifted to Defendants to set forth evidence creating a genuine dispute of material fact as to Landlords' prima facie case or in support of one of Defendants' affirmative defenses, such that they could overcome summary judgment and proceed to a bench trial.

However, Defendants failed to do so. Defendants' Opposition to the Motion for Summary Judgment set forth *no* evidence to counter the essential elements of Landlords' breach of contract claims, and instead relied *solely* on their affirmative defense for constructive eviction, which was based on Landlords' alleged breach of the implied covenant of good faith and fair dealing. Defendants did not mention

any other affirmative defenses in their Opposition, and therefore waived any such arguments on appeal.

In their Reply in support of the Motion for Summary Judgment, Landlords cited a plethora of authority demonstrating that the implied warranty of habitability does not apply to commercial leases in Nevada, and thus could not excuse Defendants' breaches of the Leases and Guaranties as a matter of law. Defendants set forth no countervailing authority in the briefing or at oral argument, and therefore the District Court granted summary judgment in favor of Landlords.

After some additional motion practice (made necessary by Defendants' unfounded objection to having Judgment entered against them), the District Court entered final Judgment in favor of Landlords, pursuant to the Order Granting Summary Judgment. The District Court thereafter granted Landlords an award of fees and costs pursuant to a prevailing party fee provision contained in the Leases.

On appeal, Defendants argue that they should have been allowed to proceed to a bench trial on two affirmative defenses: (1) mitigation of damages—which Defendants entirely failed to raise at summary judgment, and (2) constructive eviction based on the implied warranty of habitability, which Defendants argue *does* apply to commercial leases in Nevada.

First, by failing to assert their mitigation of damages defense at summary judgment, Defendants waived any such argument under Nevada law. Therefore,

Defendants are not entitled to raise this argument on appeal. And, contrary to Defendants' assertions, Landlords' Motion for Summary Judgment did set forth evidence demonstrating the precise damages owed by Defendants, and cited to that evidence accordingly. Second, the overwhelming weight of authority—both authoritative and persuasive—holds that the implied warranty of habitability does not apply to commercial leases in Nevada. Therefore, because Defendants' constructive eviction affirmative defense is based solely on the implied warranty of habitability, the constructive eviction defense fails as a matter of law.

However, even if the implied warranty of habitability did apply to commercial leases in Nevada (it does not), Tenant accepted the Premises in an "as-is" condition under the Leases, thereby waiving any implied warranties, to the extent they apply. As such, Defendants have not properly set forth or supported any defense to their clear breaches of the Leases and personal Guaranties, and the District Court did not err in entering Judgment in Landlords' favor.

Further, because Landlords were the prevailing party to the District Court action, the District Court also did not err in granting Landlords' an award of their reasonable fees and costs, pursuant to the Prevailing Party Provision contained in the Leases. Because the District Court committed no legal error, this Court must affirm the District Court's Judgment and subsequent Fee Award.

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VII. STANDARD OF REVIEW

A. SUMMARY JUDGMENT

Orders granting summary judgment are reviewed de novo. *See Tore, Ltd. v. Church*, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989). "[T]he question on appeal is whether any genuine issues of fact were created by the pleadings and proof offered below." *Id.* (*citing McPherron v. McAuliffe*, 97 Nev. 78, 79, 624 P.2d 21, 21 (1981)). In *Wood v. Safeway*, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), this Court abrogated the "slightest doubt" standard and adopted the aforementioned standard as employed by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

The non-moving party cannot "simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment in the moving party's favor. *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (*quoting Matsushita*, 475 U.S. at 586). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id.* (*quoting Bulbman, Inc. v. Nevada Bell*, 109 Nev. 105, 110, 825 P.2d 588, 591 (1992)). The non-moving party is "not entitled to build a case on the gossamer threads of whimsy, speculation, and

conjecture." *Wood*, 121, Nev. at 730–31, 121 P.3d at 1030 (*quoting Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

B. ATTORNEYS' FEES AND COSTS

"The decision to award attorney fees is within the sound discretion of the district court and will not be overturned absent a manifest abuse of discretion." *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). However, when a party's eligibility for attorneys' fees raises a question of statutory interpretation or construction of a contractual fee provision, this Court reviews such issues de novo. *In re Estate & Living Tr. of Miller*, 125 Nev. 550, 552–53, 216 P.3d 239, 241 (2009); *Davis v. Beling,* 128 Nev. 301, 321, 278 P.3d 501, 515 (2012).

