IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CYNTHIA PICKETT; AND CYNTHIA PICKETT, MSW, LCSW, LADC, INC., N/K/A CYNTHIA PICKETT MSW, LCSW, LADC, PC,
Appellants,
vs.
MCCARRAN MANSION, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 70127

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order granting a motion for summary judgment.[1] Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Appellants brought four claims below: breach of the covenant of quiet enjoyment, breach of contract, breach of implied covenant of good faith and fair dealing, and attorney fees. On appeal, appellants challenge five district court orders: (1) granting summary judgment in favor of respondent on appellants' breach-of-covenant-of-quiet-enjoyment claim and denying summary judgment on remaining claims; (2) granting respondent's motion in limine to exclude all of appellants' improperly disclosed damages and witnesses; (3) granting respondent's motion in limine to exclude evidence of damages in 2015 for failure to mitigate; (4) granting respondent's motion in limine to exclude appellants' economic loss expert; and (5) granting

[1]We do not recount the facts except as necessary to this disposition.

summary judgment on appellants' remaining claims for lack of proof of damages. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (holding that interlocutory orders may be heard in an appeal from the final judgment). We address each in turn.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

A district court's ruling on a motion in limine is reviewed for an abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). We review a district court's decision to admit or exclude evidence for an abuse of discretion. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008); *Las Vegas Metro.* But when the "ruling rests on a legal interpretation of the evidence code," this court reviews the ruling de novo. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012) (internal quotation marks omitted).

1. The grant of summary judgment on the breach-of-covenant-of-quiet-enjoyment claim

Appellants argue that the district court erred by granting summary judgment on the breach-of-covenant-of-quiet-enjoyment claim on grounds that they failed to vacate in a reasonable time. Specifically, they contend that this issue is a question of fact that should be resolved by a jury. We agree.

A tenant will prove a breach-of-covenant-of-quiet-enjoyment claim by proving constructive eviction. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008). For a commercial tenant seeking to prove constructive eviction, the claim has four elements: (1) "the landlord must either act or fail to act," (2) "the landlord's action or inaction must render the whole or a substantial part of the premises . . . unfit for occupancy for the purpose for which it was leased," (3) "the tenant must actually vacate the premises within a reasonable time," and (4) the commercial tenant must show that it provided "the landlord notice of and a reasonable opportunity to cure the defect." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. ___, ___, 335 P.3d 211, 214 (2014) (internal quotation marks omitted).

Below, respondent advanced two specific arguments in support of its request for summary judgment on this claim: first, respondent's acts or omissions did not render the whole or substantial part of the premises unfit for occupancy, and second, appellants did not vacate the premises within a reasonable period of time. The district court granted summary judgment only on the second ground, holding that appellants did not vacate the premises within a reasonable time from when the problems with the landlord began.

On appeal, respondent abandons its first argument and now argues only that the judgment should be affirmed because appellants failed to vacate in a reasonable time. Upon review of the record, construing all the evidence in a light most favorable to appellants, the nonmoving party below, we conclude that there is a genuine issue of material fact regarding whether appellants vacated the premises within a reasonable time. The "reasonable time" is not measured right from the start of problems between the landlord and tenant; rather, the time is measured from the moment upon which the problems have finally reached a sufficient level, for "the landlord's action or inaction must render the whole or a substantial part of the premises . . . unfit for occupancy for the purpose for which it was leased," which is what appellants contend happened through a series of events, and we agree that is a genuine issue of material fact. *See id.*

Further, because this was a commercial lease, appellants were required to provide the landlord with a reasonable opportunity to cure the defect, which necessarily prolongs the permissible time for the tenant to stay on the premises. Therefore, we conclude that a rational finder of fact could reasonably find on this record that appellants vacated within a reasonable time. As respondent advances no other argument for affirmance on appeal, we reverse this grant of summary judgment and remand for further proceedings.

2. *The grant of respondent's motion in limine to exclude improperly disclosed damages and witnesses*

Appellants argue that the district court abused its discretion in excluding some of appellants' witnesses, as well as their emails, due to late disclosure. A district court can exclude witnesses disclosed after discovery deadlines if no "substantial justification" is offered for the late disclosure, NRCP 37(c)(1), and on appeal, we review only for an abuse of discretion, *see*

Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Appellants disclosed these witnesses and their emails after the applicable discovery deadlines, and the district court did not abuse its discretion in concluding that appellants' alleged "lack of computer skills" was not a "substantial justification" for being untimely.[2] *See* NRCP 37(c)(1). Therefore, we affirm this order.

3. The grant of respondent's motion in limine to exclude evidence of damages from 2015

Appellants argue that the district court erred in ordering the exclusion of all evidence of damages from 2015 on grounds that appellants failed to reasonably mitigate their damages. We agree.

