

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAW OFFICE OF DAN M. WINDER
P.C., a domestic professional
corporation, and DAN M. WINDER,
an individual,
Petitioners

Electronically Filed
Jul 13 2021 09:23 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

The Eighth Judicial District Court of
the State of Nevada, IN AND FOR the
COUNTY OF CLARK; and the
Honorable Gloria J. Sturman, District
Judge Department 26,
Respondents;

And

Lavelle P. Atkinson and Sheila
Atkinson, Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS
Mandating the Eighth Judicial District Court, Clark County
The Honorable Gloria J. Sturman District Judge
Grant Summary Judgment to Petitioners in
District Court Case No. A-19-804902-C

PETITIONERS' APPENDIX VOLUME 5 of 5

Arnold Weinstock, Esq.
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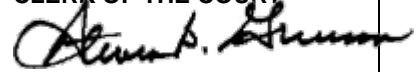
Attorney for the Winder Petitioners

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAVELLE P. ATKINSON, SHEILA
ATKINSON, individuals,

Plaintiffs,

vs.

CHARLES BROWN, an individual; STACY
BROWN, an individual; LAW OFFICE OF DAN
M WINDER, P.C., a domestic professional
corporation; DAN M. WINDER, an individual;
DOES I through X; and ROE CORPORATIONS
I through X, inclusive.

Defendants.

Case No.: A-19-804902-C

Dept. No.: XXVI

**ERRATA TO PLAINTIFFS' OPPOSITION
TO WINDER DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

Hearing Date: June 15, 2021

Hearing Time: 9:30 a.m.

Pursuant to NRCP 6(b), Plaintiffs Lavelle P. Atkinson and Sheila Atkinson (collectively "Plaintiffs" or the "Atkinsons"), by and through their attorneys of record, hereby file this errata to their opposition to the Winder Defendants' motion for summary judgment. Through this errata, Plaintiffs will correct an error in which Plaintiffs inadvertently omitted Exhibit 29 to the above-

1 referenced opposition. As such, attached hereto is **Exhibit 29** to Plaintiffs' opposition.

2 DATED this 24th day of May, 2021.

3 Respectfully submitted,

4 **MAIER GUTIERREZ & ASSOCIATES**

5 /s/ Danielle J. Barraza

6 JOSEPH A. GUTIERREZ, ESQ.
Nevada Bar No. 9046

7 DANIELLE J. BARRAZA, ESQ.
Nevada Bar No. 13822

8 8816 Spanish Ridge Avenue
9 Las Vegas, Nevada 89148
Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Administrative Order 14-2, a copy of **ERRATA TO PLAINTIFFS'**
3 **OPPOSITION TO WINDER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was
4 electronically filed on the 24th day of May, 2021, and served through the Notice of Electronic Filing
5 automatically generated by the Court's facilities to those parties listed on the Court's Master Service
6 List, as follows:

7 Dan M. Winder, Esq.
8 Arnold Weinstock, Esq.
9 LAW OFFICE OF DAN M. WINDER, P.C.
3507 West Charleston Blvd.
Las Vegas, Nevada 89102
10 *Attorney for defendants Dan M. Winder and Law Office of Dan M. Winder P.C.*

11 /s/ Natalie Vazquez
12 An Employee of MAIER GUTIERREZ & ASSOCIATES
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EXHIBIT 29

EXHIBIT 29

DECLARATION OF TEX WHITSON

I, Tex Whitson, declare as follows:

1. I am over the age of 18 and I have personal knowledge of all matters set forth herein. If called to do so, I would competently and truthfully testify to all matters set forth herein, except for those matters stated to be based upon information and belief, and as to those matters I am informed and believe them to be true.

2. From 1990 to present day, I have resided at 5275 Auburn Avenue in Las Vegas, Nevada 89108.

3. Sheila and Lavell Atkinson were my neighbors ever since I moved in and until they moved out about three years ago.

4. During the summer of 2017, I personally witnessed Charles Brown coming to Sheila and Lavell Atkinson's residence on Auburn Avenue on numerous occasions. He was talking to Sheila for long periods of time.

5. I also personally interacted with Charles Brown on different occasions at the Atkinson home, at the Atkinsons' property that Charles Brown was supposed to be buying, at my residence, and at community meetings.

6. In 2017, Charles Brown indicated to me that he had an interest in purchasing the commercial property located at 2315 North Decatur Blvd., Las Vegas, Nevada, 89108, which was owned by the Atkinsons (the "Atkinsons' Commercial Property").

7. In 2017, Charles Brown would be walking around the neighborhood often, and went to my house on numerous occasions to talk to me about the Atkinsons' Commercial Property and his plans for turning the property into a used car lot.

8. On several occasions in 2017, I personally witnessed Charles Brown walking around the Atkinsons' Commercial Property. I would stop by to see what he and the men he was with were doing at the Property and he would talk to me about his plans and him owning the Atkinsons' Commercial Property.

9. From my personal observations, Charles Brown was not working by himself on trying to obtain the Atkinsons' Commercial Property, but with a team of people. For example, I personally

1 observed Charles Brown with a couple of other men walking around the Atkinsons' Commercial
2 Property and talking about how they were going to remodel it. I also personally heard Charles Brown
3 say to me that he was working with an attorney [Dan Winder], who was helping him with obtaining
4 the Atkinsons' Commercial Property.

5 10. This information that Charles Brown was getting help from an attorney was surprising
6 to me because from my personal observations, Charles Brown appeared destitute and unable to pay
7 for any attorney, as on one occasion in 2017 Charles Brown showed up without a vehicle at the
8 community meeting (stating that he owned the Atkinsons' Commercial Property). He asked me for a
9 ride home. Charles Brown had me driving him all across the Las Vegas valley before eventually I
10 told him I could not be driving him around everywhere, so he finally had me drop him off on
11 Charleston Boulevard, which was on the other side of town from the Atkinsons' Commercial Property,
12 but which I understand is also where Charles Brown's attorneys' office is located.

13 11. At one point after Charles Brown sued the Atkinsons, Charles Brown called me and
14 asked if I would be willing to show up at a hearing and "testify" on his behalf for his case against the
15 Atkinsons, which was a direction from his attorney. I told Charles Brown that I had no interest in
16 testifying, as I had no personal information about any wrongdoing from the Atkinsons. My
17 understanding was that Charles Brown never paid the Atkinsons once cent but he would say that he
18 was suing them to get his money back.

19 12. Throughout my interactions with Charles Brown, it became clear to me that Charles
20 Brown had no real experience in purchasing properties, and needed a team of people to try to help
21 him obtain the Atkinsons' Commercial Property, which per Charles Brown himself, included his
22 attorney Dan Winder.

23 13. Charles Brown also personally said to me that he and his wife were interested in
24 obtaining a residential property in the Auburn Avenue neighborhood, which is where the Atkinsons
25 lived and I later found out that Charles Brown and his attorney also had plans for that property.

26 ///

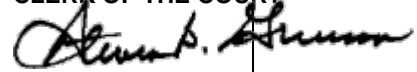
27 ///

28 ///

14. In making this Declaration, I declare under penalty of perjury and the laws of the State of Nevada that the foregoing is true and correct to the best of my information, knowledge, and belief.

DATED this 20th day of May, 2021.

TEX WHITSON



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Attorney for Winder Defendants

**8TH JUDICIAL DISTRICT COURT
CLARK COUNTY, NV**

Lavelle P. Atkinson, Sheila Atkinson, individuals,
Plaintiffs

VS.

CHARLES BROWN, and individual; LAW
OFFICE OF DAN M. WINDER P.C. a domestic
professional corporation; DAN M. WINDER, an
individual, et al

Defendants

**Date of Hearing: 06/15/21
Time of Hearing: 9:30 AM**

**CASE NO: A-19-804902-C
Dept.: 26**

**DEFENDANTS' REPLY
RE
DEFENDANTS' MOTION
FOR
SUMMARY JUDGMENT
FILED 05 07 21**

Defendants Law Office of Dan M. Winder, P.C. and Dan M. Winder, by and through their attorney Dan M. Winder hereby reply to the Opposition to Motion for Summary Judgment filed by Plaintiffs on the 21st day of May, 2021.

POINTS AND AUTHORITIES

1. SUMMARY OF RESPONSE

1.1. CLAIM AND ISSUE PRECLUSION.

Plaintiffs did assert the identical claims in the first litigation and they were dismissed; the claims are barred by issue and claim preclusion. In addition, the claim for attorney fees could have

1 been brought by motion in the first litigation.

2 **1.2. PLAINTIFF'S HAVE NO CREDIBLE EVIDENCE TO SUPPORT THEIR**
3 **CONTENTION THAT BROWN INTENDED TO FRAUDULENTLY INDUCE**
4 **THEM TO ENTER INTO THE PURCHASE AGREEMENT**

5 Despite any lack of credible evidence, Plaintiffs continue to claim that, at the time they
6 signed the Purchase Agreement, that Brown intended to swindle the Plaintiffs out of their property
7 without paying for it. According to the Purchase Agreement, In order to receive the property,
8 Brown had to pay for it. They do not proffer any explanation as to how Brown might have thought
9 he could possibly get his hands on the property without paying for it. No reasonable jury could
10 find clear and convincing evidence Brown intended to get his hands on the property without the
11 Plaintiffs being paid.

