

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA,

Appellant,

vs.

180 LAND CO., LLC, A NEVADA LIMITED-
LIABILITY COMPANY; AND FORE STARS,
LTD., A NEVADA LIMITED-LIABILITY
COMPANY,

Respondents.

180 LAND CO., LLC, A NEVADA LIMITED-
LIABILITY COMPANY; AND FORE STARS,
LTD., A NEVADA LIMITED-LIABILITY
COMPANY,

Appellants/Cross-Respondents,

vs.

CITY OF LAS VEGAS, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA,

Respondent/Cross-Appellant.

No. 84345

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**AMENDED
JOINT APPENDIX
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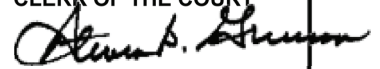
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LLC,

Petitioner,

vs.

CITY OF LAS VEGAS,

Respondent.

AND RELATED PARTIES

CASE NO. A-17-758528-J
DEPT NO. XVI

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 03, 2022

**PLAINTIFF LANDOWNERS' MOTION TO DETERMINE PREJUDGMENT
INTEREST**

[645] PLAINTIFF LANDOWNERS' MOTION FOR ATTORNEY FEES

APPEARANCES (VIA BLUEJEANS):

FOR THE PETITIONERS:

JAMES J. LEAVITT, ESQ.
ELIZABETH GHANEM HAM, ESQ.

FOR THE RESPONDENT:

GEORGE F. OGILVIE, III, ESQ.
PHILIP R. BYRNES, ESQ.
J. CHRISTOPHER MOLINA, ESQ.
ANDREW W. SCHWARTZ, ESQ.
REBECCA L. WOLFSON, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 3, 2022, 1:40 P.M.

* * * * *

THE COURT: All right. I just want to say good afternoon to everyone and welcome you to our afternoon February 3rd, 2022 calendar.

And let's go ahead and set forth our appearances. We'll start first with the plaintiff and then we'll move to the defense.

MR. LEAVITT: Good afternoon, Your Honor. James J. Leavitt here on behalf of the plaintiff, 180 Land, LLC, landowners.

Elizabeth, we can't hear you.

THE COURT: Yeah, you'll have to hit star 4, ma'am.

MS. GHANEM HAM: Sorry about that. Sorry about that. Good afternoon, everyone. Good afternoon, Your Honor. Elizabeth Ghanem Ham on behalf of 180 Land and Fore Stars Landowners.

THE COURT: Okay.

MR. OGILVIE: Good afternoon, Your Honor. George Ogilvie on behalf of the City of Las Vegas.

MR. SCHWARTZ: Good afternoon, Your Honor. This is Andrew Schwartz for the City of Las Vegas.

MR. MOLINA: Good afternoon, Your Honor. This is Chris Molina on behalf of the City.

MS. WOLFSON: And good afternoon, Your Honor.

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1 Rebecca Wolfson also on behalf of the City of Las Vegas.

2 MR. BYRNES: And good afternoon, Your Honor. Phil
3 Byrnes on behalf of the City of Las Vegas.

4 THE COURT: And I think that covers all appearances;
5 is that correct?

6 MR. LEAVITT: Yes, on behalf of the plaintiff, Your
7 Honor.

8 THE COURT: All right. And I --

9 MR. OGILVIE: Yes, Your Honor.

10 THE COURT: All right. Okay. So once again, good
11 afternoon.

12 And I see we have, from what I can gather in looking
13 at the calendar, we have two pending motions. One would be
14 plaintiff landowners' motion for determination of prejudgment
15 interest, and the second would be plaintiff landowners' motion
16 for attorneys' fees.

17 Which one should we handle first?

18 MR. LEAVITT: Well, Your Honor, I think perhaps the
19 prejudgment interest one would be best to handle first.

20 THE COURT: All right. Okay. And, Mr. Ogilvie, is
21 that fine? No objection there?

22 MR. OGILVIE: Yes, Your Honor. No objection.

23 THE COURT: All right. Then that's what we'll do.

24 All right. Sir, you have the floor.

25 MR. LEAVITT: Thank you, Your Honor. Again, James J.

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1 Leavitt on behalf of the plaintiff landowners.

2 Your Honor, this motion for prejudgment interest is a
3 standard motion that's filed in every eminent domain case, and
4 especially in every inverse condemnation case where the amount
5 recovered is higher than what the government offered; or, as
6 the case is in an inverse condemnation case, is the award. And
7 the prejudgment interest is statutory, or at least the
8 procedure for prejudgment interest is statutory. There's three
9 issues that need to be resolved posttrial by the Court
10 according to the statute 37.18175.

11 Two issues appear to be undisputed. In fact, there
12 was no opposition drafted by the City of Las Vegas regarding
13 two issues, which is the date of commencement of interest,
14 which is August 2nd, 2017. And there was no opposition to
15 the interest being compounded annually. Those are two of the
16 issues that the statutes require us to address and that the
17 Court is to resolve as part of the determination of prejudgment
18 interest.

19 The only disputed issue before you now, in order to
20 calculate the prejudgment interest is what is the rate of
21 return that should be used.

22 So that's the issue that I'll address right now is
23 what rate should be used to determine the prejudgment interest
24 on behalf of the landowners in this case on the \$34 million
25 verdict.

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1 First, the rule. The Nevada Supreme Court has held
2 that prejudgment interest is part of the just compensation
3 award. The Nevada Constitution also states very clearly that
4 the determination of the rate of return for prejudgment
5 interest is also part of the just compensation award meaning
6 that it's part of the constitutionally mandated rights that the
7 landowners have in this case.

8 The test that the Nevada Supreme Court has used to
9 determine the rate of return is that rate which will put the
10 landowner back in the same position monetarily as he would have
11 been in had his property not been taken.

12 Now, that's a pretty general rule, but the Nevada
13 Supreme Court goes on to explain the purpose of that rule which
14 more fully explains how that rule should be applied when
15 determining the rate of return. The Supreme Court said that
16 interest is to compensate for the period that the landowners
17 were, and this is a quote, "deprived of the use of the proceeds
18 that should have been paid at the time of the taking."

19 So what the Court is saying here is we're going to go
20 back to August 2nd, 2017. We're going to assume that the
21 landowner had, for purposes of this case, \$34,135,000. What
22 rate of return could this landowner have achieved on that
23 \$34 million had that money been paid on August 2nd, 2017?
24 And there's a strong public policy for this rule that the Court
25 has adopted, especially in an inverse condemnation case.

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1 First, the government has had use of the property.
2 It's been taken from the landowner. And secondly, the
3 landowner has not been paid for that taking. And so what
4 interest does is it compensates the landowner for that lost use
5 of those proceeds during that period.

6 Now, before I discuss the specific rule, I want to
7 address one of the concerns or one of the issues that the City
8 raised in its brief. The City doesn't make an argument that
9 the rate of return is improper. The City doesn't make an
10 argument that the landowners have improperly calculated the
11 rate of return. 90 percent of the City's brief is the amount
12 of money that the landowners are asking for in prejudgment
13 interest is too high. The Nevada Supreme Court has addressed
14 that issue twice.

15 First, in the *Sisolak* case, the Nevada Supreme Court
16 awarded interest to Mr. *Sisolak* that more than doubled his
17 award. Mr. *Sisolak* received approximately \$6 million in that
18 inverse condemnation case for the taking of his airspace. The
19 prejudgment interest was significantly higher than \$6 million.

20 In the *Alper* case, the Nevada Supreme Court, and I'll
21 quote what they say here, "As indicated by the award in the
22 present case, prejudgment interest may be very substantial in
23 protracted condemnation proceedings." And here's what they
24 say, "and may, in fact, exceed the inflated value of the land."

25 That's especially true in an inverse condemnation

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1 case because they tend to be very protracted, as you've seen in
2 this case. The landowners -- the landowners have to prove the
3 property interest. The landowners have to prove the take. The
4 landowners have to prove the just compensation phase all
5 through discovery. In a direct eminent domain case, you go to
6 trial, and the only issue is how much does the government have
7 to pay? So that's why prejudgment interest is very high in
8 these inverse condemnation cases.

9 So now how do we calculate the rate of return here?
10 The Nevada Legislature has adopted a statute, and in that
11 statute, the Nevada Legislature says that the Court shall
12 determine the rate, and then it says that rate shall not be
13 below prime plus 2 percent.

14 So, Your Honor, prime plus 2 percent as the City has
15 argued, is not the rate of return that should be applied in
16 this case. Instead, the rate of return that should be applied
17 in this case is that rate which would put the landowner back in
18 the same position monetarily as he would have been in had his
19 property not been taken.

20 Now, Your Honor, we've done this for a long time, as
21 you're well aware, and there's only one case in Nevada where
22 the District Court Judge granted prejudgment interest based
23 upon a certain rate of return, and then that issue was taken up
24 to the Nevada Supreme Court, and the Nevada Supreme Court
25 affirmed. And here's what the Nevada Supreme Court said. It's

1 in the *State versus Barsy* case.

