

IN THE SUPREME COURT OF THE STATE OF NEVADA

KYONG SUN OH AND SUK JOO OH,
D/B/A BONANZA DISCOUNT CENTER,
Appellants,

vs.

SMITH'S FOOD AND DRUG CENTERS,
INC., A DELAWARE CORPORATION,
Respondent.

SMITH'S FOOD AND DRUG CENTERS,
INC., A DELAWARE CORPORATION,
Appellant,

vs.

SUK JOO OH AND KYONG SUN OH,
D/B/A BONANZA DISCOUNT CENTER,
Respondents.

No. 43190

FILED

SEP 25 2006

BY *[Signature]*
M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

No. 43406

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from district court orders in a landlord-tenant dispute granting Smith's motion for summary judgment and denying Smith's motion for attorney fees. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. For the reasons stated below, we affirm the district court order granting Smith's motion for summary judgment. While we conclude that the district court did not err in denying Smith's motion for attorney fees pursuant to a provision in the parties' lease allowing for an award of attorney fees to the prevailing party, we determine that Smith's may be entitled to attorney fees pursuant to NRCP 11. Therefore, we remand this matter to the district court for consideration of sanctions pursuant to this rule.

FACTS AND PROCEDURAL HISTORY

These appeals arise from a dispute between Smith's Food and Drug Centers (Smith's) on one hand, and Suk Joo Oh and Kyong Sun Oh (collectively the Ohs) on the other, over the parties' respective rights and responsibilities under a sublease of commercial real estate.

Smith's predecessor-in-interest, Smith's Food King No. 1, along with MAK Enterprises and Sav-On Realty, Inc., originally owned separate parcels, or lots, of land, which collectively comprised a shopping center located in Las Vegas. These parties signed a Declaration of Establishment of Protective Covenants, Conditions, and Restrictions and Grants of Easements (CC&R's), which authorized MAK to contract and pay for maintenance expenses on behalf of the fee owners. The CC&R's provided that the fee owners would bear a pro rata "share of the cost of operation, management control and maintenance of the entire Common Parking and Common Service Area." Section 6.4 of the CC&R's required MAK to obtain prior written approval by parties owning, in the aggregate, more than 75 percent of the ground floor of the shopping center for any single expense in excess of \$2,000. Section 6.4 further stipulated that "such right of approval may be delegated by such owner to a tenant or other agent." As Smith's lot, Lot 6, comprised 32.4 percent of the ground floor of the shopping center, MAK required the approval of the owner of Lot 6 for any expense in excess of \$2,000, unless the owner delegated the approval rights to its tenant, in which case MAK required the approval of the tenant.

Master lease

After signing the CC&R's, Smith's Food King No. 1 sold Lot 6 to American Property Investors VII (API). Presumably, as the owner of

Lot 6, API acquired the approval rights set forth in the CC&R's. Smith's proceeded to lease Lot 6 back from API pursuant to a master lease. The master lease stated that it was a "net" lease. Section 8(b) provided that Smith's Food King No. 1 would "promptly at its cost and expense, make all necessary replacements, restorations, renewals, and repairs to the Leased Premises and appurtenances thereto, whether interior or exterior, structural or non-structural, ordinary or extraordinary, and foreseen or unforeseen, ordinary wear and tear excepted." The master lease made no reference to the approval rights set forth in the CC&R's.

Smith's subsequently became the successor-in-interest to Smith's Food King No. 1 and American Real Estate Holdings (ARE) became the successor-in-interest to API.

Sublease

Smith's later subleased Lot 6 to the Ohs pursuant to a sublease. Through the sublease, the Ohs acquired the rights to lease Lot 6 "together with the rights, privileges, easements and licenses appertaining thereto" granted to Smith's under the master lease. While the sublease did not specifically state that the sublease was a net lease, pursuant to section 14 of the sublease, the Ohs agreed to perform and pay all obligations of Smith's under the master lease. Section 13.2 provided that "[i]f the Master Lessor fails to perform any of its obligations under the Master Lease, Smith's agrees to cooperate with Sublessee [the Ohs] in enforcing any rights of the tenant under the Master Lease." Like the master lease, the sublease did not address the approval rights set forth in the CC&R's. Finally, section 5 provides that Smith's "may in its sole discretion and at any time, assign its interest hereunder to a third party

and shall, upon such assignment, be relieved from its obligations hereunder.”