12
13 **1.3. EACH OF THE CLAIMS FOR RELIEF ASSERTED BY PLAINTIFFS REQUIRE**
14 **PLAINTIFF TO PROVE THAT BROWN COMMITTED THE TORT OF**
15 **FRAUDULENT INDUCEMENT WHICH THEY CANNOT PROVE.**

16 **1.3.1. Civil Conspiracy**

17 As stated by the Plaintiff (Op Brf P24, L 78), "to establish a civil conspiracy claim, a
18 plaintiff must show **commission of an underlying tort...**" Plaintiffs have established no proof
19 whatsoever that, at the time Plaintiffs signed the Purchase Agreement, Defendant intended to
20 swindle them out of their property without paying for it. Since that was a legal impossibility, the
21 claim is simply unbelievable on its face.

22 **1.1.1. Concert Of Action**

23 As stated by the Plaintiff (Op Brf P24, L2-3), "Under the Restatement, liability attached
24 for concert of action if two **persons commit a tort** while acting in concert..." There being no
25 evidence from which a reasonable jury could conclude that either Brown or the Winder defendants
26 intended to transfer the property to Brown without consideration, this claim fails on that ground

1 alone.

2 **1.1.2. Aiding and Abetting a Misrepresentation**

3 As pointed out by the Plaintiffs (Brf P 26 L23-24), “Under the Restatement, liability
4 attached for civil aiding and abetting if the defendant substantially assists or encourages another’s
5 conduct **in breaching a duty** to a third person.” They claim the same baseless breach of duty, that
6 Brown had a duty to tell the Atkinson’s he did not intend to pay for the property. As this claim is
7 without any factual support and surely no reasonable jury will find clear and convincing evidence
8 to support the theory, the Aiding and Abetting claim must fail for want of a misrepresentation,
9 among other reasons.

10
11 **1.2. THERE IS INSUFFICIENT EVIDENCE OF ATTORNEY FEES TO SUBMIT**
12 **THESE FEES TO THE JURY**

13 Defendants have offered no proof whatsoever that Plaintiffs owed their attorneys any
14 money whatsoever at the end of the first litigation.

15
16 **2. PLAINTIFFS’ INTRODUCTION SHOULD BE IGNORED IN ITS ENTIRETY.**

17 NRCP 56(c) provides:

18 (1) Supporting Factual Positions. A party asserting that a fact cannot be or
19 is genuinely disputed must support the assertion by:

20 (A) citing to particular parts of materials in the record, including
21 depositions, documents, electronically stored information, affidavits or
22 declarations, stipulations (including those made for purposes of the
23 motion only), admissions, interrogatory answers, or other materials;...

24 EDCR 2.21 provides:

25 (a) Factual contentions involved in any pretrial or post-trial motion
26 must be initially presented and heard upon affidavits, unsworn declarations
under penalty of perjury, depositions, answers to interrogatories, and
admissions on file.

The entire introduction is without a single reference to any affidavit or document; it should be

1 ignored in its entirety.

2
3 **3. REFUTATION OF FACTS CLAIMED AS UNDISPUTED BY PLAINTIFFS**

4 **3.1. (P5 ¶¶ 7-8) BROWN'S HEARSAY STATEMENTS ARE NOT ADMISSABLE**

5 Plaintiffs' assert (P ¶7) "Charles Brown told Sheila Atkinson that he had a 'partner'
6 involved, specifically his "attorney" Dan Winder" and that 'they worked together' and that Mr.
7 Winder "was going to make the papers out" for the sale of the Commercial Property" and other
8 hearsay statements concerning Mr. Winder and "the guy that wants to buy this place...it's his
9 partner." Similar hearsay assertions are made in ¶ 8.

10 Plaintiffs offer no explanation as to how this hearsay statement might be admissible in
11 evidence.

12 NRCP 56(c)(2) provides:

13 (2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party
14 may object that the material cited to support or dispute a fact cannot be
presented in a form that would be admissible in evidence.

15 Nevada follows the Federal Hearsay Rules which are embodied at NRS 51.035:

16 "Hearsay" means a statement offered in evidence to prove the truth of the matter
17 asserted unless:

- 18 1. The statement is one made by a witness while testifying at the trial or hearing;
19 2. The declarant testifies at the trial or hearing and is subject to cross-examination
concerning the statement, and the statement is:

20 (a) Inconsistent with the declarant's testimony;

21 (b) Consistent with the declarant's testimony and offered to rebut an express or
implied charge against the declarant of recent fabrication or improper influence
or motive;

22 (c) One of identification of a person made soon after perceiving the person; or

23 (d) A transcript of testimony given under oath at a trial or hearing or before a
24 grand jury; or

- 25 3. The statement is offered against a party and is:

26 (a) The party's own statement, in either the party's individual or a representative
capacity;

- 1 (b) A statement of which the party has manifested adoption or belief in its truth;
2 (c) A statement by a person authorized by the party to make a statement
concerning the subject;
3 (d) A statement by the party's agent or servant concerning a matter within the
scope of the party's agency or employment, made before the termination of the
4 relationship; or
5 (e) A statement by a coconspirator of a party during the course and in furtherance
of the conspiracy.
6

7 No one expects Mr. Brown to testify at trial; §2 is not apposite.

8 Since there has been no tort committed, the conspiracy and other claims must fail

9 Plaintiffs may assert that §3(e) is apposite. However, before testimony of hearsay
10 statements made by a coconspirator may be admitted, the existence of the conspiracy must be
11 established by independent evidence, *Fish v. State*, 92 Nev. 272, 274, 549 P.2d 338, 340 (1976),
12 and the statements must have been made "during the course and in furtherance of the conspiracy,"
13 *Carr v. State*, 96 Nev. 238, 239, 607 P.2d 114, 116 (1980). . Even if the tort of fraudulent
14 inducement is established there is no independent evidence of a conspiracy.
15

16 **3.2. (P6 ¶13) BROWN'S DEPOSITION TESTIMONY IN A PRIOR CASE IS NOT**
17 **ADMISSABLE AND IS INACCURATELY CHARACTERIZED BY PLAINTIFFS.**

18 Brown's testimony in the prior deposition is hearsay evidence. Evidence must be
19 admissible to be considered in a motion for summary judgment. The statements made in his
20 deposition by Mr. Brown are clearly hearsay statements. The Winder Defendants were not a
21 party to the prior litigation and they had no opportunity to cross-examine Mr. Brown as they
22 represented him in that matter and were not informed of the claims in this matter at that time.

23 The Nevada Rules of Civil Procedure do not provide for the admission of Brown's
24 statements to be used against the Winder Defendants.

25 NRCP 32(8) provides:

26 (8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken and,
if required, filed in any federal- or state-court action may be used in a later

1 action involving the same subject matter between the same parties, or their
2 representatives or successors in interest, to the same extent as if taken in the
3 later action. A deposition previously taken may also be used as allowed by
4 Nevada law of evidence.

5 The Winder Defendants were not a party to the prior action nor were they a representative
6 or successor in interest. Also, the prior action did not involve the same subject matter.

7 Although Brown did state he visited the Plaintiffs on some occasions he did not suggest
8 or intimate that the Plaintiffs required wearing down anywhere in the passage cited by Plaintiffs
9 Neither is that conclusion a reasonable inference from the testimony of Mr. Brown in the
10 deposition.

11 **3.3. (P6 ¶18) CHARLES BROWN DID TRANSFER FUNDS FOR THE PURPOSE OF** 12 **OPENING AN ESCROW ACCOUNT**

13 The undisputed fact is check #16333 dated 08/21/17 was issued by Defendant Winder Law
14 for the express purpose of funding an escrow account.¹ The word “escrow” appears on the memo
15 line in front of the address for the property the Atkinson’s had agreed to sell. This was one of the
16 costs advanced by Winder Law in connection with its representation of Mr. Brown in the purchase
17 of the property. Although the documents produced in the prior litigation finally demonstrated an
18 escrow had not been opened, it is clear both Mr. Brown² and Mr. Winder³ believed an escrow had
19 been opened.

20 **3.4. (P 6 ¶19- P7 ¶ 26) DECLARANT BROWN’S HEARSAY STATEMENTS**

21 Plaintiffs make many references to Brown’s inadmissible deposition from a prior case and
22 Sheila Atkinsons’ recitation of purported statements of Mr. Brown to establish a partnership
23

24
25 ¹ P Ex. 21 ATKINSON0404.

26 ² P Op Ex. 15, Winder Depo P87-89² P Op Ex.15, *in passim* see particularly P 54-61

³ P Op Ex. 15 P 44 L4-13

1 between Mr. Brown and Mr. Winder and that Mr. Brown didn't have the money to pay for the
2 property. Since none of this is admissible for the reasons stated above, they can hardly be
3 established facts.