2 First, the Nevada Supreme Court said the rate of
3 return is a question of fact. Secondly, the rate of return
4 must be based upon evidence taken posttrial by the District
5 Court Judge, and thirdly, here's the only piece, Your Honor,
6 out of all the cases that we have in Nevada on inverse
7 condemnation and on prejudgment interest. This is the only
8 place where the Nevada Supreme Court indicates the type of
9 evidence that it will accept to determine the rate of return.
10 And this is what the Court said in *Barsy*, that the rate that
11 could be achieved -- the test is the rate that could have been
12 achieved had the landowners, and here's the quote, "invested
13 his money in land similar to that condemned."

14 So what the Nevada Supreme Court relied upon in the
15 *Barsy* case was what was the land increase like during the
16 relevant period? In other words, if the landowner had been
17 paid their money as of 2017 and invested that money in land
18 similar to that condemned, to quote *Barsy*, what would he have
19 achieved? And we've provided to you two reports which include
20 empirical evidence. One is by Mr. DiFederico, who was the
21 appraiser in this case, and the other is by Mr. Lenhart, who's
22 a broker. This is the precise evidence that the Nevada Supreme
23 Court held should be considered when determining the rate of
24 return on the prejudgment issue in the *Barsy* case.

25 And, Your Honor, I can go through the DiFederico

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1 report with you if you'd like. I can go through the Lenhart
2 report, but both of those reports -- well, first of all, the
3 DiFederico report arrives at a rate of return of 23 percent for
4 the relevant period in this case, and the Lenhart report
5 arrives at a rate of return of 25 to 27 percent of the relevant
6 period.

7 I'll reference just the DiFederico report for just a
8 moment, Your Honor. Mr. DiFederico investigated Colliers
9 International Survey, a well-respected survey, to determine
10 what the rate of return was on land similar to the 35 acre
11 property from 2017 to 2022.

12 He also referenced CoStar in his report, and CoStar,
13 Your Honor, is a compilation of sales and resales of property,
14 and they have data which shows wherein you can identify
15 properties that are similar to the 35-acre property and
16 determine what those properties sold and resold for and
17 determine what the rate of increase was for those properties
18 during the relevant period.

19 He also referred to, in his report, to lot sales that
20 have occurred in the area that are similar to the landowner's
21 property.

22 And then he didn't end there. He went and found five
23 individual properties that had sold and resold during the
24 relevant period to support his number, and then he concluded,
25 Your Honor, based upon those four sources of empirical

1 evidence, that the proper rate of return to apply in this case,
2 following the *Barsy* standard, is 23 percent each year,
3 compounded annually.

4 Mr. Lenhart, Your Honor, followed the same process.
5 Except for he used seven sales and resales of properties during
6 the relevant period, and he came in with even a higher rate of
7 return of 25 to 27 percent.

8 Because that is the only evidence before the Court
9 right now on what the proper rate of return is, the landowners
10 chose the lowest number there, 23 percent, so there would be no
11 dispute as to what the rate of return should be for the
12 prejudgment interest in this case, Your Honor.

13 So, Your Honor, unless you have any questions, the
14 request is straightforward. Prejudgment interest should
15 commence from August 2nd, 2017. That's not a disputed issue.

16 That prejudgment interest should be compounded
17 annually. That's not a disputed issue.

18 And the rate of return should be 23 percent, as
19 that's the only evidence that's before this Court on this
20 question of fact that's pending, Your Honor.

21 Do you have any questions for me, Judge?

22 THE COURT: Not at this time, sir.

23 MR. LEAVITT: Okay.

24 THE COURT: Okay. And from the defense, we'll hear
25 from whoever's arguing this motion.

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1 MR. SCHWARTZ: Yes, Your Honor. This is Andrew
2 Schwartz, and I'll be -- I'll be representing the City on this
3 motion.

4 There is no dispute that the minimum interest rate
5 for prejudgment interest in this case is prime plus 2 percent.
6 The only test, the only standard that the Court has to apply to
7 allow the Court to award prejudgment interest above that rate
8 is this constitutional standard that the -- the Constitution
9 and the case law is essentially saying the Court should award
10 the prime plus 2 percent rate from the statute unless a higher
11 rate would be necessary to make the property owner whole. And
12 we do not have those facts in this case. In fact, we have just
13 the opposite. We have just the opposite, Your Honor. There is
14 absolutely no reason to award the property owner more than the
15 statutory rate to make it whole because it's already been made
16 whole 54 times by the judgment.

17 Now, the Developer paid, and this is -- the Developer
18 paid four and a half million dollars for the 250-acre Badlands.
19 That's \$18,000 an acre. This is the 35-acre case. So the
20 Developer paid \$630,000 for the 35-acre segment of the property
21 that he carved out of the Badlands.

22 The Court has awarded the Developer \$34,135,000 in
23 takings damages in this case.

24 So that's 54 times the Developer's investment in the
25 property, and so it -- it cannot be, it cannot be the case here

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1 that more money in interest above prime plus 2 percent is
2 necessary to make the Developer whole here, and the case is
3 even stronger that the Developer doesn't need extraordinarily
4 high rate of interest to be made whole.

5 Not only has the Developer already made 54 times its
6 investment in the 35-acre property, but the City approved 435
7 luxury housing units for construction on the 17-acre segment of
8 the Badlands. And by the Developer's own evidence, that
9 increased the value of just the 17-acre portion by 26 million.

10 So now you have a four and a half million dollar
11 investment with one judgment for 34 million. The City's
12 approval of development in one part that's increased the value
13 by 26 million. So you've got -- that's \$60 million. So you've
14 got an investment of four and a half million dollars.

15 Now, the Developer has received in damages and in
16 enhanced value of the property due to the City's approval, you
17 know, the City lifted the PR-OS designation and rezoned the
18 property to allow 435 units. Now, you've got \$60 million plus
19 the Developer still has 200 acres left, 200 acres left of the
20 Badlands in which to develop.

21 The Developer applied to develop the 133 acres
22 portion of the property under Judge Crockett's order. The City
23 couldn't consider that application because the Developer didn't
24 file a major modification application.

25 Well, so the City never examined the 133-acre

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1 applications on the merits.

2 Then the Nevada Supreme Court reversed that and said
3 you don't need a major modification application. The City --
4 the City then wrote to the Developer and said now that the
5 Judge Crockett order has been reversed, refile your
6 applications for the 133-acre case. They haven't refiled the
7 application. In fact, the City asked Judge Sturman to remand
8 those applications to the City Council so the City Council
9 could decide them on the merits, and the Developer opposed it.
10 In fact, the Developer dismissed its petition for judicial
11 review on the 133-acre case. So then in the 65-acre case, the
12 Developer never even filed one application.

13 So the Developer can't seriously argue this
14 extraordinary interest rate to make it whole. If you include
15 the -- what the -- the \$52 million that they're seeking in
16 prejudgment interest, you add that to the 34 million in this
17 case, that would be, by my calculations, a 13,800 percent
18 profit, 13,800 percent profit on an investment in the property.
19 So they don't meet the test, and that's the only test for an
20 extraordinarily high interest rate.

21 And I'll address the *Barsy* case. The *Barsy* case
22 doesn't apply. First of all, *Barsy* was an eminent domain case.
23 The Court there said the government took -- delayed in filing
24 the eminent domain action. The government wanted the property
25 for a public project, delayed filing the eminent domain action

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1 and during that period, *Barsy* lost tenants and lost money. So
2 when the Court awarded *Barsy* the fair market value of the
3 property on the date of value, the Court included, well, this
4 isn't enough to make *Barsy* whole because he lost some tenants.
5 So they said -- the Court accepted evidence that what would --
6 what would the interest rate be if *Barsy* had invested that in a
7 building that had tenants so that he could make the return and
8 that what he lost when the City delayed in the condemnation
9 action.

10 Number one, the *Barsy* was -- needed a higher interest
11 rate to be made whole, and that finding cannot be made in this
12 case. We're as far from that determination as you can get.

13 And the second thing is, the Court there didn't say
14 that you get the profit from an investment, the profit from an
15 investment of that -- of the amount of the award. It said what
16 would be the equivalent if you invested that property in
17 property that had tenants, which was the value of the property
18 that *Barsy* would have had had his tenants not moved out due to
19 the condemnation blight.

20 And so therefore, the Court was just adjusting the
21 interest rate, which is what the return on money that *Barsy*
22 would get in order to compensate him for something that he
23 lost. And in this case, the Developer lost nothing like that.
24 The Developer has been rewarded with a windfall, at least with
25 the judgment, 54 times its investment.

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1 The *Alper* case -- and by the way, the interest rate
2 the Court found in *Barsy* was what, prime plus 2 percent.
3 That's the -- that's ultimately what the Court concluded was a
4 fair rate of interest, prime plus 2 percent.

5 The *Alper* case, there was a case where the City
6 physically took possession of the property. The county
7 physically took possession of the property for a public
8 project, for a road project, and the property owner brought an
9 inverse case because the City didn't file an eminent domain
10 case. So that was really an eminent domain case where the
11 government agency took possession of the property and
12 dispossessed the property owner.