VIII. ARGUMENT

The crux of Defendants' argument on appeal is Defendants' misguided belief that they were entitled to proceed to bench trial to present testimony regarding two affirmative defenses (implied warranty of habitability and failure to mitigate damages) alleged in Defendants' Answer and Counterclaim, despite having entirely failed to satisfy their burden to present evidence or authority supporting their affirmative defenses at summary judgment. As Landlords will demonstrate herein, Defendants' affirmative defenses were either waived for their

failure to raise them at summary judgment (*e.g.*, the "mitigation of damages" defense), or failed as a matter of law (*e.g.*, the "constructive eviction" defense). Accordingly, the District Court's Judgment and subsequent Fee Award in Landlords' favor was proper.

A. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF LANDLORDS

In their Motion for Summary Judgment, Landlords attached and cited sufficient evidence demonstrating all the elements of their claims for breach of lease and breach of guaranty, *i.e.*, "proof of a valid contract, performance or excuse of performance by the non-breaching party, breach by the defendant, and damages." *Hosp. Int'l Grp. v. Gratitude Grp., LLC*, 132 Nev. 980, 387 P.3d 208 (Nev. 2016) (internal citations omitted) (unpublished). [SUPP 1-112]. The District Court's Order Granting Summary Judgment explicitly cites the evidence supporting each of the foregoing elements:

a. The Leases and Guaranties are valid, fully executed contracts. *See* Motion Ex. 2 (Unit C-23/24 Lease, Addendum and Guaranty); Motion Ex. 3 (Unit C-10/29 Lease, Addendum and Guaranty).
b. Plaintiffs fully performed under the terms of the Leases and Guaranties. *See* Motion Ex. 4 (Declaration of Kevin Donahoe) (affirming that Defendants utilized the Premises pursuant to the Leases until May 8, 2018, when they vacated the Premises).
c. Defendants breached the Leases and Guaranties by abandoning the Premises early, without authorization, and ***failing to pay all monthly rent payments due under the Leases***. *Id. See also* Motion Exs. 2 at ARV000015–16 and 3 at ARV000048–49

(Sections 13.6 and 23.1 of the Leases); ***Motion Exs. 5 and 6 (ledgers reflecting all outstanding balances owed under the Leases).***

d. ***Plaintiffs incurred damages as a result of Defendants' non-payment of rent due and owing under the Leases and personal Guaranties. Id.***

[VIII AI 530-31] (citing the evidence attached to and cited in Landlords' Motion for Summary Judgment).

It is a fundamental maxim that, "[w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but *must*, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Wood*, 121 Nev. at 731, 121 P.3d at 1030–31 (internal quotations omitted) (internal citations omitted) (emphasis added).

> The gist of a summary judgment motion is to require the adverse party to show that it has a claim or defense, *and has evidence sufficient to allow a jury to find in its favor on that claim or defense*. The opposition sets it out, and then the *movant has a fair chance in its reply papers to show why the respondent's evidence fails to establish a genuine issue of material fact*.

Schuck v. Signature Flight Support of Nevada, Inc., 126 Nev. 434, 439, 245 P.3d 542, 545 (2010) (citing *Carmen v. San Francisco Unified School Dist.,* 237 F.3d 1026, 1031 (9th Cir. 2001)) (emphasis added).

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1. Defendants Failed to Raise Their "Mitigation of Damages" Affirmative Defense at Summary Judgment, and Thus Waived That Argument on Appeal

This Court has adopted the general rule that a point not raised at summary judgment "is deemed to have been waived and will not be considered . . ." *Schuck*, 126 Nev. at 436, 245 P.3d at 544 (2010) (internal quotations omitted) (citing *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). This rule:

> is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties.

Id. at 437 (citing *Boyers v. Texaco Refining and Marketing, Inc.,* 848 F.2d 809, 812 (7th Cir.1988)).