4 Further, Mr. Brown testified he believed he could get investors to pay for the property⁴.
5 Certainly, there is a large business in finding undervalued property and getting investors to invest
6 in the property, selling it and dividing the profit.

7
8 **3.5. P 27 ¶ 27-28 INSUFFICIENT EVIDENCE FOR CLAIM DAN WINDER WAS
PARTNER REFERRED TO IN DEPOSITION**

9 As discussed above, the hearsay statements of Mr. Brown reported by Sheila Atkinson in
10 her deposition are inadmissible both because the statements are hearsay and because the deposition
11 of Mr. Brown is not usable in this proceeding.

12 Further, despite Plaintiff's representation that Dan Winder is the partner referred to by Mr.
13 Brown, there is no reason to believe that is true based upon the deposition testimony.⁵ In fact, Mr.
14 Brown appears to be referring to his brother, "the one that was the bad arm."⁶

15
16 **3.6. P 9 ¶ 29- P11 ¶ 36 ARGUMENTS ARE NOT FACTS**

17 Whether the letter sent by the Winder firm to the Atkinsons is threatening is argument, not
18 a fact. The letter states "If you, or your legal counsel, if any, wish to discuss this matter further,
19 please feel free to contact me at your convenience. I shall await your prompt response."⁷

20 Plaintiffs offer no factual support whatsoever to support their contention "Dan Winder had
21 an employee, Arnold Weinstock, Esq. sign off on the December 2017 letter."⁸

22
23

⁴ P Op Ex. 4 P 82 L7-25

24 ⁵ P. Op. Ex 3. 37-38

25 ⁶ P. Op Ex. 2 P 39 L 2-24.

26 ⁷ P. Op Ex 6

⁸ P. Op. P9 ¶32.

1 **3.7. (P 11 ¶ 46) NO ADMISSABLE PROOF EXISTS BROWN LIED ABOUT THE**
2 **KELLY MORTGAGE PRE-APPROVAL LETTER.**

3 The author of the affidavit on which this false claim is based is a resident of California, her
4 deposition was not taken and she cannot be compelled to appear at trial. Certainly, the affidavit
5 is not admissible at trial because it is hearsay. As there is no admissible evidence to support
6 Plaintiffs' claimed admissible fact, it cannot be considered in the Motion for Summary Judgment.

7 Tracy L. Kelly perjured herself by claiming she is competent to make the affidavit and
8 that she has personal knowledge of the facts set forth in the affidavit. Further, she does not show
9 any competence for her conclusory statement that "My assistant's name is Veda Williams, but she
10 is not a Mortgage Consultant and she did not sign the letter."⁹ She offers no explanation as how
11 she knows what Veda signed or didn't sign; she cannot have personal knowledge of what Veda
12 signed or didn't sign. The only person who is competent to testify that his assistant did not sign
13 the letter is Veda Williams herself. Veda Williams has not been disclosed as a witness and
14 presumably lives in California as well. As such, she probably cannot be compelled to appear and
15 testify at trial even if the Court would allow her to as a consequence of not being disclosed.
16 Presumably, this affidavit was prepared by Plaintiffs' counsel who knew or should have known
17 Tracy L. Kelly was incompetent to make this assertion. From this we can infer that Veda Williams
18 probably would have said she did prepare and sign the letter whether she was authorized to or not.

19
20 **3.8. (P 14 ¶ 53) THE EXISTANCE OF AN APPRAISL WAS DISCLOSED BY MR.**
21 **BROWN IN RESPONSE TO AN INTERROGATORY.**

22 Defendants claim no preliminary appraisal letter was ever disclosed by Mr. Brown. If
23 "disclosed" means "attached to a 16.1 disclosure," Plaintiffs' statement is technically correct but
24 misleading. On October 27th, 2018, Defendant responded to interrogatories as follows:
25
26

⁹ P. Op. Ex 11 ¶ 11.

1 **INTERROGATORY NO. 12:**

2 If you ever had an appraisal conducted on the Property at issue, please
3 state the following:

- 4 a. Name, address and phone number of person/company who
5 performed the appraisal
6 b. Date of appraisal
7 c. Amount property was appraised at.

8 **ANSWER NO.12:**

9 I had an appraisal done. The property was appraised at \$250,000. The
10 property was appraised by Keith Harper of Las Vegas.¹⁰

11 From the Interrogatories, Plaintiffs were well aware of the appraisal and who did it when Plaintiffs
12 took Brown's deposition a month later.¹¹ No one was trying to hide anything about this appraisal
13 from the Plaintiffs.

14 **3.9. P14 ¶ 55 DEFENDANTS WERE RETAINED TO REPRESENT BROWN
15 BEFORE WINDER LAW ISSUED ANY CHECKS.**

16 Plaintiffs arbitrarily picked the date of the signed retainer agreement as the beginning of
17 Mr. Winder's representation of Mr. Brown in connection with the Atkinson property. However,
18 the relationship began before the signed agreement. As Mr. Winder testified in his deposition:

19 Q And so did you agree that Purchase Agreement before you -- I mean did
20 you review that Purchase Agreement before you agreed to take Charles
21 Brown's case?

22 **A I believe when he consulted with me about the property and wanting
23 legal assistance in purchasing the property, there was no -- at that point
24 in time we developed an attorney-client relationship. He subsequently
25 brought a Purchase Agreement to me.**

26 Q And was that before or after the legal representation had started?

 [Objection]

¹⁰ P Op.Ex. 12 P4 INT 12

¹¹ P Op Ex. 11 P 1

1 Q So when I asked you when the legal representation started, you said you'd
2 have to refer to the representation agreement. Do you recall that?

3 **A I'm saying, when I began to consult with him, the relationship began;**
4 **and if you wanted the dates, it was prior to the signed retainer**
5 **agreement. So I'd have to consult with the -- look at the retainer**
6 **agreement to give you the approximate date to that.¹²**

7 The purchase agreement was signed on July 20th, 2017.¹³ The representation began before that
8 time. The check for the Appraisal was written August 7th, 2017,¹⁴ after the representation began.
9 The check for the Escrow was written August 21, 2017,¹⁵ after the representation began.

10 **3.10. P 14 ¶57-58. THERE IS NO ISSUE OF FACT AND NO DISCREPANCY**
11 **REGARDING WHETHER WINDER LAW LOANED BROWN THE MONEY**
12 **FOR THE APPRAISAL AND ESCROW.**

13 Many lawyers handle cases on a contingent basis. Frequently, the lawyers pay costs in
14 connection with their representation of clients. Not uncommonly, lawyers pay certain expenses
15 before litigation is commenced. As the Winder Law's fee was largely contingent in this matter,¹⁶
16 it made sense for Winder Law to obtain an appraisal to make sure the deal had value, and to fund
17 the initial escrow fee without which there could not have been a recovery. That's what Winder
18 Law did. Sometimes agreements provide that although costs may be deducted from the recovery
19 in addition to the attorney fees, the costs are not owing in the event there is no recovery. Sometimes
20 the client owes the attorney the extended costs regardless of the recovery. In this case, Mr. Brown
21 still owes the money even though the escrow did not close. The agreement was contingent in that,
22 without the close of escrow, Winder Law will probably never be paid.

23 The initial agreement in this matter provided for a retainer fee in the amount of \$20,000.00
24 at the time the property was refinanced. Costs advanced by the attorney were to be paid upon the
25 refinancing of the property. This is a loan and it is an advance of costs. There is no discrepancy.

26 ¹² P Op Ex. 15 P 42 L8-P43 L7

¹³ P Op Ex 1 P6, the checks were issued by Defendant Winder Law on

¹⁴ P Op Ex 14.

¹⁵ P Op Ex 21 ATKINSON0404.

¹⁶ Retainer Agreement P OP Ex. 17

1 Plaintiffs posit no reason why the check should have been disclosed in the first litigation
2 and whether it was disclosed or not has no bearing on this litigation.

3 **3.11. P. 59 ¶ 59-60 MR. BROWN AND THE WINDER DEFENDANTS WERE**
4 **COMPLETELY CLEAR ABOUT THE APPRAISAL**

5 During the first litigation, Mr. Brown disclosed the existence of the appraisal in response
6 to an interrogatory question before his deposition was taken. He obviously had no intent to hide
7 the appraisal. The appraisal was simply not relevant to the first proceeding no is relevant to this
8 one. Plaintiffs offer no reason as to why either The Winder Defendants or Mr. Brown should have
9 obtained copies of the documents and provided them to the Plaintiffs.

10 While it is true that Keith Harper put in an affidavit that the final evaluation of the property
11 would be significantly altered because the lease was not consummated, the lease was not
12 consummated because the sale did not go through.

13
14 **3.12. P 63 ¶ 64-69 AT THE MOTION FOR SUMARY JUDGMENT HEARING IN**
15 **THE PRIOR LITIGATION, MR. WINDER BELIEVED AN ESCROW HAD**
16 **BEEN OPENED BECAUSE WINDER LAW HAD PAID THE INITIAL**
\$1000.00 DEPOSIT FOR THE ESCROW.