13 Similar to *Barsy* where the Court was -- it was an
14 eminent domain case that took the Court -- the agency
15 ultimately took possession of the property. And in there, the
16 Court said that -- that *Alper* was entitled to what rate of
17 interest? Prime plus 2 percent. Prime plus 2 percent.

18 He didn't say that *Alper* could take the condemnation
19 award and invest it in some speculative investment and that the
20 Court would speculate, well, how much money would you have made
21 on this speculative investment. What if you put it in the
22 stock market or, you know, well, then you have to assume, well,
23 what if you put it in NASDAQ and NASDAQ went down during the
24 period that you put it in the Fortune 500 stocks, and that went
25 up during the period.

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1 The Court didn't say that you could invest the money.
2 It said they're entitled to a higher rate of interest.
3 Interest is the return on money. It's not profit from a
4 speculative development.

5 So neither *Alper* -- and moreover, *Alper* in *Barsy*
6 don't apply to this case because this was a regulatory taking
7 case concerning the agency's regulation of the owners use of
8 the property. This was not an eminent domain case like *Barsy*
9 and *Alper* where the government actually took physical
10 possession of the property.

11 All the City did here, according to the Court in its
12 judgment, was regulate the owners use of the property. The
13 City never dispossessed the owner from the property. During
14 this entire time the property owner had the full possession and
15 use of the property where use is allowed by law.

16 So there's no reason to determine here that because
17 the property owner was dispossessed from the property that the
18 property owner needed the money to -- that -- in the judgment
19 to replace that property.

20 Now, the Developer argues here that -- oh, and let me
21 back up.

22 So there are three cases, Your Honor, that are like
23 this in Nevada where the claim, the taking claim was that the
24 regulation of the owners use of the property affected a taking.

25 The Court here awarded the \$34 million for the

1 categorical and Penn Central claims, where the property owner
2 alleged that the City's regulation of the owners use of the
3 property was a taking.

4 *Alper* and *Barsy* are completely different cases.
5 Those are eminent domain cases where the government took
6 physical possession of the property. The property owner didn't
7 have possession and use of the property during the -- during
8 most of the lawsuit in *Barsy* and in any part of the lawsuit in
9 the *Alper* case.

10 In Nevada, there are three cases like this. They are
11 the State case, the Kelly case and the Boulder City case. In
12 all of those cases, the Supreme Court found that the taking had
13 to wipe out all use and value of the property. That wasn't the
14 case there either because the cases weren't ripe or because the
15 owner still had some use of the property or that the agency
16 didn't change the law applicable to the property.

17 And in each of those cases, the Nevada Supreme Court
18 found no taking. So we don't have the case like this where the
19 claim is excessive regulation of the owners use of the property
20 resulted in the taking. Where the Court then found a taking
21 and awarded prejudgment interest, not of some interest rate,
22 but of the amount of the award, if the amount of the award had
23 been invested and what would the -- the property owner have
24 earned on that investment. We don't have a case that says that
25 that applies here. Even if *Barsy* held that you can set the

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1 interest rate by what the owner would have earned had the owner
2 invested the award at the time of the taking in some
3 speculative investment.

4 So that means that the only guidance for the Court
5 here in this case is from the Constitution, which is the
6 standard. Make the property owner whole.

7 And I've explained the property owner has already
8 been made more whole 54 times by just the judgment alone.

9 Now, the Developer, assuming, assuming that it wasn't
10 clear that the Developer here has already been made whole by
11 the judgment, the Developer says, well, we would have invested
12 this money in some -- in real estate. We would have invested
13 this money in some speculative real estate venture.

14 Well, that's not really true here because this is a
15 real estate developer. They build. That's their business.
16 They don't buy land and hold the land and hope that it
17 appreciates.

18 And in this case, what would the Developer have done
19 with the money? Well, it certainly wouldn't have built
20 anything. It didn't need the money to build anything. So it
21 wasn't harmed because it didn't have \$34 million.

22 When he went into this project, he paid four and a
23 half million for the 250 acres. The Developer must have had
24 the money to develop the property at that time if that was the
25 Developer's intent. It didn't need an extra 34 million to make

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1 this profitable, particularly when it paid so little for the
2 land, four and a half million.

3 So this is a real estate developer. What they're
4 saying is that they would've taken the money and, at the time,
5 they would have been prescient enough to know that the
6 investing that money in the real estate market would have
7 earned them a greater return than prime plus 2 percent, that
8 they would -- if they would have had a crystal ball, and they
9 would've earned that money.

10 Or, you know, who's to say whether they or any other
11 property owner, if this is going to be the rule in takings
12 cases, any time you have a condemnation award, you can
13 always -- the owner could always argue, well, I would've
14 invested it. I would've invested it in Zoom, or I would have
15 invested it in SpaceX, and, you know, quadrupled my money.
16 What if they thought, well, I think the stock market is the
17 best place to invest the money. Would they have made what is a
18 hundred percent on the judgment over four years? Well, who's
19 to say.

20 The whole thing is completely speculative, and that's
21 why all the cases and the statutes in the Constitution talk in
22 terms of interest. Interest is return on money. It's the time
23 value of money.

24 What the Developer is seeking here is profit. It's a
25 completely different thing, and profit that's speculative. We

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1 know what the interest rates are. We know what the prime rate
2 is, and we can add 2 percent to that, but -- and but we don't
3 know what the Developer would have invested this money in a
4 profitable venture.

5 Or even if you -- even if you were to allow the
6 Developer to gamble on the judgment and pay the interest rate
7 equivalent to what the Developer would have earned in profit on
8 a speculative venture, what they now in hindsight say they
9 would've done, you know, you've got 2020 hindsight. Oh, yeah,
10 we would have invested in the real estate market because that
11 seems to have increased substantially. Well, that can't be the
12 measure of the prejudgment interest.

13 But assuming none of that is true, the Developer
14 doesn't have an appraisal of what this property or what any
15 property would've been worth had the Developer bought it back
16 in 2017. Their valuation evidence is just average values for a
17 certain type of real estate. They just take an average. That
18 wouldn't be admissible in court.

19 So to appraise property, you need to compare the
20 property to sales of comparable property, actual market data.
21 You can't just average the change in average prices for an
22 entire class of properties and say, well, that's my damage
23 because real estate development is speculative, and who's to
24 say whether one property would have appreciated at the same
25 rate as another property. The whole thing kind of collapses

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1 under speculation.

2 So just thinking in terms of an interest rate, just
3 stepping back and looking at the big picture, 23 percent annual
4 interest rate, I mean, that's like double the usury rate.
5 Who's ever heard of an interest rate so high? No Nevada cases
6 ever, ever found that prejudgment interest to be so high, and,
7 as I've said, in no takings case either inverse or eminent
8 domain takings case where prejudgment interest has been
9 addressed, it's never been higher than prime plus 2 percent in
10 my research.

11 So all we have here, Your Honor, is the
12 constitutional requirement to make the Developer whole and for
13 the Developer to claim that they need another \$52 million to be
14 made whole after they've already earned 54 times their
15 investment in this property is -- that would be -- that would
16 be an unjust result to put it mildly.

17 Now, the Developer has claimed that they actually
18 spent \$45 million to buy the Badlands and a hundred million
19 dollars seems to change over time.

20 There is absolutely no evidence, no evidence that the
21 Developer paid more than four and a half million dollars for
22 the Badlands.

23 The contract, the contract of sale between the
24 Developer here and the Peccoles, who developed the Peccole
25 Ranch Master Plan, was for seven and a half million for the

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1 entire Badlands. And the City has established by the documents
2 that went back and forth between the Developer and the Peccoles
3 in negotiations for that purchase that 3 million of that
4 purchase price was for other real estate --

5 THE COURT: Sir, I think we lost you. You faded out.
6 The last word that you set forth on the record was -- what was
7 it? Are you there?

8 Didn't he say real estate? Was that the last word
9 before you?

10 THE COURT RECORDER: He is not --

11 THE COURT: Because I thought he said real estate. I
12 was listening.

13 (Pause in the proceedings.)

14 THE COURT: Did we lose everybody over --

15 THE COURT RECORDER: No, just him.

16 THE COURT: You'll have to call him.

17 MR. LEAVITT: Your Honor.

18 THE COURT: Yes.

19 MR. LEAVITT: James J. Leavitt. I'm still here on
20 the line.

21 THE COURT: Okay. Thank you, sir.

22 THE COURT RECORDER: I'm going to put something on
23 chat, Your Honor.

24 THE COURT: And e-mail him so he knows we lost him.

25 (Pause in the proceedings.)

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1 THE COURT: Mr. Ogilvie, can you hear me, sir?

2 MR. OGILVIE: Yes, Your Honor. I'm here.

3 THE COURT: Is there anyway you can contact
4 Mr. Schwartz for us.

5 MR. OGILVIE: I was going to ask Sarah Lucy to
6 contact him. I'm sure she's already attempted.

7 THE COURT: You know what we'll do, I think it makes
8 sense, and I think if my memory is correct, I think the last
9 word he set forth on the record was "real estate." Maybe that
10 can cue him, but anyway let's take a 10-minute recess to give
11 him an opportunity to reconnect, and you can, you know, take
12 that time to maybe call him personally or whatever has to be
13 done, but we're going to take 10 minutes to accommodate him.
14 Okay.