All relevant evidence is admissible unless (1) a restriction under Title 4 of the Nevada Revised Statutes applies, (2) the United States and Nevada Constitutions require exclusion of the evidence, or (3) "a statute limits the review of an administrative determination to the record made or evidence offered before that tribunal." NRS 48.025(1). The duty-to-mitigate-damages doctrine is not a restriction on the admissibility of evidence, but is instead an affirmative defense that, when proven by the defendant, limits the amount of damages a claimant may be awarded. *See Nev. Ass'n Servs, Inc. v. Eighth Judicial Dist. Court*, 130 Nev. ___, ___, 338 P.3d 1250, 1254 (2014) (holding that the defendant bears the burden of proving an affirmative defense); *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 394 & n.20, 168 P.3d 87, 95 & n.20 (2007) (holding that mitigation of damages is an affirmative defense). Specifically, the doctrine

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[2]Appellants do not allege that their late disclosure was harmless. *See* NRCP 37(c)(1) (providing that a party that fails to timely disclose evidence may not present that evidence "unless such failure is harmless").

provides that if liability and damages are established, and the claimant is found to have failed to mitigate some or all of its damages, the amount of those damages that could have been reasonably avoided will be subtracted from the final monetary judgment. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005); *James Hardie Gypsum (Nev.) Inc. v. Inquipco*, 112 Nev. 1397, 1404-05, 929 P.2d 903, 908 (1996) (noting that the issue of reasonableness is a decision to be made by the trier of fact), *disapproved of by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001); *see also Rockingham Cty. v. Luten Bridge Co.*, 35 F.2d 301, 308 (4th Cir. 1929) (holding that the appropriate award when there is a failure to mitigate is subtracting the reasonably avoidable damages but still awarding the damages not reasonably avoidable, plus the profit which would have been realized had the contract been carried out in accordance with its terms); Robert A. Hillman, *Principles of Contract Law* 149-50 (2d ed. 2009). Therefore, the district court's exclusion of evidence of damages from 2015 was an abuse of discretion. *See* NRS 48.025; *Davis*, 128 Nev. at 311, 278 P.3d at 508.

4. The grant of respondent's motion in limine to exclude the economic loss expert

Appellants argue that the district court abused its discretion in granting respondent's motion in limine to exclude appellants' economic loss expert. "We review a district court's decision to admit expert testimony for an abuse of discretion." *Leavitt v. Siems*, 130 Nev. ___, ___, 330 P.3d 1, 5 (2014). The district court abuses its discretion when it "fail[s] to apply the full, applicable legal analysis," *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014), or "bases its decision on a clearly erroneous

factual determination or it disregards controlling law," *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016).

In this case, the district court failed to address the Nevada Supreme Court's established standard for evaluating expert testimony. *See Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). To testify as an expert witness, the witness must be qualified in an area of specialized knowledge, the testimony must assist the trier of fact, and the testimony must be limited to the scope of the expert's knowledge. *Id.* at 498, 189 P.3d at 650. Only *Hallmark*'s second factor was at issue in this case. Expert testimony assists "the trier of fact only when it is relevant and the product of reliable methodology. In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is . . . based more on particularized facts rather than assumption, conjecture, or generalization." *Id.* at 500-01, 189 P.3d at 651-52 (footnotes omitted).

Rather than addressing the *Hallmark* factors, the district court relied on its own "independent research." In granting the motion in limine, the district court stated its "biggest issue with regard to [the expert's report] is that there is no support or published study, for instance, of the standard growth. There is nothing to support how it compared to the ten to 30 percent growth rate" the expert used to calculate Pickett's damages. The district court failed to explain how this perceived omission rendered the expert's opinion irrelevant or unreliable under *Hallmark*. Moreover, the expert's opinions in his reports and declaration actually did include references to consideration of industry standards and growth rates and his reasoning behind using a 10-30 percent growth rate for Pickett's business. He concluded that Pickett's business had outperformed the industry's average

growth, and her own growth rate had been approximately 10-30 percent annually over the preceding 5 years. He also concluded the growth of her business stopped or declined during the period of time in which Pickett alleges the problems began and were not ameliorated.

The district court's concerns regarding the expert's methodology are more appropriately left for cross-examination rather than exclusion. By granting the motion in limine, the district court effectively precluded Pickett's evidence regarding damages. Because the district court abused its discretion in striking Pickett's economic loss expert without any analysis pursuant to *Hallmark*, the district court's ruling prevented Pickett from proving her damages.

5. The final judgment granting summary judgment on remaining claims

After the motions in limine, the sole argument respondent advanced for summary judgment on appellants' remaining claims was that, as a result of the district court's orders on the motions in limine, appellants could no longer present any evidence of damage at trial. Appellants conceded that, without the economic loss expert, they were unable to prove damages. Accordingly, the district court granted summary judgment on appellants' remaining claims, each of which requires proof of damages. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) ("Under Nevada law, 'the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach.'" (alteration in original) (quoting *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006))).

