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DISTRICT COURT

CLARK COUNTY, NEVADA

PV HAZELL FAMILY TRUST, PAUL B. HAZELL and VERONICA CHEW INDIVIDUALLY and as Trustees of the PV HAZELL FAMILY TRUST, Plaintiffs, vs. JOHN CHATWIN, an individual, VIRGINIA CHATWIN, an individual, and QUAIL SUMMIT PROPERTY OWNERS' ASSOCIATION, a Nevada corporation, Defendants.	CASE NO. A568113 DEPT. NO. X **OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Hearing Date: September 15, 2010 Hearing Time: 9:00 AM

Plaintiff, by and through their attorneys of record, Goold, Patterson, Ales & Day, hereby brings its Opposition to Defendants' Motion for Summary Judgment. This opposition is based on the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument permitted at the time of this hearing.

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Dated this ___ day of August, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This matter started with a Nevada Real Estate Division ("NRED") arbitration on May 9, 2008.[1] The arbitration concerned certain improvements installed at Plaintiffs' neighbor's property and the handling by the Board for the Association of that matter.[2] At the arbitration, the neighbors were ordered to remove the offending structures.[3] The neighbors ("Meeks") appealed the decision to the District Court.[4] Defendants Quail Summit Property Owners' Association (the "Association") and John Chatwin prevailed at the arbitration and Plaintiff appealed.[5] Since the District Court matters began new evidence has come to light that at a minimum raise material questions of fact to be decided by the jury.

More than a year before the arbitration commenced, Plaintiffs brought certain complaints to the attention of the Association in writing and in person at a board meeting. In particular, Plaintiffs complained about the structures and alterations the Meeks made and about Mr. Chatwin's basketball court on the side of his house. He was the president of the Association at the time and was in charge of enforcing the rules for

[1] See Arbitration Award as Exhibit "1" attached to Defendants' Motion for Summary Judgment.
[2] Id.
[3] Id.
[4] The Court may take judicial notice of the filing of District Court Case No. A568374.
[5] See Arbitration Award as Exhibit "1" attached to Defendants' Motion for Summary Judgment.

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the Association. The Meeks's structures were in direct violation of the CC&R's and the Association's rules prohibit basketball hoops in the community.

Despite Plaintiffs' numerous complaints to the Association, the Association never investigated any of the issues. At the board meeting, Mr. Chatwin refused to respond to Plaintiff's inquiry regarding his basketball court. And two of the board members simply laughed at Plaintiff's comments. Receiving no response, Plaintiffs filed a claim with the Ombudsman for common interest communities through the NRED. The Association claimed that since Plaintiffs filed a complaint with the Ombudsman's office, it had no obligation to do anything until contacted by the Ombudsman. The Ombudsman's office failed to do anything for over a year. The arbitration ensued.

At the arbitration, the Meeks testified that they did not need to have approval from the Association for the alterations to their rear yard.[6] They testified that there was an unwritten rule that no one needed approval for rear yard improvements.[7] The Association never disputed this argument at the arbitration and maintained that their only consideration is how something looks from the street.

After losing the arbitration, the Meeks requested a trial de novo from the District Court and submitted a request to the Association for approval for the objectionable alterations then several years after installation.[8] The Association initially requested building permits for each item.[9] Even though no permits were provided, the Association's Architectural Review Committee ("ARC") approved every structure and alteration without any notice to Plaintiffs.[10] Meanwhile Plaintiffs were involved in litigation to have the arbitrator's award as to the Meeks upheld by the District Court. It was only in response to Plaintiffs' motion for summary judgment against the Meeks

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[6] Id. at 5-6.

[7] Id.

[8] See Meeks's Property Improvement Submittal Checklist and Design Review Committee Action Form attached hereto as Exhibit "A."

[9] See Letters dated September 25, 2008 and November 18, 2008 from Association's Management Company to Meeks attached hereto at Exhibit "B."

[10] See Meeks's Approval Letters attached hereto at Exhibit "C."

about six months after the approval that they found out about it. As a result, Plaintiffs lost the motion for summary judgment and had judgment entered against them. By that time, Plaintiffs incurred substantial attorneys' fees pursuing the arbitration and District Court matters. Plaintiffs then filed a timely appeal to the Nevada Supreme Court. On appeal the matter with the Meeks was settled through the mandatory settlement conference process. The Meeks's offensive structures were removed.