In 1994, the Ohs and Smith’s amended the sublease, extending the sublease to 2003. This amendment also provided the Ohs the option to extend the agreement until 2008, which the Ohs subsequently exercised.

Option agreement

In 2002, Smith’s entered into an option agreement with MAK, which gave MAK the right to acquire Smith’s interest in Lot 6. MAK exercised the option and purchased Smith’s interest in Lot 6 in May 2003, some two months after the initial dispute arose between the Ohs, Smith’s, and several defendants below.

Initial dispute

The initial dispute between the Ohs and Smith’s arose in February 2003 when MAK contracted and paid for repairs to the shopping center’s parking lot. MAK requested payment for a pro rata share of the repair costs from ARE, which in turn demanded that Smith’s pay the cost to repair the parking lot. Smith’s, in turn, demanded that the Ohs bear the cost. The Ohs refused, contending that the repairs were necessary due to ordinary wear and tear, and that under the master lease and sublease, the Ohs were not responsible for such repairs.

Original complaint

On February 26, 2003, the Ohs filed a complaint against Smith’s and API in district court seeking a declaration that pursuant to the master lease and sublease, the Ohs were not responsible for the repair costs as the repairs were due to ordinary wear and tear, and (2) an injunction restraining Smith’s and API from taking actions that would

“deprive and obstruct” the Ohs’ tenancy of the property.¹ The Ohs also brought a breach of contract cause of action against Smith’s. The Ohs contended that Smith’s breached section 13.2 of the sublease by refusing to cooperate with the Ohs in enforcing the Ohs’ right to refuse to pay for the parking lot repairs and instead demanding that the Ohs pay for the repairs.

Exercise of option

Approximately two months after the Ohs filed their original complaint, MAK exercised its option to acquire Smith’s interest in Lot 6. The assignment of leases, made effective May 1, 2003, provided:

Assignor [Smith’s] hereby assigns the Leases [master lease and sublease], and all its right, title and interest and obligations therein to Assignee [MAK], and Assignee hereby assumes and agrees to be bound at all times hereafter by all terms, conditions and provisions of the Leases. This Assignment includes, but not limited to, any and all claims, counterclaims, causes of action, and demands of whatsoever kind or nature, now existing of which may hereafter accrue to Assignor assertable in Case No. A463922 [the Ohs’ case against Smith’s and API] filed in the District Court of Clark County, Nevada. Assignee specifically assumes all liability, debts, and obligations of whatsoever kind or nature, now existing or which may hereafter attach to Assignor in Case No. A463922 filed in the District Court of Clark County, Nevada.

The same day as the assignment of leases became effective, MAK and Smith’s entered into an indemnity agreement, in which Smith’s agreed to

¹Presumably, the Ohs brought their complaint against API because they were unaware that ARE was the successor-in-interest to API.

assign to MAK all of Smith's rights to recover from any third party pursuant to the terms of any lease of the property. Also on May 1, 2003, the Ohs received notice that Smith's transferred all of its rights and interests to MAK. The notice stated that all rental and other payments under the sublease that became due and payable subsequent to the date of the notice were to be made to MAK.

Amended complaint

Fifteen days after the Ohs received notice of the assignment, the Ohs filed an amended complaint against Smith's, API, ARE, MAK, MAK Corp., and Warren Kellogg as an officer and shareholder of MAK Corp. The first four claims were against Smith's and ARE only. In the first cause of action, the Ohs sought a declaration of Smith's, ARE, and the Ohs' rights and responsibilities under the master lease and sublease. Specifically, the Ohs alleged that, pursuant to the master lease and sublease, the Ohs were not responsible for the parking lot repairs as the repairs were necessary due to ordinary wear and tear. In the second cause of action, the Ohs sought an injunction restraining ARE and Smith's from taking actions that would "deprive and obstruct" the Ohs' tenancy of the property. In the third cause of action, the Ohs sought damages for Smith's and ARE's alleged breach of the master lease and sublease. In this, the Ohs alleged that ARE and Smith's breached the master lease and sublease by demanding that the Ohs pay a pro rata portion for the cost to replace the parking lot. In their fourth cause of action, the Ohs sought damages for Smith's and ARE's alleged breach of an implied covenant of good faith and fair dealing. Again, the Ohs alleged that Smith's and ARE caused this breach by demanding that the Ohs pay for the parking lot repairs. The Ohs additionally alleged that Smith's breached an implied covenant of

good faith and fair dealing by secretly entering into an option contract with MAK and not giving the same option opportunity to the Ohs.