On appeal, respondent does not explicitly ask this court to affirm this final grant of summary judgment, but instead defends the judgment only by arguing in defense of the district court's rulings on the motions in limine and the first motion for summary judgment. Although

the fact section of respondent's answering brief briefly mentioned another potential concern with the evidence (i.e., "Over the course of discovery, Pickett failed to produce any evidence that would indicate she lost patients as a result of the 'office environment' at McCarran Mansion."), we do not consider this passing comment in the fact section of respondent's brief to be cogent argument supported by relevant authority, and therefore decline to consider it as a basis for affirmance. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that this court need not consider claims that are not cogently argued or supported by relevant authority); *see also* NRAP 28(a)(8) (providing that an appellant's brief must include a statement of facts); NRAP 28(a)(10) (providing that an appellant's brief must include an argument section, which is a separate section from the statement of facts, and which must contain all of appellants' contentions on appeal); NRAP 28(b) (providing that a respondent's answering brief shall adhere to, among other things, the requirements of NRAP 28(a)(8) and (10)).

Although respondent made similar references to causation in scattered locations in various motions below, these references always appeared in passing in support of other legal arguments. These brief complaints about causation were inadequate to raise an independent basis for granting summary judgment.[3] Therefore, in addition to declining review

[3]These brief comments about causation, mentioned only in support of other legal issues, were not adequate to put the appellants on fair notice of the need to litigate this specific issue in opposition to the present motions as a potential independent basis upon which the court might grant summary judgment. *See* NRCP 56(c) (detailing the requirements for adequately supporting an argument in a motion for summary judgment). Even if the district court wished to grant summary judgment on the element

for failure to cogently argue this issue and support it with a citation to relevant authority, we conclude that respondent waived this issue by failing to raise it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011). We see no other arguments raised on appeal in support of affirmance, and therefore, we reverse the grant of summary judgment.[4]

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.

Silver, C.J.

Gibbons, J.

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of causation sua sponte, it would have needed to first provide appellants fair notice and an opportunity to be heard on these grounds. *See Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). Upon adequate notice, appellants would have been obligated to include a section of argument on causation in their opposition brief below, and may have attached thereto evidence relating to this issue.

[4]Accordingly, we also reverse the order granting summary judgment on appellants' claim for attorney fees.

TAO, J., concurring:

I join in the order of partial reversal but, on remand, would recommend the district court address a question that all parties have apparently overlooked and that might moot all of the other grounds raised in this appeal: Are Pickett's causes of action even cognizable? In reviewing the record, I have my doubts.

Leases have existed in some form or another since 12th-century feudal England, and their metes and bounds are well-established. *See* David S. Hill, *Landlord and Tenant Law in a Nutshell*, 1 (West 5th Ed. 2011). In Nevada, the obligations of commercial landlords are codified in NRS Chapter 118C. Here, Pickett's causes of action seem to me to rely upon legal duties unrecognized within any Nevada statute or in nine centuries of common law. I don't think we ought to create such duties for the first time now. *See* Richard K. Willard, *Changing the Law: The Role of Lawyers, Judges and Legislators Concerning Social Engineering and the Common Law*, 11 Harv. J. L. & Pub. Pol'y 23 (1988) ("[O]ur common law disciplines of property, contracts and torts have been revolutionized by a generation of judges engaged in social engineering."). Without creating those duties, it appears to me, based upon the existing record, that there's no way Pickett could prevail as a matter of law.

I.

Both parties focus their arguments in this appeal narrowly on the question of damages. But in doing so they've missed a possible defect in the larger picture: Pickett is entitled to recover damages that arise only from a claim that's legally valid in the first place. Because neither party included extensive (in judicial slang, "cogent") argument on this larger question, the majority doesn't reach the issue, and I agree that the question

isn't quite ripe as this appeal is currently framed. But just because the parties haven't identified a potential legal defect doesn't mean the district court can't consider it on remand, after ordering proper briefing. In some instances, we could even raise it ourselves on appeal: "[t]he ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. Such is the case where [clearly controlling law] was not applied by the trial court." *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (internal citation omitted). *See Mardian v. Greenberg Family Trust*, 131 Nev. ___, ___, 359 P.3d 109, 111 (2015) (on de novo review of denial of summary judgment, the court is not limited to only what the parties expressly argue: "While the arguments made by the parties focus on Nevada law, the issue of whether the Arizona law should have been applied must also be addressed.").

There exist two entirely different variants of "judicial restraint": one arising from concerns over judicial process, and the other arising from fidelity to underlying principles of law. The former prizes adherence to such doctrines of judicial convenience as *stare decisis*, deciding cases on the narrowest grounds available, and answering only questions fully and cogently briefed by the parties. This is the approach that my colleagues adopt, and I agree for all of the reasons articulated in the majority order. Because the validity of Pickett's claims wasn't squarely raised below, Pickett hasn't been given a full and fair opportunity to respond, and it's possible that she possesses some evidence that it was indeed the landlord's actions that caused her injuries.