Also after the arbitration, the Association directed a letter summarizing the litigation to be sent to all homeowners.[11] This letter was drafted by the Association's attorney to the board and fails to properly disclose all the facts surrounding the litigation. Somehow every homeowner received a copy. As a result of each homeowner receiving the letter, Plaintiffs are consistently subjected to ridicule and scorn by the other homeowners.[12] In response to Plaintiffs' claim that the basketball court was not shielded from view of the street, a sign appeared on Mr. Chatwin's tree that said "Paul – this is a tree, duh."[13] Mr. Chatwin claims he did not place the sign on the tree.[14] Evidently the matter was discussed with so many residents of the community that Mr. Chatwin could not say who would put the sign in his yard, but he claims it was not him or any member of his family. After dissemination of the letter and the sign in Mr. Chatwin's yard, Plaintiffs had animal feces placed on their driveway, trash thrown in their backyard, and glares from fellow homeowners.[15] Ms. Chew is currently seeking medical treatment for the stress this situation is causing her.[16]

Plaintiffs recently found out that not all of the ARC members who approved the Meeks's structures even did a site inspection beforehand. The Association never notified Plaintiffs about the approval even though it knew Plaintiffs had previously

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[11] See Letter from Jay Hampton to the Board of Directors dated September 18, 2009 attached hereto at Exhibit "D."

[12] See Affidavit of Veronica Chew _____ attached hereto at Exhibit "E."

[13] See Photo of Chatwin's Sign attached hereto at Exhibit "F."

[14] See Deposition of John Chatwin at 72-73 attached hereto at Exhibit "G."

[15] See Affidavit of Veronica Chew _____ attached hereto at Exhibit "E."

[16] See id.

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arbitrated over the improvements and were in a District Court case over them at that time. In addition, the Association did not require any modifications to the improvements to address the concerns Plaintiffs expressed numerous times to the Association. For example, Plaintiffs complained that the bar-b-que was so close to the block wall between the properties that whenever it was in use Plaintiffs could not keep their windows open because smoke would billow into their house.

Cheryl Miller, a member of the ARC, inspected the structures after the arbitration and during the litigation between the Meeks and Plaintiffs.[17] Also at the inspection were Margaret Sciara (Board and ARC member), Diane Wright (ARC member), and Pam Ghertner (then Board President).[18] Ms. Miller thought the structures were "ugly" and "atrocious."[19] And she questioned why no one had noticed the structures on the "monthly walk-throughs" since they were visible from the street.[20] She said she would only approve them if they were made to match the house.[21]

Ms. Miller was not asked to sign the approval. Suzanne Moon (ARC member) and Marilyn Cunningham[22] (ARC member) signed the approval even though they did not conduct a site inspection.[23] The third signature is from Ms. Sciara who testified that the improvements "didn't seem to offend anybody on the ARC committee."[24] This directly contradicts what Ms. Miller said she told Ms. Sciara at the inspection.

Ms. Moon says she approved the structures despite the pending conflict and neighbor's objections to be "neighborly."[25] Ms. Sciara basically says as to each item requiring approval that they were approved because they were not offensive from the

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[17] Deposition of Cheryl Miller at 14 attached hereto at Exhibit "H."
[18] Id. at 14-15.
[19] Id. at 16, l. 23-25; at 17.
[20] Id. at 18, l. 2-6.
[21] Id. at 18, ll. 7-11.
[22] Marilyn's last name is not legible on the ARC form.
[23] See Meeks's Approval attached hereto as Exhibit "C."
[24] Deposition of Margaret Sciara at 90, l. 23 attached hereto at Exhibit "I."
[25] Deposition of Suzanne Moon at 29, ll. 20-23 attached hereto at Exhibit "J."

street.[26]

Ms. Sciara admits that she did not consider the effect of noise from children playing on the in-ground trampoline immediately adjacent to Plaintiffs' property.[27] She admits approval of the basketball hoop was in violation of the Association's rules.[28]

Ms. Miller also testified that her neighbor was notified when she made changes to her landscaping, but yet Plaintiffs were not notified of the Meeks's application.[29] And Ms. Sciara testified that the Association never required notice to neighbors when applications for improvements are made to the Association.[30]

In addition to the approval of the Meeks's structures/alterations and questionable details surrounding it, Plaintiffs also recently discovered that Mr. Chatwin has a business relationship with the Meeks.[31] The Meeks are clients of Mr. Chatwin.[32] He is their insurance agent. Did this relationship have something to do with the Association's inaction when initially questioned about the Meeks's structures? This is just another issue of fact to be determined.