The Ohs brought their fifth cause of action for conspiracy to interfere with business relations and prospective business relations against Smith's, ARE, MAK, MAK Corp., and Kellogg. The Ohs alleged that these parties entered into a conspiracy to force the Ohs to vacate the property by forcing the Ohs to pay for the parking lot repairs. The Ohs' last three causes of actions, against MAK, MAK Corp., and Kellogg, were for intentional and/or negligent interference with contractual/business relations, tortious taking of economic or business opportunity and interference with prospective economic advantage, and piercing the corporate veil.

District court

For the proceedings in the court below, API, ARE, MAK, MAK Corp., and Kellogg jointly retained counsel, while Smith's acquired representation from separate counsel. The district court initially denied the Ohs' motion for a preliminary injunction, as the Ohs failed to present a sufficient basis to warrant the issuance of an injunction. The Ohs subsequently renewed their motion for a preliminary injunction.

Although it is not clear from the record, at least one defendant countered with an application for summary eviction. MAK filed a countermotion for an order to show cause why temporary restitution should not issue. The district court denied the application for summary

eviction, and enjoined the defendants from seeking summary eviction from any other court.²

In an order dated October 29, 2003, the district court denied the Ohs' renewed motion for a preliminary injunction and granted, in part, MAK's countermotion for an order to show cause why a temporary writ of restitution should not issue. The district court found that the master lease and sublease were net leases and, as such, the Ohs were responsible for all costs of repairs. The district court ordered the Ohs to pay to MAK, as additional rent, the sum of \$208,287.89 for the common parking area maintenance expenses. The district court found that the additional rent charges were assessed against the Ohs pursuant to section 6 of the CC&R's. As an accommodation to the Ohs, the district court allowed the Ohs to pay the sum over 60 months. The October 29, 2003, order was not final for appeal purposes.³

Smith's motion for summary judgment

On January 22, 2004, Smith's filed a motion for summary judgment. Smith's argued that section 17 of the master lease and section 5 of the sublease expressly allowed Smith's to assign its interest to any third party, and thus Smith's did not breach the sublease or an implied covenant of good faith and fair dealing by assigning its interest to MAK rather than the Ohs. While Smith's did not directly address the Ohs' claims for declaratory and injunctive relief or the Ohs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing

²The district court minutes do not indicate which of the defendants the district court enjoined.

³See NRCP 54(b); NRAP 3A(b).

based on the repair costs, Smith's did note that the district court already concluded that the Ohs were responsible for the parking lot repairs.

For the first time, in their opposition to this motion, the Ohs alleged that Smith's acquired the approval rights set forth in the CC&R's from ARE through the master lease. It is unclear from the Ohs' opposition whether the Ohs argued that Smith's acquired the approval rights and the Ohs were not obligated to pay for repairs which Smith's did not approve first, or that the Ohs acquired the approval rights from Smith's through the sublease and the Ohs were not responsible to pay repairs which the Ohs did not approve of first. The Ohs also impliedly made a request for a continuance, pursuant to NRCP 56(f), contending that evidence acquired through discovery would address the issue of the approval rights.

At a March 11, 2004, hearing on Smith's motion, the Ohs conceded that Smith's had the right to assign its interest to any third party. The district court then noted that the Ohs did not have "a claim there as to any actions taken as to the parking lot and their voting on the parking lot." The district court ultimately concluded that the Ohs were not damaged by any alleged conspiracy between MAK and Smith's to evict the Ohs, as the district court prevented any such eviction. At the hearing, the district court announced that it was granting Smith's motion for summary judgment. Smith's attorney agreed to draft the order.

According to the district court minutes, counsel for the Ohs and MAK attended a hearing before the district court three days later. The minutes indicate that the Ohs noted that section 6.4 of the CC&R's required MAK to obtain prior written approval by parties owning, in the aggregate, more than 75 percent of the ground floor of the shopping center

for any single expense in excess of \$2,000. The minutes also indicate that the district court reserved the issue of the parking lot repairs.

In its March 16, 2004, district court minutes, the district court noted that, based on its reading of the master lease and sublease, the Ohs did not acquire the approval rights, but the court would allow the Ohs an additional 40 days to conduct discovery relating to this issue. It is unclear from the minutes whether the district court intended to reserve the approval rights issue as to all the defendants, or the defendants with the exclusion of Smith's.