In the second variant, doctrines of mere convenience (like *stare decisis* or addressing only the narrowest ground available) are recognized as merely a means to an end whose "greatest purpose is to serve a

constitutional ideal—the rule of law" and when adherence to a principle of convenience "does more to damage this constitutional ideal than to advance it, we must be more willing to depart" from it. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375-78 (2010) (Roberts, C.J., concurring) (deriding the "false premise" that the "practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law . . . There is a difference between judicial restraint and judicial abdication.").

This case represents a paradigmatic example of where the two forms of restraint can clash, or at least appear inconsistent. I agree that we ought not be activist and strike down dubious causes of action when their validity hasn't been fully contested by the parties as well as cogently argued. *See Maslenjak v. U.S.*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring) (courts should decline to rule on matter where "the parties have not had the chance to join issue fully"). But in a case like this, exercising that restraint should not be interpreted as reflecting a belief that the claims are indeed valid under Nevada law. By exercising the first form of restraint, we simply leave that question for the district court to resolve on remand.

II.

Pickett asserts three[5] causes of action: breach of contract based upon the landlord's alleged failure to provide a receptionist in the building

[5]Pickett's complaint included a fourth claim titled "attorney fees," but that's not an independent cause of action. A "cause of action" has been defined as the "fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief." *See Meech v. Hillhaven West Inc.*, 776 P.2d 488, 497 (Mont. 1989) (quoting *State v. Preston*, 181 N.E.2d 31, 36 (Ohio 1962)). A request for an award of attorney fees is merely a prayer for an additional form of relief arising from the same

lobby; breach of the implied covenant of good faith and fair dealing; and breach of the covenant of quiet enjoyment. All three arise from the same lease.

Why do I think the district court ought to review whether these claims are valid? Here are the facts behind Pickett's claims, as defined by her own pleadings, affidavits, and documentary evidence: Pickett rented space in a shared office building to operate a psychotherapy business. Things didn't go well and her business lost money, purportedly because of the "hostile" and unpleasant behavior of the lobby receptionist and the other tenants toward her and her clients. According to Pickett's brief, two other tenants directed "verbal abuse complete with heckling, screaming and profanity" toward Pickett, including once "berating" her in the lobby in front of her clients; refused to tell her clients where the bathroom was located; posted a sign in the lobby informing her clients that their questions would not be answered; and generally "ignor[ed]" and refused to assist her clients. Pickett asserts that these behaviors drove her clients away.

In response, Pickett didn't sue the neighbors who actually damaged her business. Indeed, it appears she couldn't have: the torts of

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underlying facts associated with Pickett's other claims, and is not itself an independent claim. *See Velazquez v. Mortg. Elec. Registration Sys.*, 2011 WL 1599595, at *3 (D. Nev. Apr. 27, 2011) (holding that a request for one particular remedy such as "declaratory relief is not a separate substantive claim for relief") (unpublished); *Josephson v. EMC Mortgage Corp.*, 2010 WL 4810715 (D. Nev. Nov. 19, 2010) (noting that a particular "form of relief . . . is not intended to furnish the Plaintiffs with a second cause of action for the determination of identical issues") (internal quotation marks omitted); *Stock West Inc. v. Confederated Tribes of Coville Reservations*, 873 F.2d 1221, 1225 (9th Cir. 1989) (noting that request for an additional form of relief is not a substantive cause of action).

tortious interference with contract or business advantage require the defendant to have employed "unlawful or improper" means of interference, *see Crockett v. Sahara Realty Corp.*, 95 Nev. 197, 200, 591 P.2d 1135, 1137 (1979), and also require that the defendant acted with the specific intent to damage the plaintiff's contract rather than out of mere "malevolent spite," *see Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nev.*, 106 Nev. 283, 287, 792 P.2d 386, 388 (1990). So the tenant's conduct, as unpleasant as Pickett thinks it was, probably wasn't so severe as to be tortious. Pickett also likely couldn't have sued the neighbors for breaching any contract; there was no contract between Pickett and her neighbors. Paragraph 3(a) of Pickett's lease includes a clause requiring Pickett not to "disturb" or cause a nuisance to other tenants. But that's an agreement that exists between Pickett and the landlord, not Pickett and her neighbors, and doesn't support a cause of action against her neighbors.

Thus, even if Pickett had wanted to sue the neighbors, there's a good chance she couldn't have. In any case, she didn't. She sued the landlord.

III.