15 MR. OGILVIE: Thank you, Your Honor.

16 THE COURT: We'll be in recess for 10 minutes.

17 (Proceedings recessed at 2:16 p.m., until 2:32 p.m.)

18 THE COURT: All right. We're back on the record.
19 Is that correct, ma'am?

20 THE COURT RECORDER: Yes, Your Honor.

21 THE COURT: All right. And, Mr. Schwartz, I think
22 the last word you set forth on the record was real estate. I
23 might be wrong on that, but I was following your argument, sir.

24 Do we have him?

25 THE COURT RECORDER: Mr. Schwartz, are you there?

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1 THE COURT: Did we lose him?

2 THE COURT RECORDER: Judge, we must have lost him
3 again. He was there.

4 Mr. Schwartz, can you hear us?

5 MR. SCHWARTZ: Yes. I'm sorry.

6 Your Honor, I think I was addressing the four and a
7 half million dollar purchase price, which is important here
8 because it goes directly to the issue of whether the Developer
9 here needs to be made whole by getting an award of \$52 million
10 in prejudgment interest.

11 The four and a half million dollar purchase price is
12 established by overwhelming evidence. The contract between the
13 Developer and the Peccoles who sold the Badlands to the
14 Developer in March of 2015, provided that the purchase price
15 was seven and a half million dollars.

16 This was a negotiated purchase between two
17 sophisticated real estate developers, an arm's-length
18 transaction. It was a -- there's no indication it was not a
19 fair market transaction. And the -- it was a heavily
20 negotiated price. In discovery the Developer didn't want to
21 release, but we finally got an order from the Court to (video
22 interference) the Developer to release the documents concerning
23 this negotiation, and they established that \$3 million of the
24 seven and a half million dollar purchase price was for other
25 real estate, and this is confirmed by the seller, by the

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1 Peccoles in a deposition.

2 So the purchase price of the Badlands was four and a
3 half million dollars, and the Developers claim that the
4 purchase price is actually \$45 million, and I think at trial
5 they said a hundred million dollars was the purchase price. In
6 discovery, the City requested documents from the Developer to
7 support that contention. \$7.5 million in the contract signed
8 by both parties, and that documents indicate 3 million that was
9 for other real estate.

10 What documents do you have to establish end dollar
11 purchase price or any purchase price other than what it states
12 in the documents that we have. None. The Developer has
13 produced not a shred of evidence. Only the Developer's claim
14 that the purchase price was \$45 million, not a single document.
15 Who purchases property for \$45 million and doesn't have a
16 single document to show that that's the case, you know,
17 that's -- it's preposterous for the Developer to allege that.

18 Then so we are left with a \$34,135,000 that's 54
19 times what the Developer paid for the 35-acre property. They
20 paid 18,000 an acre, \$630,000 for 35 acres compared to
21 \$54 million -- excuse me \$34 million, which is 54 times what
22 they invested in the property.

23 So it -- the Developer can't seriously contend here
24 that the Developer needs an extraordinary interest rate of
25 something above prime plus 2 percent to be made whole when the

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1 Developer's already been made whole many times over and still
2 has (video interference), made the 26 million on the 17-acre
3 property and still developed the 133-acre, 65-acre property.
4 The City sent them a letter saying go ahead and apply. You
5 haven't really applied. The City hasn't reviewed an
6 application on the merits. They still have that property that
7 might be developed or that they can use for uses permitted by
8 the PR-OS designation.

9 So they've really got -- they really received a huge
10 windfall in this case, and awarding them \$52 million in the
11 interest in addition to that would be -- would not be in the
12 interest of justice.

13 I did want to say one more thing about the *Sisolak*
14 case. In that case, that was a physical taking case where the
15 Court awarded prejudgment interest. The opinion, the Supreme
16 Court opinion doesn't say what the interest rate was. It just
17 says prejudgment interest was awarded. There is no discussion
18 in that case that the interest rate would be whatever the
19 Developer claims it could have made in profit had the Developer
20 invested that money in some speculative investment.

21 So apparently the interest rate there in the *Sisolak*
22 case was just the statutory rate.

23 So there is no case that supports the Developer's
24 position that instead of interest they're entitled to profit in
25 this speculative investment.

1 The only authority that really applies here is the
2 constitutional authority for an interest rate that's higher
3 than prime plus 2 percent only if the property owner can show
4 that they need that to be made whole to be put in the same
5 monetary position as they were without the -- without the
6 award, and that's impossible in this case. Thank you.

7 THE COURT: All right. Thank you, sir.

8 We'll hear from Mr. Leavitt.

9 MR. LEAVITT: Thank you, Your Honor. James J.
10 Leavitt on behalf of the plaintiff landowner 180 Land.

11 Judge, this is a hearing on a very narrow issue:
12 What is the rate of return to apply for the prejudgment
13 interest issue in an inverse condemnation case. That's it.
14 And the Nevada Supreme Court has been very clear that that's a
15 question of fact to be decided by the Judge in a posttrial
16 hearing based upon evidence.

17 Counsel, didn't provide you one shred of evidence of
18 what the proper rate of return would be. He made again about
19 95 percent of his argument was based upon irrelevant issues. I
20 do want to address just a couple of those.

21 First he attempts to rewrite the decision that this
22 Court made. He keeps saying that this case is a regulatory
23 taking. This Court found that there was a per se taking of the
24 landowner's property where the landowner has been dispossessed
25 of that property. We are now here to determine the remedy that

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1 the landowner should receive after getting a just compensation
2 award, a remedy that's set forth in the Constitution and a
3 remedy that's set forth in the statutes, and that remedy is
4 prejudgment interest. The purpose for prejudgment interest is
5 to, Number 1, remedy what the government has done in this case
6 by taking the property and not paying the landowner for that
7 property. It's been five years now, five years now that the
8 government has had possession of the property, and the
9 landowners haven't been paid.

10 So the Nevada Supreme Court said that under those
11 circumstances, in an inverse condemnation case, prejudgment
12 interest must be paid for that period that the landowner was
13 dispossessed and lost use of the property. Now, the entire
14 premise for Mr. Schwartz's argument that he just made was the
15 2005 purchase price.

16 Your Honor, there is not a case in this country that
17 relies upon a 17-year-old purchase price to determine
18 prejudgment interest. There's not a case in this country that
19 considers a 17-year-old purchase price when determining the
20 proper rate of return, firstly. So it's entirely irrelevant.
21 The entire premise for the argument that was just made is
22 entirely irrelevant.

23 In addition to being irrelevant, it's not even true.
24 Your Honor, we had pretrial hearings. We had motions in limine
25 on the purchase price, and the 2005 purchase price was excluded

1 because it was so irrelevant to determine the value of the
2 property as of the 2017 date of value.

3 Now, counsel repeated probably 15 times his belief
4 that \$4.5 million was paid for the property. There's no basis
5 for that, Your Honor. The government took the deposition of
6 the PMK of the seller of the property and the deposition of the
7 PMK of a buyer of the property, Mr. Johan Lowy. Both of them
8 confirmed that the purchase occurred in 2005. It was a
9 complicated transaction. There was a lot of hair on it, and
10 the buyer, the PMK buyer stated that when you take all of the
11 consideration into -- or you consider all of the consideration
12 for in that 2005 purchase price that it amounted to over a
13 hundred million dollars.

14 Those are the PMKs, Your Honor, not argument of
15 counsel, but those were the PMKs. And, Your Honor, that's why
16 that evidence was excluded. It was excluded to determine just
17 compensation for the same reasons it should be excluded to
18 determine prejudgment interest.

19 Now, let me address the *Barsy* decision. As I laid
20 out, Your Honor --

21 THE COURT: And I'm going to jump in for a second.

22 MR. LEAVITT: -- *Barsy* is a decision -- sure.

23 THE COURT: And I just want to make sure the record
24 is clear in this regard because from a historical perspective,
25 I do remember a lot of the law and motion in this case. Now,

1 understand, when it comes to discovery, and I know everyone
2 understands it is relevancy for the purposes of discovery is
3 much broader than admissibility at the time of trial; right?
4 We all understand that.

5 MR. LEAVITT: Right.

6 THE COURT: And that's one of the reasons why I
7 permitted discovery on the purchase price issue; however,
8 ultimately, at the end of the day, when it comes to the value
9 and just compensation at the time of taking, that's not
10 relevant, really and truly. It comes down to what was the
11 valuation back in 2017 when I made a determination there was a
12 taking in this case.

13 Just -- and this is important to point out as far as
14 that value is concerned. I mean, two things. First and
15 foremost, that was a question of fact; right. Secondly, we had
16 an evaluation from the plaintiff at approximately 34 million or
17 so, and then I had nothing else to consider. So in many
18 respects, when it comes to that evaluation, that's what was
19 admitted at the hearing, and so that's what I went with; right?
20 And that's kind of important to point out.