However, in an order filed March 16, 2005, and prepared by Smith's counsel, the district court dismissed all of the Ohs' claims against Smith's and granted Smith's motion for summary judgment on those claims. The court further stated that the order was a final judgment certified for appeal under NRCP 54(b). The Ohs filed a motion for reconsideration, arguing that Smith's breached the contract and an implied covenant of good faith and fair dealing by failing to disclose to the Ohs that Smith's acquired the approval rights. In a short order, the district court denied the Ohs' motion for reconsideration. On April 23, 2004, the Ohs appealed the district court order granting Smith's motion for summary judgment (Docket No. 43190).

Attorney fees

Smith's subsequently moved the district court for attorney fees and costs pursuant to a provision in the sublease allowing for an award of attorney fees and costs to the prevailing party in an action under the sublease. In its opposition to Smith's motion for attorney fees and costs, the Ohs argued that Smith's enjoyed no privity of contract with the Ohs as of May 1, 2003, when Smith's assigned its interest in the sublease to

MAK, and thus Smith's could not seek attorney fees pursuant to a provision in the sublease. In another short order, the district court granted Smith's motion for costs but denied its request for attorney fees. Smith's now appeals this denial of attorney fees (Docket No. 43406).

Subsequent litigation

Subsequent to the dismissal of the Ohs' claims against Smith's, the Ohs proceeded with litigation against the remaining defendants. In a July 12, 2004, order granting, in part, the remaining defendants' motion for summary judgment, the district court: dismissed the Ohs' fifth cause of action for conspiracy to interfere with business relations and prospective business against ARE, MAK, MAK Corp., and Kellogg; dismissed the Ohs' sixth cause of action for tortious taking of economic or business opportunity and interference with prospective economic advantage against MAK, MAK Corp., and Kellogg; dismissed the Ohs' eighth cause of action for alter ego/piercing the corporate veil against MAK Corp. and Kellogg. The district court noted that

[w]ith respect to the Ohs first, second, third and fourth causes of action for declaratory relief, injunctive relief, breach of contract and breach of the implied covenant of good faith and fair dealing against ARE, the only remaining issue to be litigated is whether the approval rights contained in section 6.4 of the CC&R's were delegated to the Ohs, and if so, whether the Ohs could therefore escape liability for its \$208,287.89 proportionate share of the parking lot restoration charges.

On October 11, 2004, the Ohs moved for summary judgment, arguing that ARE and/or API delegated the approval rights through "the course of conduct and dealings since the year 1978" to Smith's, and this right of approval contractually flowed to the Ohs as subtenants pursuant to the sublease. This is the first time the Ohs clearly argued that they

acquired the approval rights pursuant to the sublease. In a November 12, 2004 order, the district court denied the Ohs' motion for summary judgment and entered complete summary judgment in favor of the remaining defendants. By granting summary judgment in favor of the defendants and dismissing the Ohs' claims, the court ostensibly concluded that the Ohs' approval rights claim lacked merit.

The Ohs filed a motion to alter or amend the judgment. They again argued that ARE delegated the approval rights to Smith's, which thereafter delegated the same rights to the Ohs through the sublease. The Ohs contended that the district court erred in granting summary judgment in favor of MAK because MAK failed to acquire Smith's or the Ohs approval before contracting and paying for the parking lot. The Ohs contended that the district court erred in granting summary judgment in favor of ARE, because ARE "approved in writing Smith's delegation of any and all of its rights" to the Ohs. The district court summarily denied the Ohs' motion for reconsideration. On January 5, 2005, the district court entered judgment in favor of MAK Enterprises, MAK Corp., API, ARE, and Kellogg against the Ohs in the sum of \$208,287.89 as and for common parking area maintenance expenses over a term of 60 months interest. The district court subsequently awarded the remaining defendants \$80,000 in attorney fees and \$12,150.89 in costs. The Ohs appealed again. In their docketing statement, the Ohs included the district court order granting Smith's motion for summary judgment as one of the orders on



appeal.⁴ The Ohs subsequently requested that this court dismiss this second appeal docketed as No. 44416.