At a minimum, the Association's approval process of the Meeks's structures/alterations raises questions of fact relative to the effectiveness of approval and whether it was made in good faith. An argument can be made based on the ARC members' deposition testimony that their behavior violates the Association's own governing documents and prior practices. That is at the center of this case. The multiple issues of fact that exist must be decided by the jury before any resolution of the claims for relief.

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[26] Deposition of Margaret Sciara at 94-95 attached hereto at Exhibit "I."
[27] Deposition of Margaret Sciara at 127, ll. 2-5 attached hereto at Exhibit "I."
[28] Id. at 131, l. 17-20.
[29] Deposition of Cheryl Miller at 48-49 attached hereto at Exhibit "H."
[30] Id. at 87, ll. 14-17.
[31] See Deposition of John Chatwin at 74-75 attached hereto at Exhibit "G."
[32] Id.

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II. LEGAL ARGUMENT

A. The Standard of Review

A motion for summary judgment is a procedure which entitles a party who can "show that there is no genuine issue as to any material fact....to a judgment as a matter of law."[33] "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is *no genuine issue as to any material fact*."[34] Adopting the standard for review of summary judgment motions set out in decisions by the United States Supreme Court, the Nevada Supreme Court stated:

> The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.
>
> While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." The nonmoving party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'"[35]

B. MATERIAL FACTS EXIST AS TO PLAINTIFFS' CLAIM FOR FALSE LIGHT.

The Association disseminated to each owner in the community a letter describing the current litigation. While the Association claims it does not know of any false statement it made, it should. It was drafted by the Association's attorney to the board. It somehow made its way to each owner's mailbox in the community. The Association disseminated the letter to each of the owners for the sole purpose of making Plaintiffs

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[33] NRCP 56(c).

[34] Id. (emphasis added).

[35] Wood v. Safeway, Inc., 121 P.3d 1026, 1031 (Nev. 2005) (footnotes omitted). See also Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986); Bulbman, Inc. v. Nevada Bell, 825 P.2d

look unreasonable and litigious. The Association failed to explain that it approved the Meeks's structures even though the arbitrator ordered their removal and the matter was pending in district court. The letter talks about the on-going expense to the Association, but does not discuss that the Association's insurance company is paying for the defense. The result of the letter is that other homeowners think they are litigious and unreasonable people who are costing the Association incredible amounts of attorneys' fees for no good reason. This is false. The Association put Plaintiffs in a false light by disseminating the letter.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[36]

"[T]he published matter must be false, though not necessarily defamatory."[37] Since dissemination of the misleading letter, Plaintiffs have endured negative and vulgar treatment from fellow neighbors.[38] A sign in Mr. Chatwin's yard stated "Paul – this is a tree, duh."[39] Animal feces were placed in their driveway.[40] Trash was thrown in their backyard.[41] They consistently get glares and evil stares from neighbors as they walk or drive-by their house.[42] While the Association can provide an update of the ongoing litigation to its members, it has no right to deliberately misrepresent the facts of the case to Plaintiffs' detriment.

588, 591 (Nev. 1992).

[36] Restatement (Second) of Torts § 652E (quoted by Machleder v. Diaz, 801 F.2d 46, 53 (2nd Cir. 1986).

[37] Machleder, 801 F.2d at 53.

[38] See Affidavit of Veronica Chew _____ attached hereto at Exhibit "E."

[39] See Picture of Chatwin's Sign attached hereto at Exhibit "F."

[40] See Affidavit of Veronica Chew _____ attached hereto at Exhibit "E."

[41] See id.

[42] See id.

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In addition to the deceptive letter, the Association has stated that the Plaintiffs' legal actions are costing the Association money in having to defend against those legal actions. However, contrary to the aspersions cast by the Association, it has been defended by counsel paid pursuant to an insurance policy. Therefore, the Association has made false statements that have caused damage to Plaintiffs.