21 For the record, I do -- and this is a question I have
22 for everyone. I did read the *Barsy* case, and I think that's
23 what you're going to. I have a copy of it. The text right in
24 front of me, and I'll just read into the record what the trial
25 court -- I'm sorry, the Supreme Court set forth in that

1 specific case.

2 And this is the, to me, some of the really important
3 and pertinent language, and this is off of page 718 of the
4 decision, and that would be 113 Nevada Reporter 718, and I'm
5 looking right here, and it starts out as follows: NDOT
6 contends that the statutory rate operates as a prima facie
7 evidence of a fair rate, period. In Clark County versus *Alper*,
8 and they cite the case. This Court referred to the statutory
9 rate as a floor on permissible rates and allowed the
10 legislature -- it allowed that legislative amendments
11 increasing the statutory rate where prima facie proof of an
12 interest -- of an increase in interest rates, not prima facie
13 proof of a fair rate, and that's really important to point out.

14 And they go further. They said this Court further
15 held that the determination of a proper interest rate is a
16 question of fact, and the District Court was not bound by the
17 statutory rate, period. And so that's kind of where we're at
18 right now. I understand it's a question of fact. I get that.

19 And so here we have evidence from two experts offered
20 by the plaintiff at this stage of the proceedings, and it's
21 pretty clear what the opinions are. And so anyway, when it
22 comes to determining what would be just compensation as it
23 pertains to -- and I want to make it really clear. I'll go
24 ahead and set it forth as it's stated in the case because I
25 don't want to misquote it.

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1 The Court further went on and said, quote, This Court
2 further held that the determination of a proper interest rate
3 is a question of fact, and the District Court was not bound by
4 the statutory interest rate. We stated that just compensation
5 requires that the landowner be put in as good position
6 pecuniarily as he would have been if his property had not been
7 taken.

8 The purpose of awarding interest is to compensate the
9 landowner for the delay in the monetary payment that occurred
10 after the property had been taken, and that appears to be
11 fairly clear to me, and so at the end of the day, that's what
12 we're really looking at. We're looking at, okay, what is the
13 appropriate, fair rate under the facts of this case based upon
14 the current evidence as set forth in the record?

15 Is that a little distortion?

16 THE COURT RECORDER: I'm going to mute somebody.

17 THE COURT: Okay. And that's where we're at
18 primarily.

19 And so my question, my first question is this. What
20 does a trial court like me do under the facts of this case
21 where I have to decide what the rate should be; right, in light
22 of the current state of the evidence, because this is a
23 question of fact. And I'll just throw that out because I have
24 a lot of other thoughts in that regard too.

25 Mr. Leavitt, and then we'll hear from Mr. Schwartz.

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1 MR. LEAVITT: Thank you, Your Honor. Again, James J.
2 Leavitt on behalf of 180 Land, the plaintiff landowners.

3 And continuing in the decision, Your Honor, and
4 you're absolutely correct as going forward in reading the case,
5 it's a question of fact based upon the evidence that's
6 presented. And as we continue down the case, on page 718, that
7 note 6 is where the Court specifically identifies the evidence
8 that was considered by the lower District Court Judge and
9 affirmed by the Nevada Supreme Court.

10 Again, this is the only case that I'm aware of where
11 the Nevada Supreme Court identifies the type of evidence that
12 it would consider when determining the fair rate, and it's
13 right here. It says Barsy's expert, at Headnote 6 testified
14 that a prudent landowner would have paid off the mortgage on
15 the land or invested his money in land similar to that
16 condemned rather than hold the land at such a low rate of
17 return.

18 So what we did, Your Honor, is we presented our -- we
19 presented these two experts with that precise language and said
20 we want you to determine for us the rate of return that the
21 landowners could have achieved on the \$34,135,000 had they
22 invested in land similar to that condemned, and that's the
23 evidence that we brought to you, which is the specific evidence
24 that the Nevada Supreme Court relied upon in *Barsy*.

25 Now, Your Honor, counsel stated that what happened in

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1 *Barsy* is that the Court granted interest to make up for lost
2 tenants and lost money that was -- that Mr. Barsy had incurred
3 as a result of tenants leaving his property. Your Honor, we
4 litigated that case. That appears nowhere in that case. The
5 lost tenant compensation was compensated through what was
6 called precondemnation damages in that case.

7 Then after that precondemnation damages was paid and
8 compensation was paid for the land on top of that, the Nevada
9 Supreme Court awarded prejudgment interest. There's not a
10 citation in any part of that record. I don't recall that ever
11 even being an issue that interest was awarded to make up for
12 lost tenants. It's an entirely made up rendition of the case,
13 Your Honor.

14 The case is very clear that the interest that was
15 awarded in *Barsy* was because Mr. Barsy was not timely paid. It
16 was for the lost use of the proceeds and that interest rate was
17 based upon what he could have earned had he invested that money
18 in land similar to what was taken, and that's again, Your
19 Honor, the evidence that we presented to you.

20 The *Alper* case. Counsel stated that in *Alper* the
21 Nevada Supreme Court awarded prime plus two. Again, that's not
22 true. In *Alper*, the Nevada Supreme Court remanded the case
23 back to the lower District Court Judge and gave a very clear
24 signal to the lower District Court Judge.

25 In *Alper*, the Nevada Supreme Court wanted to make

1 sure that the type of arguments that we're hearing today don't
2 influence the determination of interest. Again, the Court said
3 that -- in *Alper* it sent the case back to the District Court
4 and then told the District Court, listen, interest may be very
5 substantial in this case and may, in fact, exceed the inflated
6 value of the land.

7 The Court wanted to be very clear to the District
8 Court Judge that it was sending that *Alper* case back to is that
9 listen, your interest calculation must be based on the
10 Constitution. It must be based upon the proper rate and in
11 times it's going to far exceed the value of the land taken,
12 just like it far exceeded the value of the land taken in the
13 *Sisolak* case.

14 The other argument that counsel makes is that we're
15 asking for profit. Your Honor, we're not asking for any
16 profit. We didn't bring to you a project. We didn't go out
17 and build an apartment complex and say here's the money we
18 would have earned. That's not what we did.

19 Again, we gave to two different experts, who by the
20 way prepared their reports entirely independent of one another
21 and gave the instruction from *Barsy*: What is the rate of
22 return the landowners could have achieved by investing in land
23 similar to that condemned, and they both provided empirical
24 evidence of exactly what that rate of return would have been
25 during the relevant period.

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1 And, Your Honor, I'll just say this briefly. All of
2 this argument and statements about building and not building
3 again, entirely irrelevant to why we're here today.

4 I'll address one last final argument, Your Honor.
5 His counsel said these landowners would not have developed or
6 reinvested in land. These landowners wouldn't have done this.
7 I have no idea how Mr. Schwartz knows that. It's argument of
8 counsel, but we do have evidence, which is why we're here
9 today, is to review evidence and arrive at a fair rate based
10 upon the question of fact presented to you, and that evidence
11 was attached to our reply as Exhibit Number 8, and it's the
12 declaration of Vicki DeHart (phonetic). She is one of the
13 principals in this case. I'll just read a very small portion
14 of it:

15 That the common practice of the partnership
16 is to invest in real estate proceeds -- invest
17 in real estate property. That they never would
18 have invested in any type of instrument or land
19 that only yields prime plus two, and then they
20 say the proceeds would have been reinvested in
21 vacant land or improved real property by means
22 of a 1033 exchange.

23 Which is the eminent domain version of a 1031
24 exchange.

25 So the evidence that's before us here today is that

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1 the proceeds would have been invested in land. That's the
2 exact evidence. We didn't even need the declaration because
3 that's the exact direction that the Nevada Supreme Court has
4 given in the *Barsy* case is to determine the rate of return that
5 would have been achieved if they had invested the money in land
6 similar to that condemned.

7 So, Your Honor, we ask that you enter an order.
8 Again, the other two issues are not in dispute. The only issue
9 is what's that fair rate of return? And in particular, for
10 this landowner who does land investments, in fact, we've
11 referred to the landowner repeatedly through this proceeding as
12 the landowner, and the City has repeatedly referred to them as
13 the Developer, and now the City wants to pretend like he's not
14 a land investor; he's not a Developer.

15 We have the perfect situation here, Your Honor, for
16 this question of fact where we have the perfect plaintiff who
17 only invests in land. Their business has never invested in
18 stocks or any other type of investment instrument that would
19 bring a rate of return of prime plus 2 percent as set forth in
20 Ms. DeHart's declaration. She lays it out very clearly what
21 they invest in. Not only do we have the perfect plaintiff, but
22 we have the perfect facts which line up identical to the *Barsy*
23 case, which is exactly what the *Barsy* court decided.

24 So, Your Honor, we would respectfully request,
25 pursuant to the *Barsy* decision, that the rate of return of

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1 23 percent be applied. That's the only empirical evidence
2 before the Court which establishes a fair rate of return, Your
3 Honor.