Critically, Defendants' Opposition to the Motion for Summary Judgment is *entirely* silent regarding the "mitigation of damages" affirmative defense. [VII AI 483-509]. Defendants readily admit the same in their email to the District Court. [SUPP 54]. Defendants also confirm the same in their Opening Brief. *See* Opening Brief at 15 ("Appellants had asserted the failure to mitigate in its Answer and Counterclaim as well as the Opposition to the *Motion for Entry of Judgment*.") (emphasis added).

Defendants cannot expect to proceed to bench trial to litigate a "mitigation of damages" affirmative defense that they failed to raise at summary judgment.

Schuck, 126 Nev. at 436, 245 P.3d at 544 (points not raised at summary judgment are waived); *Conner v. S. Nevada Paving, Inc.*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987) ("the burden of proving failure to mitigate is on the breaching party") (citing *Cobb v. Osman*, 83 Nev. 415, 422, 433 P.2d 259, 263 (1967)). Critically, Defendants' undeveloped citations to *Yount v. Criswell Radovan, LLC*, 136 Nev. 167 (2020) and *Complete Care Medical Center v. Beckstead*, 484 P.3d 950, 2021 WL 1345693 (Nev. 2021) (unpublished)—which Defendants submitted without any meaningful context or analysis—does not save Defendants from the reality that if they wanted to assert a "mitigation of damages" defense, Defendants were obligated to raise that issue at summary judgment. *See* Opening Brief at 13, 17. Because they failed to do so, Defendants have waived that argument.

Moreover, it is not enough that Defendants untimely raised the mitigation of damages issue in their opposition to the Motion for Entry of Judgment. *See* Opening Brief at 15. The Motion for Entry of Judgment was not an extension of the summary judgment proceedings, or a second bite at the apple for Defendants to assert new legal theories in opposition to the Motion for Summary Judgment. Rather, the Motion for Entry of Judgment was a procedural anomaly, made necessary by Defendants' unfounded objection to having Judgment entered against them pursuant to the District Court's Order Granting Summary Judgment. *See* [VIII AI 548-69].

Finally, contrary to Defendants' assertions, the Motion for Summary Judgment and the evidence attached and cited therein *does* support the District Court's precise dollar figure Judgment. *See* Opening Brief at 15. As explained in the Motion for Entry of Judgment, the Leases (attached as Exhibits 2 and 3 to the Motion for Summary Judgment) set forth the term of the lease, the base rent, and other monthly charges, late fees, and applicable interest. [VIII AI 553]; [SUPP 41-101]. The Guaranties (attached to the Leases) confirm that M. Bour and H. Mengesha were jointly and severally liable for any unpaid rents. [VIII AI 553]; [SUPP 69, 100]. The Tenant Ledgers (attached as Exhibits 5 and 6 to the Motion for Summary Judgment) provided a detailed computation of all outstanding rents due and owing under the Leases. [VIII AI 553]; [SUPP 105-12]. The Tenant Ledgers were authenticated in the Declaration of Kevin Donahoe (attached as Exhibit 4 to the Motion for Summary Judgment). [SUPP 102-04].

Thus, Defendants' argument on appeal that Landlords did not request a "dollar figure judgment" at summary judgment is incorrect. Opening Brief at 15. Indeed, the District Court could not have granted summary judgment in favor of Landlords *unless* they had set forth adequate evidence of their damages, as damages is an essential element of any breach of contract claim. *Hosp. Int'l Grp.*, 132 Nev. 980, 387 P.3d 208. In light of the foregoing, Defendants waived their "mitigation of damages" affirmative defense at summary judgment, and thus they

cannot prevail on this argument on appeal.

2. The Implied Warranty of Habitability Does Not Apply to Commercial Leases in Nevada

Next, Defendants argue that the District Court erred in holding that their "constructive eviction" (based on an alleged breach of the implied warranty of habitability) does not apply to commercial leases in Nevada, and submit that they should have been allowed to proceed to a bench trial to litigate this issue. *See* Opening Brief at 18-23. However, as Justice Cherry recognized at the Motion for Summary Judgment hearing:

> Nevada law does not recognize implied warranty of habitability in a commercial lease setting unlike a residential lease setting. [Landlords] cite a plethora of persuasive authority from other states recognizing the same. Defendants cite none.