C. THE ASSOCIATION'S CONDUCT HAS CAUSED EMOTIONAL DISTRESS TO VERONICA CHEW.

The Association claims there is no evidence of outrageous conduct or severe emotional distress to maintain a claim for intentional infliction of severe emotional distress. But Plaintiffs previously told the Association that details of Ms. Chew's medical treatment would be provided to them once they would agree to a protective order. To date, the Association has not agreed to a protective order, so the information has not been provided to them.

The cause of the distress is likewise not a secret. The combination of the letter disseminated by the Association and the Association's approval of the Meeks's structures has caused Plaintiff, Veronica Chew, severe emotional distress.[43] As detailed above, Plaintiffs have endured negative and vulgar treatment from fellow neighbors.[44] A sign was placed in Mr. Chatwin's yard saying "Paul – this is a tree, duh."[45] Animal feces were placed in Plaintiffs' driveway.[46] Trash was thrown in their backyard.[47] They consistently get glares and evil stares from neighbors as they walk or drive-by their house.[48] The manner in which Ms. Chew is treated by her fellow homeowners as a result of the Association's intentional misrepresentations causes her extreme anxiety making it difficult for her to work.[49] She is currently seeking care for her anxiety.[50]

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[43] See Affidavit of Veronica Chew _____ attached hereto at Exhibit "E."
[44] See id.
[45] See Picture of Chatwin's Sign attached hereto at Exhibit "F."
[46] See Affidavit of Veronica Chew _____ attached hereto at Exhibit "E."
[47] See id.
[48] See id.
[49] See id.

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The behavior and wrongful conduct of the Association and Mr. Chatwin creates issues of fact for the jury to decide. Indeed, Suzanne Moon, a former Association board member, admitted that the sign in Mr. Chatwin's yard was "offensive."

D. THE ASSOCIATION'S FAILURE TO EXERCISE GOOD FAITH PRECLUDES RELIANCE OF THE BUSINESS JUDGMENT RULE AS A DEFENSE.

The Association claims it was under a "duty to exercise their authority in approving or disapproving the homeowner's proposed improvements."[51] It cites Cohen v. Kite Hill Community Association[52] for this proposition. But the Association fails to finish the California court's statement of the law. The court stated that it is "a settled rule of law that homeowner's associations must exercise their authority... *in conformity with the declaration of covenants and restrictions, and in good faith.*"[53] It is that part of the settled rule of law that the Association failed to follow.

The Association's basis so far for why the Meeks's structures were approved during litigation over them is basically to be "neighborly." Evidently the Association chose to be "neighborly" to the Meeks at the expense of Plaintiffs as no consideration was given as to the offensive nature of the structures from Plaintiffs' property. The Association fails to explain how it can ignore the obvious complaints by Plaintiffs. It fails to explain why it did not notify Plaintiffs when the Meeks requested the approval. It fails to explain why two of the three ARC members who signed the Meeks's approval did not conduct a site inspection.

More importantly, the Association fails to explain why two of the three ARC members who did attend the site inspection refused to approve the Meeks' ARC application that belatedly sought approval of their offending structures.

Furthermore, the Association fails to explain why it approved the Meeks' ARC

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[50] See id.

[51] Defendant's Motion for Summary Judgment at 9, ll. 5-10.

[52] 142 Cal. App. 3d 642, 650 (1983).

[53] Id. (emphasis added).

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application when the Association stated it would not consider Meeks' ARC application until Meeks provided their building permits and Meeks did not provide their building permits to the Association.

The Nevada Supreme Court in Leonard v. Stoebling[54] found it to be "unreasonable per se" for an architectural review committee to fail to conduct a site inspection. In Leonard, the committee approved a structure without looking at the impact to the neighbor's view of Lake Mead.[55] The court considered the committee's decision "arbitrary" warranting "injunctive relief" in favor of the neighbor.[56] Here two of the three ARC members who conducted the inspection found that it was inconsistent with neighborhood standards after the site inspection.[57] The only one who attended the site inspection who did not find the structures offensive was Ms. Sciara, who previously testified on behalf of the Association, as its president, at the arbitration. But in spite of all that, the Association claims its decision is protected by the business judgment rule.