4 THE COURT: All right. And I did ask some questions.
5 Mr. Schwartz, out of fairness, I'm going to give you a chance
6 to address those, sir.

7 MR. SCHWARTZ: Thank you, Your Honor.

8 In the *Barsy* case and the *Alper* case, these are
9 physical takings cases. The Court did not -- there's no
10 evidence, no evidence whatsoever that the City dispossessed the
11 property owner from the property, that the City took possession
12 of the property. There's no evidence of that whatsoever.
13 Those cases don't really apply. The cases that apply here are
14 Kelly, Boulder City and State, and those cases hold that to
15 show a taking through regulation of the owners use of the
16 property there has to be a complete wipeout in value. And
17 there clearly wasn't a complete wipeout of value for all of the
18 reasons that we have presented in evidence in this entire case,
19 including their argument to the tax assessor that the property
20 still had golf course use of the property after the City
21 allegedly -- after the City denied the 35-acre application.
22 That statement was made by the Developer's attorney two months
23 after the City denied the Developer's applications.

24 But be that as it may, the City has not, has not
25 dispossessed the Developer. There's no evidence of that, and

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1 so I don't think the Court's decision could be based on the
2 *Barsy* and *Alper* case because those are cases involving eminent
3 domain with a physical possession of the property.

4 By I think that the argument -- the Developer's
5 argument here loses sight of the standard here. Yeah, if the
6 Developer had invested the money in the real estate market, in
7 2020 hindsight, they would have made -- they could've made some
8 big profits. It would depend on what property they invested in
9 because some appreciated, and some didn't appreciate, and
10 they're just dealing with averages here.

11 So this requires the Court to speculate as to what
12 this 23 percent, pure speculation.

13 But anyway --

14 THE COURT: And so --

15 MR. SCHWARTZ: -- maybe they would have made more
16 money if they had invested the award.

17 THE COURT: No. No. I don't want to cut you off, I
18 don't. Why would it be speculation? That's what I need to
19 know.

20 MR. SCHWARTZ: Well, the evidence before the Court as
21 to the rate of appreciation of real estate, not the interest
22 rate -- we're getting far afield here from interest, which is a
23 problem, but the rate of appreciation of real estate is an
24 average rate. It's an average rate. So the Court does have
25 evidence of a proper interest rate, which is the statutory

1 rate. The legislature is saying here's the rate. Unless you
2 can show, unless you can show that the owner needs a higher
3 rate to be made whole.

4 But what the evidence before this Court is not an
5 interest rate. It's the average rate of return of certain
6 types of real estate in the City of Las Vegas in the last four
7 years. So it's entirely speculative to say, if I'm a judgment
8 creditor in a takings case, I would have invested the money. I
9 would've invested the money in real estate, and the property I
10 would have invested in would have appreciated at the average
11 rate of all these properties. I would've been wise enough to
12 invest it in property where I wouldn't have lost money or maybe
13 not lucky enough to invest it in property that -- where its
14 value multiplied many times in that period, but it's the
15 average rate. So it's just -- it's 2020 hindsight about a
16 speculative investment. And you could say the same thing.

17 What if the stock market had gone up 30 percent per
18 year since 2017. The Developer could then say, well, I
19 would've taken that 34 million and invested it in the stock
20 market, and I would have made an average the increase in the
21 market, in the Fortune 500 or the NASDAQ. I would've made that
22 money. Purely speculative, and I don't think that the
23 Constitution or the legislature intended that this Court would
24 be engaging in that kind of speculation in setting an interest
25 rate.

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1 The Court would set an interest rate needs to look at
2 what's the return on the value -- the time value of money.
3 What's the return on that money had they invested it and got
4 interest, not profit. And then the Court the Constitution
5 says, well, the Court can't set an interest rate that's higher
6 than the statutory rate in order to make the property owner
7 whole.

8 So, yeah, there's evidence before the Court of how
9 the real estate market appreciated overall in Las Vegas, but
10 there is no evidence before the Court that an interest rate
11 higher than the statutory rate is necessary to make this
12 property owner whole, like in *Barsy*.

13 That's -- counsel's rendition of the facts in *Barsy*
14 is not correct. In *Barsy*, the Court said you lost tenants. So
15 in awarding the -- in awarding the awards for the value of your
16 property -- remember, this is the condemnation action. The
17 agency took possession, took title of the property for a public
18 project. Condemnation action. The award of fair market value
19 as of the date of value was not enough to compensate for your
20 lost tenants, nor was the precondemnation interest. That's why
21 the Court said we're going to set an interest rate that's
22 higher -- higher than we otherwise would because to make up --
23 to make up for your lost value of your real estate during the
24 time when the City hadn't condemned your property.

25 If the precondemnation damages in *Barsy* were enough

1 to compensate the property owner for the lost tenants, then why
2 would the Court engage in this inquiry about an interest rate
3 necessary to make the property owner whole. So the facts as
4 the Developer has described them are wrong.

5 So we focus now on the standard, which is you need to
6 make the property owner whole.

7 Now, this Developer says, well, you need to make me
8 whole because I needed this money to build. I'm a developer.
9 I build -- I build things.

10 Well, the City has established, has clearly
11 established that this Developer has no interest in building on
12 the Badlands property. It had a permit to build 435 units on
13 the 17-acre property, and it's done nothing, nothing to build,
14 and, of course, the reason? Well, because that doesn't fit
15 with its narrative here, which is that it's victimized by the
16 City.

17 The Developer could've filed another application to
18 develop the 35-acre property at the City's invitation. It
19 didn't do so. It could have tried to develop the 133-acre and
20 65-acre property. It had no interest. So the Developer didn't
21 need this money.

22 My point is, Your Honor, the Developer didn't need
23 this money to make it whole so that it could engage in some
24 real estate development. It didn't have any interest in that.
25 It's just using the Courts here to get, you know, a windfall

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1 from the taxpayers. So it didn't need a higher interest rate
2 to be made whole.

3 And my final point is this, okay. And there is
4 absolutely no evidence that the purchase price, and the Court I
5 think needs to focus on the amount the Developer paid for the
6 property in order to determine whether the interest rate on the
7 judgment needs to be extraordinarily high to make the Developer
8 whole. So then purchase price is directly relevant.

9 Now --

10 THE COURT: And I have a question for that, and this
11 is just more of a hypothetical than anything else. I mean, I
12 look at my house I currently live in, and I don't mind saying
13 it, I mean, I'm fortunate I live in a great neighborhood, and
14 I've been in the house for about 9, 10 years, and the value has
15 doubled; right? And we all know what the real estate market
16 has done over the last three or four years, more than doubled.

17 But my question would be this. Hypothetically, if
18 there was a taking done by a governmental entity today, why
19 would the purchase price be relevant on any level? Because
20 it's worth what it's worth at the time of the taking. So why
21 am I --

22 MR. SCHWARTZ: Well, that's right.

23 THE COURT: Yeah. And so why am I focused on that
24 issue? Because now we're looking at the time period post
25 taking during the litigation where the landowner was deprived

1 of usage in looking at what the appropriate interest rate
2 should be for that.

3 And I kind of get that, but -- and here's -- and I
4 don't mind -- this -- and I get it. That's why I'm spending a
5 lot of time on this because I understand it's a lot of money.
6 There's a lot of risk. I get it. I understand all of that.

7 Here is my question, and this is straight from the
8 *Barsy* case. It provides the following: Quote, While the
9 statutory rate should be used if unchallenged, once competent
10 evidence is presented supporting another rate of interest as
11 being more appropriate, and this is where the language gets
12 really interesting, quote, The District Court must determine
13 which rate would permit the most reasonable interest rate;
14 right. What would be reasonable, and that's specifically what
15 the language from the case provides, and so that's what I'm
16 required to do.

17 And I realize there's a lot here. There's a lot at
18 risk, I do, and I want to make sure -- because I want to really
19 take my time as far as this specific issue is concerned.

20 And so, Mr. Schwartz, in light of that, what do I do?
21 I mean, I want to make sure I understand what your position is
22 because right now, I mean, I have to determine ultimately a
23 question of fact. I do have two evaluations from the landowner
24 in this case, and that I have to grapple with as the fact
25 finder, and we can all agree to that, and that's what I'm

1 required to do.

2 And just as important, when it comes to review, it's
3 my understanding that at the end of the day, what the reviewing
4 court would look at, and they would make a determination as to
5 whether or not whatever decision I make is supported by
6 substantial evidence in the record; right, more likely to than
7 not, preponderance of the evidence standard.

8 But go ahead, sir. I don't want to cut you off. I'm
9 going to open it up for you. I have made a lot of comments
10 there.

11 You have the floor.

12 Of course, we're going to hear from Mr. Leavitt after
13 you're done.

14 MR. SCHWARTZ: The legislature has determined that a
15 proper rate of interest for a judgment is -- prejudgment
16 interest is prime plus 2 percent, and the law provides that you
17 can -- that the Court can find that the rate is higher than
18 that if it's necessary to make the property owner whole.