Pickett's three claims are all square pegs wedged into round holes, because her landlord didn't commit the actions that caused her injury. So Pickett asserts a sort of third-party liability: the landlord didn't engage in the hostility, but rather had some duty to step in and stop the hostile behavior of the other tenants, even though the conduct was non-tortious and didn't breach any contract involving Pickett. Because the landlord didn't intervene, Pickett contends the landlord is now responsible for every penny of injury that the other tenants inflicted upon Pickett's business.

Is this a cognizable theory under these facts? However styled, all of Pickett's claims rest upon the same underlying premise: that landlords have some legal duty to police the interpersonal conduct of their tenants toward other tenants even when the conduct is non-tortious.

It seems to me that accepting the validity of Pickett's claims would stretch the law unduly and invite courts into a place they don't belong. Property ownership is central to the American concept of democratic freedom; the right to own property is the individual right most frequently mentioned in the U.S. Constitution[6] (and, not coincidentally, it's the first right attacked by communist theory). But I wouldn't have thought that the act of renting out property turns a landlord into a sort of "politeness police" supervising whether tenants are sufficiently courteous and friendly toward each other, under penalty of being sued by an unpopular one. *See* Gerald Korngold, *Whatever Happened to Landlord-Tenant Law*, 77 Neb. L. Rev. 703, 713-15 (1998) (observing that landlord-tenant law has become a "battleground" over social issues such as religious beliefs, morality, the sanctity of marriage, personal autonomy, and civil rights). A landlord could certainly agree to voluntarily assume contractual responsibility for something like this as an express term of a lease. I doubt, though, that

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[6]*See* U.S. Const. amend. III (protecting "any house"); amend. IV (protecting "houses" from unreasonable search and seizure); amend. V (prohibiting deprivation of life, liberty or "property" without due process of law, and preventing "private property" from being taken without just compensation); amend. XIV (prohibiting deprivation of life, liberty, or "property" without due process of law). In feudal times, all land belonged to the sovereign and citizens could only own land at the whim of the King. In contrast, a central guarantee of our Constitution is that citizens can own land free of governmental interference except to the extent permitted by the Constitution.

Pickett's lease contains any such assumed duty; if it does, Pickett has not shown or explained how. Absent such voluntary contractual acceptance, courts have never recognized anything like this to be a fundamental incident of property ownership inherent to the landlord-tenant relationship. So I wonder if the very premise behind Pickett's claims isn't fatally flawed.

IV.

Among other problems, there seems to be an obvious causation gap looming within Pickett's claims. Causation is a substantive element of any claim for damages (excepting strict liability claims, which Pickett's are not). *See, e.g., Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) ("Under Nevada law, 'the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach.'" (alteration in original) (emphasis added) (quoting *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006))); *see also Wall v. Michigan Rental*, 852 F.3d 492, 495 (6th Cir. 2017) (Sutton, J., concurring) (holding that in a dispute between a landlord and tenant, "[t]he claimant must connect the violation to a concrete injury in fact").

Although the parties and the district court framed their analysis below in terms of damages, the real problem they were grappling with appears more accurately characterized as one of causation. The landlord argued:

> Although Proctor [the expert witness] summarily stated in his report that Pickett had a decrease in clients "because of the office environment," Proctor offered absolutely no factual basis for that statement and no such basis exists. . . . Over the course of discovery, Pickett failed produce any evidence that would indicate she lost patients as a result of the "office enforcement" at McCarran

> Mansion. Pickett testified at her deposition that she personally has "no way to quantify" whether she lost patients as a result of McCarran's actions and she has not identified any lay witnesses with personal knowledge of why patients allegedly left.

Pickett responded:

> [Landlord] contends that Pickett offered no evidence that she lost clients as a result of the environment in the property. This is not true. Pickett through her testimony and the expert report demonstrates that her income went down for the first time in the history of Pickett's practice in spite of a substantial rate increase. . . . Pickett's income after leaving the property began rising as noted in Mr. Proctor's supplemental report.

But Pickett's argument is a non-sequitur. Merely because business income decreased at the same time that the conduct at issue happened (even assuming the landlord can be blamed for the conduct) does not mean that one was necessarily the cause of the other. Correlation is not the same thing as causation. *See Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 173 (2003) ("Correlation is not causation."). "[C]ourts must not allow evidence of temporal correlation to serve as a substitute for science-based causation evidence." *Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009).