The Association is correct, the business judgment rule can be applied to the conduct of the board, but the board must act in *good faith*.[58] The Association did not even comply with its own governing documents when it approved the structures. Indeed, Ms. Sciara admitted approval of Meeks' basketball hoops was a violation of the Association's rules prohibiting basketball hoops. The Architectural Standards and Procedures of Quail Summit ("Design Guidelines")[59] do not say that the *only* thing to consider when reviewing an application for improvements is how it will look from the street, which was the reason given by Ms. Sciara for approving Meeks' ARC application. The Design Guidelines require much more, including the effect upon view of surrounding Lots. Design Guidelines, Part IV, Article A, Section 3: Standards of

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[54] 120 Nev. 543, 549, 728 P.2d 1358, 1362 (1986).

[55] Id.

[56] Id.

[57] Deposition of Cheryl Miller at 16-18, 24-25 attached hereto at Exhibit "H."

[58] The Association's motion cites numerous authorities to support that good faith and the best interest of the community are the factors applied to decisions of a board of directors.

[59] See Design Guidelines attached hereto at Exhibit "K."

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Review states:

> The Committee shall, in reviewing the designs reflected by plans, specifications and other materials submitted to it, consider the harmony of external design appearance and location of the proposed building or other improvement in relations to surrounding structures and topography. Such design review shall include, without limitation, colors, building style, relationship of proposed improvements to the site, driveway type and location, building location, grading design, drainage design, landscaping design, effect upon view of surrounding Lots, and irrigation location.[60]

Likewise, the CC&R's also state a standard for review of plans. The CC&R's at Section 7.9 (Standards of Review) states as follows:

> The Committee shall, in reviewing plans, specifications and other materials submitted to it, consider the suitability of the proposed building or other improvement for the area in which it will be located; the quality of the materials to be used in construction; and the effect of the proposed building or other improvement on the Property, and other Lots. In that regard, the Committee shall consider the impact of the proposed height of any improvement upon the view from any other Lot and shall have the right to disapprove plans and specifications by reason of any such impact.[61]

Two ARC members who viewed the structures refused to approve Meeks' ARC application because the offensive structures were not in compliance with the Design Guidelines and CC&R's.[62] Instead of trying to improve the structures so they would be in compliance, as suggested by one ARC member at the site inspection, Ms. Sciara sought approval from the two ARC members who did not conduct the inspection. Ms. Sciara admits approval of the basketball hoop was in violation of the Association's rules.[63] At a minimum there remains a huge issue of fact as to whether or not the standards set forth in the Design Guidelines and CC&R's were followed by ARC

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[60] See Design Guidelines attached hereto at Exhibit "K."
[61] See CC&R's attached hereto at Exhibit "L."
[62] Deposition of Cheryl Miller at 24-25 attached hereto at Exhibit "H."
[63] Deposition of Margaret Sciara at 127, ll. 2-5 attached hereto at Exhibit "I."

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members.

Another factor showing the Association's bad faith is its timing. For years Plaintiffs complained about the offensive structures and the Association did nothing. The Association did nothing when the arbitration commenced, but stated the Meeks would not grant them access. It was only after the Meeks lost at the arbitration and the Arbitrator ordered the offending structures removed, that the Association took action, which was to approve the offending structures in violation of their own governing documents. It is submitted that a big problem with their approach is that the Association decided long ago not to do anything about Meeks' offensive structures. By deciding to apply their selective version of the Design Guidelines and CC&R's they damaged Plaintiffs. They prevented Plaintiffs from enforcing the CC&R's on their own as expressly allowed pursuant to the CC&R's. As homeowners, Plaintiffs have a personal right to enforce the restrictions. The Association may have made a decision not to enforce restrictions in rear yards based on how they looked from the street, but the CC&R's do not support that position and neither do the Design Guidelines. In effect, the Association's approval of Meeks' offensive structures after Plaintiffs had already spent substantial sums in attorneys' fees seeking removal of Meeks' offensive structures. Additionally, the Association purposefully failed to give notice to Plaintiffs. The only logical reason for that could be to cause Plaintiffs' further damage as they unknowingly pursed their district court case.