[XI AI 979-80].

Indeed, the Nevada landlord/tenant statutes (NRS 118A and 118C), Nevada case law, and persuasive case law from all across the country supports Landlords' position that the implied warranty of habitability does *not* apply to commercial leases in Nevada. First, NRS 118A, relating to *residential* leases, expressly states that "[t]he landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition." NRS 118A.290. *See also* [SUPP 10]. On the other hand, NRS 118C, relating to *commercial* leases, makes no mention of habitability or fitness for a particular purpose. *See* NRS 118C *et. seq.*; [SUPP 10].

This Court "previously recognized the fundamental rule of statutory construction that the mention of one thing implies the exclusion of another." *In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006) (internal alterations and quotation marks omitted). *See also* [SUPP 10]. "Therefore, where the Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings. *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009). *See also* [SUPP 10]. "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the [L]egislature's intent." *V & S Ry. LLC v. White Pine County*, 125 Nev. 233, 239, 211 P.3d 879, 882 (2009) (internal quotations and citations omitted).

Because the Nevada Legislature applied the concept of habitability to residential leases, but not commercial leases, the Court must presume that the Nevada Legislature deliberately excluded the applicability of habitability to commercial leases. *See also* [SUPP 10]. This Court is "not empowered to go beyond the face of a statute to lend it a construction contrary to its clear meaning." *Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736, 709 P.2d 1020, 1022 (1985). *See also Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1016 (1979) ("If the words of a statute are clear, ***we should not add to or alter them*** to accomplish a purpose not on the face of the statute. . .") (emphasis added).

Additionally, although this Court has never squarely addressed this issue, the majority view of courts and scholars around the country is that the implied warranty of habitability and fitness for an intended purpose does not apply to commercial leases. *B.W.S. Investments v. Mid-Am Restaurants, Inc.*, 459 N.W.2d 759, 763, 1990 WL 108794 at *4 (N.D. 1990) (citing 3A *Thompson on Real Property,* § 1230 (1981) ("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."); 49 Am.Jur.2d *Landlord and Tenant* § 768 (1970) (the general rule that there is no implied warranty of fitness or as to the conditions of the premises applies to premises leased for business purposes); Restatement (Second) of Property, Landlord and Tenant, § 5.1 Caveat and Comment (1977) (implied warranty of habitability not extended to commercial leases). *See also* [SUPP 10-11].

"Most jurisdictions have expressly or impliedly refused to extend the implied warranty of habitability into commercial leases." *Teller v. McCoy*, 162 W. Va. 367, 380 (1978). "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.'" *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905,

913 (Tex. 2007) (citing 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 233[2][b] (Patrick J. Rohan, ed.,1991)). *See also Doe v. Grosvenor Ctr. Associates*, 92 P.3d 1010, 1024 (Hawai'i Ct. App. 2004) (noting that Hawai'i generally does not recognize the implied warranty of habitability in commercial leases). *See also* [SUPP 10-11].

Based on the overwhelming weight of authority, and a plain reading of the Nevada landlord-tenant statutes (NRS 118A and 118C), it is clear that the Nevada legislature did not intend to create an implied warranty of habitability in commercial leases in Nevada, and this Court should reject Defendants' invitation to expand the scope of Nevada's commercial landlord-tenant statute.

3. Even if the Implied Warranty of Habitability Does Apply to Commercial Leases, Tenant Waived That Warranty by Agreeing to the "As-Is" Clauses in the Leases

However, even if the implied warranty of habitability *did* apply to commercial leases in Nevada, courts consistently recognize that such warranties may be waived if the commercial tenant accepts the property in an "as-is" condition. *See, e.g., Coulston v. Teliscope Productions, Ltd.*, 378 N.Y.S.2d 553, 554 (App. Term 1975) ("With respect to the abatement of rent for breach of the implied warranty of habitability, the doctrine's application may not be extended to the fact pattern at bar involving a corporate tenant taking the premises 'as is' under a commercial lease."); *Davidow v. Inwood N. Prof'l Group--Phase I*, 747 S.W.2d

373, 376 (Tex. 1988) ("If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.").