Under Nevada law, an expert's testimony cannot prove either causation or damages when the opinion is based upon facts beyond the expert's knowledge. *Gramanz v. T-Shirts and Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995). In *Gramanz*, the plaintiff tried to establish damages based on expert testimony on a drop in sales. *Id.* at 484-85, 894 P.2d at 347-48. The court held that this testimony was insufficient, as a matter of law, to prove damages because the evidence of a drop in sales "at best provide[s] nothing more than evidence of a diminution of [the company's] value. The evidence does not, however, provide the required

evidentiary basis for determining a reasonably accurate award of damages." *Id.* at 485, 895 P.3d at 347. Therefore, "evidence going only to the fact of diminution in value alone will not, without an evidentiary basis for determining a reasonably accurate amount in damages, establish a basis for an award of substantial damages." *Id.* at 484-85, 894 P.2d at 347-48 (internal brackets and quotations omitted) (citing *Mort Wallin v. Commercial Cabinet*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989)); *see also Frantz v. Johnson*, 116 Nev. 455, 469-70, 999 P.2d 351, 360 (2000) (interpreting *Gramanz* to hold "that it is an abuse of discretion for an expert to give an opinion on facts beyond his knowledge.").

The accounting expert here did something similar. He calculated Pickett's estimated expected profits for 2014 by subtracting actual revenue from higher potential revenue levels projected from previous years. But the expert report itself makes clear (even clearer if we consider the supplemental report)[7] that the expert was qualified to calculate the amount of losses Pickett suffered, but had no basis whatsoever, either in knowledge or expertise, to offer any opinion regarding the ultimate *cause* of those losses.[8] By his own admission, any conclusion about causation would

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[7]The supplemental report was produced late during discovery, and therefore the district court would not have abused its discretion in declining to consider it. *See* NRCP 16.1(a)(2)(D); 16.1(a)(3); 26(e)(1); 37(c)(1). It's unclear whether, and to what extent, the district court actually considered it, if at all.

[8]The expert's supplemental report makes even clearer that the expert was unable to independently verify the cause of the business's downward economic trend in 2014, clarifying that it was only the appellants' "assertion" and allegation that supports the conclusion that the "office environment" and respondent's conduct caused the loss in clients.

be speculative and therefore wholly insufficient to defeat summary judgment. *See Gramanz*, 111 Nev. at 485, 894 P.2d at 347.

Ultimately, the only evidence in the record identifying the cause of Pickett's business losses was a single sentence of her own affidavit attesting that "[a]s a result of the hostile treatment by [the] secretary of my clients entering the building, I lost multiple clients." But that single sentence shouldn't be enough to establish causation. It's utterly conclusory and speculative, lacking any identifiable basis either in fact or in Pickett's personal knowledge: it's just a naked conclusion. *See Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) ("The nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.") (internal quotation marks omitted). Furthermore, it's not even clear: does "multiple clients" mean two, or two hundred? And this difference matters, because the affidavit doesn't say that the loss of these unidentified and unnumbered clients amounted to the entirety of her business losses in 2014, or that she has any idea how many clients were lost and what proportion of her overall losses they would have been responsible for.

If speculation by an accounting expert isn't sufficient to prove causation, then the same speculation by a layperson like Pickett certainly shouldn't be. *See Gramanz*, 111 Nev. at 485, 894 P.2d at 347; *Wood*, 121 Nev. at 732, 121 P.3d at 1031. This is as true on summary judgment as it is at trial, because Pickett's burden of persuasion on summary judgment is precisely the same as her burden at trial. *Cuzze v. Univ. and Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). If the expert's testimony is insufficient as a matter of law to prove causation at trial, then it's just as insufficient as a matter of law to prove causation on summary judgment. *See id.* (evidentiary dispute is only capable of defeating summary

judgment if it is "genuine," meaning that a "rational trier of fact could return a verdict for the non-moving party" under the same burden of proof that would apply at trial).

This all strikes me as a serious causation problem with Pickett's claims. Had this question been squarely raised, I'd favor an affirmance of summary judgment rather than reversal based upon the existing record.

V.

Pickett's claim for "breach of the covenant of good faith and fair dealing" contains gaps as well.[9] In Nevada, "[e]very contract imposes upon the contracting parties the duties of good faith and fair dealing . . . ." *A.C. Shaw Construction v. Washoe County*, 105 Nev. 913, 914, 784 P.2d 9, 9 (1989) (internal quotation marks omitted). The purpose of the claim is to prevent a contracting party from "deliberately counterven[ing] the intention and spirit of the contract," *Morris v. Bank of America Nevada*, 110 Nev. 1274, 1278, 886 P.2d 454, 457 (1994) (internal quotation marks omitted) by

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[9]Every lease includes an implied covenant of quiet enjoyment that exists by operation of law, but Pickett's lease contains an express covenant which may substantively limit the contours of Pickett's claims if there is any meaningful difference here between the express covenant and the legally implied covenant. *See Johnson v. Missouri-Kansas-Texas R. Co.*, 216 S.W.2d 499, 502 (Mo. 1949) ("Of course such a covenant may not be implied, if there is an express covenant dealing with the same subject matter, or any expressed intention to the contrary."); *Best v. Crown Drug Co.*, 154 F.2d 736, 737-38 (8th Cir. 1946) ("The general rule in Missouri and elsewhere is that an ordinary lease raises an implied covenant of quiet enjoyment . . . But it is equally well settled that such an implied covenant will not arise in the face of an express covenant of a more limited character." (citations omitted)). The parties have not litigated this specific issue below or on appeal, so for the purposes of this appeal, I will assume the two claims are the same in scope.

engaging in "an arbitrary or unfair act that worked to [the other party]'s disadvantage," *Nelson v. Heer*, 123 Nev. 217, 227, 163 P.2d 420, 427 (2007).