DISCUSSION

Approval rights

In its appeal, the Ohs argue that the district court erred in granting summary judgment in favor of Smith's on the Ohs' claims for declaratory relief, injunctive relief, breach of contract, and breach of the implied covenant of good faith and fair dealing because discovery would have revealed that the Ohs acquired the approval rights pursuant to the sublease.⁵ The Ohs contend that if evidence shows that the Ohs had the approval rights, then Smith's breached the sublease and implied covenant of good faith and fair dealing by failing to disclose to the Ohs that the Ohs

⁴In their second amended notice of appeal, the Ohs list the following as on appeal: (1) "all orders and judgment in this case"; (2) May 26, 2003, order granting defendants' motion for sanction for violating court order; (3) March 16, 2004, order granting summary judgment in favor of Smith's and dismissal of claims against Smith's; (4) July 12, 2004, order granting in part, MAK, MAK Corp., ARE and Kellogg's motion for summary judgment entered July 12, 2004; (5) September 1, 2004, order denying Ohs' motion for reconsideration of cam charges issues; (6) November 12, 2004, order denying Ohs' motion for summary judgment and granting the defendants' countermotion for summary judgment; (7) December 21, 2004, order denying the Ohs' motion for reconsideration of the court's order granting defendants' countermotion for summary judgment; (8) January 5, 2005, judgment; (9) January 12, 2005, order denying the Ohs' motion to alter or amend the judgment, granting in part the Ohs' motion to retax the costs and granting the defendants' motion for attorney fees; and (10) all orders and rulings entered by the district court and made appealable by the foregoing.

⁵As the Ohs only argue on appeal that they acquired the approval rights through the master lease and sublease, we will not address the Ohs' other claims in their complaint and amended complaint further.

acquired the approval rights and refusing to cooperate with the Ohs in enforcing the Ohs' approval rights.

As a preliminary matter, we note that, at least arguably, the Ohs cannot raise the issue of the approval rights in their appeal from the district court's order granting summary judgment in favor of Smith's. This relates to the failure of the district court to finally resolve whether the Ohs acquired the approval rights until after granting summary judgment in favor of Smith's. Specifically, in its July 2004 order granting partial summary judgment in favor of the remaining defendants, the district court indicated that it reserved ruling on the Ohs' claims for declaratory relief, injunctive relief, breach of contract, and breach of the implied covenant of good faith and fair dealing against ARE. On these claims, the district court indicated that the only remaining questions were whether the Ohs acquired the approval rights contained in section 6.4 of the CC&R's, and whether the Ohs may therefore escape liability for its proportionate share of the parking lot. However, on November 12, 2004, the district court granted complete summary judgment in favor of the remaining defendants. Additionally, the January 5, 2005, judgment memorialized the court's final determination that the Ohs were obligated to pay the parking lot assessment. By granting summary judgment in favor of the defendants remaining after the dismissal of Smith's, the court ostensibly concluded that the Ohs did not acquire the approval rights. Thus, arguably, the approval rights were the subject of the second appeal, which this court dismissed, and the Ohs cannot now litigate this issue in

its appeal of the district court order granting Smith's motion for summary judgment.⁶

However, because the Ohs first raised the issue of the approval rights in their opposition to Smith's motion for summary judgment, the Ohs could arguably raise this issue in the present appeal, Docket No. 43190. Additionally, it was arguable that the Ohs did indeed acquire the approval rights from Smith's. We conclude, however, that the Ohs' privity of contract argument with respect to Smith's claims for attorney fees applies with equal force to their ability to seek relief from Smith's under the assigned sublease.

As previously noted, the Ohs argued in their opposition to Smith's motion for attorney fees and costs that Smith's enjoyed no privity of contract with the Ohs as of May 1, 2003, when Smith's assigned its interest in the sublease to MAK. Indeed, the assignment of leases from Smith's to MAK included "any and all claims, counterclaims, causes of action, and demands of whatsoever kind or nature, now existing or which may hereafter accrue" in this case. Additionally, MAK assumed "all liability, debts, and obligations of whatsoever kind or nature, now existing or which may hereafter attach to" this case. By the Ohs' own admission in their opposition to Smith's motion for attorney fees, MAK's exercise of the

⁶Arguably, the Ohs lost their right to appeal the district court order granting summary judgment in favor of Smith's as well. In their notice of appeal for Docket No. 44416, the Ohs stated they were appealing "all orders and judgment in this case" including the district court order granting Smith's motion for summary judgment. As previously noted, the Ohs subsequently requested that this court dismiss the appeal in Docket No. 44416. As Docket No. 44416 included Smith's motion for summary judgment, the Ohs arguably lost the right to appeal this motion when they requested this court dismiss the appeal in Docket No. 44416.