Given all these issues, at a minimum, there are significant issues of material fact surrounding the Association's approval that need to be decided by the jury. Only if they are found to of acted in good faith can they hope to use the business judgment rule as a defense.

As far as Mr. Chatwin is concerned, he purposefully withheld pertinent information from Plaintiffs when asked directly about his basketball hoops. He was the board President at that time and owed every owner in the Association a fiduciary duty. Plaintiffs recently discovered that Mr. Chatwin has a business relationship with the

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Meeks. It is entirely possible that the board at that time refused to conduct any investigation as to the Meeks for this reason. Whether Mr. Chatwin exercised good faith when he refused to respond in a professional and accurate manner to Plaintiffs' inquiries are issues of fact to be decided by the jury for this case.

Moreover, another Association board member acknowledged that it was reasonable for Plaintiffs to inquire of Mr. Chatwin's basketball hoops because they violated the Association's rule prohibiting basketball hoops and such inquiry should have been responded to.

E. PLAINTIFFS HAVE THE RIGHT TO FORCE THE ASSOCIATION TO COMPLY WITH THE GOVERNING DOCUMENTS.

The Association's assertion that owners in a common interest community have no claim against the Association if the Association enforces only some restrictions, and not others is without merit and defies logic. The Association exists to comply with its governing documents and any authority it has is derived from those documents. If the Association's board decides not to enforce certain restrictions any other homeowner can force the Association to do so. The CC&R's state: "In addition to any other remedies herein provided, each provision of this Declaration with respect to an Owner or the Lot of an Owner shall be enforceable by the Association or any Owner by a proceeding for a prohibitive or mandatory injunction or by a suit or action or recover damages." NRS 116.4117(2)(b)(1), as the Association quoted in its motion, specifically gives each owner a right of action to enforce "any provision of the declaration" against the Association.

Plaintiffs' claim is based on the Association's failure to investigate the Meeks' non-conforming structures after Plaintiffs complained. The Association is obligated to comply with its governing documents. The Association board and ARC members testified that all they consider when they look at applications for alterations is how the change will look from the street. If that is in fact their only consideration, they are not

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complying with their governing documents.[64]

The Association admits that it does not consider how neighbors may feel about a particular structure or modification as long as the structure or modification is not offensive from the street.[65] That is in direct conflict with the Association's governing documents and Plaintiffs have every right to force them to comply. Plaintiffs have the right to force them to comply, because the Association's only authority is defined by the governing documents and NRS 116. When the Association picks and chooses what parts of the Design Guidelines and CC&R's it wants to consider, it effectively takes away any right an individual owner has to seek compliance of the CC&R's from its neighbors. That is no more obvious than in this case. Plaintiffs were successful at the arbitration in having the offensive structures ordered to be removed at the arbitration. But after the Association granted their approval of the Meeks's offensive structures (based solely on how they looked from the street), the District Court granted summary judgment in favor of the Meeks allowing them to leave them as they were. The Association effectively eliminated Plaintiffs' right of action to enforce the CC&R's against the Meeks. For that the Association is liable for all damages caused to Plaintiffs and the Association should be forced to grant approvals based on every factor set forth in the governing documents.

If the Association is allowed to selectively enforce its Design Guidelines, an owner could put a lime green outhouse in their backyard and as long as it was not visible or "offensive" from the street, the Association would approve it and eliminate the right of that owner's neighbor to stop it. Such a result would be absurd, but entirely likely if the Association is allowed to continue with their current ways.

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[64] See Design Guidelines Part IV, Article A, Section 3 quota infra; CC&R's Section 7.9 quoted infra.

[65] Affidavit of Margaret Sciara (the Association's Exhibit 5); Deposition of Margaret Sciara at 94-

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F. THE ASSOCIATION'S ARGUMENT REGARDING ATTORNEYS' FEES NOT BEING PLEADED AS SPECIAL DAMAGES AND PLAINTIFFS NOT HAVING ACTUAL DAMAGES ARE RED HERRINGS.

The Association argues that since Plaintiffs are seeking their attorneys' fees they had to plead them as special damages. The Association's argument is misleading. Plaintiffs' amended complaint does state at Paragraph 45 "[a]ditionally, Plaintiffs are entitled to recover its attorney's fees incurred herein under NRS 18.010 and the CC&R's." Therefore, and contrary to the argument made in the moving papers, Plaintiffs did plead entitlement to recovery attorney's fees.