A breach can be pursued either as a claim sounding in contract law or in tort law. *See Hilton Hotels Corp. v. Butch Lewis Prod., Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). If pursued as a tort claim, the plaintiff must allege the breach of "a duty created by law, not merely a duty created by contract[.]" *K Mart Corp. v. Ponsock*, 103 Nev. 39, 49, 732 P.2d 1364, 1370 (1987), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990), *but recently cited in Torres v. Direct Ins. Co.*, 131 Nev. ___, ___, 353 P.3d 1203, 1210 (2015). But, under principles of tort law, landlords are generally not responsible for the negligent conduct of their tenants toward other tenants. *See Wright v. Schum*, 105 Nev. 611, 612-13, 781 P.2d 1142, 1142-43 (1989). And that's true even when the conduct is actually tortious and independently actionable, which it isn't here. Furthermore, a tort claim based on this breach requires the plaintiff to show a "special relationship between the parties" or a "special element of reliance or fiduciary duty." *Torres*, 131 Nev. at___, 353 P.3d at 1210; *Hilton Hotels Corp..*, 107 Nev. 226, 233, 808 P.2d 919, 923 (1991). There's no such relationship here. A landlord owes a duty of reasonable care to its tenants within the confines of the landlord-tenant relationship, but does not have a broader duty extending beyond the leased premises and the scope of that relationship. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 & comment f & m (2012). Thus, there's no "special relationship" between a landlord and tenant when it comes to the conduct of third parties unrelated to the lease. *See Smith v. Eighth Jud. Dist. Ct.*, 2014 WL 2702701 (Nev. 2014) (unpublished).

Consequently, Pickett's claim can't survive as a tort claim, leaving us with a claim arising from contract. But a party can assert such a claim only when the defendant commits an act closely related to the terms of the contract itself: the act must effectively "destroy or injure the right of the other party to receive the benefits of the contract" or the defendant must have done something to "prevent or hinder performance by the other party." *Hilton Hotels Corp.*, 107 Nev. at 234, 808 P.2d at 923. *See Torres*, 131 Nev. at ___, 353 P.3d 1203 at1211 (no claim for breach of covenant when "nothing in Nevada's absolute-liability statute creates a contractual relationship between" the parties).

But there's no such claim when the alleged "duty" has nothing to do with the contract. Were it otherwise, courts could artificially create new contractual duties that the parties never contemplated, never agreed to undertake, or may even have specifically negotiated out of the contract. Thus, for example, where a defendant did not have a duty under the contract to disclose certain information, a claim for breach cannot be maintained based upon the non-disclosure of the information. *See Nelson v. Heer*, 123 Nev. 217, 227, 163 P.2d 420, 427 (2007) ("Since Nelson bore no contractual duty to disclose the water damage, Nelson's omission did not constitute an arbitrary or unfair act that worked to Heer's disadvantage" and thus his claim for breach of implied covenant of good faith and fair dealing was "insufficient as a matter of law").

Here, Pickett's claim alleges that the landlord breached two duties: one to install a receptionist at the front desk who wasn't "hostile" toward her clients, and another to stop neighboring tenants from being "hostile" toward her and her clients in the halls. Are these duties

sufficiently related to the terms of the contract to sustain a claim like this? I harbor doubts.

There are two ways to interpret Pickett's allegations about the receptionist. If Pickett is arguing that the landlord committed a breach by failing to provide a receptionist, then it seems to me that the breach didn't cause her injuries. She doesn't allege that she lost business because a receptionist was absent (her allegation is that one was provided but was rude toward her clients). If this is her theory, then the breach that she identifies didn't cause her injuries.

On the other hand, if Pickett is arguing that the landlord committed a breach because a receptionist was provided, but was incompetent and rude, then I'm having trouble understanding how the breach relates to the contract. The lease stipulates that the landlord provide a receptionist. Under this theory, the landlord did (assuming the other tenant's receptionist acted as the landlord's agent, a fact not proven but which I'll accept as true for purposes of summary judgment). So what was the breach? There's only a breach if the lease required the landlord to provide a receptionist to do the job in a way that Pickett liked. But as far as I can tell from the record, Pickett appears to be the only tenant dissatisfied with the receptionist, and nothing that the receptionist did was either tortious or a breach of Pickett's lease in and of itself. So Pickett's claim boils down to that the receptionist did her job in way that was not actionable and apparently satisfied everybody but Pickett, and the landlord is responsible for Pickett's dissatisfaction. That seems a stretch to me.