17 At the hearing, Mr. Winder represented the \$1000.00 check he wrote for opening deposit
18 in escrow had been used for that purpose. In fact, that turned out not to be true. There is no
19 evidence whatsoever that Mr. Winder ever intended the check he wrote to fund the escrow ended
20 up being used to pay for a loan application.

21
22 **3.13. P19 ¶ 71-72 THE RETAINER AGREEMENT IS AND ALWAYS HAS BEEN**
23 **FOR ASSISTANCE IN THE PURCHASE OF THE PLAINTIFFS'**
COMMERCIAL PROPERTY AT 2315 N. DECATUR BLVD.

24 Defendants ask this Court give judicial notice to the fact that the property located at 2315
25 N. Decatur Blvd, is located at the corner of Decatur and Auburn.¹⁷ This fact is well known to
26

¹⁷ Street view and map of 2315 N. Decatur Ex. J Hereto

1 Plaintiffs as it was discussed in the deposition of Defendant Winder.¹⁸ This is an undisputed fact
2 exactly contrary to the Plaintiffs' false assertion. The Agreement to Employ Attorney,¹⁹ when
3 taken in context, is clearly for the purchase of the Decatur property. There is no suggestion
4 anywhere in the factual record, that the Agreement had anything to do with the Plaintiffs' home.

5
6 **3.14. P20 ¶¶ 73-75 THE FEE AGREEMENT WAS CONTINGENT IN THE
7 SENSE DEFENDANTS WERE UNLIKELY TO BE PAID IN THE EVENT
8 ESCROW DID NOT CLOSE.**

9 Although under the terms of the agreement, Mr. Brown was required to pay the retainer
10 whether or not escrow closed, the collection of the fees was largely uncertain if escrow did not
11 close. In any event, whether the agreement was contingent or not has no bearing on any material
12 fact in this litigation.

13 **3.15. P20 ¶76 DEFENDANTS HAVE PRODUCED NO ADMISSABLE DAMAGES.**

14 **3.15.1. Emotional Distress**

15 In cases where emotional distress damages are not secondary to physical injuries, but
16 rather, precipitate physical symptoms, either a physical impact must have occurred or, in the
17 absence of physical impact, proof of "serious emotional distress" causing physical injury or
18 illness must be presented. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 448, 956 P.2d 1382, 1387
19 (1998). Plaintiffs claim no physical injury or illness, have no medical testimony or records to
20 support a claim of physical injury or illness and thus cannot claim any emotional distress type
21 damages. The Nevada Supreme Court requires physical injury in the context of a real property
22 transaction for emotional distress damages in connection with a real property matter:

23 We have previously required a plaintiff to demonstrate that he or she has
24 suffered some physical manifestation of emotional distress in order to support an
25 award of emotional damages. *See, e.g., Barmettler v. Reno Air, Inc.*, 114 Nev.
26 441, 448, 956 P.2d 1382, 1387 (1998) ("[I]n cases where emotional distress
damages are not secondary to physical injuries, but rather, precipitate physical

¹⁸ P OP Ex. 24 P 6 L10-22

¹⁹ P OP Ex 17 P D 0009.

1 symptoms, either a physical impact must have occurred or, in the absence of
2 physical impact, proof of 'serious emotional distress' *167 causing physical injury
3 or illness must be presented."); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482–83,
4 851 P.2d 459, 462 (1993). While we have relaxed the physical manifestation
5 requirement in a few limited instances, *see Olivero v. Lowe*, 116 Nev. 395, 400,
6 995 P.2d 1023, 1026 (2000) (explaining that the physical manifestation
7 requirement is more relaxed for damages claims involving assault), we cannot
8 conclude that a claim for emotional distress damages resulting from deceptive
9 trade practices in connection with a failed real estate and lending transaction
10 should be exempted from the physical manifestation requirement.

11 Unlike in *Olivero*, where we stated that “the nature of a claim of assault is
12 such that the safeguards against illusory recoveries mentioned in *Barmettler* and
13 *Chowdhry* are not necessary,” 116 Nev. at 400, 995 P.2d at 1026, there is no
14 guarantee of the legitimacy of a claim for emotional distress damages resulting
15 from a failed real estate and lending transaction without a requirement of some
16 physical manifestation of emotional distress.

17 Thus, because Betsinger failed to present any evidence that he suffered
18 any physical manifestation of emotional distress, we reverse the jury's award of
19 \$43,000 in emotional distress damages. *Betsinger v. D.R. Horton, Inc.*, 126 Nev.
20 162, 167, 232 P.3d 433, 436 (2010)

21 Thus, because this is a failed real estate transaction and because Plaintiffs do not contend they
22 suffered any physical injury as a result, there can be no damages for emotional distress.

23 3.15.2. Invoices From Boarding Up Property

24 There is no evidence this expense was occasioned by anything done by Mr. Brown and,
25 in any event, there is no proffered reason why the Winder Defendants should be held liable for
26 this damage.

3.15.3. Attorney Fees

Because they are claiming attorney fees as damages, the damages must be proven to the
jury. Plaintiffs have produced no evidence that Plaintiffs owed their attorney anything after the
first litigation, only named witnesses to authenticate the bills on the last day of discovery, and have
no witness who can testify to the reasonableness and necessity of the bills, a foundational
requirement. Plaintiffs have never produced any kind of engagement letter or retainer agreement

1 indicating their attorneys are owed anything and if so, what.

2 **4. THERE ARE NO MATERIAL DISPUTED FACTS.**

3 Addressed below are each of the facts Plaintiffs claim are disputed.

4
5 **4.1. (P 23 ¶ 1) THERE IS NO MATERIAL DISPUTE AS TO THE DATE**
6 **DEFENDANTS BEGAN REPRESENTING BROWN.**

7 The Winder Defendants have made no differing responses as to when their representation
8 began. Contrary to the representation of Plaintiffs, Defendant's answer to interrogatories do not
9 state that Defendants began representing Mr. Brown on the date the litigation commenced. This
10 mischaracterization is clear when the entire question and answer are reviewed:

11 **INTERROGATORY NO. 6:**

12 State the effective date of Defendant's representation of Mr. Brown in the
13 Brown Litigation.

14 **RESPONSE TO INTERROGATORY NO. 6:**

15 Defendant Law Office represented Mr. Brown on the day the litigation
16 commenced.

17 Litigation is defined in Black's Law Dictionary as:

18 **litigation** *n.* (17c) **1.** The process of carrying on a lawsuit <the attorney
19 advised his client to make a generous settlement offer in order to avoid
20 litigation>. **2.** A lawsuit itself <several litigations pending before the court.
21 LITIGATION, Black's Law Dictionary (11th ed. 2019)

22 Plaintiffs did not ask "When did you begin representing Mr. Brown, as they claim in their brief;
23 instead, they asked for the "effective date of the representation of Mr. Brown in the Brown
24 Litigation." The question was answered properly and has nothing to do with when the Winder
25 Defendants began representing Mr. Brown.

26 Whether the representation began before or after the Purchase Agreement was signed is
not a material distinction. The Purchase Agreement was signed by the Plaintiffs on July 20th,
2017.²⁰ The check to Valuation Consultants for the appraisal is dated August 7th, 2017.²¹

²⁰ Purchase Agreement P. Op. Ex. 1 P6

²¹ Check to Valuation Consultants P Op. Ex.14 P Atkinson00034

1 The first Agreement to Employ Attorney was signed on the 10th of August, 2017.²²

2 Plaintiffs assert: [T]he first representation agreement was not signed until April 10th, 2017,
3 well *after* the Purchase Agreement was signed in July 2017.” Since April 10th, is *before* July of
4 2017, the Plaintiffs may have meant “August” instead of “April.” Mr. Winder’s Declaration²³
5 Mischaracterized by Plaintiffs’ reads as follows:

6 **4. On or about** July 23rd, 2017 I undertook representing Mr. Brown with
7 respect to the property involved in this litigation, 2314 North Decatur
located on the corner of Auburn and Decatur, Las Vegas, Nevada.

8 As the Winder Defendants were not involved in the drafting, negotiation, or execution of
9 the Purchase Agreement,²⁴ Regardless of when the representation began, Mr. Winder had no
10 reason to write a check to Valuation Consultants if he was not representing Mr. Brown in the
11 purchase of the property. The Winder Defendants have provided as straight an answer as is
12 possible as to when the representation began in light of the passage of time and the fading of
13 memories. What is clear and undisputed, despite the noble efforts of Plaintiff’s lawyers, is that
14 Mr. Winder was acting as an attorney for Mr. Brown and not as a partner at all times relevant.

15 There is no dispute of a material fact as to when the representation began. “A genuine
16 issue of material fact is one where the evidence is such that a reasonable jury could return a verdict
17 for the non-moving party.”²⁵. No reasonable jury could find that the Winder Defendants were
18 acting other than in a capacity as a lawyer for Mr. Brown.

19 Plaintiffs do not suggest how the beginning date of representation is material.
20
21
22

23 ²² Agreement to Employ Attorney P. OP Ex 17 P 3 (Bates D 0011).