> By agreeing to lease the building 'as is,' Gym–N–I agreed to make its own appraisal of the physical condition of the premises. Thus, the sole cause of Gym–N–I's injury, by its own admission, is itself. We hold, therefore, that the "as is" clause negates Gym–N–I's claim that Snider's actions caused injury.

Gym-N-I Playgrounds, Inc., 220 S.W.3d 905, 914 (Tex. 2007). *See also* [SUPP 11-12].

Therefore, even if Nevada recognized the implied warranty of habitability in commercial leases (which it does not), the express language of the Leases still control. Not only did Tenant accept the property in an "as-is" condition, it also separately agreed that "Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition and repair . . . ." [SUPP 5, 47, 78]. This fact further persuaded Justice Cherry at the Motion for Summary Judgment hearing that Defendants' constructive eviction affirmative defense lacked merit. [XI AI 980] ("Also, I'm very impressed that this was an as-is lease, which makes a big difference in my book.").

With no implied warranty of habitability or suitability in commercial leases, and Tenant's acceptance of the Premises in an "as-is" condition, Defendants' defense as to the condition of the premises fails as a matter of law, and the District Court properly granted summary judgment in favor of Landlords.

4. Defendants' Constructive Eviction Argument Fails as a Matter of Law, as it is Precluded by the Leases' Terms and the Law Regarding the Implied Warranty of Habitability

As Justice Cherry recognized at the Motion for Summary Judgment hearing, "since implied warranty of habitability in a commercial lease setting is not recognized, and since the claim and defense for a constructive eviction is based solely on implied warranty of habitability, as a matter of law Defendants cannot prevail on the breach of contract claim." [XI AI 980]. Indeed, while Nevada does recognize constructive evictions in the context of commercial leases, the few cases on this subject are consistent that the landlord must act or fail to act *in breach of the express lease terms* (rather than any *implied* warranty) before there can be a constructive eviction.[9]

For example, in *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development*, LLC, 130 Nev. 834 (2014), the commercial tenant claimed a

[9] The Nevada case law examples cited in this section also apply to Defendants' arguments regarding insufficient parking at the Premises. The Leases expressly state that each warehouse unit is assigned four (4) parking spots. [SUPP 4, 41, 70]. Defendants never asserted that they did not have access to the contractually allotted parking spaces. The Leases also expressly state that they contain "all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding shall be effective." [SUPP 55, 87].Thus, because the Leases do not contain any implied warranties (based on their plain text and as a matter of law), and because the parties never executed a written amendment to the Leases, Defendants cannot claim constructive eviction based on their claim that there was insufficient parking at the Premises. *See* Opening Brief at 8-9.

constructive eviction because the roof leaked. The landlord had a *contractual duty* to maintain the roof and protect the interior from water intrusion. *Id.* at 836. "Villa Fiore assumed the landlord's duties *under the lease*, including the duty to maintain the roof and protect the interior from water intrusion." *Id.* (emphasis added). The Court never discussed any implied duties of the landlord, but rather only the express duties owed under the lease. *Id. See also* [SUPP 12].

In *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008), the tenant argued that because the landlord entered tenant's storage unit to inspect it, the tenant had been constructively evicted and the landlord breached the covenant of quiet enjoyment. The Court rejected the tenants' claim because the lease expressly provided that the landlord could inspect the storage unit. "Under the lease agreement, Schiff and her agents were permitted to enter Winchell's storage unit at any reasonable time for the purpose of inspection or maintenance." *Winchell*, 124 Nev. at 947, 193 P.3d at 952. Therefore, "Winchell could not show that he was constructively evicted because he *voluntarily surrendered any right* to refuse Schiff's reasonable entry *under the terms of the lease*." *Id.* (emphasis added). The Court never discussed any *implied* duties of the landlord, but rather only the *express* duties and rights under the lease. *Id. See also* [SUPP 12-13].