As indicated above, Plaintiffs were forced to incur attorney's fees in successfully challenging the Meeks' improper installation of structures on their property. The Arbitrator rejected the Meeks' argument that they did not need approval from the Association, which argument was supported by the Association when it was made to the Arbitrator. Thereafter, the Meeks objected to the Arbitrator's decision and the matter proceeded to litigation before the District Court. The Association was fully aware of that litigation and went ahead and approved the Meeks' offensive structures after arguing those structures did not need to be approved. The wrongful approval of the Meeks' offensive structures by the Association resulted in prolonged legal proceedings in the District Court case filed by the Meeks and an appeal to the Nevada Supreme Court. It was only while the matter was on appeal were the issues resolved and the offending structures removed. Thus, the Plaintiffs are seeking recovery of their attorney's fees incurred in the Meeks' case, which is an item of actual damages Plaintiffs have been forced to incur because of the Association's wrongful conduct. Plaintiffs have plead entitlement to recovery of attorney's fees in the Meeks' case.

Furthermore, Plaintiffs are seeking recovery of their attorney's fees incurred in this case, and Plaintiffs have plead entitlement to recovery of attorney's fees in this case as well.

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95 attached hereto at Exhibit "I."

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The general rule as set out in Horgan v. Felton[66] is that "[g]enerally, attorney fees are not recoverable absent a statute, rule, or contractual provision to the contrary." The court went on to say "[a]s an exception to the general rule, a district court may award attorney fees as special damages in limited circumstances."[67] This refers to the attorneys' fees in the action in which they were incurred. The attorneys' fees incurred in this action are recoverable by virtue of the CC&R's as well as by statute. The CC&R's provide at Section 8.4 that "[i]f any court proceedings are instituted in connection with the rights of enforcement and remedies provided in this Declaration, the prevailing party shall be entitled to recover from the losing party any costs and expenses in connection therewith, including reasonable Attorneys' fees." Plaintiffs' right to recover attorney's fees is also statutory as set forth in NRS 116.4117(4), which permits attorneys' fees to the prevailing party. Although, there is no need to plead attorneys' fees as special damages when the right to recover them is contractual, Plaintiffs did in fact plead their right to recover their attorney's fees.

The Association alleges that Plaintiffs have no actual damages to bring a claim under NRS 116.4117 against the Association. NRS 116.4117 specifically states "[t]he civil remedy provided by this section is in addition to, and not exclusive of, any other available remedy or penalty." Meaning Plaintiffs need not meet the requirements of NRS 116.4117 to have a claim against the Association, but in fact, they do. Plaintiffs have sustained actual damages resulting from the failure of the Association to follow its governing documents.

As detailed previously, Plaintiffs spent substantial sums of money pursuing enforcement of the CC&R's against their neighbors, the Meeks. Plaintiffs were successful at the arbitration level, but the Meeks sought a trial de novo with the District Court. Unbeknownst to Plaintiffs, the Meeks sought the Association's approval of their offending structures and the Association summarily and inappropriately approved

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[66] 170 P.3d 983, 986 (Nev. 2007).

[67] Id.

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them. The Association blatantly failed to consider the objections of Plaintiffs that the offending structures violated the governing documents. As a result of the Association's wrongful approval, Plaintiffs were unnecessarily forced to expend time and money seeking compliance by the Meeks with the CC&R's. If the Association had followed its governing documents or - at a minimum - stayed out of the situation, Plaintiffs would not have had to incur all the attorney's fees challenging the Meeks' offensive structures. These fees are not the fees incurred in this action; they are not subject to special pleading requirements. They are simply damages they incurred. Plaintiffs will prove them like any other element of damages at trial.

The Association cites to Sandy Valley Associates v. Sky Ranch Estates Owners Association[68] for the proposition that "our Supreme Court disapproves of the trial court awarding attorney fees as damages unless the case falls under a special category of litigation."[69] The Sandy Valley Court explained the distinction between attorneys' fees as a cost of litigation and as an element of damage.[70] The former is recoverable if authorized by agreement, statute or rule.[71] The latter must be pleaded as special damages and proved just as any other element of damages at trial.[72] But the Court is referring in both cases to the attorneys' fees incurred in the action. Plaintiffs in this case are seeking to recover attorney's fees incurred in the Meeks' case as damages as well as attorney's fees incurred in this case.