24 ²³ D Mot, Ex A ¶4

²⁴ Winder Declaration D Mot, Ex A P4 ¶3.

25 ²⁵ *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). *Toi-Ya D. Foster,*
26 *Individually, Appellant, V. Rudolph Carlo King, M.D., Individually; And Wellhealth Medical*
Group (Volker), P.C., A Nevada Professional Corporation, Respondents. Toi-Ya D. Foster,
Individually, Appellant,, No. 78957-Coa, 2021 WL 2155034, At *2 (Nev. App. May 26, 2021)

1 4.2. **THERE IS NO EVIDENCE FROM WHICH A REASONABLE JURY COULD**
2 **CONCLUDE THE FEE AGREEMENTS PERTAINED TO PLAINTIFFS'**
3 **RESIDENCE.**

4 As discussed above, the commercial property which is the subject of this litigation is
5 located on the corner of Auburn and Decatur. The use of Auburn Property in the retainer
6 agreement refers to the commercial property. The use of Auburn to describe the commercial
7 property in no way implicates any intentions with regard to the Plaintiffs' home; Plaintiffs cite no
8 facts to support their contention, there is no evidence The Winder Defendants undertook
9 representation of Mr. Brown that they had any knowledge whatsoever pertaining to the Plaintiffs'
10 residence.

11 **4.3. THERE IS NO EVIDENCE FROM WHICH A REASONABLE JURY COULD**
12 **CONCLUDE THE WINDER DEFENDANTS WERE CONSPIRING AND**
13 **ACTING IN CONCERT WITH BROWN.**

14 **4.3.1. As An Attorney And Law Firm Representing Mr. Brown Defendants Are**
15 **Immune From Liability to Plaintiffs.**

16 As discussed above, there is no material issue of fact as to whether Defendants were
17 representing Mr. Brown at all times relevant.

18 Given an attorney's ethical obligations to be candid with a client and zealously represent
19 his or her client, and the general presumption that an attorney providing legal services to a client
20 is generally not subject to third-party liability for that representation.²⁶ Accordingly, Defendants
21 are immune from liability to these Defendants for any of their claims.

22 **4.3.2. Because There Is No Dispute That No Tort Was Committed By Mr. Brown**
23 **With Respect To His Intent To Pay For The Property, There Can Be No**
24 **Liability For Any Of Plaintiffs' Claims.**

25 As discussed above, Plaintiffs have not demonstrated any evidence which a reasonable jury
26 could find clear and convincing that Mr. Brown lacked the intention to pay for the property at the
time the Plaintiffs willingly signed the Purchase Agreement. Without that, there is no tort. A tort

²⁶ *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018)

1 is a required element of all three of Plaintiffs' Causes of Actions against Defendants.

2 To establish fraud in the inducement, the plaintiff must prove, by *clear and convincing evidence*
3 each of the following elements:

4 (1) a false representation made by the defendant

5 (2) Defendant's knowledge or belief that the representation was false (or
6 knowledge that he had an insufficient basis for making the representation),

7 (3) Defendant's intention to therewith induce Jones to consent to the contract's
formation,

8 (4) Plaintiff's justifiable reliance upon the misrepresentation, and

9 (5) damage to the Plaintiff resulting from such reliance.

10 Fraud is never presumed; it must be clearly and satisfactorily proved.²⁷

11 There is no evidence proffered by Plaintiffs from which a reasonable jury could find, by
12 clear and convincing evidence, that Brown never intended to pay for the property. Why would
13 he have had his wife apply for a loan if he didn't intend to go through with the purchase. What
14 reason might he have had for forging, if he did, these documents.

15 4.3.3. **No Reasonable Jury Could Find The Winder Defendants Conspired or Acted**
16 **in Concert With Mr. Brown.**

17 4.3.3.1. **CONSPIRACY**

18 Actionable civil conspiracy arises where two or more persons undertake some concerted
19 action with the intent "to accomplish an unlawful objective for the purpose of harming another,"
20 and damage results. [Consol. Generator-Nevada, Inc. v. Cummins Engine Co., 114 Nev. 1304,](#)
21 [1311, 971 P.2d 1251, 1256 \(1998\).](#) Thus, a plaintiff must provide evidence of an explicit or tacit
22 agreement between the alleged conspirators. [Mahlum, 114 Nev. at 1489, 970 P.2d at 112.](#)
23 Summary judgment is appropriate if there is no evidence of an agreement or intent to harm the
24

25 ²⁷ *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290–91, 89 P.3d 1009,
26 1018 (2004)

1 plaintiff. [*Consol. Generator–Nevada*, 114 Nev. at 1311, 971 P.2d at 1256.](#)

2 In addition to there being no evidence to conclude that there was fraud in the inducement
3 of the Purchase Agreement, there is no evidence that the Winder Defendants had any intent “to
4 accomplish and unlawful objective for the purpose of harming the Plaintiffs. There is no evidence
5 of an explicit or tacit agreement between Brown and the Winder Defendants to accomplish and
6 unlawful objective.

7 As briefed above, for the “Partner” statements reportedly made by Mr. Brown, they are
8 hearsay. In any event, other evidence of an explicit or tacit agreement to commit a tort before
9 liability can attach for Civil Conspiracy. There is no other such evidence.

10 4.3.3.2. ACTING IN CONCERT

11 “[T]o constitute concerted action, the [plaintiffs] were required to present evidence
12 manifesting a common plan to commit a tortious act where the participants knew of the plan and
13 its purpose and took substantial affirmative steps to [harm the plaintiffs].”); *Juhl v. Airington*,
14 936 S.W.2d 640, 644–45 (Tex.1996) cited with approval by *GES, Inc. v. Corbitt*, 117 Nev. 265,
15 271, 21 P.3d 11, 15 (2001). If Brown had a plan to commit a tortious act, Defendants were not
16 aware of it.²⁸ There is no evidence from which a reasonable jury could find the Winder
17 Defendants knowingly acted in concert with Mr. Brown.. Accordingly, Winder Defendants are
18 entitled to Summary Judgment on this Claim for relief.

19 4.3.3.3. AIDING AND ABETTING

20 The tort of aiding and abetting is laid out in the Restatement (Third) of Torts:

21 A defendant is subject to liability for aiding and abetting a tort upon proof
22 of the following elements:

- 23 (a) a tort was committed against the plaintiff by another party;
24 (b) the defendant knew that the other party's conduct was wrongful;
25 (c) the defendant knowingly and substantially assisted in the
26 commission or concealment of the tort; and
(d) the plaintiff suffered economic loss as a result.

²⁸ Declaration of Dan M. Winder, Defendants’ Motion for Summary Judgment, Ex. A

The only tort Plaintiffs allege was committed is the tort of fraud in the inducement with respect to the original Purchase Agreement. Plaintiffs offer up the two checks issued by Winder Law. There are no facts which indicate that Brown did not intend to go through with the purchase or that, if he didn't, that the Winder Defendants had any knowledge of or participation in the fraud or attempted in any way to cover it up.²⁹

5. CONCLUSION

These claims are entirely barred by issue and claim preclusion.

Defendants are immune from liability in this matter because they were acting as attorneys at all stages. Plaintiffs have offered no evidence from which a reasonable jury could conclude that the Winder Defendants knew of any fraudulent conduct of Mr. Brown with respect to the inducement to sign the Purchase Agreement. Mr. Brown's hearsay partner statements are inadmissible in the absence of other evidence of conspiracy or knowledge and, in any event, Mr. Brown naming Mr. Winder as his "partner" does not mean in any way that the Winder Defendants had any knowledge that Brown intended to commit or had committed a fraud with respect to the purchase agreement.

Accordingly, the Winder Defendants pray this Court enter Summary Judgment as follows:

- 1) Plaintiffs' claims are barred by issue and claim preclusion.
- 2) Plaintiffs' claims are barred by lawyer-immunity
- 3) No Reasonable Jury Could Conclude there is clear and convincing evidence that Mr. Brown fraudulently induced Plaintiffs to sign the Purchase Agreement.
- 4) Insufficient independent evidence of conspiracy exists to admit the partner hearsay statements and that there for Plaintiffs' claim fails.
- 5) No reasonable Jury could find the Winder Defendants acquiesced, encouraged or had any knowledge of Brown's intent, if he had it, to fraudulently induce Plaintiffs to sign the Purchase Agreement or that, if true, the Plaintiffs had been defrauded. Accordingly, all of

²⁹ Declaration of Dan M. Winder, Plaintiff's Motion for Summary Judgment, Exhibit A.

1 Plaintiffs' Causes of Action against the Winder Defendants fail.

2 6) Plaintiffs were negligent in failing to respond to the Weinstock Letter from Winder Law
3 inviting them to call or have their attorneys call to discuss the matter with the Winder
4 Defendants, this negligence is greater than that of the Defendants, if any, and is therefore
5 a bar to the claims of Plaintiffs. Therefore, Plaintiffs' claim fails.