Finally, in *Las Vegas Oriental, Inc. v. Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255 (1981), the Court considered whether the failure to provide

adequate heating and air conditioning was a breach of the lease and, therefore, a constructive eviction. Specifically, the Court stated: "In this appeal we are required to determine if there is sufficient evidence to support the trial court's determination that Las Vegas Oriental, Inc., a landlord, *breached the lease between it and Sabella's* by virtue of its failure to provide adequate heating and air conditioning to a portion of the leased premises." *Id.* The Court found that the trial court properly ruled that the landlord breached the lease and constructively evicted the tenant. *Las Vegas Oriental*, 97 Nev. at 313, 630 P.2d at 256 (1981). The Court never discussed any *implied* duties of the landlord, but rather only whether the landlord breached the lease. *Id. See also* [SUPP 13].

These foregoing cases demonstrate that, in Nevada, the express terms of the written agreement between commercial tenants and landlords control. The Nevada caselaw on constructive evictions in the context of commercial leases has never identified any implied duties of commercial landlords. Because Tenant accepted the property in an "as-is" condition and agreed that "Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition and repair," Defendants' constructive eviction defense fails as a matter of law, and the District Court properly granted summary judgment in favor of Landlords. [SUPP 5, 47, 78].

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B. BECAUSE SUMMARY JUDGMENT IN FAVOR OF LANDLORDS WAS PROPER, THE DISTRICT COURT'S AWARD OF FEES AND COSTS IN FAVOR OF LANDLORDS WAS ALSO PROPER

Defendants appeal the District Court's Fee Award in favor of Landlords on the sole basis that Judgment in favor of Landlords was inappropriate, and therefore Landlords were not entitled to fees and costs under the Prevailing Party Provision. *See* Opening Brief at 23-24. Defendants do not challenge the propriety of the District Court's analysis of the *Brunzell* factors, which the District Court did consider and address in the Order Granting Summary Judgment. *See id*.; [XI AI 938-39].

However, as Landlords have demonstrated herein, the District Court's Entry of Judgment in favor of Landlords was not legal error, and thus Landlords are the prevailing party to the suit. As such, Landlords were entitled to an award of their reasonable fees and costs pursuant to the Prevailing Party Provision. *See* [SUPP 58, 89] (Paragraph 31). "Attorney fees are . . . available when authorized by rule, statute, or contract." *Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law." NRS 18.010(1). The Supreme Court of Nevada noted, with respect to the language above, "[i]t is the rule that provisions in contracts for the payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or

collection are valid and enforceable." *Bates v. Chronister*, 100 Nev. 675, 683, 691 P.2d 865, 871 (1984).

Because Landlords rightfully prevailed in the District Court action, as demonstrated herein, and because the Leases grant fees and costs to the prevailing party to any suit arising thereunder, the District Court's Fee Award was proper and should not be altered by this Court.

IX. CONCLUSION

In light of the foregoing, Landlords respectfully request that this Court deny Defendants' appeal in its entirety. Defendants failed to meet their burden at summary judgment before the District Court, and as such they are not entitled to proceed to a bench trial on their waived and/or meritless affirmative defenses. Judgment and the Fee Award in favor of Landlords was proper, and this Court should not disturb the District Court's ruling.

Dated this 18th day of November, 2021.

HOLLEY DRIGGS

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ADDENDUM OF AUTHORITIES (NRAP 28(F))

NRS CHAPTER 118A – RESIDENTIAL LANDLORD/TENANT STATUTE

NRS 118A.290(1) Habitability of dwelling unit.

1. The landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition. A dwelling unit is not habitable if it violates provisions of housing or health codes concerning the health, safety, sanitation or fitness for habitation of the dwelling unit or if it substantially lacks:

(a) Effective waterproofing and weather protection of the roof and exterior walls, including windows and doors.

(b) Plumbing facilities which conformed to applicable law when installed and which are maintained in good working order.

(c) A water supply approved under applicable law, which is:

(1) Under the control of the tenant or landlord and is capable of producing hot and cold running water;

(2) Furnished to appropriate fixtures; and

(3) Connected to a sewage disposal system approved under applicable law and maintained in good working order to the extent that the system can be controlled by the landlord.

(d) Adequate heating facilities which conformed to applicable law when installed and are maintained in good working order.

(e) Electrical lighting, outlets, wiring and electrical equipment which conformed to applicable law when installed and are maintained in good working order.