In Sandy Valley attorneys' fees were not authorized by agreement, statute, or rule.[73] That is not the case in this matter. In Sandy Valley, the attorneys' fees incurred in that action were an element of damages that needed to be proven as an element of damages at the trial.[74] In this matter, Plaintiffs incurred damages that will be proven at

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[68] 117 Nev. 948, 35 P.3d 964 (2001).
[69] Defendants' Motion for Summary Judgment at 13, ll. 17-19.
[70] Sandy Valley, 35 P.3d at 968-69.
[71] Id.
[72] Id. at 969.
[73] Id. at 968.
[74] Id.

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trial (as detailed above) and they will seek attorneys' fees as a cost of litigation against the Association. The Association's objections to Plaintiffs' claims in this regard are unfounded.

G. CHATWIN MAY NOT USE STATUTE OF LIMITATIONS AS A DEFENSE TO COMPLIANCE WITH THE CONDITIONAL APPROVAL.

The Association and Chatwin claim that the conditional approval relating to Chatwin's property requiring that the basketball court be shielded from view of the street cannot be enforced now due to a statute of limitations. The Association has an obligation to enforce restrictions. If the Association's failure to enforce a restriction prevents an owner from doing so, the Association is liable. Cheryl Miller was a member of the ARC when the basketball hoops on Chatwin's property were conditionally approved. She explained that there is a monthly inspection and if the tree that was planted was no longer blocking the basketball hoops from view of the street, the owner should be forced to rectify the situation. Ms. Miller stated:

> I mean, that's simple logic, and it should be followed. I mean, everybody should meet the same criteria as everybody else.[75]

She went on to say:

> If you could see something from the street it needs to be shielded or taken down. So we have a management company that has a responsibility to enforce the CC&R's, to provide the violation letters, and to make sure that every single homeowner complies the same as every other homeowner.[76]

The Association and Chatwin assume the tree in Chatwin's front yard to block the basketball court from view was planted in 1991 at the latest and that's when any statute of limitations would start. However, that would be incorrect. According to the Association's records the tree planted at some point in 1991 was sufficient to satisfy the Association's requirements. The tree may have been blocking the basketball court for many years thereafter. The problem now is that it does not currently block the

[75] Deposition of Cheryl Miller at 39 attached hereto at Exhibit "F."

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basketball hoops from view of the street. The statute of limitations, if at all applicable, cannot start until the violation occurs. In order for Mr. Chatwin to use a statute of limitations defense, he must show when the violation existed. He certainly would not be suggesting that the tree did not grow over the past several years. When did the tree grow too high to block the basketball court? When was the tree trimmed to no longer provide a shield? If the Association was doing its job, it would know the answers to these questions. Since it does not, Mr. Chatwin cannot prove how long the violation existed precluding any sort of statute of limitations defense. Furthermore, whether the tree currently on Mr. Chatwin's property effectively shields the basketball court from view of the street is a question of fact to be decided by the jury at trial.

III. CONCLUSION

For all the foregoing reasons, significant issues of material fact exist which need to be decided by the jury for this matter. Several questions of fact exist as to the Association's approval of the Meeks's alterations. This issue is central to the outcome of this matter. If the approval was not made in good faith, the Association is liable to Plaintiffs for their actual damages and attorneys' fees as costs in this matter. The Association's failure to accurately describe the circumstances of the litigation to all the homeowners placed Plaintiffs in a false light which subjected them to ridicule and scorn by fellow homeowners. Ms. Chew suffers severe emotional distress from the Association's failure to exercise good faith and the offensive sign in Mr. Chatwin's yard. Defendants may have access to evidence supporting this fact if they would agree to a protective order, but to date they have not. In addition, a material fact exists as to whether or not Mr. Chatwin's business relationship with the Meeks impacted the

[76] Id. at 39-40.

board's decision to do nothing about Plaintiffs' complaints. Too many genuine issues of material fact exist to prevent the granting of a motion for summary judgment in favor of Defendants.

Submitted this ___ day of August, 2010.

GOOLD PATTERSON ALES & DAY

By:_____

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