As for her allegations about how other tenants treated her in the halls, there's nothing in the lease that even arguably covers this. Based on what's in the record now, Pickett might not have liked how other tenants

treated her, but—so long as the underlying conduct was non-tortious—that seems to me to be a problem between her and the other tenants that didn't have anything to do with the landlord's lease obligations. But it's possible we don't have all of the facts before us, so Pickett is entitled to a chance to develop this on remand.

VI.

Pickett's third claim alleges breach of the covenant of quiet enjoyment. Historically, the covenant of quiet enjoyment originated in the law of deeds for the transfer of freehold estates in land, as one of the covenants of a general warranty deed in a land sale. Over time, it began to be loosely imported into the law of leaseholds, and today it's almost universally recognized as an implied covenant in all leases, although states differ widely on what conduct is, or is not, encompassed within the covenant.

In most jurisdictions, however, "the covenant of quiet enjoyment involves an interference with possession of the premises by a landlord, persons under the landlord's direction or paramount title holders, but not interference by third parties." Ira Meislik, *Quiet Enjoyment in Commercial Leases: What is it? Where is it going?,* FindLaw (1997) (Thomson Reuters FindLaw) (http://corporate.findlaw.com/business-operations/quiet-enjoyment-in-commercial-leases-what-is-it-where-is-it.html) (*citing* Richard R. Powell, *Powell on Real Property* 16B–15 n.13); *see also* Milton R. Friedman & Patrick A. Randolph, Jr., *Friedman on Leases* § 29:3, pp. 29-26 (Practicing Law Institute, 5th Ed. 2015), ("the conditions complained of by tenant must be due to an affirmative breach of duty by the landlord. Hence, if the landlord has no duty to tenant to prevent certain conditions from occurring, these conditions, no matter how horrible, do not give rise to a claim"); Restatement (Second) of Property (1977), § 16.3

comment (a) (the covenant of quiet enjoyment includes "a promise by the landlord that the tenant will not be disturbed in his enjoyment of the leased property by . . . the landlord or by anyone whose conduct is attributable to the landlord . . . the landlord remains liable on his implied promise only for disturbance of the tenant by himself, or someone whose conduct is attributable to him."); *Dillon-Malik, Inc. v. Wactor*, 728 P.2d 671, 673 (Ariz. App. 1986) ("A landlord's obligation under a covenant of quiet enjoyment does not extend to acts of other tenants or third parties unless such acts are performed on behalf of the landlord or by one claiming paramount title."); *Western Stock Center, Inc. v. Sevit, Inc.*, 578 P.2d 1045, 1051 (Col. 1978) ("The covenant of quiet enjoyment is breached by 'any disturbance of a lessee's possession by his lessor' . . . The crucial issue . . . is whether the disturbance of the tenant's possessory interest is attributable to the landlord" (quoting *Radinsky v. Weaver*, 460 P.2d 218, 220 (Col. 1969)); *Casperson v. Meech*, 583 P.2d 218, 222 (Alaska 1978) (no claim for breach of implied covenant of quiet enjoyment where "there is no evidence that [the breach] was attributable to [the landlord].").

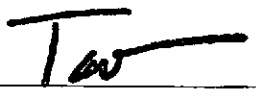
Nevada follows this limitation: "[t]he purpose of the covenant of quiet enjoyment is to secure tenants against the acts or hindrances of landlords." *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008) (citing *Ripps v. Kline*, 70 Nev. 510, 513, 275 P.2d 381, 382 (1954)).

But Pickett doesn't allege that her business suffered injury from any affirmative "acts or hindrances" performed personally by the landlord, only that the actions of third parties did. Unless Pickett can demonstrate otherwise on remand—namely, that the actual cause of her injuries was the landlord or someone acting on its behalf—I would conclude that there's no valid claim here under Nevada law.

There's a second reason why this claim seems a poor fit for Pickett's allegations: in Nevada, a claim for a breach of the implied covenant of quiet enjoyment requires that the landlord's actions cause the entirety (or at least a substantial part) of the premises to be rendered "unfit for occupancy," coupled with actual physical abandonment of the premises (a concept known as "constructive eviction"). *See Yee v. Weiss*, 110 Nev. 657, 660, 877 P.2d 510, 512 (1994) (defining constructive eviction). Pickett doesn't appear to allege that her entire premises were unusable for any purpose whatsoever, but rather only that some of her visiting clients were so annoyed by the neighbors that they chose not to return. So as things stand, unless Pickett can prove something very different on remand from the set of facts now before us, I doubt there's a claim here.

VII.

For the foregoing reasons, I join in the majority order but recommend the district court consider these questions on remand.



_____, J.
Tao

cc: Hon. Lynne K. Simons, District Judge
Madelyn Shipman, Settlement Judge
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