(f) An adequate number of appropriate receptacles for garbage and rubbish in clean condition and good repair at the commencement of the tenancy. The landlord shall arrange for the removal of garbage and rubbish from the premises unless the parties by written agreement provide otherwise.

(g) Building, grounds, appurtenances and all other areas under the landlord's control at the time of the commencement of the tenancy in every part clean, sanitary and reasonably free from all accumulations of debris, filth, rubbish, garbage, rodents, insects and vermin.

(h) Floors, walls, ceilings, stairways and railings maintained in good repair.

(i) Ventilating, air-conditioning and other facilities and appliances, including elevators, maintained in good repair if supplied or required to be supplied by the landlord.

NRS 118C.200 ET. SEQ. – COMMERCIAL LANDLORD/TENANT STATUTE

NRS 118C.200 Basic obligations of landlords; right to exclude tenant; remedies of tenant for violation by landlord or landlord's agent.

1. A landlord or a landlord's agent may not interrupt or cause the interruption of utility service paid for directly to the utility company by a tenant unless the interruption results from construction, bona fide repairs or an emergency.

2. A landlord may not remove:

(a) A door, window or attic hatchway cover;

(b) A lock, latch, hinge, hinge pin, doorknob or other mechanism connected to a door, window or attic hatchway cover; or

(c) Furniture, fixtures or appliances furnished by the landlord,

➥ from commercial premises unless the landlord removes the item for a bona fide repair or replacement. If a landlord removes any of the items listed in this subsection for a bona fide repair or replacement, the repair or replacement must be promptly performed.

3. A landlord may not intentionally prevent a tenant from entering the commercial premises except by judicial process unless the exclusion results from:

(a) Construction, bona fide repairs or an emergency;

(b) Removing the contents of commercial premises abandoned by a tenant; or

(c) Changing the door locks of a tenant who is delinquent in paying at least part of the rent if the landlord has provided the tenant with written notice of the delinquency and of the landlord's intent to change the door locks by certified mail, return receipt requested, at least 3 days before changing the door locks.

4. If a landlord or a landlord's agent changes the door lock of commercial premises leased to a tenant who is delinquent in paying rent, the landlord or agent must place a written notice on the front door of the commercial premises stating the name and the address or telephone number of the person or company from which the new key may be obtained. The new key is required to be provided only during the regular business hours of the tenant and only if the tenant pays the delinquent rent.

5. If a landlord or a landlord's agent violates this section, the tenant may:

(a) Recover possession of the commercial premises or terminate the lease; and

(b) Recover from the landlord an amount equal to the sum of the tenant's actual damages, 1 month's rent or $500, whichever is greater, reasonable attorney's fees and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord.

6. A lease supersedes this section to the extent of any conflict.

(Added to NRS by 2011, 1486; A 2015, 1015)

NRS 118C.210 Right of tenant to recover possession; filing of complaint; restitution.

1. If a landlord locks a tenant out of commercial premises that are subject to a rental agreement in violation of NRS 118C.200, the tenant may recover possession of the commercial premises as provided by this section.

2. A tenant must file with the justice court of the township in which the commercial premises are located a verified complaint for reentry, specifying the facts of the alleged unlawful lockout by the landlord or the landlord's agent. The tenant must also state orally under oath to the court the facts of the alleged unlawful lockout.

3. If a tenant has complied with subsection 2 and if the court reasonably believes an unlawful lockout may have occurred, the court:

(a) Shall issue an order requiring the tenant to post a bond in an amount equal to 1 month of rent; and

(b) Upon the posting of the bond, may issue, ex parte, a temporary writ of restitution that entitles the tenant to immediate and temporary possession of the commercial premises, pending a final hearing on the tenant's verified complaint for reentry.

4. A temporary writ of restitution must be served on the landlord or the landlord's agent in the same manner as a writ of restitution in a forcible detainer action. A sheriff or constable may use reasonable force in executing a temporary writ of restitution under this subsection.

5. The court shall hold a hearing on a tenant's verified complaint for reentry. A temporary writ of restitution must notify the landlord of the pendency of the matter and the date of the hearing. The hearing must be held not earlier than the first judicial day and not later than the fifth judicial day after the date on which the court issues the temporary writ of restitution.