6 7) Plaintiffs are the cause of their own harm by failing to respond to the Weinstock letter from
7 the Winder Defendants, and are an intervening cause which supersedes the responsibility,
8 if any, of the Winder Defendants. Accordingly, Plaintiffs' claim fails

9 Dated this 9th day of June, 2021

10 THE LAW OFFICE OF DAN M. WINDER

11 /s/Dan M. Winder
12 Nevada Bar No. 1569
13 3507 West Charleston Blvd.
14 Las Vegas, Nevada 89102
15 Telephone (702) 474-0523
16 Facsimile (702) 474-0631
17 Attorney for Winder Defendants

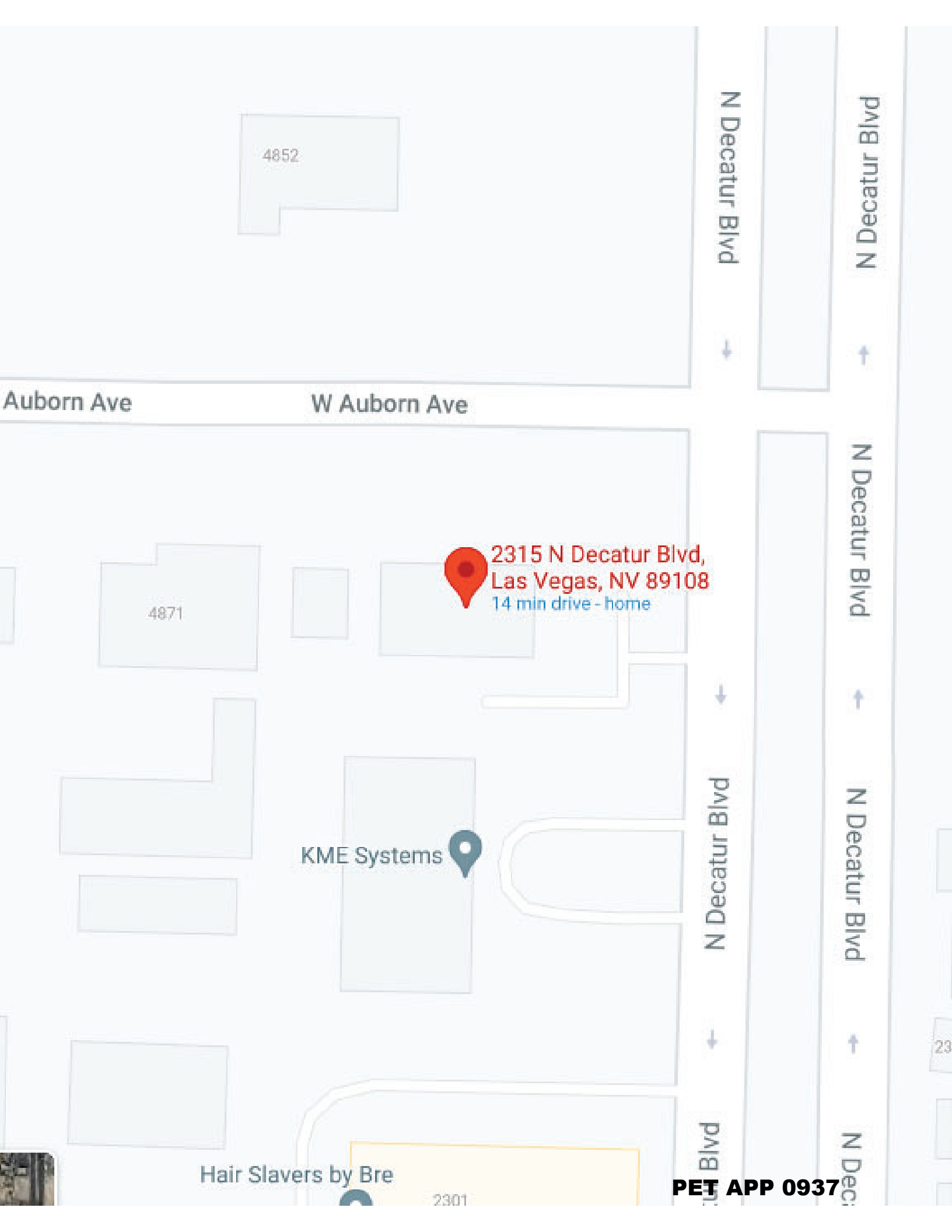
18 **CERTIFICATE OF SERVICE**

19 I certify I served the foregoing on the attorneys of record via the Court's Electronic Filing
20 System on the date stamped thereon by the System.

21 /s/Hamilton Moore
22 An Employee of the Law Office of Dan M. Winder
23
24
25
26

EXHIBIT J

EX J



4852

N Decatur Blvd

N Decatur Blvd

Auborn Ave

W Auburn Ave

4871

N Decatur Blvd

2315 N Decatur Blvd,
Las Vegas, NV 89108
14 min drive - home

KME Systems

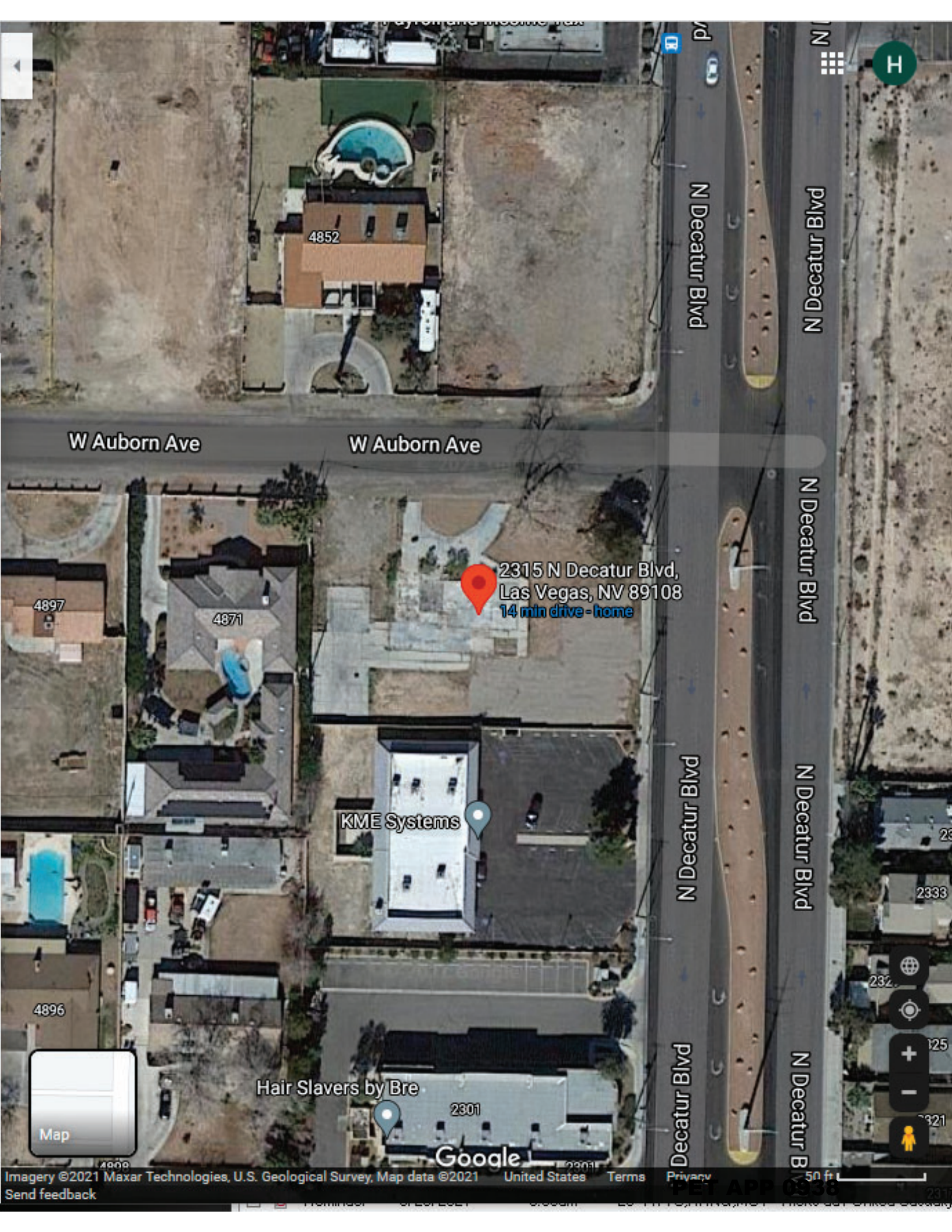
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PET APP 0937



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Las Vegas, NV 89108
14 min drive - home

KME Systems

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Map

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PET APP 0939

1 ORDR

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 LAVELLE P. ATKINSON, et al.,

7 Plaintiff(s),

8 v.

9 CHARLES BROWN, et al.,

10 Defendant(s).

CASE NO. A-19-804902-C
DEPT NO. 26

HEARING DATE: 5/13/21
HEARING TIME: 9:00 a.m.