19 This Court has been asked to determine an interest
20 rate that will make the property owner whole, and that's in
21 addition to the award; right? Because the Court's already made
22 an award of 34 million plus.

23 So the Court's task is to find an interest rate that
24 is necessary to make the property owner whole. So in this
25 case, the property owner bought the property for four and half

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1 million. Now, why is that significant? Well, because the
2 award is 54 times what the property owner paid for the 35-acre
3 property, 54 times. And the property owner's appraiser, the
4 property owner's appraiser said that the property is worth
5 \$34 million and change if the property owner -- if the property
6 can be developed with housing, and it's worth zero if it's not,
7 if it can't be developed for housing.

8 In his appraiser -- in his appraisal, Mr. DiFederico
9 used comparable sales to value the property. One of his sales
10 was from February of 2015. That's a month before the close on
11 the sale of the Badlands property. And this notion that there
12 was some 2005 purchase price, there's no evidence of that, and
13 it's not relevant because we've got a purchase and sale
14 contract from 2015 between --

15 THE COURT: So tell me this, sir --

16 MR. SCHWARTZ: -- it's been authenticated --

17 THE COURT: -- and I don't want to cut you off. I
18 don't want to cut you off on this issue. I don't, but you keep
19 going back to the purchase price, and why would that be
20 relevant as it pertains to the ultimate determination I made in
21 this case regarding the value of the property at the time of
22 taking? Because we can all agree --

23 MR. SCHWARTZ: Because it's relevant --

24 THE COURT: -- assets -- you know, you can buy
25 something if you hold it, and sometimes you buy in the right

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1 area, and the property can make -- increase dramatically over
2 17 years, and consequently, why would the purchase price matter
3 when the fair market value at the time of taking could be 50
4 times or a hundred times what the purchase price will be?

5 And that happens a lot with real property, especially
6 in a growing community like Las Vegas. Because I've been here
7 since 1985, and I would anticipate some parts of the Valley
8 back in 1985, I remember this where St. Rose Parkway is located
9 was raw desert. Today I don't know what that property is
10 worth, and that's kind of my point. I'm trying to figure out
11 on any level why the purchase price would be germane. I just
12 don't see it.

13 MR. SCHWARTZ: Because the Court's already awarded
14 what the Court says is just compensation of \$34 million. And
15 in setting the interest rate, the Court looks to whether the
16 property owner needs to be made whole, not what they would have
17 made had they invested that money in some investment. The
18 Court is here trying to determine an interest rate (video
19 interference).

20 THE COURT: And that interest rate -- and the
21 interest rate from the time the taking occurred up until I make
22 the decision, like we would in any case involving prejudgment
23 interest; right?

24 MR. SCHWARTZ: But what -- that's not interest. What
25 happened after the judgment, after the -- excuse me, after the

1 alleged taking, what happened after the alleged taking, that's
2 subject to prejudgment interest. The legislature didn't say,
3 you know, what -- that you can get what's called profit for
4 investing the money that you should have received on that date.
5 That would leave these taking cases over to a complete
6 free-for-all of grossly speculative evidence, like we have in
7 this case, about what the property owner would have made.

8 That's not typically admissible in evidence. It's
9 too speculative, but that's not the test, and that's why the
10 test is interest, and the interest has to be, if it's going to
11 be higher than the statutory amount, it has to be to make the
12 property owner whole for something that happened before the
13 taking in this case.

14 Now if I could finish my point about this purchase
15 price.

16 So the Developer's appraiser said that one of the
17 sales that and which he relied for his \$34 million value for
18 just the 35-acre property was from February of 2015. Well, the
19 sale of the 35-acre property occurred in March of 2015. So you
20 can't say that the very same property is not relevant to the
21 value of the property --

22 THE COURT: No. No. Say that --

23 MR. SCHWARTZ: -- when their own appraiser is
24 admitting --

25 THE COURT: And, Mr. Schwartz --

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1 MR. SCHWARTZ: -- that these sales are relevant --

2 THE COURT: Mr. Schwartz, I don't want to cut you
3 off. Say that again so I can make sure I -- so I can make sure
4 I can follow you. I think you were talking -- I just want to
5 make sure I understand what your position is. You said -- did
6 you say 1985?

7 MR. SCHWARTZ: No. I said 2015.

8 THE COURT: Okay, no. No. I want to follow you.
9 The 2015 transaction. Go ahead and tell me what you said. I
10 want to listen. Go ahead.

11 MR. SCHWARTZ: So an appraiser values property by
12 comparing the subject property with sales of similar property.
13 The more similar the property, the more accurate the appraisal,
14 the less subject to the appraisal. The sale of the very same
15 property, the very same property that's at issue is -- can be a
16 perfect comparable. It's the same property. It's got the same
17 location, the same topography, the same features. Everything
18 is the same. So there's not much guesswork.

19 So when this appraiser considered sales of property
20 from before the date of value, the date that the Badlands
21 transaction, so you can't say that this appraiser -- that the
22 sale of the Badlands being about two years -- two years and
23 five months before the alleged date of value, you can't say
24 that it's too old, that there's -- that it's too old. So it's
25 almost a perfect comparable, and that property sold for 18,000

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1 an acre.

2 Mr. DiFederico said that that same property, that
3 same property is now worth almost a million dollars an acre.
4 So when you compare the Developer's investment in the property
5 with the judgment, the Developer made 54 times their
6 investment. You don't need to give them a high interest rate
7 to make them whole.

8 Let's take the Developer's allegation that they spent
9 45 million for the property. Heck, why not a million, a
10 hundred million, a hundred million dollars. There's no
11 evidence of that, but let's say a hundred million. That's
12 400,000 and acre. This Court has awarded the Developer almost
13 a million dollars per acre for this property. So that's more
14 than twice what the Developer paid, even with the Developer's
15 false claim that they paid a hundred million dollars for the
16 Badlands.

17 So the Developer doesn't need this extraordinarily
18 high interest rate to be made whole for something that the
19 government did.

20 The Developer also had the right to change the date
21 of value to the date of trial. The Developer didn't do that.

22 If -- you know, if the -- if the property had
23 appreciated like they say, well, the Developer could have done
24 that. They didn't do that.

25 But the evidence to the Court, that's before the

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1 Court is completely speculative. In any takings case where
2 there's a damage award, is the Court going to say well, you
3 know, I am going to, you know, in looking back in the two or
4 three years from the time of award of prejudgment interest to
5 the alleged taking, the Court's going to look back and say,
6 well, the Developer is going to -- the property owner is going
7 to say, well, I would have invested it in my uncle's -- my
8 uncle's shoe business, and I would have -- and, look, my
9 uncle's business made, you know, these exorbitant profits, and
10 so that's my -- that's what I lost.

11 I just think that the Court going down this road,
12 even if the Court can consider this, because again, there's no
13 evidence the Developer hasn't been made whole, if the Court
14 goes down that road, it's requiring the Court to engage in rank
15 speculation.

16 And it also will end up in a completely unjust
17 result. I mean, the Developer has already made 54 times its
18 investment in the property. And to award the Developer another
19 \$52 million just it kind of shocks the conscience.

20 So there's no grounds for it. The Developer has
21 already made a windfall. It doesn't need to double down on the
22 windfall.

23 THE COURT: So I guess the bottom line, sir, what
24 you're saying, look, Judge, you should stick to the statutory
25 rate?

1 MR. SCHWARTZ: That's right. We calculated what the
2 statutory rate would yield based on the judgment. Again, we're
3 not conceding anything about liability in this case or, you
4 know, that the compensation awarded was just, but based on the
5 Court's judgment and the facts of this case, the unrefuted
6 facts, an interest rate higher than the statutory rate would be
7 unconscionable, would -- it would pile an enormous windfall on
8 top of what is already an enormous windfall, giving the
9 Developer, as I calculated, 13,800 percent profit on its
10 investment.

11 THE COURT: I understand, sir. I just wanted to make
12 sure I wasn't overlooking anything.

13 All right. And have you said everything you need to
14 say right now, sir? Then I'll go ahead and give Mr. Leavitt
15 the last word on this issue.

16 MR. SCHWARTZ: Yeah. One more thing. In the *Sisolak*
17 case, the prejudgment interest was greater than the award
18 because it was assessed over a very long period of time, a very
19 long period of time. But it's my understanding that the
20 interest rate awarded in *Sisolak* was the statutory rate. It
21 wasn't -- it wasn't -- it wasn't what the Developer could have
22 invested in the property. I mean, if that were the case,
23 certainly the Developer in that case could have made the
24 argument, well, I could've taken the money and invested it in
25 this and invested it in that and made higher than the statutory

1 rate.

2 I don't think that occurred in the *Sisolak* case
3 because there was no showing that the Developer needed a higher
4 interest rate to be made whole, and that's really the point
5 here.