option assigned all of Smith's rights and liabilities arising under the sublease. As Smith's cannot be subject to liabilities arising under a contract to which it was no longer a party, the district court did not err in granting summary judgment in favor of Smith's.⁷

Attorney fees

In its appeal, Smith's argues that the district court abused its discretion in denying Smith's motion for attorney fees. Because MAK assumed all liability and acquired all claims assertable in this case, and because MAK acquired the right to an award of attorney fees under the sublease, we conclude the district court did not err in denying Smith's motion for attorney fees pursuant to the sublease.⁸

We conclude, however, under the circumstances of this case, an award of attorney fees may be appropriate to Smith's under NRCP 11. When an attorney violates NRCP 11 by bringing a claim that is "both baseless and made without a reasonable and competent inquiry," the court shall impose upon the attorney an appropriate sanction, which may

⁷In this, we note that the assignment of leases constituted a valid novation, discharging Smith's of all of its duties under the sublease. "A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." United Fire Insurance Co. v. McClland, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). The parties do not dispute that the sublease was a valid, existing contract. Under section 5 of the sublease, the Ohs agreed to relieve Smith's of all of its obligations under the contract should Smith's assign the sublease to a third party. The assignment of rights from Smith's to MAK thus extinguished Smith's obligations under the sublease and created new rights and responsibilities between MAK and the Ohs.

⁸In this, we note that the Ohs and MAK settled all of their respective claims as part of the dismissal of Docket No. 44416.

include reasonable attorney fees.⁹ Here, by the Ohs' own admission in their opposition to Smith's motion for attorney fees, Smith's enjoyed no privity of contract with the Ohs as of May 1, 2003. However, the Ohs proceeded to file an amended complaint two weeks later seeking damages against Smith's for a sublease under which Smith's had no liability. As the Ohs received notice that Smith's assigned its interest in the master lease and sublease, and because the sublease provides that the Ohs were bound by this assignment, we conclude that the Ohs' attorney may have brought a baseless claim against Smith's without reasonable inquiry. Therefore, we remand this matter to determine whether to award sanctions under NRCP 11.¹⁰

⁹Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990); NRCP 11.

¹⁰With regard to the merits of the Ohs' claim that they were entitled to approve the parking lot renovations, we conclude that the district court's construction of the CC&R's, the master lease and the sublease was reasonable. The master lease and sublease say nothing about the obligation to pay assessments mandated under the CC&R's. Accordingly, it was reasonable for the district court to conclude that the owner of Lot 6 held the right to approve the parking lot renovations. Because the owner had the right to assess Smith's for the renovation expenses, Smith's had the right to pass the assessment through to the Ohs.

Going further, the Ohs have not in any respect addressed the merits of Smith's arguments that the summary judgment in Docket No. 43190 should be affirmed on all grounds except those related to the actual cost of the parking lot repairs. Thus, the Ohs have not carried their burden of showing reversible error under an assumption that the assignment to MAK was not determinative of the issues they have raised in Docket No. 43190.

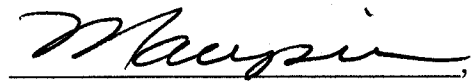
Finally, we note that the convoluted nature of the proceedings below and before this court is the sole responsibility of the Ohs' counsel. We caution

continued on next page . . .


CONCLUSION

In conclusion, we affirm the district court's order granting summary judgment in favor of Smith's. We reverse the district court's denial of attorney fees and remand this matter to the district court to consider possible sanctions pursuant to NRCP 11. Accordingly, we

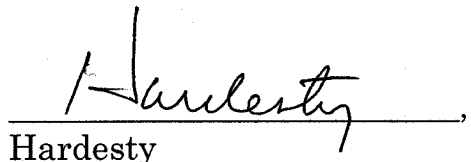
ORDER the judgment of the district court **AFFIRMED IN PART AND REVERSED IN PART AND REMAND** this matter to the district court for proceedings consistent with this order.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Valerie Adair, District Judge
Hong & Hong
Snell & Wilmer, LLP/Las Vegas
Clark County Clerk

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counsel that fragmented representation creates undue burdens on parties and the court system. We also note that certain representations in his briefs demonstrated a lack of candor to the tribunal that, if repeated in the future, may warrant referral to the state bar for investigation. By way of example, the Ohs' counsel falsely represented that the Ohs had litigated their right to approve the repairs from the very beginning of the case, including in the original complaint.