11
12
13
14 ORDER RE: DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

15
16 The Court, having reviewed the above report and recommendations prepared by the
17 Discovery Commissioner and,

18 X No timely objection having been filed,

19 _____ After reviewing the objections to the Report and Recommendations and good cause
20 appearing,

21 * * *

22
23
24
25
26
27
28 **PET APP 0940**

1 AND

2 ~~X~~ IT IS HEREBY ORDERED the Discovery Commissioner's Report and
3 Recommendations are affirmed and adopted.

4
5 IT IS HEREBY ORDERED the Discovery Commissioner's Report and
6 Recommendations are affirmed and adopted as modified in the following manner.
(attached hereto)

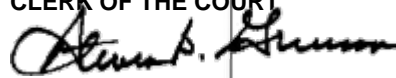
7
8 IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for
reconsideration or further action.

9
10 IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is
11 set for _____, 2021, at _____:_____ a.m.

12
13 Dated this 11th day of June, 2021

14 

15
16 DFA D1E DAA0 1C2B
17 Gloria Sturman
18 District Court Judge
19
20
21
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24
25
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27
28



DCCR
DAN M. WINDER, ESQ.
Nevada Bar No. 001569
Arnold Weinstock
State Bar # 810
LAW OFFICE OF DAN M. WINDER, P.C.
3507 West Charleston Blvd.
Las Vegas, Nevada 89102
Telephone (702) 474-0523
Facsimile (702) 474-0631
Attorney for Winder Defendants

8TH JUDICIAL DISTRICT COURT
CLARK COUNTY, NV

Lavelle P. Atkinson, Sheila Atkinson,
individuals,

Plaintiffs

VS.

CHARLES BROWN, and individual; LAW
OFFICE OF DAN M. WINDER P.C. a
domestic professional corporation; DAN M.
WINDER, an individual, et al

Defendants

Case #: A-19-804902-C
Dept #: 26

Hearing Date: 05/13/21
Hearing Time: 9:00 AM

DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS
RE
DEFENDANTS' MOTION FOR
DISCOVERY SANCTIONS FILED
04/12/21

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

HEARING DATE: 05/13/21

HEARING TIME: 9:00 AM

APPEARANCES:

Plaintiff Danielle J. Barraza, Esq., of the law firm MAIER GUTIERREZ & ASSOCIATES, on behalf of *Plaintiffs Lavelle P. Atkinson and Sheila Atkinson*

Defendant *Arnold Weinstock, Esq., of the law firm LA w OFFICE OF DAN M. WINDER, P.C., on behalf of Defendants Law Office of Dan M Winder, P. C. and Dan M Winder*

I. FINDINGS

Winder Defendants' Motion for Discovery Sanctions or Alternatively to Compel filed 04/12/21 came on for hearing before the Discovery Commissioner on the 13th day of May, 2021.

Defendants' Motion requested the following relief:

1. Plaintiffs' claims for attorney fees as damages be dismissed as a sanction for failure to disclose their attorney fee agreements and willful and unjustified failure to provide the information in response to requests for production, interrogatories, and depositions.
2. In the alternative, compelling Plaintiffs to disclose all documents requested, answer all interrogatories promulgated, and have additional depositions taken on all matters pertaining to attorney fees, including, without limitation, fee agreements, engagement letters, verbal understandings `pertaining to attorney fees, payments made or which must be made, the conditions under which payments must be made and why Plaintiffs did not seek attorney fees by post-judgment motion in the prior action.
3. Award Defendants \$7,500.00 as a reasonable attorney fee for having to file this motion and \$3500.00 for having to retake Plaintiffs' depositions.

II. RECOMMENDATIONS

The Discovery Commissioner, having reviewed the pleadings and papers on file herein relative to the motions, having heard the representations of those present at the hearing, and for good cause appearing, hereby makes the following recommendations:

The Commissioner recommends Winder Defendants' Motion for Discovery Sanctions or Alternatively to Compel be granted in part and denied in part as follows

1. Plaintiffs are required to supplement and fully respond to Requests for Production 1-4. Anything within Plaintiffs' possession, custody, or control that does not fall within the provision must be produced within seven days, anything withheld must be identified in a privilege log.
2. Regarding depositions, the parties must conduct a 2.34 conference reference addressing what defendants deem were insufficient responses and whether retaking depositions is appropriate.
3. Production of retainer agreements, engagement letters, and documents pertaining to attorney fees is required where, as in this matter, Plaintiffs seek attorney fees as damages with redactions limited to matters unrelated in any manner to the fees or payment of fees. Such redactions must be accompanied by privilege log.
4. The Discovery Commissioner recommends no attorney fees be awarded ^{for}

Dated this 26th day of May, 2021. *the bringing of this motion. (EJ)*



Discovery Commissioner

Respectfully submitted this 26th day of May,
2021.

Approved as to form and content,

Maier Gutierrez & Associates

LAW OFFICE OF DAN M. WINDER, P.C.

/s/Danielle J Barraza

Joseph A. Gutierrez, Esq.

Nevada Bar No. 9046

Danielle J Barraza, Esq.

Nevada Bar No. 13822

8816 Spanish Ridge Avenue

Las Vegas, NV 89148

Attorney for the Plaintiffs

/s/Arnold Weinstock

State Bar No: 810

3507 West Charleston Blvd. Las Vegas,

Nevada 89102 Telephone (702) 474-0523

Facsimile (702) 474-0631

Attorney for Winder Defendants

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire June 10, 2021.

A copy of the foregoing Discovery Commissioner's Report and Recommendations was electronically filed and served on counsel on May 27, 2021 pursuant to NEFCR 9.

By:

Natilie Simonetti

Commissioner Designee.

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5	
6 Lavelle Atkinson, Plaintiff(s)	CASE NO: A-19-804902-C
7 vs.	DEPT. NO. Department 26
8 Charles Brown, Defendant(s)	
9	

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

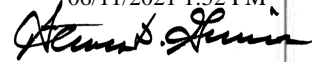
14 Service Date: 6/11/2021

15 MGA Docketing	docket@mgalaw.com
16 Case Manager	Casemanager@attorneydanwinder.com
17 Adriana Pereyra	adriana@integritylawnv.com
18 Dan Winder	winderdanatty@aol.com
19	

20 If indicated below, a copy of the above mentioned filings were also served by mail
21 via United States Postal Service, postage prepaid, to the parties listed below at their last
22 known addresses on 6/14/2021

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PET APP 0946


CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

LAVELLE P. ATKINSON, SHEILA
ATKINSON, individuals,

Plaintiffs,

vs.

CHARLES BROWN, an individual; STACY
BROWN, an individual; LAW OFFICE OF DAN
M WINDER, P.C., a domestic professional
corporation; DAN M. WINDER, an individual;
DOES I through X; and ROE CORPORATIONS
I through X, inclusive.

Defendants.

Case No.: A-19-804902-C
Dept. No.: 26

Hearing Date: May 13, 2021
Hearing Time: 9:00 a.m.

ORDER

The Court, having reviewed the above Report and Recommendations prepared by the
Discovery Commissioner and,

1
2
3 X No timely objection having been filed,

4
5 After reviewing the objections to the Report and Recommendations and good cause
6 appearing,

7 AND

8 X IT IS HEREBY ORDERED, the Discovery Commissioner's Report and
9 Recommendations are affirmed and adopted.

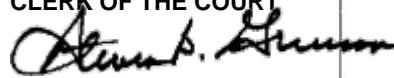
10
11 IT IS HEREBY ORDERED, the Discovery Commissioner's Report and
12 Recommendations are affirmed and adopted as modified in the following matter.
13 (Attached hereto.)

14
15 IT IS HEREBY ORDERED, that a hearing on the Discovery Commissioner's Report
16 is set for _____, 2021, at ____ : ____ .m.

17
18
19 Dated this 11th day of June, 2021

20 

21 A98 059 BE25 360B
22 Gloria Sturman
23 District Court Judge
24
25
26
27
28



DCRR
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Attorneys for Plaintiffs

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CLARK COUNTY, NEVADA

LAVELLE P. ATKINSON, SHEILA
ATKINSON, individuals,

Plaintiffs,

vs.

CHARLES BROWN, an individual; STACY
BROWN, an individual; LAW OFFICE OF DAN
M WINDER, P.C., a domestic professional
corporation; DAN M. WINDER, an individual;
DOES I through X; and ROE CORPORATIONS
I through X, inclusive.

Defendants.

Case No.: A-19-804902-C
Dept. No.: 26

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATION
GRANTING IN PART AND DENYING IN
PART PLAINTIFFS' MOTION FOR AN
ORDER TO SHOW CAUSE AS TO WHY
DEFENDANT LAW OFFICE OF DAN M.
WINDER, P.C. SHOULD NOT BE HELD
IN CONTEMPT FOR FAILING TO
ABIDE BY DCRR GRANTING
PLAINTIFFS' MOTION TO COMPEL #1**

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

DATE OF HEARING: May 13, 2021

TIME OF HEARING: 9:00 a.m.