6 The Court doesn't get to all of this other evidence
7 unless the Court finds that the Developer -- that something
8 about that award was not enough to compensate the Developer,
9 just not enough to give them 54 times their investment in the
10 property. They need more. That's the --

11 THE COURT: But is --

12 MR. SCHWARTZ: That's the decision the Court needs to
13 make.

14 THE COURT: But here's my question though. Is that
15 really the standard? And the reason why I asked that question,
16 and this come straight from the *Barsy* case, and this is what
17 the Nevada Supreme Court sets fourth, and I think I've read
18 this in the record before, but quote,

19 "While the statutory rate should be used if
20 unchallenged, once competent evidence is
21 presented supporting another rate of interest
22 being more appropriate, the trial judge must" --
23 Meaning I have no alternative here.

24 -- "then determine which rate would permit
25 the most reasonable interest rate."

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1 And so that's where we're at right now.

2 MR. SCHWARTZ: But the reasonable rate, Your Honor,
3 is the rate that's necessary to make the property owner whole.
4 The Court in that case said that the owner lost tenants while
5 the agency delayed the -- filing the eminent domain action.

6 Again, the Court already -- if the Court had already
7 made the owner whole with the award of the fair market value of
8 the property and the prejudgment -- the precondemnation damages
9 award, if it had already made the owner whole, then under the
10 Constitution, there would be no reason to award higher than the
11 statutory rate. That's only, you know, a reasonable rate is
12 only the rate that's necessary to make the owner whole, the
13 owner whole.

14 And in this case, in *Barsy*, I think it's pretty clear
15 the Court was giving a rate higher than the statutory rate
16 because they wanted to make the property owner whole, and they
17 said well, you can invest another real estate where you get a
18 higher return. That's because the assumption is you'd have
19 tenants, and you'd be getting a higher return than the return
20 that you got during this period, which was because you didn't
21 have tenants.

22 So that's why the Court there found, well, we need to
23 give a higher rate, and so we'll use, you know, we'll
24 compensate this owner who wasn't made whole by the awards with
25 this higher rate, and it just happens to be that the evidence

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1 was, well, what -- what he would have invested in this other
2 real estate to where if they had tenants he would've made up
3 that money had he lost, that he lost because the agency caused
4 him to lose his tenants.

5 We don't have that situation here. We have the
6 opposite situation where the Developer invested a certain
7 amount of money, and the Courts awarded the investor 54 times
8 what the Developer invested in the property. So the Developer
9 didn't lose anything. They got a huge windfall. So there's no
10 reason to award prejudgment interest in addition to that huge
11 windfall, to give them double or triple, yes, 52 million, would
12 have been having tripling their windfall.

13 You know, under the Constitution to test this, you
14 got to make the property owner whole. I think that's what the
15 Court needs to focus on, and there's no evidence that this
16 Developer needs yet more money to be made whole.

17 THE COURT: All right, sir. And thank you.

18 And we'll hear from Mr. Leavitt now.

19 MR. LEAVITT: Thank you, Your Honor. James J.
20 Leavitt on behalf of 180 Land, the plaintiff landowner again.

21 Your Honor, counsel said that the legislature
22 determined prime plus 2 percent to be the appropriate rate.
23 That's not what the legislature determined. The legislature
24 that the state says -- that the statute states the rate of
25 interest to be used to compute the award of interest must be

1 determined by the Court which, quote, must not be less than
2 prime plus 2 percent. The legislature never once determined
3 the prime plus 2 percent is the appropriate rate. They simply
4 said it cannot be below that.

5 And as you read from *Barsy*, the Nevada Supreme Court
6 said that once you receive competent evidence, you must
7 determine the rate which would be the most reasonable interest
8 rate. So the operative words there are reasonable interest
9 rate.

10 I will quote from the report by Bill Lenhart. This
11 is interest motion Bates stamp 0085. He concludes that he's
12 done his entire research here and that he says that the rate
13 which a landowner, and I'm going to quote, would reasonably
14 expect is a compound rate of 25 to 27 percent a year.

15 Your Honor used the exact standard that the Nevada
16 Supreme Court asked this Court to follow and asked *Barsy* to
17 follow, which what is the reasonable interest rate based upon
18 the rate of return for land during the relevant period.

19 Mr. DiFederico in his report, interest motion, dash,
20 0005, arrived at the same conclusion of a reasonable interest
21 rate except for he arrived at 23 percent, again pursuant to the
22 *Barsy* decision.

23 So, Your Honor, the question was to Mr. Schwartz, why
24 is this speculative? It's not, Your Honor. There's three
25 reasons this rate of return is not speculative. Number one,

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1 the rate of return based upon land is what the landowners do.
2 They've done it in the past, and they're doing it now. They
3 invest in land.

4 Number two, it's what *Barsy* relies upon. *Barsy*
5 relies upon evidence of what the rate of return is of land
6 during the relevant period to determine the rate of interest.

7 And third, it's what the experts have confirmed in
8 this case.

9 So we have the landowners doing it. We have the
10 *Barsy* court relying it on it, and we have the experts
11 confirming it. That's the evidence before the Court right now
12 on this question of fact.

13 What we don't have from the City is any evidence of
14 why prime plus two should apply. They provided no evidence
15 from anybody, from an expert other than argument of counsel.
16 And what is that argument of counsel based on? He reargues the
17 purchase price that this Court has already ruled on, and he
18 tries to claim that that purchase price occurred in 2015. Both
19 the person most knowledgeable on the sale and the person most
20 knowledgeable on the purchase stated that the purchase price
21 was in 2005.

22 I'm going to quote just very briefly, Your Honor,
23 from this Court's order on the purchase price. Number one, the
24 purchase price transaction does not reflect the highest and
25 best use of the 35-acre property on the date of value.

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1 Number two, the City has not identified an expert
2 that can testify to it.

3 Number five finding, jumping ahead, the purchase
4 price transaction beginning in 2005 is too remote to the date
5 of value with changes in the market fluctuations.

6 And then, Your Honor, I'm not going to continue to
7 read. That's the Court's motion -- that's the Court's order on
8 the motion in limine. We've been down this road. We've argued
9 this issue ad nauseam. The purchase price has been excluded
10 because it's so remote.

11 I will end with one example. You buy a parcel of
12 property in Las Vegas in 2005, your home. Say you got it for
13 \$50,000. Since 2005, which would not be unheard of, the
14 property is now worth \$700,000.

15 Under Mr. Schwartz's analysis here, all the City
16 would have to pay is \$50,000 because that made you whole, no
17 interest, not the increase in the value of your land, but let's
18 go back 17 years. Let's look at what you paid for the
19 property, and we'll give you 50 grand. Now, you've been made
20 whole. That's not the standard.

21 The standard is determining the value of the property
22 on the date of value. Once that property valuation is
23 determined, then the interest rate is -- then interest is based
24 on that value, and the rate is based on the time period in
25 which the landowners lost the use of those proceeds, and the

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1 Nevada Supreme Court in Barsity said, look to land increases.

2 We've done that, Your Honor, and that's the only
3 evidence before the Court.

4 We respectfully request that you apply that -- or
5 that you rule that that 23 percent rate of return should be
6 applied because there's no evidence to contest it, just like
7 there was no evidence to contest the \$34 million value.

8 Thank you, Your Honor.

9 THE COURT: All right. And I don't mind saying this.
10 I mean, I thought about this case. I thought about my prior
11 decision as it pertained to the 34 million. And at the end of
12 the day there was no other alternative as far as value is
13 concerned.

14 And then, I mean, this -- I don't mind saying this to
15 everyone. The amounts being requested are significant sums of
16 money. I've made a lot of decisions in the past regarding
17 sums. I mean, I've had judgments in excess of \$500,000,000 in
18 this department that I had to reduce. That was for punitive
19 damages. It's my recollection I reduced it by -- I think it
20 was a State Farm Insurance Company case in front of the supreme
21 court where punitive damages had to have some sort of
22 relationship to compensatory damages, no more than 10 to 1.
23 And I had to reduce that. I forget what the exact sum was.
24 But I'm just saying we've had a lot of cases like that.

25 But here -- and this is the real -- I guess where the

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1 rubber meets the road. We have argument about potentially what
2 would be the most reasonable interest rate, but I have no
3 evidence. And that's kind of what I'm grappling with right
4 now. We have no challenge under Hallmark as to --

5 MR. SCHWARTZ: Your Honor.

6 THE COURT: Yeah, go ahead.

7 MR. SCHWARTZ: Counsel freely intermixes rate of
8 return with interest rate. The expert testimony that was
9 presented to this Court are the rates of appreciation of real
10 estate. They are not reasonable interest rates. There's no
11 evidence from the developer of a reasonable interest rate in
12 this case.

13 THE COURT: All right.

14 MR. SCHWARTZ: He said the expert said a reasonable
15 interest rate is such and such, 23 percent per year. No,
16 that's not what the evidence shows. The evidence shows that
17 real estate, that the average of a class of real estate in Las
18 Vegas appreciated at a certain rate. Interest rate is the time
19 value of money. There's no case in Nevada where the Court has
20 awarded prejudgment interest at greater than prime plus
21 2 percent. Thank you.

22 THE COURT: All right. And I'm going to tell
23 everyone this. Am I going to make a decision right now? No.
24 I'm going to go back and read everything because there's a lot
25 of money involved. But at the end of the day, I'm going to