6. A party may appeal from the court's judgment at the hearing on the verified complaint for reentry in the same manner as a party may appeal a judgment in an action for forcible detainer.

7. If a writ of restitution is issued, the writ supersedes a temporary writ of restitution.

8. If the landlord or the person on whom a writ of restitution is served fails to immediately comply with the writ or later disobeys the writ, the failure is grounds for contempt of court against the landlord or the person on whom the writ was served, under chapter 22 of NRS.

9. This section does not affect a tenant's right to pursue a separate cause of action under NRS 118C.200.

10. If a tenant in bad faith files a sworn complaint for reentry resulting in a writ of restitution being served on the landlord or landlord's agent, the landlord may in a separate cause of action recover from the tenant an amount equal to actual damages, 1 month's rent or $500, whichever is greater, reasonable attorney's fees, and costs of court, less any sums for which the landlord is liable to the tenant.

11. This section does not affect the rights of a landlord or tenant in a forcible detainer, unlawful detainer or forcible entry and detainer action.

(Added to NRS by 2011, 1487)

NRS 118C.220 Jurisdiction of courts; applicability of judicial doctrines.

1. Except as otherwise provided in subsection 2, the justice court has jurisdiction over any civil action or proceeding concerning the exclusion of a tenant from commercial premises or the summary eviction of a tenant from commercial premises in which no party is seeking damages.

2. If a landlord combines an action for summary eviction of a tenant from commercial premises with a claim to recover contractual damages, jurisdiction over the claims rests with the court which has jurisdiction over the amount in controversy.

3. The provisions of NRS 40.430 and the doctrines of res judicata and collateral estoppel do not apply to:

(a) A claim by a landlord for contractual damages which is brought subsequent to an action by the landlord for the summary eviction of a tenant from commercial premises; or

(b) An action by a landlord for the summary eviction of a tenant from commercial premises which is brought subsequent to a claim by the landlord for contractual damages.

(Added to NRS by 2011, 1488)

NRS 118C.230 Disposal of abandoned property.

1. Except as otherwise provided in subsection 3, a landlord who leases or subleases any commercial premises under a rental agreement that has been terminated for any reason may, in accordance with the following provisions, dispose of any abandoned personal property, regardless of its character, left on the commercial premises without incurring any civil or criminal liability:

(a) The landlord may dispose of the abandoned personal property and recover his or her reasonable costs out of the abandoned personal property or the value thereof if the landlord has notified the tenant in writing of the landlord's intention

to dispose of the abandoned personal property and 14 days have elapsed since the notice was mailed to the tenant. The notice must be mailed, by certified mail, return receipt requested, to the tenant at the tenant's present address, and if that address is unknown, then at the tenant's last known address.

(b) The landlord may charge and collect the reasonable and actual costs of inventory, moving and safe storage, if necessary, before releasing the abandoned personal property to the tenant or his or her authorized representative rightfully claiming the abandoned personal property within the appropriate period set forth in paragraph (a).

(c) Vehicles must be disposed of in the manner provided in chapter 487 of NRS for abandoned vehicles.

2. A tenant of commercial premises is presumed to have abandoned the premises if:

(a) Goods, equipment or other property, in an amount substantial enough to indicate a probable intent to abandon the commercial premises, is being or has been removed from the commercial premises; and

(b) The removal is not within the normal course of business of the tenant.

3. If a written agreement between a landlord and a person who has an ownership interest in any abandoned personal property of the tenant contains provisions which relate to the removal and disposal of abandoned personal property, the provisions of the agreement determine the rights and obligations of the landlord and the person with respect to the removal and disposal of the abandoned personal property.

4. Any dispute relating to the amount of the costs claimed by the landlord pursuant to paragraph (b) of subsection 1 may be resolved using the procedure provided in subsection 7 of NRS 40.2542.

(Added to NRS by 2011, 1488; A 2019, 3927)

CERTIFICATE OF COMPLIANCE

1. 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 style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(1)–(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 8,318 words and 730 lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, I hereby 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 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 18th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on the 18th day of November, 2021. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Sandy Sell*
an employee of Holley Driggs