APPEARANCES:

Plaintiff: Danielle J. Barraza, Esq., of the law firm MAIER GUTIERREZ & ASSOCIATES, on behalf of *Plaintiffs Lavelle P. Atkinson and Sheila Atkinson*

Defendants: Arnold Weinstock, Esq., of the law firm LAW OFFICE OF DAN M. WINDER, P.C., on behalf of *Defendants Law Office of Dan M. Winder, P.C. and Dan M. Winder*

I.FINDINGS

This matter came on for hearing before the Discovery Commissioner on May 13, 2021, at 9:00 a.m., on Plaintiffs' motion for an order to show cause as to why Defendant Law Office of Dan M. Winder, P.C. should not be held in contempt for failing to abide by DCRR granting Plaintiffs' motion to compel #1.

Plaintiffs Lavelle P. Atkinson and Sheila Atkinson were represented by Danielle J. Barraza Esq., of the law firm MAIER GUTIERREZ & ASSOCIATES. Defendants Law Office of Dan M. Winder, P.C. and Dan M. Winder were represented by Arnold Weinstock, Esq., of the law firm LAW OFFICE OF DAN M. WINDER, P.C.

The Discovery Commissioner finds that any objections not timely lodged within 30 days after discovery requests have been served are deemed WAIVED, *except as to privilege.* (EJ)

II.RECOMMENDATIONS

The Discovery Commissioner, having reviewed the pleadings and papers on file herein relative to the motions, having heard the representations of those present at the hearing, and for good cause appearing, hereby makes the following recommendations:

IT IS HEREBY RECOMMENDED that Plaintiffs' motion for an order to show cause is GRANTED IN PART and DENIED IN PART. The motion for an order to show cause is DENIED. However, alternative relief is provided, and additional discovery responses are COMPELLED; Interrogatory Nos. 21, 23, 24, 30, and 35 issued to defendant Law Office of Dan M. Winder, P.C.


1 must be responded to as written; Interrogatory No. 31 issued to defendant Law Office of Dan M.
2 Winder, P.C. is PROTECTED; Interrogatory No. 38 issued to defendant Law Office of Dan M.
3 Winder, P.C. is COMPELLED, however limited to identifying the attorneys who worked on the
4 *Brown v. Atkinson* litigation, and if they were publicly reprimanded within five years prior to the
5 execution of the purchase agreement for the property at issue in 2017, it must be disclosed, but
6 anything else is PROTECTED. Supplemental responses are due within seven (7) days.

7 IT IS FURTHER RECOMMENDED that the Commissioner will not grant attorney fees and
8 costs associated with Plaintiffs' motion.

9 DATED this 26th day of May, 2021.


10 
11 DISCOVERY COMMISSIONER

12
13 Respectfully submitted,
14 MAIER GUTIERREZ & ASSOCIATES

15 
16 JOSEPH A. GUTIERREZ, ESQ.
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17 DANIELLE J. BARRAZA, ESQ.
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18 8816 Spanish Ridge Avenue
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19 ADRIANA PEREYRA, ESQ.
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20 INTEGRITY LAW FIRM
21 819 South 6th Street
Las Vegas, Nevada 89101
22 Attorneys for Plaintiffs

Approved as to form and content,
LAW OFFICE OF DAN M. WINDER, P.C.

23 
24 DAN M. WINDER, ESQ.
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25 ARNOLD WEINSTOCK, ESQ.
Nevada Bar No. 810
26 3507 West Charleston Boulevard
Las Vegas, Nevada 89102
27 Attorneys for Defendants Law Office of Dan M.
28 Winder, P.C. and Dan M. Winder

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on June 10 2021.

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant at the following address on the _____ day of _____, 2021:



Electronically filed and served counsel on May 27, 2021, pursuant to N.E.F.C.R. Rule 9.

By Natilie Simonetti
COMMISSIONER DESIGNEE

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 Lavelle Atkinson, Plaintiff(s) CASE NO: A-19-804902-C
7 vs. DEPT. NO. Department 26
8 Charles Brown, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

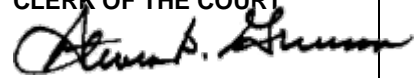
14 Service Date: 6/11/2021

15 MGA Docketing docket@mgalaw.com
16 Case Manager Casemanager@attorneydanwinder.com
17 Adriana Pereyra adriana@integritylawnv.com
18 Dan Winder winderdanatty@aol.com
19

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22 Danielle Barraza Maier Gutierrez & Associates
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PET APP 0953



NEOJ

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djb@mgalaw.com

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

LAVELLE P. ATKINSON, SHEILA
ATKINSON, individuals,

Plaintiffs,

vs.

CHARLES BROWN, an individual; STACY
BROWN, an individual; LAW OFFICE OF DAN
M WINDER, P.C., a domestic professional
corporation; DAN M. WINDER, an individual;
DOES I through X; and ROE CORPORATIONS
I through X, inclusive.

Defendants.

Case No.: A-19-804902-C

Dept. No.: XXVI

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD.

YOU AND EACH OF YOU will please take notice that an **ORDER DENYING WINDER**

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///

1 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was hereby entered on the 17th day
2 of June, 2021. A copy of which is attached hereto.

3 DATED this 18th day of June, 2021.

4 Respectfully submitted,

5 **MAIER GUTIERREZ & ASSOCIATES**

6 /s/ Danielle J. Barraza

7 JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

8 DANIELLE J. BARRAZA, ESQ.

Nevada Bar No. 13822

9 8816 Spanish Ridge Avenue

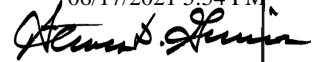
Las Vegas, Nevada 89148

10 *Attorneys for Plaintiffs*

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Dan M. Winder, Esq.
Arnold Weinstock, Esq.
LAW OFFICE OF DAN M. WINDER, P.C.
3507 West Charleston Blvd.
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Attorney for defendants Dan M. Winder and Law Office of Dan M. Winder P.C.

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CLERK OF THE COURT

ORDR

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

LAVELLE P. ATKINSON, SHEILA
ATKINSON, individuals,

Plaintiffs,

vs.

CHARLES BROWN, an individual; STACY
BROWN, an individual; LAW OFFICE OF
DAN M. WINDER, P.C., a domestic
professional corporation; DAN M. WINDER, an
individual; DOES I through X; and ROE
CORPORATIONS I through X, inclusive.

Defendants.

Case No.: A-19-804902-C
Dept. No.: XXVI

**ORDER DENYING WINDER
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: June 15, 2021
Hearing Time: 9:30 a.m.

This matter came on for hearing before the Court on June 15, 2021, at 9:30 a.m., on defendants Law Office of Dan M. Winder, P.C. and Dan M. Winder's motion for summary judgment (the "Motion").

Plaintiffs, Lavelle P. Atkinson and Sheila Atkinson, were represented by Danielle J. Barraza,

1 Esq., of the law firm MAIER GUTIERREZ & ASSOCIATES and Adriana Pereyra, Esq. of the law firm
2 INTEGRITY LAW FIRM. Defendants, Law Office of Dan M. Winder, P.C. and Dan M. Winder, were
3 represented by Arnold Weinstock, Esq., of the law firm LAW OFFICE OF DAN M. WINDER, P.C.

4 The Court, having reviewed the pleadings and papers on file herein relative to the Motion,
5 having heard the arguments of counsel present at the hearing, and for good cause appearing, hereby
6 finds that there are material facts in dispute regarding the allegations set forth in the motion for
7 summary judgment and hereby denies the motion, without prejudice.

8 Accordingly:

9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants Law Office of
10 Dan M. Winder, P.C. and Dan M. Winder's motion for summary judgment is hereby, DENIED
11 without prejudice.

12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the jury trial for this case
13 shall be moved to the August 2021 four week stack to begin August 2, 2021 at 9:00 a.m..

14 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Calendar Call shall be
15 re-set to July 22, 2021 at 9:00 a.m., and trial will be set on a preferential basis pursuant to NRS 16.025
16 due to the Plaintiffs' advanced age. Trial counsel must appear.

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1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties shall participate
2 in a Settlement Conference before a Senior Judge. Upon entry of this order, the parties shall promptly
3 coordinate with the Senior Judge Settlement Conference Coordinator to ensure the settlement
4 conference is set before trial.

5 DATED this ____ day of _____, 2021 Dated this 17th day of June, 2021



578-7BB-F6B0-74C0
Gloria Sturman
District Court Judge

6
7
8
9 Respectfully submitted,


Approved as to form and content,


10 DATED this 17th day of June, 2021.

DATED this 16 day of June, 2021.

11 MAIER GUTIERREZ & ASSOCIATES

LAW OFFICE OF DAN M. WINDER, P.C.

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13 JOSEPH A. GUTIERREZ, ESQ.
14 Nevada Bar No. 9046
15 DANIELLE J. BARRAZA, ESQ.
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*Attorneys for Defendants Law Office of Dan M.
Winder, P.C. and Dan M. Winder*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Lavelle Atkinson, Plaintiff(s) CASE NO: A-19-804902-C
7 vs. DEPT. NO. Department 26
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9

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13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/17/2021

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18 Dan Winder winderdanatty@aol.com
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